



**USING THE AMERICANS WITH DISABILITIES
ACT
TO PROTECT THE RIGHTS OF INDIVIDUALS
WITH DISABILITIES
IN TANF PROGRAMS:**

A MANUAL FOR NON-LITIGATION ADVOCACY

New and Revised - 2011 Edition

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Introduction

This manual provides basic information for lawyers and advocates on how to use federal disability rights laws to improve access to welfare benefits for people with disabilities.

Why this manual?

Study after study has confirmed what welfare advocates know from their own experience: A large percentage of individuals in welfare programs have disabilities, including physical disabilities, mental health problems and learning disabilities.¹ One federal government study found that 44 percent of families receiving welfare benefits reported having a parent or child with a disability.² These disabilities often make it difficult for clients to apply for welfare benefits, attend appointments, understand and comply with program rules, and fulfill welfare work requirements.

Federal disability rights laws are an important source of protection for welfare applicants and recipients with disabilities. These laws can be used to obtain reasonable accommodations for individual clients and systemic improvements in the administration of welfare programs.

Why a 2010 revised edition?

Since this manual was first released in 2004, there have been a number of important legal and other developments:

- In 2005, Congress reauthorized the TANF program and made some changes to the program³ and in 2008, the U.S. Department of Health and Human Services (HHS) issued final regulations implementing those changes.⁴

¹ U.S. General Accountability Office, *Outcomes for TANF Recipients with Impairments* (July 2002), (“GAO Study”) available at www.gao.gov/new.items/d02884.pdf; Eileen P. Sweeney, Center on Budget and Policy Priorities, *Recent Studies Indicate that Many Parents Who Are Current or Former Welfare Recipients Have Disabilities or Other Medical Conditions* (Feb. 2000), available at <http://www.gao.gov/new.items/d02884.pdf>.

² GAO study, *supra* note 1, at 2.

³ Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7101, 120 Stat. 4, 135 (2006).

⁴ Reauthorization of the Temporary Assistance for Needy Families (TANF) program, 73 Fed. Register 6772-6827 (February 5, 2008) (codified at C.F.R. pts. 261-265).

- In 2007, HHS issued a Frequently Asked Questions piece, reiterating the obligation to comply with the ADA and Section 504 in TANF programs, and providing examples of when and how to do so.⁵
- In 2008, Congress amended the ADA and Section 504, modifying the definition of disability, overruling a number of U.S. Supreme Court and lower court decisions interpreting the definition of disability under these laws narrowly, and making a number of other changes in the statutes.⁶
- Over the last six years, a number of state welfare agencies have developed comprehensive ADA policies applicable to their state cash assistance programs (and in some states, other benefits programs) or substantially revised existing policies to incorporate and implement ADA requirements.⁷

Some of these developments made the first edition of the manual out of date. Others are relevant to advocates engaging policy advocacy. The author believes the issue of effective communication between welfare agencies and people with disabilities warrants greater discussion than was included in the 2004 manual, and believes that accessibility of welfare agency web sites, which was not covered in the 2004 edition, should be addressed in the manual. For all of these reasons, updating the manual is necessary.

The 2011 edition and subsequent editions of the manual contains the following chapters that were not in the 2004 edition:

Chapter 5: A closer look at TANF work requirements and the ADA

Chapter 8: Welfare agencies' obligation to provide effective communication with individuals with disabilities

Chapter 9: Accessibility of welfare agency web sites

Chapter 14: Summaries of selected state welfare agency ADA policies

In addition, a significant part of Chapter 3 has been revised to discuss the ADA

⁵ U. S. Department of Health and Human Services, *Frequently Asked Questions: Meeting the Needs of TANF Applicants and Beneficiaries Under Federal Civil Rights Laws*, available at www.acf.hhs.gov/programs/ofa/civilrights/OCRqandafinal_faq.htm.

⁶ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101- 12103, 12111- 12114, 12201, 12211).

⁷ See Chapter 14 for a discussion of these developments.

Amendments Act. A number of other changes have been made in the manual.

Why a revised 2011 edition?

On September 15, 2010, the U.S. Department of Justice (DOJ) issued revised regulations for Title II of the ADA. The regulations went into effect on March 15, 2011.⁸ In addition, On March 25, 2011, the Equal Employment Opportunity Commission (EEOC) published final regulations implementing the ADA Amendments Act to the ADA definition of “disability.”⁹ These regulations go into effect on May 24, 2011. The manual has been revised to incorporate the new regulations. Chapters 3, 4, 8, 13, and Appendices C and E have been revised to incorporate and reflect the new regulations and a few other developments during 2010 and early 2011.

This manual does not address litigation issues

Lawyers and advocates can use disability rights laws on behalf of clients in welfare programs in a variety of ways: in informal advocacy on behalf of individual clients, policy advocacy, administrative complaints, and litigation. This manual is intended for individuals engaging in informal advocacy on behalf of individuals and in policy advocacy, not for those engaging in litigation. While some of the topics discussed in this manual are relevant to ADA litigation, a discussion of issues specific to litigation, such as pleading requirements for ADA claims, statutes of limitations, class certification in ADA lawsuits, and the Eleventh Amendment, is beyond the scope of this manual. Advocates interested in litigation issues should contact the National Center for Law and Economic Justice for further assistance.

This manual does not address the application of the ADA to government programs other than welfare

Federal disability rights laws can be used on behalf of people with disabilities to improve access to many types of government programs. A discussion of these issues is also beyond the scope of this manual. Some sections of the manual should be useful to advocates seeking to use the ADA on behalf of individuals in other programs, but there are additional issues to consider when using disability rights laws in other contexts. Advocates need to consider issues such as the stated purpose of the government program; program eligibility requirements; whether the policy or practice being challenged comes from state or federal statutes, regulations, or policies; whether the

⁸ U.S. Department of Justice, Non-Discrimination on the Basis of Disability in State and Local Government Services, Final Rule (September 15, 2010), 75 Federal Reg. 56164 (September 15, 2010) (codified at) 28 C.F.R. pt. 35).

⁹ Equal Employment Opportunity Commission, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended, Final Rule, 75 Fed. Reg. 16978 (March 25, 2011) (codified at 29 C.F.R. pt. 1630).

program makes exceptions to program rules for reasons other than disability, and other issues. Advocates interested in using disability rights laws on behalf of individuals in other benefits programs should contact the National Center for Law and Economic Justice.

Chapter 1: An overview of The ADA and Section 504

This manual focuses on two federal disability rights laws that can be used to improve access to welfare benefits for people with disabilities: Section 504 of the Rehabilitation Act of 1973 (“Section 504”),¹⁰ and the Americans with Disabilities Act (“ADA”).¹¹ As discussed below, both of these laws apply to welfare programs. This chapter also discussed the relationship between these laws, reasons for relying on one or both of these laws or on these laws and state law. The chapter also describes the role of federal agencies in enforcing these laws.

I. Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act (“Section 504”) prohibits discrimination against people with disabilities in all programs and activities receiving federal financial assistance, all federal executive agencies, and the U.S. Postal Service.¹² Federal TANF funds, federal Medicaid dollars, federal Child Care Development Block Grant funds and federal funds for the Food Stamp program all qualify as federal financial assistance. The programs and services of state and local welfare agencies receiving these funds, therefore, must comply with Section 504. If an agency receives federal financial assistance for some of its programs, all of the agency’s programs must comply with Section 504, even if they do not received federal financial assistance.¹³ Therefore, if a welfare agency receives federal Temporary Assistance to Needy Families (“TANF”), Food Stamp¹⁴ or Medicaid funding, state assistance programs must comply with Section 504 as well. The Personal Responsibility and Work Opportunity Reconciliation (PRWORA), the federal welfare reform law, specifically provides that Section 504 applies to any program or activity receiving federal TANF funds.¹⁵

¹⁰ 29 U.S.C. § 794(a).

¹¹ 42 U.S.C. § 12101 *et seq.*

¹² 29 U.S.C. § 794(a).

¹³ 29 U.S.C. § 794(b)

¹⁴ The name of the Food Stamp program has been changed to the Supplemental Nutrition Assistance Program (SNAP).

¹⁵ 42 U.S.C. § 608(d)(2).

Section 504 requires each federal agency to develop its own regulations implementing Section 504 for programs receiving federal financial assistance from that agency.¹⁶ The U.S. Department of Health and Human Services (“HHS”) Section 504 regulations apply to TANF and Medicaid programs.¹⁷ The U.S. Department of Agriculture (“USDA”) Section 504 regulations apply to the Supplemental Nutrition Assistance Program.¹⁸ The U.S. Department of Justice (“DOJ”) was given authority to issue Section 504 “coordination” regulations that federal agencies were supposed to use as a model when drafting their Section 504 regulations.¹⁹ Advocates should be aware that each federal agency has its own Section 504 regulations, and these regulations are not identical.

II. Americans with Disabilities Act

Many employers, businesses, and other entities do not receive federal financial assistance, and as a result, Section 504 of the Rehabilitation Act can not be used to address discrimination against people with disabilities in many settings. For this reason and others, in 1990 Congress enacted the Americans with Disabilities Act (“ADA”) “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”²⁰ The ADA is a comprehensive law with several parts (“Titles”):

- Title I prohibits discrimination in employment, including discrimination by employers, unions, employment agencies and joint labor-management committees.²¹
- Title II prohibits discrimination in services, programs and activities of state and local governments and their agencies and departments, and discrimination in public transportation.²²

¹⁶ 29 U.S.C. § 794(a).

¹⁷ 45 C.F.R. pt. 84.

¹⁸ 7 C.F.R. pt. 15b.

¹⁹ These regulations can be found at 28 C.F.R. pt. 41.

²⁰ 42 U.S.C. § 12101(b)(1).

²¹ 42 U.S.C. §§ 12111-2117.

²² 42 U.S.C. §§ 12131-34; 12141-50; 12161-65.

- Title III prohibits discrimination by “places of public accommodation,” which are private and non-profit businesses open to the public, including places of entertainment, schools, medical and legal providers, and social service providers.²³
- Title IV contains requirements regarding telecommunications services for hearing-impaired and speech-impaired individuals.²⁴
- Title V contains miscellaneous provisions, including the relationship between the ADA and other laws, attorneys’ fees, the application of the ADA to insurance, exclusions from the definition of disability, and other provisions.²⁵

Congress gave DOJ the authority to write regulations implementing the Sections of Title II that apply to state and local governments (other than transportation issues) and of Title III that apply to places of public accommodation (other than paratransit issues).²⁶ The U.S. Equal Employment Opportunity Commission (“EEOC”) was given authority to write regulations implementing Title I of the ADA and the U.S. Department of Transportation (“DOT”) was given the authority to promulgate regulations governing transportation.²⁷

In 2008, Congress passed the Americans with Disabilities Amendments Act (ADAAA), which amended the ADA.²⁸ The ADAAA made a number of changes to the ADA, many of which relate to the definition of “disability” in the ADA.²⁹ The ADAAA went into effect on January 1, 2009.³⁰ The ADAAA is discussed in Chapter 3.

²³ 42 U.S.C. §§ 12181-89.

²⁴ 47 U.S.C. § 225.

²⁵ 42 U.S.C. §§ 12201-12213.

²⁶ 42 U.S.C. §§ 12134(a); 12149(a).

²⁷ 42 U.S.C. §§ 12143(b); 12186(a).

²⁸ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (September 25, 2008) (codified at 42 U.S.C. §§ 12101- 12103, 12111- 12114, 12201, 12211).

²⁹ See 42 U.S.C. §§ 12102(1)-(4).

³⁰ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 8, 122 Stat. 3553, § 8 (September 25, 2008).

Although many parts of the ADA are relevant in welfare advocacy,³¹ this manual focuses on the requirements of Title II, which applies to the programs, services and activities of state, city, and county welfare programs.

In addition to the Title II statute and regulations, several other sources of authority that are or may be relevant to advocates using the ADA on behalf of welfare applicants and recipients:

- DOJ has issued Interpretive Guidance on Title II of the ADA;³²
- DOJ has issued a Technical Assistance Manual on Title II of the ADA;³³
- The EEOC has issued revised regulations and Interpretive Guidance on the definition of disability.³⁴ Until DOJ revises its regulations to be consistent with the ADAAA, the Title I regulations and Interpretive Guidance issued after the ADAAA was enacted should be consulted on issues related to the definition of disability under the ADA.
- The EEOC has issued Enforcement Guidance on a number of important issues.³⁵ Although this guidance applies to employment-related issues, it interprets some concepts that apply to all Titles of the ADA.
- DOJ has issued a number of documents on common issues that arise under the ADA, including service animals, child care, law enforcement, and other topics.³⁶

The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) specifically provides that the ADA applies to any program or activity

³¹ For example, Title III of the ADA applies to many education and training programs serving individuals receiving welfare and Title I may apply to employment programs serving welfare recipients.

³² 28 C.F.R. pt. 35 apps. A and B.

³³ This manual is available at www.usdoj.gov/crt/ada/taman2.html.

³⁴ Equal Employment opportunity Commission, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, Final Rule, 75 Fed. Reg. 16978 (March 25, 2011) (codified at 29 C.F.R. pt. 1630).

³⁵ This Enforcement Guidance is available at www.eeoc.gov/policy/guidance.html.

³⁶ These materials are available at www.ada.gov

receiving federal TANF funds.³⁷

III. The relationship between the ADA, Section 504, and state welfare law

A. The Relationship between Title II of the ADA and Section 504

The requirements of Title II of the ADA are very similar to those of Section 504 of the Rehabilitation Act, and many courts have held that Title II of the ADA and Section 504 are sufficiently similar that claims brought under both of these laws can be analyzed together.³⁸ Advocates should be aware that there are some differences between the Title II ADA regulations and the Section 504 regulations that apply to TANF programs. For example, as mentioned in Chapter 4, recipients of federal financial assistance from HHS must have an ADA Coordinator and ADA complaint procedure if they have 15 or more employees,³⁹ whereas Title II of the ADA requires public entities to have an ADA coordinator and complaint procedure only if the agency has 50 or more employees.⁴⁰

For the sake of simplicity, this manual will refer mostly to the ADA, but advocates should rely on both the ADA and Section 504 in their advocacy efforts when both apply. There are many reasons for doing so. One reason is that agencies may have a Section 504 policy but not an ADA policy. Another is that there are important reasons to rely on both Section 504 and the ADA in litigation, and thus, to rely on both laws in non-litigation advocacy efforts that may lead to future litigation.

B. Using the ADA and Section 504, state welfare law, or state welfare law and the ADA and Section 504

The ADA makes clear that it does not preempt state and local laws that provide equal or greater protections for individuals with disabilities.⁴¹ This manual does not discuss arguments that can be made on behalf of people with disabilities in welfare programs using state and local welfare laws, regulations or policies. The absence of discussion is not meant to suggest that advocates should forgo relying on state law and

³⁷ 42 U.S.C. § 608(d)(2).

³⁸ See, e.g., *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003), *cert. denied*, 542 U.S. 936 (2004).

³⁹ 45 C.F.R. § 84.7.

⁴⁰ 28 C.F.R. § 35.107.

⁴¹ 42 U.S.C. § 12201(b).

policy when engaging in advocacy. In some situations, advocates should use the ADA to supplement arguments under state and local law and policy. In other situations, state and local laws and policies should be used because they provide greater protections for clients than the ADA.

The type of advocacy you engage in will also affect whether you can or should use the ADA, state law or policy, or both. For example, an ADA or Section 504 Coordinator deciding an ADA or Section 504 grievance may be unwilling to consider arguments made under state public benefits law. Conversely, fair hearing officers may be unwilling to consider arguments made under ADA or Section 504 raised at a fair hearing.

IV. Federal enforcement agencies

Federal agencies have Offices for Civil Rights (“OCRs”), which are divisions within the agency that have the responsibility for enforcing federal civil rights laws and investigating discrimination complaints. OCR at the U.S. Department of Health and Human Services (“HHS”) has the authority to enforce Section 504 of the Rehabilitation Act and Title II of the ADA in programs under HHS’s jurisdiction,⁴² including welfare and Medicaid programs. Chapter 13 discusses these procedures in more detail, and explains how to use HHS Offices for Civil Rights in ADA-welfare advocacy and some of the pros and cons of doing so.

Federal agencies and their Offices for Civil Rights also issue guidance that may be relevant to the application of disability rights laws to welfare programs. In 2001, OCR at HHS issued Policy Guidance on the application of federal disability rights laws to TANF programs.⁴³ (This Guidance is discussed more fully in Chapter 4.) In 2007, OCR and the Administration for Children and Families (which oversees the TANF program) at HHS jointly issued a Frequently Asked Questions piece on TANF and federal civil rights laws that reiterates many of the points made in the 2001 Guidance and provides examples.⁴⁴ The HHS OCR Guidance and “Frequently Asked Questions” piece are not

⁴² 45 C.F.R. § 84.2.

⁴³ U.S. Department of Health and Human Services, Office for Civil Rights, *Policy Guidance: Prohibition Against Discrimination on the Basis of Disability in the Administration of TANF (Temporary Assistance to Needy Families)* (“HHS OCR Guidance”) (Jan. 19, 2001), available at www.hhs.gov/ocr/prohibition.html. This Guidance clarified and supplemented earlier HHS OCR Guidance, issued in 1999, on the application of civil rights laws to welfare reform. See U.S. Department of Health and Human Services, Office for Civil Rights, *Civil Rights and Welfare Reform - Overview*, and *Technical Assistance for Caseworkers on Civil Rights and Welfare Reform*, available at <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/crlawsandwelfarereformoverview.html>

⁴⁴ U.S. Department of Health and Human Services, Office for Civil Rights, *Frequently Asked Questions: Meeting the Needs of TANF Applicants and Beneficiaries Under Federal Civil Rights Laws*, available at www.acf.hhs.gov/programs/ofa/civilrights/OCRqandafinal_faq.htm.

law, but are extremely valuable and should be used in advocacy on behalf of people with disabilities in welfare programs. They are discussed in Chapters 4 and 5.

Chapter 2: What programs and services must comply with the Title II of the ADA?

This chapter discusses the obligation of state and local governments and their agencies and departments to comply with Title II of the ADA and the applicability of Title II of the ADA to state and local government programs and services provided under contract.

I. Programs and services provided directly by state and local government

Title II of the ADA applies to the programs, services and activities of “public entities,” which are defined as all state and local governments and their agencies and departments.⁴⁵ The programs of state and county welfare, labor, vocational rehabilitation, mental health agencies are all covered by Title II. The Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”), the federal welfare reform law, specifically provides that the ADA and Section 504 apply to any program or activity receiving federal TANF funds.⁴⁶

II. Programs and services of state and local governments provided by non-governmental entities

A. Title II of the ADA applies to state and local government programs and services provided by contractors

Many welfare agencies contract with private or non-profit organizations to operate some or all of the services of their welfare programs. Title II requirements apply to state and local government programs and services even when programs and services are provided indirectly by contractors.⁴⁷

Example: A county welfare department contracts with XYZ company to conduct disability assessments to determine whether individuals should be exempt from welfare work activities. These assessments are part of the county’s welfare program and must comply with the ADA.

⁴⁵ 42 U.S.C. §§ 12131-2; 28 C.F.R. § 35.104.

⁴⁶ 42 U.S.C. §§ 608(d)(2), (3).

⁴⁷ 28 C.F.R. §§ 35.130(b)(1), 35.130(b)(3).

B. Who is responsible for ensuring that programs and services operated by contractors must comply with the ADA?

When a welfare agency contracts with a private or non-profit entity to operate a part of its welfare program, the welfare agency has the legal responsibility for ensuring that the services delivered by the contractor does not discriminate against people with disabilities. Welfare and other agencies cannot “contract away” their legal obligation to ensure that their programs comply with the ADA.⁴⁸

Example: A county welfare department contracts with XYZ company to conduct disability assessments to determine whether individuals should be exempt from welfare work activities. The county welfare agency retains responsibility for ensuring that XYZ company does not operate the assessment process in a discriminatory manner.

C. When is a service provided by a contractor part of the state or local government’s program or service and subject to Title II?

Not every service contracted out by a state or local government is covered by Title II of the ADA. To determine whether a service provided by a private or not-for-profit contractor is a part of the welfare agency’s programs and services, and therefore, covered by Title II of the ADA, the following factors are likely to be relevant:

- Whether the service provided by the contractor is provided directly to welfare agency applicants or recipients, or whether it is provided to and benefits others, such as employees of the welfare agency.

Example: If a welfare agency contracts with a private company to operate a cafeteria for welfare agency employees, the services provided by this are not a part of the services provided by the agency to welfare applicants and recipients, and therefore are not covered by Title II of the ADA. (The contractor’s services may violate Title I of the ADA if they discriminate against the agency’s employees, but that topic is not addressed in this manual.)

- The nature of the service provided by the entity.

⁴⁸ Policy Guidance issued by the Office for Civil Rights at the U.S. Department of Health and Human Services, discussed in Chapter 4, provides: “ . . . TANF agencies frequently use contracts and vendors in the administration of their TANF programs. Agencies should be aware that these contractual and financial relationships do not eliminate TANF agencies’ obligation to ensure that TANF beneficiaries are not subjected to disability-based discrimination, even if such discrimination is more directly the result of unlawful treatment by TANF contractors and vendors.” HHS OCR Guidance, *supra* note 43, § D(1).

Example: A private, nonprofit corporation operates group homes under contract with a state agency for the benefit of individuals with mental disabilities. Given the nature of the services provided by these homes, and the mission and purpose of the state agency, these homes are covered by Title II of the ADA because they are part of the state agency's program.⁴⁹

D. What should welfare agencies do to ensure that contractors comply with the ADA?

Title II of the ADA does not specify what a state or local government or agency must do to ensure that services delivered by contractors comply with the ADA. Nevertheless, advocates can argue that state and local governments and agencies can and should do the following:

- Instruct contractors on how to comply with the ADA;
- Monitor to ensure that contractors do comply with the ADA;
- Train contractors' staff on the ADA, or require contractors to train their own staff;
- Use the contracting process to impose specific ADA compliance obligations on contractors. For example, contracts can:
 - Require the contractor to have a written policy on providing reasonable accommodations to people with disabilities;
 - Identify some of the specific reasonable accommodations the contractor must provide to clients;
 - Require the contractor to provide information to clients about their rights under the ADA; and
 - Require the contractor to provide data or other information to the welfare agency that make it possible to determine whether the contractor is complying with the ADA.

⁴⁹ U.S. Department of Justice, *ADA Title II Technical Assistance Manual*, pt. II-1.3000, Illus. 4, available at www.usdoj.gov/crt/ada/taman2.html; see also, *Hahn ex rel Barta v. Linn County*, 130 F. Supp. 2d 1036, 1059 (N.D. Iowa 2001).

All too often, welfare agencies use general boilerplate ADA and Section 504 language in their contracts with service providers, and this language is the only step taken to make sure that contractors comply with the ADA. Boilerplate contract language, without more, does not inform contractors of what specific actions they must take to achieve ADA compliance, and thus, is unlikely to be sufficient to ensure compliance with the ADA.

Chapter 3: Who is protected by the ADA?

Title II of the ADA protects a “qualified individual with a disability.”⁵⁰ Section I of this chapter discusses why and when the definition of disability is important in advocacy. Section II discusses some of the key differences between the definition of the disability under the ADA and under other laws. Section III discusses where advocates should look for information on the meaning of the term “disability” under the ADA. Section IV discusses the requirement that the definition of “disability” under the ADA be interpreted broadly. Section VI discusses the meaning of the terms “physical or mental impairment,” “substantially limits,” and “major life activity,” the elements of the disability definition for those with actual disabilities. Section V discusses who is protected under the ADA on the basis that he or she is regarded as having a disability. Section VII discusses who is protected by the ADA on the basis of having a record of a disability. Section VIII discusses the requirement that an individual be a “qualified individual with a disability” to be protected by the ADA. Section IX discusses individuals protected under the ADA on the basis of an association with an individual with a disability. Section X explains which individuals with substance abuse problems are protected by the ADA. Section XI discusses conditions that are excluded from the ADA definition of disability.

I. When is the ADA definition of “disability” important?

The importance of the ADA definition of disability depends on the type of advocacy you are engaged in.

A. Litigation and administrative complaints

In litigation or administrative complaints under the ADA, the ADA definition of disability is important because it may be necessary to provide documents showing that the plaintiff or complainant meets this definition, and thus is protected under the ADA. Moreover, some courts have held that a legal complaint filed in court must include at least some of the facts supporting the claim that the individual has a disability as defined by the ADA.⁵¹ The recent amendments to the ADA and implementing regulations indicate that in an ADA case, the main focus should be on whether discrimination occurred, not on whether the individual meets the ADA definition of

⁵⁰ 42 U.S.C. § 12131(2).

⁵¹ See e.g., *Parisi v. Coca Cola Bottling Co.*, 995 F. Supp. 298 (E.D.N.Y. 1998), *aff'd on other grounds*, 1999 U.S. App. LEXIS 22311 (2d Cir. 1999) (holding that a plaintiff must plead facts to support a claim of substantial limitation in a major life activity). It is too soon to tell whether, and the extent to which this has changed as a result of the ADAAA. Other court decisions, such as *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), may also affect the amount of specificity about an individual's disability must be included in a complaint.

disability.⁵² This, however, does not eliminate the requirements that plaintiffs plead and prove that the plaintiff or complainant has a disability. Therefore, it is important for advocates contemplating litigation or filing an administrative complaint to be familiar with the definition and how it works.

B. Policy advocacy

In policy advocacy to obtain systemic changes in welfare agency policies or practices, the ADA definition of disability may be less important because every welfare program has some applicants and recipients who meet the ADA definition of disability.

C. Informal advocacy on behalf of individual clients

If you are engaging in informal advocacy on behalf of individual clients, the government agency may assume that your client meets the ADA definition of disability and never raise the issue. However, you always need to think through how your client meets the definition, in case the agency does raise the issue. In addition, if there is any possibility that the issue could lead to litigation or administrative advocacy in the future, you should think through how your client meets it even if the agency does not raise the issue. Finally, even if the agency does not ask you to explain how your client meets the ADA definition of disability or to provide documentation, your advocacy may be more effective if you can provide the agency with documentation demonstrating that your client has a disability and needs a reasonable accommodation. To do this, you need to be familiar with the definition and how it works.

II. Differences between the ADA definition of “disability” and the definition of disability under other laws

The ADA definition of disability is different than the definition of disability under many other laws and programs. This is important because:

- Many people who are not receiving, or do not qualify for Social Security Disability (“SSD”) or Supplemental Security Income (“SSI”) meet the ADA definition of disability and have rights under the ADA.⁵³ The ADA definition is broader than the SSI/SSD definition of disability because the ADA is a law protecting individuals from discrimination, whereas SSI/SSD are benefits programs for individuals unable to work. Many welfare agency staff hear the word “disability” and assume it means “receiving SSI or SSD.” Advocates may need to explain to welfare agency staff that the ADA definition of disability is broader than the SSI/SSD definition.

⁵² 42 U.S.C. § 12101 note; 29 C.F.R. §§ 1630.1(c)(4); 1630.2(j)(1)(i).

⁵³ HHS has made this point in Policy Guidance on the application of the ADA and Section 504 to TANF programs. See HHS OCR Guidance, *supra* note 43, § C.2.

- Welfare programs do not usually use the ADA definition of disability to determine who qualifies for welfare work exemptions, deferrals, or extensions of time limits on the basis of disability. Thus, there may be individuals who do not qualify for work exemptions under state law or policy who meet the ADA definition of disability and who are entitled to work exemptions as a reasonable accommodation under the ADA. There may also be individuals who do not meet the ADA definition of disability who are entitled to work exemptions under state law or policy.⁵⁴

III. Where should advocates look for information on the meaning of the term “disability” under the ADA?

The ADA definition of “disability” is the same across all Titles of the ADA, but each of the agencies that enforces the ADA has issued regulations on the meaning of “disability.”⁵⁵ The Americans with Disabilities Amendments Act (ADAAA), which went into effect on January 1, 2009,⁵⁶ changed the ADA definition of “disability” and changed to how it should be interpreted. As of April 2011, the only the Equal Employment Opportunity Commission (EEOC) has issued post-ADAAA regulations on the new definition of “disability” and the new rules of interpretation.⁵⁷ Thus, even though the EEOC ADA regulations do not apply directly to state and local governments, they are extremely important and are relevant to Title II issues and cases.

Even after DOJ issues new ADA regulations on the definition of disability, EEOC interpretive guidance⁵⁸ and other policy materials on the ADA definition of disability will continue to be important in Title II cases, because the definition of disability is the same across all Titles of the ADA. As most ADA cases filed in court are employment discrimination cases, the bulk of the court cases interpreting the ADA definition of disability are contained in these cases.

⁵⁴ As noted above, the ADA does not pre-empt state and local laws that provide greater protection for people with disabilities. 42 U.S.C. § 12201(b).

⁵⁵ 29 C.F.R. § 1630.2 (EEOC regulations - Title I); (28 C.F.R. § 35.104 (DOJ regulations - Title II); 28 C.F.R. § 36.104 (DOJ regulations - Title III); 49 C.F.R. § 37.2 (DOT regulations - Titles II and III).

⁵⁶ ADA Amendments Act of 2008 (“ADAAA”), Pub. L. No. 110-325, § 8, 122 Stat. 3553, 3559 (September 25, 2008), (codified at 42 U.S.C. §§ 12101- 12103, 12111- 12114, 12201, 12211). The ADAAA is also discussed in Section V of this Chapter.

⁵⁷ Equal Employment Opportunity Commission, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended, Final Rule, 75 Fed. Reg. 16978 (March 25, 2011) (codified at 29 C.F.R. pt. 1630).

⁵⁸ The EEOC ADA regulations contain interpretive guidance, which is published as an appendix to the regulations. See 29 U.S.C. pt. 1630 app.

IV. The ADA definition of “disability” should be interpreted to provide broad coverage

In 2008 Congress passed the Americans with Disabilities Amendments Act (ADAAA),⁵⁹ which went into effect on January 1, 2009.⁶⁰ The purpose of the ADAAA to overrule U.S. Supreme Court and lower court decisions defining “disability” narrowly to exclude many individuals from the protections of the ADA.⁶¹ The ADAAA contains many statements regarding Congress’ intention that the ADA definition of “disability” be interpreted broadly: It provides that:

- The purpose of the ADAAA is “to carry out the ADA’s objectives of providing a ‘clear and comprehensive national mandate for the elimination of discrimination’ and ‘clear, strong, consistent, enforceable standards addressing discrimination’ by reinstating a broad scope of protection to be available under the ADA;”⁶²
- The purpose of the ADAAA is “ . . . to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis;”⁶³
- “The definition of disability in this Chapter shall be construed in favor of broad coverage of individuals under this Chapter, to the maximum extent permitted by the terms of the Chapter.”⁶⁴

Some of these helpful statements are in a part of the ADAAA that is not codified (i.e., not included in the printed code containing the law). Other are codified in a section of the law entitled “rules of construction regarding the definition of disability.”⁶⁵ Many are repeated in the EEOC regulations and interpretive guidance to those

⁵⁹ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (Sept. 25, 2008), (codified at 42 U.S.C. §§ 12101- 12103, 12111- 12114, 12201, 12211).

⁶⁰ Pub. L. No. 110-325, § 8, 122 Stat. 3559.

⁶¹ 42 U.S.C. § 12101 note. This section of the ADAAA is not codified.

⁶² *Id.*; see also 29 C.F.R. pt. 1630 app. Introduction.

⁶³ *Id.*

⁶⁴ 42 U.S.C. § 12102(4)(A); see also 29 C.F.R. § 1630.1(c)(4).

⁶⁵ Pub. L. No. 110-325, § 4(a)(4), 122 Stat. 3555-56 (codified as amended at 42 U.S.C. § 12102(4).

regulations. Regardless of where they are located, the ADAAA should make it easier for advocates to establish that their clients are entitled to protection under the ADA than it was before the ADAAA was enacted. Advocates should keep this in mind and refer to these statements of purpose and rules of construction when necessary to help establish that clients are protected by the ADA.

V. What is a physical or mental impairment that substantially limits at least one major life activity?

Under the ADA, a “disability” is defined as “(A) A physical or mental impairment that substantially limits one or more major life activities of the individual; (B) A record of such an impairment; (C) Being regarded as having such an impairment.”⁶⁶ Thus, there are three possible ways an individual can meet the ADA definition of disability. An individual must meet at least one of the “prongs” of the definition, and may meet more than one.⁶⁷

This Section discusses the first way to be protected, which is to have a physical or mental impairment that substantially limits one or more major life activities. This is often referred to as the “actual disability” prong of the ADA disability definition.

A. Physical or mental impairment

The EEOC regulations define “physical or mental impairment” as:

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following bodily systems, such as:
 - neurological
 - musculoskeletal
 - special sense organs
 - respiratory (including speech organs)
 - cardiovascular
 - reproductive
 - digestive

⁶⁶ 42 U.S.C. § 12102(1).

⁶⁷ 29 C.F.R. § 1630.2(g)(2).

- genitourinary
- immune
- circulatory
- hemic
- lymphatic
- skin
- endocrine⁶⁸
- Any mental or psychological disorder, such as an
 - intellectual disability (formerly termed mental retardation)
 - organic brain syndrome
 - emotional or mental illness
 - specific learning disabilities⁶⁹

Below are some examples of impairments under the ADA. The list is not meant to include every condition that meets the definition of “impairment” under the ADA.

Examples of physical and mental impairments:

- Blindness
- Deafness or hearing loss
- Speech impairments
- Cardiovascular disorders
- Cancer
- Diabetes

⁶⁸ 29 C.F.R. § 1630.2(h)(1).

⁶⁹ 29 C.F.R. § 1630.2(h)(2).

- Seizure disorders (such as epilepsy)
- Kidney disease
- Infectious diseases (such as tuberculosis)
- HIV and AIDS
- Cerebral palsy
- Muscular dystrophy
- Dyslexia
- Clinical depression
- Post traumatic stress disorder
- Schizophrenia
- Bipolar disorder (manic depression)
- Anxiety disorders

Note: Not every condition listed in the Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV”)⁷⁰ is considered to be a disability under the ADA. A list of conditions excluded from the ADA definition of disability are in Section XI. Some of the excluded conditions are in the DSM-IV.⁷¹

B. What is a “major life activity”?

The ADAAA added a definition of “major life activities” to the ADA.⁷² Before the ADAAA was enacted, “major life activities” was defined only in ADA regulations⁷³ and case law. The ADA now defines “major life activities” to include two different types of activities: daily tasks, and the operation of major bodily functions. The EEOC

⁷⁰ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.) (2000) (“DSM-IV”). The *DSM-IV* is used by mental health professionals to diagnose and classify health problems.

⁷¹ 42 U.S.C. § 12211(b). See Section XI for a list of conditions excluded from the ADA definition of disability.

⁷² 42 U.S.C. § 12102(2).

⁷³ See 28 C.F.R. § 35.104 (Title II); 28 C.F.R. § 36.104 (Title II); 29 C.F.R. § 1630.2(i) (Title I). These regulations have not yet been revised following the passage of the ADA Amendments Act.

regulations explain that “the term ‘major’ shall not be interpreted strictly to create a demanding standard for disability” and “[w]hether an activity is a ‘major life activity’ is not determined by reference to whether it is of ‘central importance to daily life.’”⁷⁴

1. Daily tasks/activities

The ADA and EEOC regulations provide that major life activities “include, but are not limited to,” the following activities:

- caring for oneself
- performing manual tasks
- seeing
- hearing
- eating
- sleeping
- walking
- standing
- sitting
- reaching
- lifting
- bending
- speaking
- breathing
- learning
- reading
- concentrating

⁷⁴ 29 C.F.R. § 1630.2(i)(2).

- thinking
- communicating
- interacting with others, and
- working.⁷⁵

The words “include, but are not limited to” make clear that other activities may be major life activities even if they are not included in this list.⁷⁶

2. Operation of major bodily functions

The second type of “major life activities” identified in the ADAAA is “the operation of a major bodily function,” which “include, but are not limited to,” functions of:

- the immune system
- special and sense organs and skin
- normal cell growth
- digestive
- bowel
- bladder
- neurological
- brain
- respiratory
- circulatory
- cardiovascular
- endocrine

⁷⁵ 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(i)(1)(i).

⁷⁶ 29 C.F.R. pt. 160 app. § 1630.2(i).

- hemic
- lymphatic,
- musculoskeletal; and
- reproductive functions.⁷⁷

The words “include, but are not limited to” make clear that other activities may be major life activities even if they are not in this list.⁷⁸

Specifying in the law that “major life activities” includes the operation of major bodily functions eliminates one of the common obstacles previously faced by plaintiffs filing lawsuits under the ADA. Before the ADAAA was enacted, some courts held that individuals did not have disabilities under the ADA if they could not point to a particular physical or sensory task (such as standing, walking, or speaking) that was substantially limited, even if the individual’s impairment obviously limited the person’s functioning.

Example: An individual with a bladder or bowel problem that requires frequent use of the bathroom is an individual with a disability under the ADA because she has a significant limitation in the operation of her bowel or bladder system. Before the ADAAA was passed, this individual may have had difficulty establishing that she was an individual with a disability under the ADA if she could not show that she was limited in a physical or sensory activity or limited in working.

Example: An individual with diabetes who uses insulin is an individual with a disability under the ADA because she has a significant limitation in the operation of her endocrine system. Before the ADAAA was enacted, this individual may have had difficulty establishing that she was an individual with a disability under the ADA if she could not show that she was limited in a physical or sensory activity or limited in working.

Example: An individual with cancer is an individual with a disability under the ADA because she has a significant limitation in normal cell growth. Before the ADAAA, this individual may have had difficulty establishing that she was an individual with a disability under the ADA if she could not show that she was limited in a physical or sensory activity or limited in working.

⁷⁷ 42 U.S.C. § 12102(2)(B); 29 C.F.R. § 1630.2(i)(1)(ii).

⁷⁸ 29 C.F.R. pt. 1630 app. § 1630.2(i).

C. When is someone “substantially limited” in a major life activity?

1. In general

The ADAAA was enacted in large part to overrule unreasonably narrow court interpretations of the term “substantially limits” in the ADA,⁷⁹ and to overrule the EEOC’s now-obsolete ADA regulation, which defined “substantially limits” as “unable 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.”⁸⁰

Neither the ADAAA nor the new EEOC regulations define “substantially limits;” instead, the regulations contain “rules of construction” that should be used to determine whether an impairment substantially limits a major life activity of an individual. Some of these rules are listed below; others are discussed later in the chapter. The regulations provide:

- The term “substantially limits” should be construed in favor of expansive coverage of individuals and is not meant to be a demanding standard.⁸¹
- The primary object of attention in ADA cases should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual’s impairment substantially limits a major life activity, so the threshold issue of whether an impairment substantially limits a major life activity “should not demand extensive analysis.”⁸²
- The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. In making the assessment, the degree of functional limitation required is lower than the

⁷⁹ 42 U.S.C. § 12102(4)(B)-(E); 42 U.S.C. § 12101 note; 29 C.F.R. pt. 1630 app. § 1630.2(j).

⁸⁰ 29 C.F.R. § 1630.2(j)(1)(i)-(ii) (obsolete).

⁸¹ 29 C.F.R. § 1630.2(j)(1)(i); *see also* 42 U.S.C. § 12102(4)(B) (the term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act.)

⁸² 29 C.F.R. § 1630.2(j)(1)(iii).

standard applied before the ADAAA was enacted.⁸³ The impairment does not have to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.⁸⁴

- An individual whose impairment substantially limits a major life activity does not have to show that the activity is central to most people's lives.⁸⁵

Example: An individual who is limited in a particular type of manual task (such as grasping) does not have to demonstrate that grasping is central to most people's lives.⁸⁶

- In determining whether an impairment substantially limits a major life activity, side effects of medication or other treatment, and the burdens associated with a treatment regimen, can be considered in determining whether an individual is substantially limited in a major life activity.⁸⁷
- An impairment that substantially limits one major life activity need not substantially limit another major life activity for an individual to be protected under the ADA.⁸⁸

Example: An individual who has diabetes, which is caused by a substantial limitation in endocrine function, does not have to show that she is also substantially limited in seeing (as a result of diabetic retinopathy) to show that she is a person with a disability under the ADA.

Example: An individual with epilepsy will meet the definition of disability because she is substantially limited in major life activities such as brain function, or during a seizure, functions such as hearing, speaking, walking, and thinking.

⁸³ 29 C.F.R. § 1630.2(j)(1)(iv).

⁸⁴ 29 C.F.R. § 1630.2(j)(1)(ii).

⁸⁵ 29 C.F.R. § 1630.2(j)(2)(viii)).

⁸⁶ 29 C.F.R. pt. 1630 app. § 1630.2(i).

⁸⁷ 29 C.F.R. § 1630.2(j)(4).

⁸⁸ 42 U.S.C. § 12102(4)(c); 29 C.F.R. § 1630.2(j)(2)(viii).

2. Comparisons with other people

The EEOC regulations and interpretive guidance explain whether and how an individual's functioning should be compared to that of others in determining whether an individual is substantially limited in a major life activity:

- An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.⁸⁹
- It may be useful in appropriate cases to consider the condition, manner, and duration under which the individual performs a task compared to most people in the general population, i.e., how long it takes the individual to perform the task, how difficult it is, the amount of effort required, how much pain the individual experiences, and how long the task can be performed.⁹⁰

Example: An individual with an amputated hand may be able to perform manual tasks, but it may be more difficult or cumbersome to perform them than it is for individual with two hands. The individual is therefore substantially limited in performing manual tasks.⁹¹

- The comparison between an individual's performance of a major life activity to the performance of the activity by most people in the general population does not require scientific, medical, or statistical analysis, although this type of data and analysis can be used.⁹²
- An individual may have a learning disability even though she performs well academically compared with most people in the general population because the process of reading may be different, cumbersome, painful, deliberate, and slow.⁹³

3. Duration of limitation

The EEOC regulations and interpretive guidance do not say exactly how long a

⁸⁹ 29 C.F.R. § 1630.2(j)(3)(ii).

⁹⁰ 29 C.F.R. § 1630.2(j)(4)(i).

⁹¹ 29 C.F.R. pt 1630 app. § 1630.2(j)(4).

⁹² 29 C.F.R. § 1630.2(j)(1)(v).

⁹³ 29 C.F.R. pt 1630 app. § 1630.2(j)(4).

condition or its effects must last to substantially limit a major life activity but provide the following guidance:

- The duration of an impairment is only one factor to be considered in determining whether an impairment substantially limits a major life activity, and impairments lasting a short period may be covered if sufficiently severe.⁹⁴
- The effects of an impairment lasting or expecting to last less than six months can be substantially limiting.⁹⁵
- Impairments that are episodic or in remission are disabilities if the impairment substantially limits a major life activity when it is active.⁹⁶

Example: Individuals with chronic mental health problems that have symptoms that are more limiting at some times than others are still protected by the ADA if the condition is substantially limiting at some times.

4. Substantially limited in working

In the past, individuals have had difficulty in court establishing that they are persons with disabilities who are protected by the ADA on the basis that they were substantially limited in working. This should no longer be a major obstacle to obtaining coverage under the ADA, both because of changes in the ADAAA and EEOC regulations, and because most people should not need to show a substantial limitation in working to show that they are protected by the ADA.

The EEOC interpretive guidance to the new ADA regulations state:

- Most of the time, individuals with a disability will be able to establish coverage under the ADA by showing a substantial limitation in a major life activity other than working because impairments that substantially limit working usually substantially limit another major life activity.⁹⁷
- In rare cases, an individual will need to show that an impairment substantially limits work, the individual can show this by showing that the impairment substantially limits the ability to perform a “class of jobs” or

⁹⁴ 29 C.F.R. pt 1630 app. § 1630.2(j)(1)(ix).

⁹⁵ 29 C.F.R. § 1630.2(j)(1)(ix).

⁹⁶ 29 C.F.R. § 1630.2(j)(1)(vii).; *see also* 42 U.S.C. § 12102(4)(D).

⁹⁷ 29 C.F.R. pt. 1630 app. § 1630.2(j), Substantially Limited In Working.

“broad range of jobs across classes” compared with most people with comparable skills, experience, and abilities.⁹⁸ The interpretive guidance contains additional explanation on the meaning of these terms.

- Determining that an individual is substantially limited in work should not require extensive and elaborate analysis, and it should be easier to demonstrate than it was before the ADAAA was enacted.⁹⁹
- Showing a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish a substantial limitation in the major life activity of working.¹⁰⁰

Given the complexity of showing that an individual is substantially limited in working and the fact that it should not be necessary to establish that an individual is protected under the ADA most of the time, welfare advocates should not argue that work is the major life activity that is substantially limited. This may seem counter-intuitive to welfare advocates, who are used to arguing that an individual is limited in work to obtain exemptions from or other accommodations in work activities.

5. What if an individual uses medication, wears glasses or uses something else that eliminates or reduces the limitation?

The ADAAA was enacted in part to overrule Supreme Court and lower court decisions holding that the substantial limitation in a major life activity must be measured after the effects of corrective measures (such as glasses, medication, etc.) are taken into account.¹⁰¹ Under these now-overruled decisions, if glasses, medication or other measures correct the substantial limitation (referred to as “mitigating measures” in the EEOC regulations), courts held that the person did not have a disability under the ADA.¹⁰² These rulings made it particularly difficult for people with particular types of

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 42 U.S.C. § 12102(4)(E)(i)-(iii); 42 U.S.C. § 12101 note.

¹⁰² See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (nearsighted individuals who asserted they had 20/20 vision with glasses did not state a claim that they had a disability under the ADA); *Todd v. Academy Corp.*, 57 F. Supp.2d 448 (S.D. Tex. 1999) (individual with seizure disorder who takes medication and has only light seizures as a result is not substantially limited under the ADA); *Johnson v. Penske Truck Leasing Co.*, 2001 U.S. Dist. Lexis 2771 (E.D. La. 2001) (individual whose diabetes did not affect job performance after he took insulin was not substantially limited in working and therefore protected by the ADA); *Krocka v. City of Chicago*, 203 F.3d 507 (7th Cir. 2000)(individual with depression

impairments, such as diabetes, seizure disorders and mental health problems to show that they were substantially limited in a major life activity, because medication (or insulin) is a central part of the treatment for these conditions and is often effective in reducing symptoms.

Now, the ADA clearly states that “the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures”¹⁰³ The EEOC regulations also make clear that an individual who experiences no limitations or only minor limitations in a major life activity as the result of using a mitigating measure has a disability if the impairment would be substantially limiting without the mitigating measure.¹⁰⁴

Examples of mitigating measures that must be disregarded when determining if an individual’s impairment is substantially limiting that are mentioned in the ADA are:

- Medication
- Medical supplies, equipment, or appliances
- Low vision devices (defined to exclude ordinary eyeglasses or contact lenses)
- Prosthetics, including limbs and devices
- Hearing aids and cochlear implants or other implantable hearing devices
- Mobility devices
- Oxygen therapy equipment or supplies
- Use of assistive technology, reasonable accommodations, or auxiliary aids or devices
- Learned behavioral or adaptive neurological modifications
- Psychotherapy, behavioral therapy, or physical therapy¹⁰⁵

who does not exhibit symptoms because he is taking Prozac is not an individual with a disability under the ADA).

¹⁰³ 42 U.S.C. § 12102(4)(E); 29 U.S.C. § 1630.2(j)(1)(vi).

¹⁰⁴ 29 C.F.R. § 1630.2(j)(1)(vi).

¹⁰⁵ 42 U.S.C. § 12102(4)(E)(i)(I); 29 U.S.C. § 1630.2(j)(5).

Example: An individual with bipolar disorder (manic depression) who takes medication that ameliorates the symptoms of the condition is a person with a disability under the ADA if she was substantially limited in a major life activity before taking the medication.

Example: A deaf individual who has a cochlear implant that makes it possible to hear is still substantially limited in hearing and therefore a person with a disability under the ADA.

Example: An individual who is blind in one eye has learned over time to adapt to this condition through unconscious changes in brain functioning is a person with a vision impairment who is substantially limited under the ADA.

There is an important exception to this rule. The ADAAA makes clear that for individuals with nearsightedness, farsightedness, and astigmatism that use ordinary glasses or contact lenses intended to fully correct these conditions the effects of mitigating measures *are* considered.¹⁰⁶ In other words, if an individual nearsighted, farsighted, or has an astigmatism, and glasses or contact lenses correct the problem, the individual is not substantially limited in the major life activity of seeing, and thus is not protected by the ADA. In contrast, individuals with other types of vision impairments (such as those that cause blindness or legal blindness), are protected by the ADA (even if they use devices to improve the limited vision they have).

As the determination that someone is substantially limited is usually made without considering the effect of “mitigating measures,” an individual’s failure to use a “mitigating measure” (i.e., the failure to obtain medical treatment, to take medication for a condition, or to have surgery) is also irrelevant to whether an individual has a substantially limiting impairment.¹⁰⁷

How can an individual who is using a mitigating measure show that without it, he or she would be substantially limited in a major life activity? The EEOC interpretive guidance suggests that an individual could do this by showing that he or she was substantially limited in a major life activity before he or she began to use the mitigating measure (i.e., prior to getting therapy or using of medication); or by showing what the expected course of a condition would be if mitigating measures if a condition is not treated or other mitigating measures are not used.¹⁰⁸

¹⁰⁶ 42 U.S.C. §§ 12102(4)(E)(ii), (iii)(I)-(II); 29 C.F.R. § 1630.2(j)(6).

¹⁰⁷ 29 U.S.C. pt. 1630 app. § 1630.2(j)(1)(vi).

¹⁰⁸ *Id.*

6. Some impairments will virtually always substantially limit major life activities and will virtually always be disabilities under the ADA

The EEOC regulations identify impairments that will virtually always substantially limit major life activities and therefore qualify as disabilities under the ADA. However, the regulations make clear that even for individuals with these conditions, it is necessary to conduct an individualized analysis to determine whether the impairment substantially limits a major life activity.¹⁰⁹ The examples of impairments that will virtually always substantially limit major life activities the regulations are:

- Deafness
- Blindness
- Intellectual disability (mental retardation)
- Partial or completely missing limbs
- Mobility impairments requiring the use of a wheelchair
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV
- Muscular dystrophy
- Multiple sclerosis
- Major depressive disorder, bipolar disorder, posttraumatic stress disorder, obsessive compulsive disorder, and schizophrenia¹¹⁰

¹⁰⁹ 29 U.S.C. § 1630.2(j)(3)(ii).

¹¹⁰ *Id.*

D. When should advocates use the “actual disability” prong?

As noted above, the new EEOC regulations say that if an individual may be protected under more than one prong of the ADA definition.¹¹¹ Significantly, the regulations indicate that if an individual does not need a reasonable accommodation and has an ADA claim other than the failure to accommodate,¹¹² it is generally unnecessary to proceed under the “actual disability” prong of the ADA. The regulations say that in such cases, evaluation of coverage under the ADA can be made under the “regarded as” prong (discussed below), which does not require a showing of an impairment that substantially limits a major life activity.¹¹³ However, the regulations also make clear that an individual can proceed under the “actual disability” prong of the ADA for claims other than failure to accommodate claims, even though he or she doesn’t need do so.¹¹⁴

Most of the time, welfare advocates using the ADA on behalf of individual clients will be using it to obtain reasonable accommodations for clients, or to argue that the ADA was violated when the agency did not provide an accommodation. Thus, most of the time, welfare advocates will have to proceed under the “actual disability” prong. However, there may be situations in which advocates argue that a welfare program discriminates in another way against people with disabilities, i.e., by restricting opportunities to particular types of work assignments, or operating impermissibly separate work programs for individuals with disabilities. In these situations, advocates should use the “regarded as” prong, discussed below.

VI. Who is “regarded as” having a disability?

The ADA protects individuals regarded as having a disability.¹¹⁵ This is often referred to as the “regarded as” prong of the ADA disability definition. As with the “actual disability” prong, protection under this prong should also be interpreted broadly.¹¹⁶

¹¹¹ 29 U.S.C. § 1630.2(g)(2).

¹¹² Reasonable accommodations are discussed in Chapter 4.

¹¹³ 29 C.F.R. § 1630.2(g)(3).

¹¹⁴ *Id.*

¹¹⁵ 42 U.S.C. § 12102(1)(C); 29 C.F.R. § 1630.2(g)(1)(iii).

¹¹⁶ 42 U.S.C. § 12102(4); 29 C.F.R. pt. 1630 App. § 1630.2(l)(1).

A. No need to show that the impairment is substantially limiting or is perceived as substantially limiting

The ADA explains the meaning of “regarded as” prong as follows:

An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.¹¹⁷

To be protected under the “regarded as” prong, an individual need not show that he or she actually has a substantially limiting impairment,¹¹⁸ or that the covered entity believed that his or her impairment substantially limited a major life activity.¹¹⁹ It is sufficient to show that an action was taken in response to either an actual impairment or the belief that an individual had an impairment. This is a significant change in the law. Prior to passage of the ADAAA, the Supreme Court decision held that individuals must prove that a defendant regarded him or her as having a substantially limiting impairment. The ADAAA overruled that decision.¹²⁰

Example: A welfare agency refused to place an individual into a particular work assignment that required significant contact with the public because the individual had skin graft scars. The welfare agency regards the individual as having a disability, even though the individual’s condition does not limit a major life activity and the agency staff who made the decision does not believe that it substantially limits a major life activity.¹²¹

Example: A welfare agency refused to place an individual into a particular work assignment because the individual has cancer. The welfare agency regards the individual as having a disability.¹²²

¹¹⁷ 42 U.S.C. § 12102(3)(A); *see also* 29 C.F.R. § 1630.2(l)(1).

¹¹⁸ 29 C.F.R. § 1630.2(j)(2).

¹¹⁹ 29 C.F.R. pt. 1630 app. § 1630.2(l).

¹²⁰ 42 U.S.C. § 12102(3); 42 U.S.C. § 12101 note.

¹²¹ 29 C.F.R. pt. 1630 app. § 1630.2(l).

¹²² *Id.*

While the description above appears to suggest that it is easy to establish that an individual is protected under the “regarded as” prong, and desirable to do so (as it makes it unnecessary to show that an individual was substantially limited in a major life activity), there are serious drawbacks and limitations to using this prong:

- To be protected under the “regarded as” prong, the individual must show that a covered entity took some type of action against the individual *because of* the actual or perceived condition. Some evidence of a connection between the perceived disability and the covered entity’s action is required.
- Establishing that an individual is “regarded as having an impairment does not, by itself, prove discrimination.”¹²³ An individual still has to prove that the ADA was violated.

Another limitation of the “regarded as” prong is discussed in section B below.

B. No reasonable accommodations under “regarded as” prong

The ADAAA makes clear that individuals covered by the ADA on the basis that they are “regarded as” having a disability are not entitled to reasonable accommodations.¹²⁴ This is a significant drawback and one reason why the “regarded as” prong is not likely to be used by welfare advocates in many situations.

C. Condition cannot be transitory or minor

If an individual claims he or she was discriminated against on the basis that he or she was “regarded as” having a disability, that claim will not prevail if the covered entity can show that the impairment is both “transitory and minor.”¹²⁵ “Transitory or minor” is defined as having an actual or expected duration of six months or less.”¹²⁶ The condition must actually be transitory and minor. It is not enough for the defendant to argue that it believed the condition was transitory and minor.¹²⁷

Example: If a welfare-to-work program excludes an individual from a particular job placement because she is unable to type for 3 weeks as the result of a sprained wrist, the individual is not protected under the “regarded as” prong

¹²³ 29 C.F.R. pt. 1630 app. § 1630.2(l)(3).

¹²⁴ 42 U.S.C. § 12201(h); 29 C.F.R. § 1630.9(e).

¹²⁵ 42 U.S.C. § 12102(3)(B); 29 C.F.R. § 1630.15(f).

¹²⁶ *Id.*

¹²⁷ 29 C.F.R. § 1630.15(f).

because a sprained wrist is transitory and minor.

Example: A welfare recipient working in a child care center as a welfare work activity has a cold. If the program sends her home and tells her not to return until the following week, the individual is not protected under the “regarded as” prong of the ADA, because the condition is transitory and minor.

VII. Who has a “record of” a disability?

The ADA protects individuals with a “record” of a disability.¹²⁸ This “prong” of the ADA disability definition, often referred to as the “record of” prong, includes those who actually had, or were misclassified as having, a disability in the past.¹²⁹ The ADAAA makes clear that this prong should be interpreted broadly.¹³⁰ However, the impairment in the record must be an impairment that would substantially limit one or more of the individual’s major life activities.¹³¹

Example: An individual suffered from severe depression many years ago and was in a psychiatric hospital for several months. The ADA prohibits a welfare program that trains individuals to be day care workers from excluding this individual from the program on the basis she should not work with children because she was once hospitalized for a psychiatric disability.

The EEOC regulations make clear that individuals with a record of a substantially limiting impairment may be entitled to reasonable accommodations if needed and related to the past disability.¹³² However the types of accommodations to which an individual is entitled on the basis of a “record of” a disability are likely to be limited:

Example: A welfare recipient with an impairment that previously limited a major life activity that no longer limits the major life activity may be entitled to be assigned to a welfare work activity with a flexible schedule that makes it possible for the individual to attend treatment or therapy appointments to monitor or follow-up the condition.¹³³

¹²⁸ 42 U.S.C. § 1202(1)(B); 29 C.F.R. § 1630.2(g)(1)(ii).

¹²⁹ *Id.*

¹³⁰ 42 U.S.C. § 12102(4)(A); *see also* 29 C.F.R. pt. 1630 app. § 1630.2(k)(2).

¹³¹ 29 C.F.R. § 1630.2(k)(2).

¹³² 29 C.F.R. § 1630.2(k)(3).

¹³³ *Id.*

There are many types of records that could potentially contain this information, including education, medical, or employment records.¹³⁴ To establish coverage under the “record of” prong, an individual only needs to show that he or she has a record of a substantially limiting impairment; it is not necessary to show that the covered entity knew of the record of disability. However, to establish discrimination under this prong, an individual must prove that the covered entity discriminated on the basis of the record.¹³⁵

VIII. What is a “qualified individual with a disability”?

A. Individual must meet essential eligibility requirements of the program or service

To be protected by Title II of the ADA, the general rule is that the individual must not only have a disability, but must also be a “qualified individual with a disability.”¹³⁶ A “qualified individual with a disability” in Title II of the ADA is 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 meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.¹³⁷

In the context of welfare programs, a “qualified individual with a disability” is someone with a disability (as defined by the ADA) who meets the eligibility requirements for the receipt of welfare benefits, or would meet those requirements if reasonable accommodations were provided or other changes were made in the way that the welfare agency delivers services.¹³⁸ If the individual with a disability experiences a barrier in applying for benefits, the individual is a “qualified individual with a disability” for the purpose of challenging this application barrier if she is qualified to apply for benefits. Since anyone has a right to apply for benefits, anyone with a disability under the ADA is a qualified individual with respect to the application process.

¹³⁴ 29 C.F.R. pt. 1630 app. § 1630.2(k)(2).

¹³⁵ *Id.*

¹³⁶ 42 U.S.C. § 12132.

¹³⁷ 42 U.S.C. § 12131(2).

¹³⁸ Reasonable accommodations are discussed in Chapter 4. As noted in Chapter 4, this manual uses the term “reasonable accommodations” to refer broadly to the wide range of things that welfare agencies are required to do for people with disabilities when necessary, including making reasonable modifications in policies and practices.

The requirement that an individual must meet essential program eligibility requirements applies to individuals covered by the ADA under all three prongs: “actual disability,” and those with a “record of” a disability, and those “regarded as” having a disability.

B. Some “companions” have rights under the ADA even though they do not meet essential program requirements

The DOJ ADA regulations that went into effect on March 15, 2011 require welfare agencies to provide “effective communication” with “companions” of applicants, participants and members of the public.¹³⁹ “Companion” is defined as a:

- family member
- friend, or
- associate

of the individual seeking access to the program, service, or activity, “who, along with such individual, is an appropriate person with whom the public entity should communicate.”¹⁴⁰ In other words, welfare agencies and other covered entities must provide effective communication with individuals who are interacting with the agency on someone else’s behalf, and with those who are participating in the communication with the agency, although they are not the applicant or recipient. DOJ added the reference to “companions” in the regulations because, prior to this change, some government agencies and places of public accommodation refused to provide sign language interpreters to individuals who were not the client, patient, or intended recipient of the program or service, and some courts upheld these decisions on the basis that the individual with the disability in need of the interpreter was not a client of the agency, and thus was not a “qualified individual” under the ADA. The reference in the regulations to an “appropriate person with whom the public entity should communicate” is presumably broad because DOJ did not believe it was possible to identify all of the categories of individuals that might fall into this category.

Example: A welfare recipient brings her daughter, who is deaf, with her to her appointment at the welfare agency, because her daughter is generally the person who assists her aunt in financial matters and in dealing with government agencies. Even though the mother, who is the client of the agency, does not have a disability or need an accommodation, the agency must provide a sign language interpreter to daughter if she needs one to communicate effectively

¹³⁹ 28 C.F.R. § 35.160(a)(1). The obligation to provide “effective communication to individuals with disabilities is discussed in Chapters 4 and 8.

¹⁴⁰ 28 C.F.R. § 35.160(a)(2).

with the agency.

Example: An individual with a mobility impairment seeks the assistance of her local independent living center on her public benefits case. The advocate from the independent living center who is assigned to help her has a speech impairment as a result of cerebral palsy. The welfare agency must accommodate the advocate so she can communicate effectively with the agency on her client's behalf, by communicating with the advocate by email instead of the telephone, if email is an effective method of communication for the advocate.

This requirement is mentioned here because individuals who meet the definition of “companion” will often be individuals who do are not a “qualified individual with a disability” because they do not meet essential eligibility requirements of agency programs or services (or want or need those programs or services). In this sense, this protection operates as a limited exception to the obligation that an individual be qualified for agency programs and services to have ADA rights under Title II.

IX. Agencies cannot discriminate against individuals based on their association with someone with a disability

Though not technically a part of the ADA definition of disability, ADA Title II regulations prohibit discrimination against an individual based on his or her association with someone with a disability. The regulations prohibits public entities from “excluding or otherwise denying equal services, programs and activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.”¹⁴¹

Example: A welfare agency cannot refuse to refer a parent to a job or training program because she has a child with a severe disability and the agency is concerned that the parent will frequently miss work or training to care for the child.

The basis of the association need not be a family relationship – individuals discriminated against on the basis of a known business or social relationship with an individual with a known disability are also protected.¹⁴²

¹⁴¹ 28 C.F.R. § 35.130(g).

¹⁴² Substance abuse treatment programs have used this provision to challenge restrictive zoning laws that prevent them from locating treatment facilities in particular areas on the basis of their business relationship with their clients. *See, e.g., Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997); *see also*, 29 C.F.R. pt. 1630 app. § 1630.8 (Title I Interpretive Guidance).

1. Does the ADA require welfare agencies to make reasonable accommodations for individuals with disabilities who are not applicants or recipients who are associated with an applicant or recipient?

With the exception of the obligation to provide effective communication with companions with disabilities, Title II regulations do not specifically require agencies to provide accommodations to individuals with disabilities who are not applicants, recipients, or members of the public seeking information or services from the agency. Nevertheless, if a welfare applicant or recipient without a disability is dependent on an individual with a disability to obtain or maintain benefits, advocates can argue that the failure to accommodate the non-applicant or non-recipient with a disability will result in discrimination against the applicant or recipient based on his or her association with a person with a disability. Courts have in some cases held that Title II and Title III entities must provide accommodations to individuals associated with the main intended beneficiary of the services.¹⁴³

Example: A grandparent with a disability (who does not receive cash assistance) needs a reasonable accommodation to apply for benefits for grandchildren (who do not have disabilities). If the accommodation is not provided, and the grandchildren cannot get welfare benefits as a result, the children have been discriminated against as a result of their association with (and dependence on) an individual with a disability.

2. Does the ADA require welfare agencies to make reasonable accommodations for applicants or recipients without disabilities who are associated with a person with a disability?

Title II regulations do not specifically require agencies to accommodate individuals without disabilities when the accommodation is needed based on their association with an individual with a disability. Nevertheless, advocates can argue that the failure to provide such accommodations violates the ADA because it excludes individuals from programs or denies equal services because of their association with a person with a disability.

¹⁴³ See e.g., *Bravin v. Mount Sinai Med. Ctr.*, 186 F.R.D. 293, 304 (S.D.N.Y. 1999), *modified on other grounds*, 58 F. Supp.2d 269 (S.D.N.Y. 1999) (hospital violated ADA by failing to provide an interpreter to a deaf husband attending a Lamaze class); *Rothschild v. Grottenthaler*, 907 F.2d 286 (2d Cir. 1990) (deaf parents of hearing children are “otherwise qualified” for parent-teacher conferences and therefore entitled to an interpreter to participate in and benefit from those conferences). The broader the program purpose, the more likely individuals with disabilities who are not the primary recipient of the services are to be protected under the ADA and/or entitled to reasonable accommodations.

Example: A welfare recipient without a disability needs to engage in work activities part-time to care for a spouse with a disability (who does not receive cash assistance). The accommodation is not provided, and the recipient's benefits are reduced as a result. Advocates can argue that the reduction of the parent's benefits was discrimination on the basis of an association with the spouse with a disability, even though the parent does not have a disability.

Note: In the employment context, employers are not required to accommodate employees without disabilities who need accommodations because they have a family member with a disability.¹⁴⁴

X. Individuals with Substance Abuse Problems

The ADA treats alcoholism and illegal use of drugs differently.

A. Alcoholism

Alcoholism is an impairment under the ADA.¹⁴⁵ If an individual is substantially limited in a major life activity as a result of alcoholism, she has a disability protected by the ADA.

B. Illegal use of drugs

1. General rule

The term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the government program acts on the basis of such use.¹⁴⁶

- "Illegal use of drugs" means use, possession or distribution of drugs that are illegal under the Controlled Substances Act, unless they are used under the supervision of a doctor or used in another way authorized by the Controlled Substances Act.¹⁴⁷

¹⁴⁴ 29 C.F.R. pt. 1630 app. § 1630.8.

¹⁴⁵ 28 C.F.R. § 35.104.

¹⁴⁶ 42 U.S.C. § 12210; 28 C.F.R. § 35.131.

¹⁴⁷ 42 U.S.C. § 12210(d). This exclusion from protection applies to users of illegal drugs as well as those abusing legal controlled substances.

- “Current” has been defined to mean: “sufficiently recent to justify the . . . [] reasonable belief that the drug abuse remained an ongoing problem.”¹⁴⁸ It is not necessarily limited to the same, day, week, or even month.¹⁴⁹
- A state or local government “acts on the basis of such use” when it denies or terminates benefits or services, or excludes from participation, an individual because he or she is currently engaging in the illegal use of drugs.

2. Exceptions to the ADA exclusion for illegal use of drugs

There are several important exceptions to the rule excluding current illegal users of drugs from protection under the ADA:

- Individuals currently participating in a drug rehabilitation program who are not currently engaged in illegal use of drugs are protected by the ADA.¹⁵⁰
- Individuals who have successfully completed a drug rehabilitation program who are not currently engaged in illegal use of drugs are protected by the ADA.¹⁵¹
- Current illegal drug users cannot be denied health care or other services provided in connection with drug rehabilitation on the basis of their drug use.¹⁵²

Example: A hospital cannot refuse to treat someone who has overdosed on drugs on the basis that the person is a current illegal drugs user.

¹⁴⁸ See, e.g., *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 856 (5th Cir. 1999) (an employee who used cocaine six weeks before he was notified that he was fired was currently engaging in the illegal use of drugs and therefore not protected by the ADA); Equal Employment Opportunity Commission, *Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, § 8.3 (1992).

¹⁴⁹ *Id.*

¹⁵⁰ 42 U.S.C. § 12210(b).

¹⁵¹ *Id.*

¹⁵² 42 U.S.C. § 12210(c).

- People who are engaged in illegal use of drugs and have another substantially limiting impairment are protected by the ADA on the basis of the other impairment (unless the government agency action was taken on the basis of the drug use).

Example: A person who uses illegal drugs and has an intellectual disability (e.g. mental retardation) is protected by the ADA on the basis of the cognitive disability. A drug treatment program cannot exclude that person because she has a cognitive disability if she needs and qualifies for the drug treatment program's services and can benefit from it.

Example: A community residence for people with mental health problems can expel a resident who engages in illegal use of drugs. The fact that the person has a mental health problem and is a person with a disability under the ADA on this basis will not protect her from being expelled.

3. The ADA and drug testing

The Personal Responsibility and Work Opportunities Reconciliation Act ("PRWORA") allows welfare agencies to conduct drug testing of welfare recipients,¹⁵³ In addition, the ADA itself it makes clear that drug testing does not violate the ADA.¹⁵⁴

Nevertheless, an agency's implementation of drug testing may raise problems under the ADA. Because some medications prescribed by doctors can result in a positive drug test, there is a possibility that an individual will test positive as the result of medication taken to treat a disability or its symptoms. If a welfare agency takes adverse action against a TANF recipient who tests positive for drugs and the individual has a disability and uses a prescribed medication that caused the positive test result, the agency has discriminated against the individual on the basis of disability in violation of the ADA. Agencies and or testing labs must have procedures in place to ensure that this does not occur, by giving individuals an opportunity to disclose prescribed medication use. In addition, advocates should be aware that a federal appellate court has held that random, suspicionless drug testing of TANF recipients is unconstitutional. See *Marchwinski v. Howard*, 113 F. Supp.2d 1134 (E.D. Mich 2000), *aff'd*, 60 F. App'x 601 (6th Cir. 2003).

¹⁵³ 21 U.S.C. § 862b.

¹⁵⁴ 42 U.S.C. §§ 12210(b).

XI. Exclusions from the ADA definition of disability

A. Some conditions are excluded from the ADA definition of disability

The following conditions are not disabilities under the ADA:¹⁵⁵

- Homosexuality
- Bisexuality
- Transvestism
- Transsexualism
- Pedophilia
- Exhibitionism
- Voyeurism
- Gender identity disorders not resulting from physical impairments
- Kleptomania
- Pyromania
- Compulsive gambling
- Psychoactive substance abuse disorders resulting from current illegal use of drugs.

¹⁵⁵ 42 U.S.C. § 12211.

Chapter 4: What welfare agencies must do to comply with the ADA

This chapter discusses the specific requirements and prohibitions of Title II of the ADA as they apply to welfare programs. Section I discusses Policy Guidance and other documents issued by the U.S. Department of Health and Human Services (“HHS”) on the application of the ADA and Section 504 to TANF programs. Section II discusses key Title II protections and their application to applicants and recipients of welfare benefits. For each Title II requirement, the chapter provides examples of how the requirement applies to welfare programs and examples of “promising practices” from the OCR Policy Guidance on how to comply with the Title II requirement. Section III discusses other ADA concepts. Section IV discusses possible defenses to some Title II claims and reasonable accommodation arguments. For further discussion of PRWORA TANF work program requirements and the application of the ADA and Section 504 to TANF work programs, see Chapter 5.

I. OCR Policy Guidance and other HHS documents on the application of the ADA and Section 504 to welfare programs

A. 2001 HHS OCR Policy Guidance

In January 2001, the Office for Civil Rights (“OCR”) at HHS issued Policy Guidance on the application of the ADA and Section 504 to TANF programs.¹⁵⁶ The Policy Guidance is extremely useful in advocacy on ADA/504 welfare issues. The Guidance:

- makes clear that the ADA and Section 504 apply to every aspect of TANF programs, including the application process, employability assessments, work activities, time limits, and education and training programs
- addresses several different types of discrimination against people with disabilities (including exclusionary rules, separate programs, administrative practices that tend to screen out, etc); and
- provides examples of reasonable accommodations for people with mental and developmental disabilities instead of focusing exclusively on physical accessibility.

¹⁵⁶ U.S. Department of Health and Human Services, Office for Civil Rights, *Policy Guidance: Prohibition Against Discrimination in the Administration of Temporary Assistance for Needy Families (TANF)*, (“HHS OCR Guidance”) (Jan. 19, 2001), available at www.hhs.gov/ocr/prohibition.html.

B. Overview and structure of the 2001 Guidance

The OCR Guidance is divided into several sections:

- Section A contains background on PRWORA, the prevalence of disabilities in TANF recipients, the range of approaches taken by state TANF programs to serve people with disabilities, and previous HHS OCR guidance on civil rights and welfare reform.
- Section B, entitled “legal authority,” discusses the some of the essential ADA and Section 504 concepts and requirements, including: ensuring equal access; adopting non-discriminatory methods of program administration; and modifying policies, practices, and procedures.¹⁵⁷
- Section C discusses who is protected by the ADA and Section 504, and who must comply with these laws.
- Section D, entitled “Legal Requirements and Promising Practices,” is the longest and most structurally complex section of the Guidance. It discusses three essential ADA legal requirements and “promising practices” that implement the legal requirement.
- The appendix to the Guidance contains a sample “diagnostic review checklist”¹⁵⁸ that welfare agencies can use to determine the types of program modifications they need to make to come into compliance with the ADA and Section 504.

C. Legal weight of the 2001 HHS OCR Guidance

Advocates should keep in mind that the HHS OCR Guidance is guidance, not regulations.¹⁵⁹ As a result, arguing that a welfare agency practice “violates the Guidance” may not be the best approach. (or OCR) to point out that the Guidance is not law. Nevertheless, it may be possible to draw distinctions between the sections of the Guidance entitled “legal requirements” and those entitled “promising practices.” For this reason, this manual identifies the section and subsection of the Guidance where each statement is made, and, if the statement is from the “Legal Requirements and Promising Practices” section, whether the statement is located directly under a “Legal Requirements” heading or is described as a “promising practice.”

¹⁵⁷ These concepts are discussed later in this chapter.

¹⁵⁸ “Diagnostic reviews” are discussed in Chapter 10.

¹⁵⁹ Congress gave the Department of Justice, not HHS, the authority to promulgate regulations implementing Title II of the ADA. 42 U.S.C. § 12134(a).

1. “Legal requirements”

The “legal requirements” sections of the Guidance reflect OCR’s views of what welfare agencies must do to meet their obligations under the ADA. Therefore, they should be afforded weight by welfare agencies and courts. To date, no court has ruled on the weight to be given to the OCR Guidance. In practice, the Guidance has been used by advocates in policy advocacy with many state welfare agencies to help them understand ADA and Section 504 requirements and to persuade them to develop or improve ADA policies.

2. “Promising practices”

The “promising practices” discussed in the Guidance are ways TANF agencies can meet their obligations under the ADA and Section 504. Many of these “promising practices” are actual examples of approaches taken by welfare agencies around the country when the Guidance was issued. The Guidance states that the promising practices discussed in the Guidance are illustrative and are not mandatory requirements and a TANF agency’s failure to implement a particular promising practice will not necessarily lead to a finding by OCR that the welfare agency has violated the ADA or Section 504.¹⁶⁰

However, advocates should take the position that the “promising practices” discussed in the Guidance are more than “best practices,” the “gold standard,” or good ideas. They are methods of preventing or avoiding the discrimination that is likely to occur against welfare applicants and recipients with disabilities in the absence of the “promising practice.” Thus, an agency that has neither adopted the particular types of “promising practices” discussed in the Guidance nor taken other comparable measures is likely to be violating the ADA. If welfare agency officials maintain that they are not required to adopt the “promising practices” discussed in the Guidance, advocates should ask what comparable policies and practices the agency has adopted to prevent the particular type of discrimination at issue.

D. 2007 HHS OCR and ACF “Frequently Asked Questions” on TANF and Federal Civil Rights Laws

In 2007, the HHS Office for Civil rights and Administration for Children and Families (ACF) jointly issued a document entitled “Frequently Asked Questions: Meeting the Needs of TANF Applicants and Beneficiaries Under Federal Civil Rights

¹⁶⁰ HHS OCR Guidance, *supra* note 156, § A(4) (“Background; Legislative and Regulatory Framework”).

Laws” (“FAQ”).¹⁶¹ The FAQ was issued after the Deficit Reduction Act (“DRA”) reauthorized and made changes to the TANF program and HHS published regulations implementing the DRA changes to TANF.

The stated purpose of the HHS FAQ was to address states’ questions about compliance with federal disability rights laws after DRA was enacted. The FAQ makes clear that “neither the DRA nor the TANF regulations change how states are to comply with applicable Federal civil rights laws” and that “TANF agencies have the same legal obligations to comply with Title VI, Section 504, the ADA, and the Age Discrimination in Employment Act that they had prior to the DRA and its changes to TANF.”¹⁶² Further, by having ACF and OCR jointly issue the FAQ, HHS presumably intended to convey that HHS was speaking with one voice on these issues and make clear that the same division of the agency that issued the DRA regulations was also reiterating the importance of compliance with civil rights laws in the administration of TANF programs.

Like The OCR Policy Guidance, the FAQ cannot be cited as law. However, advocates can argue that agency policies and practices are inconsistent with the FAQ, and can argue that the agency is not doing things discussed in the examples to the FAQ or something comparable.

II. Title II requirements

A. No exclusion from participation or denial of an opportunity to participate

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or subjected to discrimination by any such entity.”¹⁶³ DOJ Title II ADA regulations go on to define “discrimination” by listing specific practices that constitute “discrimination,” but advocates can rely on this general non-discrimination language in addition to the specific practices identified in the regulations that constitute discrimination.¹⁶⁴

¹⁶¹ U.S. Department of Health and Human Services, Administration for Children and Families and Office for Civil Rights, *Frequently Asked Questions: Meeting the Needs of TANF Applicants and Beneficiaries Under Federal Civil Rights Laws* (“HHS FAQ”), Background; Question 2 (undated), available at www.acf.hhs.gov/programs/ofa/civilrights/OCRqandafinal_faq.html.

¹⁶² *Id.*, Background.

¹⁶³ 42 U.S.C. § 12132. See also 28 C.F.R. § 35.130(a).

¹⁶⁴ 28 C.F.R. §§ 35.130(b)-(g).

Example: An education and training program for welfare recipients that refuses to admit someone into the program who meets the essential eligibility requirements for the program (such as having completed high school or having a GED), simply because she has a vision impairment or learning disability, is excluding the individual from participation on the basis of disability, in violation of the ADA.

Example: A welfare agency that refuses to permit people with disabilities who are exempt from work activities to participate voluntarily violates the ADA by denying access to the full range of programs and services available.

OCR Guidance: A welfare agency cannot exempt all people with disabilities from work activities involuntarily because doing so denies individuals with disabilities an opportunity to participate in work activities in violation of the ADA.¹⁶⁵

B. Equal opportunity to participate and benefit

ADA Title II regulations provide that public entities may not “afford a qualified individual with a disability an opportunity to participate in and benefit from the aid, benefit or service that is not equal to that afforded to others.”¹⁶⁶ In other words, even if a welfare agency does not completely prevent a person with a disability from obtaining benefits, participating in education and training programs or qualifying for extensions of benefits, it may nonetheless violate the ADA if it provides access to programs, activities and benefits that this not equal to that provided to others. Public entities may deny an opportunity to participate and benefit if:

- It is much more difficult for people with disabilities to obtain a benefit or service because of a disability;
- It takes significantly longer for people with disabilities to obtain a benefit or a service;
- People with disabilities have access to a narrower range of programs and services than others; or
- Help that would make the benefit or service meaningful or effective is not provided.

Example: The welfare agency requires all clients to come to the welfare office for each appointment and has no alternative procedure for people who cannot

¹⁶⁵ HHS OCR Guidance, *supra* note 156, § A(3) (“Background; State Activities”)

¹⁶⁶ 28 C.F.R. § 35.130(b)(1)(ii).

leave home to travel to the welfare office. The program violates the ADA by failing to provide an equal opportunity to obtain benefits to an individual with a serious panic disorder who has difficulty leaving home and using public transportation as a result of her disability.

Example: The welfare agency refers a client with a learning disability to a basic education program that relies heavily on written materials. The individual has difficulty processing written information as a result of her disability. If the program does not provide additional verbal instructions to her, it has violated the ADA by denying her an equal opportunity to participate in and benefit from the program.

The OCR Guidance: To comply with the equal access requirement, welfare agencies must:

- Provide people with disabilities with appropriate services;¹⁶⁷
- Ensure that individuals with disabilities have access to the entire range of services for which they are qualified;¹⁶⁸
- Modify policies and practices at all stages of a TANF program, including the application process, training, education, and work activities; and¹⁶⁹
- Ensure that contractors have the knowledge experience and expertise to serve individuals with disabilities.¹⁷⁰

The TANF agency should undertake a comprehensive examination of the agency's policies and practices to determine changes necessary to ensure that TANF participants with disabilities have an equal opportunity to participate and benefit.¹⁷¹

¹⁶⁷ HHS OCR Guidance, *supra* note 156, §§ B(a) ("Legal Authority: The Disability Policy Framework"); D(1) ("Legal Requirements and Promising Practices: The Legal Requirement to Ensure Equal Access to TANF Programs Through the Provision of Appropriate Services").

¹⁶⁸ *Id.*, § D(1) ("Legal Requirements and Promising Practices: The Legal Requirement to Ensure Equal Access to TANF Programs Through the Provision of Appropriate Services").

¹⁶⁹ *Id.*, §§ B ("Legal Authority: The Disability Policy Framework"); § B(b) ("Legal Authority: The Disability Policy Framework: Modifying Policies, Practices and Procedures to Ensure Equal Opportunity").

¹⁷⁰ *Id.*, § D(1) ("Legal Requirements and Promising Practices: The Legal Requirement to Ensure Equal Access to TANF Programs Through the Provision of Appropriate Services").

¹⁷¹ *Id.*, § B(b) ("Legal Authority: The Disability Policy Framework: Modifying Policies, Practices and Procedures to Ensure Equal Opportunity").

Examples of “promising practices” for ensuring an equal opportunity to participate and benefit mentioned in the Guidance include:

- Entering into partnerships with other agencies such as vocational rehabilitation agencies;¹⁷²
 - Reimbursing contractors in a manner that facilitates equal opportunity for people with disabilities by taking into consideration the additional costs of serving people with disabilities;¹⁷³ and
 - Conducting “exit interviews” to learn whether clients believe their disabilities were identified and their needs accommodated.¹⁷⁴
- C. No discriminatory criteria or methods of program administration

Title II regulations prohibit public entities from “utiliz[ing] criteria or methods of program administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals with disabilities.”¹⁷⁵ “Criteria and methods of program administration” refer to the official written policies of an agency as well as to its actual practices.¹⁷⁶

Example: The welfare agency does not screen and assess welfare recipients to determine whether they have disabilities and assigns many people with disabilities to work activities that are not appropriate for them. As a result, many recipients are sanctioned inappropriately. The agency’s failure to identify individuals’ disabilities, practice of assigning them to inappropriate work activities, and practice of sanctioning them for non-compliance when they cannot comply for disability-related reasons, are methods of program administration with a discriminatory effect on people with disabilities. They also impair the

¹⁷² *Id.*, § D(1) (“Legal Requirements and Promising Practices: Promising Practices in the Provision of Equal Access to TANF Programs”).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ 28 C.F.R. §§ 35.130(b)(3)(i)-(ii).

¹⁷⁶ 28 C.F.R. Pt. 35 App. B § 35.130(b)(3).

objectives of the TANF program for individuals with disabilities, because individuals placed in inappropriate work activities are hindered in their ability to move towards self-sufficiency.

Example: The welfare agency has a written policy stating that people with disabilities can get help filling out applications, but doesn't provide this help in practice. This program violates the ADA by using a method of program administration that has a discriminatory effect on people with disabilities.

Example: The welfare agency has a written policy stating that only individuals who are eligible for SSD or SSI benefits are exempt from work activities on the basis of disability. This policy violates the ADA by using methods of program administration that have a discriminatory effect on people with disabilities, because some individuals with disabilities who cannot engage in work activities are being denied an exemption, which is a reasonable accommodation.

The OCR Guidance: Non-discriminatory methods of administration are achieved by:

- Training welfare agency staff to provide equal access;¹⁷⁷
- Ensuring that contractor staff are trained;¹⁷⁸
- Having a clear written policy incorporating modifications to policies and practices;¹⁷⁹ and
- Conducting regular oversight of programs and practices.¹⁸⁰

“Promising practices” for achieving non-discriminatory methods of program administration mentioned in the OCR Guidance include:

- Using staff from another government agency with expertise in learning

¹⁷⁷ HHS OCR Guidance, *supra* note 156, §§ B(c) (“Legal Authority: The Disability Policy Framework: Non-Discriminatory Methods of Administration”); D(3) (“Legal Requirements and Promising Practices: The Legal Requirement to Adopt Non-Discriminatory Methods of Administration”).

¹⁷⁸ *Id.*, § D(3) (“Legal Requirements and Promising Practices: The Legal Requirement to Adopt Non-Discriminatory Methods of Administration”).

¹⁷⁹ *Id.* (The Guidance says that a TANF agency “may need to fulfill their obligation [...] by implementing a comprehensive written policy . . .”)

¹⁸⁰ *Id.* (The Guidance says that a TANF agency “may need to fulfill their obligation [...] by conducting regular oversight . . .”)

disabilities to train the welfare agency on modifying instructional materials for individuals with learning disabilities;¹⁸¹

- Imposing penalties and requiring corrective action plans from contractors that implement programs in a discriminatory manner;¹⁸² and
- Routinely investigating which welfare recipients are being sanctioned to determine whether they have disabilities that substantially contributed to their non-compliance.¹⁸³

D. No eligibility criteria that screen out people with disabilities

Title II regulations prohibit public entities from “impos[ing] or apply[ing] eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with a disability from fully and equally enjoying any service, program or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”¹⁸⁴

Example: A welfare agency requires recipients seeking extensions of cash assistance beyond the state’s TANF time limit to have no prior sanctions. The agency does not screen and assess recipients to identify their disabilities, and as a result, many recipients with disabilities are placed in activities that are not appropriate for them, and are sanctioned as a result. The welfare agency violates the ADA by making decisions about eligibility for extensions of benefits that are the result of the agency’s previous failure to comply with the ADA violations (e.g., the failure to screen and assess disabilities and assignment of clients with disabilities to inappropriate work activities).

Example: A welfare agency requires individuals who want to lift a sanction to demonstrate a willingness to comply with work activities by engaging in work activities for five days before the sanction is lifted. The agency does not provide reasonable accommodations to individuals with disabilities during the five-day period. The welfare agency violates the ADA by using eligibility criteria for lifting sanctions that screen out people with disabilities.

¹⁸¹ *Id* (“Legal Requirements and Promising Practices: Promising Practices in Non-Discriminatory Methods of Administration”).

¹⁸² *Id*.

¹⁸³ *Id*.

¹⁸⁴ 28 C.F.R. § 35.130(b)(8).

E. Providing reasonable accommodations when necessary to avoid discrimination

Title II regulations provide that public entities “shall make reasonable modifications in policies, practices, or procedures when the accommodations are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”¹⁸⁵ This requirement is one of the most important protections applicants and recipients with disabilities have in welfare programs. Advocates should think about this requirement in broad terms.

A word about terminology: though the term “reasonable modifications,” not “reasonable accommodations,” is used in the Title II regulations, many advocates, welfare agency ADA policies, and welfare agency consumer education materials use the term “reasonable accommodations” when referring to this Title II requirement. As “reasonable accommodations” is the term that most agency officials and clients are familiar with, there may be advantages to using this term. As long as policies, agency training materials, and consumer education materials make clear that modifications in agency policies and practices are one type of accommodation that is required, there is little reason to insist on using and getting states to use the term “reasonable modifications.” For the reasons stated above, this manual uses the term “reasonable accommodation(s), not reasonable modifications.”

The ADA doesn’t define the terms “reasonable accommodation” and “reasonable modification.” In welfare advocacy, it is helpful to think of a reasonable accommodation as any reasonable change in the way that the agency does something, or in what they require or permit the applicant or recipient to do.

1. Types of reasonable accommodations

Many types of program and rule changes and help can be reasonable accommodations. Some are listed below.

a. Giving a person help doing something

Example: If an individual has a disability that makes it difficult to fill out an application for benefits, help with fill out the application is a reasonable accommodation for that individual.¹⁸⁶

¹⁸⁵ 28 C.F.R. § 35.130(b)(7).

¹⁸⁶ HHS OCR Guidance, *supra* note 156, § D(2) (“Legal Requirements and Promising Practices: Promising Practices in Modifying Policies and Programs to Ensure Access for People with Disabilities”);

Example: If an individual needs help finding a doctor or clinic to evaluate her disability and provide documentation for a work exemption, helping the person to find a medical provider is a reasonable accommodation for the agency.

OCR Guidance: A “promising practice” is calling, or making a home visit, to client with a known mental impairment or learning disability when the agency knows the client will be unable to understand a written notice, before taking negative action against the client based on the notice.¹⁸⁷

b. Giving a person additional time

Example: Providing on-the-job training or supports for a longer period of time to a person with a disability is a reasonable accommodation.¹⁸⁸

c. Allowing a person to do less of something

Example: If an individual with a disability can participate in work activities but cannot, as a result of a disability, participate full-time, allowing the individual to engage in work activities for fewer hours is a reasonable accommodation to.

Example: If an individual with a disability can participate in job search but cannot make the minimum number of required job contacts, allowing the individual to make fewer job contacts is a reasonable accommodation.¹⁸⁹

d. Allowing a person do something at another place

Example: If an individual with a disability cannot travel to a welfare office for an appointment, conducting the appointment at the client’s home is a reasonable accommodation.¹⁹⁰

see also U.S. Department of Justice, *The Americans with Disabilities Act Title II Technical Assistance Manual*, § II-3.6100, available at www.ada.gov/taman2.html.

¹⁸⁷ *Id.*, § D(2) (“Legal Requirements and Promising Practices: Promising Practices in Modifying Policies and Programs to Ensure Access for People with Disabilities”).

¹⁸⁸ *Id.*; see also *McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004); *Vollmert v. Wisconsin Dep’t of Transportation*, 197 F.3d 293 (7th Cir. 2000); *Manley v. Office of Vocational Rehabilitation*, 654 A.2d 25 (Pa. Commw. Ct. 1994).

¹⁸⁹ *Id.*

¹⁹⁰ See 28 C.F.R. §35.150(b)(1) (mentioning home visits as one way for public entities to achieve program access). The OCR Guidance contains the following statement in a sample client notice: “We can

e. Allowing a person to do something at another time

Example: If an individual with a disability is receiving mental health treatment, providing a flexible work schedule so the person can participate in mental health treatment is a reasonable accommodation.¹⁹¹

f. Allowing a person doing something in another way

Example: If a welfare agency requires several appointments to complete an employability or disability assessment and an individual has a disability that makes it difficult to attend all of these appointments, it is a reasonable accommodation to combine appointments or hold two appointments on the same day, to reduce the number of times the individual is required to attend appointments to complete the assessment process.¹⁹²

Example: If a welfare agency usually requires individuals to be examined by a doctor under contract with the welfare agency to determine employability, and an individual's disability makes it very difficult to attend the doctors appointments, it is a reasonable accommodation for the welfare agency to waive this requirement and rely on recent medical reports from the individual's treating physician as documentation of the disability and need for a work exemption or other work accommodations.

g. Providing equipment

Example: If an individual with a visual impairment can participate in and benefit from a computer education and training program with software that magnifies the image on the computer screen, it would be a reasonable accommodation to provide such software.

call or visit if you are not able to come to our office." HHS OCR Guidance, *supra* note 152, § D(2) ("Legal Requirements and Promising Practices: Promising Practices in Modifying Policies and Programs to Ensure Access for People with Disabilities"); *Manley v. Office of Vocational Rehabilitation*, 654 A.d 25 (Pa. Commw. Ct. 1994)

¹⁹¹ HHS OCR Guidance, *supra* note 156, § D(2).

¹⁹² HHS OCR Guidance, *supra* note 156, § D(2) , states that modifying a complicated application process to ensure access by individuals with cognitive impairments is a "promising practice." ("Legal Requirements and Promising Practices: Promising Practices in Modifying Policies and Procedures to Ensure Access for People with Disabilities").

h. Waiving a requirement if a person cannot meet the requirement with or without a reasonable accommodation

Example: If an individual has a disability and is currently unable to engage in work activities, even with reasonable accommodations, exempting the individual from work activities is a reasonable accommodation.¹⁹³

OCR Guidance: Additional examples of “promising practices” in making reasonable accommodations include:

- Making reasonable accommodations to facilitate compliance (instead of sanctioning for non-compliance);¹⁹⁴
- Providing extensions of benefits beyond the 60 month federal time limit;¹⁹⁵
- Suspending state time limits during the assessment process for those with suspected disabilities;¹⁹⁶
- Broadly defining activities that “count” towards the state’s work participation rate;¹⁹⁷
- Allowing an individual to do activities even if they are not countable for either the State or federal work participation rates;¹⁹⁸
- Facilitating compliance of a parent whose child has a disability that makes it difficult or impossible to comply with an employment plan because the parent needs to care for the child, by giving parent an extension of time to meet work requirements or helping the parent find appropriate child care.¹⁹⁹

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

See Chapter 5 for a further discussion of the application of the ADA to TANF work requirements.

2. Other reasonable accommodation issues

Stating that individuals with disabilities have a right to reasonable accommodations leaves some important questions unanswered. Do individuals have to request reasonable accommodations, or does the welfare agency have an obligation to offer them? Are individuals whose disabilities have not been diagnosed entitled to reasonable accommodations? These issues are discussed in Appendix A, Frequently Asked Questions About Using the ADA on Behalf of Clients in Welfare Programs.

F. Service animals

Welfare agencies must modify policies (e.g., “no animals allowed”) to permit individuals with disabilities to use service animals.²⁰⁰ The 2010 revisions to the ADA Title II ADA regulations contain extremely detailed requirements on service animals, to address the many problems encountered by people with disabilities who use service animals.

1. Definition of service animal

The ADA defines a service animal as a dog who is individually trained to do work or perform tasks for an individual with a disability that are directly related to the individual’s disability.²⁰¹

- Examples of such tasks include: assisting individuals who are blind and those with vision impairments with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with disabilities, helping individuals, helping people with psychiatric or neurological disabilities by preventing or interrupting impulsive or destructive behavior.²⁰²

²⁰⁰ 28 C.F.R. § 35.136(a).

²⁰¹ 28 C.F.R. § 35.104.

²⁰² *Id.*

- The fact that the presence of a dog may deter crime does not qualify as work or a task.²⁰³
- The emotional support and companionship provided by dogs does not qualify as work or a task either.²⁰⁴

Although they do not meet the definition of “service animal” under the ADA, the regulations also require state and local governments to make reasonable accommodations to permit the use of miniature horses by people with disabilities if the horse has been individually trained to perform work or tasks for a person with a disability.²⁰⁵

2. Permissible questions about service animals

The ADA prohibits welfare agencies from asking about the nature or extent of a disability of an individual using a service animal. If it is obvious that the animal has been trained to perform a task for the individual, the agency cannot ask further questions.²⁰⁶ Welfare agencies cannot require documentation that an animal has been trained or licensed as a service animal.²⁰⁷

If it is not obvious that the animal is a service animal, the agency can ask the following questions:

- (1) Is the dog (or miniature horse) required because of a disability?
- (2) What work or task is the dog (or miniature horse) trained to perform?²⁰⁸

3. Under limited circumstances, service animals can be excluded

A service animal must have a leash, harness, or tether, unless they would interfere with the animal’s safe and effective performance of the task the animal was trained to perform. If a leash, harness or tether would interfere, the animal must nonetheless be under the individual’s control (through voice commands, hand signals,

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ 28 C.F.R. § 35.136(i).

²⁰⁶ 28 C.F.R. § 35.136(f).

²⁰⁷ *Id.*

²⁰⁸ 28 C.F.R. § 35.136(f).

or other effective means.²⁰⁹

Welfare agencies can exclude service animals if they are out of control and the animal's handler does not take effective action to control the animal. It can also exclude animals that are not housebroken.²¹⁰ If a service animal is properly excluded, the agency has to give the individual with a disability an opportunity to participate in programs or services without the service animal.²¹¹

G. The right to participate in integrated programs

Title II provides that public entities shall “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”²¹² In addition, the regulations make clear that if the welfare agency has separate programs for people with disabilities, people with disabilities have the right to participate in “integrated” programs that are not designed just for people with disabilities if they meet the essential eligibility requirements for the program.²¹³

Example: A welfare agency offers a training program for individuals with speech and hearing impairments. Under the ADA, an individual with a disability can choose to participate in an education and training program that is not designed specifically for individuals with these impairments if she meets the eligibility requirements for that program.²¹⁴

The ADA’s “integration mandate,” as the “most integrated setting” requirement is often referred, has been the subject of much litigation involving the Medicaid program. It has been used to challenge aspects of Medicaid programs, including limits in and reductions in coverage of community-based services that result or are likely to result in the institutionalization of individuals with disabilities. This topic, however, is beyond the scope of this manual, which focuses on welfare programs.

²⁰⁹ 28 C.F.R. § 35.136(d).

²¹⁰ 28 C.F.R. § 35.136(b).

²¹¹ 28 C.F.R. § 35.136(c).

²¹² 28 C.F.R. § 35.130(d); *see Olmstead v. L.C.*, 527 U.S. 581 (1999).

²¹³ 28 C.F.R. § 35.130(b)(2).

²¹⁴ HHS OCR Guidance, *supra* note 156, § D(1) (“Legal Requirements and Promising Practices: The Legal Requirement to Ensure Equal Access to TANF Programs Through the Provision of Appropriate Services”).

H. Accessible and usable programs, services and activities

Title II requires public entities to “operate each service, program, and activity so that the service, program, or activity is accessible to and usable by, individuals with disabilities.”²¹⁵ The way in which a welfare agency is required to achieve this requirement (sometimes referred to as the “program access” requirement), depends on the nature of the facilities in which programs and services are located.

1. New construction

Buildings in which construction began after January 26, 1992 must be designed and built so they are accessible to and usable by people with disabilities.²¹⁶ The federal government has technical accessibility standards (i.e., standards that specify how wide a doorway must be or how much turn space a corridor must have to be considered accessible), and these standards have been revised over the years.²¹⁷ The ADA regulations specify which standards must be followed, depending upon the date that construction begins.²¹⁸ The regulations also have specific rules for new construction of particular types of facilities (e.g., group homes, jails, housing at places of education).²¹⁹

2. Alterations to existing buildings

Alterations made to buildings or parts of buildings after January 26, 1992 must be made so that the altered portions are, to the greatest extent possible, accessible to and usable by people with disabilities.²²⁰ The regulations contain detailed requirements

²¹⁵ 28 C.F.R. § 35.150(a).

²¹⁶ 28 C.F.R. § 35.151(a)(1). There are exceptions to this requirement when it is structurally impracticable. 28 C.F.R. § 35.151(a)(2).

The access standards are codified at 28 C.F.R. pt. 36 app. A and 28 C.F.R. pt. 41-101.19.6 app. A.

²¹⁷ The two sets of standards incorporated into Title II of the ADA are the Uniform Federal Accessibility Standards (UFAS) (available at www.access-board.gov/ufas/ufas-html/ufas.htm) and the ADA Accessibility Guidelines (ADAAG) (the 2010 ADAAG standards are available at www.ada.gov/2010ADAstandards_index.htm; the 1991 ADAAG standards are available at www.ada.gov/stdspdf.htm).

²¹⁸ 28 C.F.R. §§ 35.151(c)(1)-(3).

²¹⁹ 28 C.F.R. §§ 35.151(e)-(k).

²²⁰ 28 C.F.R. § 35.151(b).

about the meaning of this obligation. They also contain exceptions.²²¹

3. Existing buildings (that are not altered)

It is the programs, services, and activities, but not necessarily the buildings, that must be accessible to or usable by people with disabilities. A welfare agency is not required to make every welfare agency office or building physically accessible, as long as the programs and services provided in those offices are accessible to and usable by people with disabilities. The agency can provide “program access” in a number of ways. For example, it can relocate services to accessible buildings, conduct home visits, or redesign services or equipment.²²² However, these alternatives must be administered in a manner that does not deny an equal opportunity to participate in and benefit from programs.²²³ In addition, existing facilities that are not altered on or after March 12, 2012 do not have to be modified to comply with the most recent (2010) technical accessibility standards.²²⁴

Example: A welfare agency has one office in the county. The agency is located in a building with several steps at the only entrance to the building. The steps have no ramp or wheelchair lift. To comply with the ADA, the welfare agency allows individuals to apply for and recertify benefits by mail, fax or phone, and makes home visits to individuals who cannot physically access the welfare office. Nevertheless, delays in providing home visits to people with disabilities are common, and as a result, individuals with disabilities lose their benefits when their applications are not recertified. The welfare agency is failing to provide meaningful or equal access to its programs to people with disabilities.²²⁵

I. Effective communication

Title II requires public entities to “take appropriate steps to ensure that communications with applicants, participants and members of the public with

²²¹ See, e.g., 28 C.F.R. § 35.151(b)(4)(ii)(C), (safe harbor); § 35.151(b)(4)(iii) (disproportionality).

²²² *Id.*

²²³ 28 C.F.R. § 35.130(b)(1)(ii).

²²⁴ 28 C.F.R. § 35.150(b)(2)(i).

²²⁵ *Id.*; *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (holding that Section 504 requires grant recipients to provide meaningful access to programs and services).

disabilities are as effective as communications with others.”²²⁶ To ensure effective communication, the agency “shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.”²²⁷ “Auxiliary aids and services” are defined in the regulations to include:

- “qualified interpreters onsite or through video remote interpreting (VRI) services, notetakers; real-time computer-aided transcription services, written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices, assistive listening systems; telephones compatible with hearing aids, closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunication products and systems, including text telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered materials available to individuals who are deaf or hard of hearing.”²²⁸
- “qualified readers; taped texts’ audio recordings’ Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision.”²²⁹

Example: A welfare agency must provide a qualified sign language interpreter to a deaf individual who uses sign language during the application interview when necessary to ensure effective communication.

Example: A welfare agency must provide informational materials about its programs in large print for individuals with vision impairments who need it.

In determining what type of auxiliary aid or device is necessary, “a public entity

²²⁶ 28 C.F.R. § 35.160(a)(1).

²²⁷ 28 C.F.R. § 35.160(b)(1).

²²⁸ 28 C.F.R. § 35.104. The ADA statute also has a definition of auxiliary aids and services: “(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; (C) acquisition or modification of equipment or devices; and (D) other similar services and actions.” 42 U.S.C. § 12103(1).

²²⁹ 28 C.F.R. § 35.104.

shall give primary consideration to the requests of the individual with disabilities.”²³⁰ Further, the regulations make clear that “the type of auxiliary aid or service necessary to ensure effective communication will vary with the

- nature
- length
- complexity of the communication
- the context in which the communication takes place²³¹

Example: An individual who is hearing impaired who uses sign language has a right to a sign language interpreter at a meeting at which the individual’s employability is being evaluated. Given the importance, length, and complexity of the communication, effective communication cannot be achieved through writing notes, gestures, or lipreading.

It should be obvious from the definition of “auxiliary aids and services” that legal obligation to provide effective communication is not limited to in-person communication. When a welfare agency communicates with clients by phone, it must use TDDs or equally effective means of communication, such as a relay service, with speech and hearing-impaired individuals.²³²

Note: The ADA regulations on communication access do not limit the right to effective communication to individuals with speech, hearing or vision impairments. Advocates may be able to use this requirement on behalf of individuals with other types of impairments.

Example: When a welfare agency knows that a client has a cognitive disability that affects the ability to read and understand notices sent by the welfare agency, the agency may need to send notices to both the client and a designated family member, or may need to call the client in addition to sending a notice, to fulfill its obligation to provide effective communication.²³³

²³⁰ 28 C.F.R. § 35.160(b)(2).

²³¹ 28 C.F.R. § 35.160(b)(2).

²³² 28 C.F.R. § 35.161(a).

²³³ HHS OCR Guidance, *supra* note 156, § D(2) (“Legal Requirements and Promising Practices: Promising Practices in Modifying Policies and Programs to Ensure Access for People with Disabilities”).

For a further discussion of communication access requirements of the ADA, see Chapter 8.

J. Notice of rights

Title II requires public entities to “make available to participants, beneficiaries and other interested persons information regarding the provisions of Title II of the ADA and its applicability to the services, programs, and activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and [Title II].”²³⁴

When considering whether a welfare agency’s ADA consumer education materials are effective, advocates should consider whether they:

- Are in many formats, and are read to clients who cannot read.
- Are written, to the extent possible, so that people with developmental and learning disabilities can understand them.²³⁵
- Explain who is protected under the ADA. Many people believe that the ADA applies only to physical disabilities or do not consider the conditions they have to be disabilities.
- State that the individuals with disabilities have a right to reasonable accommodations they need to obtain services, as opposed to saying only that the ADA “prohibits discrimination” against people with disabilities. Clients cannot be expected to know that under the ADA, “discrimination is defined to include the failure to provide reasonable accommodations.”²³⁶
- Provide examples of how ADA and Section 504 concepts apply to the welfare program (i.e., “you may be entitled to engage in work activities part-time if you need to because of a disability”).

²³⁴ 28 C.F.R. § 35.106.

²³⁵ HHS OCR Guidance, *supra* note 156, § D(2) (“Legal Requirements and Promising Practices: Promising Practices in Modifying Policies and Programs to Ensure Access for People with Disabilities”).

²³⁶ In a decision in an ADA and Section 504 complaint against the Massachusetts welfare agency, HHS OCR found that a welfare agency’s ADA and Section 504 notice was inadequate because it did not clearly state that individuals can request accommodations or inform them of how to do so. This HHS OCR decision is discussed in Appendix C.

- Describe what people can do if they think their rights have been violated (e.g., state that individuals have a right to file a grievance and contain the name and contact information for the agency's ADA Coordinator).
- Are given to everyone, not just people the agency believes have disabilities.

OCR Guidance: The Guidance contains model ADA “notice of rights” language from a notice used in Tennessee that is written in simple language.²³⁷

The author has copies of welfare agency ADA notices that contain these features.

K. ADA Coordinator

The ADA requires all state and local government entities with 50 or more employees to designate at least one person to coordinate ADA compliance and investigate ADA complaints or grievances (see grievance procedure, discussion below).²³⁸

HHS Section 504 regulations are more stringent: they require all entities receiving federal funds from HHS with 15 or more employees to designate an individual to coordinate Section 504 compliance.²³⁹ The agency must make available the name, office address, and telephone number of the ADA/504 Coordinator to interested individuals.²⁴⁰

One issue that has arisen is whether the ADA/504 Coordinator must be an employee of the welfare agency or whether the Coordinator can be employed by another state or local government agency (such as the building agency or executive branch (e.g. Mayor's Office, County Executive, etc.)). While there is no case law on the issue, a strong argument can be made that the ADA/504 Coordinator must be an employee of the welfare agency:

- Section 504 and ADA regulations provide if the entity covered by the ADA/504 has more than the required number of it employees, it must have an ADA/504 Coordinator. If agencies could use someone outside of the agency, it would undermine the regulatory thresholds that trigger the obligation to have a coordinator.
- Familiarity with the welfare agency's programs, governing law, and agency

²³⁷ HHS OCR Guidance, *supra* note 156, § D(2) (“Legal Requirements and Promising Practices: Promising Practices in Modifying Policies and Practices to Ensure Access to People with Disabilities”).

²³⁸ 28 C.F.R. § 35.107(a).

²³⁹ 45 C.F.R. § 84.7(a).

²⁴⁰ 28 C.F.R. § 35.107(a).

operating procedures is likely to be essential to effective coordination and oversight of an agency's ADA/504 compliance. An ADA/504 Coordinator who is not familiar with agency regulations and procedures is ill-prepared to determine whether particular accommodations are reasonable and to oversee ADA/504 compliance.

- Designating someone outside of the welfare agency to be the agency's ADA/504 Coordinator may reflect agency officials' poor understanding of the ADA and 504. If the welfare agency's designated ADA coordinator is someone from the buildings department, it may mean that welfare agency officials do not understand that the ADA and Section 504 require program accessibility, which involves many things other than physical accessibility (which may not even be required). Even if the buildings department official is qualified to address physical accessibility issues at the welfare agency, he or she is extremely unlikely to be qualified to oversee other ADA/504 issues, such as the provision of reasonable accommodations, effective communication, effective notice of ADA/504 rights, etc.

Another set of issues arises because there may be more than one ADA/504 Coordinator with responsibility for an agency's programs. State welfare agencies must have an ADA/504 Coordinator (as they have more than the required number of employees). In states with county-administered programs, most local welfare agencies will also have the requisite number of employees to trigger the obligation to have an ADA/504 Coordinator. The ADA/504 regulations do not address the relationship between Coordinators when there is more than one Coordinator with jurisdiction over a program. Suffice it to say that the result of these overlapping responsibilities should not be that neither the state nor the local welfare agency oversees ADA/504 compliance.

L. Grievance procedure

The ADA requires all state and local government entities with 50 or more employees to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any violation of the ADA.²⁴¹ As with the ADA/504 Coordinator requirement, the HHS Section 504 grievance procedure requirement applies to smaller entities. HHS Section 504 regulations are more stringent. They require all entities receiving federal funds from HHS with 15 or more employees to adopt a grievance procedure.²⁴² There is no requirement that individuals file an ADA or 504 grievance before filing a lawsuit.

A number of questions have arisen in ADA-welfare policy advocacy regarding the

²⁴¹ 28 C.F.R. § 35.107(b).

²⁴² 45 C.F.R. § 84.7(b).

grievance procedure requirement.

1. The meaning of “prompt”

The regulations do not define “prompt,” and no court has interpreted the term. Given the nature of welfare programs, and the consequences to clients of being unable to obtain, or of losing, benefits, advocates working with welfare agencies to develop grievance procedures should press for short time frames. Many DOJ settlements with Title II entities contain ADA grievance procedures with a 30 day time period for deciding grievances. In welfare programs, 30 days is simply too long for some aggrieved individuals to wait.

2. What process is due

The ADA regulations are silent about whether the grievance procedure must provide an opportunity for a hearing, a written decision, etc. Many welfare agency grievance procedures do not provide an opportunity for a hearing. Typically, they are paper review with additional fact investigation if necessary. And some do not require a written decision. HHS Section 504 regulations require the grievance procedure to “incorporate appropriate due process standards,”²⁴³ but “appropriate” is not defined. It is unclear whether this language, which is not in the ADA regulations, requires any more process than the ADA grievance procedure regulations. When working with a welfare agency to develop or modify ADA grievance procedures, keep in mind that the more formal the procedure is, the less prompt it is likely to be. However, advocates may want to urge the agency to provide written decisions that provide the reason for the decision, particularly when the agency is denying the grievance.

3. Relationship between the ADA/504 grievance process and fair hearings

The ADA and Section 504 grievance procedure regulations do not mention fair hearings or address the relationship between fair hearings and ADA/504 grievance procedures. This is hardly surprising, as the ADA applies to the programs of all state and local government entities, and Section 504 applies to the programs of all recipients of federal financial assistance from HHS, and many of these programs do not have a fair hearing process.

A welfare agency may argue that the existence of a fair hearing process obviates the need to have a separate ADA/504 grievance procedure. There are many problems with this argument. First, the ADA/504 grievance procedure must be prompt. In many states, it can take months before a fair hearing is scheduled, held, and decided. Second,

²⁴³ *Id.*

the ADA/504 regulations require grievances to be decided by the ADA/504 Coordinator. Hearing officers are not ADA/504 Coordinators. Third, hearing officers may not be trained on the ADA/504, and in many jurisdictions, hearing officers believe they cannot decide ADA/504 issues.

4. Overlapping grievance procedures

In states with county-administered programs and more than 15 employees at the local welfare agency, both the state welfare agency and the local agency should have ADA/504 grievance procedures. A state welfare agency ADA/504 Coordinator might try to argue that clients must use the local grievance process first before filing a grievance with the state welfare agency. Nothing in the ADA/504 regulations permits a state welfare agency to restrict access to its grievance procedure in this manner. Some clients prefer to file a grievance directly with a state coordinator, particularly if the ADA Coordinator was involved in the initial decision to deny the accommodation.

III. Other ADA concepts

The following ADA requirements, although not mentioned in the Title II regulations, can be found in court decisions and/or the HHS OCR Guidance, where they are described as “concepts central to Section 504 and Title II of the ADA [] of particular importance to administration of TANF programs in a manner that ensures equality of opportunity for individuals with disabilities”²⁴⁴

A. Meaningful access

Although the phrase “meaningful access” does not appear in the ADA or the Title II regulations, the Supreme Court has held that Section 504 requires “meaningful access to the benefit that the grantee offers,”²⁴⁵ and the ADA legislative history indicates that Congress intended this standard to be incorporated into the ADA. The OCR Guidance also states that individuals with disabilities must be given meaningful access to TANF programs.²⁴⁶

²⁴⁴ HHS OCR Guidance, *supra* note 156, § B (“Legal Authority: The Disability Policy Framework”).

²⁴⁵ *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (holding that reducing the number of covered inpatient days per year that a state Medicaid program did not deny people with disabilities meaningful access to Medicaid).

²⁴⁶ HHS OCR Guidance, *supra* note 156, § B (“Legal Authority: The Disability Policy Framework”).

B. Individualized treatment

The HHS OCR Guidance states that equality of opportunity for people with disabilities in welfare programs requires “individualized treatment.”²⁴⁷ It goes on to explain that “Individualized treatment requires that individuals with disabilities be treated on a case-by-case basis consistent with facts and objective evidence . . . [] and not on the basis of generalizations and stereotypes.”²⁴⁸ Welfare agencies cannot take a “one size fits all” approach to individuals with disabilities. Even people with the same diagnosis or disability have different abilities, limitations, and needs.

Example: If a welfare agency assumes everyone can work regardless of his or her disability and its effect on functioning, the agency is failing to provide individualized treatment and is violating the ADA.

Example: If a welfare agency gives everyone the same “cookie-cutter” employability plan or finds everyone able to do the same tasks or jobs, it is violating the obligation to provide individualized treatment and is violating the ADA.

Example: If a welfare agency requires everyone to work full-time regardless of disability and functioning it is violating the obligation to provide individualized treatment and is violating the ADA.

Example: If a welfare agency fails to screen and assess welfare applicants and recipients to identify disabilities, it cannot provide individualized treatment because it does not know what services individuals need or what programs are appropriate for them.

C. Freedom of choice

Although the words “freedom of choice” do not appear in the ADA, the concept of freedom of choice is embodied in the ADA and reflected in several of its prohibitions and requirements, and is mentioned in the 2001 HHS OCR Guidance. People with disabilities have the right to refuse reasonable accommodations, aids, services, or benefits;²⁴⁹ and the right to choose to receive services in an integrated setting with people

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ 28 C.F.R. § 35.130(e)(1).

without disabilities even if separate services for people with disabilities exist.²⁵⁰ The HHS OCR Guidance states that disclosure of a disability by a TANF applicant or recipient must be voluntary.²⁵¹

Freedom of choice sometimes has negative consequences for clients. For example, if a recipient refuses to disclose a disability to a welfare agency, the agency may be hampered in its ability to draft an individualized plan for the individual, and the recipient may have difficulty complying with her plan. If the recipient does not comply with the plan, the agency is likely to sanction the recipient or close his or her case. Similarly, if a recipient refuses a reasonable accommodation offered by the welfare agency, and the cannot comply with welfare program requirements as a result, the agency may well adverse action against the recipient on the basis of his or her failure to comply. Welfare agencies can take adverse actions against clients for non-compliance with program requirements in such instances. Agencies must offer clients choices, but the result may be that an individual with a disability makes a choice that the welfare agency, family members, or advocates believe is not in the individual's best interest.

Example: An individual with a serious mental health problem needs help gathering documents in support of an application for benefits. The welfare agency offers this help but the individual refuses it. The welfare agency can deny the individual's application on the basis that documentation establishing eligibility was not provided.

However, a strong argument can be made that before a welfare agency takes an adverse action against a client for non-compliance with a requirement, after the client has refused to be screened for disabilities or refused an accommodation, the agency must offer screening or the reasonable accommodation again. The grounds for this argument are particularly strong when the agency knows or strongly suspects that the individual has a disability (e.g., a cognitive disability or mental health problem) that might affect the individual's decision-making ability. Many individuals refuse help when it is first offered but are more receptive to it when it is presented as a means of preventing or possibly avoiding a sanction, case closure or application denial.

²⁵⁰ 28 C.F.R. § 35.130(d) .

²⁵¹ HHS OCR Guidance, *supra* note 156, § (D)(1) ("Legal Requirements and Promising Practices: The Legal Requirement to Ensure Equal Access to TANF Programs Through the Provision of Appropriate Services"). See Chapter 7 for a further discussion of disability screening and assessment by welfare programs.

VI. The “direct threat” exception

A. Welfare agencies can exclude individuals who pose a “direct threat”

Welfare agencies can exclude individuals with disabilities from programs and activities when the individual poses a “direct threat” to health and safety.²⁵²

Example: An individual with a serious mental health problem arrives at a training program for welfare recipients brandishing a gun and threatening to use it. This individual poses a direct threat to health and safety. The welfare agency can exclude the individual from the program until she poses less of a threat.

Example: An individual has active, infectious tuberculosis that is easily communicated to other people through casual contact. An education and training program for welfare recipients can probably exclude this individual from the program until he poses less risk to others.

B. How serious does a “direct threat” have to be?

The “direct threat” test is difficult to meet. Proof of the threat must be based on a reasonable judgement that relies on current medical knowledge or the best available objective evidence on the:

- nature of the risk
- duration of the risk
- severity of risk
- probability that harm will occur, and
- whether reasonable accommodations will reduce the risk.²⁵³

Example: A welfare recipient benefits who has HIV does not pose a direct threat to other participants in a job readiness program because HIV is not spread through casual contact and thus the probability that harm will occur is extremely low.

²⁵² 28 C.F.R. § 35.139.

²⁵³ 28 C.F.R. § 35.139(b).

Example: An applicant for welfare benefits who has been diagnosed with schizophrenia does not pose a direct threat to other people at an employment training program simply because she has been diagnosed with schizophrenia.

C. The welfare agency has an obligation to reduce the threat through reasonable accommodations

A “direct threat” is a threat that cannot be eliminated or reduced with reasonable accommodations.²⁵⁴ Therefore, before excluding or expelling a person from a program or taking other adverse action on the basis that he or she poses a direct threat, the program must try to find ways to reduce the behavior that poses a threat, or its effects.

Example: If a person with a psychiatric disability attending an education and training program for welfare recipients engages in behavior that is threatening to other program participants, the program has a legal obligation to explore whether a reasonable accommodation will reduce the risk of behavior before terminating the individual from the program on the basis that she poses a direct threat. Possible reasonable accommodations for this individual may include giving the individual an opportunity to obtain counseling, transferring the individual to another class, or intervening to defuse the situation.

4. Who must be at risk from the threat?

The has held that individuals whose disabilities pose a direct threat to someone else’s health and safety *or* to their *own* health and safety are excluded from ADA protection.²⁵⁵

V. Defenses

A. Fundamental alteration and undue burden

1. Welfare agencies do not have to make accommodations or do other things that would be a fundamental alteration or undue burden

A welfare agency’s obligations under the ADA are not unlimited. If changes to achieve program accessibility, changes to provide effective communication or changes in

²⁵⁴ *Id.*

²⁵⁵ *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002) (holding that employees who pose a threat to their own health and safety are not “qualified individuals” protected by the ADA).

agency policies or practices would be a fundamental alteration of the program, service, or activity,” they are not required by the ADA.²⁵⁶ A “fundamental alteration” is a change in program requirements or the way that a program operates that would fundamentally change the nature or purpose of the program or of the program rule, or that would be very expensive or burdensome for other reasons.

Example: It may be so expensive to make a building in which a welfare agency is located physically accessible that the agency may be able to demonstrate that it would be a fundamental alteration or undue burden to make architectural modifications. (If this is the case, the agency must take other steps to make the welfare program accessible to and usable by people with disabilities, be relocating programs, meeting clients at accessible locations, seeing clients in their homes, etc.

Example: Waiving job search for an individual with a disability who is obviously unable to comply with or benefit from job search is a reasonable accommodation. It may be more difficult, however, to argue that the ADA requires a welfare agency to abandon its general approach and completely eliminate the requirement that individuals search for jobs before they are given a comprehensive disability screening and evaluation, because that may fundamentally alter the program.

Title II also has an exception to the requirement to make structural modifications and changes to achieve effective communication when it would cause “undue financial or administrative burdens.”²⁵⁷ Often the “fundamental alteration” and “undue burden” defenses are raised and analyzed together. The “fundamental alteration” defense has also been used to raise cost issues.²⁵⁸

2. The cost of an accommodation and the effect of the accommodation on allocation of resources are relevant to fundamental alteration and undue burden

Case law interpreting the meaning of “fundamental alteration” and “undue burden” is complex, and a discussion of it is beyond the scope of this manual. In practice, unless a welfare agency has been sued, it is unlikely to argue that the reason it will not provide a requested accommodation because it would be a “fundamental alteration” or “undue burden” to do so (though it may take the position that a program modification is too expensive). Nevertheless, advocates should be aware of the

²⁵⁶ 28 C.F.R. §§ 35.130(b)(7); 35.150(a)(3); 35.164.

²⁵⁷ 28 C.F.R. §§ 35.150(a)(3), 35.164.

²⁵⁸ See, e.g., *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999).

following:

- Whether or not a public entity refers to a “fundamental alteration” or to an “undue burden,” public entities are allowed under the law to consider the cost of an accommodation or other program change;²⁵⁹
- When deciding whether an accommodation or other program change is a “fundamental alteration” or “undue burden,” in at least some situations, public entities can consider not just the cost of providing the accommodation to an individual client who requests it, but the overall cost of providing it to others who would be entitled to the same accommodation or change;²⁶⁰
- Public entities can also consider whether providing the accommodation will result in an unfair distribution of resources by directing too large a share of state or agency resources to particular individuals when others get few or no services.²⁶¹

3. Public entities face substantial hurdles when they make fundamental alteration and undue burden arguments

For a number of reasons, it will not be easy for welfare agencies to demonstrate that an accommodation or other change would be a fundamental alteration or undue burden:

- In the welfare context, providing reasonable accommodations to individuals with disabilities so they can participate in and benefit from TANF programs and services is consistent with the purpose of TANF programs, and the cost of some program modifications may be minimal or non-existent, and can often be borne by other agencies and programs.

Example: In a Letter of Findings issued by OCR in a Massachusetts complaint filed on behalf of two welfare recipients with learning disabilities, HHS OCR found that it would not fundamentally alter the TANF program to provide screening and assessment to identify learning disabilities and to provide appropriate services to individuals with learning disabilities. OCR noted that doing so would be consistent with the purposes of the TANF program; several other states provide learning

²⁵⁹ *Id.* at 607.

²⁶⁰ *Id.*

²⁶¹ *Id.*

disability screening, assessment, and services for individuals with learning disabilities in their TANF programs; and the welfare agency had indicated that Medicaid would cover the cost of the assessments.²⁶²

- If the public entity has made an exception to a rule for others, it will be difficult for the public entity to show that the making the same type of exception as an accommodation for an individual with a disability would fundamentally alter the nature of the program.²⁶³

Example: If a welfare agency exempts individuals over the age of 60 and those with young children from work activities, it will be difficult for the agency to demonstrate that work is an essential program requirement and demonstrate that exempting individuals with disabilities who are unable to work from those activities would fundamentally alter the nature of the program.

- The fact that a program requirement is an eligibility requirement does not automatically insulate it from an ADA challenge. The critical question is whether the eligibility requirement is essential to the nature and purpose of the program.²⁶⁴

Example: A California statute limited welfare eligibility to children age 17 and under, and to 18 year olds expected to graduate high school by age 19. The rule has a discriminatory effect on 18 year olds with disabilities who are not expected to graduate by age 19 because of their disabilities. The stated purpose of the welfare program is to reduce dependency on government benefits, promote rehabilitation, promote the family's right and responsibility to support and protect its children, and provide opportunities for educational and social progress. The California Court of Appeal held that denying benefits to 18 year olds with disabilities who are not expected to graduate by age 19 does not further these program purposes, and in fact undermines them, because 18 year olds with

²⁶² This Letter of Findings is discussed in Appendix C.

²⁶³ See, e.g., *PGA Tour, Inc. v. Martin*; 532 U.S. 661, 685-86 (2001)(in Title III case, Supreme Court held that walking the course is not an essential part of golf in part because using a golf cart is permitted in some golf tours); *Washington v. Indiana High School Athletics Assoc'n., Inc.*, 181 F.3d 840 (7th Cir. 1999), *cert. denied*, 528 U.S. 1046 (1999) (waiving school rule limiting semesters of athletic participation for students with disabilities would not be a fundamental alteration in part because school had waived the rule for others); *Bingham v. Oregon Sch. Activities Assoc.*, 37 F.Supp.2d 1189 (D. Or. 1999)(when exceptions to rule limiting athletic participation were made in other situations, making an exception for a disability-related reason was not a fundamental alteration).

²⁶⁴ *Fry v. Saenz*, 98 Cal. App.4th 256, 264 (2002).

disabilities who have not finished high school are ill-prepared for work, and their families will have more difficulty providing educational opportunities as a result of the rule. The court held that if the cost of providing welfare benefits for 18 year olds with disabilities was not an undue financial burden for the State, the rule violated the ADA and had to be modified.²⁶⁵

- The fact that a rule was created by statute or regulation does not insulate it from ADA challenge.²⁶⁶
- Some courts have held that an agency must consider whether the purpose of the program or rule would be fundamentally altered if it is modified for a particular individual with a disability, considering the circumstances and abilities of that individual. If the rule will not accomplish its purpose when applied to the individual, these courts have held that it would not be a fundamental alteration to modify the rule for that individual.²⁶⁷

Example: If the purpose of requiring people to engage in work activities is to encourage work and self-sufficiency, and a person with the disability is incapable of working or being self-sufficient, waiving the work participation requirement for that individual should not fundamentally alter the nature or purpose of the work requirement.²⁶⁸

- When the requested accommodation would be a fundamental alteration or undue burden, the welfare agency must do other things to accommodate the person that would not be a fundamental alteration.²⁶⁹

²⁶⁵ *Id.* On remand, the court held that a \$9 million to \$16 million cost of making the modification for the remainder of the current fiscal year and following fiscal year was not an undue financial burden. No. 00CS01350 (Cal. Super. Ct. Sacramento County, May 25, 2004) (mem.).

²⁶⁶ *Id.*; *cf. Crowder v. Kitigawa*, 81 F.3d 1480 (9th Cir. 1996) (state animal quarantine regulation endorsed by legislature violated ADA and had to be modified); *Helen L. v. DiDario*, 46 F.3d 325, 329 (3^d Cir.), *cert denied*, 516 U.S. 813 (1995) (funding scheme for attendant care created by legislature that denied people with disabilities the right to receive services in the most integrated setting violated the ADA).

²⁶⁷ *See, e.g., Washington v. Indiana High School Athletics Assoc'n., Inc.*, 181 F.3d 840 (7th Cir. 1999) (applying individualized analysis to rule limiting participation in high school athletics); *cf. Ganden v. Nat'l Collegiate Athletic Assoc., Inc.*, 1996 U.S. Dist. LEXIS 17368 (N.D. Ill. 1996) (same approach used in Title III case).

²⁶⁸ Further, if an individual is unable to comply with work requirements, sanctions are unlikely to serve as a deterrent to non-compliance.

²⁶⁹ 28 C.F.R. §§ 35.150 (a)(3), 35.164.

Example: The ADA probably does not require welfare agencies to pay for each applicant and recipient with a disability who cannot drive or take public transportation to a welfare office to take a taxicab to welfare appointments, because the expense involved may make it a fundamental alteration or undue burden. Nevertheless, the ADA does require the agency to provide other reasonable accommodations to these individuals so they can to obtain and maintain benefits, such as reducing the number of appointments the client must attend, conducting home visits, and allowing individuals to recertify eligibility by mail.

4. Public entities may face procedural hurdles when they make fundamental alteration and undue burden arguments

- Once an individual has requested an accommodation and made a minimal showing that it is reasonable, the burden is on the welfare agency to prove that the accommodation would be a fundamental alteration.²⁷⁰
- Title II regulations provide that when an agency decides that an accommodation to achieve program or communication access (and possibly other types of accommodations) would be a fundamental alteration or undue burden, the decision and reasons must be made by the head of the public entity or his or her designee after considering all of the resources available to fund the service, program, or activity, and the decision must be put in writing.²⁷¹ This requirement is routinely ignored by public entities.

²⁷⁰ *Olmstead*, 524 U.S. at 604 (plurality)(court considers the cost of deinstitutionalization when the state raised a fundamental alteration defense).

²⁷¹ 28 C.F.R. §§ 35.150(a)(3), 35.164.

Chapter 5: A closer look at TANF Work Requirements and the ADA

This manual assumes some familiarity with the federal TANF block grant program and state TANF cash assistance programs.²⁷² Nevertheless, given that there were changes to the federal law when TANF was reauthorized by the Deficit Reduction Act of 2005 (DRA),²⁷³ this edition of the manual has added a chapter to explain these changes and the relationship between these changes and ADA/504 requirements.

Section I chapter summarizes some of the key TANF provisions as amended by DRA, discusses the possible impact of these provisions on states' willingness to accommodate individuals with disabilities in TANF work activities, and the continuing applicability of the ADA and Section 504 to state TANF programs. The chapter also discusses some of the arguments that states may try to make for why they cannot, or do not have to, exempt TANF recipients with disabilities from work activities or permit them to engage in activities that are not countable toward work participation rates.²⁷⁴ Finally, the chapter discusses some of the things states can do to help meet work participation rates while meeting the needs of participants with disabilities.

Advocates should be aware that TANF is up for reauthorization in 2010, and there may be additional changes to the federal TANF law that could make some of the information in this chapter out of date.

I. Key TANF provisions as amended by the DRA of 2005

Below are summaries of the key provisions of TANF, as amended by DRA, that may impact the way that states treat individuals with disabilities in their TANF cash

²⁷² For general information on the federal TANF block grant and state TANF programs, see Liz Schott, Center on Budget and Policy Priorities, *Policy Basics: An Introduction to TANF*, (March 19, 2009), available at www.cbpp.org/cms/index.cfm?fa=view&id=936; U.S. Department of Health and Human Services, Administration for Children and Families, TANF Annual Reports to Congress, available at www.acf.hhs.gov/programs/ofa/data-reports/index.htm.

²⁷³ Deficit Reduction Act of 2005, § 7102 (Feb. 8, 2006); Pub.L. No. 109-171, 120 Stat. 3132, (codified at 42 U.S.C. § 601 *et. seq.*). On February 5, 2008, the U.S. Department of Health and Human Services (HHS) issued regulations implementing these changes. 73 Fed. Reg. 6772 (February 5, 2008), (codified at 45 C.F.R. Parts 261, 262, 263, and 265).

²⁷⁴ States use a variety of terms to describe the status of TANF recipients who are permitted to not engage in work activities, e.g., exemption, deferrals, etc. This chapter uses the term “exempt” and “exemption” to refer to such exceptions.

assistance programs.²⁷⁵

A. Tougher mandatory state work participation rates

PRWORA requires 50% of all families and 90% of two-parent families receiving TANF to be engaged in countable work activities for mandated numbers of hours.²⁷⁶ PRWORA gives states a “caseload reduction credit” under which a state’s required participation rate is reduced by past caseload reduction achieved.²⁷⁷ HHS can impose significant financial penalties on states that fail to meet these rates.²⁷⁸

Before DRA, caseload declines since 1995 were included in calculating the case-load reduction credit.²⁷⁹ Given that states had major declines in the early years of welfare reform, this meant that many states were required to meet participation rates that were far below 50%. DRA changed the date from which the caseload reduction credit is calculated to fiscal year 2005.²⁸⁰ This change made the work participation rates more difficult to meet in many states.

In August 2009, HHS announced that 13 states and three territories did not meet the state work participation rate for all families, two-parent families, or both, for fiscal year 2007, the first year in which the new formula for calculating the case load reduction

²⁷⁵ For a fuller discussion of PRWORA and DRA requirements, see Center on Budget and Policy Priorities and Center on Law and Social Policy, *Implementing the TANF Changes in the Deficit Reduction Act: “Win-Win” Solutions For Families and States, Second Edition* (“Win-Win Solutions”) (May 9, 2007) available at www.clasp.org/admin/site/publications/files/0339.pdf.

²⁷⁶ 42 U.S.C. § 607.

²⁷⁷ 42 U.S.C. § 607(b)(3)(A)(I).

²⁷⁸ 42 U.S.C. §§ 607(a)(1)-(2); 607(c)(1)(A)-(B); 609(a)(3). Under PRWORA and DRA, two-parent families in which one parent has a disability are included in the all-families participation rate but not the two-parent rate. 42 U.S.C. § 607(b)(2)(C).

²⁷⁹ 42 U.S.C. § 607(b)(3) (1996) (amended 2006).

²⁸⁰ Deficit Reduction Act § 7102(a)(B); 45 C.F.R. § 261.40(a)(1).

credit was in effect.²⁸¹ HHS has issued 60 day penalty letters to these states,²⁸² but as of March 2010, no penalties have been imposed. The regulations contain a protracted process that includes notice to states, an opportunity to demonstrate reasonable cause or develop corrective compliance plans, and an opportunity to come into compliance, before penalties are imposed.²⁸³ It is unclear at this point whether any penalties will be imposed, and the earliest they would be imposed is 2011 or 2012.

The American Recovery and Reinvestment Act of 2009 (ARRA),²⁸⁴ signed in February 2009, changed the method for calculating participation rates for fiscal years 2009, 2010, and 2011. In calculating the participation rate for these years, ARRA permits states to use either the prior fiscal year as its comparison year for calculation of the caseload reduction credit or the caseload reduction credit it qualified for when the comparison year was FY 2007 or 2008, whichever had a lower caseload.²⁸⁵ As a result, if a state serves more families in the TANF program the previous year than it did in FY 2007 or 2008 as a result of the recession, the state will be “held harmless” for this increase when the caseload reduction credit is calculated.

States concerned about their ability to meet work participation rates may be reluctant to provide reasonable accommodations to individuals with disabilities in work activities, if the accommodations sought (such as exempting the individual from work activities or allowing the individual to engage in activities that are not countable) would prevent the state from being able to count the individual towards the state’s federal work participation rate.

B. Limiting state flexibility in state “Maintenance of Effort” funds

Under TANF, states must maintain a share of state spending – known as

²⁸¹ U.S. Department of Health and Human Services, Administration for Children and Families, *Temporary Assistance for Needy Families Information Memorandum*, No. TANF-ACF-IM-2009-01 (August 28, 2009), available at www.acf.hhs.gov/programs/ofa/policy/im-ofa/2009/200901/IM200901.htm. A chart of states’ FY 2007 participation rates is available at <http://www.acf.hhs.gov/programs/ofa/particip/2007/index2007.htm>

²⁸² U.S. Department of Health and Human Services, Administration for Children and Families, *Temporary Assistance for Needy Families Information Memorandum*, No. TANF-ACF-IM-2009-01 (August 28, 2009), available at www.acf.hhs.gov/programs/ofa/policy/im-ofa/2009/200901/IM200901.htm

²⁸³ 45 C.F.R. § 262.4.

²⁸⁴ American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 (February 17, 2009).

²⁸⁵ American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, § 2101 (February 17, 2009), codified at 42 U.S.C. § 607(b)(3)(A)(i).

“maintenance of effort” (MOE) funds – to receive federal TANF funding.²⁸⁶ Before DRA, states had greater flexibility in using MOE funds. Families receiving benefits through a separate state program paid for only with MOE funds were not included in the state’s work participation rates.²⁸⁷ Some states took advantage of this flexibility and created programs, paid for solely with MOE funds, for groups who were unlikely to meet the required work rates, such as individuals with disabilities.²⁸⁸

Now, states are required to count towards the work participation rates families receiving assistance through programs funded by MOE funds.²⁸⁹ Unless a state program receives neither TANF nor MOE money, program participants are subject to work participation rates. As a result, states may be less willing to permit individuals with disabilities to engage in activities that are not federally countable, even if those clients are in a program that is funded with MOE, not federal TANF funds.

C. Many families with parents or children with disabilities are counted in the work participation rates

For the most part, PRWORA does not exclude families with a parent or child with a disability from the work participation rate calculations.²⁹⁰ However, parents caring for a family member with a disability who lives in the household and who is not attending school on a full-time basis are excluded from the participation rate.²⁹¹ This exclusion, however, does not apply to:

- parent caretakers of children with disabilities who attend school full-time, even if caretaking responsibilities prevent the parent from engaging in full-time, or any, work activities
- non-parent caretakers of family members with disabilities
- parents caring for family members with disabilities who live outside of the household

²⁸⁶ 42 U.S.C. § 609(a)(7).

²⁸⁷ 42 U.S.C. §§ 607(b)(1)(B), 607(b)(2)(B).

²⁸⁸ For example, Virginia placed families who were exempt from work activities under state policy, including families with a parent or child with a disability, in a separate state program. See <http://www.acf.hhs.gov/programs/ofa/data-reports/MOE-05/virginia.htm> for a description of Virginia’s program.

²⁸⁹ Deficit Reduction Act § 7102(b).

²⁹⁰ 42 U.S.C. §§ 607(b)(1)-(2).

²⁹¹ 45 C.F.R. §§ 261.2(n)(2)(I);, 261.22.

- parents who have disabilities themselves.²⁹²

As a result, states may be inclined to require parents with disabilities and parent caretakers of household members with disabilities (who are not exempt from the work rate) to engage in federally countable work activities.

D. Countable work activities are narrowly defined and only limited amounts of barrier removal activities are federally countable

To count towards the federal work participation rate, an individual's participation must fall within one of the activities in the original TANF law in PRWORA.²⁹³ "Work activities" include:

- subsidized and unsubsidized employment;
- work experience;
- on-the-job training;
- job search and job readiness assistance;
- education related directly to employment;
- community service programs;
- vocational educational training (not to exceed 12 months);
- job skills training directly related to employment.

²⁹² 45 C.F.R. § 261.2(n)(1)(iii). Parents who receive SSI are also excluded from the work participation rate calculation, except that on a case-by-case basis, states can choose to include SSI recipients who are engaging in federally countable work activities in the work rates. 45 C.F.R. § 261.2(n)(2)(ii). Under PRWORA and DRA, two-parent families in which one parent has a disability are counted only in the all-family rate and not in the higher two-parent rate. 42 U.S.C. § 607(b)(2)(C).

²⁹³ 42 U.S.C. § 607(d). To count towards the "all-families" rate, a family must participate for at least 30 hours per week; to count towards the two-family rate, the family must participate for 35 or 55 hours per week, depending upon whether the family receives federally funded child care. 42 U.S.C. §§ 607(c)(1)(A)-(B). Activities are defined as "core" or "non-core;" to count towards the federal work rates, participants must spend a minimum number of hours each week engaged in a "core" activity for 20 hours per week to count towards the all-family rate, and more to count towards the two-family rate. 42 U.S.C. §§ 607(c)(1)(A), (B).

- satisfactory attendance at secondary school, or in a course of study leading to a certificate of general equivalence, in the case of an individual who has not received a high school diploma or certificate of general equivalence.
- providing child care services to an individual who is participating in community service.

Prior to DRA, states had the flexibility to define each of these work activities. Some states defined some categories, such as “community service” broadly, to include activities that assist clients in addressing barriers to employment, such as participating in counseling, medical treatment, or rehabilitation.²⁹⁴

Now, there are greater restrictions on the types of activities that states can count towards the federal work rates. DRA required HHS to define the activities that can qualify under each category of work activity,²⁹⁵ and the regulations define the categories of work activities fairly narrowly. “Community service,” for example, is defined in DRA regulations as “structured programs and embedded activities in which TANF recipients perform work for the benefit of the community under the auspices of public or non-profit organizations.”²⁹⁶

Although the regulations allow states to count individuals receiving substance abuse treatment, mental health treatment, and rehabilitation services towards the federal work rates, only limited amounts of these activities are federally “countable.” The regulations count these activities under “job search and job readiness,” a work activity that is federally “countable” for only 4 consecutive weeks, and 6 weeks total, per year, or 12 weeks if the state qualifies as a “needy state” based on its unemployment rate or increases in its food stamp caseload.²⁹⁷ Further, one hour of rehabilitation activities counts as one hour of work.²⁹⁸

²⁹⁴ U.S. Government Accountability Office, *Welfare Reform: HHS Should Exercise oversight to Ensure TANF Work Participation is Measured Consistently Across States*, GAO-05-821 (Aug. 2005), available at www.gao.gov.

²⁹⁵ Deficit Reduction Act § 7102(c)(i)(1)(A).

²⁹⁶ 45 C.F.R. § 261.2(h).

²⁹⁷ 42 U.S.C. § 607(c)(2)(A)(i) (limits on countable “job search and job readiness”); 603(b)(5) (qualifying as a “needy state”); 45 C.F.R. § 261.2(g) (defining “job search and job readiness” activities to include treatment and rehabilitation). Between October 2008 and July 2009, between 44 and 52 states and territories met the definition of needy state during at least one month, based on its unemployment rate or increased in the state’s food stamp caseload. A list of these states is available at www.acf.hhs.gov/programs/ofa/policy/pi-ofa/12wks_qualifiers09.htm.

²⁹⁸ 45 C.F.R. § 261.60(a).

Some individuals with disabilities are unable to engage in any work activities other than treatment or rehabilitation, but receive far fewer than 30 hours of treatment per week. States may be inclined to require these individuals to engage in other countable activities part time in addition to treatment, so the state can count the person towards the state's participation rate. States may also try to require individuals to leave treatment, or to choose full-time countable activities after four weeks of treatment or rehabilitation, so they can count the person towards the work rate.

E. States must meet onerous verification requirements before they can count a person's work participation

States must report to HHS "the actual hours that an individual participates in an activity," and must "support each individual's hours of participation in the case file."²⁹⁹ States were required to submit Work Verification Plans to HHS describing how they determine countable hours of participation, monitor participation to ensure that actual hours of participation are reported, and accurately input and provide data to HHS.³⁰⁰

States may try to pass some of the responsibility for verifying participation onto TANF recipients and sanction or close the cases of those who do not comply with these requirements. Individuals with disabilities may have particular difficulty in meeting these documentation requirements. Assistance with verification requirements is a reasonable accommodation under the ADA, so advocates should assist clients with disabilities in requesting help with verification requirements as a reasonable accommodation.

II. The application of the ADA to TANF work programs

A. The ADA and Section 504 apply to TANF programs and still require TANF programs to provide reasonable accommodations to individuals with disabilities

PRWORA refers specifically to the ADA and Section 504 and provides that these laws "shall apply to any program or activity which receives funds provided under this part."³⁰¹ As discussed in Chapter 4, HHS has issued Policy Guidance about the application of the ADA and Section 504 to TANF programs,³⁰² and more recently, in

²⁹⁹ 45 C.F.R. §§ 261.60(a), 261.61(a).

³⁰⁰ 45 C.F.R. § 261.62.

³⁰¹ 42 U.S.C. § 608(d).

³⁰² U.S. Department of Health and Human Services, Office for Civil Rights, *Policy Guidance: Prohibition Against Discrimination on the Basis of Disability in the Administration of TANF (Temporary*

2007, a Frequently Asked Questions (FAQ) piece about TANF and civil rights laws that discusses some of the ways that the ADA and Section 504 apply to TANF programs.³⁰³ Finally, the preamble to the 2008 final DRA regulations reiterates that TANF programs must comply with the ADA and Section 504.³⁰⁴ The Policy Guidance, FAQ document and preamble to the DRA regulations all state that TANF programs must make reasonable accommodations for individuals with disabilities.³⁰⁵

B. TANF programs must exempt individuals with disabilities from work activities when necessary and permit clients to engage in work activities that are not federally countable

While states may feel pressure to meet work participation rates, states must exempt clients with disabilities from work activities if they are unable to participate, even though the result is that the state cannot count accommodated individuals towards the work participation rate. When HHS issued the final DRA regulations, it stated in the preamble:

- “By limiting the maximum participation rate to 50%, Congress recognized that some individuals would not be able to satisfy the full requirements.”³⁰⁶
- “It is also important to note that a State may be legally obligated to provide a reasonable accommodation/modification under the ADA and Section 504 even if it will not receive credit toward its Federal work activity requirements for the accommodation/modification.”³⁰⁷

Assistance to Needy Families) (“HHS OCR Guidance”) (Jan. 19, 2001), available at www.hhs.gov/ocr/prohibition.html.

³⁰³ U.S. Department of Health and Human Services, Administration for Children and Families and Office for Civil Rights, *Frequently Asked Questions: Meeting the Needs of TANF Applicants and Beneficiaries Under Federal Civil Rights Laws* (“HHS FAQ”), available at www.acf.hhs.gov/programs/ofa/civilrights/OCRqandafinal_faq.html. Although this document is undated, it was released in 2007.

³⁰⁴ 73 Fed. Reg. 6772, 6775 (February 5, 2008).

³⁰⁵ HHS OCR Guidance, *supra* note 302, §§ B, B(b), D(2); HHS FAQ, *supra* note 303, Questions 6, 8, 9; 73 Fed. Register 6772, 6775 (February 5, 2008).

³⁰⁶ 73 Fed. Register 6772, 6775 (February 5, 2008).

³⁰⁷ *Id.*

- C. Can a state argue that it does not have to accommodate clients in TANF work activities because doing so would conflict with TANF?

No. This type of conflict simply does not exist. PRWORA, as amended by DRA, does not require states to require people with disabilities to engage in countable work activities if they are unable to do so. Nor does it prohibit states from exempting people with disabilities from work activities when they are unable to participate. Moreover, as noted above, HHS's position is that states can and must comply both with PRWORA and with the ADA and Section 504. It is implicitly HHS's position that it is possible for states to do both.

- D. Can a state argue that it would fundamentally alter its TANF program to provide reasonable accommodations to TANF recipients with disabilities?

No. In fact, providing reasonable accommodations in work activities to TANF recipients with disabilities is consistent with the purposes of TANF programs, not a fundamental alteration of them. Many state TANF statutes and state plans describe serving needy families and increasing self-sufficiency as goals of these programs. These goals are consistent with providing benefits to needy families with a parent or a child with a disability even if they cannot engage in federally countable work activities. They are also consistent with permitting recipients with disabilities to engage in activities that are not federally countable that will assist these individuals in becoming employable.

- E. Can a state argue that the risk of penalties for failing to meet work participation rates makes it an undue financial or administrative burden to exempt TANF recipients with disabilities from work activities?

No. While cost is a factor that courts can consider in determining whether an accommodation is reasonable or a fundamental alteration (see Chapter 4), states face many obstacles in arguing that the possibility of future penalties for failure to comply with work participation rates is the reason they cannot currently accommodate individuals in work activities. Specifically:

- The fact it could cost a state some unspecified money (in penalties) to comply with the ADA is not, in and of itself, evidence that it would be a fundamental alteration. Courts have held that general, speculative assertions by state and local governments that compliance with the ADA

and Section 504 will be too costly are insufficient to meet a fundamental alteration defense.³⁰⁸

- It is unclear how a state could demonstrate that providing reasonable accommodations to individuals with disabilities will be the reason it will be unable to meet work participation rates, particularly when many other aspects of TANF program design and operation, and other factors (e.g., the state of the economy) also affect a state's work participation rate.
 - Penalties are not a certainty for any state, even states that have received penalty letters from HHS.
 - If HHS grants penalty relief to any state that failed to meet the work participation rates in 2007, it should be even more difficult for states to demonstrate that the failure to accommodate is likely to lead to the future imposition of penalties.
- F. Can a state argue that work is an essential eligibility requirement of the TANF program, and that work activities therefore do not have to be modified for clients with disabilities?

No. Work is not an essential eligibility requirement of TANF programs. TANF programs are not just work programs – they also provide cash and non-cash assistance to needy families. Further, many state TANF programs exempt or defer some individuals from work requirements, by law, policy, or practice. Thus, it would be very difficult for a state to show that it would alter something essential about the program to permit people with disabilities who cannot engage in federally countable work activities to be excused from that requirement.

III. Designing state TANF programs to meet the needs of people with disabilities

There are number of things states can do to assist the state in meeting work participation rates that will also meet the needs of individuals with disabilities. Advocates should encourage states to consider these and other approaches.³⁰⁹

³⁰⁸ *Townsend v. Quasim*, 328 F.3d 511, 520 (9th Cir. 2003); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 785-786 (7th Cir. 2002); *Makin v. Hawaii*, 114 F.Supp.2d 1017, 1034-36 (D. Haw. 1999).

³⁰⁹ Many of these approaches are discussed in Center on Budget and Policy Priorities and Center for Law and Social Policy entitled *Implementing the TANF Changes in the Deficit Reduction Act: "Win-Win"*

A. Screening TANF applicants and recipients to identify disabilities³¹⁰

Screening clients for disabilities, as early as possible, can assist states in meeting their participation rates for many reasons:

- The sooner a state identifies clients' disabilities, the sooner it can provide or arrange for the appropriate services, treatment, or other barrier removal activities that will enable some of these individuals to participate in federally countable activities.
- The sooner a state identifies clients' disabilities, the sooner it can make use of the limited weeks of federally countable barrier removal activities to provide clients the programs and services they need.
- Disability screening can identify individuals who should apply for SSI (see Section V.D below). Receipt of SSI will remove them from the TANF program, and thus, from federal work participation rate requirements.³¹¹

B. Improving work and education and training programs so they meet the needs of TANF recipients with disabilities

Because many work activities and programs are not appropriate for people with disabilities and fail to meet their needs and provide needed accommodations, many clients with disabilities seek work exemptions and deferrals. But work activities and education and training programs can be improved to better meet the needs of individuals with disabilities. States could expand the range of work and education and training options available, disability professionals could be involved to a greater extent in education and training program design and implementation, and support services such as job coaches and tutors with expertise in working with adults with disabilities could be built into programs.

Solutions For Families and States, Second Edition. ("Win-Win Solutions") (February 2007) available at www.clasp.org/admin/site/publications/files/0339.pdf.

³¹⁰ Disability screening is discussed in greater detail in Chapter 6.

³¹¹ At the same time, it is certainly the case that screening will also assist the state in identifying clients who should be exempt from work activities or who need to engage in activities that are not countable as an accommodation.

C. Preventing sanctions, providing outreach to sanctioned families, and providing services that assist parents in participating in work activities

A high percentage of parents sanctioned for non-participation with work activities have one or more barriers to employment, including disabilities.³¹² Several states have implemented programs that conduct outreach to sanctioned families to determine the reason for non-compliance with work or other program requirements, provide assistance in attending appointments, and take steps to address the causes of non-compliance.³¹³ Some states conduct outreach before sanctions are imposed to prevent sanctions and determine the cause of non-compliance so it can be addressed.³¹⁴ These programs are consistent with TANF program goals and can assist states in increasing work participation rates.³¹⁵

D. Assisting TANF recipients with disabilities in obtaining SSI

Some TANF recipients with disabilities qualify for, but do not receive, SSI benefits. Getting TANF recipients onto SSI helps recipients and states, because SSI provides higher levels of benefits than TANF and is funded solely with federal funds. It also removes from the work participation rate TANF recipients who are unlikely to be able to engage in 30 or more hours of federally countable work activities. Some states use welfare agency staff to assist individuals in navigating the SSI application process; others contract with legal aid and legal services offices to advocate on behalf of welfare recipients applying for SSI benefits.³¹⁶ States can create or expand these programs.

³¹² For a summary of the research on this issue, see Marcia Meyers et al, *Review of Research on TANF Sanctions*, Report to Washington State WorkFirst SubCabinet, at 6, 20-22, (June 2006), available at http://www.workfirst.was.gov/research/studies/sanction_literature_final.pdf

³¹³ See Jacqueline Kauff et al, Mathematica Policy Research, Inc., *Using Work-Oriented Sanctions to Increase TANF Program Participation, Final Report* (September 2007), available at www.mathematica-mpr.com/publications/PDFs/worksanctions.pdf; Heidi Goldberg and Liz Schott, Center on Budget and Policy Priorities, *A Compliance-Oriented Approach to Sanctions in State and County TANF Programs*, (Oct. 2000), available at www.cbpp.org/cms/index.cfm?fa=view&id=1301; see also Chapter 14 for a description of pre-sanction review policies in Virginia and New Jersey.

³¹⁴ *Id.*

³¹⁵ See discussion of possible approaches in *Win-Win Solutions*, *supra* note 273 at 62-63.

³¹⁶ For information on these programs, see *Win-Win Solutions*, *supra* note 280 at 103-106; see also, LaDonna Pavetti et al, Mathematica Policy Research, Inc., *Lessons From The Field: When Five Years is Not Enough: Identifying and Addressing the Needs of Families Nearing the TANF Time Limit in Ramsey County, Minnesota* (March 2006), available at www.mathematica-mpr.com/publications/pdfs/timelimitramsey.pdf.

Chapter 6: Welfare agencies' obligation to identify clients' disabilities

Some welfare agencies do not do an adequate job of identifying applicants' and recipients' disabilities and the effect of those disabilities on the ability to comply with work requirements and other program requirements. A number of Title II requirements provide strong support for an argument that welfare agencies must take steps to identify clients' disabilities. This chapter provides an overview of disability screening and assessment and discusses how advocates can use the ADA to obtain disability screening and assessment in welfare programs. Section I defines disability "screening" and "assessment" as those terms are used in the manual. Section II discusses the legal obligation of welfare agencies to offer disability screening and assessment, and HHS OCR Guidance and other documents that contain statements by HHS that welfare agencies are required to offer disability screening and assessment. Section III discusses the elements of an effective welfare agency disability identification process. Section IV discusses how advocates can obtain copies of disability screening tools used by welfare agencies around the country, and Section V discusses how to decide which screening tool to advocate that a welfare agency use.

I. What are disability "screening" and "assessment"?

Although the terms "screening" and "assessment" are used in different ways by different welfare agencies, this manual uses these terms in the following way:

A. Disability screening

In this manual, "disability screening," refers to the process of asking an applicant for or recipient of welfare benefits a series of questions designed to determine if the individual has or is likely to have a disability that is likely to affect the individual's ability to work or comply with other program rules.

B. Disability assessment

In this manual, "disability assessment" refers to an in-depth diagnostic evaluation by a qualified medical, mental health, or other professional qualified to definitively diagnose a disability and determine the severity of the disability and its affect on functioning.

Note: PRWORA, the federal welfare reform law, requires agencies receiving TANF funds to "assess" the "skills, prior work experience, and employability" of TANF recipients.³¹⁷ Many welfare agencies use the term "assessment" to describe the

³¹⁷ 42 U.S.C. § 608(b)(1).

process of assessing clients' education, work experience, skills, interests and career goals even if this process does not include disability screening or assessment.

II. The legal obligation to screen and assess disabilities

ADA Title II regulations, which discuss the obligations of all programs and services of state and local governments, do not specifically address whether public entities have an obligation to identify individuals' disabilities. Nevertheless, a number of Title II requirements, the HHS OCR Guidance, HHS ACF-OCR Frequently Asked Questions piece, and an HHS OCR Letter of Findings³¹⁸ strongly support an argument that the ADA requires welfare agencies to screen and assess to identify disabilities.

A. HHS's position on disability screening and assessment

The HHS has made clear that in its view, welfare agencies must offer clients an opportunity for disability screening and an opportunity to obtain an assessment if disclosure, screening, or other factors indicate that the client has a disability or possible disability.

1. 2001 HHS OCR Guidance

The 2001 HHS OCR Guidance on the application of the ADA and Section 504 to TANF programs states:

At a minimum, intake workers should be able to recognize potential disabilities and to conduct an initial screening to identify possible disabilities for those individuals who agree to undergo screening.

If there is an initial indication that an individual has a disability that may impact his/her ability to successfully complete or benefit from a current or proposed program assignment based on applicant or beneficiary disclosure, an initial screening or other information, the TANF agency should give the individual an opportunity for a more comprehensive evaluation or assessment.³¹⁹

³¹⁸ As discussed in Chapter 13, an HHS OCR Letter of Findings is a letter discussing the findings of an OCR complaint or compliance review.

³¹⁹ U.S. Department of Health and Human Services, Office for Civil Rights, *Policy Guidance: Prohibition Against Discrimination on the Basis of Disability in the Administration of TANF (Temporary Assistance to Needy Families)* ("HHS OCR Guidance"), § D(1) (Jan. 19, 2001), available at www.hhs.gov/ocr/prohibition.html.

2. HHS “Frequently Asked Questions” piece

In 2007 the Administration for Childrens Services and Office for Civil Rights at HHS jointly issued a document entitled “Frequently Asked Questions: Meeting the Needs of TANF Applicants and Beneficiaries Under Federal Civil Rights Laws. In partial response to the question “How can a TANF agency ensure equal access to people with disabilities?”, the piece states:

In ensuring equal access to people with disabilities, TANF agencies should have a comprehensive and effective screening and assessment tools in place. TANF agencies should offer to conduct an initial screening of each applicant and beneficiary to identify those with possible disabilities, and inform applicants and beneficiaries that their participation in screening and disclosure of disability is voluntary. This screening should be conducted by trained staff, using validated screening tools. If there is an initial indication that an individual has a disability that may impact his/her ability to successfully complete or benefit from a current or proposed program assignment, the TANF agency should give the individual an opportunity for a more comprehensive assessment.³²⁰

3. 2001 HHS OCR Letter of Findings against the Massachusetts welfare agency

In 2001, HHS OCR has also issued a Letter of Findings in a complaint filed on behalf of two Massachusetts welfare recipients with learning disabilities (and similarly situated persons).³²¹ The Letter of Findings makes clear that the ADA and Section 504 require welfare agencies to provide disability screening and assessment. HHS OCR found that the welfare agency violated the ADA and Section 504 by failing to provide an equal opportunity to the complainants and others to participate in and benefit from the welfare agency’s programs. The Letter of Findings states:

In large part, [the welfare agency’s] failure to provide people with learning disabled individuals with equal opportunity stems from inadequacies in the [welfare agency’s] assessment process and from [the welfare agency’s] failure to identify obstacles to employment that confront individuals with learning disabilities and what individuals with learning disabilities need in

³²⁰ U.S. Department of Health and Human Services, Administration for Children and Families and Office for Civil Rights, *Frequently Asked Questions: Meeting the Needs of TANF Applicants and Beneficiaries Under Federal Civil Rights Laws*, available at www.acf.hhs.gov/programs/ofa/civilrights/OCRqandafinal_faq.html.

³²¹ The Letter of findings is available at www.masslegalservices.org/docs/5428_OCR-to-Mcintire.pdf and <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/tanf-tanfloc.pdf>. This Letter of Findings is discussed in Appendix C.

order to have an equal opportunity to participate in the [welfare agency's] program.

OCR went on to explain that “neither [the welfare agency] nor its contractors or vendors conduct any screening or assessment to determine whether [welfare agency] beneficiaries have learning disabilities, or to determine whether these disabilities would hinder their ability to benefit from [the welfare agency's] education, job skills, or employment programs.” In the list of required corrective actions at the end of the Letter, OCR states that the welfare agency “must modify its procedures to provide for initial screening, and when appropriate, full assessment of [welfare agency] beneficiaries to determine whether these individuals have learning disabilities and to determine whether these learning disabilities would interfere with beneficiaries’ ability to participate in [welfare agency] programs. . .” HS OCR also found that screening, assessing, and accommodating learning disabilities would not be a fundamental alteration.

While the complaint and LOF concerned screening and assessment for learning disabilities, the rationale of the Letter of Finding applies equally to screening and assessment for other types of disabilities.

4. Preamble to final Deficit Reduction Act regulations

In the preamble to the final Deficit Reduction Act regulations, HHS discusses states’ obligation to comply with the ADA and Section 504. In this discussion, HHS states:

In addition, TANF agencies must ensure equal access to programs for TANF clients. In ensuring equal access, it is critical that TANF agencies have comprehensive and effective screening and assessment tools in place.³²²

B. PRWORA requires welfare agencies to comply with the ADA and Section 504

The federal welfare reform law requires TANF programs to comply with the ADA and Section 504.³²³ Welfare agencies cannot comply with these laws if they do not know who has disabilities. Given the large percentage of welfare recipients with disabilities, including hidden and undiagnosed disabilities, these programs will inevitably discriminate against many people with disabilities if they do not identify individuals’ disabilities. A number of the arguments that follow apply this general argument to specific ADA requirements or specific aspects of welfare programs.

³²² U.S. Department of Health and Human Services, Administration for Children and Families, Reauthorization of the Temporary Assistance for Needy Families Program, Final Rule, 73 Fed. Reg. 6775 (February 5, 2008).

³²³ 42 U.S.C. § 608(d).

C. Disability screening and assessment are necessary for appropriate, individualized employability assessments

PRWORA requires agencies receiving TANF funds to assess the “skills, prior work experience, and employability” of TANF recipients.³²⁴ Individuals with disabilities will not have a meaningful or equal opportunity to benefit from this employability assessment process³²⁵ unless their disabilities are identified. Indeed, this rationale is mentioned in the HHS OCR Guidance.³²⁶

D. Without disability screening and assessment, welfare agencies will not know whether applicants and recipients need reasonable accommodations or what reasonable accommodations they need

Title II requires welfare agencies to provide reasonable accommodations to people with disabilities when necessary to avoid discrimination.³²⁷ Welfare agencies will be far less likely to know whether individuals need reasonable accommodations, and what accommodations these individuals need, if they do not provide disability screening and assessment, and therefore, less likely to provide the reasonable accommodations required by the ADA. Discrimination against people with disabilities is a certainty without the information provided by screening and assessment.

E. Disability screening and assessment are necessary to prevent welfare agencies from administering sanctions and other adverse actions in a manner that has a discriminatory effect

When a welfare agency fails to identify individuals’ disabilities, assigns them to inappropriate work activities, and the individual or family is sanctioned as a result, the welfare agency has used “methods of program administration” that screen out people with disabilities from the welfare program.³²⁸ The same is true when a welfare agency fails to identify clients’ disabilities and closes an individual’s or family’s welfare case for failure to comply with other program requirements, when the failure to comply was the result of a disability that was not identified and accommodated.

³²⁴ 42 U.S.C. § 608(b)(1).

³²⁵ 28 C.F.R. § 35.130(b)(1)(ii) requiring an equal opportunity to participate and benefit; *Alexander v. Choate*, 469 U.S. 287 (1985) (requiring meaningful access).

³²⁶ HHS OCR Guidance, *supra* note 319, § D(1).

³²⁷ 28 C.F.R. § 35.130(b)(7).

³²⁸ 28 C.F.R. § 35.130(b)(3)(ii).

- F. Welfare agencies cannot provide an equal and meaningful opportunity to achieve program goals to people with disabilities without screening and assessment

One of the permissible goals of TANF programs is to “end the dependence of needy families on government benefits by promoting job preparation, work, and marriage.”³²⁹ Individuals with disabilities will not have an equal or meaningful opportunity to achieve these program goals, as the ADA and Section 504 require,³³⁰ if their disabilities are not identified and addressed through the provision of reasonable modifications and appropriate services.

III. Elements of an effective welfare agency disability identification process

Below are a list of features that the author believes are necessary for an effective welfare agency disability identification process. The list is a reflection of the author’s opinion, after reviewing the 2001 HHS OCR Guidance, screening tools from many states, discussing the issue with advocates and welfare agency officials, and reviewing reports. Some of these elements are discussed in the HHS OCR Guidance, but many are not.

- A. Welfare agencies should give all applicants and recipients an opportunity to disclose a disability

The 2001 HHS OCR Guidance makes clear that individuals in welfare programs must be given an opportunity to disclose a disability.³³¹ However, as disclosed below, giving individuals the opportunity to disclose a disability or asking whether they have a disability, without more, is not an adequate disability identification process.

³²⁹ 42 U.S.C. § 601(a)(3).

³³⁰ 28 C.F.R. § 35.130(b)(1)(ii); *Alexander v. Choate*, 469 U.S. 287 (1985).

³³¹ HHS OCR Guidance, *supra* note 319, § D(1) (“Legal Requirements and Promising Practices: The Legal Requirement to Ensure Equal Access to TANF Programs Through the Provision of Appropriate Services to People with Disabilities”); Letter of Findings in OCR Complaint No. 01-98-3055 (discussed in Appendix C).

B. Welfare agencies should offer disability screening to all applicants and recipients

The 2001 HHS OCR Guidance and the Massachusetts HHS OCR Letter of Findings make clear that individuals in welfare programs must offer disability screening to clients.³³² There is a significant difference between giving individuals the opportunity to disclose a disability (or asking individuals whether they have a disability) and disability screening.

Giving individuals an opportunity to disclose a disability, without more, is insufficient, because many individuals have disabilities that have not been diagnosed, and many others do not view their conditions as disabilities. These individuals are unlikely to disclose a disability if asked whether they have a disability or told they have a right to disclose a disability. In contrast, screening can and should be designed to ask a series of questions that will identify people with disabilities, those likely to have disabilities, and those who have or may have disabilities even if they are unaware that their condition qualifies as a disability.

As many people do not know that they have disabilities, screening must be offered to everyone, not just those individuals the welfare agency has reason to believe have a disability.

C. Disclosure of a disability and disability screening should be voluntary

While welfare advocates have a range of opinions regarding the best approach, the author believes that disability screening should be voluntary for welfare applicants and recipients. In other words, welfare agency staff should be required to offer disability screening to all applicants and recipients, but clients should be told they are not required to disclose a disability or undergo screening. This approach is consistent with the 2001 HHS OCR Guidance and with the overall philosophy of the ADA.³³³

As a practical matter, a welfare agency cannot force clients to disclose information if they do not want to do so, because clients can always decide not to share this information

³³² HHS OCR Guidance, *supra* note 319, § D(1) (“Legal Requirements and Promising Practices: The Legal Requirement to Ensure Equal Access to TANF Programs Through the Provision of Appropriate Services to People with Disabilities”); Letter of Findings in HHS OCR Complaint No. 01-98-3055, *supra* note 298 (discussed in Appendix C).

³³³ HHS OCR Guidance, *supra* note 319, § D(1) (“Legal Requirements and Promising Practices: The Legal Requirement to Ensure Equal Access to TANF Programs Through the Provision of Appropriate Services to People with Disabilities”).

with the agency. Further, telling clients they must disclose a disability and answer questions about disabilities is not likely to be effective in establishing trust with clients.

D. Clients should be provided with information about the purpose and benefits of screening and the risks of declining screening or deciding not to disclose a disability

Common sense suggests that clients are more likely to disclose a disability or agree to be screened if they understand why they are being asked about their disabilities, and how the information will be used by the agency. If clients are told that:

- the information obtained from disclosure of a disability and screening will be used to see whether they are entitled to some type of modification in welfare work requirements or other accommodation or help
- if they do not disclose a disability or agree to be screened, the agency will be unable to provide them with these accommodations and help
- if they need help or another type of accommodation and don't get it, they may have difficulty complying with work activities or other program requirements
- if they have difficulty complying with work activities or other program requirements, they may be at risk of sanctions or having their cash assistance case closed

they may be more willing to disclose a disability and undergo screening.

The agency should also provide two other pieces of information to clients:

- who the information obtained from screening and disability disclosure will be shared with
- the fact that the existence of a disability will not disqualify them from benefits. This is critical. Many clients are aware of welfare work requirements and may also believe that if they cannot work due to a disability, they cannot get benefits.)

Anecdotal information from state advocates suggests that when staff are required provide this information to clients when they offer screening, screening participation rates are higher.

E. Welfare agency staff should be trained to administer disability screening tools and to recognize potential disabilities

The 2001 HHS OCR Guidance states that welfare agencies must be trained to recognize potential disabilities and to administer a screening tool.³³⁴

F. Screening for disabilities should occur early

There are a number of advantages to offering clients screening early. The sooner barriers to employment are identified, the sooner they can be addressed. Information obtained from screening is relevant to the type of work activity a client is assigned to, and to whether the client should be assigned to a work activity at all. Some welfare agencies conduct a comprehensive screening only on long-term welfare recipients and those approaching time limits to attempt to determine why they have not found employment. One of the goals of welfare programs is to assist individuals in becoming self-sufficient. Waiting months or years to conduct disability screening does not advance these goals effectively.

Note: PRWORA, which requires welfare agencies to assess the skills, prior work experience, and employability of program participants, gives welfare agencies 90 days to conduct this assessment,³³⁵ but says nothing about the timing of disability screening. The HHS OCR Guidance is silent on the question of when agencies should conduct disability screening, although it does state that “intake workers” should be trained to recognize potential disabilities and conduct an “initial” screening,³³⁶ which suggests that screening should occur early in the intake process.

At the same time, some have noted that screening may be less effective when it is offered early in the process, because clients may be more mistrustful of the worker, and therefore less likely to disclose disability-related information. One way to address this concern is to offer screening early in the process and then offer it again later on (see Section N below).

³³⁴ *Id.*

³³⁵ 42 U.S.C.A. § 608(b)(2)(B)(i).

³³⁶ HHS OCR Guidance, *supra* note 319, § D(1) (“Legal Requirements and Promising Practices: The Legal Requirement to Ensure Equal Access to TANF Programs Through the Provision of Appropriate Services to People with Disabilities”).

G. Adequate disability screening requires asking applicants and recipients several questions

There is no one question a welfare agency can ask that qualify as adequate disability screening. There is no two or three questions that can serve as adequate screening. Given the range of conditions, both diagnosed and undiagnosed, that clients have, adequate screening requires asking several questions.

H. Disability screening should be comprehensive

Some disability screening tools used by welfare agencies focus on a particular type of problem (such as mental health problems or learning disabilities). Others are comprehensive, and ask about or screen for physical and mental health problems, learning disabilities, substance abuse, housing and legal problems, children's disabilities, and other issues. Welfare applicants and recipients have a wide range of health and mental health problems. Thus, there is no rational basis for screening for only one type of disability. While many comprehensive screening tools ask fewer questions on particular types of disabilities than screening tools that focus on that type of disability, a comprehensive screening tool can be used to identify issues that require further exploration with a client. Some welfare agencies administer a comprehensive tool, and supplement that tool with additional screening tools that focus on particular issues identified as possible barriers on the comprehensive tool.

I. The purpose of disability screening and assessment should be to identify disabilities of which the client is already aware and to identify possible disabilities that the client may not be aware of

Many applicants for and recipients of welfare benefits have disabilities that have not been diagnosed. Asking clients questions such as "have you received treatment for any of the following conditions: . . ." is not an effective way to find out whether individuals have a disability of which they are not aware.

The HHS OCR complaint filed against the Massachusetts welfare agency was brought on behalf of two individuals with learning disabilities. One was diagnosed with a learning disability as a child, which the welfare agency failed to ask about. The other had never been diagnosed with a learning disability before coming to the welfare agency. She was diagnosed as a result of a referral by a mental health provider, after she had tried and failed several times to complete an education and training program to which she was assigned as a work activity. HHS OCR found that the agency violated the ADA and Section 504 in failing to screen, assess, and accommodate both of these

individuals.³³⁷ Thus, it is clearly HHS OCR's position that identifying likely, previously undiagnosed conditions should be one of the purposes of screening.

- J. The purpose of disability screening and assessment should be to determine whether the client has a medical, mental health, or learning problem, that affects the ability to work or to comply with other program requirements

The same conditions that limit or prevent individuals from working also limit their ability to attend appointments at the welfare agency, read and understand welfare agency notices, and do other things required by the welfare agency to obtain and maintain benefits. Clients with disabilities are entitled to reasonable accommodations in these program requirements as well, so the goal of disability screening and assessment should be to determine whether individuals need a reasonable accommodation to participate in any aspect of the welfare program.

- K. If screening indicates that an individual is likely to have a disability that may affect the ability to participate in or benefit from any aspect of the welfare program, the welfare agency should give the individual an opportunity for a more comprehensive evaluation or assessment by a qualified professional

The purpose of an in-depth disability assessment should be to identify the type of disability the client has, its severity, its affect on working and performing other tasks, and the types of programs, services and reasonable modifications needed by the individual. Welfare agency staff are not qualified to conduct in-depth disability assessments. Welfare agencies should refer individuals who need such assessments to trained, qualified professionals. In some cases, an in-depth assessment will not be necessary because a client will already have documentation of the disability. In many cases, however, clients will not have this information and will need an assessment.

- L. Welfare agencies should help individuals who need in-depth assessments find medical or other professionals to conduct the assessments if individuals need and want this help

Many disabilities make it difficult for clients to navigate various systems and advocate on their own behalf. Assisting individuals with disabilities who need help finding a doctor or clinic to perform an assessment is a reasonable modification required by the ADA.

³³⁷ See Appendix C for further discussion of the Letter of Findings.

- M. If clients have their own doctors or other treating professionals, the welfare agency should help clients obtain documentation from these professionals and review and consider this documentation as part of the disability identification process

There is no principled basis for a welfare agency to refuse to review and consider reports and letters written by the client's treating doctor or therapist about the client's condition and functional limitations.³³⁸ A client's treating professional may know the client far better than the medical professional used by the agency to evaluate employability.

- N. Welfare agencies must use the information obtained from disability screening and assessment

One of the central purposes of screening and assessment is undermined if the agency ignores the information obtained from this process. The 2001 HHS OCR Guidance indicates that agencies are required to use the information they obtain from screening and assessment to individualize services.³³⁹ Individuals who are screened and found to be likely to have disabilities should be asked to provide documentation of the condition, or referred to a medical, mental health or other professional for an in-depth assessment, and information obtained from screening and assessment (or existing documentation) should be used to develop or modify the client's employability plan.

- O. Disability identification should not be a one-time event

Disability identification should be a continuing process. Some clients develop disabilities after they begin to receive welfare benefits, or after an initial screening. Others have conditions that get worse over time. Some clients initially choose not to undergo screening but may be more willing to do so when they have difficulty performing a work activity. For these reasons and many others, a welfare agency should offer screening not just when a client first applies for benefits, but at many other times, particularly when a client appears to be struggling to comply with program requirements.

³³⁸ Advocates should be aware, however, that the ADA does not contain its own "treating physician rule" or require a public entity to defer to the opinion of an individual's treating doctor or therapist.

³³⁹ HHS OCR Guidance, *supra* note 319, § D(1) ("Legal Requirements and Promising Practices: The Legal Requirement to Ensure Equal Access to TANF Programs Through the Provision of Appropriate Services to People with Disabilities").

IV. Obtaining screening tools

There is no federal agency or organization that systematically collects these tools. Advocates can obtain some tools, and information about those tools, from the following sources:

A. Reports

Policy reports describe some screening tools and disability identification processes used by welfare agencies and provide information on which states are using them. Unfortunately, these reports do not contain the screening tools themselves.³⁴⁰

B. The web

A few disability screening tools, including the Washington State learning disability screening tool,³⁴¹ the Kentucky Works Assessment Form,³⁴² and the Michigan Family Automated Screening Tool,³⁴³ are posted on line.

C. National Center for Law and Economic Justice

The author has screening tools from a number of welfare agencies around the country.

³⁴⁰ See, e.g., Jacqueline Kauff, Mathematica Policy Research, Inc., *Assisting Recipients Living with Disabilities to Obtain and Maintain Employment: (Final Report)* (Feb. 2008); Terri Thompson & Kelly Mikelson, Urban Institute, *Screening and Assessment in TANF Welfare-to-Work: Ten Important Questions TANF Agencies Should Consider* (Mar. 2001); Terri Thompson & Kelly Mikelson, Urban Institute, *Screening and Assessment in TANF Welfare-to-Work: Implementation Challenges and Considerations* (August 2000), available at www.urban.org.

³⁴¹ Learning Needs Assessment, available at www.onestoptoolkit.org/Downloads/WA%20Learning%20Needs%20Screening%20Tool.pdf.

³⁴² Kentucky Works Assessment Form, available at www.kyequaljustice.org/file/view/KW-200+Kentucky+Works+Assessment+Form.pdf

³⁴³ Michigan Family Automated Screening Tool, available at www.Michigan.gov/fast.

V. Choosing a screening tool

You may be in a position to recommend screening tools to your welfare agency or to recommend changes to a tool already in use. Welfare agencies around the country use a variety of screening tools, and reviewing and choosing among them can be daunting.

Unfortunately, there are no easy or obvious answers to the question of which tools are best. Below are some of the factors advocates may want to consider when choosing, recommending, or reviewing screening tools.

A. If a screening tool has been validated for use by welfare agencies, your welfare agency should use it

The 2001 HHS OCR Guidance states that disability screening should be use screening tools that have been properly validated.³⁴⁴ “Validation” is the process of testing the tool under scientific conditions to determine whether, and to what extent, the tool accurately identifies or measures the thing it is intended to identify or measure. Unfortunately, most disability screening tools used by welfare agencies have not been validated for use by welfare agencies. This means that no one knows for sure how effective they are in identifying welfare applicants and recipients likely to have disabilities when they are administered by welfare workers in the welfare setting. Even when a screening tool has been adapted from an established validated diagnostic test (such as a psychological test), that does not mean it will have the same effectiveness or predictive ability when administered by non-professionals at a welfare agency.

There are two learning disability screening tools that have been validated for use by welfare agencies. They are:

- The tool often referred to as the “Washington State” tool (because it was developed in Washington State). It is brief (13 “yes/no” questions), free, and has a scoring system that informs the welfare agency worker when to refer an individual for an in-depth diagnostic evaluation. Many welfare agencies use this tool. Advocates should strongly consider asking their welfare agency to use it.³⁴⁵

³⁴⁴ HHS OCR Guidance, *supra* note 319, § D(1) (“Legal Requirements and Promising Practices: The Legal Requirement to Ensure Equal Access to TANF Programs Through the Provision of Appropriate Services to People with Disabilities”).

³⁴⁵ This screening tool is available at www.onestoptoolkit.org/Downloads/WA%20Learning%20Needs%20Screening%20Tool.pdf.

- A screening tool developed in Kansas. It is longer than the Washington State tool and contains a number of “yes/no” questions and a paper and pencil test.
- B. A screening tool that has not been validated is better than no screening tool

Lack of available validated screening tools is not a legitimate (or legal) reason for a welfare agency to fail to conduct any disability screening. Although the HHS OCR Guidance states that welfare agencies should use “validated” screening tools,³⁴⁶ HHS OCR was probably unaware when it issued the Guidance of the dearth of screening tools validated for use by welfare agencies. There is no indication that OCR believes welfare agencies should screen only for learning disabilities until validated screening tools for other disabilities become available. Tools that have not been validated for use by welfare agencies will identify some individuals likely to have disabilities, even if they do not identify everyone.

- C. A screening tool that uses neutral language to describe conditions and symptoms is probably more effective than one that does not

Both the title of the screening tool and the questions in the tool should be phrased in a way that increases the likelihood that individuals will answer truthfully if they have a particular condition or experience. For example, calling a learning disability screening tool a “learning needs assessment” will probably be more effective in getting welfare applicants and recipients to participate in screening than calling it a “learning disability screen.”

- D. A screening tool that asks about diagnoses and symptoms is probably better than a tool that asks only about diagnoses

Because many welfare applicants and recipients have conditions that have not been diagnosed, screening should ask about known conditions, as well as symptoms that indicate an individual is likely to have a condition that has not been diagnosed. Mental health problems and learning disabilities are the two types of disabilities for which it is particularly important to ask about symptoms. Asking a person “How often do you feel sad, blue or down in the dumps?” is likely to be more effective in identifying individuals likely to have undiagnosed mental health problems than asking “Do you suffer from depression?”

³⁴⁶ HHS OCR Guidance, *supra* note 319, § D(1) (“Legal Requirements and Promising Practices: The Legal Requirement to Ensure Equal Access to TANF Programs Through the Provision of Appropriate Services”).

E. The screening tool should ask about an appropriate time period

The goal of screening in welfare agencies should be to identify problems likely to affect the client's current functioning. When reviewing screening tools, consider whether the questions ask about a time period that will accomplish that goal. Because the author is not a medical or mental health clinician, and most screening tools used by welfare agencies have not been tested, it is difficult to say for sure what time periods are relevant for this purpose, and the answer may be different for different types of conditions. Nevertheless, the author believes that there are some common sense rules of thumb.

1. The time period should be long enough to identify conditions and likely conditions that are chronic and episodic

Many chronic health and mental health problems have symptoms that wax and wane. A screening tool that asks "have you had feelings of hopelessness and helplessness in the last two weeks?" may fail to identify individuals with chronic depression if the individual happens to be having a good couple of weeks. Asking only about extremely short time periods (such as a few weeks) may not be effective for this reason.

2. Some problems occurred too long ago to be relevant

A screening tool that asks if the person has "ever" had a problem with drugs or alcohol, or "ever" been hospitalized for a mental health problem is probably going too far back in time. The fact that a person had a mental health or substance abuse problem five or ten years earlier may tell the welfare agency very little about the client's current functioning, and certainly, is not the most efficient way to learn about current problems. Further, if the individual answers "yes" to an "ever" question, the worker will then have to find out how long ago the problem occurred, and make a decision about whether the past problem is likely to be relevant to future functioning. Without guidance, welfare agency staff are not equipped to make these types of determinations.

Another problem with "have you ever" questions is that they may run afoul of the ADA or lead to ADA violations by the welfare agency. If information about a past history of a disability is used to exclude these individuals from jobs or education and training opportunities for which they are currently qualified, this would be discrimination based on a "record of" a disability.

3. Some conditions do not change over time

Some disabilities do not change over time. Welfare agencies can and should ask some questions about experiences in school, no matter how long ago the applicant or recipient attended school, because learning difficulties, receipt of supportive

services from the school system or placement in particular classes in school may well be an indication that an individual has a disability that currently limits the ability to read, learn, understand, or do other things.

4. Six month to one year time period is probably best

Given the considerations noted above, in the author's view, asking about the past six months to one year is probably best.

Chapter 7: Discrimination “on the basis of disability”

The ADA prohibits discrimination against people with disabilities “on the basis of disability.”³⁴⁷ Section 504 prohibits discrimination against an individual “solely by reason of her or his disability.”³⁴⁸ This chapter discusses some of the ways a welfare agency’s action or inaction is likely to be discrimination “on the basis of disability.”

I. The need for a link between the disability and the existence of harm

Many things go wrong in welfare programs, and there are many people with disabilities applying for and receiving welfare benefits. As a result, many people with disabilities are harmed by welfare agency practices. Not all of this harm, however, violates the ADA or Section 504.

Courts have not been consistent in their interpretations of what “on the basis of disability” and “solely by reason of his or her disability” mean. At a minimum, however, advocates should assume that there must be some type of connection between the person’s disability and the fact that the individual experiences harm as a result of the welfare agency’s action or inaction. There are many ways that a person’s disability might be connected to the harm resulting from a welfare agency’s practices. A few of the most common ways are discussed below.

A. Discrimination is “on the basis of disability” if the individual’s disability is the reason the individual cannot comply with a welfare program requirement

Many people have difficulty navigating the welfare system, reading notices, and following welfare program requirements. The ADA applies only when a person’s difficulty reading, navigating the welfare system, or doing other things required to obtain or maintain benefits is caused by or the result of a physical, psychiatric, learning, or developmental disability.

Example: An individual has depression and a panic disorder that prevent him from leaving his apartment. As a result, he is unable to attend appointments at the welfare agency, and the welfare agency closes his benefits case. This individual cannot comply with the program requirement because of his

³⁴⁷ 42 U.S.C. § 12132.

³⁴⁸ 29 U.S.C. § 794(a).

disability, and his inability to comply and loss of benefits was a direct result of his inability to comply. Closing this individual's case without taking other action first (e.g., offering and/or providing accommodations) is discrimination on the basis of disability.

Example: A client has difficulty reading notices, but neither the client nor the welfare agency know whether the limitation is the result of limited education, limited English proficiency, a disability, or both. As a result of her difficulty, she is unable to read the welfare agency notice, and is unaware that she has an appointment at the welfare agency. She misses the appointment, and the welfare agency closes her case. Because it is not clear whether the client's reading difficulties were the result of or caused by a substantially limiting impairment, it is not clear whether the case closure raises ADA issues. Nevertheless, the agency's failure to take steps to identify the cause of the client's difficulty may violate the ADA, Section 504, Title VI, and/or state law and policy. Further, the failure to notify the client of the right to request help reading the notices violates the ADA, Section 504, and Title VI. Until the cause of the client's difficulty has been identified, however, it would be premature for an advocate to conclude that the case closure is discrimination on the basis of disability.

Example: A client has a leg problem that sometimes makes it difficult to travel to appointments at the welfare agency. The client fails to attend an appointment because her niece was graduating high school at the same time as the appointment and she chose to attend the graduation. The client's leg problem may be a disability under the ADA, but there does not appear to be any connection between the disability and the reason she failed to attend the appointment. Her case closure was not discrimination on the basis of disability.

B. Discrimination is "on the basis of disability" if an individual needs a reasonable accommodation as the result of a disability and the accommodation is not provided

Example: If an individual has a physical disability that makes it very difficult to do work activities full-time, the welfare agency does not allow the person to do work activities part-time as a reasonable accommodation, and the individual's benefits are sanctioned as a result, this individual was discriminated against on the basis of disability. The individual was entitled to the reasonable accommodation as a result of the disability, and the loss of benefits was the direct result of the welfare agency's failure to provide a reasonable accommodation to the individual.

- C. Discrimination is “on the basis of disability” if a greater percentage of those with than without disabilities experience a particular problem and the reason for this disparity is related to the individuals’ disabilities

Example: A welfare agency has no system in place to process applications obtained through home visits. As a result, a greater percentage of people who need home visits to apply for benefits experience significant delays in obtaining benefits than individuals who don’t need home visits. The agency is discriminating against individuals with disabilities who need home visits on the basis of disability.

II. Common questions about discrimination “on the basis of” disability

- A. What if people without disabilities are also harmed by the policy or practice?

Comparison groups are not relevant in an ADA claim concerning the failure to provide reasonable accommodations.³⁴⁹ The fact that people without disabilities are also harmed by a welfare agency policy or practice does not defeat an ADA or Section 504 claim. The relevant issue is whether people with disabilities are harmed by the policy or practice because of a disability, or whether individual, because of a disability, needs the reasonable accommodation to have a meaningful opportunity to participate in and benefit from the program.

Example: The welfare agency makes clients wait for long periods of time in a welfare agency waiting room before their appointments. Some people with disabilities (i.e., agoraphobia or panic disorder) cannot wait for extended periods of time because of their disabilities, and are therefore unable to obtain benefits. The agency practice of requiring long waits (and the failure to accommodate those who cannot wait a long time because of a disability) discriminates against individuals with disabilities. The fact that other people who are unable to wait for long periods of time for other reasons (such as lack of child care) are also unable to obtain benefits as a result does not defeat the ADA claim. To remedy the ADA violation, the agency would have to provide shorter waiting times for individuals

³⁴⁹ See *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004) (welfare agency violated the ADA by failing to provide reasonable modifications to people with HIV/AIDS who needed modifications to obtain and maintain public benefits, regardless of whether agency practices had a disparate impact on people with HIV/AIDS).

with disabilities who cannot wait for an extended period of time; it would not have to modify waiting times for others who have difficulty waiting for other reasons.

B. What if the person's disability is only one of the causes of the harm?

The fact that a person's disability is only one of the reasons an individual or group of individuals is harmed by a policy or practice does not defeat an ADA claim.

Example: The welfare agency does a poor job of processing applications and complying with deadlines, and many people with and without disabilities experience delays and other problems with obtaining benefits. The agency creates a program to help people with HIV/AIDS obtain and maintain benefits, because their condition makes it particularly difficult and to attend multiple appointments, and particularly difficult to wait in crowded waiting rooms for extended periods of time (because their suppressed immune systems). The program is ineffective, and people with HIV and AIDS continue to experience delays and other difficulties obtaining and maintaining benefits. The fact that individuals with HIV/AIDS have difficulty in obtaining and maintaining benefits, both because the welfare agency not comply with program rules generally and because its program for people with HIV/AIDS is ineffective, does not defeat the ADA claim.³⁵⁰

III. The agency's action/inaction probably does not violate the ADA if there is no connection between the individual's disability and the welfare agency's action or inaction and the problem is equally likely to be experienced by those with disabilities and others

Example: If the agency loses or fails to process an application for benefits of a person with a disability, this probably does not violate the ADA (though it may violate other laws). There is no apparent connection between the client's disability and the fact that the agency lost or took too long to process the application.

Example: If the welfare agency closes the case of a client with a disability by mistake, this probably does not violate the ADA if there is no connection between the closure and the client's disability.

Example: Staff rudeness, impatience, and insensitivity towards clients generally is not discrimination on the basis of disability if staff are rude to everyone and there is no apparent connection between the rudeness and the client's disability.

³⁵⁰ *Id.* *Henrietta D. v. Bloomberg*, contains a lengthy discussion on causation in disability discrimination cases.

If, however, an individual with a disability (e.g., mental health problem or cognitive disability) needs additional explanations of program rules and other types of help to have a meaningful opportunity to benefit from welfare agency programs, the individual asked for this accommodation and explained why it is needed but it is not provided because staff are rude and impatient, the individual has been discriminated against on the basis of disability.

Chapter 8: Welfare Agencies' Obligation to Provide Effective Communication with Individuals with Disabilities

Many welfare agency clients have disabilities, including speech and hearing impairments, vision impairments, and other disabilities that affect their ability to communicate with welfare agencies. This chapter discusses the Title II ADA requirement to ensure effective communication with individuals with disabilities.

Section I discusses the obligation to provide effective communication for in-person communication with individuals who are deaf and hard of hearing and describes the components of an effective welfare agency sign language interpreter policy. Section II discusses the obligation to provide effective remote (i.e., not in-person) communication with individuals who are deaf and hard of hearing. It describes some of the technology commonly used in such communication, common barriers to effective remote communication with welfare agencies, ADA Title II requirements regarding telephone communication, and federal laws other than the ADA and Section 504 that are relevant to effective remote communication. It also discusses legal strategies for addressing communication barriers and best practices agencies can use to ensure effective remote communication with individuals with disabilities. Section III addresses the obligation to provide effective communication with individuals who are blind and those who have vision impairments. Section IV briefly discusses effective communication with individuals with intellectual disabilities.

On September 15, 2010, The U.S. Department of Justice published new Title II ADA regulations that made a number of changes to the ADA regulations that relate to the effective communication requirement.³⁵¹ Some changes were prompted by technological developments; i.e., the revised regulations now mention technologies that were not widely available when the ADA regulations were first issued in 1991. Some are changes to update terminology. Others clarify legal obligations and address common problems that have arisen since the regulations were first issued in 1991. On a few issues, DOJ incorporated into the regulations longstanding DOJ policy that was previously described in DOJ interpretive guidance and other DOJ policy materials.

I. Effective in-person communication with deaf and hard of hearing individuals

As noted in Chapter 4, Title II of the ADA requires public entities to “take appropriate steps to ensure that communications with applicants, recipients, and

³⁵¹ These new regulations are codified at 28 C.F.R. §§ 35.104; 35.160, and 35.161.

members of the public with disabilities are as effective as communication with others.”³⁵² and provides that public entities “shall furnish appropriate auxiliary aids and services when necessary to an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.”³⁵³

“Auxiliary aids and services” is defined by the ADA to include “qualified interpreters onsite or through video remote interpreting (VRI) services, notetakers; real-time computer-aided transcription services, written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices, assistive listening systems; telephones compatible with hearing aids, closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunication products and systems, including text telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered materials available to individuals who are deaf or hard of hearing.”³⁵⁴

A “qualified sign language interpreter” is defined in the ADA regulations as an interpreter “who is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.”³⁵⁵

The Title II ADA regulations provide that “[i]n determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.”³⁵⁶

In interpretive guidance, the U.S. Department of Justice (DOJ) recommends that state and local governments and their agencies and departments conduct a “communication assessment” of an individual when the need for an auxiliary aid or service is first identified, and reassess the individual regularly.³⁵⁷

³⁵² 28 C.F.R. § 35.160(a)(1). Although this regulation requires communication with people disabilities to be “as effective” as it is with others, the Manual will refer to this as the “effective communication” requirement.

³⁵³ 28 C.F.R. § 35.160(b)(1).

³⁵⁴ 28 C.F.R. § 35.104. The ADA statute also has a definition of auxiliary aids and services: “(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; (C) acquisition or modification of equipment or devices; and (D) other similar services and actions.” 42 U.S.C. § 12103(1).

³⁵⁵ 28 C.F.R. § 35.104.

³⁵⁶ 28 C.F.R. § 35.160(b)(2).

³⁵⁷ 28 C.F.R. pt. 35 App. A § 35.160.

Welfare agencies do not have to do anything to ensure effective communication with individuals with disabilities that would be a fundamental alteration and undue financial or administrative burden.³⁵⁸ The burden is on the agency to prove that taking an action would be a fundamental alteration and undue burden.³⁵⁹ In addition, the head of the agency or a designee must make the decision, and the agency must prepare a written statement of the reasons for the decision.³⁶⁰

This section describes some of the auxiliary aides and services needed by individuals who are deaf and hard of hearing and the components of effective agency policies for providing one of these services. Advocates interested in this topic should also review the 2010 settlement agreement between HHS OCR and the Florida Department of Children and Families (DCF) that was signed after deaf and hard of hearing individuals filed several ADA/504 complaints against DCF and after HHS OCR issued a Letter of Finding against DCF.³⁶¹

A. Sign Language interpreters

American Sign Language (ASL) is a unique complex language that uses signs made with the hands and other movements, including facial expressions and postures of the body. ASL is used by some but not all deaf individuals.

Many welfare agencies do not provide sign language interpreters, or do not do so in a timely fashion. Below is a discussion of the welfare agencies' obligation to provide an interpreter and the attributes of an effective welfare agency approach to providing sign language interpreters.

³⁵⁸ 28 C.F.R. § 35.164.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ The settlement agreement is summarized in Appendix C. The settlement agreement and one of the Letters of Finding are available at www.hhs.gov/ocr/civilrights/activities/agreements/index.html.

1. Welfare agencies must provide an interpreter when necessary for effective communication

As noted above, the ADA requires welfare agencies to provide a sign language interpreter when necessary to ensure effective communication with an individual with a disability.³⁶² Welfare agencies cannot require individuals to bring someone with them to the agency to interpret.³⁶³ If the interpreter is needed for effective communication, it must be provided free of charge.

2. The welfare agency should have a written policy on providing sign language interpreters and a contract or other formal arrangement with an interpreter service

As with other ADA requirements, interpreters are more likely to be provided if an agency has a written policy informing staff that interpreters must be provided and that spells out whose responsibility it is to arrange for an interpreter, how the interpreter will be paid, and other relevant information.

Staff should not have to “reinvent the wheel” to find an interpreter each time one is needed. The agency should have a contract or other formal arrangement with an interpreter service, worked out in advance, that states that the interpreter service will provide an interpreter within a specified time frame after being contacted by the welfare agency. If the agency is in a remote area and it is difficult to find interpreters who can come to the agency or to do so within a reasonable time, the agency can use video conferencing equipment (discussed in Section C below) to access the services of an interpreter at a remote location.

3. The contract or other arrangement should address the need for interpreters in some circumstances with little advance notice

Generally, there are two types of visits to welfare offices: scheduled appointments, of which the welfare agency has advance notice, and unscheduled visits, including an individual’s initial visit to the agency to apply for benefits. Welfare agencies clearly cannot provide an interpreter service advance notice of the need for an interpreter when they lack such notice themselves. If the agency contracts with a service to provide

³⁶² 28 C.F.R. § 35.160(b)(1).

³⁶³ 28 C.F.R. § 35.160(c)(1).

interpreters on site at the agency, the contract should address the fact that the welfare agency can provide advance notice of need in some situations but not others, and should require the interpreter service to provide an interpreter within a specified period of time after one is requested for visits for which the agency did not have advance notice.

4. If an interpreter cannot be provided on the day an individual comes to the agency to apply for benefits, this delay should not count against the applicant

Though agencies should strive to provide an interpreter on the first day an individual comes to the agency to apply for benefits, even if the agency does not have advance notice of the need, that may not always be possible. When it is not possible, the agency should process the application as if it were filed on the first day the individual came to the agency to apply. Individuals should not be at a disadvantage, or have to wait longer to have an applications processed, because the agency failed to provide an interpreter when one was needed.

5. The agency should provide interpreters to clients who need them without requiring clients to re-establish the need for an interpreter for each appointment

Once an agency knows that an individual needs an interpreter for agency appointments, the agency should make use of this information for future appointments, so the client does not have to re-establish the entitlement to an interpreter for subsequent appointments. As some clients choose to bring someone to interpret to some appointments and not others, the agency should have a system for determining in advance whether an interpreter will be needed for a particular appointment. While the agency shouldn't require individuals to re-establish an entitlement to an interpreter each time, it is permissible for the agency to ask the client to provide notice ahead of time as to whether the agency will need to arrange for an interpreter for the appointment.

6. Agency policies and practices cannot state or imply that individuals should use families or friends to interpret

Many welfare agencies and welfare agency ADA policies strongly imply that agency staff should use a client's friends or family to interpret whenever possible. These policies and practices are impermissible under the ADA and Section 504. The revised ADA regulations clearly state that agencies "shall not require an individual to bring another individual to interpret for him or her."³⁶⁴ If an individual with a disability

³⁶⁴ *Id.*

“specifically request[s]” that an adult who accompanied him or her to the agency interpret or facilitate communication with the agency, the agency can use the accompanying adult to interpret, if it is appropriate under the circumstances.³⁶⁵

If welfare agency has not informed the deaf or hearing-impaired individual about the right to have the agency provide an interpreter free of charge when the individual volunteers friend or relative to interpret, there is a risk that the client will volunteer the friend or relative because he or she fears that the agency will not provide an interpreter. To prevent this problem, DOJ “strongly advises” public entities to first inform the individual with a disability that the public entity “can and will” provide an interpreter or other auxiliary aids and services free of charge, before it accepts the individual’s suggestion or offer of a friend or relative to interpret.³⁶⁶

7. Unless an individual with a disability asks if a adult accompanying him or her can interpret, the agency cannot use the adult to interpret except in rare emergencies

Unless the individual with a disability “specifically requests” that an accompanying adult interpret, the welfare agency cannot rely on an accompanying adult to interpret “except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.”³⁶⁷ DOJ has made clear that if handling particular types of emergencies is part of the normal operation of the state or local government agency, this exception does not apply to these “routine” emergencies, except in “truly exigent circumstances, i.e., where any delay in providing immediate services to the individual would have life-altering or life-ending consequences.”³⁶⁸

Example: A welfare agency investigates allegations of child abuse and neglect as part of its normal operations. The agency cannot rely on the emergency exception in the ADA regulations to use an adult relative to interpret during a routine abuse and neglect investigation. The agency should have a policy or plan in place to obtain interpreter services during abuse and neglect investigations.

³⁶⁵ 28 C.F.R. § 35.160(c)(2)(ii).

³⁶⁶ 28 C.F.R. pt. 35 App. A § 35.160.

³⁶⁷ 28 C.F.R. § 35.160(c)(3).

³⁶⁸ 28 C.F.R. pt. 35 App. A, § 35.160.

8. Except in rare emergencies, minor children should not be used to interpret

The revised ADA regulations explicitly prohibit welfare agencies from using minor children to interpret or facilitate communication, “except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.”³⁶⁹ Routine emergencies that are a part of the agency’s normal operations do not meet the emergency exception, unless the “truly exigent circumstances” referred to above exist.³⁷⁰

Example: Some welfare agencies operate provide same-day benefits in emergencies or same day shelter to prevent homelessness. As these are part of the agency’s array of programs and services, the fact that an individual needs same-day services does not mean the agency can rely on the emergency exception and use a minor child to interpret.

9. Agencies cannot use staff to interpret unless they are qualified interpreters

Many agencies try to save money by using their staff as interpreters. Using staff to interpret is permissible as long as the staff person is a qualified interpreter. Possessing some knowledge of sign language does not make a staff person a qualified interpreter.³⁷¹

10. Agencies can use written notes to communicate only for brief, simple communication

The revised ADA regulations make clear that “the type of auxiliary aid or service necessary to ensure effective communication will vary with the

- nature
- length
- complexity of the communication

³⁶⁹ 28 C.F.R. § 35.160(c)(3).

³⁷⁰ 28 C.F.R. § 35.160(c)(2)(i).

³⁷¹ *See* 28 C.F.R. § 35.104 and Section I above for the definition of “qualified interpreter.”

- the context in which the communication takes place.”³⁷²

Effective communication through notes and gestures may be possible for brief, simple, communications, such as when an individual needs to request an application or schedule an appointment. It is extremely unlikely to be effective for many other communications between a welfare agency and client, given the complexity of welfare agency rules and procedures, the importance of the information to be conveyed, and the possible or likely consequence for the client if communication is not effective.

Example: An individual who is hearing impaired who uses sign language has a right to a sign language interpreter at a meeting at which the individual’s employability is being evaluated. Given the importance, length, and complexity of the communication, effective communication cannot be achieved through writing notes, gestures, or lipreading.

11. Written notes are not an effective means of communication with individuals who are not proficient in reading and writing English

Some individuals, for a variety of reasons, have a limited ability to read, write, and understand English. Reasons include: deafness from birth or an early age (i.e., American Sign Language, not English, is the individual’s first language),³⁷³ limited English Proficiency (because Spanish, Russian, or Urdu is the individual’s first language), and cognitive disabilities. If an individual is not proficient in reading and writing English, writing notes in English is not an effective form of communication for that individual and should not be used by a welfare agency, even for simple communication. In addition, if the individual has a limited ability to read and write English but the written communication requires a higher level of proficiency, the communication is not effective. In short, a welfare agency cannot use written notes to communicate unless it has information regarding the individual’s ability to read, write, and understand English.

B. Certified deaf interpreters

Some deaf individuals do not use ASL, or use a combination of ASL and “home signs” or gestures that are not ASL signs. Certified deaf interpreters are deaf or hard of hearing individuals who can help interpret these signs and gestures. They are sometimes used in tandem with an ASL interpreter.

³⁷² 28 C.F.R. § 35.160(b)(2).

³⁷³ See, e.g., *Boyer v. Tift County Hosp. Authority*, 2008 U.S. Dist. LEXIS 59700, at * 2-3 (M.D. Ga. July 31, 2008); *Young v. Nicholson*, 2007 U.D. Dist. LEXIS 2756, at * 19-20 (E.D. Wash. Jan. 12, 2007); *Center v. City of West Carrollton*, 227 F.Supp.2d 863, 864-865 (S.D. Ohio 2002).

C. Video remote interpreting

Video remote interpreting (VRI) uses video or web cameras and telephone lines to provide to sign language interpreting services through an interpreter at a remote location. VRI has some advantages over in-person interpreting, because it eliminates the need for an interpreter travel to a welfare agency. Thus, in some situations an interpreter can be provided more quickly by VRI. VRI can also increase interpreter availability in remote areas. However VRI does not always provide high-quality, or even effective communication, because the quality depends on a number of factors, including the type of equipment used and the strength and reliability of an internet connection. Sign language interpretation is dependent upon the ability of the deaf individual and the interpreter to see one another clearly. For this reason, the revised ADA regulations contain extremely specific requirements for agencies using VRI. VRI must provide:

- (1) Real-time, full-motion video and audio over a dedicated, high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;
- (2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers; and the participating individual's face, arms, hands, and fingers; regardless of his or her body position;
- (3) A clear, audible transmission of voices;
- (4) Adequate training to users of the technology and other involved individuals so they may quickly and efficiently set up and operate the VRI.³⁷⁴

D. Communication Access Real Time Captioning

Communication Access Real Time Captioning (CART) provides instantaneous, verbatim translation of spoken word into typed text. "Stenocaptioners," who are often trained court reporters, listen to spoken word and type into a stenotype machine (like those used by court reporters); computer software converts this text into English, which instantly appears on a computer screen or projector. CART is used by people who are deaf or hard of hearing; a knowledge of American Sign Language is not required to use it. CART can be used to facilitate effective communication between two individuals and to caption presentations made to groups.

³⁷⁴ 28 C.F.R. § 35.160(d)(1)-(4).

E. Assistive listening systems

Assistive listening systems improve and increase the quality of spoken communication, and include induction loops, FM systems, infrared and other devices. These devices are often used by individuals who are hard of hearing and those who have lost their hearing later in life. Although many individuals who use these devices have their own assistive listening systems, if they do not, a welfare agency may be required to provide them if necessary for effective communication.³⁷⁵

II. Effective remote communication between deaf and hard of hearing individuals and welfare agencies

Applicants, recipients, and others may need to communicate with a welfare agency by telephone. The right to effective communication includes the right to effective remote (not face-to-face) communication with the agency. As welfare agency modernization efforts in many states decrease face-to-face interaction between clients and welfare agencies rely more heavily on the internet and telephone communication, providing effective remote (non face-to-face) communication with individuals with disabilities is even more critical.

A. Remote communication technology and services for individuals who are deaf and hard of hearing

To understand the rights of clients with disabilities on these issues, some familiarity with communication technology is necessary.

1. Text telephone (TTY)

A text telephone (TTY) is a device with a keyboard and text display that can be connected directly to a telephone line, or used in conjunction with a telephone, by placing the telephone handset into the TTY coupler. TTY keystrokes are transmitted as audible signals through the telephone network. When these signals are received by another TTY, they are displayed as text.

If both the caller and call recipient have TTYs, they can communicate directly. Text typed by one caller appears on the text display of the call recipient's TTY. If only one party has access to a TTY, the call must be placed through a relay service (discussed below). Although once groundbreaking technology, TTYs are now considered outmoded

³⁷⁵ Information about assistive listening systems is available at www.hearingloss.org/learn/assistentech.asp.

by some deaf and hard of hearing individuals and are falling out of favor. Some deaf and hard of hearing individuals prefer internet-based text relay, captioned telephone service (discussed below), email, and text messaging for at least some remote communication.

2. Relay Services

Title IV of the ADA requires common carriers operating telephone voice transmission services to provide interstate and intrastate telecommunications relay services that make it possible for deaf and hard of hearing individuals to communicate with hearing individuals using voice communication services.³⁷⁶ Relay services, accessible through toll free numbers and by dialing 7-1-1, internet connections and web sites, provide “communications assistants” (operators) who interpret or transliterate communication between a caller and the recipient of the call.³⁷⁷ There are several different types of relay services:

- Text-to-voice TTY-based relay is used when one participant in the call is using a TTY and the other is not. A communication assistant (CA) reads the typed text to the hearing individual and types responses to the TTY user. Typically the deaf caller can print out and retain the text communication.
- Video relay services (VRS) enable deaf and hard of hearing individuals to use American Sign Language (ASL) to communicate remotely with voice telephone users. Using video conferencing equipment, the deaf caller and CA communicate by ASL; the CA uses a telephone to communicate with the hearing party.³⁷⁸ VRS enables deaf ASL users to communicate in their native language, which is why it has become so popular.
- Speech-to-speech services (STS) uses a CA trained to understand speech patterns of individuals with impaired speech and facilitates communication by repeating spoken words so they can be more easily understood.
- Voice carryover services (VCO) make it possible for an individual with a hearing impairment who can speak to speak by telephone to another caller and have a CA type the caller’s response.
- Hearing carryover services (HCO) make it possible for a person with a speech impairment who can hear to listen to the other party and type or

³⁷⁶ 47 U.S.C. § 225.

³⁷⁷ 47 C.F.R. §§ 64.601(a)(7), (8).

³⁷⁸ 47 U.S.C. §§ 64.601(a)(18), (26).

sign back a response. The CA reads the text or interprets sign language for the other party.³⁷⁹

- Captioned telephone services (CapTel) involves use of a telephone with a text display that enables individuals with some hearing to speak on the telephone, listen, and read what the other party is saying. The CA repeats what the hearing party says, and using specially trained voice recognition technology, the CA's speech is converted to text that appears on the captioned telephone.
- Internet Protocol (IP) relay uses a computer or other web-based communication for text communication between the caller and the CA.³⁸⁰ Typically the deaf caller can print out and retain the text.

B. Steps welfare agencies must take to ensure effective remote communication

1. Welfare agencies must use either a TTY or relay to communicate remotely with deaf and hard of hearing individuals

The ADA requires welfare agencies that communicate by telephone with applicants and beneficiaries to use TTYs or “equally effective” communications systems, such as relay services to communicate with individuals with impaired hearing or speech.³⁸¹ Interpretive Guidance to the ADA regulations makes clear that state and local government programs and services are not generally required to have a TTY to make calls to and receive calls from deaf callers,³⁸² although telephone emergency services are required to have a TTY or other means of direct access to deaf callers.³⁸³

³⁷⁹ 47 U.S.C. §§ 64.601(a)(8), (a)(13), (a)(15), (a)(19).

³⁸⁰ For information about these types of relay services, see www.fcc.gov/cgb/consumerfacts/trs.html; see also www.nad.org/issues/telephone-and-relay-services/relay-services.

³⁸¹ 28 C.F.R. § 35.161(a).

³⁸² 28 C.F.R. pt. 35 App. B § 35.162.

³⁸³ 28 C.F.R. § 35.162.

2. Welfare agencies should have policies on remote communication with individuals with disabilities and train staff on these policies

Some welfare agencies lack policies on how to communicate with deaf and hard of hearing individuals by phone and/or fail to train staff on how to place and answer calls using a TTY or relay services. Deaf and hard of hearing individuals report that agencies sometimes hang up on them when they do not hear a voice right away, because they believe the call is from a telemarketer, or they are unfamiliar with video relay technology. Some agencies have TTYs that are not answered by a live person, so the caller's only option is to leave a message. Some agencies do not return these messages, or do not do so promptly.

Some of these practices violate the obligation to provide effective communication with individuals with disabilities; others deny meaningful or equal access to agency programs and services, or both. The revised ADA regulations require agencies must respond to telephone calls from relay services in the same manner than it responds to other calls.³⁸⁴ If the agency answers the voice telephone with a live person (a practice that is increasingly rare) but does not answer a TTY with a live person, there is a disparity in access and communication that may violate the ADA.

To ensure ADA compliance, welfare agencies should have written policies instructing staff on how to provide effective telephone communication with individuals with disabilities. The policy should explain what TTYs and relay services (including video relay) are; state whether the agency has a TTY machine or uses relay; if the agency has a TTY, inform staff of where it is located and how to use it; explain to make outgoing and accept incoming calls by relay and TTY (if the agency has a TTY); state how often the TTY must be checked for messages and whose responsibility it is to do this; explain what to expect when using TTY and relay and accepting incoming calls; and contain other related information.

3. Welfare agency policies must communicate with individuals other than the applicant or recipient when necessary to ensure effective communication with individuals with disabilities

Some welfare agencies refuse to speak with anyone other than the applicant or recipient by phone about an applicant's or recipient's case. Although this policy or practice may be motivated by well-intended privacy and confidentiality concerns, it has an adverse affect on individuals, including those who are deaf and hard of hearing, who are unable to call and speak to the agency directly by voice telephone as a result of their disabilities.

³⁸⁴ 28 C.F.R. § 35.161(c).

In the most extreme cases, a welfare agency may refuse to speak to a relay operator. This refusal violates the ADA. The revised Title II ADA regulations require agencies to respond to calls from relay services “in the same manner it responds to other calls.”³⁸⁵ Even before the ADA regulations were revised, refusal to accept calls from a relay operator was found to held by a court to federal disability rights laws.³⁸⁶ Further, Federal Communications Commission regulations forbid relay operators from “disclosing the content of any relayed conversation,” with some exceptions.³⁸⁷ Thus reliance on privacy and confidentiality concerns is unjustified. At least one court has held that relay operators are language conduits, and that federal regulations requiring real-time, verbatim transmission of statements provide assurance of reliable transmission.³⁸⁸

Some welfare agencies accept relay calls but will not speak with a friend, relative, or advocate calling on behalf of a deaf or hard of hearing individual. This also violates the ADA, by failing to ensure effective communication with individuals with disabilities; administering the public benefit program in a manner that has a discriminatory effect; denying individuals with disabilities a meaningful access to programs and an equal opportunity to participate in and benefit from the program; and denying reasonable modifications when necessary to avoid discrimination.³⁸⁹ An across-the-board refusal to accept such calls is not necessary to address legitimate privacy and confidentiality concerns. Agencies can ask clients to sign release forms authorizing the agency to communicate with the third party or take other steps to ensure that a client has truly authorized the third party to communicate with the agency on his or her behalf. Release forms cannot be used in a way that is unduly burdensome or that adds significant delay to the communication between the individual with a disability and the agency.

³⁸⁵ 28 C.F.R. § 35.160(c).

³⁸⁶ Cf., *United States v. Space Hunters, Inc.*, 2001 U.S. Dist. LEXIS 12804 (S.D.N.Y. Aug. 24, 2001), enforced, 2004 U.S. Dist. LEXIS 23699 (S.D. N.Y. Nov. 23, 2004) (Fair Housing Amendments Act case), *aff’d in part*, 429 F.3d 416 (2d Cir. 2005).

³⁸⁷ 47 U.S.C. § 225(d)(1)(F); 47 C.F.R. § 64.604(a)(2)(i).

³⁸⁸ See, e.g., *Germano v. International Profit Assoc’ns, Inc.*, 2008 U.S. App. LEXIS 19990, * 10-11 (7th Cir. 2008) (holding that testimony about statements made through relay communication assistant were not hearsay because the CA served as “no more than a language conduit”).

³⁸⁹ 28 C.F.R. § 35.160(a) (effective communication); *Alexander v. Choate*, 469 U.S. at 301 (requiring meaningful access); 7 C.F.R. § 15b.4(b)(1)(ii); 28 C.F.R. § 35.130(b)(1)(ii); 28 C.F.R. § 41.51(b)(1)(ii); 45 C.F.R. §§ 84.4(b)(1)(ii); 84.52(a)(2) (equal opportunity to participate in and benefit from programs); 7 C.F.R. § 15b.4(b)(4); 28 C.F.R. § 35.160(a); 28 C.F.R. § 41.51(b)(3); 45 C.F.R. § 84.4(b)(4) (prohibiting methods of program administration with a discriminatory effect); 28 C.F.R. § 35.130(b)(7); 45 C.F.R. § 84.4 (b)(1)(vii) (reasonable accommodations must be provided).

4. Welfare agency policies cannot use only one accessible method of remote communication

Some agencies assume that because they use or make available one method of remote communication available to people with speech and hearing impairments, they have met their legal obligations. An agency may take the position, for example, that because it has a TTY it is not required to speak to a friend or relative calling on behalf of a deaf or hard of hearing client. But there is no one means of remote communication that is effective for and available to everyone with disabilities. For example:

- TTYs are not an effective means of communication for some individuals with both hearing and vision impairments, because these individuals have difficulty reading the print on a TTY machine, which cannot be enlarged.
- TTY are not an effective means of communication for individuals with a limited ability to read and write English.
- There will always be some individuals who cannot use or do not have access to a particular method of communication on at least a temporary basis when equipment breaks down, individuals need to place calls when they are away from home, or for other reasons.

Agency policies should make clear that one size does not fit all, and require staff to be flexible.

5. Welfare agencies should consider using text-based communication with clients with disabilities

Some deaf and hard of hearing individuals prefer text-based communication (including email, text messaging, and instant messaging) over TTY or relay for remote communication. Advocates may want to encourage agencies to require staff use text-based communication with deaf and hard of hearing clients who want to communicate remotely with the agency this way. Using text-based communication will not necessarily require additional staff time or resources, as staff time spent communicating by text communication with clients should be offset by a decrease in time spent communicating with clients by TTY or relay. To ensure that text-based communication is effective, agencies should develop policies to ensure that text messages are checked, read, and responded to within specified time periods.

6. Welfare agencies must ensure that Interactive Voice Response (IVR) Systems do not create communication barriers for individuals with disabilities

Many public benefits agencies use automated telephone systems, not live staff, to answer phones, route callers to appropriate offices, and take messages. These systems, often collectively referred to as interactive voice response (IVR) systems, often pose a number of problems for deaf and hearing impaired individuals:

- Hard of hearing individuals may have difficulty hearing menu options and voicemail messages, particularly if they are in the high frequency range, the message is spoken too rapidly, or poor-quality technology impairs sound clarity.³⁹⁰
- IVR systems do not usually connect directly to TTYs, so TTY users must use relay services to place a call. This means that the relay operator must convert all recorded prompts, menus, and messages into text; the caller must read this text, and then type instructions to the operator on which option to select. IVR systems often provide insufficient time for relay callers to do this and make a selection in the time allotted.³⁹¹
- Some IVR systems disconnect callers who do not respond within the allotted time period.³⁹²

The revised ADA regulations address IVR specifically and provide:

When a public agency uses an automated-attendant system, including but not limited to voicemail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems.³⁹³

³⁹⁰ Northern Virginia Resource Center for Deaf and Hard of Hearing Persons, *Guidelines for Voice Menu Systems to Serve Deaf and Hearing Impaired Individuals*, (“Guidelines for Voice Menu Systems”) at 1, available at <http://www.nvrc.org/MediaLibrary/Voice%20Menu%20Sys%205-08.pdf>

³⁹¹ 28 C.F.R. pt. 35 App. A § 35.161; Guidelines for Voice Menu Systems. p.1.

³⁹² *Id.*

³⁹³ 28 C.F.R. § 35.161(b).

DOJ has explained that this requires automated telephone systems to be usable by individuals with disabilities.³⁹⁴ Agencies can achieve this in a variety of ways, including programming the systems to (1) give callers the option to request additional time to respond; (2) default to a live person when an option is not selected within the allotted time period; or (3) offer callers an immediate option of bypassing the voice menu system to speak to a live person.³⁹⁵ DOJ has indicated in interpretive guidance, however, that the regulations do not require agencies to allow callers to speak to a live person.³⁹⁶

C. Other federal laws relevant to remote communication access and people with disabilities

Advocates should be aware that in addition to Title II of the ADA, other federal laws apply or relate to remote communication between welfare agencies and individuals with disabilities. Although these laws do not apply directly to state and local welfare agencies, advocates should be aware of them, for the reasons discussed below.

1. Section 508 of the Rehabilitation Act and similar state laws

Section 508 of the Rehabilitation Act applies to federal agencies, and requires electronic and information technology, including voicemail, IVR systems, and messaging systems, to be accessible to and usable by people with disabilities, unless it would be an undue burden.³⁹⁷ If doing so would be an undue burden, the federal agency must provide an alternative means of access to information and data.³⁹⁸

The U.S. Access Board has promulgated Section 508 electronic and information technology standards with which federal executive agencies must comply, unless it would be an undue burden.³⁹⁹ These standards require voicemail, auto-attendant and IVR systems to be usable by TTY users and require these systems to alert individuals when the

³⁹⁴ 28 C.F.R. § 35.160(a).

³⁹⁵ *Guidelines for Voice Menu Systems*, *supra* note 390, at 2 ; *see also*, Inclusive Technologies, *Checklist for Voice IVR Accessibility*, available at http://inclusive.com/ivr_access/checklist_voice_01.htm.

³⁹⁶ 28 C.F.R. pt. 35 app. A § 35.161.

³⁹⁷ 29 U.S.C. § 794d(a)(1)(A)(i).

³⁹⁸ 29 U.S.C. § 794d(a)(1)(B).

³⁹⁹ 36 C.F.R. pt. 1194; 36 C.F.R. § 1194.2(a) These standards are available at <http://www.access-board.gov/sec508/standards.htm>.

time for providing a response is about to run out and to provide sufficient time to indicate that more time is needed.⁴⁰⁰

Although Section 508 does not apply directly to state and local public benefits agencies, a number of states have adopted 508 standards or similar standards for information technology.⁴⁰¹ Advocates interested in these issues should check to see what regulations, standards or policies have been adopted in your state.

2. Section 255 of the Telecommunications Act

Section 255 of the Communications Act requires telecommunications products and services designed, developed, and fabricated after February 8, 1996 to be accessible to and usable by people with disabilities if readily achievable.⁴⁰² If accessibility is not readily achievable, telecommunications products and services must be compatible with devices and equipment used by people with disabilities to achieve access, such as TTYs and assistive listening devices, if doing so is readily achievable.⁴⁰³ The law applies to telecommunications equipment; telecommunications services (including regular telephone calls and computer-provided directory assistance), call waiting, speed dialing, caller ID, call tracing, and repeat dialing; and to information services (including voicemail systems and interactive voice response systems).⁴⁰⁴

The FCC has issued regulations for voicemail and IVR services detailing how the accessibility, usability and compatibility requirements apply to IVR.⁴⁰⁵ “Accessible” means, among other things, that it has to be operable in at least one mode without requiring a timed response, operable in at least one mode for those with limited manual dexterity, limited cognitive ability, etc. Advisory Guidance issued by the U.S. Access Board notes that IVR systems are not usable by deaf and hard of hearing individuals and recommends augmenting the use of an automated system with an automated TTY system, or having methods for deaf callers to opt out of the automated system.⁴⁰⁶

⁴⁰⁰ 36 C.F.R. §§ 1194.23(c); 1194.23(d).

⁴⁰¹ See Hewlett Packard, *State IT Accessibility*, available at www.hp.com/hpinfo/abouthp/accessibility/state_it_accessibility081015A.pdf?jumpid=reg_R1002_USEN

⁴⁰² 47 U.S.C. §§153; 255(b); (c); 47 C.F.R. §§ 6.5(a)(1); (b)(1); 36 C.F.R. § 1193.21.

⁴⁰³ 47 U.S.C. § 255(d); 47 C.F.R. §§ 6.5(a)(2); (b)(2); 36 C.F.R. § 1193.21.

⁴⁰⁴ 47 U.S.C. §§ 255(b), (c); www.access-board.gov/about/laws/telecomm.htm.

⁴⁰⁵ 47 C.F.R. pt. 7.

⁴⁰⁶ 36 C.F.R. Part 1193 App. A § 1193.33(b), 63 Fed. Reg. 5608, 5637.

Section 255 is not enforceable against a welfare agencies that purchase inaccessible telecommunications equipment or uses the equipment in a way that creates accessibility problems. The law applies to the designers and manufacturers, and is enforced by filing a complaint with the FCC against the manufacturer of the telecommunications product or service.⁴⁰⁷ Nevertheless, Section 255 is relevant to advocates for the following reasons:

- The existence of Section 255 means that many products currently on the market, include IVR systems, have the capacity to be programmed and used in a way that does not create barriers to access to deaf and hard of hearing individuals.
- Agency purchasing contracts and contracts with call centers can and should specify that agencies and/or call centers purchase and use equipment that is accessible to and usable by people with disabilities.
- FCC regulations and Access Board Advisory Guidance acknowledge problems with IVR systems for deaf and hard of hearing individuals and contain recommendations for alternatives.

III. Effective communication with individuals with vision impairments

Welfare agencies have an obligation to provide communication with individuals who are blind and those who are vision-impaired that is as effective as that provided to others, and to provide auxiliary aids and services when necessary to provide effective communication with these individuals.⁴⁰⁸

The ADA Title II regulations define “auxiliary aids and services” to include: “Qualified readers; taped texts; audio recordings; Brailled material and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision.”⁴⁰⁹ As noted in Section I, Title II ADA regulations provide that

⁴⁰⁷ 47 U.S.C. § 255(f); 47 C.F.R. §§ 6.16-6.22.
www.fcc.gov/cgb/complaints.html.

⁴⁰⁸ 28 C.F.R. §§ 35.160(a)(1); (b)(1).

⁴⁰⁹ 28 C.F.R. § 35.104.

“[i]n determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.”⁴¹⁰

Many welfare agencies fail to implement these requirements. Many of the issues that arise and attributes of an effective approach to meeting this obligation are similar to those that arise for individuals who are deaf and hard of hearing.

1. The welfare agency should have a written policy on providing materials in alternative formats for individuals who are blind and those with vision impairments and a contract or other formal arrangement with a company that converts documents into alternative formats

Welfare agencies are more likely to meet their obligation to provide materials in alternative formats to those who are blind and vision-impaired if they have a written policy informing staff of this obligation and that indicates whose responsibility it is to obtain materials in alternative formats, who to contact to arrange for materials to be converted, where copies of standard agency materials that are available in alternative formats can be found, and other relevant information.

Staff should not have to reinvent the wheel to find get materials converted into alternative formats each time they are needed. The agency should have a contract or other arrangement with a for-profit, non-profit, or other government agency that converts materials into Braille and other alternative formats. Some states may have agencies or commissions that perform this service.

2. Welfare agencies should convert frequently distributed materials into alternative formats so they are readily available.

Welfare agencies should anticipate that some individuals will need materials in alternative formats and convert them so they are available when needed.

3. Welfare agencies should provide client notices in alternative formats

The obligation to provide written materials in alternative formats applies not just to agency brochures and other materials, but to notices sent to clients regarding appointments, recertification, non-compliance, fair hearings, etc.⁴¹¹ Agencies have an

⁴¹⁰ 28 C.F.R. § 35.160(b)(2).

⁴¹¹ See *American Council of the Blind v. Astrue*, 2009 U.S. Dist. LEXIS 97599 (N. D. Calif. October 20, 2010) (holding that the Social Security Administration has an obligation under Section 504 to provide

obligation to do it unless they can show that it would be a fundamental alternation or undue financial or administrative burden.⁴¹² Providing notices in alternative formats is likely to be more challenging for agencies than converting general materials such as informational brochures into alternative formats, as it is likely to require changes in agency procedures for developing and mailing notices.

4. The obligation to provide materials in alternative formats is not limited to the application

Some welfare agency policies require staff to read written materials (such as applications) to clients who are unable to read them because of a vision impairment or other. Policies that apply only to the application are not adequate, as clients receive other written materials from the agency, including recertification materials, adverse action notices, fair hearing notices and decisions, etc.

5. Reading written materials to clients may not provide effective communication

Even if an agency has an adequate mechanism in place to read materials to clients, this may not meet the agency's obligations under the ADA. The revised ADA regulations make clear that "the type of auxiliary aid or service necessary to ensure effective communication will vary with the

- nature
- length
- complexity of the communication
- the context in which the communication takes place⁴¹³

Given this framework, reading materials to a client is unlikely to be effective in at least some circumstances. If materials are lengthy, complex, are designed to be consulted on an as-needed basis (e.g., "Frequently Asked Questions" documents, materials explaining agency programs and procedures), hearing them read once is unlikely to be sufficient (or comparable to the experience that sighted users).

notices in Braille and electronic format to individuals who are blind).

⁴¹² 28 C.F.R. § 35.164.

⁴¹³ 28 C.F.R. § 35.160(b)(2).

Reading materials to clients is unlikely to be effective for other reasons. Clients may need or want to read or consult agency materials or notices several times. If they are dependent on agency staff to read the materials to them, this will be difficult. Agencies are generally not designed to provide this service, and in many states and localities, clients cannot reach their workers by phone even once, much less several times. Even with systems in place to meet this need, an argument can be made that this does not meet the agency's obligation to provide communication that is "as effective" as that provided to others, because people without vision impairments are free to look over agency written at any time of the day or night, whereas no agency will provide reading "on demand" 24/7. Finally, a fundamental principle underlying disability rights laws is that individuals with disabilities, to the greatest extent possible, should be able to function independently, without assistance from others, if they are able and want to do so. Asking the agency to read a document to you is simply not comparable to receiving the document in a format that makes it possible to read it yourself.

IV. Effective communication with individuals with intellectual disabilities

The focus in this chapter on individuals with hearing and vision impairments is not meant to suggest that the effective communication requirement does not apply to individuals with other types of disabilities, such as cognitive (or intellectual) disabilities. The ADA Title II regulation requiring state and local governments to "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communication with others"⁴¹⁴ does not mention particular types of disabilities, and thus applies to communication with individuals with cognitive or intellectual disabilities (including mental retardation, traumatic brain injury, etc.). Providing effective communication with individuals with cognitive and intellectual disabilities could require welfare agencies to:

- Simplify existing written notices and other program materials so that they are easier to read by individuals with a limited ability to read and write
- Read and explain notices (and other program materials) to clients
- Follow up written notices with a phone call to explain the notice⁴¹⁵

⁴¹⁴ 28 C.F.R. § 35.160(a)(1).

⁴¹⁵ The HHS OCR Guidance provides, as an example of a "promising practice," calling or making a home visit, to client with a known mental impairment or learning disability when the agency knows the client will be unable to understand a written notice, before taking negative action against the client based on the notice. HHS OCR Guidance, *supra* note 319, § D(2).

- Send copies of notices to the client and to the client's friend, relative, social worker or other person in the client's life who can go over the notice with the client⁴¹⁶

Title II ADA regulations also mention transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments."⁴¹⁷

⁴¹⁶ See *Blatch v. Hernandez*, 360 F.Supp.2d 595, 633 (S.D.N.Y. 2005). Additional support for the obligation to provide these accommodations can be found in Equal Employment opportunity Commission, *Questions and Answers About Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act*, available at www.eeoc.gov/facts/intellectual_disabilities.html.

⁴¹⁷ 28 C.F.R. § 35.104.

Chapter 9: Accessibility of Welfare Agency Web Sites

Every state welfare agency has a website.⁴¹⁸ Agencies use their web sites to post at least some of the following: information about office location and hours of operation, general descriptions of the public benefits programs, detailed information on eligibility requirements for those programs, information on how to apply for benefits, screening tools that inform individuals whether they may be eligible for benefits, agency policies and policy manuals, notices concerning settlements in lawsuits, answers to frequently asked questions, downloadable application forms, and applications that can be completed and submitted online.

Section I discusses some of the common barriers that individuals with disabilities may have accessing welfare agency web sites. Section II discusses the legal obligation of welfare agencies to have accessible web sites. Section III discusses web accessibility standards and guidelines. Section IV contains information on tools that can be used to check web site accessibility.

I. Common web site accessibility problems

Individuals with disabilities may have difficulty accessing welfare agency web sites and the documents posted on them, for a variety of reasons:

- The web site may contain logos, pictures, or videos that are not decipherable by screen readers used by blind and visually impaired people to convert written text into spoken word.
- Documents on the web site may be in a PDF image format that cannot be read by screen readers and Braille readers that some blind and visually impaired individuals use to read info on web sites.
- Tables containing data, as well as those used primarily for aesthetic reasons, may be incomprehensible to individuals with disabilities using screen readers, which read from left to right and top to bottom.
- Information may be conveyed by color alone (e.g., subway maps identifying subway lines only by color, red text to signify which information the user is required to provide), without descriptive information, and thus be inaccessible to those with vision impairments using screen readers, those with low vision, and those who are color blind.
- Links may be too close together for individuals with fine motor coordination problems to use.

⁴¹⁸ See www.aphsa.org/Links/links-state.asp for links to state welfare agency websites.

- The web site may only be navigable by a mouse. This is a barrier for individuals (such as those with paraplegia) unable to use their hands to operate a mouse, who navigate web sites by holding a stick in their mouth that operates the keyboard.
- Links may be poorly labeled (e.g., “click here”) or may be too far from the text describing their purpose, and thus their purpose may be unclear to individuals with vision impairments using magnifying equipment to view a web site, since less information is visible on the screen at any given time and link may be viewed without surrounding content.
- Pulldown (“cascading”) menus are difficult for individuals using screen magnifiers and those with limited motor skills because it is necessary to click and drag the mouse with precision.
- Insufficient color contrast between text and background may make the web site difficult to read by those with low vision, and the web site may be set up in such a way that the reader cannot adjust color or contrast.
- Layout may be confusing to those using assistive technology, those with cognitive impairments, and others.
- Internal web site search engines may be unforgiving about spelling mistakes. This may pose difficulties for individuals with fine motor coordination, those with learning disabilities, and those with vision impairments (who cannot see the screen and thus are unaware of the error).

II. The legal obligation to have accessible web sites

State and local welfare agency web sites are a part of the agency’s programs and services. As such, they must be accessible to and usable by people with disabilities.⁴¹⁹ As noted in Chapter 4, Title II of the ADA requires state and local government programs, when viewed in their entirety, to be accessible to and usable by people with disabilities.⁴²⁰

⁴¹⁹ See U.S. Department of Justice, *ADA Best Practices Toolkit for State and Local Governments*, Chapter 5: *Website Accessibility Under Title II of the ADA*, (“DOJ Web Site Toolkit”), available at www.ada.gov/pccatoolkit/chap5toolkit.htm; *Martin v. Metropolitan Atlanta Rapid Transit Authority*, 225 F. Supp.2d 1362, 1377 (N.D. Ga. 2002) (holding that until city transit agency web site was accessible, the agency was “violating the ADA mandate of ‘making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service’”); U.S. Department of Justice, *Non-Discrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, Advance Notice of Proposed Rulemaking, 75 Federal Register 43460 (July 26, 2010).

⁴²⁰ 28 C.F.R. § 35.150(a).

This does not necessarily require an agency to make every part of its facilities physically accessible, because program accessibility can be achieved in other ways. However, even if a welfare agency makes information and applications available through other means, it must make its web site accessible, for several reasons:

- Title II of the ADA requires welfare agencies to provide an equal opportunity to participate in and benefit from programs and services.⁴²¹ The internet provides 24/7 access to information and documents without the need to travel, or even to leave home, and without the need for an agency staff person to be available to answer questions and/or provide copies of documents or accept a submitted document. No other means of accessing information, and no other means of applying for benefits, provides the 24/7 access that the internet provides.⁴²² Thus, even if individuals with disabilities have other ways to obtain information and submit applications, if the agency web site is not accessible, individuals with disabilities do not have equal or comparable access to the program. As the Department of Justice has noted, equality of opportunity can only be achieved in today's society only if it is clear to State and local governments that their web sites must be accessible.⁴²³
- If the agency posts information on its web site that is not yet available to applicants and recipients through other means (e.g., recent settlements in lawsuits, recent changes in policy), individuals with disabilities who cannot access this information because the web site is inaccessible have an even stronger argument that equal access has been denied.
- Title II of the ADA requires welfare agencies to ensure that communication with applicants, recipients, and members of the public with disabilities is as effective as with others.⁴²⁴ Web sites are one means of communication. An agency that fails to make its web site accessible to individuals has failed to ensure that communication with individuals with disabilities is as effective as it is with others.⁴²⁵

⁴²¹ 28 C.F.R. § 35.130(b)(1)(ii).

⁴²² DOJ Web Site Toolkit, *supra* note 419.

⁴²³ 76 Federal Register 43462.

⁴²⁴ 28 C.F.R. § 35.160(a).

⁴²⁵ The revised ADA regulations include “accessible electronic and information technology” in the definition of auxiliary aids and services that must be provided when necessary to ensure effective communication. 28 C.F.R. § 35.104.

- For some people with disabilities, including those with mobility impairments, those who cannot drive and those with lack of access to accessible transportation, the web may be the primary or the best means of obtaining information about agency programs or submitting an application for benefits. The fact that information and applications are also available at welfare agency offices may have little practical consequence for these individuals. The failure to make it available on line in an accessible manner may deny equal and/or meaningful access to the agency's programs, services, and information.

III. Website accessibility standards and guidelines

To date, the Department of Justice, which enforces Title II of the ADA, has not developed or adopted a specific set of technical standards that state and local government agency web sites must meet under Title II of the ADA. However, this does not mean that state and local governments can sit back and wait to make their web sites accessible. DOJ has made clear that it expects state and local government agencies to take steps to make their web sites accessible now.⁴²⁶ DOJ materials refer to two sets of existing accessibility standards that agencies should use as a resource in doing so. These standards are discussed below.

A. Section 508 Accessibility Standards

In 1998, Congress passed Section 508 of the Rehabilitation Act.⁴²⁷ Section 508, which applies to federal agencies, requires electronic and information technology, including web sites, to be accessible to people with disabilities. The U.S. Access Board has promulgated Section 508 standards.⁴²⁸ The following are examples of Section 508 internet standards:

- "A text equivalent for every non-text element shall be provided (e.g., via "alt", "longdesc", or in element content)"⁴²⁹
- "Web pages shall be designed so that all information conveyed with color is also available without color, for example from context or markup."⁴³⁰

⁴²⁶ DOJ Web Site Toolkit, *supra* note 419.

⁴²⁷ 29 U.S.C. § 794d.

⁴²⁸ These standards are codified at 36 C.F.R. Part 1194. They are available at www.access-board.gov/sec508/standards.htm and www.section508.gov/index.cfm?FuseAction=Content&ID=11.

⁴²⁹ 36 C.F.R. § 1194.22(a).

⁴³⁰ 36 C.F.R. § 1194.22(c).

- “A text-only page, with equivalent information or functionality, shall be provided to make a web site comply with the provisions of this part, when compliance cannot be accomplished in any other way. The content of the text-only page shall be updated whenever the primary page changes.”⁴³¹
- “When pages utilize scripting languages to display content, or to create interface elements, the information provided by the script shall be identified with functional text that can be read by assistive technology.”⁴³²

The federal government is in the process of updating Section 508 standards.⁴³³ The revised standards are likely to be more similar to the WCAG guidelines discussed below.

B. Web Content Accessibility Guidelines (WCAG)

The Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C), has developed detailed Web Content Accessibility Guidelines (WCAG).⁴³⁴ In December 2008, WCAG Guidelines 2.0 were published. Section 508 standards identify which W3C standards are identical to the Section 508 standards and where differences exist.⁴³⁵

The W3CAG is written in plain English, with explanatory text. Examples of W3CAG standards are as follows:

- “Provide text alternatives for any non-text content so that it can be changed into other forms people need, such as large print, braille, speech, symbols or simpler language.” (Guideline 1.1).
- “Make it easier for users to see and hear content including separating foreground from background.” (Guideline 1.4).
- “Provide users enough time to read and use content.” (Guideline 2.2).

⁴³¹ 36 C.F.R. § 1194.22(k).

⁴³² 36 C.F.R. § 1194.22(l).

⁴³³ Architectural and Transportation Barriers Compliance Board, *Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Telecommunications Act Accessibility Guidelines; Electronic and Information Technology Accessibility Standards*, Advance Notice of Proposed Rulemaking, 75 Federal Register 13457 (March 22, 2010); see also www.access-board.gov/508.htm.

⁴³⁴ These standards are available at www.w3.org/WAI/guid-tech.

⁴³⁵ See notes accompanying 36 C.F.R. § 1194.22.

WCAG supplements each guideline with explanatory information and techniques for implementing the guideline.

C. State law and standards

Almost every state has a general law or policy on accessible technology⁴³⁶ that applies to state agency web sites, or a specific law or policy on web site accessibility. These laws and policies apply to state agency web sites and in some case to other entities' web sites as well. These laws and policies typically adopt Section 508 standards, WCAG guidelines, or some combination of the two. Hewlett Packard has posted a chart on its website listing state laws and policies on web site accessibility which provides a useful starting place for research.⁴³⁷ Advocates should make sure that the information posted there is current. In states with county-administered welfare systems, these state laws and policies may not apply by their terms to county agency web sites. Even if they do not apply, however, county agencies still have an obligation to make their web sites accessible under the ADA and Section 504.

States also have state Offices of Information Technology⁴³⁸ that have a range of responsibilities, including adoption of technology accessibility standards, oversight of the purchase of information technology, and in some states, oversight of state agency compliance with accessibility technology laws or standards. Advocates should research state law and their state's Office of Information Technology to determine whether the state has adopted specific technology accessibility standards.

D. Other sources of guidance on web site accessibility

Advocates should be aware of some of the other resources available on web site accessibility.

⁴³⁶ Ohio appears to be the exception to this rule.

⁴³⁷ Hewlett Packard, *State Web Accessibility*, available at http://www.hp.com/hpinfo/abouthp/accessibility/State_Web_Accessibility.pdf

⁴³⁸ See, e.g., Michigan Department of Information Technology, <http://www.michigan.gov/dit> State of New Mexico Chief Information Officer, www.cio.state.nm.us New York State Office of the Chief Information Officer, www.oft.state.ny.us. Note that these state agencies and offices have different names in different states, some but not all are called "Office of Information Technology."

1. "DOJ ADA Best Practices Toolkit for State and Local Governments, Chapter 5: Website Accessibility Under Title II of the ADA"

The DOJ ADA Toolkit for state and local governments has a chapter on web site accessibility under Title II of the ADA.⁴³⁹ The chapter has an addendum with a checklist⁴⁴⁰ that contains questions like "Do all links have a text description that can be read by a screen reader (not just a graphic or "click here"?) The checklist appears to track the Section 508 standards, but it may not reflect all of these standards. It also addresses other issues, such as developing an agency web site accessibility policy.

2. "Beyond ALT Text: Making the Web Easy to Use for Users With Disabilities"⁴⁴¹

This manual, developed by the Nielson Norman Group, has many useful tips for making web sites accessible, not just for those with vision impairments who use screen readers and magnifying equipment, but also for individuals with manual coordination difficulties, learning disabilities that affect spelling, and other disabilities. It goes beyond a discussion of the Section 508 standards and W3C Guidelines and contains helpful recommendations useful on web page layout that maximizes accessibility, including how to develop text to describe images, the number of links to include on a page, text size, location of links, and other 'usability' issues.

3. "Web Accessibility: Web Standards and Regulatory Compliance"⁴⁴²

This voluminous treatise discusses the technical standards, describes how technology such as screen readers work, discusses the law, and many other topics.

⁴³⁹ *Supra* note 419.

⁴⁴⁰ U.S. Department of Justice, *ADA Best Practices Toolkit for State and Local Governments, Chapter 5 Addendum: Title II Checklist (Website Accessibility)*, available at www.ada.gov/pcatoolkit/chap5chklist.htm.

⁴⁴¹ Kara Pernice et al, Nielson Norman Group, *Beyond ALT Text: Making the Web Easy to Use for Users with Disabilities*, (October 2001), available at <http://www.nngroup.com/reports/accessibility>.

⁴⁴² Jim Hatcher et al., *Web Accessibility: Web Standards and Regulatory Compliance* (July 2006), available at www.friendsofed.com/web-accessibility/index.html.

4. WebAIM

WebAIM, which stands for Web Accessibility in Mind, is a non-profit organization that is committed to expanding the web's potential to for people with disabilities.⁴⁴³ WebAIM's website contains a wealth of information written for individuals who are not web designers on the particular accessibility problems posed by various features of web design, along with information on how to address these problems. WebAIM has also developed WAVE, a web accessibility screening tool (these tools are discussed below) that is fairly straightforward to use.⁴⁴⁴

IV. Checking web site accessibility

There are a number of programs and screening tools that can be used to check or test web site accessibility to identify the changes that must be made to make the web site accessible.⁴⁴⁵ The W3C web site notes that "no tool can automatically determine the accessibility of Web sites." Thus, to get a complete picture of web site accessibility, it may be necessary to hire a consultant or to ask individuals with different types of disabilities and those using different types of technology to try to use the web site.

V. Advocacy on web site accessibility issues

NCLEJ is aware of little advocacy to date by welfare advocates on welfare agency web site accessibility. NCLEJ would be interested in hearing from advocates who raise these issues with state or local welfare agencies.

⁴⁴³ See www.webaim.org.

⁴⁴⁴ See <http://wave.webaim.org>.

⁴⁴⁵ Many are listed at www.w3.org/WAI/ER/tools/complete.html and www.section508.gov/index.cfm?FuseAction=Content&ID=122.

Chapter 10: ADA planning requirements

Both Section 504 and Title II of the ADA contain planning requirements for public entities to ensure that they take necessary steps to come into compliance with these laws. This chapter discusses the ADA and Section 504 planning requirements and their application to TANF and other public benefit programs. Section I provides an overview of ADA and Section 504 planning requirements. Section II discusses which agencies have to draft plans. Section III discusses planning requirements and TANF programs. Section IV discusses strategic reasons for raising ADA/504 planning issues. Section V identifies resources for developing plans.

I. Overview of Section 504 and ADA planning obligations

A. Section 504

1. Transition plan

HHS Section 504 regulations provide that if a recipient of federal financial assistance from HHS needed to make “structural” (i.e., architectural) changes to meet its obligation to make programs and services accessible to and useable by people with disabilities, the recipient was required, by a date long past (November 1977), to develop a transition plan setting forth the steps needed to make these structural changes.⁴⁴⁶ The plan was required, at a minimum, identify the physical obstacles that limit accessibility, describe “in detail” the methods that will be used to make the facilities accessible, and specify the schedule to taking the steps necessary to achieve full accessibility.⁴⁴⁷ If the time period for completing these changes is more than three years, the plan was supposed to identify the steps that will be taken during each year,⁴⁴⁸ and the person responsible for implementing the plan.⁴⁴⁹ The regulations require the plan to be developed with the assistance of interested people, including individuals with disabilities and organizations representing individuals with disabilities.⁴⁵⁰

⁴⁴⁶ 45 C.F.R. § 84.22(e).

⁴⁴⁷ 45 C.F.R. §§ 84.22(e)(1)-(3).

⁴⁴⁸ 45 C.F.R. § 84.22(e)(3).

⁴⁴⁹ 45 C.F.R. § 84.22(e)(4).

⁴⁵⁰ 45 C.F.R. § 84.22(e).

2. Self-evaluation plan

HHS Section 504 regulations also require all recipients of federal financial assistance from HHS to evaluate, within one year after the effective date of the HHS Section 504 regulations (May 1978), all of its policies and practices to determine which ones may violate Section 504, and modify those that have a discriminatory effect on people with disabilities.⁴⁵¹ The regulations also require recipients to take remedial action to eliminate the discriminatory effects of those policies and practices.⁴⁵² Recipients were required to consult interested persons, including people with disabilities and organizations representing people with disabilities, in this process.⁴⁵³ Recipients of federal financial assistance with at least 15 employees were required to make available to the public the list of areas examined, problems identified, and people and organizations consulted and changes made.⁴⁵⁴

B. ADA

Title II ADA regulations have very similar planning requirements.

1. Transition plan

By July 1992, all public entities with more than 50 employees that needed to make “structural” (i.e., architectural) changes to come into compliance with the ADA were required to create an ADA transition plan describing “in detail” the methods that would be used to achieve compliance, as well as any structural changes the welfare agency chose to make, even if they were not required to achieve ADA compliance.⁴⁵⁵ The deadline for making these changes was January 1995.⁴⁵⁶

⁴⁵¹ 45 C.F.R. §§ 84.6(c)(1)(i)-(ii).

⁴⁵² 45 C.F.R. § 84.6(c)(1)(iii).

⁴⁵³ 45 C.F.R. §§ 84.6(c)(1)(i)-(iii).

⁴⁵⁴ 45 C.F.R. § 84.6(c)(2).

⁴⁵⁵ 28 C.F.R. § 35.150(d).

⁴⁵⁶ 28 C.F.R. § 35.150(c).

Public entities were required to provide an opportunity to interested persons, including individuals with disabilities and organizations representing people with disabilities, to participate in the development of the transition plan by submitting comments and make the plans available for public inspection.⁴⁵⁷

2. Self-evaluation plan

By January 1993, public entities were also required to develop an ADA self-evaluation plan that examined the public entity's services, policies and practices, and identified those that "do not or may not" meet the requirements of Title II, and identify changes necessary to achieve ADA compliance.⁴⁵⁸ The regulations require public entities that have drafted such to plans "proceed to make necessary modifications" but contain no specific date by which the changes must be made.⁴⁵⁹

As with transition plans, public entities were required to provide an opportunity for interested persons, including individuals with disabilities and organizations representing people with disabilities, to participate in the self-evaluation process by submitting comments.⁴⁶⁰ If the public entity had more than 50 employees, it was required to make the ADA plan available for public inspection for three years, identify the persons consulted in plan development, describe program areas examined, access problems that were identified, and the changes that were made.⁴⁶¹

_____ Title II ADA regulations provide that if a public entity already complied with Section 504 self-evaluation and transition plan requirements, it was only required to develop ADA transition and self-evaluation plans for programs and services that were not included in the agency's Section 504 plan.⁴⁶²

C. References to planning in the 2001 HHS OCR Policy Guidance

The 2001 HHS OCR Guidance does not refer specifically to transition or self-evaluation plans. It does, however, state that welfare agencies should engage in a "diagnostic review," which appears to be very similar to a self-evaluation. It states:

⁴⁵⁷ 28 C.F.R. § 35.150(d)(1).

⁴⁵⁸ 28 C.F.R. § 35.105(a).

⁴⁵⁹ *Id.*

⁴⁶⁰ 28 C.F.R. § 35.105(b).

⁴⁶¹ 28 C.F.R. §§ 35.105(c)(1)-(3).

⁴⁶² 28 C.F.R. §§ 35.105(d); 35.150(d)(4).

The TANF agency should undertake a comprehensive examination of its own policies, practices, and procedures to determine changes necessary to ensure that TANF participants with disabilities have an equal opportunity to benefit, or otherwise ensure that necessary modifications to policies, practices and procedures are made.⁴⁶³

In order to ensure that necessary modifications are made, the TANF agency may need to conduct a diagnostic review of agency policies, practices and procedures. Based on this review, the agency would determine changes necessary to ensure that people with disabilities have an equal opportunity to benefit from TANF programs. As part of this review, the TANF agency would conduct a thorough assessment of the prevalence of various populations of people with disabilities who participate in its TANF programs. Based on this information, the TANF agency analyzes each step of the TANF program to determine what changes are necessary to ensure that people with disabilities have an equal opportunity to participate in related activities. Appropriate areas for modification following a diagnostic review include:

- (1) the application process and procedures related to notifying beneficiaries of their rights;
- (2) the nature and requirements of TANF programs; and
- (3) policies and practices to aid individuals in sustaining TANF program participation.

Programs appropriate for a diagnostic review include TANF, 'welfare to work,' child care, and any other Federally assisted, State, or local government-run programs related to TANF activities. Alternatively, TANF agencies may engage in other means to ensure that necessary modifications are made to policies, practices and procedures.⁴⁶⁴

⁴⁶³ HHS OCR Guidance, *supra* note 319, § B (b) ("Legal Authority: The Disability Policy Framework; Modifying Policies, Practices and Procedures to Ensure Equal Opportunity").

⁴⁶⁴ *Id.*, § D(2) ("Legal Requirements and Promising Practices: The Legal Requirement to Modify Policies, Practices and Procedures to Ensure Equal Access to TANF Programs and Services").

II. Which public entity must develop the plans?

Some welfare programs are administered by the state agency; others by counties.⁴⁶⁵ In county-administered states, both the State and the local welfare agency will have the requisite number of employees to trigger planning obligations. State and local executives (e.g., Mayor's Office, County Executive) will also have the required number of employees to trigger planning obligations. In some states and localities, an agency other than the welfare agency has responsibility for buildings and physical plant issues. In some states and localities, responsibility for welfare programs is divided between two state agencies (e.g., where the labor agency administers or oversees welfare work programs). This raises the obvious question: Which public entity has the responsibility for engaging in planning for welfare programs?

ADA Title II and Section 504 regulations do not specify which public entity has responsibility for engaging in planning for particular program when more than one public entity has some responsibility for a program.⁴⁶⁶ Despite this lack of clarity, some reasonable parameters for welfare agencies' planning obligations can be identified.

A. At least one public entity must engage in ADA planning for each part of each welfare program

Each welfare program in each part of each state should be covered by at least one a self-evaluation plan, and if necessary, transition plan. If the only entity that has engaged in ADA/504 planning is the executive, chances are good that those plans are not sufficiently specific to address changes that need to be made in welfare agency policies and practices to achieve program accessibility. Where responsibility for a welfare program is divided between two agencies, both entities should conduct a self-evaluation for the part of the program it administers or oversees.

Because multiple entities at different levels of government could have the obligation to engage in ADA or 504 planning for a welfare program, there is a danger that each public entity has assumed that another public entity is responsible for engaging in

⁴⁶⁵ For information on which states use each forms of administration, *see* U.S. Department of Health and Human Services, Temporary Assistance for Needy Families (TANF), Eighth Annual Report to Congress (2008), p 88, available at www.acf.hhs.gov/programs/ofa/data-reports/annualreport8/TANF_8th_Report_111908.pdf

⁴⁶⁶ Given this lack of specificity in the ADA/504 regulations, advocates may need to request plans that cover or include the welfare agency/program from several public entities before the advocate has a complete picture of whether there are transition and self-evaluation plans for a welfare program, and whether those plans are adequate.

the ADA or Section 504 planning for the welfare program, and thus done nothing itself. No agency should assume that another agency is engaging in planning for the welfare program unless it has checked to find out whether that is the case, and checked to ensure that planning did in fact occur.

B. Agencies responsible for physical plant issues can conduct transition plans, but not self-evaluation plans

Agencies and departments responsible for physical plant issues should have the expertise to determine whether architectural changes are feasible, and how long they will take, and thus can draft transition plans, but they are in position to draft self-evaluation plans, which require familiarity with the program rules and practices. If the only plan that covers a local welfare program is the county's transition plan, planning is not adequate or complete. Even when drafting transition plans, however, building agencies may need to consult with others. For example, if the public entity opts to achieve program access by means other than architectural modifications, the plan needs to identify what those means are. If changes in program policies and practices are required, the welfare agency should be involved.

C. It is critical for the state and county welfare agency to play some role in the evaluation process

Even if a state or county executive conducts planning, the executive branch is extremely unlikely to know enough about the operation of the welfare agency's programs to conduct a meaningful self-evaluation. Therefore, the welfare agency, and not just the executive, will have to play a role in the evaluation process even if the final plan is issued by the executive.

D. In county-administered welfare programs, it is critical for counties to play some role in the planning process

Given the issues that should be addressed in a self-evaluation plan, in county-administered programs, counties must develop their own self-evaluation plans or, at a minimum, play some role in the self-evaluation process. Some program practices, such as informal appointment policies, how applications are accepted, or what happens if a client who cannot see or read comes to the welfare office, are likely to vary from one county to another, and states are unlikely to know what those practices are. This the state welfare agency, on its own, cannot evaluate whether these policies and practices impair equal access to people with disabilities.

- E. In county-administered programs, state welfare agencies should oversee the planning process

Even in county-administered programs, the state is the lead TANF agency, and thus, maintains some general responsibility for ADA and Section 504 compliance of the welfare program. If a state delegates to local welfare agencies the task of drafting self-evaluation plans should ensure that local agencies actually undertake such planning, and do an adequate job. One way to do this is to require local agencies to submit their self-evaluation plans to the state welfare agency's ADA Coordinator.⁴⁶⁷ State welfare agencies can play an important role in ensuring that local plans are adequate by providing guidance to local agencies on how to engage in such planning, and providing self-evaluation checklists or model self-evaluation plans.

- F. In county-administered programs, dividing planning responsibility among agencies is probably permissible

It is probably permissible for a state and its counties, or a state and local welfare agencies, to apportion responsibility for drafting a welfare program ADA self-evaluation plan between them. For example, it may make sense for a state welfare agency to review state welfare agency program rules and policies, and a local welfare agency to evaluate local agency practices and issues related to the day-to-day operation of the local welfare program.

III. ADA planning in TANF programs

PRWORA was enacted in 1996, long after the deadlines for developing ADA and Section 504 plans had passed. Title II and Section 504 regulations, do not address the obligations of public entities and recipients of federal financial assistance to draft plans for programs created after the planning deadlines in the ADA and Section 504 regulations. Nor do they require public entities and recipients of federal financial to update their plans when programs change (i.e., from the AFDC program to a TANF program). This raises a question of how the ADA and Section 504 planning requirements apply to TANF programs.

⁴⁶⁷ ADA and Section 504 Coordinators are discussed in Chapter 4.

A. HHS OCR Guidance suggests that all TANF agencies must engage in such planning for their TANF programs

As noted above, the 2001 HHS OCR Guidance suggests that all TANF agencies must engage in such planning for their TANF programs.⁴⁶⁸

B. Public entities that never drafted plans for their welfare programs have an obligation to do so now

Courts have ordered public entities that never developed self-evaluation or transition plans to develop plans after the deadlines for drafting these plans have passed.⁴⁶⁹ Thus, if an agency never engaged in ADA or 504 planning for its AFDC program, there is an argument that it must do so now. Because it would make no sense for welfare agencies to engage in planning for AFDC programs that no longer exist, advocates can argue that the agency must engage in planning now for its TANF program.

C. Agencies that drafted incomplete plans have an obligation to modify and supplement those plans

Courts have ordered agencies that failed to address particular issues in an ADA plan to revise plans even though the deadlines for drafting these plans have passed.⁴⁷⁰ The failure to address the needs of individuals with mental health problems or learning disabilities, or the failure to examine a particular aspect of a program (such as the application process) may make a welfare agency's plans incomplete. Thus, even though planning deadlines have passed, this helps support an argument that the agency must engage in planning now to address issues that were not addressed in previous plans.

⁴⁶⁸ HHS OCR Guidance, *supra* note 319, §§ B(b) ("Legal Authority: The Disability Policy Framework: Modifying Policies, Practices and Procedures to Ensure Equal Opportunity"); D(2) ("Legal Requirements and Promising Practices: The Legal Requirement to Modify Policies, Practices and Procedures to Ensure Equal Access to TANF Programs and Services").

⁴⁶⁹ See, e.g., *Simpson v. City of Charleston*, 22 F.Supp.2d 550 (S.D.W. Va. 1998) (holding that City that failed to draft ADA transition plan must create a plan years after planning deadlines passed or show cause why this should not be required).

⁴⁷⁰ See, e.g., *Clarkson v. Coughlin*, 898 F.Supp. 1019 (S.D.N.Y. 1995) (ordering a State Department of Corrections, which did not address accessibility of prison programs and living quarters in its ADA plan to draft a plan addressing these issues months after planning deadlines had passed).

D. Agencies must draft plans for their Medicaid and Food Stamp programs if they have not done so

Even if a welfare agency could successfully argue that it has no obligation to draft a plan for its TANF program, it had a clear-cut legal obligation to engage in ADA or Section 504 planning for its Medicaid and Food Stamp programs. If the welfare agency failed to do so, it violated the ADA and Section 504, and should be required to engage in such planning now.

IV. Strategic reasons for raising ADA planning obligations

As the years pass, ADA/504 planning requirements may seem less relevant, and advocates engaging in ADA policy advocacy with welfare agencies may wish to focus instead on working with the agency to develop an agency ADA policy that instructs staff on what they need to do now to comply with the ADA/504. Nevertheless, there may be strategic reasons to ask agencies for their ADA/504 plans, or to determine whether they engaged in such planning:

- Without planning, ADA and Section 504 compliance is unlikely. Any welfare agency that has failed to take a systematic look at its programs and determine what changes need to be made to avoid discriminating against individuals with disabilities is likely to be violating the ADA and Section 504 because it is unaware of the changes it should have made.
- Asking a welfare agency for its ADA and Section 504 self-evaluation and transition plans may increase your leverage with the agency in ADA policy advocacy, particularly if it has done little or nothing about ADA and Section 504 compliance.⁴⁷¹

⁴⁷¹ Although this is not a manual for litigators, advocates should be aware that some courts have held that individuals have the right to enforce ADA planning requirements, *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850 (10th Cir. 2003); but others have held that individuals do not have a private right to enforce ADA planning requirements (i.e., only DOJ can hold public entities accountable for planning violations). See *Lonberg v. City of Riverside*, 571 F.3d 846 (9th Cir. 2009); *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901 (6th Cir. 2004). Welfare agency officials may be unaware of this case law, and in any event, advocates can bring planning deficiencies to DOJ's attention. Another issue that has been raised in recent cases is the time period in which individuals can raise ADA legal claims for plans that were drafted years before.

V. Resources for developing plans

Advocates can look to a number of other resources for ideas about what should be included in an ADA or Section 504 plan.

A. OCR Policy Guidance

OCR's Policy Guidance contains a sample "diagnostic review checklist" with a number of useful ideas for questions welfare agencies should ask during a "diagnostic review" or self-evaluation process.⁴⁷²

B. Adaptive Environments Manual

A few years after the ADA went into effect, the U.S. Department of Justice ("DOJ") contracted with Adaptive Environments, Inc. a private organization, to draft a guide that contains a 5-step process for doing a self-evaluation and transition plan.⁴⁷³

C. DOJ ADA Tool Kit

The Department of Justice has developed an ADA best practices tool kit for State and Local Governments to assist state and local officials to improve compliance with Title II of the ADA.⁴⁷⁴ The toolkit contains checklists and survey forms on several specific topics, including effective communication; web site accessibility; curb ramps; and ADA Coordinator, grievance procedure, and notice requirements.

⁴⁷² OCR Guidance, *supra* note 319, App. 1 ("Examples of Promising Practices in Modifying Policies and Programs to Ensure Equal Access").

⁴⁷³ Adaptive Environments, Inc., *ADA Title II Action Guide For State and Local Governments*, (1992), LRP Publications, Horsham, PA. This guide is not on line. The National Center for Law and Economic Justice has a copy.

⁴⁷⁴ U.S. Department of Justice, *ADA Best Practices Tool Kit for State and Local Governments*, available at www.ada.gov/pcatoolkit/toolkitmain.htm.

D. San Francisco survey instrument

Consultants to the San Francisco Mayor's Office on Disability have developed a survey for San Francisco agencies to use to obtain the information needed to draft a self-evaluation plan.⁴⁷⁵

E. Short checklist developed by advocates

A group of welfare advocates from around the country has developed a short checklist that can be used to identify the types of ADA problems in welfare programs that should be addressed in a self-evaluation plan.⁴⁷⁶

F. Earlier ADA-TANF manual

An earlier manual written by the author discusses the topics that should be addressed in a self-evaluation plan.⁴⁷⁷

G. Workforce Investment Act

The federal Workforce Investment Act requires agencies to draft a "Method of Administration" which is similar to an ADA self-evaluation plan. The regulations detailing what a Method of Administration must contain are useful guidance in developing a self-evaluation plan.⁴⁷⁸

⁴⁷⁵ This survey instrument is on file with the author.

⁴⁷⁶ This checklist is is on file with the author.

⁴⁷⁷ Cary LaCheen, *Using Title II of the Americans with Disabilities Act on Behalf of TANF Recipients*, 8 Georgetown J. of Pov. Law and Pol. 1 (Winter 2001), available at www.nclej.org.

⁴⁷⁸ 29 C.F.R. § 37.54.

Chapter 11: Using the ADA in non-litigation advocacy

This chapter discusses some of the ways advocates can use the ADA in non-litigation advocacy. Section I discusses using the ADA in informal advocacy with welfare agencies on behalf of individual clients. Section II discusses making ADA arguments in welfare agency fair hearings. Section III filing ADA grievances with the welfare agency. Section IV discusses using the ADA in welfare policy advocacy, and Section V contains some helpful tips for effective systemic policy advocacy.

I. Using the ADA in informal advocacy on behalf of individual clients

Many advocates make telephone calls and write letters to welfare agencies on behalf of individual clients. While this type of advocacy often relies on state law, regulations, and policy, advocates can also request reasonable accommodations for clients.

Even if the ADA does not entitle the client to any more relief than the client is entitled to under state law and policy, there may be strategic reasons for relying on the ADA in this type of advocacy. Many welfare agencies are aware that they have obligations under the ADA, even if they do not know exactly what those obligations are. Many also know that they have done little or nothing to bring their programs into compliance with the ADA. Thus the agency may be motivated to give a client the relief the client seeks out of concern that if the matter is not resolved favorably for the client, the agency may face an ADA lawsuit.

A sample letter to a welfare agency requesting accommodations under the ADA can be found in Appendix B. Additional letters are available from the National Center for Law and Economic Justice.

II. Raising ADA claims at fair hearings

Advocates may want to consider raising ADA issues in welfare fair hearings. State welfare agencies and other state agencies that provide administrative law judges (“ALJs”) for welfare agency hearings vary in their willingness to decide ADA claims. Some believe they lack the authority to rule on ADA claims or are not comfortable ruling on ADA claims because they lack familiarity with the ADA. Advocates should review the state’s welfare or administrative procedure law, which may address the scope of fair hearings and the hearing officers’ authority.

Some states have adopted or incorporated ADA requirements and concepts into state law or welfare agency policy. In these states, it may be possible to make arguments under that these laws or policies and avoid the question of whether ALJs have the authority to decide ADA claims.

One way to use the ADA in fair hearings is to argue that the agency's failure to provide a reasonable accommodation caused or contributed to the client's failure to comply with a program requirement. The strength of this type of argument may depend on what state statutes and policies say about the obligation to identify clients' disabilities; whether the welfare agency was aware of, or should have been aware of, the individual's disability and need for a reasonable accommodation; and whether the individual requested a reasonable accommodation or whether the agency was on notice of the need for the accommodation.

Although most welfare agencies have a "good cause" provision that can be used to argue that the individual was unable to comply with a program requirement as a result of a disability, there may be strategic reasons for supplementing these arguments with ADA arguments. Some ALJs may be inclined to issue a favorable ruling for a client under state law or policy so they do not have to reach the ADA argument.

Advocates should be aware that raising a civil rights claim in a state administrative hearing and failing to appeal it in state court may preclude a lawsuit in federal court on the same claim or issue.⁴⁷⁹ As a practical matter, however, if the client or legal services office is unlikely to bring litigation on an issue, a fair hearing may be the client's chief opportunity to address the issue.

III. Filing ADA grievances with the welfare agency ADA Coordinator

As noted in Chapter 4, Title II of the ADA requires state and local governments and their agencies and departments to adopt and publish an ADA grievance procedure for the "prompt" resolution of complaints if the agency has more than 50 employees, to be decided by an ADA Coordinator.⁴⁸⁰ HHS Section 504 regulations require all recipients of

⁴⁷⁹ See *Alexander v. Pathfinder, Inc.*, 91 F.3d 59 (8th Cir. 1996) (holding that a parent who lost an administrative hearing challenging her child's release from an institution and failed to appeal the decision in state court was precluded from bringing a lawsuit in federal court raising ADA and Constitutional claims); *cf.*, *Olson v. Morris*, 188 F.3d 1083 (9th Cir. 1999) (doctor who lost an administrative hearing challenging the revocation of his medical license who did not appeal in state court was precluded from filing a federal lawsuit to challenge the license revocation on Constitutional grounds).

⁴⁸⁰ 28 C.F.R. §§ 35.107(a), (b).

federal financial assistance with 15 or more employees to have a grievance procedure and a coordinator to oversee compliance and investigate complaints.⁴⁸¹

The regulations do not mandate time frames for filing or resolving complaints or other aspects of the grievance process, so welfare agencies are free to design their own procedures.

Some welfare agencies may have an ADA/504 grievance policy for job applicants and employees, but not for applicants and recipients of its programs. If the agency has an ADA/504 grievance policy for applicants and recipients, filing grievances may be an efficient way to resolve relatively straightforward issues for individual clients. Filing grievances can also help to build a record on the types of problems clients with disabilities face, and make it more difficult for the agency to claim that it was unaware that a particular problem exists. It is unlikely to be an effective way to resolve more complex issues, and it may not even obtain a particular accommodation for a client on an ongoing basis going forward. In at least one state, an issue raised in an individual grievance led to a subsequent policy modification on the issue benefitting other clients.

IV. Using the ADA in welfare policy advocacy

There are an unlimited number of ways to use the ADA in policy advocacy to obtain improvements in welfare programs for people with disabilities. A few approaches are discussed below. NCLEJ has worked with advocates in a number of states and localities on such policy advocacy and is available to work with advocates on policy advocacy on these issues.

A. Raise systemic problems with a state or local welfare agency and argue that the ADA requires systemic change

In many states, advocates have used the ADA to obtain improvements in agency notices, screening and assessment procedures, sanction policies, and other policies and practices. In some cases, these efforts have grown out of a broader ongoing dialogue between advocates and the welfare agency. In others, advocates have initiated a dialogue with the welfare agency on ADA issues. Chapter 14 summarizes several state welfare agency ADA policies. All but one of these policies were adopted or significantly improved as the result of such policy advocacy.

⁴⁸¹ 45 C.F.R. § 84.7(b).

B. Raise ADA issues in welfare agency or local government advisory committees

Some state and local welfare agencies have consumer or legal advisory committees that provide opportunities for advocates to raise issues concerning the problems faced by people with disabilities who need and attempt to access welfare (or other government benefits and services). If an advocacy organization or advocate is already on such a committee, raising the issue may be as simple as bringing it up at a meeting. If not, advocates can ask to make a presentation to the committee. Advocates can also reach out to current committee members and try to persuade them to take up ADA issues.

C. Raising ADA welfare issues in comments on state or local welfare legislation or proposed regulations

Many bill and regulation drafters fail to consider the effect of a proposed law or regulation on people with disabilities. Often, proposed legislation and regulations will have an effect on people with disabilities that is unintended or different than its effect on others. The ADA may provide a legal handle with which to raise concerns about these proposals and provide a means of obtaining language that requires agency staff to accommodate individuals with disabilities when implementing new laws and policies.

D. Raising ADA welfare issues in state or local legislative oversight hearings

State and local legislatures have committees with oversight authority over welfare agencies. Advocates may be able to interest the committees in ADA compliance issues.

E. Raising ADA welfare issues during the contract approval process

In many states, some welfare program functions are operated by private or non-profit contractors. This poses many challenges for welfare advocacy. Private contractors may not have the same legal obligation as government agencies to provide public participation in policy-making. There is no dispute, however, that the ADA applies to aspects of the welfare program that are provided by contractors, or that Section 504 applies to aspects of the program funded with federal financial assistance.⁴⁸²

⁴⁸² See Chapter 1 for a discussion of this issue.

There are a number of ways that advocates can attempt to shape the welfare agency contracts to try to maximize public accountability of contractors and ensure that the contractors provide adequate services and comply with civil rights laws. A few of these approaches are listed below.⁴⁸³

1. Obtain existing contracts between the welfare agency and contractors

Review the contracts for the following:

- **Language on ADA and Section 504 compliance:** Does the contract require the contractor to have a reasonable accommodation policy? Make reasonable accommodations? Is the ADA and Section 504 language boilerplate, or does it contain meaningful detail about what contractors are required to do to comply?
- **The services to be provided:** How does the contract ensure that services that will be provided to people with disabilities are appropriate, sufficient, and individualized?
- **Staffing and training requirements:** Does the contract place any limitations on who can provide the services provided by the contractor? Are there caseload limits? Are there staffing limits, or training or licensing requirements for staff serving clients with disabilities?
- **Monitoring:** Does the welfare agency require the contractor to provide data or other information to the welfare agency that will enable the welfare agency to monitor ADA and Section 504 compliance?

⁴⁸³ For more information on how advocates can engage in welfare advocacy when services are privatized, see Mary R. Mannix et al., *Public Benefits Privatization and Modernization:: Recent Developments and Advocacy*, 42 Clearinghouse Rev. 4 (May-June 2008); Henry Freedman et al., *Uncharted Terrain: The Intersection of Privatization and Welfare*, 35 Clearinghouse Rev. 557 (Jan.-Feb. 2002); Eileen Sweeney et al., *Language Matters: Designing State and County Contracts for Services Under Temporary Assistance for Needy Families*, 35 Clearinghouse Rev. 508 (Jan.-Feb. 2002).

- **Payment scheme:** Will the contract pricing structure encourage or discourage the contractor from giving people with disabilities the services they need?
2. **Initiate a conversation with the welfare agency before the next Requests for Proposals (“RFPs”) are issued, and advocate to obtain changes in the RFPs**

Ask for specific contract revisions.

3. **Testify at contracting hearings and submit written comments on contracts before they are finalized**

Many states and localities have contracting rules that provide for public input in the contracting process. Even if the welfare agency does not make the changes you advocate for, you can put the agency and contractors on notice that you will be monitoring when the contract is implemented.

4. **Research the contractors, their Boards, and staff**

Determine:

- Whether the contractors have ever delivered the same type of service before, and if so, the contractors’ track records
- Whether the contractors have provided services in your state or community before
- Whether the contractors, Board members or staff have been the subject of adverse publicity or investigations
- Whether contractors’ staff have been the subject of complaints or disciplinary proceedings

5. Contact city and state comptrollers, state and local legislators and other government officials

In some jurisdictions, there are multiple many state and local government bodies and officials with oversight responsibility of welfare agencies or particular aspects of their operation, and multiple agencies with some role in the contracting process or contract oversight. These entities and individuals may be interested in contracting issues because they have a responsibility for ensuring that the agency spends its money wisely and awards contracts fairly.

V. Tips for effective systemic policy advocacy

Generally, ADA welfare policy advocacy on systemic issues is most effective when advocates do the following:

A. Provide examples of clients who have experienced harm

You can cite as examples your own clients, those of fellow staff members, or those from other legal services offices in your state, county or city. Local social service providers are also a good source of information about individuals with disabilities who are having difficulty obtaining or maintaining benefits.

B. Know what steps, if any, the welfare agency has already taken to comply with the ADA

Before meeting with or writing to welfare agency officials about systemic problems, advocates may want to have some idea of whether the agency has taken any steps to comply with the ADA in its welfare program, whether the agency has an ADA policy, and if so, what it requires. Advocates can obtain this information by contacting agency officials or others, and by using your state Freedom of Information Act. Chapter 12 discusses documents you may want to request from your welfare agency.

C. Make specific suggestions for agency improvements

Advocacy is most effective when advocates can suggest alternative policies and practices that the welfare agency should adopt. Advocates can use the policies summarized in Chapter 14 as a starting place for developing a list of policy

recommendations. The HHS OCR Guidance on the application of disability rights laws to TANF programs⁴⁸⁴ should also be helpful.

⁴⁸⁴ HHS OCR Guidance, *supra* note 319.

Chapter 12: Using state Freedom of Information laws to obtain documents on welfare agency compliance with the ADA

States, and many localities, have “Freedom of Information” (FOIL) laws that require state (and in some cases local) agencies and departments to provide copies of agency documents to the public upon request.⁴⁸⁵ This chapter discusses how use Freedom of Information laws as part of ADA policy advocacy. Section I discusses the types of documents and other materials advocates may want to request from welfare agencies. Section II contains tips for requesting ADA documents. Section III discusses what agency documents can prove, and Section IV discusses how the absence of particular types of documents can be used in ADA policy advocacy.

I. Materials advocates may want to request from welfare agencies

There are many documents advocates can request from welfare agencies that are relevant to ADA compliance and ADA policy advocacy. The list below is not meant to suggest that you request all of them. The types of documents you request should depend on how quickly you want the documents (a larger request will probably take longer to process), whether the agency will or is likely to waive fees for copying and providing the documents, the type of issues you are focusing on in your advocacy, and the probative value (or lack thereof) of the documents you are requesting.

A. ADA and Section 504 consumer education materials

- Consumer education (“know your rights”) materials on the ADA and Section 504
- Memos, policies and other documents concerning the distribution of these materials and whose responsibility it is to distribute them
- Posters on the ADA and Section 504 used by the agency

⁴⁸⁵ The National Freedom of Information Coalition website has links to all state Freedom of Information laws: www.nfoic.org/state-foi-laws.

- Memos, policies and other documents concerning where those posters should be located
- Documents related to agency monitoring to determine whether consumer education materials have been distributed and posters have been posted

B. ADA, Section 504, and disability policies

- Agency policies on the ADA and Section 504
- Agency policies on serving people with disabilities or making agency programs accessible to people with disabilities
- Documents relating to the distribution of ADA and Section 504 policies, policies on serving individuals with disabilities, and policies on making agency programs accessible to people with disabilities, to agency staff

C. ADA and Section 504 grievance procedures and coordinators

- The name, address and contact information on the agency's ADA/ 504 Coordinator
- A copy of the agency's ADA/504 grievance procedure
- Copies of grievances that have been filed under the ADA/504 policy (with client name, case number and other identifying information removed)
- Data on the number of grievances filed under the policy, and the number resolved in favor of the client

D. Reasonable accommodations and modifications

- Copies of all reasonable accommodation and reasonable modification policies
- Copies of all documents related to serving clients with disabilities in the agency
- Data on the number of individuals who have requested reasonable accommodations or modifications, the number of requests granted and denied, the type of accommodations/modifications requested, and the reason for denials of requests

E. Data on the prevalence of people with disabilities in the welfare program

- The number of individuals in the agency's welfare program who have disabilities
- The number of individuals in the agency's welfare program who have particular disabilities (such as learning disabilities or mental health problems)
- The number of families in the program who have a child with a disability or serious health problem
- The number of individuals who are exempted from work activities on the basis of disability
- The number of individuals who are exempted from work activities on the basis of a child or other family member's disability
- The number of individuals who have been provided with specific reasonable modifications or accommodations *other than* work exemptions (such as part time work, or flexible schedules to accommodate the need for medical, mental health or substance abuse treatment)

Note: Most welfare agencies are unlikely to have such data.

F. Information related to welfare agency contracts

- Contracts between the welfare agency and private or non-profit organizations conducting disability assessments, operating job training or welfare work programs, or operating any other part of the welfare program
- Documents related to contractors' obligations under the ADA and Section 504
- Audits, reports or other documents related to monitoring contract vendors to determine if they are compliant with the ADA and Section 504
- Corrective action plans submitted by contractors to the agency

G. Training materials for welfare agency staff and contractors

- All training materials used to train agency or contractor staff on the ADA and Section 504
- All materials describing who is required to participate in this training and how often it is provided

H. Disability and employability assessments

- All protocols, manuals and descriptions of the disability and employability assessment process
- All documents addressing how assessors are supposed to make determinations about employability and disability

- All documents addressing the weight to be given to the opinions of clients' treating professionals in making employability or disability assessments

II. Tips for requesting materials through Freedom of Information laws

When you are drafting Freedom of Information requests to welfare agencies on these issues, keep the following in mind:

A. Refer to both the ADA and Section 504

Some welfare agencies may have plans, policies and consumer education materials for Section 504 but not the ADA, and vice versa. Therefore, you should always request the same documents under both the ADA and Section 504.

B. If you don't know what documents, policies, or procedures the agency has, or the terminology used by the agency, use generic terms to describe what you want

Agencies do not always use the same terminology that is used in the ADA or Section 504 regulations. The agency might have a "complaint procedure" that is its ADA and Section 504 grievance procedure; an "equal opportunity officer" who satisfies the ADA and Section 504 requirements or an ADA or Section 504 "Coordinator." It may have a "reasonable modification" or "reasonable accommodation" policy. The agency may provide "home visits," "house calls", or have "homebound services." Use alternative terms when making requests, and/or describe your request in sufficiently general terms that encompass all of the possible terminology used by the agency.

III. What can agency documents prove?

Documents obtained through Freedom of Information laws may shed light on a welfare agency's ADA compliance (or lack thereof) in a number of different ways. Even when documents do not prove that a welfare agency is violating the ADA, they can be helpful in supporting such an argument, or in demonstrating that the agency has not taken steps to implement the ADA.

A. Some documents contain policies that violate the ADA

Example: A welfare agency policy states that staff are not allowed to make any exceptions to a first-come-first-serve appointment policy. This policy violates the ADA because the ADA requires flexibility in this type of policy for individuals with disabilities who cannot wait to be seen as a result of their disabilities.

Example: A welfare agency policy states that staff are not allowed to assist anyone with filling out an application for benefits. This policy violates the ADA because assisting people with applications is a reasonable modification to which some people with disabilities are entitled.

B. Some documents are evidence that the welfare agency believes it must take a particular action to comply with the ADA

Example: A welfare agency policy states that the agency is supposed to make sure, before lowering the client's benefits or closing a case for failing to comply with a program rule, that a client's disability was not the reason for the non-compliance. In practice the agency doesn't conduct such reviews. The existence of this policy can be used to argue that the welfare agency believes such a policy is needed to comply with the ADA. This should help to establish that the agency's failure to comply with the policy violates the ADA.

IV. What can the absence of a document prove?

Often, welfare agencies provide no documents in response to a request for a specific type of document. If the agency has not provided a cover letter describing what documents they are providing, or which items in your request each document is responsive to, you may want to contact the agency to make sure that the failure to provide a particular type of document was not an oversight. Assuming you are sure that the agency does not have a particular type of document, the absence of a document may shed light on the agency's ADA compliance in a number of ways.

- A. The absence of a document may show that the agency is violating the ADA

Example: If the agency has no consumer education materials on the ADA, this is evidence that the agency has violated the ADA because the ADA requires agencies to provide notice of ADA rights to applicants, recipients, and others.⁴⁸⁶

- B. The absence of a document may show that the agency has not taken steps to implement the ADA and is likely to be violating the ADA

Example: If a welfare agency has no written policy on making reasonable accommodations for people with disabilities, it is likely that the agency is not providing reasonable accommodations to all of those who need them, because it is unclear how staff would know when to provide accommodations, whose responsibility it is to provide them, or the types of things that constitute reasonable accommodations.

Note: The absence of a written policy does not, without more, prove that reasonable accommodations are not being provided or that the ADA is being violated. Title II ADA regulations do not specifically require the agency to have a written reasonable accommodation policy. They require the agency to make reasonable accommodations.⁴⁸⁷

Example: If the agency has no staff training materials on the ADA, this shows that the agency has not made an effort to do things that are important for effective implementation of the ADA.

Note: The failure to train staff is not, in and of itself, an ADA violation, because Title II regulations do not specifically require staff training on the ADA. As a

⁴⁸⁶ 28 C.F.R. § 35.106.

⁴⁸⁷ The HHS OCR Guidance, *supra* note 319, is more specific than the Title II regulations about the need for written ADA policies. It states that a welfare agency should “establish a clear written policy that incorporates modifications to policies, practices and programs made to ensure access for persons with disabilities . . .” § B(c) (“Legal Authority; The Disability Policy Framework: Non-Discriminatory Methods of Administration”).

practical matter, however, the agency cannot meet its obligations under the ADA without such training.⁴⁸⁸

- C. The absence of a document may show that the welfare agency is not following its own policies on serving clients with disabilities

Example: A welfare agency has a written policy requiring the agency to make sure, before lowering the client's benefits or closing a case for failing to comply with a program rule, that a client's disability was not the reason for the non-compliance. Nevertheless, when an advocate makes a Freedom of Information request for all documents related to implementation of this policy and all communications to agency staff about the policy, the agency responds that it has none. The absence of these documents strongly suggests that the agency is not complying with, and has not taken steps to implement its own policy.

⁴⁸⁸ The HHS OCR Guidance, *supra* note 319, states that a welfare agency "should train its staff to provide equal access to TANF programs for individuals with disabilities." § B(c) ("Legal Authority; The Disability Policy Framework: Non-Discriminatory Methods of Administration").

Chapter 13: Using federal Offices for Civil Rights in ADA welfare advocacy

This chapter discusses how advocates can use Offices for Civil Rights (OCRs) to obtain improvements in welfare programs for clients with disabilities. Section I explains what federal Offices for Civil Rights are; Section II provides an overview of the OCR complaint process, including the time frame for filing OCR complaints, information to include in a complaint, and the OCR complaint investigation process. Section III discusses OCR compliance reviews. Section IV discusses the ability of OCR to convert a complaint into a compliance review and how advocates can play a role in compliance reviews. Section V discusses issues advocates should consider in deciding whether to file an OCR complaint or request a compliance review. Section VI contains resources for advocates using the OCR complaint or compliance review process. Section VII discusses the option created by the new ADA regulations that permits the U.S. Department of Justice to retain and investigate ADA complaints involving welfare agencies.

In the author's view, federal agency Offices for Civil Rights have not fulfilled their potential as a mechanism for redressing civil rights violations and requiring state and local governments and others to comply with federal civil rights laws in the operation of their programs. Before using the OCR complaint or compliance review process, advocates should carefully consider the benefits and limitations of these processes, and reach out to other advocates who have used the process in their region. It is also possible that in the coming years OCRs will become a more rigorous enforcer of civil rights.

I. Offices for Civil Rights

ADA Title II regulations designate seven agencies with authority for accepting, investigating, and resolving ADA complaints and conducting ADA compliance reviews of state and local government agencies. The U.S. Department of Health and Human Services ("HHS") is the designated agency for all complaints against state and local government entities that relate to the provision of health and social services.⁴⁸⁹ The U.S. Department of Agriculture ("USDA") is the designated agency for Title II ADA complaints involving all state and local government agricultural programs, including the Food Stamp program.⁴⁹⁰ Offices for Civil Rights ("OCRs") within these agencies perform these enforcement activities. In addition, the OCRs at HHS and USDA have authority for investigating Section 504 complaints concerning programs and activities receiving federal financial assistance from HHS and USDA, respectively. The U.S. Department of Justice

⁴⁸⁹ 28 C.F.R. § 35.190(b)(3).

⁴⁹⁰ 28 C.F.R. § 35.190(b)(1).

(“DOJ”) is the designated ADA enforcement agency for programs relating to law enforcement, public safety, corrections, commerce and industry, state and local government support services (such as audit, personnel, and comptroller services), banking and finance, and other government functions not assigned to the six other designated ADA enforcement agencies.⁴⁹¹

This chapter focuses on the OCR at HHS.

II. The OCR complaint process

One way that OCRs enforce disability rights and other civil rights laws is by investigating complaints. Clients and advocates can file a complaint with OCR on behalf of an individual or group of individuals with disabilities concerning a welfare agency’s failure to comply with the ADA or Section 504 (or both).⁴⁹²

A. How much time do you have to file a complaint?

A complaint must be filed within 180 days of the discrimination, unless there is good cause for why the complaint was not filed within this time.⁴⁹³ If the complaint claims that the welfare agency is engaging in an ongoing pattern of discrimination, some, but not all, of the examples of that pattern must take place within 180 days of when the complaint is filed.⁴⁹⁴

⁴⁹¹ 28 C.F.R. § 35.190(b)(6).

⁴⁹² 35 C.F.R. § 170(a); 45 C.F.R. § 80.7(b). There are two sets of procedural regulations that apply to HHS OCR enforcement activities: DOJ ADA Title II regulations (28 C.F.R. §§ 35.170-35.178) and HHS regulations for Title VI of the Civil Rights Act (45 C.F.R. pt. 80). HHS OCR follows DOJ ADA regulations for ADA complaints and HHS Title VI regulations for other complaints, including Section 504 complaints. HHS OCR also has a Case Resolution Manual that provides guidance for staff on complaint investigation and resolution. U.S. Department of Health and Human Services, Office for Civil Rights, *Office for Civil Rights Department of Health and Human Services Case Resolution Manual For Civil Rights investigations* (Revised 2009) (“HHS OCR Case Manual”), available at www.hhs.gov/ocr/civilrights/complaints/crm2009.pdf.

⁴⁹³ 28 C.F.R. § 35.170(b); 45 C.F.R. § 80.7(b).

⁴⁹⁴ HHS OCR Case Manual, *supra* note 492, at 10.

B. Where do you file a complaint?

If a complaint involves a TANF or Medicaid program, it should generally be filed with the OCR at HHS. However, because many people think of DOJ as the ADA enforcement agency, many individuals file ADA complaints with DOJ. For many years, DOJ ADA regulations said that if DOJ received a complaint for which it did not have jurisdiction under Section 504 and for which it is not the designated ADA enforcement agency, it would refer the complaint to the appropriate designated agency.⁴⁹⁵ The recently revised ADA regulations state that if DOJ receives a complaint that should have been filed with another designated ADA enforcement agency, DOJ can either refer the complaint to the appropriate designated agency or exercise jurisdiction and investigate the complaint.⁴⁹⁶ This important change is discussed in Section VI below.

If advocates wish to file a complaint with HHS OCR, the complaint should be filed with the HHS OCR regional office that serves the state. HHS OCR has a headquarters in Washington D.C. and ten regional offices, each of which serves several states. The name and address of each regional office, with a list of states in that region, can be found in Appendix D. In contrast, OCR complaints involving the Supplemental Nutrition Assistance Program are typically filed with USDA OCR headquarters in Washington.

C. What information should you include in a complaint?

The following information should be included in the complaint:⁴⁹⁷

- The name, address and phone number of the complainant;
- If an advocate, friend or other person is filing a complaint on someone else's behalf, the name, address and phone number of the person filing the complaint;
- The signature of the person filing the complaint;

⁴⁹⁵ 28 C.F.R. § 35.171(a)(2)(ii).

⁴⁹⁶ 28 C.F.R. §§ 35.171(a)(2)(ii); 35.190(e).

⁴⁹⁷ See U.S. Department of Health and Human Services, Office for Civil Rights, "Fact Sheet: How to File a Discrimination Complaint with the Office for Civil Rights," available at www.hhs.gov/ocr/discrimhowtofile.html.

- The name, address and phone number of the agency or organization that discriminated against the client;
- What actions or policies caused or led to the discrimination;
- When the discrimination took place; and
- What type of discrimination the client or group experienced.

You should also want to include:

- The nature of the physical or mental impairment the complainant or complainants have, and how those impairments substantially limit the ability to engage in major life activities;
- Why the actions or policies in the complaint were discriminatory, i.e., what part of the ADA or Section 504 regulations they violate;
- The type of relief the complainant seeks; and
- If the complaint is brought under Section 504, what federal funds are involved.

OCR has a complaint form but advocates are not required to use it.⁴⁹⁸

D. Complaint investigation

When HHS OCR receives a discrimination complaint, it has an obligation to investigate promptly.⁴⁹⁹ HHS OCR must attempt to resolve complaints informally whenever possible, and usually tries to settle complaints before it begins an investigation, and throughout the investigation process.⁵⁰⁰ Complaint investigation may include one or

⁴⁹⁸ The form can be found at www.hhs.gov.

⁴⁹⁹ 45 C.F.R. § 80.7(c).

⁵⁰⁰ 45 C.F.R. § 80.7(d)(1); HHS OCR Case Manual, *supra* note 492, at 58, 61. The revised ADA regulations give OCR more leeway to decide whether an informal resolution is appropriate. 28 C.F.R. §

more interviews with the complainant and staff of the welfare program, reviews of program policies and regulations, site visits, reviews of client records, and other investigation methods.⁵⁰¹ Initially, OCR must review the complaint to determine whether the complaint alleges discrimination, whether the agency has jurisdiction to investigate, and other threshold issues. This process is supposed to be completed within 30 days.⁵⁰² If it accepts the case for investigation, it is supposed to notify the complainant and respondent in writing.⁵⁰³

For many years, ADA Title II regulations required HHS to investigate and resolve “each complete complaint” it received.⁵⁰⁴ This is no longer true. The revised ADA regulations states that the designated agency “shall investigate complaints for which it has jurisdiction;” the word “each” has been removed.⁵⁰⁵ In interpretive guidance to the revised regulations, DOJ has explained that it lacks the resources to investigate every complaint and wanted to clarify that designated agencies (including HHS and USDA) “may exercise discretion in selecting title II complaints for resolution.”⁵⁰⁶ Although this statement appears to confuse investigation with resolution, the bottom line is that HHS has the discretion to decline to investigate and/or resolve a complaint.

When HHS OCR investigates and finds a violation of a civil rights law, it may issue Letter of Finding (LOF)⁵⁰⁷ or offer the respondent an opportunity to enter into a voluntary resolution agreement; if an agreement is obtained, a LOF is not issued.⁵⁰⁸ After a LOF is issued, OCR attempts to reach agreement with the respondent on the steps the respondent will take to remedy the problem; this agreement is called a settlement agreement.⁵⁰⁹ OCR is supposed to attach a draft settlement agreement with the LOF it

35.172(c).

⁵⁰¹ HHS OCR Case Manual, *supra* note 492, at 36-57.

⁵⁰² 28 C.F.R. § 35.172(c); HHS OCR Case Manual, *supra* note 492, at 38.

⁵⁰³ HHS OCR Case Manual, *supra* note 492, at 34.

⁵⁰⁴ *See* former 28 C.F.R. § 35.172(a).

⁵⁰⁵ 28 C.F.R. § 35.172(a).

⁵⁰⁶ 28 C.F.R. pt. 35, App. A § 35.172.

⁵⁰⁷ 28 C.F.R. § 35.172. HHS OCR Case Manual, *supra* note 492, at 59.

⁵⁰⁸ HHS OCR Case Manual, *supra* note 492 at 65.

⁵⁰⁹ *Id.* at 67.

sends to the respondent.⁵¹⁰ OCR can also issue a No Violations Letter,⁵¹¹ or a letter confirming that voluntary action was taken by the agency.⁵¹²

If, after a LOF is issued, the respondent refuses to sign a voluntary compliance agreement, ADA regulations require HHS to refer the matter to the Attorney General with a recommendation for appropriate action.⁵¹³ If it is a Section 504 complaint, OCR has more discretion: it can (but is not required to) hold an administrative hearing and decide to withdraw HHS funds from the welfare program (if it is a Section 504 complaint), or refer the matter to the U.S. Department of Justice, which can bring a lawsuit against the welfare agency.⁵¹⁴ In practice, however, HHS rarely if ever takes either of these actions, even in ADA complaints. OCR can also refer the matter to the Attorney General for enforcement if a respondent refuses to provide information needed to investigate the complaint or failed to comply with a settlement agreement.⁵¹⁵

E. Monitoring

When HHS OCR enters into a voluntary resolution agreement or settlement with a respondent, it is supposed to monitor compliance with the agreement.⁵¹⁶

F. Appealing OCR's decision

If a complainant disagrees with HHS OCR's decision, he or she can file a "Request for Review" within 30 days of the date of HHS OCR's letter with HHS OCR headquarters in Washington D.C.⁵¹⁷ Notice of the right to request reconsideration is supposed to be included in the Letter of Findings or closure letter.⁵¹⁸

⁵¹⁰ *Id.*

⁵¹¹ *Id.* at 68.

⁵¹² *Id.* at 62.

⁵¹³ 28 C.F.R. § 35.174.

⁵¹⁴ 45 C.F.R. § 80.8(a); HHS OCR Case Manual, *supra* note 492, at 78.

⁵¹⁵ HHS OCR Case Manual, *supra* note 492, at 78-79.

⁵¹⁶ *Id.*

⁵¹⁷ *Id.* at 73-75.

⁵¹⁸ *Id.* at 73.

III. OCR compliance reviews

A. OCR authority to conduct compliance reviews

HHS OCR also has the authority to conduct compliance reviews of state and local government agencies and recipients of federal funds to determine whether they are in compliance with the ADA, Section 504, or one of the other laws HHS OCR enforces.⁵¹⁹ A number of things can trigger a review, including anecdotal information that discrimination is occurring.⁵²⁰ Advocates can ask HHS OCR to conduct a compliance review of its state or local welfare program.

B. The role of advocates in the OCR compliance review process

Even if you do not plan to file complaints with OCR, you may want to develop a relationship with your regional HHS OCR office. Doing so might make HHS OCR more likely to conduct compliance reviews of welfare programs, or to turn to you for information once they have made a decision to conduct a compliance review. Some HHS OCR staff have said that they want to hear from local advocates but they do not know which organizations to contact. Regional OCR offices may be more familiar with groups that focus on race, sex, and national origin discrimination than with disability rights groups, and they are likely to be even less familiar with organizations engaged in welfare advocacy.

If you learn that HHS OCR is already conducting or intends to conduct a compliance review of the welfare program in your state or county, get involved! Contact your regional HHS OCR office, find out who is conducting the compliance review, and ask to meet with the investigator. This is critical because HHS OCR:

- Should hear clients' and advocates' perspective, and not just the welfare agency.
- Does not know the welfare agency as well as you do. You can give OCR suggestions about who to interview and what questions to ask.

⁵¹⁹ 28 C.F.R. § 35.172(b); 45 C.F.R. § 80.7(a); HHS OCR Case Manual, *supra* note 492, at 80-83.

⁵²⁰ HHS OCR Case Manual, *supra* note 492, at 80.

- Does not know as much about your state or local welfare program as you do. Post-welfare reform, welfare programs differ from one another more than ever. You can play a valuable role in educating HHS OCR about the rules and structure of your state's welfare program.
- May not know as much about your state as you do. When HHS OCR conducts a compliance review of a state program, it typically investigates the state agency and a few counties. You should suggest which counties HHS OCR should investigate, to make sure that HHS OCR investigates counties with the largest welfare programs, the greatest problems, or those that are typical of the rest of the state.

If you learn that HHS OCR is conducting a compliance review of your state or county welfare program, you can file a complaint against the welfare agency. Doing this may increase the chance that HHS OCR will focus on the issues you think are important.

IV. Treating a complaint as a compliance review

The HHS OCR Case Manual states that HHS OCR can treat a complaint filed with OCR as a compliance review when the complaint involves systemic issues, complaint investigation reveals issues not raised in the complaint, or the agency has received multiple complaints against the same respondent, or an individual withdraws a complaint raising systemic issues.⁵²¹ It also states that if the allegations raised in a complaint are also the subject of an ongoing or scheduled compliance review, HHS OCR can close the complaint.⁵²² When HHS OCR decides to close a complaint on this basis, it is supposed to notify the complainant and also consider whether any of the complainant's allegations can be resolved immediately.⁵²³

⁵²¹ *Id.*

⁵²² *Id.* at 71-72.

⁵²³ *Id.* at 72.

V. Considerations in using OCR procedures as part of an advocacy strategy

A. Should advocates file an OCR complaint or request a compliance review?

In the author's opinion, advocates who want to use HHS OCR as part of an advocacy strategy should file HHS OCR complaints (instead of requesting compliance reviews) unless there is a good reason not to do so. HHS OCR complaints have several advantages over compliance reviews:

- Although OCR now has discretion to decline to investigate and resolve complaints, it may be more likely to investigate a formal complaint than to conduct a compliance review that has been requested.
- HHS OCR must notify the complainant and his or her representative that a complaint has been resolved, and provide a copy of a Letter of Findings or compliance agreement.⁵²⁴ HHS OCR is not required to notify clients or advocates that the agency has completed a compliance review, even if HHS OCR met with the advocate or client during the review, and even if the review was prompted by information provided by the client or advocate. Some HHS OCR regional offices do not notify advocates of the results of compliance reviews.
- Advocates may have greater control over the focus of a complaint investigation than a compliance review.

B. Do advocates have to file an OCR complaint before filing a lawsuit?

No. Both Title II of the ADA and Section 504 can be enforced by filing an administrative complaint or a lawsuit.⁵²⁵ There is no requirement that an individual

⁵²⁴ *Id.* at 59.

⁵²⁵ 42 U.S.C. § 12133; 28 C.F.R. § 35.172(d), 35.178; 29 C.F.R. § 794a(a)(2); 45 C.F.R. § 84.61.

exhaust administrative remedies before filing a lawsuit under either Title II of the ADA or Section 504.⁵²⁶

C. Should advocates file an OCR complaint or a lawsuit?

HHS OCR complaints have advantages and disadvantages over lawsuits. Some are discussed below.⁵²⁷

1. Advantages of the OCR complaint process over litigation

- You do not have to be a lawyer to file a complaint.
- HHS OCR, the agency that will decide your complaint, has issued helpful Policy Guidance on the application of the ADA and Section 504 to welfare programs.⁵²⁸
- HHS OCR complaints are not subject to the strict rules on standing and class representation (although some OCR regional offices have required complainants to be in current need of relief before issuing a finding of discrimination).

2. Disadvantages of the OCR complaint process compared with litigation

- HHS OCR offices are severely understaffed. It can take a few years (or more) for HHS OCR to investigate a complaint and issue a Letter of Finding and even longer to finalize a resolution agreement. If an advocate is seeking relief for an individual, it is unlikely to come from HHS OCR in time to help the client,

⁵²⁶ *Schonfeld v. City of Carlsbad*, 978 F.Supp. 1329 (S.D.Cal. 1997), *aff'd*, 172 F.3d 876 (9th Cir. 1999) (Title II).

⁵²⁷ For a more complete discussion of this issue, see Randal Jeffrey, Elisabeth Ryden Benjamin and Constance P. Carden, *Drafting an Administrative Complaint to be filed with the U.S. Department of Health and Human Services' Office for Civil Rights*, 34 Clearinghouse Rev. 276-288 (Sept.-Oct. 2001).

⁵²⁸ See Chapter 4 for a discussion of the 2001 HHS OCR Guidance.

particularly since HHS OCR does not order interim relief while the investigation is taking place.⁵²⁹

- Clients and advocates are not present during the negotiations between HHS OCR and the welfare agency. OCR may be willing to give you an opportunity to express your views about the content of a resolution agreement, but there is no formal mechanism for clients and advocates to participate in this process.
- Advocates and their clients are not a party to resolution or voluntary compliance agreements and cannot enforce them if the welfare agency does not comply.
- HHS OCR regional offices differ in their level of expertise on the ADA/504. Your regional office may have limited familiarity with the ADA and Section 504 beyond physical access issues and the obligation to provide sign language interpreters. Before filing a complaint, you may want to request a meeting with your regional HHS OCR office to get a sense of its priorities and its familiarity with ADA and Section 504 program access requirements affecting your clients before deciding to use the HHS OCR complaint process.
- Some HHS OCR investigations are superficial. HHS OCR may find a welfare agency in substantial compliance with the ADA because it has an ADA policy, without looking at the adequacy of that policy or whether the policy is followed.

D. Can advocates file both an OCR complaint and a lawsuit on the same issue?

Technically, yes. Courts have held that filing an HHS OCR complaint does not limit an individual's ability to file a lawsuit on the same issue because an HHS OCR complaint leads to a compliance agreement that the individual cannot enforce, or

⁵²⁹ The HHS OCR Case Manual does say, however, that if a matter is time-sensitive and a complainant's alleged rights may be adversely affected without speedy action, HHS OCR should "undertake to immediately determine the facts and attempt resolution of the issue." HHS OCR Case Manual, *supra* note 492, at 31.

discontinuance of federal funds to the agency, which does not benefit the complainant.⁵³⁰ Before you plan to use both enforcement mechanisms, however, be sure to consider the following:

- The HHS OCR's Case Manual states that HHS OCR will "may use its discretion" to close complaints when "similar allegations are currently pending in Federal or State court or in another agency, and, based on the nature, history and status of the proceeding, available facts and circumstances of the complaint, deferral by OCR is warranted."⁵³¹ An earlier version of the manual said that OCR would close complaints when "the same allegations" were pending in another matter. It is unclear whether this change reflects a decision by HHS OCR to close more complaints on this basis.
- Judges can decide "as a matter of judicial efficiency" to place a case on hold if the issues in the case have been raised elsewhere.
- There is a possibility that a court may defer to HHS OCR's findings if OCR issued findings prior to the issuance of the court opinion.

One approach is to file a lawsuit and HHS OCR complaint raising the same claims in different agency programs. In New York City, advocates filed a Title VI OCR complaint against the New York City welfare agency for failure to provide language access in the Medicaid program, and a lawsuit against the same agency for failing to provide language access in its Food Stamp program.⁵³² In light of the language in HHS OCR's most recent Case Resolution Manual regarding closing "similar" cases, it is unclear whether this approach would avoid dismissal of the OCR complaint.

⁵³⁰ Cf. *Cannon v. University of Chicago*, 441 U.S. 677, 707 n. 42 (1979) (holding that there is implied right of action under Title IX even though the law contains administrative remedies, in part because individuals cannot participate in the OCR administrative complaint process or enforce an OCR agreement).

⁵³¹ HHS OCR Case Manual, *supra* note 492, at 72.

⁵³² This case and the HHS OCR complaint are discussed in the Clearinghouse Review article cited in note 527.

VII. Resources for advocates using OCR as part of an advocacy strategy

There is no single method for obtaining information on how HHS OCR has resolved complaints or compliance reviews on similar issues. Below is a list of some ways to obtain this information:

A. HHS OCR Website

HHS OCR posts summaries of some Letters of Findings, compliance reviews and resolution agreements on its web site, and in some cases posts the actual Letters, agreements, and reviews.⁵³³ Some of these summaries and related documents can be found in “civil rights special topics.” TANF is one of the topics identified.⁵³⁴ Advocates can review these summaries and submit FOIL requests for the documents from either HHS OCR headquarters or the regional offices, if they are not posted. HHS OCR has informed the National Center for Law and Economic Justice that its current approach is to post summaries of all HHS OCR Letters of Finding and compliance agreements on the topics it has identified as “special topics.” However, advocates should be aware that not all past agreements and Letters are posted there. For copies of earlier Letters of Finding, compliance reviews and agreements on a topic, advocates will have to submit a FOIA request.

HHS OCR also posts summaries of selected case activities on identified issues,⁵³⁵ and summaries of selected settlement agreements⁵³⁶ that are not broken down by topic. HHS also has “electronic reading rooms” with summaries of enforcement efforts and copies of some documents, but OCR does not have its own reading room.⁵³⁷

⁵³³ See www.hhs.gov/ocr/civilrights/resources/index.html.

⁵³⁴ See www.hhs.gov/foia/reading/index.html.

⁵³⁵ <http://www.hhs.gov/ocr/civilrights/activities/examples/TANF/tanfsummaryselected.html>

⁵³⁶ www.hhs.gov/ocr/civilrights/activities/agreements/index.html

⁵³⁷ The HHS web page links to electronic reading rooms are at www.hhs.gov/foia/reading/index.html.

B. Freedom of Information Act

Advocates can make Freedom of Information Act requests to OCR headquarters or to regional offices for Letters of Finding, voluntary compliance agreements and compliance reviews. These documents can be requested from HHS OCR regional offices or HHS OCR headquarters. A number of factors affect whether the request should be directed to the regional office or headquarters:

- If you are interested in learning how HHS OCR has approached a particular issue across the country, the request should be directed to HHS OCR headquarters, because regional offices are not likely to have documents from other HHS OCR regions.
- HHS OCR makes some attempt to categorize enforcement actions by the type of government program involved (e.g., TANF), but it may be difficult to obtain copies of all of the agency's enforcement actions involving welfare programs, particularly from OCR headquarters. Regional offices may have a greater institutional memory of their own investigations and actions.
- Although regional offices are supposed to submit final copies of Letters of Finding, compliance reviews, and compliance agreements to HHS OCR headquarters, this may not always occur, or may take a long time. As a result, HHS OCR headquarters may not have final copies of recent documents.

If you know that a particular document exists and want to obtain a copy, it is probably more efficient to request it from the regional office.

C. National Center for Law and Economic Justice

The National Center for Law and Economic Justice has copies of many HHS OCR complaints and voluntary compliance agreements involving ADA and Section 504 claims against welfare agencies. If you contact us, we can provide you with relevant documents. If you have HHS OCR complaints, Letters of Findings, compliance reviews and compliance agreements on welfare, Medicaid, or Supplemental Nutrition Assistance Program, please provide us with redacted copies so we can share them with others.

VIII. Filing ADA complaints against welfare agencies with the Department of Justice

As noted above, the revised ADA regulations provide that if a Title II ADA complaint is filed with DOJ, DOJ can either refer the complaint to the appropriate designated agency or agency with jurisdiction to investigate a 504 complaint, or DOJ may exercise jurisdiction, keep the complaint, and investigate it.⁵³⁸ This change creates potential new ADA enforcement options for welfare advocates.

For a number of reasons, there may be advantages to filing an ADA complaint against a welfare agency with DOJ. DOJ is likely to have more resources devoted to civil rights enforcement generally, and ADA enforcement in particular. DOJ has a separate division in the agency for ADA enforcement. In contrast, HHS OCR enforces a number of different civil rights laws, and other laws, such as HIPAA. HHS OCR is located within HHS, the federal agency with overall responsibility for the cash assistance and Medicaid programs; DOJ's ADA enforcement division is completely outside of HHS, and thus potentially more distant from state welfare programs. The culture in the two agencies is likely to be different.

This new option, however, is not a panacea. The fact that the regulations give DOJ the option of investigating an ADA complaint involving a welfare agency does not mean that DOJ will exercise its discretion to do so, or will exercise this discretion in your complaint. Advocates who want DOJ to retain jurisdiction over a complaint should contact DOJ before filing a complaint to discuss the complaint, indicate your desire to have DOJ investigate it, and get an idea of whether this is likely. If you have no indication from DOJ that DOJ is interested in retaining jurisdiction over a complaint before you file it with DOJ, you should assume that DOJ will refer the complaint to HHS OCR for investigation.

DOJ is likely to need a reason to retain jurisdiction over a complaint. One possible reason is a particular interest by DOJ in an issue raised in a complaint, based on the nature of a complainant's disability, the type of respondent or program at issue, the nature of the ADA legal claim involved, or other factors. DOJ may be hesitant to exercise jurisdiction in an area that HHS OCR has been active in, such as ADA/504 compliance by welfare programs, or to exercise jurisdiction when a complaint raises issues on which HHS OCR has issued guidance. The best way to learn what DOJ's areas of interest, priorities, and concern are, and to determine whether your complaint is likely to be retained by DOJ, is to contact DOJ before filing a complaint with DOJ.

⁵³⁸ 28 C.F.R. §§ 35.171(a)(2)(ii); 35.190(e). Even before the regulations were revised, DOJ has in at least a few instances investigated ADA complaints against welfare agencies.

Chapter 14: Summaries of Selected State Welfare Agency ADA Policies

This chapter summarizes welfare agency policies in five states. Section I explains the reason for adding this chapter to the manual and the circumstances that led to development of these state policies, explains how state policies were selected for inclusion in the chapter, and contains several caveats about the policies. Section II summarizes the state policies. Section II briefly discusses the importance of local welfare agency policies.

I. Why have a Chapter on state ADA policies?

1. Several State welfare agencies now have comprehensive ADA policies

After this manual was first released in 2004, a number of state welfare agencies adopted ADA policies or revised existing policies and manuals to incorporate ADA requirements. In many states, these policy changes occurred as a result of advocacy efforts in which NCLEJ played a significant role. This chapter has been added to the manual with the hope that it will be useful to advocates in other states who are interested in getting their states to develop or improve welfare agency ADA policies.

Although the title of the chapter refers to “ADA Policies,” the ADA is not always identified in these policies as the reason for a particular policy provision. For example, a number of states added or revised requirements regarding screening to identify disabilities, but rarely if ever identify the ADA as the source of the obligation to screen. However, in all of the states discussed below, at least some of the added or strengthened requirements are specifically identified as ADA requirements. Others are requirements that advocates proposed either because they are required by the ADA, necessary to achieve ADA compliance, or means of achieving ADA compliance, even if they are not identified as such in the policy.

2. None of the policies discussed are perfect

It is important to keep in mind that advocates did not get all of the changes they sought in any of the states discussed below. Further, in some states, particular policy changes that would have been desirable were not sought, either because they would require a change in state law, or because advocates believed their chance of persuading the state to adopt them were slim or worse, or for other reasons. In all of the states

discussed below, however, the new or revised policies are a vast improvement over the agencies' previous policies, and are far more detailed than welfare agency ADA policies in most other states.

3. How policies were selected for this chapter

Several state welfare agencies have developed or revised their ADA policies in recent years. The state policies included in this chapter were selected because they are comprehensive and detailed, and because they contain most or all of the following:

- several examples of reasonable accommodations that must be provided to individuals with disabilities;
- specific steps that must be taken to identify clients' disabilities;
- an acknowledgment of the link between disabilities and non-compliance with program requirements and steps to be taken to prevent individuals from being subject to adverse actions for non-compliance that is the result of a disability;
- detailed requirements for notifying individuals about of their rights under the ADA; and
- detailed requirements for recording information about disabilities and accommodations in a client's case record and what must be recorded.

4. General versus specific language in policies

Many state welfare agency ADA policies discuss ADA requirements and prohibitions, such as the prohibition on excluding individuals with disabilities from programs on the basis of disability, the obligation to provide equal access to programs and services, and other general requirements. While general language is beneficial and far better than silence on the topic, general ADA language, without more, is inadequate to achieve ADA compliance. Why? Because most welfare agency staff have no idea what obligations like "equal access" or "reasonable accommodations" mean, or how these general requirements translate into specific actions that must be taken by agency staff to fulfill their obligations under the ADA. In the author's view, good ADA policies contain both general ADA language, as well as the following specific types of information:

- examples of general requirements like “meaningful access” and “reasonable accommodations” that are relevant to the agency’s programs;
- examples of hypothetical situations in which “meaningful access” is denied and reasonable accommodations are not provided;
- whose responsibility it is at the agency to do the things required to provide to do what to comply with these and other ADA obligations; and
- other “operational details” needed by staff to meet their ADA obligations.

This specificity and “operational details” are the difference between a vague ADA policy and one that has some chance of being implemented. Therefore, while all of the state agency policies discussed in this chapter contain both general ADA language and more specific information, it is the specific language that has been included below.

5. The existence of a written ADA policy does not ensure ADA compliance but is a critical first step

The fact that a state welfare agency has a detailed written policy for providing reasonable accommodations to individuals with disabilities and complying with other ADA requirements does not guarantee compliance with the policy or with the ADA. Getting a state welfare agency to adopt an ADA policy or to revise existing policies to incorporate ADA requirements is only the first step. Without a detailed policy, however, ADA compliance is far less likely, and advocacy on behalf of individual clients far more difficult. Without a detailed ADA policy, it will be necessary to persuade the agency that the action you seek is a reasonable accommodation required by the ADA. If an agency has an ADA policy that requires the agency to take the action you are seeking, your job should be easier.

6. The inclusion of a particular state’s policy in this chapter does not mean the state is complying with the policy or the ADA

This manual makes no representations as to whether welfare agencies in the states discussed below are in compliance with their ADA policies. The reason for including these particular policies is to give advocates a sense of the types of policies that they may want to advocate for and to see different approaches.

II. Selected State welfare agency ADA policies

1. Virginia

In November 2004, the Virginia Department of Social Services issued revisions to its TANF Manual. These changes can be found in the current manual,⁵³⁹ as well as in a transmittal to local agencies summarizing the changes.⁵⁴⁰

In Virginia, TANF applicants and recipients with disabilities have a right to the following:

- Home visits, telephone interviews, and the right to use authorized representatives for interviews when they cannot attend appointments at the welfare agency for a disability-related reason. (*Va. TANF Manual § § 101.1.G; 401.2.A*)
- Help with applying for benefits and getting documents that help establish eligibility for benefits and establish disabilities. (*§§ 105.1-2; 305.1.C; 401.1.D.; 401.2.A.10; 401.2.B.1; 401.5.dd.1; Ch. 1000 p. 12*)
- Employability assessment appointments that do not conflict with medical or mental health appointments. (*Ch. 1000 p. 9*)
- Screening for mental health problems, learning disabilities, and other disabilities whenever the individual requests screening, discloses a disability, or appears to be having difficulty with participation in welfare work activities and a disability may be the reason. (*§§ 901.4.L; Ch. 1000 pp. 6, 8a, 11, 12, 26, 41-43, 52*)
- A free diagnostic evaluation by a qualified professional if screening indicates a possible disability and Medicaid or other sources will not pay for it. (*§§ 901.2.C; Ch. 1000 pp. 7, 18*)

⁵³⁹ The Virginia Department of Social Services TANF Manual is available at <http://www.dss.virginia.gov/benefit/tanf/manual.cgi>.

⁵⁴⁰ Virginia Department of Social Services, *Temporary Assistance for Needy Families (TANF) Program*, TANF Transmittal 27, (November 18, 2004), on file with the author.

- Have the agency and fair hearing officer consider medical documentation from the client's treating doctor or therapist of a disability. (§§ 106.2.F; Ch. 1000 pp .7)
- An activity and service plan that addresses the client's disabilities and the accommodations and services needed by the individual. (§§ 901.4.L; Ch. 1000 pp. 8a, 11, 11b, 12, 14, 52)

People with disabilities have a right to reasonable modifications in work activities, including (§§ 401.5.dd; Ch. 1000 pp. 12, 14).

- Working fewer or flexible hours. (§§ 901.2.C; Ch. 1000 pp. 12, 15)
- Work hours that do not conflict with medical, mental health, substance abuse treatment. (Ch. 1000 p. 15)
- Assignment to particular types of activities. (§§ 901.2.C; Ch. 1000 p. 12)
- No concurrent work activity. (Ch. 1000 pp. 24, 43, 45)
- Fewer job contacts during job search. (Ch. 1000 pp. 15, 19, 21)
- More time in job placement and job development, and in education and training. (Ch. 1000 pp. 12, 15, 47-47a, 72)
- A job coach. (Ch. 1000 p. 15)
- A temporary exemption from work activities if the client can't participate with accommodations. (§ 901.2.C; Ch. 1000 pp. 12)
- Special equipment. (Ch. 1000 pp. 12, 15)

People with disabilities have a right to reasonable accommodations in time limits and deadlines, including:

- The deadline for requesting a hardship exception. (Ch. 1000 pp. 71, 75)

- The deadline for requesting aid continuing if the hearing wasn't request earlier because of a disability. (*§ 105.2.A*)
- The right to reapply for TANF before 24 month TANF ineligibility period is up if person can't work because of disability or disability of family member. (*§ 901.11*)

People with disabilities have a right to reasonable modifications in sanctions, including:

- No sanction can be imposed until after the agency contacts the client by phone to find out why the client failed to comply with a work activity. (*Ch. 1000 pp. 58, 59a*)
- No sanction can be imposed if the failure to comply with a work requirement was the result of a disability or household member's disability. (*§ 901.6.B; Ch. 1000 p. 59*)
- No sanction can be imposed unless a supervisor has reviewed the decision to sanction to ensure that the client was offered screening and provided with accommodations. (*Ch. 1000 p. 59a*)
- Getting a sanction lifted if the non-compliance that led to the sanction was the result of a disability. (*§ 901.6.G*)
- No disqualification from a hardship exception if one or more of the disqualifying sanctions was the result of a disability that was not identified, or if identified, was not addressed. (*Ch. 1000 p. 71a*)
- No intentional program violation can be imposed if disability prevented filing timely and accurate information or client lacked the capacity to intend to defraud because of a disability. (*§ 102.3.B*)

TANF applicants and recipients caring for a household member with a disability have a right to reasonable modifications, including:

- A temporary exemption from work activities. (*§ 901.2.F*)
- Part-time and flexible work activities. (*Ch. 1000 p. 15*)

- Work activities that do not conflict with care-taking responsibilities. (§ 901.2.F; Ch. 1000 p. 15)
- Good cause for non-compliance with work activities if the household member's disability was the reason for non-compliance. (§ 901.6.B)
- Many other modifications in work and other TANF program requirements, if needed because the individual is caring for a household member with a disability. (106.2.B; 106.2.F; 901.2.D; Chapter 1000 pp. 11- 11a, 19, 21, 41a, 59, 71-71a)

2. North Carolina

In 2008, The North Carolina Department of Health and Human Services revised its Work First Manual to incorporate ADA requirements.⁵⁴¹

In North Carolina, TANF applicants and recipients with disabilities have a right to:

- Accommodations in appointments, such as reduced waiting time, home visits, appointments that do not conflict with medical appointments. (*DHS Work First Manual §117.VI.C*)
- Assistance from DHS in completing the First Stop work registration if the individual cannot complete the process because s/he is hospitalized or homebound. (*DHS Work First Manual § 104C.VI*)
- Initial screening for mental health and substance abuse problems. (*DHS Work First Manual §§ 104B.I; 104B.VIII; 117*)
- Rescreening for mental health problems, substance abuse problems, and health problems within 3 or 12 months of termination from assistance. (*DHS Work First Manual § 117.IV*)
- A functional capacity evaluation that assesses the individual's physical and mental ability to engage in work activities. (*DHS Work First Manual § 119.XIV*)

⁵⁴¹ North Carolina Department of Health and Human Services, *Work First Manual*, available at <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-95/man>.

- A referral for assessments by Qualified Professionals in Substance Abuse, mental health professionals, and other qualified professionals when screening indicates that an individual may be at risk of a mental health or substance abuse problem. *(DHS Work First Manual §§ 104B.I; 104B.VIII; 117.X; 118.III.B)*
- A referral for to vocational rehabilitation for an assessment if appropriate. *(DHS Work First Manual § 117.I.D.6)*
- A comprehensive and individualized mutual responsibility agreement that is based on a thorough assessment of the individual's disability and that includes the reasonable accommodations and support services needed by the individual that is updated to include disability-related circumstances that require a reassessment of appropriate work activities. *(DHS Work First Manual §§ 103.IV; 117.I.A; 117.I.C; 117.III.A; 117.VII; 118.II.B; 119.XIV)*
- Support services, including mental health counseling, case management, vocational rehabilitation services, adult day care, and other services needed to engage in work activities and move towards self-sufficiency *(DHS Work First Manual § 117.VII; 117.VIII)*
- Have the individual's disability, requests for accommodations, decisions on accommodation requests, and the type of accommodation provided recorded in the client's case record. *(DHS Work First Manual § 117.VI.E)*
- File a grievance with the program if the individual believes she has not been accommodated. *(DHS Work First Manual § 117.VI.F)*
- Good cause for failure to participate in work activities as a result of illness, participation in substance abuse treatment, or attendance at medical appointments. *(DHS Work First Manual § 120.III)*

People with disabilities have a right to reasonable accommodations in work activities, including:

- Part-time work activities if the individual cannot engage in 35 hours of work activities per week as the result of a disability. *(DHS Work First Manual §§ 103.II.2; 104B.VI; 117.VI.C.1; 118.II.B; 119.XIV)*
- Participation in state work activities that do not count toward the federal work participation rate, such as parent training, behavioral development,

post-secondary education, or other activities if the individual cannot engage in federally countable activities. *(DHS Work First Manual §§ 118.IV)*

- Exemptions from work activities when needed as the result of a disability. *(DHS Work First Manual § 104B.VI; 117.VI.C.2)*
- Restructuring of work activities, including modified work schedules, modified equipment or tests, provision of qualified readers, interpreters, or job coaches. *(DHS Work First Manual § 117.VI.C.3; 118.II.B)*
- Additional supervision at work activities. *(DHS Work First Manual § 117.VI.C.4)*
- Mental health or substance abuse treatment as a work activity. *(DHS Work First Manual § 104B.VI)*
- An exemption from registering with First Stop for clients receiving Supplemental Security Income (SSI), VA benefits based on 100% disability, or Social Security Disability. *(DHS Work First Manual § 104C.V)*
- A determination of whether the individual qualifies for an exemption when he or she fails to participate in work activities. *(DHS Work First Manual § 118.II.C.)*
- A determination of whether there is a disability-related reason for failing to give advance notice that the individual is unable to comply with work activities. *(DHS Work First Manual § 118.II.C.)*

People with disabilities have a right to help with:

- Applying for cash assistance and disability benefits. *(DHS Work First Manual §117.VI.C.5; 117.VIII)*
- Requesting a hardship exemption from the 60 month lifetime time limit on benefits, if help is needed as a reasonable accommodation. *(DHS Work First Manual § 105.V)*
- Gathering and submitting documentation and other information in support of eligibility for benefits and documenting a need for accommodations in work activities. *(DHS Work First Manual §§ 105A.VII.B; 105A.VII.C; 118.II.B)*

- Understanding notices if the individual has a learning disability. (*DHS Work First Manual § 117.VI.C.5*)
- Complying with work participation reporting requirements. (*DHS Work First Manual § 118.VI.D*)

People with disabilities have a right to reasonable modifications in time limits and deadlines, including:

- More time to submit documentation or other information in support of eligibility for benefits. (*DHS Work First Manual §§ 105A.VII.B; 105A.VII.C*)
- A right to have the agency consider stopping the 24 month time clock if the individual becomes ill, disabled or incapacitated or demonstrates a limited physical or mental ability to progress towards self-sufficiency; if reasonable accommodations or supportive services needed by the individual cannot be located or provided; and when the individual is in inpatient or long-term residential treatment for a mental health or substance abuse problem. (*DHS Work First Manual §§ 104B.VI; 105A.III.A; 117.VI.I*)
- A right to more than one delay in requesting a hardship extension if the need for additional time is related to providing reasonable accommodations. (*DHS Work First Manual § 1045A.A*)

TANF applicants and recipients caring for a household member with a disability have a right to reasonable accommodations, including:

- Specialized child care for a child with a disability. (*DHS Work First Manual § 117.VI.C.6*)
- An exemption from work requirements and work registration if the parent is caring for a family member with a disability in the home. (*DHS Work First Manual § 103.IV.A.4*)

3. New Jersey

In 2005, The New Jersey Department of Human Services Division of Family Development issued a freestanding ADA policy applicable to all of the Division's programs, including all programs of state and county local welfare agencies; job training

agencies and their contractors, subcontractors and vendors; and programs for families, youths, and children.⁵⁴²

Under the policy, individuals with disabilities have the right to the following accommodations:

- Assistance with filling out an application
- Assistance in getting documentation in support of an application
- Home visits
- rescheduling appointments when an individual needs to reschedule for a documented reason related to a disability
- Shorter waits for appointments
- Different explanations of program rules
- Alternative notices if a disability affects the ability to read
- Bring a relative with them to appointments
- Have copies of notices sent to a relative, with the client's permission
- Additional time to obtain documents or attend training
- Adjustments in work activities if a disability interferes with the performance of the activity
- Postponement of work activities or time off from work activities for disability-related treatment

⁵⁴² New Jersey Department of Human Services, Division of Family Development, *Providing Services to Individuals with Disabilities*, DFD Program Instruction 05-06-1 (June 1, 2005). The State has not posted the program instruction, but it is available on the Community Health Law Project website at www.chlp.org/News11. As this policy is not in a consistent format, page numbers are not provided.

- Time off from a work activity for a child's disability
- Equipment used to participate in work activities
- Specialized instruction in reading or writing, or job mentoring on site
- Work settings that are accessible to persons with mobility impairments

The policy also requires the following general types of accommodations to be provided:

- Giving a person more time to perform tasks
- Letting a person perform an activity at another place, manner, or time
- Allowing a relative or companion to assist the person in an activity
- Allowing a person to get treatment or services before requiring them to do an activity
- Allowing a person to not engage in an activity if the person is obviously unable to do so
- Auxiliary aids or services to ensure effective communication with individuals with disabilities

In all but exceptional cases, requests for accommodations must be decided within 5 days.

The policy points out that disability rights laws protect family members of individuals with disabilities, and requires accommodations of parents without disabilities so they can engage in caretaking of children with disabilities.

The policy requires offices to do the following to identify clients' disabilities and inform them of their rights:

- Prominently feature posters encouraging individuals with disabilities to report their disabilities and obtain assistance
- Inform clients that disclosure of a disability is voluntary
- Screen clients for disabilities using a specified screening tool and refer the individual to a case manager so a more comprehensive screen can be administered
- Train staff to recognize potential disabilities
- Offer in-depth assessments to identify the nature and severity of a disability and need for an accommodation

The policy requires programs to record the following in the client's case record:

- The clients' disabilities
- Requests for accommodations, even if the words "disability," "ADA" or "accommodation" were not used by the client, if a reasonable person would consider the statement as a request for help that is related to a disability
- Decisions on accommodation requests
- If an accommodation request was denied, the reason it was denied
- Whether and when the accommodation was provided

Programs must do the following to prevent sanctions and other adverse actions:

- Use a compliance-oriented approach
- Perform a pre-sanction review to determine if the individual has a disability-related reason for non-compliance

- If a disability is identified, refrain from taking the adverse action and accommodate the individual's disability
- Refrain from taking an adverse action while a complaint, grievance, or hearing on a discrimination claim is pending
- Systematically assess which clients are being sanctioned and the reason for the sanction, to determine whether disability substantially contributed to the non-compliance

Regarding documentation of a disability, the policy provides:

- Programs cannot require clients to document obvious disabilities before providing them with accommodations
- For disabilities that are not obvious, if the client does not have documentation, the program must give the client a reasonable time to obtain the documentation and accommodate the client while the documentation is being obtained
- Programs must assist individuals in getting documentation of their disabilities

To monitor compliance the ADA and Section 504, programs must:

- Complete a checklist attached to the policy to help identify changes that must be made in policies and practices to come into compliance with the ADA
- Conduct regular oversight of programs to ensure compliance, which can include a review of a random sampling of case records
- Monitor to ensure that current screening and assessments are adequate, whether staff are knowledgeable about the ADA, whether clients' needs are being met,
- Monitor contractors to ensure that they are in compliance with the ADA and Section 504

- Impose penalties on and require corrective action of contractors and subcontractors that are not in compliance

With respect to training, the policy requires programs to:

- Train staff to ensure that there is no gap between policies and actual practices
- Address in training the topics listed in an appendix to the policy
- Ensure that similar training is provided to contractors' staff
- Train all staff that have contact with clients
- Address in training: identification of potential disabilities, reasonable accommodations, individualized treatment, how to work with other agencies with expertise in serving individuals with disabilities, exemptions from welfare work activities, and other benefits programs such as SSI

Regarding an ADA/504 grievance procedure and Coordinator, the policy provides:

- Each local agency must have an ADA/504 Coordinator to oversee ADA/504 compliance, decide ADA grievances, and review all recorded requests for accommodations
- Each local agency must have a back-up Coordinator to decide ADA grievances if the ADA/504 Coordinator was involved in the original decision to deny the accommodation
- All grievances should be reviewed and investigated immediately by the local ADA/504 Coordinator
- If the grievance cannot be resolved by the local Coordinator, it should be referred to the state welfare agency ADA Coordinator, and in all but extenuating circumstances, should be resolved within 14 days

4. Michigan

In 2009, the Michigan Department of Human Services issued an ADA policy that applies to all programs of the Michigan Department of Human Services.⁵⁴³

The policy requires programs to provide the following accommodations for individuals with disabilities:

- Give a person more time to meet deadlines or requirements, more time to engage in time-limited work activities, and more time to get documents and attend training, and delaying or allowing time off from work activities for mental health or other disability-related treatment. (pp. 3-4)
- Give clients 30 days to provide documentation from doctors and other professionals. (p. 9)
- Defer a person from work activities if reasonable accommodations cannot assist the individual in engaging in work activities. (p. 4)
- Provide additional explanation of program rules. (p. 3)
- Provide notices in alternative formats if disability affects the ability to read. (p. 3)
- Allow a person to do an activity at another time and place, manner, or time frame, including providing home visits to individuals and allowing people to reschedule appointments. (p. 3)
- Assist a person in performing an activity, including filling out an application or getting documentation in support of an application or document a disability. (pp. 3, 6)

⁵⁴³ Michigan Department of Human Services, *Non-Discrimination in Service Delivery*, Administrative Handbook 2009-005, AHJ 1313 (July 1, 2009), available at <http://www.mfia.state.mi.us/olmweb/ex/ahj/1313.pdf>.

- Allow a relative or companion to assist a person in an activity, including accompanying the person to appointments and allowing relatives to get copies of important notices, if the client consents. *(p. 3)*
- Allow a person to get treatment or services before requiring them to do an activity. *(p. 3)*
- Provide support services to assist a person in participating in work activities. *(p. 4)*
- Allow for settings that are accessible to individuals with mobility impairments. *(p. 4)*
- Adjust work activities if disability interferes with the performance of the activity. *(p. 4)*
- Allow the person to not do an activity if he or she is obviously unable to do so. *(p. 3)*
- Allow for time off from work activities if needed because of a child's disability. *(p. 4)*
- With the client's written permission, provide information about the client's disability and the reasonable accommodations needed when a referral is made to another agency. *(p. 3)*
- Provide auxiliary aides and services to individuals with hearing, speech, and visual impairments when necessary to ensure effective communication. *(p. 4)*

The policy requires agency staff to record the following information in the client's case record:

- All disability-related barriers;
- Reasonable accommodations needed;
- Requests for accommodations;

- Decisions on accommodation requests;
- Reasons for accommodation denials; and
- Accommodations provided. *(pp. 2, 7)*

The policy requires agency staff to do the following to notify clients of their rights under the ADA:

- Notify clients of the right to request reasonable accommodations. *(p. 5)*
- Notify clients that disclosure of a disability is voluntary. *(p. 5)*
- Put posters in all DHS offices about the rights of individuals with disabilities in clearly visible areas. *(p. 5)*

Agencies must do the following to identify clients' disabilities:

- Ask clients during the application and review process whether they need assistance because of a disability. *(p. 5)*
- Offer applicants and recipients disability screening, and if screening identifies a potential disability, offer the client an in-depth assessment by an appropriate professional to assess the nature and severity of the disability and the need for accommodations. The agency must provide assistance in scheduling the in-depth assessment and pay for it if the client does not have Medicaid coverage or Medicaid will not pay for the assessment. *(pp. 6,8)*
- Be alert to common signs of disabilities such as mental or emotional problems. *(p. 6)*

Agencies must follow the following procedures in processing requests for reasonable accommodations:

- Treat all verbal and non-verbal communications that a reasonable person would interpret as a request for help or that a program requirement is difficult to meet as a request for an accommodation. *(p. 8)*

- Provide accommodations when an obvious disability or barrier exists, even if a disability has not been diagnosed. *(pp. 6, 9)*
- Identify local resources available for individuals with disabilities so they can be offered, and record that this information was provided in the client's case record. *(p. 6)*
- If a caseworker cannot provide an accommodation, ask for assistance from the ADA coordinator in the DHS central office. *(p. 7)*
- Provide accommodations as soon as possible, and in time to prevent an individual from being denied an equal opportunity to participate in and benefit from programs, and in all but exceptional cases, provide accommodations within 5 business days. *(p. 7)*
- Consult with the ADA Coordinator before denying a request for an accommodation or providing a different accommodation than the accommodation that was requested. *(p. 7)*
- If an accommodation request is denied or an accommodation other than the one requested is provided, notify the client in writing (or orally as needed) about the decision, the reasons, and the right to file a complaint with the ADA Coordinator with contact information of the Coordinator. *(p. 7)*
- Provide accommodations before clients have provided documentation indicating a need for an accommodation when an accommodation is requested or it is apparent that it is needed, after consulting with the ADA Coordinator. *(p. 9)*

Individuals' disabilities, need for accommodations, and need for disability services and supports must be addressed in the client's family self-sufficiency plan. *(p. 9)*

The agency ADA grievance procedure provides:

- Local agencies must have an ADA Coordinator and a back-up ADA Coordinator to decide ADA grievances if the ADA Coordinator was involved in the initial decision to deny the accommodation. *(p. 11)*

- In most instances, ADA Coordinators must decide ADA-related grievances within 14 business days and in all but exceptional circumstances, must notify the individual of the decision in writing or alternative format if necessary within 20 calendar days of receiving the grievance. (p. 11)

Michigan DHS has a separate policy requiring staff to screen clients for disabilities⁵⁴⁴ and a policy for providing effective communication with deaf and hard of hearing individuals.⁵⁴⁵

5. Connecticut

In 2006, the Connecticut Department of Social Services revised its Uniform Policy Manual (UPM).⁵⁴⁶ The current manual requires all Connecticut DSS programs to do the following for individuals with disabilities when necessary in the cash assistance, Medicaid, and Food Stamp programs:

- Provide assistance to clients with disabilities who need to provide documentation of a disability to the agency. (Section 1005.10(B)(4))
- Waive office interviews and conduct interviews by phone. (Section 1005.10(B)(13)(b))
- Extend deadlines for providing documentation for eligibility. (Section 1005.10(B)(13)(c))
- Assign a specialized worker to assist the client in completing necessary forms, gathering documentation, and assist with making medical appointments. (Section 1005.10(B)(13)(d))
- Provide forms in Braille or large print. (Section 1005.10(B)(13)(e))

⁵⁴⁴ Michigan Department of Human Services, *Family Automated Screening Tool and Family Self-Sufficiency Plan*, PEM 228, PPB 2008-13, October 1, 2008, available at WWW.Michigan.gov/fast.

⁵⁴⁵ Michigan Department of Human Services, *Effective Communication for Persons who Are Deaf and Hard of Hearing*, AHJ 1314, AHB 2008-05 (December 1, 2008), available at www.mfia.state.mi.us/olmweb/ex/ahj/1314.pdf

⁵⁴⁶ Connecticut Department of Social Services, *Uniform Policy Manual*, available at www.sharinglaw.net/elder/UPM.htm#INDEX.

- Conduct home visits to explain notices or to help complete an application, and receive and review information. *(Section 1005.10(B)(13) (e))*
- Document request for accommodations and decision on the request, and if denied, the reason for the denial, in the client's case record. *(Section 1005.10(B)(15))*
- Inform clients requesting accommodations of the right to file a grievance to review the decision on the accommodation request. *(Section 1005.10(B)(16))*
- Before taking any action on a case, review whether a need for accommodation is recorded in the case record and whether the agency provided the accommodation. *(Section 1005.10(B)(17))*
- Acknowledge receipt of request for accommodations made to the ADA Coordinator within 10 working days. *(Section 1005.10(B)(18)(a))*
- Decide requests for accommodations made to the ADA Coordinator within 20 working days after the request is received. *(Section 1005.10(B)(18)(b))*
- Tag client forms to indicate that accommodations are required so that recipients who need accommodations can be readily identified by staff that see their case record. *(Section P-1005.10(1))*
- Send a memo to an official at the central office with the name and telephone number of every blind and visually impaired individual who wants to be called before the agency mails out a mass notice. *(Section P-1005.10(1))*
- Inform clients of the right to accommodations orally or in writing if an accommodation is needed during application, redetermination, and when providing a notice of action, and whenever it becomes apparent that an individual may need an accommodation. *(Sections 1005.10(B)(5); (6))*
- Provide accommodations to individuals with disabilities without documentation if there is a record of the client's disability. *(Section 1005.10(B)(8))*
- Inform clients who have requested accommodations of the information needed by the agency to decide the accommodation request. *(Section 1005.10(B)(11))*

- Inform assistance units of the right to file an ADA grievance if they believe they have experienced discrimination. (*Section 1005.15 (A)(1)*)
- Accept oral grievances if the assistance unit is unwilling or unable to file a written complaint. (*Section 1005.15 (A)(2)*)

Connecticut also has a screening procedure, which is not included in the Uniform Procedures Manual.

III. Local welfare agency ADA policies

In some states, TANF programs are administered, not by the state, but by county welfare offices. In others, the program is state-administered but local office procedures vary significantly from one local office to another. In both circumstances, local welfare offices may need ADA policies, or at a minimum, implementation procedures, as well. Most state ADA policies cannot include the type of operational details necessary for staff in local offices to know exactly what they need to do and whose responsibility it is to do it. Advocates working with states to develop state agency policies should keep this in mind, and may want to recommend language in the state policy that anticipates this issue and requires local agencies to develop local policies or procedures, and spells out the timetable by which they must do so.

To reduce the danger that local welfare agencies ADA policies will simply repeat the general ADA requirements, advocates may want to recommend that state policies:

- Specify both the topics and the types of details that must be included in a local policy
- Specify that local policies must contain the types of operational details (who what, when, where how) that workers need to know to understand what their responsibilities are
- Contain a model local policy, or at a minimum, a checklist of topics and information to be included in a local policy
- Require localities to submit local ADA policies to the state agency for review

- Invite local agencies to seek technical assistance from the state in developing local policies and procedures

The National Center for Law and Economic Justice has a project in New York State that works to persuade local welfare districts (there are 58) to develop or improve local agency ADA policies. Although the state welfare agency issued an ADA policy, documents obtained through state Freedom of Information Law requests revealed that local agencies had not taken sufficient steps, or in some cases, any steps, to implement it through local policies and procedures and staff training. As a result of the project, some districts have adopted excellent ADA policies and notice of rights materials, and several others are in the process of developing or improving their policies. For further information or copies of local welfare agency ADA policies, contact NCLEJ.

Appendix A: Frequently asked questions about using the ADA on behalf of clients in welfare programs

This chapter discusses some of the issues that frequently arise in welfare programs that have not been discussed elsewhere in the manual. For more information on the issues discussed in this chapter or other issues, contact the National Center for Law and Economic Justice.

I. Does the ADA require clients to ask for reasonable accommodations, or is a welfare agency required to offer them and/or detect that they are needed?

As difficult as this may be to believe, Title II ADA regulations do not say whether individuals have to request reasonable accommodations to trigger a public entity's obligation to provide them. Neither does the HHS OCR Policy Guidance.

Many individuals with disabilities do not request reasonable accommodations from welfare agencies. Some people do not know that their health and mental problems constitute disabilities under the ADA, do not know that the ADA requires the welfare agency to provide reasonable accommodations, or do not know either of these things. Others have disabilities that make it difficult to make such a request. Therefore, in policy advocacy, advocates may want to urge welfare agencies to offer reasonable accommodations to everyone, and/or make "targeted" offers of reasonable accommodations to individuals the agency has a reason to suspect have a disability and a need for reasonable accommodations. In addition, in advocacy on behalf of individuals, advocates may want to argue that even though a client did not request an accommodation, the agency violated the ADA by failing to provide one.

If you are advocating on behalf of an individual, it is always best to request a specific reasonable accommodation for a client, explain why it is needed, and document the request and need for the accommodation. When these steps are taken and the agency does not provide the reasonable accommodation or respond to the request, it should be very easy to demonstrate that the agency has violated the ADA (if the individual has a disability under the ADA and the requested accommodation is reasonable).

Requesting an accommodations whenever possible is also a good idea because even if the agency knows that an individual needs some type of reasonable accommodation, it may not know what type of accommodation the individual needs. No two people are alike, and even two people with the same diagnosis or functional limitation may need or want

different accommodations. (If the welfare agency has already been provided with this information, or provided the same accommodation in the past, that is another matter).

However, there may be circumstances in which advocates want to argue that an agency should have accommodated a client even though the client did not request an accommodation. This is likely to occur when a client has a disability, was unable to comply with a program requirement as the result of not receiving an accommodation, and the agency has taken or intends to take an adverse action against the client. In these circumstances, there are a number of arguments in support of the position that the agency had an obligation to accommodate a client even if she did not request an accommodation. Some of these arguments are fact-dependent, and will not apply in every situation. They are described below.

A. Even employers have an obligation to accommodate some employees who do not request accommodations

In the employment context, the ADA generally requires individuals to come forward and request reasonable accommodations.⁵⁴⁷ The reasons for this are many: Title I of the ADA contains detailed restrictions of the types of questions employers can ask job applicants and employees about their disabilities,⁵⁴⁸ so employers may not know that a job applicant or employee has a disability and needs an accommodation unless the individual steps forward to ask. Further, Congress did not want employers to make assumptions about the limitations or accommodation needs of employees and job applicants with disabilities.

Nevertheless, even in the employment context, the Equal Employment Opportunity Commission (EEOC) has taken the position that an employer should initiate a discussion about reasonable accommodations when the employer: 1) knows the individual has a disability; 2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and 3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. In addition, an employer can ask an employee if an accommodation is needed when the employer knows that the individual has a disability and reasonably believes it may be needed.⁵⁴⁹

⁵⁴⁷ See U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Reasonable Accommodations and Undue Hardship Under the Americans with Disabilities Act*, (October 2002) (“EEOC Reasonable Accommodation Guidance”), “Requesting a Reasonable Accommodation,” available at www.eeoc.gov/policy/docs/accommodation.htm

⁵⁴⁸ 42 U.S.C. § 12112(d).

⁵⁴⁹ EEOC Reasonable Accommodation Guidance, *supra* note 547, at Q, and A no. 13.

Thus, advocates can argue that at a minimum, welfare agencies have an obligation to initiate a discussion about reasonable accommodations in the same circumstances.

B. Title II does not require that a disability must be known to require an accommodation to be provided

Title I of the ADA provides that it is discrimination for employers to fail to provide reasonable accommodations “to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee . . .”⁵⁵⁰ Title II regulations requiring “reasonable modifications” do not use the word “known.” Nor does Title III of the ADA,⁵⁵¹ on which the Title II regulations are modeled.

This argument raises practical questions. Title II does not require public entities to accommodate those without disabilities, so a welfare agency would presumably need some basis for knowing that an individual has a disability and needs an accommodation. Further, as not all individuals with the same disability need the same accommodation, the agency would presumably need some information about the nature of the accommodation needed. The argument does not address what, precisely, welfare agencies must do to accommodate individuals with disabilities of which the agency is unaware.

C. Some state welfare agencies require staff to offer accommodations under some circumstances even when they are not requested

Some state welfare agency requires staff to use behavioral observations, historical data and other information to identify individuals who may not be able to self-identify as having a disability and to offer accommodations to those individuals, even if they have not been requested. The example given in the policy is an individual with a mental disability acting in a hostile or disruptive manner in the client waiting area.⁵⁵²

⁵⁵⁰ 42 U.S.C. § 12112(b)(5)(A).

⁵⁵¹ 42 U.S.C. § 12182(b)(2)(A)(ii).

⁵⁵² See, e.g., New York State Office of Temporary and Disability Assistance, *Providing Access to Temporary Assistance Programs for Persons with Disabilities and/or Limited English Proficiency (LEP)*, 06-ADM-05 (2006) (“New York ADA Policy”) at 11, available at http://onlineresources.wnyc.net/pb/docs/06_adm-5.pdf

D. Some state welfare agencies require staff to interpret requests for accommodations broadly

It is unreasonable to require clients to use “magic words” such as “Americans with Disabilities Act” or “reasonable accommodation” when requesting an accommodation. Many clients are not familiar with these terms, particularly if they have not been provided with any consumer education materials about the ADA that use these terms. At least one state welfare agency policy specifies that clients cannot be required to use particular words in their accommodation requests, and goes on to say that statements by clients that they had difficulty doing something (such as traveling to the welfare office or attending an appointment at a particular time of day) and statements that they are having difficulty doing something (such as engaging in work activities) should be treated as request for an accommodation.⁵⁵³

E. Reasonable accommodations must be offered to avoid discrimination

Title II requires welfare agencies to provide reasonable accommodations when “necessary to avoid discrimination.” The word “avoid” suggests that the agency must do something to prevent discrimination from occurring. If welfare agencies wait for each person with a disability who needs a reasonable accommodation to request one, much discrimination will not be prevented, because many clients will not receive accommodations and will experience adverse consequences as a result. In other words, an argument can be made that to avoid discrimination, it is necessary for welfare agencies to take a proactive approach by offering reasonable accommodations.

⁵⁵³ New Jersey Department of Human Services, Division of Family Development, Providing Services to Individuals with Disabilities, DFD Program Instruction 05-06-01 (2005) (“New Jersey ADA Policy”), available at www.chlp.org/News11.

- F. Reasonable accommodations must be offered to provide an equal opportunity to participate and benefit in welfare programs and avoid administering welfare programs in a manner that has a discriminatory effect

Title II requires welfare programs to provide an equal opportunity to participate and benefit from the welfare agency's programs,⁵⁵⁴ and prohibits the use of policies and practices that have a discriminatory effect, or that impair accomplishment of the objectives of the program for people with disabilities.⁵⁵⁵ Given the large number of welfare recipients with disabilities in welfare programs, the likelihood that a particular welfare applicant or recipient has a disability and needs a reasonable accommodation is higher than it is in many other government programs and services. Moreover, given the types of disabilities welfare recipients are most likely to have, they may be less likely to request accommodations. To ensure that an equal opportunity to participate and benefit is provided, and to ensure that the program is not administered in a discriminatory manner, welfare agencies should offer reasonable accommodations.

- G. Title II planning requirements require welfare agencies to make systemic changes that will decrease the likelihood of discrimination

Unlike Title I of the ADA, Title II contains planning requirements that require welfare agencies to take a systematic look at each aspect of their programs and change those that have a discriminatory effect.⁵⁵⁶ These planning requirements support the argument that Title II does not permit welfare agencies to sit back and wait for individuals to make their needs known, but must review their programs and make necessary changes to ensure equality of opportunity and meaningful access. The regulations do not specify what these affirmative changes are, but advocates can argue that offering reasonable accommodations, particularly to those who appear to need them, is needed to ensure meaningful access and equality of opportunity.

⁵⁵⁴ 28 C.F.R. § 35.130(b)(1)(ii).

⁵⁵⁵ 28 C.F.R. §§ 35.130(b)(3)(i)-(ii).

⁵⁵⁶ 28 C.F.R. §§ 35.105, 35.150(d). These requirements are discussed in Chapter 10.

- H. Welfare programs are different than other programs because they have an obligation to take steps to identify clients' disabilities

As discussed in Chapter 6, the 2001 HHS OCR Policy Guidance and other OCR and HHS statements and materials require welfare programs to offer screening for disabilities. As one purpose of screening is to identify the accommodations needed, the screening requirement is additional evidence that welfare agencies cannot sit back and wait for clients to request accommodations. Further, once the welfare agency has information about a client from disability screening, and any supporting documentation or the results of in-depth assessments, it is in a good position to know what accommodations are needed, and in a good position initiate a discussion about reasonable accommodations, even if the client has not requested them.

- I. In some instances, the welfare agency should have known that the individual has a disability and needed or may have needed an accommodation

Depending upon the facts, it may be possible to argue that the welfare agency should have known that the individual has a disability and needed or may have needed an accommodation. This type of argument can be made if the client discloses an accommodation to the agency, if the client's disability is obvious, if accommodations have been provided to the individual in the past, if the client's case record contains information that indicates that the client has a condition that limits or is likely to limit functioning, or if the client is behaving in a way that suggests that the client may have a disability. Advocates can argue that at a minimum, the agency has an obligation to initiate a discussion with the client to give the client an opportunity to disclose a disability, or to offer accommodations.

II. Are individuals without documentation of a disability entitled to reasonable accommodations?

Title II of the ADA does not address disability documentation issues. In the employment context, the general rule is that employers can require employees to provide documentation of a disability and need for accommodation.⁵⁵⁷ However, an argument can be made that imposing this requirement inflexibly is not permissible under the ADA.

⁵⁵⁷ EEOC Reasonable Accommodation Guidance, Q. And A no. 6, *supra* note 476.

- A. Even employers have an obligation to accommodate employees without documentation of a disability if the disability and need for accommodation are obvious

In the employment context, employers can require employees to provide documentation of a disability when the need for an accommodation if the disability and accommodation are not obvious.⁵⁵⁸ Thus, at a minimum, advocates can argue that welfare agencies cannot require documentation of a disability and need for accommodation when both are obvious.

- B. Some state welfare agencies prohibit welfare agencies from requiring documentation of a disability when the disability is obvious

Some state welfare agency ADA policies provide an exception to disability documentation requirements when a disability is obvious.⁵⁵⁹

- C. Documentation requirements are unreasonable if an individual has not been offered screening and provided an opportunity for an assessment

Welfare agencies have an obligation to offer disability screening to welfare clients and an opportunity for a more in-depth assessment. Some clients can or will obtain documentation of a disability through the assessment process but have not been assessed. This may be because the welfare agency does not generally screen welfare clients or refer them for assessments, because the agency did not screen the client for a disability, or because the individual is in an early stage of the application process and screening and/or an opportunity for an assessment have not yet occurred. It would be unreasonable and unfair to deny the client an accommodation in the early stages of the application process because of a lack of documentation of a disability, when it is not the client's fault that the documentation is not yet available and may be available further on in the process. There is a strong argument that the agency should accommodate the client, and giving the client a reasonable time to provide the documentation.

⁵⁵⁸ *Id.*

⁵⁵⁹ See, e.g., New York ADA Policy, *supra* note 552, at 15; New Jersey ADA Policy, *supra* note 542.

- D. Documentation requirements are unreasonable if the client is applying for Medicaid but does not yet have it

If the client is an applicant, not just for cash assistance but for Medicaid as well, and lacks documentation of the disability because she has no means to pay for the doctors appointments and/or tests required, advocates can argue that the agency should accommodate the client, and giving the client a reasonable time to provide the documentation.

- E. Documentation requirements are unreasonable if the client is not provided with accommodations necessary to obtain documentation

Obtaining copies of existing medical records, asking doctor's offices to write letters, making doctors' appointments, and attending those appointments, may be difficult for individuals with disabilities for reasons related to their disabilities. If help in performing these tasks is needed as an accommodation and is not provided, advocates can argue that the welfare agency should provide the accommodation and at the same time, assist the client with making appointments and obtaining documentation. The argument that the client lacks documentation of a disability because the client needs assistance with obtaining documentation that was not provided is stronger if the client requested help in obtaining the documentation or making doctors' appointments. If a client has an obvious disability (such as an obvious mental health problem), the argument is even stronger. This argument, however, does not eliminate documentation requirements entirely.

III. Are individuals with undiagnosed disabilities entitled to reasonable accommodations?

This issue overlaps with questions I and II above, because many individuals who do not request accommodations fail to do so because they have undiagnosed disabilities, and/or lack documentation of their disabilities.

As with Questions I and II above, the ADA Title II regulations and HHS OCR Guidance do not directly address this issue. However, many of the arguments made above apply equally to undiagnosed disabilities. If an individual is in the early stages of the application process and has not had an opportunity to be screened and assessed, or the agency fails to screen and offer an opportunity for an assessment, it is unreasonable to penalize the individual for failing to provide documentation before the individual has had an opportunity to obtain an assessment that may result in a diagnosis. The same is true of an individual who is also applying for Medicaid, who currently lacks the ability to see a doctor and obtain a diagnosis and documentation. If an individual needs

accommodations to obtain an assessment and they have not been provided, it would also be reasonable to provide an accommodations while assisting the person to obtain an assessment.

IV. Can welfare agencies require welfare recipients to participate in treatment as a condition of receiving benefits?

Some welfare agencies require individuals who are found unable to engage in work activities as a result of a disability to participate in medical, mental health or substance abuse treatment as a condition of receiving cash assistance benefits, and reduce or discontinue benefits when individuals do not comply.

No court has ruled on whether mandating treatment for welfare recipients and reducing or terminating benefits when individuals do not comply violates the ADA. The HHS OCR Guidance does not directly address the issue. Below are some of the arguments that can be made in support of an argument that requiring treatment as a condition of obtaining benefits violates the ADA. There are also arguments that can be made by welfare agencies that mandating treatment as a condition of receiving welfare benefits does not violate the ADA that should be considered by advocates. The author is available to discuss this issue further with advocates.

A. Mandatory treatment is inconsistent with voluntary disclosure of disabilities

The HHS OCR Guidance states that disclosure of a disability must be voluntary.⁵⁶⁰ Requiring welfare recipients to engage in treatment seems inconsistent with making disclosure voluntary. If the consequence of voluntary disclosure is mandatory treatment, over time, clients would be disinclined to disclose disabilities. This in turn would make it more difficult for the welfare agency to provide appropriate services, and as a result, undermine the goals of the welfare program.

⁵⁶⁰ HHS OCR Guidance, *supra* note 319, § D(1).

B. Individuals cannot be required to accept reasonable accommodations

Title II ADA regulations provide that individuals with disabilities cannot be required to accept a reasonable accommodation they choose not to accept.⁵⁶¹ An argument can be made that mandatory treatment is a reasonable accommodation that individuals with disabilities are being required to accept.

C. Requiring people with disabilities to participate in separate or different programs is prohibited by the ADA

Title II regulations prohibit public entities from requiring individuals with disabilities to participate in separate or different programs if they want to participate in programs that are not separate and different.⁵⁶² If an individual with a disability would prefer to participate in a work activity other than treatment, and the individual is qualified for the work activity, the ADA prevents a welfare agency from requiring the individual to attend treatment instead of participating in another work activity. This, however, is not an argument that prohibits mandatory treatment under all circumstances.

D. Mandatory treatment is inconsistent with the ADA philosophy of freedom of choice

As noted in Chapter 4, although the term “freedom of choice” appears nowhere in the ADA, it is implicit in other ADA requirements, including the requirement that individuals with disabilities receive services in the least restrictive environment appropriate to their needs,⁵⁶³ the requirement that individuals with disabilities be served in integrated programs if separate programs are available,⁵⁶⁴ and the prohibition on requiring an individual to accept a reasonable accommodation he or she does not want.⁵⁶⁵ An argument can be made that mandatory treatment as a condition of receiving benefits is inconsistent with freedom of choice.

⁵⁶¹ 28 C.F.R. § 35.130(e)(1).

⁵⁶² 28 C.F.R. § 35.130(b)(2).

⁵⁶³ 28 C.F.R. § 35.130(d).

⁵⁶⁴ 28 C.F.R. § 35.130(b)(2).

⁵⁶⁵ 28 C.F.R. § 35.130(e)(1).

V. How does the ADA apply to welfare time limits?

The Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”), the federal welfare law, gives states considerable discretion in deciding whether to exempt individuals from time limits.

Unfortunately, it is difficult to argue that the ADA requires welfare agencies to provide cash assistance to all people with disabilities for as long as they need it. Language in PRWORA makes clear that TANF benefits are not that type of entitlement.⁵⁶⁶ In addition, the Supreme Court held in a case challenging reductions in the number of days of inpatient care covered by a state’s Medicaid program that while Section 504 requires people with disabilities to be provided with meaningful access to the state’s Medicaid program, they were not denied meaningful access to Medicaid when days of inpatient coverage were reduced, because “nothing in the record suggests that the handicapped in Tennessee will be unable to benefit meaningfully from the coverage they do receive.”⁵⁶⁷ It is difficult to argue that individuals who received cash assistance up to the state’s time limit did not have meaningful access to cash assistance.

Nevertheless, the ADA should narrow the scope of agency discretion regarding time limits. In addition, using the ADA in this context may help to get extensions of time limits for additional individuals.⁵⁶⁸

- A. Policies for extending benefits beyond the time limit cannot have eligibility requirements that are likely to screen out individuals with disabilities in the basis of disability

The ADA prohibits welfare agencies from using “eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”⁵⁶⁹ Eligibility criteria for time limit extensions that screen out individuals with disabilities from qualifying are therefore prohibited by the ADA.

⁵⁶⁶ 42 U.S.C.A. § 601(b).

⁵⁶⁷ *Id.* at 301 (1985).

⁵⁶⁸ While some states exempt individuals from time limits and others extend benefits for additional months, for the sake of simplicity, the manual refers to all means of providing additional months of benefits beyond a time limits an “extension” of time limits.

⁵⁶⁹ 28 C.F.R. § 35.130(b)(8).

Example: A welfare agency policy gives extension of benefits beyond the time limit only to families who have never been sanctioned for failing to comply with work requirements. The welfare agency does a poor job of identifying participants' disabilities and providing appropriate work assignments and reasonable accommodations to individuals with disabilities, and as a result, many individuals with disabilities are sanctioned because their disabilities are not identified or accommodated. The sanctions process is administered in a manner that discriminates against people with disabilities (by sanctioning individuals who were entitled to accommodations they did not receive, that would have enable them to avoid sanctions. The eligibility requirement for time limit extensions also violates the ADA, by screening out people with disabilities from extensions of benefits based on sanctions that violate the ADA.

- B. Extensions of benefits must be administered in a way that gives individuals with disabilities an effective and meaningful opportunity to obtain and benefit from them

The ADA requires welfare agencies to administer extensions of benefits in a manner that provides people with disabilities an equal and meaningful opportunity to participate in and benefit from them.⁵⁷⁰ Some welfare agencies administer extensions of benefits in a manner that denies people with disabilities this equal and meaningful opportunity.

Example: A welfare agency policy states that individuals who have not achieved economic self-sufficiency as a result of disability or other reasons are eligible for extensions of benefits. In practice the welfare agency notifies only those with pending SSI applications that they may be eligible for these extensions. The agency is violating the ADA by systematically denying an equal and meaningful opportunity to obtain extensions of benefits to categories of individuals with disabilities who meet the eligibility requirements for an extension (e.g., those with ADA disabilities who have not applied for SSI and those whose SSI applications have been denied).

⁵⁷⁰ 28 C.F.R. § 35.130(b)(1)(ii); *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

VI. How does the ADA apply to education and training time limits?

Some individuals with disabilities need additional time to complete education and training programs for disability-related reasons. The ADA can be used to argue that these individuals are entitled to attend additional months of training as their primary work activity.

- A. People with disabilities must be provided with an equal and meaningful opportunity to participate in and benefit from education and training programs

Unlike cash assistance, which benefits recipients each month it is provided, the benefit of education and training program is largely obtained when the individual completes the program and obtains a diploma, license, certificate, or degree. Therefore, an argument can be made that an individual with a disability who is unable, for a disability-related reason, to complete an education and training program within the education and training time limit, does not have an equal and meaningful opportunity to benefit from the program, and should be permitted to finish the program as a primary work activity as a reasonable modification under the ADA.

Example: An individual is unable to take a full-time course load as the result of a visual, physical or learning disability. As a result, it will take her longer to complete the program than the welfare program education and training time limit allows. This individual will be denied an equal and meaningful opportunity to benefit from the education or training program in violation of the ADA if she is not permitted to complete the program as her primary work activity.

Example: An individual with a disability needs a reasonable accommodation or auxiliary aid or device (such as a sign language interpreter) to participate in and benefit from an education or training program. The modification, aid or device is not provided for six months by either the education or training program or the welfare agency. As a result, the individual was unable to follow, understand, or benefit from the program during the period of time that the modification is not provided. The individual will be denied an equal and meaningful opportunity to participate in and benefit from the program unless she is allowed to remain in the program for an additional six months, or to retake the program, with the modification, aid or device that she needs.

Appendix B: Sample Letter Requesting Reasonable Accommodations

DATE

Worker

Local Welfare Office

123 Toonses Lane

Somewhere, NY 12345

BY FAX

Re: Charlotte X

Case no.:

Dear Ms. Worker:

I am writing on behalf of my client, Charlotte X, to request a reasonable accommodation under the Americans with Disabilities Act (ADA).

Ms. X, a 56-year old woman, has rheumatoid arthritis and high blood pressure. As a result of her rheumatoid arthritis, it is difficult for Ms. X to walk or stand for more than a few minutes at a time without experiencing a great deal of pain. The ____ welfare office is (distance) from her home, and traveling to the office requires a great deal of walking. As a result, it is extremely difficult for her to travel to the ____ welfare office for routine appointments, including her upcoming recertification appointment scheduled for (date). A letter from Dr. Y., Ms. X's doctor, verifying that she has rheumatoid arthritis, and describing its affect on her mobility, is being faxed with this letter.

I am writing to request that the agency:

- 1) Conduct Ms. X's upcoming recertification appointment at her home;
- 2) Place Ms. X on "homebound" status so future DSS appointments take place at Ms. X's home, until medical evidence indicates that her condition has improved and she is able to travel to attend appointments; and

3) Refrain from sending Ms. X. appointment notices informing her that she must come to the ____ welfare office for appointments, and stating that her benefits may be stopped if she does not attend.

Ms. X is entitled to home visits as a reasonable accommodation under the Americans with Disabilities Act, 28 C.F.R. § 35.130(b)(7). Please contact me by (date) to inform me whether the agency will provide this reasonable accommodation for Ms. X, and if the accommodation will not be provided, the reason the request is being denied.

Sincerely,

Appendix C: Key advocacy efforts on behalf of clients in welfare programs using the OCR complaint process

Over the past few years, advocates have used the OCR complaint process to raise disability discrimination issues in welfare programs. Some of these complaints, and complaint resolutions (Letters of Findings, compliance reviews, compliance agreements) are summarized below. The summaries below are not comprehensive, and do not include every argument made by advocates, finding by OCR, or action agreed to in a compliance agreement. They are intended to provide examples of the types of arguments made by advocates, OCR findings, and actions agreed to in compliance agreements.

Florida

Settlement agreement between the HHS Office for Civil Rights and the Florida Department of Children and Families

Since 1999, OCR has investigated several complaints against the Florida Department of Children and Families (DCF) alleging that DCF failed to provide sign language interpreters and auxiliary aids and services to DCF clients or their companions. (File Nos. 00-2441, 02-02518, 05-36562, 10-104893). The first investigation resulted in a voluntary resolution agreement in 2000. The second and third investigation resulted in Letters of Finding finding that DCF violated the ADA and Section 504 and failed to correct deficiencies that DCF agreed to address in the 2000 resolution agreement. The fourth investigation, conducted after Jacksonville Legal Aid filed a complaint on behalf of four individuals in 2007, also found that DCF violated the ADA and Section 504.

In January 2010, DCF entered into a settlement agreement in which DCF agreed to:

- Provide the particular type of auxiliary aid or service requested by the deaf or hard of hearing client or companion in “aid-essential situations,” including but not limited to: many medical or mental-health-related communications, discussions of client rights and informed consent, public benefits eligibility determinations (except during completion of an initial food stamp application), educational classes, presentations concerning DCF programs, and adult or child protective services investigation interviews;
- Provide an interpreter within 2 hours after a request is made in an emergency situation that is not a scheduled appointment;

- Provide an interpreter at the time of scheduled appointments, and if an interpreter fails to appear, provide an interpreter available within two hours after the scheduled appointment;
- Use qualified interpreters, and contract with interpreter services that provide certified interpreters;
- Not use family members, advocates, or friends to interpret or facilitate communication unless the customer or companion wants the individual to assist with communication, the individual agrees to assist, the use is appropriate under the circumstances, the client is made aware of the right to free auxiliary aids and services, and the client or companion confirms in writing that she was made aware of free auxiliary aids and services;
- Contract with an independent consultant, selected with OCR's approval, to monitor DCF efforts to comply with the settlement agreement, provide technical assistance to DCF, conduct assessments, and develop or approve plans and documents;
- Develop and implement an action plan, self-assessment plan, training plan, and monitoring plan within specified time frames and incorporate each term of the settlement agreement into each of the plans;
- Submit all plans, policies, procedures, compliance reports, and other relevant documents to the independent consultant for review, to DCF for approval, and to OCR for monitoring and approval;
- Create and advisory committee of professionals who work with deaf and hard of hearing individuals to advise DCF and the independent consultant on implementing the settlement agreement;
- Designate an ADA/504 Coordinator at each DCF administrative and regional office and a "Single Point of Contact" at each DCF direct service facility and DCF contractor to coordinate provision of auxiliary aids and services to deaf and hard of hearing individuals and other ADA/504 compliance issues;
- Develop and distribute a revised interim and final policy for ensuring effective communication with deaf and hard of hearing individuals to all DCF personnel and relevant advocacy organizations;

- Develop a customer grievance/feedback forms to evaluate services;
- Survey deaf advocates who assist deaf and hard of hearing clients and companions on their experiences with DCF;
- Conduct a communication assessment of all deaf or hard of hearing clients and companions, including those who come to the agency without scheduled appointments, using a communication template;
- Post notices about the right to appropriate auxiliary aids or services near entrances of all DCF administrative offices and direct service facilities;
- Notify individuals who have not requested auxiliary aids and services who may need them of their right to appropriate auxiliary aids and services free of charge;
- Make notices of the right to free auxiliary aids and services, grievance and complaint forms, privacy information and other written information determined by DCF to be of sufficient importance to all clients and companions available in American Sign Language on DVD, CD rom, or downloadable internet files;
- Record information regarding the type of auxiliary aid or service requested; the nature and importance of the communication at issue; the individual's communication abilities, and number of people involved in the communication, and the auxiliary aid or service provided in the client's case record;
- Provide a written denial of requested auxiliary aids or services to the client with the reason for the denial (in circumstances that are not "aid-essential situations," where DCF has such discretion);
- Train ADA/504 Coordinators, Single-Point-of-Contacts and other personnel who typically interact with clients on the ADA and Section 504, the settlement agreement, and auxiliary aids and services; and
- Provide compliance reports prepared by the independent consultant to OCR.

The settlement agreement contains extensive detail about the duties of the independent contractor, ADA/504 Coordinators, and Single-Point-of-Contacts; the contents of required plans; the nature of the monitoring activities; the composition and role of the advisory committee; and the deadlines by which specific actions must be initiated and completed, and other requirements of the agreement.

2007 Letter of Finding available at:

www.hhs.gov/ocr/civilrights/activities/agreements/index.html

Compliance agreement available at:

www.hhs.gov/ocr/civilrights/activities/agreements/index.html

For more information, contact: Sharon Caserta, Jacksonville Legal Inc.

126 West Adams Street, Jacksonville, FL. 32202 Telephone # (904) - 353 - 1320
V/TTY, Video Phone # 904-245-1121, sharon.caserta@jaxlegalaid.org

Georgia

Voluntary compliance agreement between the HHS Office for Civil Rights and Georgia Department of Human Resources

Georgia Legal Services filed several complaints (OCR Complaint Nos. 00-04-7015-7017, 04-00-7054-56, 00-04-3068-69, 00-043129) with OCR on behalf of individual welfare recipients with disabilities who were denied reasonable accommodations in work activities, appointments, assessments, and other aspects of the TANF program. The complaints were filed as part of a coordinated strategy, because advocates were aware that OCR was conducting a compliance review of the welfare agency and they wanted to ensure that OCR addressed particular issues. OCR investigated the complaints and in February 2001, entered into a compliance agreement with the state welfare agency in which the welfare agency agreed to:

- Delegate duties to an ADA/Section 504 Coordinator to assure coordination of the agency's compliance efforts;
- Develop procedures to ensure that individuals receive reasonable accommodations and receive evaluations from the state vocational rehabilitation agency;

- Meet with Georgia Legal Services and OCR to discuss how the agency will address the particular needs of the individual complainants;
- Ensure that the welfare agency's disability work group meets regularly and includes Georgia Legal Services and OCR in its meetings;
- Submit a training agenda for training staff on the ADA to OCR;
- Ensure that each county office has taken steps to provide effective communication with sensory-impaired clients; and
- Develop procedures to reach out to people terminated from TANF whose disabilities may not have been properly identified, starting with those who have received lifetime sanctions;

Compliance agreement available at:

www.hhs.gov/ocr/civilrights/activities/examples/TANF/tanf-gahrdcsreview.pdf

For more information, contact: Nancy Lindbloom, Georgia Legal Services, 215 Southview Drive, Athens, Ga. 30601 (706) 369-5922, nlindbloom@glsp.org

Massachusetts

OCR Letter of Finding in complaint filed on behalf of parent of two children with mental health problems

The Massachusetts Advocacy Center filed a complaint (OCR Complaint No. 03-10879) on behalf of a mother of two teenage siblings with serious mental health problems. The family was homeless. The Massachusetts welfare agency provided a range of services to homeless families, including placement in congregate shelters, and placement in hotels when shelters are full. The agency placed the family in a motel for several months because a shelter placement was not available, and later, transferred them to a congregate care shelter when space opened up.

The shelter environment caused a deterioration in the mental health of both children, so the complainant requested a transfer back to the motel. She explained the reason for the request and submitted documentation, including a letter from the children's psychiatrist. After taking several months to make a decision, the agency denied the request.

OCR issued a Letter of Findings in January 2004 finding that the agency violated the ADA by failing to provide the requested reasonable accommodation, failing to have an adequate reasonable accommodation policy, and failing to provide adequate notice of ADA and Section 504 rights. The Letter of Findings states that to comply with the ADA and Section 504, the welfare agency must:

- Investigate reasonable accommodation requests and engage in an interactive process with the individual requesting the accommodation even though medical documentation of disabilities and the need for the reasonable accommodation has not yet been provided;
- Develop a chain-of-command for decision-making on reasonable accommodation requests;
- Have a time frame for reviewing and deciding reasonable accommodation requests;
- Have a method for communicating a decision and the right to appeal;
- Provide guidance to agency staff on how to decide reasonable accommodation requests;
- Train staff on the new policy and guidance;
- Ensure that contractors make reasonable accommodations by developing procedures for contractors and training contractors' staff;
- Develop an effective ADA and Section 504 notice;
- Include information on the ADA and Section 504 in shelter notices;
- Develop procedures for informing individuals of their rights during intake, development of self-sufficiency plans, and/or discussions of non-compliance; and
- Provide the requested modification to the complainant.

Compliance agreement available at: National Center for Law and Economic Justice website: www.nclej.org

For more information, contact: Michelle Lerner, lernermichelle@aol.com.

HHS OCR Letter of Finding in complaint filed against the Massachusetts Department of Transitional Assistance on behalf of two individuals with learning disabilities

In 1998 the Massachusetts Law Reform Institute filed a complaint (OCR Complaint No. 01-98-3055) on behalf of two individuals with learning disabilities in the TANF program. In January 2001, OCR issued a Letter of Findings stating that the following welfare agency practices contributed to ADA and Section 504 violations by the welfare agency:

- Failing to screen and assess the complainants to identify the nature of their disabilities even after one complainant told the agency about her learning problem and the other had a history of attending special education;
- Referring the complainants to education and training programs taught by individuals with no experience teaching people with learning disabilities;
- Failing to monitor the agency's compliance with the ADA and Section 504 and the compliance of contractors; and
- Failing to train staff to recognize and accommodate people with disabilities, programs and services available for people with disabilities, and the ADA.

The OCR Letter required the agency to take the following corrective actions:

- Provide for an initial screening, and when necessary, an assessment, of TANF recipients to determine whether they have learning disabilities;
- Provide appropriate services to individuals with learning disabilities that will enable them to participate in and benefit from TANF programs;
- Ensure that contractors make reasonable accommodations to avoid discriminating against people with learning disabilities;

- Train welfare agency staff, and ensure contractors are trained, on assessing and providing appropriate services to individuals with learning disabilities;
- Monitor the agency and contractors for compliance with these requirements; and
- Providing appropriate relief to the individual complainants.

OCR made clear that “nothing in our investigation to date leads to the conclusion that making reasonable modifications in the [TANF] program to facilitate equal access to the program by learning disabled [TANF] recipients would result in a fundamental alteration of the program.” It noted that making these modifications was consistent with the goals of the program, that numerous other states had incorporated learning disability screening, assessment, the provision of appropriate services to individuals with learning disabilities into their programs, and that the welfare agency had alleged that the State Medicaid program would cover the cost of the assessments.

In 2006, HHS OCR and the Massachusetts welfare agency entered into a resolution agreement. The agreement includes, but is not limited to, provisions that require the agency to:

- Notify program applicants and participants of their rights under the ADA and Section 504 in a variety of forms and at various application and participation stages of the agency’s programs;
- Provide ADA and Section 504 training to all new staff and to staff that missed prior ADA and Section 504 training;
- Provide training on how to use the learning disability screening tool to staff that have client contact;
- Offer free screening for learning disabilities to program participants;
- Screen only after a client provides informed consent;
- Offer Employment Service Program participants free learning disability evaluations if screening indicates potential learning disabilities;

- Evaluate the potential need to offer screening and assessment to DTA program participants not associated with the Employment Services Program;
- Monitor employment services contractors for compliance with the ADA and Section 504;
- Continue to use “accommodation teams” to respond to reasonable accommodation requests from people with disabilities, assist in negotiating reasonable accommodations, and ensure that Employment Service Program contractors provide approved reasonable accommodations;
- Notify clients whose benefits were terminated from cash assistance after January 19, 2001 for failure to comply with welfare program requirements of the availability of screening and assessment for learning disabilities and the continuing right to reapply for benefits; and
- Provide notice to the public on the availability of screening and assessment for current and future employment service program participants, including former participants who reapply.

Letter of Finding available at:

www.masslegalservices.org/docs/5428OCR-to-Mcintire.pdf and
<http://www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/tanf-tanf-flo.pdf>

Resolution agreement available at:

www.hhs.gov/ocr/civilrights/specialtopics/tanf/tanf-resagreement.pdf

For more information, contact: Ruth Bourquin, Massachusetts Law Reform Institute, 99 Chauncy Street, 5th Floor, Boston, MA 02111 (617) 357-0700, rbourquin@mlri.org

Request for a compliance review of the Massachusetts Department of Transitional Assistance made to HHS OCR on behalf of individuals with mental disabilities

In February 2001, Greater Boston Legal Services (“GBLS”) wrote to OCR Region requesting a compliance review of Massachusetts Department of Transitional Assistance to determine the agency’s compliance with the ADA and Section 504. The letter was written on behalf of all GBLS clients with mental disabilities in the Massachusetts TANF

program and other assistance programs. The letter alleged that the Massachusetts welfare agency violates the ADA by using policies and practices that screen out people with mental disabilities from qualifying for work exemptions and good cause and using other methods of program administration that have a discriminatory effect, including the failure to:

- Investigate the reasons for non-compliance with program requirements before sanctioning individuals;
- Fully inform individuals about what constitutes good cause; and
- Train staff about mental disabilities and how to recognize them.

In addition, the complaint challenged a number of aspects of the agency's reasonable accommodation process, including the failure to:

- Advise people of their right to reasonable accommodations;
- Train staff about the process for obtaining reasonable accommodations and the types of accommodations available;
- Provide reasonable accommodations when requested and monitor the process;
- Have a grievance process when reasonable accommodations are denied; and
- Provide reasonable accommodations to individuals who need them to obtain documentation of their disabilities.

An appendix to the letter provides numerous detailed descriptions of GBLS clients who have experienced discrimination.

For further information, contact: Melanie Malherbe, Greater Boston Legal Services, 197 Friend Street, Boston, MA 02114 (617) 603-1625.

Current Status: The OCR case is currently inactive and the remaining issues are being pursued in a federal ADA class action against the welfare agency.

Request for compliance review available from: Melanie Malherbe, Greater Boston Legal Services, 197 Friend Street, Boston, MA 02114 (617) 603-1625, and National Center for Law and Economic Justice.

New York

HHS OCR complaint filed in New York City on behalf of all applicants for and recipients of cash assistance with psychiatric disabilities

In April 2002, the Welfare Law Center and other welfare advocates in New York City filed a complaint (OCR Complaint No. 02-02-3104) against the New York City welfare agency on behalf of all applicants and recipients for public assistance benefits with psychiatric disabilities. The complaint alleges that the following policies and practices have a discriminatory effect on people with psychiatric disabilities, making it difficult or impossible for these individuals to obtain and retain public assistance benefits:

- Failing to provide help with the application process;
- Inflexible appointments;
- Failing to provide home visits;
- Denying applications and discontinuing benefits of individuals who miss appointments as a result of a psychiatric disability when no reasonable modifications were provided;
- Failing to screen for psychiatric disabilities;
- Failing to provide reasonable accommodations during the disability assessment process, work activities and programs designed for individuals who are too disabled to work,
- Disregarding documentation from individuals' own doctors;
- Failing to exempt individuals with severe psychiatric disabilities from work activities, and sanctioning these individuals when they are unable to comply with work requirements;

- Using a payment scheme that created a disincentive for the contractor to conduct thorough assessments;
- Failing to have an adequate reasonable modification policy, ADA grievance procedure, and ADA Coordinator;
- Failing to provide adequate notice to applicants and recipients of their rights under the ADA;
- Failing to monitor its own ADA compliance or that of contractors; and
- Failing to train staff on disabilities and the ADA.

The complaint asks OCR to require the New York City welfare agency to:

- Conduct a diagnostic review of its policies and practices to identify other policies and practices that have a discriminatory effect on people with psychiatric disabilities and modify policies that have a discriminatory effect;
- Create a work group comprised of the attorneys filing the complaint, welfare agency and OCR staff to draft a reasonable accommodation policy and a protocol for disability screening and assessment; and
- Review case files of individuals whose applications were denied or benefits were discontinued as a result of non-compliance with program requirements to determine whether any had psychiatric disabilities that were not assessed and accommodated, and restore all benefits improperly withheld.

The complaint contains an appendix providing descriptions of numerous individuals with psychiatric disabilities who were subject to discriminatory policies and practices.

Complaint available at: www.nclej.org

Current status: Advocates withdrew this complaint in 2007.

For further information, contact: Cary LaCheen, National Center for Law and Economic Justice, 275 Seventh Avenue, Suite 1506, New York, NY 10001-6708 (212) 633-6967, lacheen@nclej.org.

North Carolina

Voluntary Compliance Agreement Between HHS Office for Civil Rights and North Carolina Department of Health and Human Services on ADA/Section 504 and NC TANF program

In March 2011, the HHS Office for Civil Rights (OCR) and North Carolina Department of Health and Human Services (DHHS) entered into a Voluntary Compliance Agreement after conducting a compliance review to determine whether the state's TANF program complies with the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation act (Section 504). The compliance review found that DHHS:

- Designates individuals as “work ready” without screening or assessing them to determine whether disabilities affect their ability to work;
- Has not developed and used effective screening tools;
- Has not sufficiently trained Work First Case Managers on the ADA and Section 504, working with individuals with disabilities, and related issues;
- Lacks procedures for evaluating the needs of participants with disabilities and does provide applicants and recipients an opportunity for a timely comprehensive assessment when an intake interview indicates a disability;
- Has not provided reasonable accommodations to participants with disabilities and participants with family members with disabilities;
- Does not regularly assess clients' progress at work activities to determine whether participants have disabilities and need accommodations;
- Does not provide written materials that provide adequate notice of ADA/504 rights; and
- Fails to ensure that Work First program is accessible to and usable by participants with disabilities and those with household members with disabilities.

Under the terms of the Voluntary Compliance Agreement, the North Carolina DHHS agreed to:

- Within 30 days, designate someone who reports directly to the Division Director to oversee ADA/504 compliance in the Work First program.
- Within 60 days, notify all Work First agencies about the agreement.
- Within 60 days, review and revise agency Work First policies to ensure that they comply with the agreement.
- Require Work First agencies to offer an informal assessment (defined to include disability screening) to all applicants. An informal assessment must be offered when an application is submitted, before closing a case for failure to cooperate, before denying initial 24 month and 60 month extensions, before sanctioning or reducing benefits, and whenever an individual requests an informal assessment. The assessment must use particular screening tools identified in the agreement that screen for learning disabilities, mental health problems, substance abuse, and physical limitations.
- Within 60 days, send notice of the right to an informal assessment to all Work First participants.
- Require Work First agencies to inform clients, when an informal assessment is offered, about the purpose and benefits of the informal assessment, the fact that it is voluntary, who the information will be shared with, the advantages of being assessed, and other information so they can make an informed decision about whether to agree to an informal assessment.
- Within 60 days, require all Work First agencies to offer a formal assessment by a professional by a qualified professional at no cost to clients when the informal assessment or the client's behavior indicate the need for an assessment or the individual presents medical or other information indicating that her or she may have a disability. The purpose of the formal assessment is to determine whether the participant has a disability; if so, whether and how it limits employment or participation in employment-related activities; the appropriateness of a particular work assignment or employment plan; the need for training and education; and how work participation rules and time limits apply to the individual. Work First agency staff and contractors must participants with information on the purpose of the formal assessment and other information so they can make an informed decision about whether to agree to a formal assessment.
- Within 30 days of performing an informal or formal assessment, revise a 1 participant's Mutual Responsibility Agreement based on the information in the informal/formal assessment.

- If an individual declines to be assessed, base the work placement decisions on the best information available to the agency, including medical documentation provided by the participant, information from other agencies and observations of Work First staff and contractors.
- Adopt procedures to ensure that when clients move between Work First agencies that information from informal/formal assessments are provided to the newly assigned agency.
- Within 60 days, review Work First notices (including notices of Work First assignments and changes in assignments, case closures, sanctions, and approval and denial of extensions, to determine whether they need to be revised to make them accessible to individuals with low literacy levels or disabilities.
- Within 60 days, develop policies and procedures to ensure that Work First agencies have the resources they need to use appropriate professionals to conduct formal assessments and provide reasonable accommodations.
- Within 60 days, develop policies and procedures to ensure that disability-related issues and other barriers to participation are considered before sanctions are imposed.
- Within 60 days, review and revise (if necessary) ADA/Section 504 grievance procedures so they comply with the ADA and Section 504. The procedures must be made available to applicants and recipients and provided in alternative formats.
- Require Work First agencies and contractors to train staff within 180 on their working with individuals with various types of disabilities; how to conduct informal assessments, provide accommodations, and conduct appropriate follow-up on individuals identified as having disabilities, the obligation to document information in the case record, and how to resolve grievances, and related issues.
- Within 180 days, monitor compliance with the agreement by ensuring that the DHHS person responsible for overseeing compliance with the agreement monitors compliance and tracks data on formal and informal assessments, accommodations needed and provided, and outcomes achieved; compiling and analyzing information from the agency's tracking system; conducts reviews of agency policies and procedures to determine if procedures need

further revision, additional staff training is needed, or other action should be taken.

- Provide a range of accommodations in the application process and appointments, including help with completing forms and collecting documentation, assistance in obtaining accessible transportation, modifying appointments, and providing auxiliary aids and services when necessary to ensure effective communication. (These accommodations are mentioned in the definition of “reasonable accommodations”).
- Provide specified documents and information to HHS OCR within specified time frames including: the name of the person assigned to oversee compliance with the agreement, the memo to Work First agencies and contractors about the agreement, the notice informing clients about the right to an informal assessment, changes in the Work First Manual, verification that Work First agency staff have completed training, and other documents that must be developed as a result of the agreement.

Compliance agreement available from: Cary LaCheen, NCLEJ,
lacheen@nclej.org

For further information, contact: Doug Sea, Senior Attorney. Legal Services of Southern Piedmont, 1431 Elizabeth Avenue, Charlotte NC 28204 704-971-2593,
dougs@lssp.org.

Oregon

Voluntary compliance agreement between the HHS Office for Civil Rights and the Oregon Department of Human Services

Legal Aid Services of Oregon and the Oregon Law Center filed a complaint in October 2001 with OCR on behalf of eight TANF applicants and recipients with physical or mental disabilities (98-00101). The individuals requested reasonable modifications in their employment plans, the requests were denied, and the complainants were disqualified from benefits as a result. In April 2002, the Oregon Law Center filed OCR complaints against the Oregon welfare agency on behalf of three additional individuals.

In August 2004, the Oregon Department of Human Services entered into a compliance agreement with OCR in which the welfare agency agreed, within specified time frames, to:

- Designate an agency ADA/Section 504 Coordinator to oversee ADA/Section 504 compliance and conduct periodic reviews of agency policies to determine whether they need to be modified to comply with the ADA and Section 504;
- Designate an additional ADA/Section 504 Coordinator for the TANF program to assist the agency Coordinator on the TANF program's ADA/Section 504 compliance;
- Develop an ADA/Section 504 grievance procedure;
- Offer disability screening to all applicants and recipients and a formal assessment to individuals identified by screening to need further evaluation to determine whether they have a disability;
- Refrain from sanctioning clients for failure to participate during the assessment process;
- Use teams to review disability-related problems before sanctioning clients, and remove sanctions when a client's disability caused the non-compliance;
- Train staff on a range of issues, including disabilities, disability screening, providing reasonable accommodations, documenting disabilities in a client's case record, and the agency's ADA/Section 504 grievance procedure;
- Monitor ADA/Section 504 compliance of the welfare agency and contractors, and provide data to OCR on a quarterly basis for two years on the number of people with disabilities served by the program, number of grievances filed and other ADA-related issues a range of issues;
- Review and update all agency policies and manuals so they reflect all aspects of ADA/Section 504 compliance; and
- Provide copies of relevant policies and procedures (including TANF manuals, ADA/Section 504 grievance procedure, training plan and materials) to OCR.

Compliance agreement available at:

www.hhs.gov/ocr/civilrights/specialtopics/tanf/tanf-ordhsa-agreement.pdf

For further information, contact: Karen Berkowitz, Oregon Law Center, 921 SW Washington, Suite 516, Portland, OR 97205 (503) 473-8321, FAX (503) 295-0676, Kberkowitz@oregonlawcenter.org

Wisconsin

Voluntary Compliance Agreement Between HHS Office for Civil Rights and Wisconsin Department of Children and Families

In April 2010, the HHS Office for Civil Rights (OCR) and Wisconsin Department of Children and Families entered into a Voluntary Compliance Agreement to resolve complaints filed in 2002 by the ACLU Foundation of Wisconsin and Legal Action of Wisconsin with HHS OCR about numerous aspects of the W-2 program under the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act (Section 504), and Title VI of the Civil Rights Act (for discrimination on the basis of race). The complaints alleged that the W-2 program:

- Did not have in place effective and timely disability screening and assessment procedures to identify the abilities, limitations, and needs of W-2 participants;
- Designated W-2 participants as “job ready” without conducting disability screening and assessments, and failed to provide appropriate work assignments to individuals with disabilities;
- Did not regularly assess participants’ progress in activities to determine whether they had disabilities and needed accommodations;
- Did not have specialized education and training programs for W-2 participants with disabilities;
- Failed to provide reasonable accommodations to W-2 participants with disabilities and their household members;
- Failed to provide adequate notice, including notice of ADA rights, to W-2 participants;
- Failed to adequately train W-2 staff on the ADA/504 and on how to identify disabilities;

- Failed to oversee W-2 agencies' ADA/504 compliance;
- Does not assist clients with disabilities in obtaining documentation of their disabilities;
- Sanctioned and closed cases of individuals with disabilities unable to comply with program requirements for-disability-related reasons instead of accommodating them;
- Extended time limits to W-2 participants in a racially discriminatory manner; and
- Had other policies and practices that discriminate against participants with disabilities.

Under the terms of the Voluntary Compliance Agreement, the Wisconsin Department of Children and Families (DCF) agreed to:

- Within 30 days, designate an ADA/504 Coordinator who reports directly to the Deputy Secretary of DCF to oversee ADA/504 compliance, periodically review DCF policies and procedures to determine whether reasonable modifications are required, provide technical assistance to W-2 agencies, decide ADA/504 grievances, keep records of grievances, help develop ADA/504 training, and monitor ADA/504 compliance;
- Within 30 days, designate a staff person to coordinate Title VI compliance who reports directly to the Deputy Secretary of DCF to periodically review DCF policies and procedures to determine whether reasonable modifications are required, provide technical assistance to W-2 agencies, decide ADA/504 grievances, keep records of grievances, help develop ADA/504 training, and monitor ADA/504 compliance;
- Within 60 days, notify all W-2 agencies about the Voluntary Compliance Agreement.
- Within 180 days, require all W-2 agencies to conduct an informal assessment of each applicant during the application process and whenever changes in placement are made, to determine whether the individual has a disability or other barrier to participation including health and mental health issues, diagnosed learning disabilities, child behavioral problems and other issues, service and accommodation needs, and other barriers to W-2 participation;

- Establish guidelines for when W-2 agencies should conduct additional informal assessments before taking adverse actions against participants;
- Require all agencies to offer screening with the Barrier Screening Tool to all W-2 participants to assist in identifying potential disabilities, other barriers, and identify the need for a formal assessment;
- Require all W-2 agencies to inform applicants and participants about the purpose of screening, the fact that screening is voluntary, who screening results will be shared with, the right to request screening at any time, the right to decline screening and to present other information about disabilities and other barrier to the program that will be used to determine activities, services, and accommodations for the individual, and to post information about screening in waiting areas of all W-2 agencies;
- Within 180 days, require all W-2 agencies to offer a formal assessment by a professional by a qualified professional at no cost to any W-2 participant when a informal assessment and/or Barrier Screening Tool or the client's behavior indicates the need for such an assessment or the individual presents medical or other information indicating that her or she may have a disability, when a participant returns to the program after his or her case was closed for at least a year, and before denying an extension of time limits, unless screening was completed within the last year;
- Inform clients that benefits cannot be reduced for declining a formal assessment;
- Inform W-2 and Community Service Jobs participants that their benefits cannot be reduced for failing to participate in assigned activities until after screening is offered and either completed or declined,
- Inform W-2 and Community Service Jobs participants that their benefits cannot be reduced for failing to comply with an assigned activity until formal assessment results have been received by the agency, or until the agency has determined that the individual will not comply with the assigned activity and specified information has been entered into the program's computer system;
- Obtain specific information from those performing the formal assessment specified in the Voluntary Compliance Agreement and in forms attached to the Agreement and consider this information when developing the clients' employment plan;

- Require all W-2 agencies to conduct an educational needs assessment of all new W-2 applicants and before making changes in placement;
- Require W-2 agencies to develop or revise employment plans within 30 days after a formal assessment is performed, provide in writing to recipients the services and accommodations they will receive, and document why recommended accommodations were not incorporated into the employment plan;
- Base work placement decisions on the best available information when an individual declines a formal assessment, while continuing to informally assess the individual and to emphasize the importance of cooperating with an assessment;
- Consider self-reports of a disability or other barrier, along with other substantiating information, including behavioral cues, basic education test results, or pattern of low participation, in conjunction with a formal assessment, as part of the assessment process;
- Require W-2 agencies, before assigning clients to particular activities, to ensure that work sites and education and training programs are informed of reasonable accommodations needed by clients;
- Develop procedures to ensure that disabilities and barriers are considered before agencies take adverse actions that result in more than a 20% reduction of benefits, including reviewing a statistically significant sample of cases for disabilities and other barriers, ensuring that disability is considered in determining good cause for non-cooperation, ensuring that reasonable accommodations are considered, and through other means;
- Within one year, identify and implement best practices to reduce inappropriate sanctioning and train staff and contractors on those practices;
- Within 180 days, develop policies to ensure that W-2 agencies have the resources they need to provide accommodations to clients with disabilities;
- Require all W-2 agencies and contractors to receive training on Title VI, training intended to prevent and address race discrimination, and training to ensure that worker discretion isn't exercised in a manner that violates Title VI;

- Within one year, develop a plan to improve case management and hold roundtables for staff, supervisors and contractors on case scenarios to increase consistent decision-making by staff;
- Require all W-2 staff and contractors to receive training on the Voluntary Compliance Agreement within one year;
- Monitor compliance with the Agreement by reviewing quarterly assessment data and data from other sources that identifies outcomes for individuals with disabilities, including data on adverse actions and cases with at least 20% reductions in benefits;
- Provide data to OCR on the numbers of individuals in the W-2 program, the number receiving informal and formal assessments and accommodations, the number who obtain employment, GEDs, or high school diplomas, the number of grievances filed, and the subject and resolution of those grievances;
- Provide documents and information to OCR, including the identify of the ADA/504 and Title VI Coordinators, the notice about the Voluntary Compliance Agreement to W-2 agencies, grievance procedures, the informal assessment inventory, formal assessment tools, revised W-2 policies and procedures, notices posted in waiting rooms, ADA/504/Title VI staff training materials, assessment consent forms, proof that contractors have attended training, final and draft state TANF plans, and monitoring reports;
- Take other steps specified in the Agreement to ensure that the rights of individuals with disabilities are protected.

Voluntary compliance agreement available at:

www.hhs.gov/ocr/civilrights/activities/examples/TANF/witanfagreement.pdf.

For further information, contact: Karyn L. Rotker, ACLU of Wisconsin Foundation 207 E. Buffalo Street, Suite 325, Milwaukee, WI 53202 (414) 272-4032, krotker@aclu-wi.org; Patricia DeLessio, Legal Action of Wisconsin, Inc., 230 West Wells Street, Room 800, Milwaukee, WI 53202 (414) 278-7722.

Appendix D: National and Regional Offices for Civil Rights

HHS Regional Offices

Region I (CT, ME, MA, NH, RI, VT)

HHS Office for Civil Rights
JFK Building, Room 1875
Boston, MA 02203
(617) 565-1357

Region II (NJ, NY, PR, VI)

HHS Office for Civil Rights
26 Federal Plaza, Suite 3312
New York, NY 10278
(212) 264-4136

Region III (DE, DC, MD, PA, VA, WV)

HHS Office for Civil Rights
200 Independence Ave., S.W.
Washington, D.C. 20201
(202) 619-1136

Region IV (AL, FL, GA, KY, MS, NC, SC, TN)

HHS Office for Civil Rights
61 Forsythe Street, S.W., Suite 3B70
Atlanta, GA 30323
(404) 562-7871

Region VI (AR, LA, NM, OK, TX)

HHS Office for Civil Rights
1301 Young Street, Suite 1169
Dallas, TX 75202
(214) 767-4949

Region VII (IA, KS, MO, NE)

HHS Office for Civil Rights
601 East 12th Street, Room 248
Kansas City, MO 64106
(816) 426-7278

Region VIII (CO, MT, ND, SD, UT, WY)

HHS Office for Civil Rights
1961 Stout Street
Denver, CO 80294
(303) 844-7838

Region IX (AZ, CA, HI, NV, American Samoa, Guam, U.S. Affiliated Pacific Island Jurisdictions)

HHS Office for Civil Rights
50 United Nations Plaza, Room 322
San Francisco, CA 04193
(415) 437-8310

Region V (IL, IN, MI, MN, OH, WI)

HHS Office for Civil Rights
233 North Michigan Avenue, Suite 420
Chicago, IL 60601

Region X (AK, ID, OR, WA)

HHS Office for Civil Rights
2201 Sixth Avenue, Suite 900
Seattle, WA 98121
(206) 615-2584

HHS and USDA Office for Civil Rights Headquarters

HHS OCR Headquarters
HHS Office for Civil Rights
200 Independence Ave., S.W.
Washington, D.C. 20201
(800) 368-1019
OCRMail@hhs.gov

USDA OCR
Office for Civil Rights
U.S. Department of Agriculture
1400 Independence Ave., SW
Washington, D.C. 20250
(202) 720-5964
(866) 632-9992 (toll free)
(202) 401-0216 (TDD)

Appendix E: Important court decisions and settlements

Some key cases on the ADA and Section 504 that are relevant to ADA/ 504 welfare advocacy

Alexander v. Choate, 469 U.S. 287 (1985)

American Council of the Blind v. Astrue, No. C-05-04696 (WHA), 2008 U.S. Dist. LEXIS 86524 (N.D. Calif. 2008) (denying defendant's motion to dismiss); 2009 U.S. Dist. LEXIS 97599 (findings of fact and conclusions of law)

Aughe v. Shalala, 885 F.Supp. 1428 (W.D. Wash. 1995)

Beno v. Shalala, 853 F. Supp. 1195 (E.D. Cal. 1993), *aff'd*, 30 F.3d 1057 (9th Cir. 1994)

Blatch v. Hernandez, 360 F.Supp.2d 595 (S.D.N.Y. 2005)

Brown v. City of North Chicago, No. 04-C-1288, 2005 U.S. Dist. LEXIS 3722 (N.D. Ill. Feb. 28. 2005), 2006 U.S. Dist. LEXIS 47371 (N. D. Ill. June 28, 2006)

Burns-Vidlak v. Chandler, 939 F.Supp. 765 (D. Haw. 1996), *appeal dismissed*, 165 F.3d 1257 (9th Cir. 1999)

Cathey v. North Carolina Department of Health and Human Services, No. 08 CVS-27647, (N.C. Superior Court, Mecklenberg Co., June 8, 2009)

Does 1-5 v. Chandler, 83 F.3d 1150 (9th Cir.1996)

Fry v. Saenz, 98 Cal. App. 4th (2002), *on remand* (Super. Ct. of Cal., Sacramento County, May 25, 2004) (unpubl.)

Harper v. Massachusetts Dep't of Transitional Assistance, No. 1:07-cv-12351-MLW (D. Mass. Filed December 20, 2007)

Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1994), *cert. denied*, 516 U.S. 813 (1995)

Henrietta D. v. Bloomberg, 331 F.2d 216 (2d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004)

Howard v. Dep't of Soc. Welfare, 655 A.2d 1102 (Vt. 1994)

Hunsaker v. County of Contra Costa, 149 F.3d 1041 (9th Cir. 1998)

Lovely H. V. Bloomberg, 235 F.R.D. 248 (S.D.N.Y. 2006)

Mitchell v. Barrios-Paoli, 687 N.Y.S.2d 319 (N.Y. App. Div. 1st Dep't 1999)

Perdue v. Murphy, 915 N.E.2d 498 (Ind. Ct. App. 2009), *later decision*, 938 N.E.2d 766 (Ind. Ct. App. 2010)

Raymond v. Rowland, Civ. No. 303 CV 0118 (JBA), 2004 WL 551241 (D. Conn. Mar. 12, 2004)

Thibault v. Mass. Dep't of Transitional Assist., CIV. No. SUCV97-04760C (Suffolk Superior Court) (preliminary injunction granted, December 29, 1998)(supplemental preliminary injunction granted Feb. 26, 1999) (available from the National Center for Law and Economic Justice)

Weaver v. New Mexico Human Servs., 945 P.d 70 (N.M. 1997)

Williams v. Contra Costa County., Case No, C93-01922 (Calif. Superior Ct., Contra Costa County) (judgment, Aug. 3, 1994)

Wright v. Giuliani, 230 F.3d 543 (2d Cir. 2000)

Some key settlements in ADA-public benefits cases

Bradford v. County of Contra Costa, No. 97-CV-1024 (JM) (United States District Court, Southern District of Calif.) (order approving settlement, July 29, 1997) (available from the National Center for Law and Economic Justice)

Brou v. County of Alameda, No. C-96-3206 CRB, (settlement agreement, Mar. 5, 1999) (available from the National Center for Law and Economic Justice)

Lind v. Snider, CIV No. 94-4840 (E. D. Pa.) (settlement approved Set. 21, 1994) (available from the National Center for Law and Economic Justice)

Santos v. County of Alameda, No. Co4-02725 (JCS), (N.D. Calif.) (Settlement Sept. 1, 2005) (available from the National Center for Law and Economic Justice)

Vance v. Nusbaum, Civ. No. 2:01-200 (D. W. Va.) (Settlement March 10, 2004) (available from the National Center for Law and Economic Justice)

ADA U.S. Supreme Court decisions ⁵⁷¹

Albertson's Inc., v. Kirkingburg, 527 U.S. 555 (1999)

Barnes v. Gorman, 536 U.S. 181 (2002)

Barnett v. U.S. Air Inc., 535 U.S. 391 (2002)

Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001)

Bragdon v. Abbott, 524 U.S. 624 (1998)

Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598 (2001)

Chevron U.S.A., Inc., v. Echazabal, 536 U.S. 73 (2002)

Cleveland v. Policy Mgmt. Syst. Corp., 526 U.S. 795 (1999)

Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279 (2002)

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001)

Murphy v. United Parcel Serv., 527 U.S. 516 (1999)

⁵⁷¹ Note: *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Albertson's Inc., v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999); and *Toyota Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2001) have been expressly overruled in whole or in part by the Americans with Disabilities Amendments Act, Pub. L. No. 110-335, 122 Stat. 3553 (2008).

Olmstead v. L.C., 527 U.S. 581 (1999)

Raytheon v. Hernandez, 540 U.S. 44 (2003)

Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005)

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)

Tennessee v. Lane, 541 U.S. 509 (2004)

Toyota Mfg., Kentucky, Inc., v. Williams, 534 U.S. 184 (2001)

United States v. Georgia, 546 U.S. 151 (2006)

Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998)

Yeskey v. Pennsylvania Dep't of Corr., 524 U.S. 206 (1998)

Appendix F: Helpful websites

Below are selected web sites with information and reports on disabilities, the prevalence of disabilities in welfare recipients, and other topics relevant to advocacy efforts on behalf of individuals with disabilities in welfare programs. The list is meant to be a starting place for advocates interested in obtaining additional information on these topics. There are obviously many other web sites that contain relevant information.

ADA Home page: www.ada.gov

American Public Human Services Association: www.aphsa.org

California Institute for Mental Health: www.cimh.org

Center on Budget and Policy Priorities: www.cbpp.org

Center on Law and Social Policy: www.clasp.org

Federal Communications Commission: www.fcc.gov

Hewlett Packard: www.hp.com

Inclusive Technologies: <http://inclusive.com>

Mathematica Policy Research: www.mathematica-mpr.com

Manpower Research Demonstration Corporation: www.mdrc.org

National Association of the Deaf: www.nad.org

National Freedom of Information Coalition: www.nfoic.org/state-foi-laws

National Joint Committee on Learning Disabilities: www.ldonline.org/

National Institute for Literacy: www.nifl.gov

National Center for Law and Economic Justice: www.nclej.org

Northern Virginia Resource Center for Deaf and Hard of Hearing Persons:
www.nvrc.org

Section 508: www.section508.gov

U. S. Access Board: www.access-board.gov

Urban Institute: www.urban.org

U.S. Department of Health and Human Services, Office for Civil Rights:
www.hhs.gov/ocr

U.S. Department of Health and Human Services, Administration for Children and Families: www.acf.hhs.gov

U.S. Department of Justice: www.justice.gov

U.S. Equal Employment Opportunity Commission: www.eeoc.gov

WebAIM: www.webaim.org

Web Accessibility: Web Standards and Regulatory Compliance:
www.friendsofed.com/web-accessibility/index.html.

World Wide Web Accessibility Consortium Web Accessibility Initiative:
www.w3.org/WAI/guid-tech