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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 97-15177

WORTH "BUTTERCUP" HALE, IVO SUTICH, CHERYL ELLISON, GREGORY MICHAEL MYKETUK, ANGELA LOPEZ, JONATHAN TULIN, and MENTAL HEALTH ASSOCIATION OF SAN FRANCISCO

Plaintiffs-Appellees,

vs.

KIMBERLY BELSHÉ, Director, California Department of Health Services, sued in her official capacity; STEPHEN MAYBERG, Director, California Department of Mental Health, sued in his official capacity; MATTHEW FONG, Treasurer, State of California, sued in his official capacity; and KATHLEEN CONNELL, Controller, State of California, sued in her official capacity

Defendants-Appellants

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. C-96-1804 (SAW)
The Honorable STANLEY A. WEIGEL, Judge

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INTRODUCTION

By this Court's order filed on March 6, 1997, briefing in this appeal was expedited and the appeal was ordered calendared together with *Armstrong v. Wilson,* 96-1 6870, and *Clark v. California,* 96- 16952. Plaintiffs/Appellees (hereinafter, "plaintiffs") have reviewed the briefs filed by the plaintiffs and the United States Department of Justice in *Armstrong* and *Clark,* which address many of the same questions of Eleventh Amendment immunity at issue in the instant appeal. Plaintiffs have attempted wherever possible to avoid repetition and instead reference in footnotes those relevant portions of the briefing in *Armstrong* and *Clark.*

Instead, plaintiffs' briefing in the instant case focuses on several issues which are unique to this appeal. Since we have asserted claims under the Medicaid Act and the Nursing Home Reform Act provisions of Medicaid, our brief addresses the long history of applying *Ex Parte Young* in Medicaid actions against state officials for prospective and injunctive relief. Secondly, our claims under the Americans with Disabilities Act ("ADA") arise in the context of the right of persons with disabilities to receive services in the most integrated setting appropriate to their needs - the ADA's so-called "integration mandate. "

Accordingly, our briefing focuses on this provision and its application to persons in nursing homes who seek access to community services. Finally, we address the state's attempt to mis-characterize this as a "deinstitutionalization" case.

ISSUES PRESENTED

1. Whether the rule of *Ex parte Young,* 209 U.S. 123 (1908) permits this suit for prospective injunctive relief against state governmental officials for violating the federal Medicaid Act, 42 U.S.C. § 1396 *et seq.*, the Nursing Home Reform Act, 42 U. S . C . § 1396r *et* seq. and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*

2. Whether Congress has the power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause to remedy discrimination against people with disabilities and therefore has the authority to abrogate the state's Eleventh Amendment immunity from suit under the ADA.

JURISDICTION

1. Plaintiffs/Appellees (hereinafter "plaintiffs ") agree with defendants/appellants (hereinafter "defendants") that the district court had jurisdiction pursuant to 28 U.S.C. Sections 1331 and 1343.

2. Plaintiffs agree with defendants that this Court has jurisdiction to hear the appeal of the district court's order denying them absolute immunity under the Eleventh Amendment. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf& Eddy, Inc., 506* U.S. 139 (1993).

ATTORNEYS' FEES

If successful, plaintiffs will seek their attorneys' fees, costs and reasonable litigation expenses for defending this appeal pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 12205.

STATEMENT OF THE CASE

Plaintiffs brought this class action on behalf of a putative class of persons who presently reside in locked nursing facilities, known as "Institutions for Mental Disease" ("SNF/IMD") and persons who reside in communities all over California but who are at risk of being placed in SNF\IMDs because of defendants' practices which they contend violate the Medicaid Act, the Nursing Home Reform Act and the ADA. Excerpt of Record ("ER") at 3,4. Plaintiffs' claims under the state-federal Medicaid program challenge the defendants' illegal administration of community mental health services. Specifically plaintiffs contend that defendants violate their statutory obligations under the

federal Medicaid Act by: (1) allowing some Medi-Cal recipients to receive the services they need in the community while others are denied these services; (2) imposing illegal limitations on the amount, duration or scope of available mental health rehabilitative services; (3) allowing some counties to decide on a county-by-county basis whether to make the services available with the result that in some counties a full range of services is provided while in others there are few services available; and (4) not providing services promptly when and where needed. Having decided to seek and accept federal Medicaid funds for rehabilitative mental health services, defendants are obligated to deliver them fairly and in accordance with federal law. ER at 4.

Plaintiffs also contend that defendants have violated their duties under the federal Nursing Home Reform provisions of the Medicaid Act, 42 U .S .C . § 1396r. Through the process of Pre-Admission Screening and Annual Resident Review', or "PASARR," individuals identified as having a psychiatric disability are evaluated to determine whether they need a nursing facility level of care or whether their needs can be met in the community. Defendants have failed to do any assessments whatsoever for many individuals, have failed to do timely

[1] With the passage of the Medicaid Nursing Homes Annual Resident Review Act of 1996, Congress eliminated the annual Resident Review portion of PASARR.

assessments for others, have failed to consider community alternatives and have failed to provide necessary services when they were otherwise unavailable. Full implementation of defendants' PASARR responsibilities is critically significant to persons being considered for placement in SNF/IMDs since it would compel utilization of alternative community services and would do much to close the "revolving door" which sends plaintiffs back to locked psychiatric nursing homes when they could remain safely in the community if appropriate services were provided.

Finally, underlying these claims are plaintiffs' claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.,* which requires defendants to provide services to persons with disabilities in the most integrated setting appropriate to their needs. Here, since plaintiffs could receive state funded mental health services in the community, it is a violation of the ADA to provide services instead only in locked psychiatric nursing homes.

Contrary to defendants' strident claims, this is not a "deinstitutionalization lawsuit." See Appellants' Opening Brief (hereinafter, "AOB") at 3: "Plaintiffs allege that State Defendants failed to comply with the Medicaid Act, NHRA and the ADA, by failing to deinstitutionalize all of

California's Institutes for Mental Disease, ..." Plaintiffs did not raise the issues of "right to treatment" which were rejected in *Youngberg v. Romeo, 457* U.S. 307, 102 S.Ct. 2452, 73 L.Ed. 28 (1982), nor did they ever raise a substantive due process claim. Plaintiffs did not seek to shut down IMDs through this action because they recognize that these placements are necessary for some individuals. Nor did plaintiffs seek to compel defendants to create new programs in the community since the present scope of community-based rehabilitative services in the state Medicaid plan will meet their needs. Plaintiffs did seek to force state officials to remove the illegal funding constraints and assessment practices which have limited the availability of these programs and resulted in unnecessary institutional placement for many in violation of federal law. Plaintiffs moved for class certification on August 2, 1996. Concurrently, defendants moved to dismiss all of plaintiffs' claims pursuant to Federal Rule of Procedure 12(b)(6) on numerous grounds, one of which is at issue in this appeal: that defendants are immune from suit under the Eleventh Amendment.

On December 2, 1996, District Judge Stanley Weigel issued his decision which denied defendants' motion to dismiss pursuant to their Eleventh

Amendment immunity defense. Judge Weigel held[2]

> The Eleventh Amendment does not bar Plaintiffs from seeking injunctive relief to prevent State officers from continuing to violate the Medicaid Act, the PASARR provisions of the NHRA, and the ADA.

Dist. Ct. Opinion, ER at 5. This appeal followed.

SUMMARY OF ARGUMENT

This action falls within the well-settled rule that the Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief. *Ex Parte Young,* 209 U.S. 123 (1908). Since defendants concede that plaintiffs seek only prospective declaratory and injunctive relief against state officials sued in their official capacities, this Court need not even reach the constitutional questions posed by defendants regarding Congressional authority to otherwise abrogate state immunity.

The Supreme Court has expressly and implicitly recognized the continued viability of the *Young* rule *(Seminole Tribe of Florida v. Florida,* __ U .S . __, 116 S.Ct. 1114, 1133 n. 14 and n. 16 (1996)) and lower courts, in decisions both

[2] The district court did not rule on plaintiffs' motion for class certification and all proceedings in this case have been stayed by order of the district court pending the resolution of this appeal.

preceding and postdating *Seminole,* have regularly applied the *Young* exception to cases, such as this, which challenge state officials' failure to follow the mandates of federal statutes irrespective of potential ancillary impact of the decision on the state. Indeed, since the adoption of the federal-state program in the Medicaid Act, courts, including California district courts and this Court, have addressed systemic violations of the Medicaid Act by state officials and routinely allowed remedies which result in significant alterations of state procedures.

Congress acted pursuant to a valid exercise of its powers under Section 5 of the Fourteenth Amendment in abrogating state Eleventh Amendment immunity from suit under the ADA. Section 5 gives Congress broad powers to pass appropriate legislation to enforce the Equal Protection Clause of the Fourteenth Amendment. *Katzenbach v. Morgan, 384* U.S. 641, 86 S.Ct. 1717 (1966). These sweeping powers clearly support Congressional legislation which requires that states affirmatively insure equal treatment for individuals subject to discrimination. Thus the integration mandate of the ADA is justified by Congressional findings that disability based discrimination is grounded in the segregation and isolation of individuals with disabilities. *Martin v. Voinovich,*

840 F.Supp. 1175 (S.D. Ohio 1993). *Helen L. v. DiDario*, *46* F.3d 333 (3d Cir. 1995).

Much of the authority relied on by defendants in support of their positions is based on the false premise that this is a deinstitutionalization case and thus must be dismissed as irrelevant.

STANDARD OF REVIEW

Plaintiffs agree with defendants that the issues raised herein are reviewed de novo.

ARGUMENT

I. *EX PARTE* YOUNG PERMITS THIS SUIT AGAINST STATE OFFICIALS TO REDRESS VIOLATIONS OF FEDERAL LAW

Defendants argue that the district court is without jurisdiction to issue declaratory and injunctive relief to compel state officials to comply with the Americans with Disabilities Act, the Medicaid Act, and the Nursing Home Reform Act, citing *Seminole Tribe of Florida v. Florida,* __ U.S. __, 116 S.Ct. 1114 (1996). To the contrary, the Eleventh Amendment is no bar to this action. Defendants do not dispute that plaintiffs seek only prospective declaratory and injunctive relief against state officials sued in their official capacities. Consequently, since this action falls within the well-settled

exception to Eleventh Amendment immunity set forth in *Ex Parte Young, 209* U.S. 123 (1908), this Court need not even reach the constitutional questions posed by defendants regarding Congressional authority to otherwise abrogate state immunity. Indeed, abrogation is wholly unnecessary 'for plaintiffs' suit to proceed on their Medicaid Act claims, since Congress has not purported to abrogate state immunity for alleged violations of the Medicaid Act. *Cf. Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 517 (1990) (Congress passed in 1975 and then repealed in 1976, a provision requiring states to waive any Eleventh Amendment immunity from suit for violations of the Medicaid Act).[3]

Because the Nursing Home Reform Act is one part of the federal Medicaid Act, any immunities or lack thereof that defendants enjoy are synonymous with those under the Medicaid Act. Plaintiffs. readily concede that neither the Nursing Home Reform Act nor the Medicaid Act of which it is a

[3].The state has continued to accept federal Medicaid funds following enactment of 42 U.S. C. § 2000d-7. That section was enacted pursuant to Congress' Fourteenth Amendment authority to abrogate states' Eleventh Amendment immunity by "manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity. " *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). As analyzed at pages 40-42 of the Department of Justice's *amicus* brief in *Armstrong*, continued acceptance of federal Medicaid funds following the enactment of § 2000d-7 constitutes a consent to be sued and a waiver of immunity with respect to claims that can be brought under § 2000d-7. While this action was not brought under Section 504 but under the broader sweep of the Americans with Disabilities Act, to the extent the Section 504 and ADA claims are congruent, the state has waived its immunity and consented to suit.

part are promulgated pursuant to the Fourteenth Amendment: both are concededly Spending Clause enactments. Compare, AOB at 10- 11 (arguing that the Nursing Home Reform Act should be construed in a manner similar to Titles VI and IX).

A. Undisturbed by *Seminole. Ex Parte Young* Allows Plaintiffs To Seek Prospective Injunctive Relief

It is well-settled that "[t]he Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief." *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.,* 714 F.2d 946, 952 (9th Cir. 1983). This recognized distinction between allowable actions for prospective relief versus disallowed actions for retroactive monetary relief traces its lineage to *Ex Parte Young, 209* U.S. 123 (1908).

In *Young,* the Supreme Court upheld an injunction against a state attorney general on the grounds that when a state official acts unconstitutionally, he acts *ultra vires,* "stripped of his official or representative character," and thus of any immunity the state might have been able to provide. *Id.* at 160.

The rule of *Ex Parte Young* "gives life to the Supremacy Clause", by providing a pathway to relief from continuing violations of federal law by a

state or its officers. *Green v. Mansour*, 474 U.S. 64, 69 (1985). As the Court has explained, "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. " *Id.* at 68 (citations omitted).

In *Seminole,* the Court expressly acknowledged that while its holding prohibits certain suits against the state *qua* state, the Court was not disturbing the "other methods of ensuring the State's compliance with federal law. " *Seminole* at 1133 n.14. The Court held that: "an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law". *Id.* (emphasis added). At another point, the Court underscored the fact that "several avenues remain open for ensuring state compliance with federal law: an individual may obtain injunctive relief under *Ex Parte Young* to remedy a state officer's ongoing violation of federal law. " *Id.* at n. 16. Thus, the majority in *Seminole* took great pains to emphasize the narrow scope and implications of its decision in a fashion that makes it unmistakably clear that the *Young* doctrine remains alive and well.

Lower courts interpreting *Seminole* have also agreed that it does not modify the *Ex Parte Young* doctrine. The Fifth Circuit looked at the doctrine

in light of the Supreme Court's pronouncements, concluding:

> It is well established that the federal courts have jurisdiction to hear suits against state officials where, as here, the plaintiffs seek only prospective declaratory or injunctive relief to prevent a continuing violation of federal law. Our conclusion is unaffected by the Supreme Court's recent decision in *Seminole Tribe.*

Cigna Health Plan of Louisiana v. Louisiana, 82 F.3d 642, 644 n.1 (1996) (citations omitted). *See also Clark v. Mercado,* 1996 WL 328170 at slip. op. p.1 and n. 1 (June 3, 1996, W.D.N.Y.) ("The Eleventh Amendment does not, however, bar suits seeking prospective relief against state officials . . . defendants' reliance on *Seminole* is wholly misplaced. "); *Leavitt v. Arave, 927* F.Supp. 394, 396 (D.Idaho 1996) (same).

The instant action falls squarely within the doctrine of *Ex Parte Young.* Plaintiffs have sued state officers in their official capacities, rather than the state itself, seeking only declaratory and injunctive relief. Defendants raise two arguments in opposition: that the relief requested really runs against the State and that *Ex Parte Young* should be limited only to claims of federal constitutional, and not federal statutory, violations. We discuss each argument in turn below.

B. *Ex Parte Young* Applies Even If There Is An Ancillary Impact On The State.

Defendants claim that since this suit is "seeking wide-ranging reforms on the part of the state defendants," it is really against the state and is thus barred by the Eleventh Amendment. AOB at 14. Since the state itself has already included in its state Medicaid plan the community mental health services to which plaintiffs claim an entitlement (ER at 61 - District Ct. Op.), ordering state officials to make these services available on an equitable, state-wide basis will not be a radical restructuring of the program. While the requested relief may have a subsequent impact on the state treasury, any such impact would be ancillary to bringing an end to a violation of federal law. *Papasan v. Allain*, *478* U.S. *265, 278* (1986). *Accord, Kostok v. Thomas,* 105 F.3d 65, 69 (1997) (Eleventh Amendment no bar to *Ex Parte Young* Medicaid suit for new wheelchair, despite ancillary fiscal impact on the state).

In fact, no Supreme Court case has ever held that injunctive or declaratory relief against state officers is barred because the state is the real party in interest.[4] Quite the contrary, the high court has frequently recognized

[4]Defendants cite only one case - *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 687 (1949) - in their support. AOB at 14. While *Larson* is actually inapposite, since it concerns federal immunity, the opinion notes that an official acting outside of his or her

that *Ex parte Young* actions are justified, "notwithstanding the obvious impact on the state itself." *Pennhurst ZZ, 465* U.S. at 104. "Relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Papasan, 478 U.S. at 278. Accord Milliken v. Bradley,* 433 U.S. 267, 288-90 (1977) (injunction requiring state officials to eliminate prospectively all vestiges of *de jure* segregated school system not barred by Eleventh Amendment, regardless of the impact on the state treasury).

Moreover, cases such as this one addressing systemic violations of the Medicaid Act necessarily result in statewide reforms. Courts have routinely and correctly permitted Medicaid cases to seek and secure injunctive relief under *Ex parte Young.* This has been true in other California Medicaid cases. Sweeping state-wide reforms were ordered in *Clark v. Kizer*, *758* F. Supp. 572 (E.D. Cal. 1990) (summary judgment), *aff'd and remanded sub nom. Clark v.* Coye, 967 F.2d 585 (9th Cir. 1992), *on remand,* No. S-87-1700 JFM, Medicare & Medicaid Guide New Dev. ¶ 40,888 (Oct. 14, 1992), reversed on other grounds, 60 F. 3d 600 (9th Cir . 1995). There, the court ordered state

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authority is not acting on behalf of the sovereign. *Id.* at 689-90.

officials to increase the reimbursement rates for dentists and maintain a toll-free number to link Medi-Cal recipients with dentists to address violations of the access and comparability provisions of the Medicaid Act, 42 U.S .C. §§ 1396a(a)(10)(A) and 1396a(a)(10)(B).

*Valdivia v. Department **of** Health Services,* Case No. S-90-1226 EJG/PAN (Order and Permanent Injunction August 11, 1992, Stipulated Order April 13, 1993), CCH Medicare & Medicaid Guide ¶ 41,959, addressed California's failure to comply with the Nursing Home Reform portions of the Medicaid Act by broad orders affecting most aspects of care for persons in nursing facilities including resident assessments, residents' rights, licensing and certification requirements, standards for authorizing physical and occupational therapy, etc.

Charpentier v. ***Belshé*** addressed the problem of dual-eligibles who received both Medicare and Medicaid and were being denied power and custom wheelchairs in violation of Medicaid's comparability provision. The district court issued a mandatory preliminary injunction barring the state from limiting its payment to 20% of Medicare's reasonable charge. *Charpentier,* CCH Medicare & Medicaid Guide New Dev. ¶ 38,937 (S-90-758 EJG/PAN, Nov.

20, 1990). This order was expanded to include medical supplies and other equipment, CCH Medicare & Medicaid Guide New Dev. ¶ 39,791 (January 9, 1992), with the permanent injunction issuing December 21, 1994. New Dev. ¶ 43,123. Compliance with the *Charpentier* injunctive orders required significant changes in the tape-to-tape billing and payment procedures for Medicare-Medicaid claims and changes in the Medi-Cal procedures to accommodate supplemental payments.

Sobky v. *Smoky,* 855 F.Supp. 1123 (E.D. Cal. 1994), was another *Young* action for declaratory and injunctive against California Medicaid officials. As in this case, the plaintiffs in *Sobky* alleged violations of the statewideness, reasonable promptness, and comparability provisions of the Medicaid Act, 42 U.S.C. § 1396a(a)(1), 1396a(a)(8), and 1396a(a)(10)(B). The district court found that state officials had violated the Medicaid Act in their administration of the state methadone treatment system and ordered statewide system changes to insure Medi-Cal beneficiaries had access to methadone treatment services without a waiting list and without regard to their county of residence.

In *Sneede* v. *Kizer*, 758 F.Supp. 607 (N.D. Cal. 1990), the court ordered state officials not to attribute income from one person to another except spouse

to spouse and parent to child in compliance with the Medicaid provision at 42 U.S. C . §§ 1396a(a)(17); the implementation required by this order was staggering, requiring the issuance of new manuals and directives, massive staff trainings, and substantial changes in computer programs.

Similarly, *Ex Parte Young* Medicaid cases against state officials in other jurisdictions also have sought relief which resulted in statewide reforms in the Medicaid system?

C. ***Ex Parte Young*** **Has Never Been, Nor Should It Be, Limited To Constitutional Violations Alone.**

Defendants claim that *Ex Parte Young* permits a narrow exception to Eleventh Amendment immunity in cases seeking prospective injunctive relief against state officials for constitutional violations. AOB at 4. In an apparent case of wishful thinking, defendants assert that "[t]his court believes, and Defendants agree, that extending *Ex Parte Young* to suits involving federal statutory violations, as alleged here, was a mistake. " AOB at 4. To the

[5] ***White*** v. ***Beal***, 555 **F.2d** 11146 (3d Cir. **1977)(state** standards for qualifying for eyeglasses ordered changed so that access based on need not diagnosis); ***Smith v. Vowell***, 379 F. Supp. 139 **(W.D.** Tex. **1974),** ***aff'd mem.*** 540 **F.23d** 759 **(5th Cir.** 1974); ***Greenstein*** v. ***Bane***, 833 **F.Supp.** 1054 (S.D. NY 1993) (statewide changes in how retroactive Medicaid payments were made so that beneficiaries could be reimbursed for out-of-pocket expenses to enforce); ***Ledet v. Fischer***, 638 **F.Supp.** 1288 (M.D. LA 10997) (State required to change eligibility criteria for eyeglasses so that all who needed them would qualify, not just those who need them following cataracts)

contrary, in *Almond Hill School v. U.S. Dept. of Agriculture, 768* F.2d 1030, 1034 (9th Cir. 1985) and again in *Natural Resources Defense Council (NRDC) v. California Department of Transportation, 96* F.3d 420, 422 (9th Cir. 1996), this Court found no reason to limit *Ex Parte Young* to constitutional violations alone.[6]

In fact, counsel have found no case in which the court has ever seriously questioned the applicability of *Young* to redress violations of federal statutory law. Even in *Almond Hill,* this Court identified no contrary authority and seemed to regard its conclusion as uncontroversial. The three cases which cite this holding in *Almond Hill* all conclude that *Young* applies to federal statutory violations and not just to constitutional violations. *NRDC*, 96 F.3d 420 (9th Cir. *1996); Atlantic Health Care Benefits Trust v. Foster, 809* F.Supp. 365 (M.D.PA. 1992), *aff'd, 6* F.3d *778* (3rd Cir. 1993); *Strahan v. Coxe, 939* F.Supp. 963 (D. Mass. 1996).

The Supreme Court was presented in *Seminole* itself with the opportunity

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[6]Even the concurrence of Justices O'Scannlain and Kleinfeld in *NRDC* merely expressed relief that "whatever the result of the Supreme Court's review, " it had granted certiorari in *Coeur D 'Alene Tribe of Idaho v. Idaho*, 42 F. 3d 1244 (9th Cir. 1994), cert. *granted*, 116 S.Ct. 1415 (1996) and would turn its attention to the issue. *NRDC*, 96 F.3d at 424.

to limit *Ex Parte Young* in the manner proposed by defendants. Since *Seminole* concerned alleged violations of federal statute, rather than constitutional violations, the court could have disposed of the *Ex Parte Young* issue on this ground, but did not. Similarly, *Edelman v. Jordan,* 415 U.S. 65 1. 664-668 (1974), *Quern v. Jordan,* 440 U.S. 332, 342, 99 S.Ct. 1139, 1146, 59 L.Ed. 358 (1979) and *Green v. Mansour* 424 U.S. at 69, were all *Ex Parte Young* suits against state officials to enforce provisions of the Social Security Act. In all three, the Supreme Court did not characterize this as an "extension" of *Ex Parte Young;* rather, it concluded this exception to state immunity was central to the balance of federalism.

Defendants seem to suggest that *Almond Hill* was an aberration - an "extension" of *Ex Parte Young* to novel and controversial realms. AOB at 15-16. In fact, every significant, reported Medicaid suit in the history of this major federal-state program has been an *Ex Parte Young* action against state officials for violation of the federal Medicaid statute, the most significant perhaps being *Wilder v. Va. Hospital Association, 496* U.S. 498, 110 S .Ct. *25* 10 (1990). *Wilder* was a Section 1983 action against "several state officials, including the Governor, " in which plaintiffs sought declaratory and injunctive

relief for violations of the Boren Amendment to the Medicaid Act. 110 S .Ct at 2514.[7]

Every court which has considered Eleventh Amendment immunity defenses *post-Seminole* has permitted an *Ex Parte Young* action involving statutory Medicaid claims against state officials: *Maryland Psychiatric Society, Inc. v. Wasserman,* 1996 WL 71882 n.1 (4th Cir., Dec. 16, 1996) (court has jurisdiction to hear claims against state officials for violation of the federal Medicaid Act, despite *Seminole); Daniels v. Wadley , 926* F. Supp. 1305, 13 10 (M.D. Tenn. 1996) *(Seminole* "poses no barrier to Medicaid suit under *Ex Parte Young"); Hunter v. Chiles*, 944 F.Supp. 914, 917 (S.D.Fla. 1996) (permitting Medicaid claims against state officials under *Ex Parte Young*

[7] Defendants cite *Amisub, Inc. v. State of Colorado Department of Social Services*, 879 F.2d 789 (10th Cir. 1989) and *Gamboa v. Rubin*, 80 F.3d 1338, 1339-50 (9th Cir. 1996) for the proposition that there is no express abrogation of state immunity in the Medicaid Act. AOB at 9. This is a non-sequitur which plaintiffs have never disputed, a fact which the district court itself noted. Opinion, ER at 51.

Gamboa is wholly irrelevant, as it concerns the Eleventh amendment bar on raising state law claims against state defendants in federal court. 80 F.3d at 1350. More to the point, *Amisub* only lends additional support for plaintiffs' *Young* claims. In *Amisub,* the state Medicaid agency was dismissed on Eleventh Amendment grounds but the case proceeded against the state Medicaid director based on *Ex Parte Young. Id.* at 793 n.7. The *Amisub* court then ruled for plaintiffs, finding multiple violations of the Medicaid Act and ordering the state director to comply with federal law. *Amisub* was one of the many circuit court cases that led to the court's decision in *Wilder. See, Wilder v. Va. Hospital Assoc.*, 110 S.Ct. at 2522 n. 16.

because "the relevant law in this area is unchanged" despite *Seminole*).[8]

Pre-Seminole Medicaid cases are equally consistent in permitting *Young* actions for prospective relief against state officials for violations of the Medicaid Act. *See, e.g.*, ***Kimble*** *v. Solomon, 599* F.2d 599, 601 (4th Cir. 1979) (state officials reduced Medicaid benefits without complying with federal notice requirements in Medicaid statute; while retroactive relief was barred by Eleventh Amendment, prospective relief was permitted); *Granato v. Bane, 74* F.3d 406, 410-413 (2nd Cir. 1996) (state agency violates Medicaid statute requiring notices of action and aid paid pending the hearing; damages barred by the Eleventh Amendment but court ordered prospective relief on statutory claims); *Rehabilitation* ***Ass'n of*** *Va. v. Kozlowski, 42* F.3d 1,444, 1449 (4th Cir. 1994) (suit against state Medicaid director is not barred by Eleventh Amendment because of *Young* and ***Edelman***); *New York City Health and Hospitals v.* ***Perales***, 954 F.2d 854 (2nd Cir. 1992) (where provider reimbursement scheme violated federal Medicaid statute, Eleventh Amendment

[8] In the district court, defendants raised a third argument, now apparently abandoned on appeal: that the remedial schemes of the ADA and the Medicaid Act evince Congressional intent to preclude private enforcement through an ***Ex Parte Young*** action. This argument was considered and rejected by the district court in its opinion. ER at 52 - 54. It has also been considered and rejected in the post-Seminole Medicaid cases cited in the text above.

is no bar to prospective relief.).

D. **The Historical Development of the *Ex Parte Young* Doctrine Demonstrates Its Continued Viability.**

Defendants argue without reference or supporting citation that "extending *Ex Parte Young* to suits involving alleged violations of federal statutory rights frustrates the very reasons which led to the passage of the Eleventh Amendment, without substantially furthering the supremacy of the federal law." AOB at *4-5. Accord* AOB at 16.

Defendants refer to the "historically sound principle" that "the Eleventh Amendment prevents Congressional authorization of suits by private parties against unconsenting states." AOB at 8, quoting *Seminole,* 116 S.Ct. at 1131-32. In fact, historical evidence is to the contrary. The rule we speak of under the name of *Ex Parte Young* has been recognized since the Middle Ages. Numerous commentators agree that it has been settled doctrine that a suit against an officer of the Crown permitted relief against the government despite the sovereign's immunity from suit in its own courts and the maxim that the King can do no wrong. Jaffe, *Suits against Governments and Officers: Sovereign Immunity, 77* Harv. L. Rev., at 3, 18-19. Thus the early English writs of disseisin and of attaint and later writs of certiorari and mandamus

permitted actions against the "King's man" even when the Sovereign himself was immune. Jaffe at 9, 16. As Jaffe notes in his commentary, the passage of the Eleventh Amendment in 1798

> might conceivably have been taken so to extend, the doctrine as to exclude suits against state officers even in cases where the English tradition would have allowed them. There was a running battle as to where the line would be drawn. The [Eleventh] Amendment was appealed to as an argument for generous immunity. But there was the vastly powerful counterpressure for the enforcement of constitutional limits on the states.

Id. at 20-21. There began a series of cases permitting the English practice of permitting suits against officers, culminating in *Young* itself: Orth, *Judicial Power of the United States,* at 34-35, 40-41, 122. *Young* struck the time-honored balance: state officers never have authority to violate the Constitution or federal law, so any illegal action is stripped of state character and rendered an illegal individual act, since "[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Ex Parte Young, 209* U.S., at 159-160, 28 S.Ct., at 453-454.

In sum, "the doctrine of *Ex Parte Young* seems indispensable to the establishment of constitutional government and the rule of law." *Perez v.*

Ledesma, 401 U.S. 94, 110 91 S.Ct. 674, 690 (1971) (Brennan, concurring in part and dissenting in part, quoting C . Wright, *Handbook **of** the Law **of** Federal Courts,* 292 (2nd ed. 1970). See *also* E. Chermerinsky , *Federal Jurisdiction* 393 (2d ed. 1994).

Given that *Ex Parte Young* represents a rule of such weight and longevity, it is the radical restriction of its scope, rather than its continued enforcement, that would upset federal/state relations. As the high court has repeatedly taught, such a change should come only with an extraordinarily "clear statement" before assuming a Congressional purpose to affect the federal balance.

> [I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute. "

*Will v. Michigan Dept. **of** State Police,* 491 U.S. 58, 65, 109 S.Ct. 2395, 2400-2402, 115 L.Ed2d 4 10 (1991), quoting *Atascadero State Hospital v. Scanlon, 473* U.S. at 242, 105 S.Ct. at 3147.

II. THE ABROGATION OF ELEVENTH AMENDMENT IMMUNITY CONTAINED IN THE AMERICANS WITH DISABILITIES ACT IS A VALID EXERCISE OF CONGRESS' POWER UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT.

Following the Supreme Court's decision in *Seminole Tribe,* this Court concluded that the abrogation of state Eleventh Amendment immunity from suits under the ADA was a proper exercise of Congress' enforcement power under the Fourteenth Amendment. *Duffy v. Riveland, 98* F.3d 447, 452 (9th Cir. 1996). Every other court which has considered this issue following *Seminole* has reached the identical conclusion. *Hunter v. Chiles, supra*, *944* F.Supp. at 917 (ADA and the Medicaid program); *Mayer v. University of Minnesota,* 940 F.Supp. 1474, 1480 (D.Minn. 1996) (ADA and state university employment); *Niece v. Fitzner*, 941 F.Supp. 1497, 1504 (E.D. Mich. 1996) (ADA and prison telephone communications). *See also, Martin v. Voinovich,* 840 F.Supp. 1175, 1186-87 *(S* .D. Ohio 1993) *(pre-Seminole* decision that Congress had authority for ADA abrogation under Fourteenth Amendment).

Defendants concede, as they must, that Congress expressly abrogated Eleventh Amendment immunity with enactment of the ADA (42 U.S .C. § 12202 (express abrogation), 42 U.S .C. § 12101(b)(4) (constitutional authority)), but nevertheless contend "that Congress did not act pursuant to a

valid exercise of power since it did not act pursuant to the Fourteenth Amendment." AOB at 8. Thus, this Court's inquiry is limited to whether Congress had authority under the Fourteenth Amendment to enact the ADA.

A. Congress Has the Broadest of Plenary Powers to Adopt Statutes To Enforce The Fourteenth Amendment

The Civil War amendments, including the Fourteenth Amendment, "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States, 446* U.S. 156, 179, 100 S.Ct. 1548, 1563 (1980). The Fourteenth Amendment itself directly confers upon Congress expansive powers: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

When the Supreme Court first considered the meaning of Section 5 in *Ex Parte Virginia,* 100 U.S. 339 (10 Otto) (1879), it upheld the constitutionality of a statute enacted by Congress prohibiting disqualification of jurors based on race. In so holding, the court broadly defined the power granted Congress by Section 5:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the

> prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 345-46.

In *Katzenbach v. Morgan, 384* U.S. 641, 86 S.Ct. 1717 (1966), the Supreme Court upheld a Congressional enactment prohibiting literacy tests under the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e). The Supreme Court rejected an argument that under Section 5 Congress could only prohibit acts that would violate the substantive provisions of the Fourteenth Amendment. "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment. " 384 U. S . at 651, 86 S.Ct. at 1723-1724.

More recently, in *Fitzpatrick v. Bitzer, 427* U.S. 445, 96 S .Ct. 2666 (1976), the Supreme Court upheld another Congressional abrogation of state immunity, again based on Section 5 of the Fourteenth Amendment. The abrogation permitted employment discrimination suits brought under Title VII of the Civil Rights Act of 1964, 42 U.S .C. § 2000e-2(a). The high court noted

that "the Eleventh Amendment, and the principle of state sovereignty that it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick, 427* U.S. at 456, 96 S.Ct. at 2671.

> When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for purposes of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials "which are constitutionally impermissible in other contexts."

Id. (citation omitted)(footnote omitted)(emphasis added). *Accord Schmidt v. Oakland Unified Sch. Dist.,* 662 F.2d 550, 557 n.8 (9th Cir. 1981) (under Section 5 of the Fourteenth Amendment, "Congress is not limited to prohibiting activities which would be held by the courts to violate the Fourteenth Amendment").

In the course of judicial review of Congress' authority in this area, "great deference is to be accorded Congress' determination of what measures are appropriate" in exercising its enforcement powers under Section 5 of the Fourteenth Amendment. *Bond v. Stanton, 555* F.2d 172, 175 (7th Cir. 1977).

According to the high court in *Katzenbach,* "[i]t was for Congress, as the branch that made th[e] judgment, to assess and weigh the various conflicting considerations . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which Congress might resolve the conflict as it did." 384 U. S . at 653, 86 S . Ct. at 1725.

Consistent with this principle, post-Seminole cases have upheld Congressional abrogation provisions in statutes other than the ADA, based on the Fourteenth Amendment. *Mockaitis v. Harcleroad,* 104 F.3d 1522 (9th Cir. 1997) (Religious Freedom Restoration Act); *Kimel v. Florida Board of Regents,* 1996 U.S. Dist. Lexis 7995 (N.D. Fla. May 17, 1996), *appeal pending, No.* 96-2788 (1 lth Cir.) (Age Discrimination in Employment Act); *Teichgraeber v. Memorial Union Corp.,* 946 F.Supp. 900 (D.Kan. 1996) (Age Discrimination in Employment Act); *Timmer v. Michigan Dep 't of Commerce:* 104 F.3d 833 (6th Cir. 1997) (Equal Pay Act); *Weaver v. Clarke,* 933 F.Supp. 831 (D. Neb. 1996) (Civil Rights Attorney's Fees Awards Act).

B. The ADA is Appropriate Legislation to Enforce The Fourteenth Amendment.

In *Katzenbach,* the Supreme Court explained that a Congressional

enactment is authorized by the Fourteenth Amendment if it "may be regarded as an enactment to enforce the Equal Protection Clause, . . . is 'plainly adapted to that end' and . . . is not prohibited by but is consistent with the 'letter and spirit of the constitution.'" 384 U.S. at 651, 86 S.Ct. at 1724 (citations omitted).

As legislation with an anti-discrimination focus, the ADA meets the ***Katzenbach*** test. In enacting the ADA Congress expressly invoked "the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U. S .C . § 12101(b)(4). See ***also*** 42 U.S.C. § 12101(b)(1) (purpose of the ADA is "the elimination of discrimination against people with disabilities"). Congressional findings in the ADA expressly reference problems of disability-based discrimination and segregation. 42 U.S. C. 12101 (a)(2). Pursuant to Circuit Rule 28-2.7, plaintiffs have included relevant text of the ADA, which includes these findings, in an Addendum to this brief.

Congress itself characterized the ADA as "civil rights" legislation, harkening to its Fourteenth Amendment roots. S .Rep. No. 116, 10 1st Cong . ,

1st Sess. 19 (1989) (proposing "omnibus civil rights legislation" for people with disabilities); H.R.Rep. No. 485 (II), 101st Cong., 2nd Sess. 40 (1990) (ADA "will finally set in place the necessary civil rights protection1 for people with disabilities ").

In addition, the courts have consistently concluded that the ADA, as well as Section 504 on which it was based, have the purpose of furthering "the traditional Equal Protection goal of protecting a discrete class of individuals from arbitrary and capricious action. " *EEOC v. Calumet County, 686* F.2d 1249, 1252 (7th Cir. 1982).[9]

Accordingly, the ADA is a valid exercise of Congress' power to "enforce, by appropriate legislation, " the Fourteenth Amendment's guarantee of equal protection.

c . **Defendants' Arguments Against Congressional Abrogation Authority Are Unavailing.**

Defendants make two arguments that Congress exceeded its authority under the Fourteenth Amendment in enacting the ADA. First, they argue that the ADA is outside the scope of the Fourteenth Amendment because it imposes

[9] *See Armstrong*, Brief of the United States at 34-39; *Armstrong*, Brief of Appellees at 24-28 for a discussion of additional cases regarding the Fourteenth Amendment as the authority for § 504 and the ADA.

affirmative obligations and not merely equal treatment. AOB at 12. Second, defendants argue that this is really a "deinstitutionalization" case as in *Youngberg* v. *Romeo* and its progeny, and that because the Supreme Court held in *Youngberg* that there is no constitutional due process right to community treatment, integration mandates in the ADA are also outside the constitutional authority of the Fourteenth Amendment. AOB at 12-13. Both arguments are wrong.

1. Affirmative Obligations Under The ADA Are Consistent With Congress' Broad Powers Under Section 5 Of The Fourteenth Amendment.

Defendants simplisticly focus on equal treatment as the sole remedy under the Fourteenth Amendment. AOB at 12. But the high court has never limited the remedial reach of the Equal Protection Clause to equal treatment alone. [10]

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[10] *See Armstrong*, Brief of the United States, 22-32; *Armstrong*, Brief of Appellees, 34-38 for further analysis of Congress' powers to prohibit intentional discrimination and disparate impact.

In their reply brief defendants may argue that Congress lacks the power to impose affirmative obligations to remedy discrimination against people with disabilities because the Supreme Court has not recognized disability as a suspect class. However, it is in dispute that people with disabilities are protected under the Fourteenth Amendment. See City of *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. (1985) (striking down discriminatory zoning ordinance). Additionally, "[t]he fact that the Supreme Court has subjected governmental classifications involving suspect classes to a higher level of scrutiny than other classifications does not prevent Congress from finding that another class of persons has been subjected to a history of unequal treatment and legislating pursuant to its enforcement powers of the Fourteenth Amendment to protect that class of persons from

To the contrary, in decisions concerning access to the courts by indigent people, the Supreme Court teaches that the Equal Protection Clause is sometimes violated by treating unlike persons alike. See, *e.g*, *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. at 585 (1956); *M.L.B. v. S.L.J.*, _ U.S. _, 117 S.Ct. 555 (1996). In these cases, in which the states treated indigent parties appealing from certain court proceedings as if they were not indigent, the Supreme Court noted that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." 117 S . Ct. at *569, quoting Griffin*, 351 U.S. at 17 n. 11, 76 S .Ct. at 590 n. 11. Consequently, the Equal Protection Clause required that states affirmatively modify their policies to waive appellate fees in order to ensure equal "access" to appeal for indigent persons:. *Id.* at 560.

Moreover, "[h]ere we deal, . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is a fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress." *Fullilove v. Klutznick, 448* U.S. *448, 483,* 100 S.Ct. *2758, 2777* (1980). In *Fullilove,*

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arbitrary discrimination." Mayer, 940 Fed. Supp. at 1479. See ***Clark***, Brief of the United States at 8-14; ***Armstrong***, Brief of the United States at 14-20; ***Armstrong***, Brief of Appellees at 29-34 for analysis of this issue.

the Supreme Court affirmed Congress' authority under the Fourteenth Amendment to enact the "minority business enterprise " provision of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2):

> Congress may not only induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has the authority to declare certain conduct unlawful, it may, as here, authorize and induce action to avoid such conduct.

Id. at 483-484, 100 *S* .Ct. at 2777. See also *Schmidt v. Oakland Unified Sch. Dist., 662, F.2d at 557 n. 8*

Instead of heeding the teachings of the Supreme Court itself, defendants base their interpretation of the scope of the Fourteenth Amendment exclusively on dicta from a single district court case from the Eastern District of North Carolina. *Pierce* v. *King,* 918 F.Supp. 932 (E.D.N.C. 1996); AOB at 12. *Pierce* was a prison employment case which involved facts and issues far afield from those in the instant case. The *Pierce* court concluded that the plaintiff inmate had no standing under the ADA to request accommodation because there was no covered employment relation. *Pierce, 9 18* F. Supp. at *942.* The *Pierce* court's discussion of the Fourteenth Amendment and the ADA occurred in the course of its standing discussion and was not necessary to its ruling.

At the same time that defendants rely solely on dicta in *Pierce,* they fail to inform this Court of an ADA case which *is* directly on point both factually and legally. *Martin v. Voinovich,* 840 F.Supp. 1175 (S.D. Ohio 1993). Like this case, *Martin* was brought on behalf of persons with disabilities who were forced to remain in institutions and nursing homes, even though they were eligible for community placements. While the state had community placement programs, they were not adequately funded, so that there were no openings for the *Martin* plaintiffs. As in this case, the *Martin* plaintiffs asserted violations of the ADA, as well as the Nursing Home Reform Act provisions of the federal Medicaid Act. Although *pre-Seminole, Martin* specifically considered whether Congress had constitutional authority to abrogate the state defendant's Eleventh Amendment immunity under the ADA. Citing *Fitzpatrick v. Bitzer,* the *Martin* court concluded that the Fourteenth Amendment affords such authority. *Id.* at 1186-87.

Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995) is another ADA case which, along with *Martin,* demonstrates the necessity for the affirmative remedies for disability-based discrimination which Congress fashioned in the ADA. In *Helen L.,* the plaintiffs lived in nursing facilities where they had no

contact with members of the community and were segregated away from non-disabled persons. The plaintiffs sought to participate in the state's existing program of home attendant care, for which they were qualified and which would have enabled them to return to live with their families and friends in the community. Scarce funding from the state created arbitrary limits on the numbers of persons who could participate in the attendant care program, resulting in a waiting list for these limited community services just as limited funding in California has resulted in the ***de facto*** waiting lists for rehabilitative mental health services in the community which are at issue in the instant case.

To support their claim for community based services, the plaintiffs in *Helen L.* relied on the "integration mandate" in the ADA. The ADA provides that "no qualified person with a disability shall, by reason of such disability, be excluded from participation in or be denied the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. " 42 U. S .C. § 12 132. In addition, public entities must make "reasonable modifications to rules, policies, or practices" for a "qualified individual with a disability. " 42 U. S . C . 1213 l(2). The implementing regulations are even more specific, requiring that "[a] public entity shall administer services, programs,

and activities in the most integrated setting appropriate to the individual needs of qualified individuals with disabilities," 28 C.F.R. § 35.130(d).

The Third Circuit carefully considered the purpose of the ADA in its reviewof the justification for plaintiffs' claim of a right to: services "in the most integrated setting appropriate." *Helen L.*, *46* F.3d at 332-333.

> In enacting the ADA, Congress found that "[h]istorically, society has tended to isolate and segregate individuals with disabilities and . . . such forms of discrimination . . . continue to be a serious and pervasive problem." 42 U.S.C. § 12101(a)(2) (emphasis added). Congress also concluded that "[i]ndividuals with disabilities continually encounter various forms of discrimination, including; . . . segregation . . . .", 42 U.S.C. § 12101(a)(5) (emphasis added).

Id. at 332. "Thus, the ADA and its attendant regulations! clearly define unnecessary segregation as a form of illegal discrimination against the disabled." *Id.* at *333*. *See also* Cook, "*The Americans with Disabilities Act: The Move to Integration,*" 64 Temp. L. Rev. 393, 409-410.

Congress' concerns in fashioning the ADA fall squarely within the scope of the Fourteenth Amendment, since it is well-recognized that segregation and isolation are forms of discrimination prohibited under the Equal Protection Clause. For example, in *Brown v. Board of Education*, 347 U.S. 483 (1954),

the Supreme Court found that state-supported school segregation may affect children's "hearts and minds in a way unlikely ever to be undone", and that "[s]eparate . . . facilities are inherently equal." *Id.* at 494-495.

Since integration is the most effective remedy for this form of discrimination, the Justice Department's commentary on the ADA regulations explains that "[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act." 28 C.F.R. Part 35, App. A Sec. 35.130.

In summary, Congress' broad authority under the Fourteenth Amendment includes "the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *City of Richmond v. J.A. Croson Co., 488* U.S. 469, 490, 109 S .Ct. 706 (1989) (emphasis in original), *citing Katzenbach v. Morgan, 384* U.S. 65 1. The integration mandate in the ADA construed in *Martin v. Voinovich* and *Helen L.* is just such a "prophylactic rule" which deals with the problems of discriminatory segregation and isolation faced by persons with disabilities and is squarely within Congress' authority under the Equal Protection Clause.

2. This Is Not A Deinstitutionalization Case And Is Not Controlled By Youngberg V. Romeo.

Defendants mischaracterize this as a "deinstitutionalization" case, attempting to bring it within the ambit of *Youngberg v. Romeo*, *457* U.S. 307, 102 S.Ct. 2452 (1982) and its progeny." The *Youngberg* line of due process cases, all of which were decided prior to the enactment of the ADA, are irrelevant to Congress' broad authority to enforce the Equal Protection Clause of the Fourteenth Amendment.

In *Youngberg,* the Supreme Court ruled that the plaintiff was only entitled to minimally adequate treatment under the due process clause of the Fourteenth Amendment. 457 U.S. at 322. Here, plaintiffs have alleged no constitutional due process claim. First Amended Complaint, ER at 1-41:. Instead, they have alleged claims under the ADA, legislation in which Congress was able to exercise its broader remedial power. Thus, Congress was able to fashion remedies -- the right to services in the most integrated community setting

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"Defendants also ***cite Society for Good Will to Retarded Children v. Cuomo, 737*** F.2d 1239 (2nd Cir. 1984); ***Rennie v. Klein, 720*** F.2d ***266, 269,*** 271 (3rd Cir. 1983); ***Johnson v. Brelje***, 701 F.2d 1201, 1210 ***(7th*** Cir. 1983); ***Association for Retarded Citizens of North Dakota*** v. ***Olson,*** 561 F.Supp. 473, 486 (D.N.D. 1982), ***aff'd on other grounds,*** 713 F.2d 1384 ***(8th*** Cir. 1983); ***Sanchez v. New Mexico, 396*** U.S. ***276, 90*** S.Ct. ***588*** (1970); ***State v. Sanchez, 80*** N.M. 438, 441 (1969). AOB at 13.

appropriate -- which the courts alone may not have been able to impose as a judicial remedy directly under the Constitution. See. e.g., ***Fullilove***, *448* U.S. at 483-484.

It is also important to note that the "integration mandate" of the ADA does not require the creation of entirely new community based programs, one of the remedies sought and rejected in *Youngberg.* As the Third Circuit makes clear in *Helen L.* , " 'deinstitutionalization' involves 'massive' changes in a state's programs and is not required absent a clear statutory command." *Helen L.,* 46 F.3d at 336 n. 22 (citing *Pennhurst State School and Hospital v. Haldeman,* 451 U.S. 1, 24, 101 S.Ct. 1531, 1543 (1981)). The state defendants in *Helen L.,* like the defendant here, attempted to defeat the plaintiff's claim "by labeling it a claim for 'community care' or 'deinstitutionalization' -- something which the ADA does not require. " *Helen L., 46* F.3d at 336 (citations and footnote omitted.) The court was unimpressed:

> [Plaintiff] Idell S. is not asserting a right to community care or deinstitutionalization *per* se. She properly concedes that [defendant] DPW is under no obligation to provide her with any care at all. She is merely claiming that, since she qualifies for DPW's attendant care program, DPW's failure to provide those services

> in the "most integrated setting appropriate" to her needs (without a proper justification) violates the ADA.

Id.

Martin v. Voinovich is also helpful in de-constructing defendants' contention that the instant case is merely a "deinstitutionalization" case barred by *Youngberg.* With factual allegations very similar to those in the instant case, the *Martin* plaintiffs also asserted a due process claim based on *Youngberg. Martin,* F. Supp. at 1207. Not surprisingly, the *Martin* court ruled that since "*Youngberg* does not give rise to a right to residential placement," plaintiffs had not stated a *Youngberg* claim based on "allegations such as defendants have failed to provide residential services or remove persons from institutions to community living arrangements. " ***Id.***[12] Significantly, the *Martin* court simultaneously recognized that these identical facts did give rise to a valid claim under the ADA and the Nursing Home Reform Act provisions of the Medicaid Act. ***Id.*** at 1142, 1197 - 1202.

[12]The ***Martin*** court did find that plaintiffs had stated a valid claim under ***Youngberg*** for the state's failure to provide services necessary to maintain the health and safety of persons who were involuntarily institutionalized. ***Martin, 840*** F.Supp at 1207.

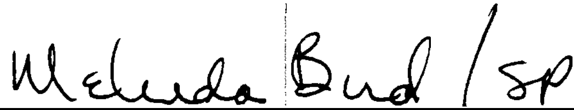
3. Title II of the ADA is consistent with Congress' Broad Powers under Section 5 of the Fourteenth Amendment

Noting that Congress identified the Commerce Clause as well as the Fourteenth Amendment as its authority for the ADA, defendants argue that plaintiffs have not alleged any ADA obligations under the Fourteenth Amendment. AOB at 11. In enacting the ADA, Congress invoked its powers under the Commerce Clause because it wished to reach the conduct of private parties. 42 U.S.C. 12101 (b)(4). The Fourteenth Amendment, rather than the Commerce Clause, is the traditional constitutional authority for prescribing state conduct. *EEOC v. County of Calumet*, *686* F.2d at 1253. Since it is plain that this action is brought pursuant to Title II of the ADA against public rather than private entities, the obligations of the ADA which plaintiffs seek to enforce are obviously traced to the Fourteenth Amendment rather than the Commerce Clause. Congress' authority to reach private entities through its authority to enforce the Fourteenth Amendment need not be decided here.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,



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STATEMENT OF RELATED CASES

Armstrong v. Wilson, No. 96-16870 and *Clark-v. California, No. 96-*16952, both of which are calendared before this panel pursuant to the Court's Order of March 6, 1997, raise similar questions regarding the constitutionality of the abrogations of Eleventh Amendment immunity in the ADA, and the availability of actions against state officials for injunctive and declaratory relief for violations of the federal law, including the ADA.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WORTH "BUTTERCUP" HALE, et al., Plaintiffs-Appellees , v. KIMBERLEY BELSHÉ, et al., Defendants-Appellants.	97-15177

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that all text is double spaced, that a 14 pt. Times Roman proportional font was used, and that the number of words in this brief is 9,142 words.

Dated: March 28, 1997

Respectfully submitted,

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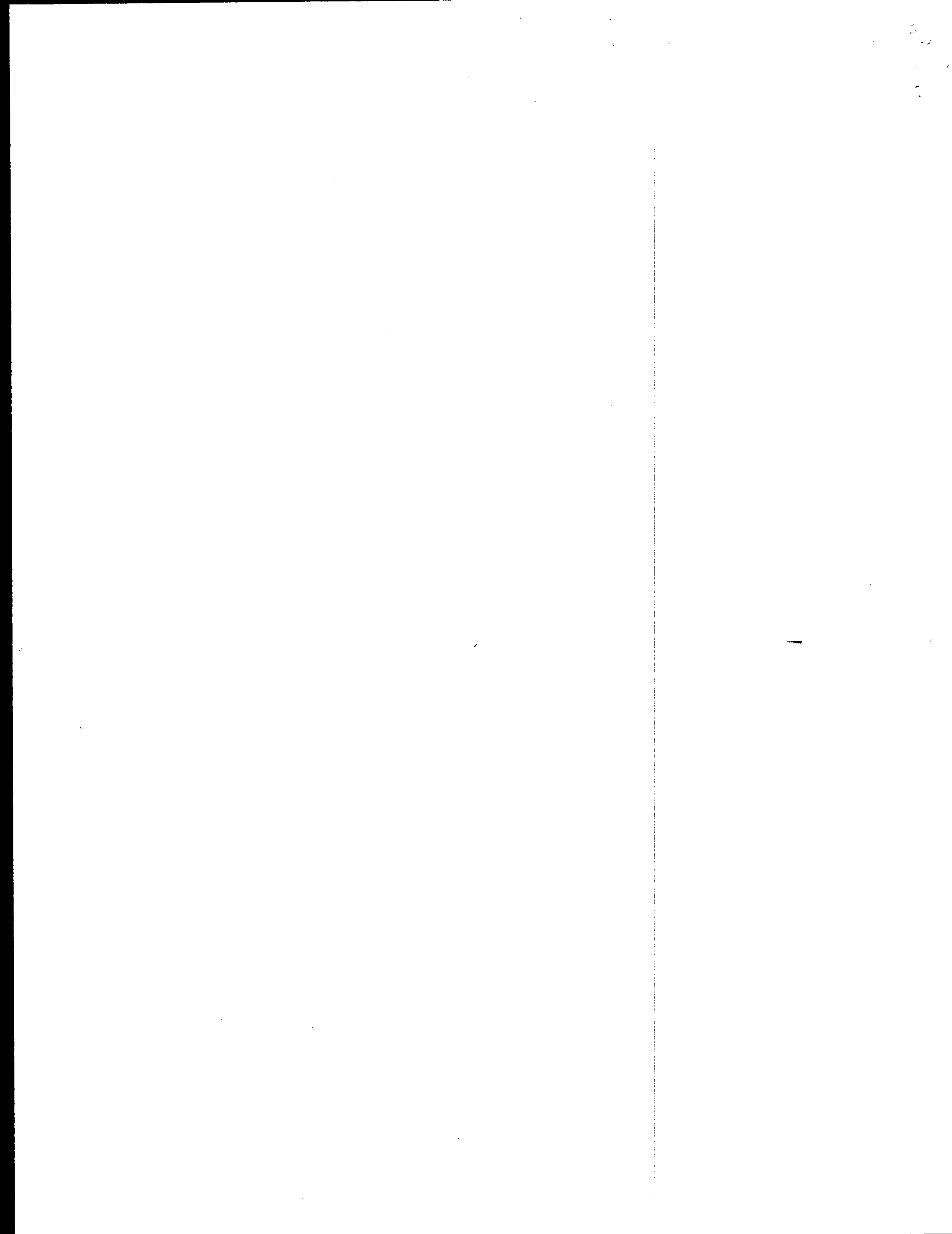
ADDENDUM TO BRIEF OF APPELLEES
(Ninth Circuit Rule 28-2.7)

1. AMERICANS WITH DISABILITIES ACT (ADA) OF 1990, 42 U.S.C.A. § 12101(a)&(b)
2. ADA, Subchapter II - Public Services, Part A, 42 U.S.C.A. §§ 12131-12134
3. ADA, Implementing Regulations, Subparts A and B, 28 C.F.R. §§ **35.101-35.148**
4. ADA, Appendix A to Part 35, Subpart B, Section 35.130
5. ADA, 42 U.S.C.A. § 12202



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ADDENDUM TO BRIEF OF APPELLEES
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1. AMERICANS WITH DISABILITIES ACT (ADA) OF 1990, 42 U.S.C.A. § 12101(a)&(b)

2. ADA, Subchapter II - Public Services, Part A, 42 U.S.C.A. §§ 12131-12134

3. ADA, Implementing Regulations, Subparts A and B, 28 C.F.R. §§ 35.101-35.148

4. ADA, Appendix A to Part 35, Subpart B, Section 35.130

5. ADA, 42 U.S.C.A. § 12202

AIDS in the food industry. Rebecca Winterscheidt. 28 **Ariz.Atty.** 13 (Mar. 1992).
Americans with Disabilities Act: A new challenge for employers. Matthew D. Schiff and David L. Miller. 27 **Tort and Ins.L.J.** 44 (1991).
Americans with Disabilities Act: A primer for employers. Jeffrey T. Johnson, 20 **Colo.Law. 473** (199 1).
Americans with Disabilities Act as it relates to AIDS in the workplace. Vimal K Shah, 6 **CBA Rec. 33 (Nov. 1992).**
An employer's guide to the Americans with Disabilities Act: From job qualifications to reasonable accommodations. Lawrence P. Postol and David D. Kadue, 24 J. **Marshall L.Rev.** 693 (1991).
Disability and community: Modes of exclusion, norms of inclusion. and the Americans with Disabilities Act of 1990. Michael B. Laudor, 43 Syracuse **L.Rev.** 929 (1992).
Human immunodeficiency virus, the legal meaning of "handicap," and implications for public education under federal law at the dawn of the age of ADA. William G. Buss, 77 Iowa **L.Rev.** 1389 (1992).
Introducing the Americans With Disabilities Act: Promises and challenges. Penn Lerblance, 27 **U.S.F.L.Rev.** 149 (1992).
Labor lawyer's guide to the Americans with Disabilities Act of 1990. Evan J. Kemp, Jr. and Christopher G. Bell, 15 Nova **L.Rev.** 31 (1991).
Parallel remedies and increased enforcement of the American with Disabilities Act. Edward Sadowsky 46 **Lab.L.J.** 214 (April 1995).
Pm-history of the Americans with Disabilities Act and some initial thoughts as to its constitutional implications. Robert E. Rains, 11 St. Louis **U.Pub.L.Rev. 185 (1992).**
Sticks and bricks, dollars and sense: The ADA and nonresidential real estate. Earl B. Slavitt and Donna J. Pugh, 81 **Ill.B.J.** 3 14 (1993).

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§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older:

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite &me improvements,

such forms of discrimination against individuals with disabilities 'continue to he a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data,' national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

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

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

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

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

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

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

(Pub.L. 101-336, § 2, July 26, 1990, 104 Stat. 328.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 **Acts.** House Report No. 101-485(Parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 267.

References in Text

This "chapter", referred to in subsec. (b), was in the original this "Act", meaning Pub.L. 101-336, July 26. 1990, 104 Stat. 327, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs. and amended section 706 of Tide 29, Labor, and sections 152, 22 1, and 611 of Title 47. For complete classification of this Act to the Code, see Short Title of 1990 Acts note set out under this section and Tables.

Short Title

1990 Acts. Section I(a) of Pub.L. 101-336 provided that: "Th.. Act [enacting this chapter and section 225 of Title 47, Telegraphs. Telephones, and Radiotelegraphs, amending section 706 of Title 29, Labor, and sections 152. 221, and 611 of Title 47, and enacting provisions set out as notes under sections 12111, 12131. 12141. 12161, and 12181 of this title] may be cited 'as the 'Americans with Disabilities Act of 1990'."

LIBRARY REFERENCES

American Digest System

Prohibition against discrimination against handicapped persons generally; programs receiving federal assistance, see Civil Rights ⇐107(1 to 4), 126.

Encyclopedias

Prohibition against discrimination against handicapped persons generally; programs receiving federal assistance, see CJ.S. Civil Rights §§ 18, 20, 49 et seq.

Law Reviews

ADR in employment law: The concept of zero litigation. John E. Sands and Sam Margulies, 155 N.J.Law. 23 (Mag.) (August/September 1993).

AIDS-related benefits equation: Costa times needs divided by applicable law. Peter D. Blanck, Clifford H. Schoenberg and James P. Tenney, 211 N.Y.L.J. 1 (Feb. 28, 1994).

Americans with Disabilities Act: An introduction for lawyers and judges. Robert L. Mullen, 29 Land & Water L.Rev. 175 (1994).

SUBCHAPTER II-PUBLIC SERVICES

CROSS REFERENCES

Architectural and Transportation Barriers Compliance Board to establish guidelines relating to this subchapter, see 29 USCA § 792.

PART A—PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means-

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45).

(2) Qualified individual with a disability

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

(Pub.L. 101-336, Title II, § 201, July 26, 1990, 104 Stat. 337.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Acts. House Report No. 101-485(Parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 267.

Effective Dates

1990 Acts. Section 205 of Pub.L. 101-336 provided that:

"(a) General rule. Except as provided in subsection (b), this subtitle [subtitle A (sections 201 to 205) of Title II of Pub.L. 101-336, enacting this part] shall become effective 18 months after the date of enactment of this Act [July 26. 1990].

"(b) Exception. Section 204 [section 12134 of this tide] shall become effective on the date of enactment of this Act [July 26, 1990]."

LIBRARY REFERENCES

American Digest System

Prohibition against discrimination against handicapped persons generally; programs receiving federal assistance, see Civil Rights ⚷107(1 to 4), 126.

Encyclopedias

Prohibition against discrimination against handicapped persons generally; programs receiving federal assistance. see C.J.S. Civil Rights §§ 18, 20, 49 et seq.

Noland v. Wheatley, N.D.Ind. 1993, 835 F.Supp. 476.

Juror's visual limitations did not render kr automatically unqualified for jury service and court had obligation to "reasonably accommodate" her pursuant to the Americans with Disabilities Act (ADA) as juror could follow case with only minimal assistance; juror was moved from seat in middle of jury box to first seat, which was closer to witness box, all documents were read into record by court so that juror woukinotbeatdisadvantageduetoher reading difficulties, court gave brief description of general layout of documents, and enlarged print version of transcript of tape introduced at trial was given to juror so that she would be able to use transcript as aid to listening to tape. People v. Caldwell, 1993, 603 N.Y.S.2d 713, 159 Misc.2d 190.

4. —— Essential eligibility requirements

To determine whether student was qualified individual for purposes of ADA, it was appropriate to first determine whether state high school activities association's age limit for participation in interscholastic sports was essential eligibility requirement. by reviewing importance of requirement to interscholastic baseball program and, if requirement was essential, to conduct individualized inquiry as to whether student met requirement with or without modification. Pottgen v. Missouri state High School Activities Ass'n, C.A.8 (Mo.) 1994, 40 F.3d 926.

In action alleging that elimination of city-sponsored recreation programs for disabled individuals was violation of ADA, only "essential eligibility requirement" that disabled individuals were required to meet in order to be "qualified individuals with disabilities" entitled to challenge elimination of programs was to request benefits of recreational program. Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, S.D.Fla.1994, 846 F.Supp. 986.

University student having cerebral palsy was "qualified" under Americans with Disabilities Act (ADA) to participate in university's roommate assignment program; essential eligibility requirements for participation in program were admission to university and submission of completed residence hall contract application requesting double room but not specifying particular roommate and student met these eligibility requirements. Coleman v. Zatechka, D.Neb.1993, 824 F.Supp. 1360.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to disc-on by any such entity.

(Pub.L. 101-336, Title II, § 202, July 26. 1990, 104 Stat. 337.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Acts. House Report No. 101-485(Parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Mm. News, p. 267.

Effective Dates

1990 Acts. Section effective 18 months after July 26, 1990, see section 205(a) of Pub.L. 101-336 set out as a note under section 12131 of this title.

LIBRARY REFERENCES

Administrative Law

state and local governments, nondiscrimination in services on basis of disability, see 28 C.F.R § 35.101 et seq.

American Digest System

Discrimination in public accommodations and services prohibited; handicap or disability, see Civil Rights ⟹119 et seq., 173 et seq.

designed to perform essentially same function as strict system, and modified system used and attempted to harmonize appropriate tenets of widely used systems. Petersen By and Through Petersen v. Hastings Public Schools, D.Neb.1993, 831 F.Supp. 742. affirmed 31 F.3d 705.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

(Pub.L. 101-336, Title II, § 203, July 26, 1990, 104 Stat. 337.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Acts. House Report No. 101-485(Parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News. p. 267.

1990 Acts. Section effective 18 months after July 26, 1990, see section 205(a) of Pub.L. 101-336, set out as a note under section 12131 of this title.

LIBRARY REFERENCES

American Digest System

Federal remedies for violation of anti-discrimination laws generally, see Civil Rights ⚷181 et seq., 191 et seq., 331 et seq.

Encyclopedias

Federal remedies for violation of anti-discrimination laws generally, see C.J.S. Civil Rights §§ 222 et seq., 225 et seq.. 340 et seq.

Law Reviews

Mental disabilities in the workplace. Louis Pechman. 211 N.Y.L.J. 1 (March 2, 1994).

WESTLAW ELECTRONIC RESEARCH

Civil rights cases: 78k[add key number].

See, also. WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Damages 1
Exhaustion of administrative remedies 2
Persons entitled to maintain action 3
Standing 3

1. Damages

Civil Rights Act of 1991 subsection providing for compensatory or punitive damages where defendant has engaged in unlawful discrimination under ADA or committed a violation of ADA did not provide personal representative of estate of interviewee with right to recover compensatory or punitive damages when interviewee collapsed and died while performing physical agility test during interview process where there was no allegation that public school board, superintendent, or security officer conducting interview engaged in intentional discrimination. Tafoya v. Bobroff, D.N.M. 1994. 865 F.Supp. 742.

Punitive damages are not available to plaintiff asserting claim under Americans With Disabilities Act (ADA) Title II, guaranteeing for qualified individuals with disabilities equal access to services and benefits provided by state and local governments. Harrelson v. Elmore County, Ala., M.D.Ala.1994, 859 F.Supp. 1465.

Monetary damages **are** not **recoverable** under Title II of Americans with Disabilities Act (ADA) to **redress mental** anguish and humiliation. Tyler v. City of Manhattan, **D.Kan.1994,** 857 **F.Supp.** 800.

2. Exhaustion of administrative remedies

Plaintiff's failure to exhaust administrative remedies did not prevent **district** court **from** exercising **jurisdiction over** plaintiffs action under Americans with Disabilities Act (ADA). Tyler v. City of Manhattan, **D.Kan.1994,** 857 **F.Supp.** 800.

Filing of employment discrimination charge with Equal **Employment Opportunity** Commission (EEOC) is not **required** under public services title of **ADA;** public services title, unlike employment title, adopts Rehabilitation Act's procedures. which do not **require** exhaustion of administrative remedies before bringing **action.** Ethridge v. State of Ala.. **M.D.Ala.** 1993, 847 **F.Supp.** 903.

Semiquadriplegic inmate did not have to file administrative claim with **Equal** Employment Opportunity Commission (EEOC) before bringing claims in court under provisions of Americans with **Disabilities** Act (ADA) prohibiting **discrimination** in **public services. Noland** v. **Wheatley, N.D.Ind.1993,** 835 **F.Supp.** 476.

State university **employee** did not **have** to exhaust administrative **remedies before** bringing claim of **employment discrimination under Americans** with **Disabilities** Act (ADA) in **private** cause of action **in federal court, in light of ambiguity on exhaustion** issue in **Act's provision governing public entities, and in light of Department** of **Justice regulations which did not require exhaustion. Petersen v. University** of **Wisconsin Bd.** of **Regents, W.D.Wis.1993,** 818 **F.Supp.** 1276.

3. **Persons entitled to maintain action**

Disabled **adult** who **alleged** her **intent** to reside in proposed treatment **facility** was not denied **municipal services** as **result** of borough's passing of zoning ordinance **authorizing condemnation** of property on which **facility** would be built, and **thus,** disabled adult did not have standing under **ADA** to sue **borough** for discrimination against **handicapped.** Kessler institute for **Rehabilitation,** Inc. v. Mayor and Council of **Borough** of Essex Fells, D.N.J. **1995,** 876 **F.Supp. 641.**

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible **format** that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing **facilities",** and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination **regulations** under part 41 of title 28, Code of Federal Regulations (as **promulgated** by the Department of Health, Education, and **Welfare on January** 13, **1978),** applicable to recipients of Federal **financial assistance** under section 794 of Title 29. With respect to "program **accessibility,** existing facilities", and "communications", **such regulations** shall **be consistent** with **regulations** and **analysis** as in **part** 39 of title 28 of the Code of Federal Regulations, **applicable** to **federally conducted** activities under such section 794 of **Title** 29.

(c) standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall he consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

(Pub.L. 101-336, Title II, § 204, July 26, 1990, 104 Stat. 337.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Acts. House Report No. 101-485(Parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 267.

Effective Dates

1990 Acts. Section effective July 26. 1990, see section 205(b) of Pub.L. 101336. set out as a note under section 12131 of this title.

LIBRARY REFERENCES

Administrative Law

State and local governments. nondiscrimination in services on basis of disability. see 28 C.F.R. § 35.101 et seq.

American Digest System

Federal remedies for violation of anti-discrimination laws; administrative regulations and proceedings, see Civil Rights ⇐182, 341 et seq.

Encyclopedias

Federal remedies for violation of anti-discrimination laws; administrative regulations and pmceedings, see C.J.S. Civil Rights §§ 223, 224, 345 et seq.

WESTLAW ELECTRONIC RESEARCH

Civil rights cases: 78k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Generally 1
Alterations 2
Curb ramps 3
Resurfacing streets 2
Transition plans 4
Undue burden 5

1. Generally

Regulations promulgated by Department of Justice under Title 11 of Americans with Disabilities Act (ADA) are entitled to substantial deference. Helen L. v. DiDario, C.A.3(Pa.) 1995. 46 F.3d 325.

2. Alterations

Resurfacing of city street was "alteration," requiring installation of curb ramps to comply with regulations promulgated under Americans with Disabilities Act, where resurfacing was from intersection to intersection, where resurfacing involved more than minor repairs or maintenance. and where resurfacing affected integral purpose of street by facilitating smooth, safe, and efficient travel of vehicles and pedestrians. Kinney v. Yerusalim, C.A.3 (Pa.) 1993, 9 F.3d 1067, certiorari denied 114 S.Ct. 1545, 128 L.Ed.2d 1%.

Resurfacing a street is an "alteration" within meaning of regulations promulgated under tbe Americans with Disabilities Act (ADA); thus, resurfacing a street triggers the statutory obligation to install curb ramps or slopes to increase usability of facilities for those in wheelchairs and

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s 35.101 Purpose.

The purpose of this part is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131), which prohibits discrimination on the basis of disability by public entities.

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s 35.102 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by, public entities.
(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA (42 U.S.C. 12141), they are not subject to the requirements of this part.

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s 35.103 Relationship to other laws.

(a) Rule of interpretation. Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.
(b) Other laws. This part does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

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s 35.104 Definitions.

For purposes of this part, the term--

Act means the Americans with Disabilities Act (Rub. L. 101-336, 104 Stat. 327, 42 U.S.C. 12101-12213 and 47 U.S.C. 225 and 611).

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

Auxiliary aids and services includes--

(1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Complete complaint means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inforrn the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Designated agency means the Federal agency designated under subpart G of this part to oversee compliance activities under this part for particular components of State and local governments.

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(l)(i) The phrase physical or mental impairment means--

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary , hemic and lymphatic, skin, and endocrine;

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

(ii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic,

visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) The phrase physical or mental impairment does not include homosexuality or bisexuality.

(2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase is regarded as having an impairment means--

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term disability does not include--

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Historic preservation programs means programs conducted by a public entity that have preservation of historic properties as a primary purpose.

Historic Properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under State or local law.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U. S.C. 812). The term illegal use of drugs does not include the use of a drug taken under supervision by a licensed health care professional, or other uses

authorized by the Controlled Substances Act or other provisions of Federal law.
Individual with a disability means a person who has a disability. The term individual with a disability does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use.
Public entity means--
(1) Any State or local government;
(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).
Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.
Qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.
Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended.
State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

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s 35.105 Self-evaluation.

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required,

the public entity shall proceed to make the necessary modifications.
(b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.
(c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:
(1) A list of the interested persons consulted;
(2) A description of areas examined and any problems identified; and
(3) A description of any modifications made.
(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

(Approved by the Office of Management and Budget under control number 1190-0006)

[58 FR 17521, April 5, 1993]

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s 35.106 Notice.

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

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s 35.107 Designation of responsible employee and adoption of **grievance** procedures.

(a) Designation of responsible employee. A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) Complaint procedure. A public entity that employs 50 or more **persons** shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

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s 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.
(b)(l) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability--
(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified

individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

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

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections--

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies,

practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(l) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of'auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

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s 35.131 Illegal use of drugs.

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Appendix A to Part 3S-Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services **(Published July 26, 1991)**

Note: For the convenience of the reader, this appendix contains the text of the preamble to the final regulation on nondiscrimination on the basis of disability in State and local government services beginning at the heading "Section-by-Section Analysis" and ending before "List of Subjects in 28 CFR Part 35" (56 FR 35696, July 26, 1991).

Section-by-Section Analysis

Subpart A--General

Section 35.101 Purpose

Section 35.101 states the purpose of the rule, which is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (the Act), which prohibits discrimination on the basis of disability by public entities. This part does not, however, apply to matters within the scope of the authority of the Secretary of Transportation under subtitle B of title II of the Act.

Section 35.102 Application

This provision specifies that, except as provided in paragraph (b), the regulation applies to all services, programs, and activities provided or made available by public entities, as that term is defined in s 35.104. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities

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Subpart B--General Requirements

Section 35.130 General Prohibitions Against Discrimination

The general prohibitions against discrimination in the rule are generally based on the prohibitions in existing regulations implementing section 504 and, therefore, are already familiar to State and local entities covered by section 504. In addition, s 35.130 includes a number of provisions derived from title III of the Act that are implicit to a certain degree in the requirements of regulations implementing section 504.

Several commenters suggested that this part should include the section of the proposed title III regulation that implemented section 309 of the Act, which requires that courses and examinations related to applications, licensing, certification, or credentialing be provided in an accessible place and manner or that alternative accessible arrangements be made. The Department has not adopted this suggestion. The requirements of this part, including the general prohibitions of discrimination in this section, the program access requirements of subpart D, and the communications requirements of subpart E, apply to courses and examinations provided by public entities. The Department considers these requirements to be sufficient to ensure that courses and examinations administered by public entities meet the requirements of section 309. For example, a public entity offering an examination must ensure that modifications of policies, practices, or procedures or the provision of auxiliary aids and services furnish the individual with a disability an equal opportunity to demonstrate his or her knowledge or ability. Also, any examination specially designed for individuals with disabilities must be offered as often and in as timely a manner as are other examinations. Further, under this part, courses and examinations must be offered in the most integrated setting appropriate. The analysis of s 35.130(d) is relevant to this determination.

A number of commenters asked that the regulation be amended to require training of law enforcement personnel to recognize the difference between criminal activity and the effects of seizures or other disabilities such as mental retardation, cerebral palsy, traumatic brain injury, mental illness, or deafness. Several disabled commenters gave personal statements about the abuse they had received at the hands of law enforcement personnel. Two organizations that commented cited the Judiciary report at 50 as authority to require law enforcement training.

The Department has not added such a training requirement to the regulation. Discriminatory arrests and brutal treatment are already unlawful police activities. The general regulatory obligation to modify policies, practices,

or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities. Under this section law enforcement personnel would be required to make appropriate efforts to determine whether perceived strange or disruptive behavior or unconsciousness is the result of a disability. The Department notes that a number of States have attempted to address the problem of arresting disabled persons for noncriminal conduct resulting from their disability through adoption of the Uniform Duties to Disabled Persons Act, and encourages other jurisdictions to consider that approach.

Paragraph (a) restates the nondiscrimination mandate of section 202 of the ADA. The remaining paragraphs in s 35.130 establish the general principles for analyzing whether any particular action of the public entity violates this mandate.

Paragraph (b) prohibits overt denials of equal treatment of individuals with disabilities. A public entity may not refuse to provide an individual with a disability with an equal opportunity to participate in or benefit from its program simply because the person has a disability.

Paragraph (b)(l)(i) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the aid, benefit,' or service provided by a public entity. Paragraph (b)(l)(ii) provides that the aids, benefits, and services provided to persons with disabilities must be equal to those provided to others, and paragraph (b)(l)(iii) requires' that the aids, benefits, or services provided to individuals with disabilities must be as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as those provided to others. These paragraphs are taken from the regulations implementing section 504 and simply restate principles long established under section 504.

Paragraph (b)(1)(iv) permits the public entity to develop separate or different aids, benefits, or services when necessary to provide individuals with disabilities with an equal opportunity to participate in or benefit from the public entity's programs or activities, but only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Paragraph (b)(1)(iv) must be read in conjunction with paragraphs (b)(2), (d), and (e). Even when separate or different aids, benefits; or services would be more effective, paragraph (b)(2) provides that a qualified individual with a disability still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities. Paragraph (d) requires that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

Paragraph (b)(2) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Paragraph (e), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an

individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.

Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status. For example, it would be a violation of this provision to require persons with disabilities to eat in the back room of a government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.

Many commenters objected to proposed paragraphs (b)(1)(iv) and (d) as allowing continued segregation of individuals with disabilities. The Department recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities will not be permitted. Nevertheless, section 504 does permit separate programs in limited circumstances, and Congress clearly intended the regulations issued under title II to adopt the standards of section 504. Furthermore, Congress included authority for separate programs in the specific requirements of title III of the Act. Section 302(b)(1)(A)(iii) of the Act provides for separate benefits in language similar to that in s 35.130(b)(1)(iv), and section 302(b)(l)(B) includes the same requirement for "the most integrated setting appropriate" as in s 35.130(d).

Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

In addition, it would not be a violation of this section for a public entity to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity

then excluded these children from other recreational services for which they are qualified to participate when these services are made available to nondisabled children, or if the entity required children with disabilities to attend only designated programs.

Many commenters asked that the Department clarify a public entity's obligations within the integrated program when it offers a separate program but an individual with a disability chooses not to participate in the separate program. It is impossible to make a blanket statement as to what level of auxiliary aids or modifications would be required in the integrated program. Rather, each situation must be assessed individually. The starting point is to question whether the separate program is in fact necessary or appropriate for the individual. Assuming the separate program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications in the integrated program will depend not only on what the individual needs but also on the limitations and defenses of this part. For example, it may constitute an undue burden for a public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.

Paragraph (b)(l)(v) provides that a public entity may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. This paragraph is taken from the regulations implementing section 504 for federally assisted programs.

Paragraph (b)(1)(vi) prohibits the public entity from denying a qualified individual with a disability the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(l)(vii) prohibits the public entity from limiting a qualified individual with a disability in the enjoyment of any right, privilege? advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the public entity from utilizing criteria or methods of administration that deny individuals with disabilities access to the public entity's services, programs, and activities or that perpetuate the discrimination of another public entity, if both public entities are subject to common administrative control or are agencies of the same State. /The phrase "criteria or methods of administration" refers to official written policies of the public entity and to the actual practices of the public entity. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985). The Court in

Choate explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design." Id. at 297 (footnote omitted).

Paragraph (b)(4) specifically applies the prohibition enunciated in s 35.130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the public entity. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the public entity, in the selection of procurement contractors, from using criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

Paragraph (b)(6) prohibits the public entity from discriminating against qualified individuals with disabilities on the basis of disability in the granting of licenses or certification. A person is a "qualified individual with a disability" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see s 35.104).

A number of commenters were troubled by the phrase "essential eligibility requirements" as applied to State licensing requirements, especially those for health care professions. Because of the variety of types of programs to which the definition of "qualified individual with a disability" applies, it is not possible to use more specific language in the definition. The phrase "essential eligibility requirements," however, is taken from the definitions in the regulations implementing section 504, so caselaw under section 504 will be applicable to its interpretation. In Southeastern Community College v. Davis, 442 U.S. 397, for example, the Supreme Court held that section 504 does not require an institution to "lower or effect substantial modifications of standards to accommodate a handicapped person," 442 U.S. at 413, and that the school had established that the plaintiff was not "qualified" because she was not able to "serve the nursing profession in all customary ways," id. Whether a particular requirement is "essential" will, of course, depend on the facts of the particular case.

In addition, the public entity may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. For example, the public entity must comply with this requirement when establishing safety standards for the operations of licensees. In that case the public entity must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with disabilities in an impermissible manner.

Paragraph (b)(6) does not extend the requirements of the Act or this part directly to the programs or activities of licensees or certified entities

themselves. The programs or activities of licensees or certified entities are not themselves programs or activities of the public entity merely by virtue of the license or certificate.

Paragraph (b)(7) is a specific application of the requirement under the general prohibitions of discrimination that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. Section 302(b)(2)(A)(ii) of the ADA sets out this requirement specifically for public accommodations covered by title III of the Act, and the House Judiciary Committee Report directs the Attorney General to include those specific requirements in the title II regulation to the extent that they do not conflict with the regulations implementing section 504. Judiciary report at 52.

Paragraph (b)(8), a new paragraph not contained in the proposed rule, prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. This prohibition is also a specific application of the general prohibitions of discrimination and is based on section 302(b)(2)(A)(i) of the ADA. It prohibits overt denials of equal treatment of individuals with disabilities, or establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation in services, benefits, or activities.

Paragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public entities may not require that a qualified individual with a disability be accompanied by an attendant. A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

In addition, paragraph (b)(8) prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, which is derived from current regulations under section 504 (see, e.g., 45 CFR 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate. For example, requiring presentation of a driver's license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver's license and the use of an alternative means of identification, such as another photo I.D. or credit card, is feasible.

A public entity may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the program in question. Examples of safety qualifications that would be justifiable in appropriate circumstances

would include eligibility requirements for drivers' licenses, or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

Paragraph (c) provides that nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part. It is derived from a provision in the section 504 regulations that permits programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with disabilities or a given class of individuals with disabilities to be limited to those individuals with disabilities. Section 504 ensures that federally assisted programs are made available to all individuals, without regard to disabilities, unless the Federal program under which the assistance is provided is specifically limited to individuals with disabilities or a particular class of individuals with disabilities. Because coverage under this part is not limited to federally assisted programs, paragraph (c) has been revised to clarify that State and local governments may provide special benefits, beyond those required by the nondiscrimination requirements of this part, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.

Paragraphs (d) and (e), previously referred to in the discussion of paragraph (b)(1)(iv), provide that the public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, i.e., in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, and that persons with disabilities must be provided the option of declining to accept a particular accommodation.

Some commenters expressed concern that s 35.130(e), which states that nothing in the rule requires an individual with a disability to accept special accommodations and services provided under the ADA, could be interpreted to allow guardians of infants or older people with disabilities to refuse medical treatment for their wards. Section 35.130(e) has been revised to make it clear that paragraph (e) is inapplicable to the concern of the commenters. A new paragraph (e)(2) has been added stating that nothing in the regulation authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual. New paragraph (e) clarifies that neither the ADA nor the regulation alters current Federal law ensuring the rights of incompetent individuals with disabilities to receive food, water, and medical treatment. See, e.g., Child Abuse Amendments of 1984 (42 U.S.C. 5106a(b)(10), 5106g(10)); Rehabilitation Act of 1973, as amended (29 U.S.C. 794); the Developmentally Disabled Assistance and Bill of Rights Act (42 U. S .C. 6042).

Sections 35.130(e) (1) and (2) are based on section 501(d) of the ADA. Section

501(d) was designed to clarify that nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them:

The Committee added this section [501(d)] to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability. For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.

Judiciary report at 71-72. The Act is not to be construed to mean that an individual with disabilities must accept special accommodations and services for individuals with disabilities when that individual can participate in the regular services already offered. Because medical treatment, including treatment for particular conditions, is not a special accommodation or service for individuals with disabilities under section 501(d), neither the Act nor this part provides affirmative authority to suspend such treatment. Section 501(d) is intended to clarify that the Act is not designed to foster discrimination through mandatory acceptance of special services when other alternatives are provided; this concern does not reach to the provision of medical treatment for the disabling condition itself.

Paragraph (f) provides that a public entity may not place a surcharge on a particular individual with a disability, or any group of individuals with disabilities, to cover any costs of measures required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part. Such measures may include the provision of auxiliary aids or of modifications required to provide program accessibility.

Several commenters asked for clarification that the costs of interpreter services may not be assessed as an element of "court costs." The Department has already recognized that imposition of the cost of courtroom interpreter services is impermissible under section 504. The preamble to the Department's section 504 regulation for its federally assisted programs states that where a court system has an obligation to provide qualified interpreters, "it has the corresponding responsibility to pay for the services of the interpreters." (45 FR 37630 (June 3, 1980)). Accordingly, recouping the costs of interpreter services by assessing them as part of court costs would also be prohibited.

Paragraph (g), which prohibits discrimination on the basis of an individual's or entity's known relationship or association with an individual with a disability, is based on sections 102(b)(4) and 302(b)(l)(E) of the ADA. This paragraph was not contained in the proposed rule. The individuals covered under this paragraph are any individuals who are discriminated against because of their known association with an individual with a disability. For example,

it would be a violation of this paragraph for a local government to refuse to allow a theater company to use a school auditorium on the grounds that the company had recently performed for an audience of individuals with HIV disease.

This protection is not limited to those who have a familial relationship with the individual who has a disability. Congress considered, and rejected, amendments that would have limited the scope of this provision to specific associations and relationships. Therefore, if a public entity refuses admission to a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA and this section.

During the legislative process, the term "entity" was added to section 302(b)(l)(E) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities.

ment practices in making determination of employee's disability; such requirement would, in effect, limit remedies presently available to injured employees under workers' compensation laws of Alabama. Trans Mart, Inc. v. Brewer, Ala.Civ.App.1993, 630 So.2d 469.

§ 12202. state immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [1] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation **to the same extent as such remedies are available for such** a **violation in an action against any public or private entity other than a State.**

(Pub.L. 101-336, Title V, § 502, July 26, 1990, 104 Stat. 370.)

[1] So in original. Probably should be "in a".

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Acts. House Report No. 101-485(Parts I-IV). House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 267.

CROSS REFERENCES

Standards same as under this section for determining violation of vocational rehabilitation provisions—

Employment of individuals with disabilities, see 29 USCA § 791.
Employment under federal contracts, see 29 USCA § 793.
Nondiscrimination under federal grants and programs, see 29 USCA § 794.

LIBRARY REFERENCES

American Digest System

Capacity and consent of state to be sued in general, see States ⟹190 et seq.

Encyclopedias

Capacity and consent of state to be sued in general, see C.J.S. States § 297 et seq.

WESTLAW ELECTRONIC RESEARCH

States cases: 360k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Generally 1
Agencies 2

1. Generally

Eleventh Amendment did not bar suit against state brought in federal court alleging violation of Rehabilitation Act and Americans with Disabilities Act; Congress expressly abrogated Eleventh Amendment immunity in respective statutes. Eiielder v. Michigan Dept. of Natural Resources, W.D.Mich.1993, 847 F.Supp. 78.

2. Agencies

Eleventh Amendment did not prevent class of persons with mental retardation or developmental disabilities from making claims under Americans with Disabil-

<u>PROOF OF SERVICE</u>

I do hereby declare that I am a citizen of the United States, employed in the County of Los Angeles, over 18 years old and that my business address is 3580 Wilshire Blvd., #902, Los Angeles, California 90010. I am not a party to the within action. On March 28, 1997, I served two copies of the foregoing:

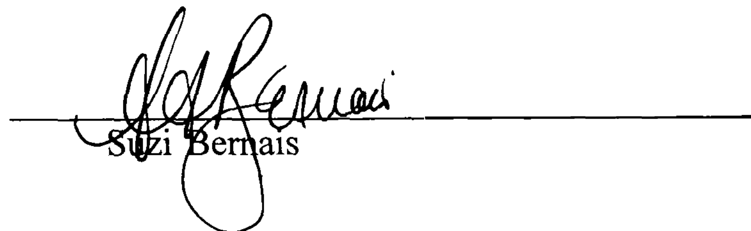
BRIEF OF PLAINTIFFS-APPELLEES

On the interested parties below in said action, via overnight Federal Express,

Beverly R. Meyers
Deputy Attorney General
Office of the Attorney General
50 Fremont St., Suite 300
San Francisco, CA 94105-2239

Honorable Stanley A. Weigel
Judge of the United States District Court
Northern District
450 Golden Gate Ave.
San Francisco, CA 94 102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 28, 1997, at Los Angeles, California.



Suzi Bernais