

Rehabilitating Section 504

**National Council on Disability
February 12, 2003**

National Council on Disability
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Rehabilitating Section 504

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Letter of Transmittal

February 12, 2003
The President
The White House
Washington, DC 20500

Dear Mr. President:

On behalf of the National Council on Disability (NCD), I am submitting a report entitled *Rehabilitating Section 504*. This report is one of a series of independent analyses by NCD of federal enforcement of civil rights laws.

The series grew out of NCD's 1996 national policy summit, attended by more than 300 disability community leaders from diverse backgrounds, who called upon NCD to work with federal agencies to develop strategies for greater enforcement of existing disability civil rights laws. This report looks at the Section 504 of the Rehabilitation Act of 1973 enforcement activities of five key federal agencies: the Department of Education, the Department of Labor, the Department of Health and Human Services, the Department of State, and the Department of Justice. NCD's findings reveal that while the Federal Government has consistently asserted its strong support for the civil rights of people with disabilities, the federal agencies charged with enforcement and policy development under Section 504 have, to varying degrees, lacked any coherent and unifying national leadership, coordination, accountability, and funding.

This report provides a blueprint for addressing the shortcomings that have hindered Section 504 compliance and enforcement until now. Among the various strategies and approaches to improve Section 504, NCD recommends that the Federal Government conduct periodic and thorough Section 504 self-evaluations; improve data collection and dissemination of data about Section 504 enforcement efforts; bolster Department of Justice resources and guidance to federal agencies on Section 504 enforcement; and apply successful practices in Section 504 technical assistance and enforcement used by federal agencies.

NCD stands ready to work with our sister agencies and other stakeholders inside and outside the government to develop these strategies. We look to the next decade of enforcement with anticipation that the promise of Section 504 can and will be realized.

Sincerely,

Lex Frieden
Chairperson

(The same letter of transmittal was sent to the President Pro Tempore of the U.S. Senate and the Speaker of the U.S. House of Representatives.)

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This report is the product of a team effort and incorporates the work of several people. The preliminary research, interviews, and document acquisition were conducted through a contract with Ardinger Consultants & Associates, Inc. This initial work was undertaken in an attempt to create a comprehensive report regarding the implementation and enforcement of Section 504 across a number of federal agencies. Because of the unevenness of some agencies' data and record systems, however, it was necessary to scale back the scope of the work to produce a snapshot view instead.

Bonnie Milstein, Michele Magar, and Sara Pratt handled the task of assisting the National Council on Disability (NCD) in refining the preliminary research results and findings to produce a draft report.

Finally, NCD would like to thank the federal agency personnel who gave their time during the development of this report. Our appreciation is extended to the staff of the Department of Health and Human Services, the Department of Education, the Department of Labor, the Department of Justice, and the Department of State. These federal agency personnel answered many questions, gathered documents, and shared data with the research team. In addition, they reviewed preliminary drafts of the contents of this document for technical accuracy.

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EXECUTIVE SUMMARY

Our forefathers and mothers came to this country because we offered unique legal guarantees of equal opportunity. They got rich, and America got rich. Every time we expanded our civil rights to include another oppressed minority, America got richer. America is not rich in spite of civil rights. America is rich because of civil rights.

Justin W. Dart, Jr.

Section 504 of the 1973 Rehabilitation Act is acknowledged as the first national civil rights law to view the exclusion and segregation of people with disabilities as discrimination and to declare that the Federal Government would take a central role in reversing and eliminating this discrimination. Section 504, which prohibits federal agencies and federally funded programs from discriminating on the basis of disability, was designed to promote and expand opportunities for persons with a broad range of disabilities and offer broad-based protection from unwarranted discrimination stemming from prejudice, social stigmas, and negative assumptions about their ability to fully participate in the mainstream of society.

Although there is some mystery as to how the language of Section 504 became part of what was clearly intended to be a funding bill, Section 504 would soon become the most important and embattled provision in the entire Rehabilitation Act. Once the legislation was passed, the pivotal question became whether Section 504 would be enforced with strong administrative rules. It took nearly four years with months of demonstrations and intense lobbying efforts before a relatively tough set of government-wide coordinating regulations was published by the U.S. Department of Health, Education and Welfare (HEW) on April 28, 1977. Effective government-wide enforcement efforts were further delayed when, in 1980, President Jimmy Carter issued Executive Order 12250, which transferred lead agency authority to the Department of Justice (DOJ). DOJ reissued government-wide enforcement regulations on August 11, 1981, without changing the original HEW regulations. Because the issuing of the government-wide regulations was exceedingly slow, many federal agencies consequently delayed issuing their own

regulations, and, in some cases, legal action was required to compel their issuance of Section 504 regulations.

The supposed remedy for segregated public services and programs and the instrument for enforcing nondiscrimination, the Rehabilitation Act and its contemporaneously enacted regulations, unfortunately, were virtually dead on arrival. Because of the lack of sufficient resources, leadership, implementation, and enforcement of Section 504 and the trend of the courts to narrow the protections and scope of disability civil rights, as well as misportrayals by the media about the supposed overreaching of these laws, what once was the centerpiece of independence for persons with disabilities has become an afterthought.

This report is one of a series of independent analyses by the National Council on Disability (NCD) of federal enforcement of civil rights. It specifically focuses on the work that the Departments of Labor, Education, State, and Health and Human Services have done to ensure that recipients of their funding follow Section 504. For the Departments of Education, Health and Human Services, and Labor, the report analyzes the commitments that these agencies made in their recent report to the President on their activities in response to the Supreme Court's decision in *Olmstead*, in the context of their Section 504 enforcement histories. In addition, it reviews the role that DOJ has played through its Section 504 coordination responsibilities and the impact that this coordination work has had on the agencies' planning and management activities. Though NCD set out to create a comprehensive assessment of the Section 504 activities of the federal agencies covered in this report, the drastic unevenness of their Section 504 programs and data and record systems required NCD to scale back the scope of the work to produce a snapshot view instead.

Why Section 504 Still Matters

NCD's evaluation of the effectiveness of Section 504 enforcement comes at an apt time. Many persons with disabilities and their advocates have become concerned that federal agencies, in

shifting their primary focus to recent laws such as the Americans with Disabilities Act (ADA), have left Section 504 behind. Indeed, NCD has heard a number of federal civil rights staff justify the lapse of Section 504 implementation on the basis that their ADA enforcement programs obviate such need.

Why should interested parties care about Section 504 enforcement now that the ADA exists? There are several reasons why the Federal Government should vigorously enforce Section 504 in conjunction with the ADA:

Section 504 covers a number of entities and federally funded activities not reached by the ADA.

Section 504 is intended to make certain that tax dollars will not be used to establish, promote, or reinforce discrimination against people with disabilities. DOJ is selective about the disability rights cases it pursues, often prosecuting only the most egregious cases or those that are likely to have a significant impact in a particular area. Thus, it is necessary to ensure that other federal agencies' Section 504 enforcement programs serve as an available and muscular tool in combating disability discrimination.

Government enforcement of Section 504 is particularly important in light of recent Supreme Court decisions that limit the scope of private civil rights enforcement. In *Board of Trustees of the University of Alabama v. Garrett*, the Supreme Court found that the ADA does not permit individuals to recover money damages when a state violates Title I of the ADA.

Thus, people with disabilities continue to look to, and must rely upon, effective enforcement of Section 504 to be able to access important federal programs and services that are crucial to their independence and success.

Where Do We Stand?

There is little disagreement that persons with disabilities are far better off now than they were at the time Section 504 was originated. As this study of the five federal agencies demonstrates, from time to time real progress is achieved and laudable efforts are being made on behalf of persons with disabilities. In spite of these efforts, however, the anticipated results have not been brought about. NCD finds that several decades after the publication of the regulations, the five agencies present a very mixed record of Section 504 enforcement. Several general themes emerge from NCD's research findings:

Agencies have not maintained consistency in their Section 504 programs' operational leadership and have given a low priority to the enforcement of Section 504, and there are significant differences in their enforcement efforts.

One of the weakest points in terms of Section 504 enforcement lies in the fact that none of the agencies examined for this report have initiated funding terminations to enforce Section 504 against grantees that violate the law. Congress provided this remedy to give federal agencies the leverage they needed to force recalcitrant grantees to stop using tax dollars in discriminatory ways and to otherwise encourage voluntary compliance with the law. It is likely that the Federal Government would be much further along the road to eliminating discrimination based on disability had it used the full arsenal and range of remedies provided by Congress.

Agencies have given low priority to collecting and analyzing Section 504 program data, and there are major differences in their data efforts. None of the agencies have developed information systems that comprehensively collect, aggregate, or summarize detailed information about complaints or compliance reviews and their outcomes. This information is important both to the public and to consumers and recipients.

Agencies have not received and have not been able to devote sufficient funding and resources to their Section 504 programs.

All five agencies, with the exception of the Department of State, have invested significant resources in providing written and verbal technical assistance to their grant recipients.

With respect to these general themes, the following information reflects some of the findings for each of the federal agencies reviewed for this report.

Department of Health and Human Services

On the basis of the data that the Department of Health and Human Services (HHS) provided to NCD, there appears to be a strong correlation between appropriations and complaint numbers. When funding and staff levels for HHS dipped in the mid-1990s, so did the level of their complaint and compliance work. Conversely, in later years, when HHS appropriations increased for civil rights enforcement, staffing numbers increased and so did the amount of work performed. However, the number of complaints and compliance reviews processed did not increase in exact proportion to staffing levels.

The HHS Office for Civil Rights has a wide array of technical assistance materials available online. The HHS Web site contains references to a large number of technical assistance materials, including complaint filing information, fact sheets, regulations, and case summaries, and the information is easily accessed from the HHS home page through a drop-down search menu that includes “civil rights” and “disabilities.”

Department of Education

The Department of Education (ED) is another large enforcement agency that provided sufficient data on which to base conclusions, showing a similar but not as strong a correlation between appropriations and complaint numbers.

ED has a civil rights enforcement budget that is more than two and a half times that of HHS and staff levels that are three and a half times the staff level of HHS. ED also receives about twice the number of complaints that HHS receives. ED's proportionately greater resources for enforcement explain in part its prompt enforcement timeframes and its ability to broaden its enforcement strategies.

ED has demonstrated noteworthy and successful efforts to shorten the time it takes to conduct investigations. Quicker investigations and resolutions result in increased confidence in the investigation process, both by potential complainants and by recipients of funding.

Department of Labor

The Department of Labor (DOL) has essentially seen no increase in funding and no increase in enforcement activity. The number of staff at DOL devoted to enforcement has dropped from 61 to a projected 48, a decrease of 21 percent. DOL's complaint filings have also dropped and show no evidence of a rebound.

DOL's list of reasonable accommodation technical information, provided by its Office of Disability Employment Policy (ODEP), deserves special mention for its usefulness, as does the agency's Job Accommodation Network.

Department of State

The Department of State has never had a Section 504 federally assisted program. It has not allocated any resources to determine whether the recipients of its grant funds comply with any of the civil rights laws.

Department of Justice

DOJ reorganized its enforcement of disability rights in 1995 by moving most of its Section 504 enforcement program to the agency's Disability Rights Section (DRS). The benefit of this reorganization was that DRS could enforce both Title II of the ADA and Section 504 against noncomplying state and local government agencies. However, the reorganization did not result in DRS's using the fund termination provisions of Section 504 with the agency's own grant recipients (primarily court administration, criminal justice, and corrections programs). Instead, DOJ left those programs within the purview of its own Office for Civil Rights (OCR), which has no effective Section 504 program.

DOJ has government-wide disability rights coordination and review responsibilities that it has not effectively fulfilled. It has not provided critical and effective leadership through the Interagency Disability Coordinating Council (IDCC), which has never met. While DOJ has published investigation and block grant review guidance and has worked with agencies on individual policies and cases, it has not provided or required the kind of guidance that would have generated government-wide civil rights enforcement data.

Recommendations

1. Conduct periodic and thorough Section 504 self-evaluations.

The agencies that are the subject of this report should routinely reevaluate programs using self-evaluation(s) that identify challenges to full participation by people with disabilities in their programs, policies, regulations, and practices. Moreover, all the agencies should assess legislation they propose, policies they intend to publish, and regulations they draft to ensure that each affirmatively furthers the goals of Section 504.

2. Improve data collection and dissemination of data about Section 504 enforcement activities.

People with disabilities want to easily read data about agency 504 compliance. Such data include complaint filings and compliance reviews initiated, specific Section 504 issues and trends in complaint and compliance reviews, and outcomes and enforcement actions. Routinely reporting 504 activities on agency Web sites would publicize Section 504 and ADA accomplishments. DOJ should support and assist agencies in developing and implementing more effective data collection systems.

3. Use funding sanctions to enforce Section 504.

Congress included an effective remedy to address discrimination on the basis of disability by recipients of federal funds. Thus far, the agencies studied in this report have not used funding sanctions to bring recipients into compliance with Section 504, although notice of the possibility of sanctions is generally given as part of agency enforcement processes. To combat disability discrimination in the most effective way possible, federal agencies should use their sanctioning authority, including making recipients ineligible to apply for continued or new funding while they are not in compliance with federal civil rights laws. This strategy could effectively be incorporated into Notices of Funding Availability and program eligibility requirements, so that no recipient or potential recipient can be funded while a preliminary or final finding of noncompliance was pending. This strategy should become an integral part of agency Section 504 enforcement efforts. Agencies should also develop and apply a range of sanctions to help bring recipients of federal funds into compliance with Section 504. Additionally, agencies should publicize their efforts to maximize deterrence of violations of the rights of people with disabilities.

4. Direct agency civil rights enforcement by the assistant secretary.

HHS and DOL should review the impact of ED's decision to have an assistant secretary lead its OCR as a way of improving the visibility and enforcement of Section 504 within each agency's funding programs.

5. Increase funding for Section 504 enforcement.

This administration should continue to improve its efforts to increase funding for civil rights enforcement. Presidential budget requests and congressional appropriations for federal agency civil rights enforcement should be adequate to staff those agencies to conduct effective civil rights enforcement and compliance. Adequate staffing is the most critical factor in providing prompt and effective enforcement of Section 504. When appropriations—and staffing—drop, the number of complaints investigated drop.

None of the three agencies has provided sufficient staff, resources, or stature within their departments, or coordination with other civil rights offices, for effective Section 504 programs.

6. Improve leadership and guidance to agencies on Section 504 enforcement.

The IDCC was created to provide critically needed leadership of disability rights enforcement throughout the Federal Government, but it has ceased to function. DOJ should revive the IDCC. DOJ should provide substantive guidance to agencies to help them enforce Section 504, including basic training and technical assistance, updates on key court decisions, guidance on investigation and resolution of Section 504 complaints, and information to help agencies conduct effective Section 504 compliance reviews. DOJ should create guidance specific to Section 504 enforcement that builds on the agency's manuals on enforcement of Title VI and Title IX. DOJ should use its authority under Executive Order 12550 to review and comment on agency Annual Implementation Reports, assess progress in agency activities, and make recommendations for improvements. DOJ should also create and make publicly available summaries of the information reported by federal agencies in their Annual Implementation Reports, as well as highlights of the Federal Government's enforcement of Section 504 compiled from other agency reports.

7. Apply successful practices in Section 504 technical assistance and enforcement used by federal agencies.

During the course of its study, NCD encountered a number of successful practices that should be reviewed by other federal agencies. For instance, the HHS Web site is exemplary and should be emulated in how it provides relevant Section 504 information in a user-friendly format. The HHS online material is rich in detail and includes helpful case studies and links to other relevant Web sites. Agencies should also review and consider including in their Web sites information similar to that provided by ED's technical assistance guidance to recipients and DOL's list of reasonable accommodation information resources. In addition, ED has successfully expanded its Section 504 program resources and effectiveness in a number of innovative ways. For example, it has encouraged parents and students to monitor recipients' implementation of compliance agreements and asked them to suggest changes to compliance agreements that have made them produce better results for students with disabilities. It has also established an intranet service that makes available policies, decisions, law review articles, regulations, handbooks, manuals, and letters for civil rights staff from different offices to facilitate their communication with each other for the purpose of expanding and improving the approaches they adopt to address common and novel discrimination issues. This type of flexibility and creativity has the potential to improve each federal agency's Section 504 enforcement program.

Conclusion

NCD's report describes the successes, the weaknesses, and the failures of five agencies' Section 504 enforcement programs over the past three decades. Our research highlights some efficient practices in the agencies' implementation and enforcement of Section 504 that should be carefully studied and more widely adopted to remedy the unevenness across the Federal Government in Section 504 programs. While it is beyond doubt that Section 504 matters, it is troubling that federal agencies have shown a lack of clear commitment to ensure that Section 504 can be vigorously integrated into federal agencies' newest mode of operations as evidenced by

their recent stated commitments to *Olmstead* and the New Freedom Initiative. NCD's report contains recommendations that should be implemented in a timely manner by these agencies, DOJ, and Congress in order to ensure the effective, meaningful, and uniform enforcement of Section 504, which has benefited least from the national commitment to its civil rights laws. Implementation of these recommendations will help to correct this historic oversight.

INTRODUCTION

As a remedy for segregated public services, the Rehabilitation Act and its contemporaneously enacted regulation have been practically a dead letter.

Timothy M. Cook, *The Americans with Disabilities Act: The Move To Integration*, 64 Temple Law Review 393, at 394 (1991)

In 1973, Americans with disabilities tied their hopes for equal access to government programs to the passage of a little-noticed provision in the Rehabilitation Act that barred discrimination on the basis of disability by recipients of federal funds. It took a nationwide sit-in at U.S. Department of Health, Education and Welfare (HEW) buildings by people with disabilities in 1977, including a month-long occupation in San Francisco, to persuade the Federal Government to issue regulations implementing Section 504 of the Rehabilitation Act. Since then, every executive agency has implemented its mandate to bar discrimination against people with disabilities by issuing regulations that describe what constitutes discrimination based on disability and that set mandates for grantees. However, there have been wide discrepancies in what the agencies have done to enforce their regulations and to ensure compliance with the law.

The National Council on Disability (NCD) has issued this report to provide a snapshot view of how five federal agencies have implemented America's promise to rid society of discrimination against people with disabilities. It examines the initial hopes of disability rights advocates who worked to secure the implementation of Section 504, and how these federal agencies defined and developed their nondiscrimination mandate.

This report focuses specifically on the work that the Departments of Labor, Education, State, and Health and Human Services have done to ensure that recipients of their funding follow Section 504. For the Departments of Education, Health and Human Services, and Labor, the report analyzes the commitments that these agencies made in their recent report to the President on their

activities in response to the Supreme Court's decision in *Olmstead*, in the context of their Section 504 enforcement histories. In addition, it reviews the role that the Department of Justice (DOJ) has played through its Section 504 coordination responsibilities, and the impact that this coordination work has had on the agencies' planning and management activities.

In preparation for this report, NCD requested Section 504-specific data from the subject agencies about complaints and compliance reviews. Among the data requested were the numbers of complaints filed and compliance reviews initiated, the outcomes of these enforcement-related activities, details of settlements, and other information about agency enforcement activities, including staffing and budget figures. When this information was not provided by the agencies, publicly available sources such as budget submissions, annual reports to Congress, and agency Web sites were consulted. Additional information was culled from each subject agency's response to the Government Performance and Results Act.

The subject agencies were then given the opportunity to review and respond to preliminary drafts of this document for technical accuracy and engage in an ongoing dialogue with NCD about the findings and recommendations. Their responses were incorporated.

The report concludes by comparing each agency's performance in the areas of complaint investigation and resolution, conduct of compliance reviews, agency information on enforcement and compliance issues, and agency resources for enforcement and compliance.

Finally, it recommends ways that agencies might better meet the original goals and expectations of the legislation and those whom the legislation was passed to protect.

CHAPTER I

THE ORIGINS OF SECTION 504: THE INITIAL PROMISE OF DISABILITY RIGHTS

One of the nation's first laws barring discrimination based on disability was enacted without fanfare and with little notice. No hearings were held, no debate took place on the floor of either house of Congress, and the name of the provision's author has long been forgotten.¹

The Rehabilitation Act of 1973 was a spending bill that authorized \$1.55 billion in aid to people with disabilities. Section 504 of the Act simply made it illegal for recipients of federal funds to discriminate on the basis of disability. It was modeled on the language of Title VI of the Civil Rights Act of 1964,² which barred recipients of federal funds from discriminating on the basis of race, color, or national origin.³ Section 504 states:

No otherwise qualified individual with a disability in the United States...shall, solely by reason of...disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. 29 U.S.C. 794.

To appreciate the significance of Section 504, it is useful to consider the genesis of Title VI. More than a century after the adoption of the Fourteenth Amendment, racial and ethnic minorities remained largely excluded, segregated, and stigmatized. Congress therefore adopted a radically different approach to civil rights in 1964. It enacted laws that tied civil rights enforcement to the expenditure of federal funds. From 1964 onward, it has been a federal civil

¹ Shapiro, Joseph P., *No Pity: People with Disabilities Forging a New Civil Rights Movement*, Random House, Times Books, New York, 1993, at p. 65.

² Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

³ 42 U.S.C. Section 2000d states that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

rights violation to use federal funds in ways that exclude, deny benefits to, or discriminate against anyone on the basis of their race, color, or national origin.

The second major change in civil rights enforcement initiated by Title VI was that, unlike constitutional violations, the 1964 Civil Rights Act prohibited unintentional acts of discrimination as well as intentional acts. Thus, a hospital conglomerate that adopted a racially neutral physician staff privilege policy that resulted in racially segregated hospitals might be in violation of the 1964 Act.⁴ Similarly, employment agencies that used racially neutral screening standards for job applicants that resulted in disproportionately lower job referrals to racial minorities than to white applicants could be subject to enforcement actions.

In other words, recipients of federal funds may not use practices and policies that have a disproportionate, adverse impact on the classes of people protected by the federal civil rights laws. If they do use such practices and policies, courts have required recipients to show that they were pursuing a valid business objective and that there are no alternative methods of fulfilling the objective that have a less discriminatory impact.⁵

Congress used this approach to civil rights enforcement to protect people with disabilities in 1973 when it amended the Rehabilitation Act to include Section 504. That section adopted the language of the 1964 Civil Rights Act and prohibited the use of federal funds to exclude, deny benefits to, or discriminate against any otherwise qualified handicapped individual in the United States.⁶ The U.S. Supreme Court later confirmed that Section 504, like the 1964 Civil Rights Act, prohibited unintentional as well as intentional discrimination.⁷

⁴ The hospital conglomerate would be in violation of Title VI unless it could show that its staff privileges policy was needed to fulfill its hospitals' mission and that there was no less discriminatory way of meeting that goal. See footnote 5.

⁵ *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Circuit, 1993).

⁶ 29 U.S.C. 794.

⁷ *Alexander v. Choate*, 469 U.S. 287 (Supreme Court, 1985) at 297.

To implement Section 504, Congress authorized HEW to issue regulations. Yet four years after its passage, Section 504 remained little more than an intriguing piece of legislation. Concerned about potential costs, the Federal Government had failed to issue regulations implementing the law.

On April 3, 1977, demonstrators with disabilities held a candlelight vigil at the home of HEW Secretary Joseph Califano to demand that he issue the draft regulations without gutting them. Forty-eight hours later, demonstrators took over Califano's office in the nation's capital and held protests at eight HEW regional offices. The HEW secretary reacted by cutting off telephone access and refusing to allow food distribution to demonstrators, effectively forcing them to abandon their efforts after 28 hours.

Califano had no such success in San Francisco, where advocates had also occupied the HEW office. After enduring six days without access to telephones, attendants, or food, demonstrators won the support of Representative Phillip Burton, who ordered guards to allow food to reach demonstrators and to install three pay phones for use by protesters. A week later, San Francisco Mayor George Moscone defied federal officials by delivering 20 air mattresses and shower hose sprays to the occupied offices. The Black Panthers prepared food donated by local supermarkets, and community support continued to grow.

After 12 days had passed with demonstrators showing no inclination to leave, Burton and Representative George Miller held a congressional hearing in the building. There, protesters learned that Califano was weighing changes to the original unpublished draft regulations that would result in "separate but equal" accommodations for people with disabilities.⁸ The news served only to strengthen the resolve of demonstrators.

On April 28, 1977, after disability rights advocates had occupied the San Francisco office of HEW for nearly a month, Califano signed the Section 504 regulations without weakening the

⁸ Shapiro, Joseph P., *No Pity: People with Disabilities Forging a New Civil Rights Movement*, *supra* at 68.

provisions. In addition to issuing regulations for recipients of HEW funds, Califano also issued model regulations for all other executive agencies to use to draft regulations that would apply to their own programs. Today, every executive agency has its own set of 504 regulations and must ensure that its grantees comply with Section 504.

A. Self-Evaluations

The framers of the Section 504 regulations required that each recipient of federal financial assistance conduct a self-evaluation,⁹ with the assistance of individuals with disabilities, to identify and correct practices and policies inconsistent with the goals of Section 504. The notion of requiring self-evaluations grew from testimony offered at 20 public hearings throughout the country that HEW conducted before issuing its regulations. One of the persistent themes of those who testified was that public and private providers made assumptions about the role of disability; the medical nature of all disability-related activities, benefits, and services; and what people with disabilities needed and wanted and what was good for them.

In addition to the aim of identifying and correcting discrimination, self-evaluations were also adopted to change the attitudes that underlay these assumptions. HEW adopted the recommendation of witnesses who asked that providers be required to review all of their policies and practices through the eyes of people with disabilities. Their hope was that such an assisted

⁹ All federal agencies and all states, cities, and others who receive federal funds are also required to conduct self-evaluations, as a result of Congress's expansion of Section 504 in 1978. The 1984 Justice Department regulations (which succeeded the original HEW regulations) that apply to federal agencies read as follows:

Sec. 39.110 Self-evaluation

(a) The agency shall, by October 11, 1985, evaluate its current 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 policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency *shall* provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until October 11, 1987, maintain on file and make available for public inspection:

- (1) A description of areas examined and any problems identified, and
- (2) A description of any modifications made.

28 CFR 39.110. [emphasis added]

self-evaluation might give the public and private providers an understanding that if buses had lifts, passengers with mobility impairments could travel to work, to school, to nightclubs. Service providers had difficulty envisioning how people with disabilities could live independently, ride buses, and contribute to society. In fact, the term “wheelchair-bound” continues to be used today, even by those who no longer believe the quality of a wheelchair user’s life is so diminished that it can be aptly described by her seat.

B. Scope of Program Access

One of the central themes of the Federal Government’s Section 504 regulations is that recipients of federal funds must ensure that their programs, as a whole, both meet the needs of their beneficiaries with disabilities and do not discriminate against them. The regulations require that program benefits and services be delivered in the most integrated setting appropriate to the needs of qualified individuals with disabilities. As time has shown, understanding what “program as a whole” means, in 504 and ADA terms, has been difficult for federal fund recipients. Several years ago, a related version of this concept became the focus of a U.S. Supreme Court decision.

In the late 1970s, HEW’s Office for Civil Rights (OCR) demanded that every college and university sign an Assurance of Compliance with the federal civil rights laws. Grove City College refused, saying that it did not receive any federal funds. In *Grove City College v. Bell*,¹⁰ the Supreme Court ruled that because the college accepted federally funded student scholarships, it had to comply with civil rights laws. However, the Court limited that obligation by holding that only the business office, which was the part of the college that actually received the scholarship funds, had to meet the civil rights obligations at issue. None of the other parts of the college had to ensure that their courses, dormitories, health services, or any of their programs were provided

¹⁰ *Grove City College v. Bell*, 465 U. S. 555 (Supreme Court, 1984).

without discrimination on the basis of race, color, national origin, religion, age, disability, or gender.¹¹

Congress rejected the Supreme Court's interpretation by enacting the Civil Rights Restoration Act of 1987.¹² The Act imposed federal civil rights responsibilities on every part of an agency if any of its parts received federal funding. For Grove City College, that meant that the college's acceptance of federally funded student scholarships triggered civil rights obligations in every program, practice, and policy it conducted or adopted.

The program-wide requirement of Section 504 provides substantial flexibility to schools and other federal fund recipients. If a college has three antiquated but similar dormitories, the college is not required to make all three buildings accessible. As long as its dormitory program meets the needs of all of its students with mobility impairments and simultaneously provides its other programs in the most integrated setting, the college may make only one or two of its dorms structurally accessible, rather than all three.

Viewing the situation from a broader perspective, colleges will find many practices, policies, and buildings that inhibit their ability to deliver their education program in the most integrated setting that is appropriate. What the Section 504 regulations permit colleges to do is to identify and correct the barriers that are likely to bring the program as a whole into compliance with the law, without correcting every barrier.

It is important to note, however, that the "program-wide" requirement applies both to architectural access and to programmatic access. A recipient of federal funds may not, for example, justify one inaccessible program by increasing the accessibility of another program. More concretely, a federally funded employer may not refuse to hire otherwise qualified people

¹¹ Gender was added to the civil rights laws that applied to education through Title IX of the General Education Provisions Act of 1973 and to employment practices through Title VII of the 1964 Civil Rights Act.

¹² The Civil Rights Restoration Act is codified at 20 U.S.C. § 1687, 29 U.S.C. § 794, 42 U.S.C. § 2000d-4a, and 42 U.S.C. § 6101.

with visual impairments simply because he provides marketing materials to potential clients in Braille.

C. Why Section 504 Still Matters

Why should interested parties care about Section 504 enforcement now that the Americans with Disabilities Act (ADA) exists? There are several reasons why the Federal Government should continue to enforce Section 504, in spite of the apparently broader coverage of the ADA.

First, and most important, Section 504 is based on the premise that tax dollars will not be used to establish, promote, or reinforce discrimination against people with disabilities. Entities that violate Section 504 risk termination of their federal monies by the agency that issued the funds. In contrast, the ADA has no funding termination remedy. Moreover, DOJ is the only agency that has independent litigating authority to enforce Title II of the ADA, including alternative means of dispute resolution. It does not have the authority to limit the timing or the amount of federal financial assistance, or to condition such funds on compliance with Section 504. Only the federal grant agencies have this authority.

Conditioning receipt of federal funds is important for another reason: It requires grant program staff to develop ongoing relationships with grantees. Agency staff are best positioned to learn how their agency's funds are used, especially because of the recent trend by state and local governments to adopt annual and multiyear plans that explain how they intend to use the federal funds they expect to receive.

Because of this knowledge, the funding agencies have the authority and the ability to influence their recipients' choices of how to spend their federal dollars. Recipient cities, for example, have used their federal funds to create separate recreation activities or swimming classes, for example, for children with disabilities; to deny participation in employment programs to applicants who take medications for psychiatric disabilities; and to place public benefit programs in inaccessible buildings. Each of these decisions is likely to be or to lead to a violation of both Section 504 and

the ADA. However, only the funding agency can withhold the amount of funding that is equivalent to the amount that would support the illegal activity. It can do much more, of course, but often the threat of temporarily withholding even a portion of the funds is enough to persuade the city to rethink its plans.

Second, agency staff have ongoing communications with recipients. Rarely do recipients contact an OCR for information or technical assistance. They direct their questions to the program funding staff, with whom they have relatively frequent conversations. To maximize enforcement, civil rights policies, practices, and goals must be incorporated into the programs that receive federal funds. That is much more likely to happen if both the funding and recipient staff understand the civil rights laws and how to identify when federal funds are being used to discriminate. If the funding agencies do not enforce Section 504, there is little or no opportunity for this type of education to occur.

Third, DOJ will never have sufficient resources to litigate each of these types of 504/ADA violations, and for those it does pursue, it must pursue them through time- and resource-consuming litigation. As a result, DOJ is selective about cases it pursues, often prosecuting only the most egregious cases or those that are likely to have a significant impact in a particular area. Less precedent-setting but equally meritorious enforcement of Section 504 violations is done only by federal funding agencies.

Fourth, Section 504 covers a number of entities that are not reached by the ADA. For example, the ADA covers only housing that is funded or operated by state and local governments. In contrast, Section 504 covers housing that is built or operated by other types of entities that receive federal funds, such as housing run by nonprofits.

Finally, government enforcement of Section 504 is particularly important in light of recent U.S. Supreme Court decisions that limit the scope of private civil rights enforcement. In *Alexander v.*

Sandoval,¹³ the Supreme Court held that only the Federal Government, not private individuals, could use Title VI of the 1964 Civil Rights Act to challenge discrimination on the basis of disparate impact. However, it would be illogical to read the constraint articulated in *Sandoval* to apply to Section 504. Section 504 clearly does not prohibit only intentional discrimination, since much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent. Despite superficial associations of Section 504 and ADA Title II with some aspects of Title VI, Section 504 and Title II of ADA differ in important respects that make the reasoning and analysis of the majority in *Sandoval* inapplicable.¹⁴ The ability to challenge disparate impact discrimination is critical to addressing bias against people with disabilities, particularly when intentional discrimination is difficult to prove.

In *Board of Trustees of the University of Alabama v. Garrett*,¹⁵ the Supreme Court found that the ADA does not permit individuals to recover money damages when a state violates Title I of the Act. However, the Federal Government may still recover such damages against states. As the Supreme Court continues to limit the ability of individuals to use the nation's civil rights laws, the Federal Government's enforcement of Section 504 is more important today than ever before.

D. Conditioning Federal Funds

Though all federal agencies have developed procedures by which federal funds may be terminated for failure to comply with Section 504, few have actually pursued termination as a

¹³ 532 U.S. 275 (Apr. 24, 2001).

¹⁴ National Council on Disability (August 17, 2001), *The Sandoval Ruling*, available at <http://www.ncd.gov/newsroom/publications/sandoval.html>.

¹⁵ 531 U.S. 356 (Feb. 21, 2001).

remedy. One reason may be that Congress attached an onerous process that federal agencies must follow to terminate funds.¹⁶

Although the law creates a burdensome process for fund termination, it remains perhaps the single most effective way to remedy discrimination. If it were used to address the most egregious cases of discrimination, it would create a powerful deterrent that would likely improve voluntary compliance with Section 504 by other federal grantees. By including it in the statute, lawmakers envisioned that less powerful remedies would not always prove sufficient to root out discrimination on the basis of disability. But the use of this remedy requires leadership and political will. For now, funding termination remains a powerful tool that has yet to be tapped by the agencies that are studied in this report. Just as clearly, federal agencies need to develop a range of effective sanctions that can also be used when necessary.

E. Meeting the Promise

Of course, whether Section 504 achieves its purpose of eliminating disability discrimination by recipients of federal funds depends in large part on how well federal agencies enforce the law. The next chapters of this report examine the Section 504 enforcement records of five federal agencies, and the final chapter recommends ways that each agency can move closer to fulfilling the promise of this groundbreaking statute.

¹⁶ All of the agencies' Section 504 regulations adopted the Title VI administrative procedures. See, for example, the Department of Education's Title VI Regulation at 34 CFR Sections 100.6-100.10 and 104.61. In addition to a full due process hearing and the secretary's approval of the termination decision, the secretary is required to file "with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action" 34 CFR 100.9(c). This requirement does not appear in the Department of Labor's Section 504 regulations. 29 CFR Section 32.46(c).

CHAPTER II

THE AGENCIES' ADMINISTRATION OF THEIR SECTION 504 PROGRAMS

A. Introduction

1. The Federal Financial Assistance Strategy¹⁷

The proponents of Section 504 embraced the federal financial assistance strategy of Title VI of the 1964 Civil Rights Act. They knew that disability discrimination was so ingrained in the country's consciousness and so thoroughly cloaked in the mantle of beneficent charity that only a dramatic approach to enforcement was likely to work. The 1964 Civil Rights Act provided the model: to condition all federal grant dollars on compliance with the nondiscrimination mandate. Section 504 simply substituted the words "solely on the basis of handicap" to describe the type of discrimination barred in place of the words "race, religion, color and national origin" contained in Title VI.

The reasons that the Civil Rights Act supporters chose to condition federal grant funds were equally valid for eradicating disability discrimination. The reasons were as follows:

1. Codify the illegality of funding "separate but equal" programs and invalidate the federal statutes that permitted the funding of such programs;¹⁸
2. Reassure reluctant federal agencies that they did have the authority to prohibit discrimination in their assistance programs;

¹⁷ To reiterate, a review and evaluation of the agencies' federally conducted activities was beyond the scope of this snapshot report on Section 504 activities.

¹⁸ U.S. Commission on Civil Rights, federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs, June 1996, p. 24. The Section 504 regulations do permit a few congressionally authorized and funded separate programs, such as Gallaudet University, which primarily serves deaf and hard of hearing students, and Housing Opportunities for Persons with AIDS.

3. Eliminate repeated debates about prohibiting discrimination in every bill that extended federal assistance;
4. Establish an “effective alternative to litigation” and to its “arduous route”;¹⁹
5. Prevent discriminatory uses of federal assistance from “defeating the program’s congressionally imposed objective”;²⁰ and
6. Halt the rampant discrimination in the states’ implementation of federal programs.

The federal agencies reviewed for this report varied widely in their efforts to address the goals of Section 504 during the 1990s. The Departments of Health and Human Services and Education were the most effective in enforcing their grants’ nondiscrimination provisions. For these agencies, administrative enforcement did effect change, often without the necessity of litigation. In contrast, litigation remained the primary enforcement tool for the Department of Justice, while for the Departments of Labor and State, the Section 504 program was never adequately supported, funded, or staffed to achieve its original goals.

2. Internal Agency Support for a Section 504 Enforcement Program

While there are obvious benefits to be gained by conditioning grants with civil rights requirements, this approach presents a basic conundrum: How can any agency that funds programs and invests enormous amounts of time, personnel, and administrative support to ensure the success of the programs simultaneously police the program’s compliance with its civil rights obligations? In other words, how can an agency simultaneously promote and police the programs it funds?

For some of the agencies, the answer was to establish a civil rights program, require recipients to sign assurances that they would comply with their civil rights obligations, and expect the funding and enforcement programs to operate as distinct entities. Both the Departments of Labor and

¹⁹ *Id.* at p. 25.

²⁰ *Id.*

State have used this approach, at least with regard to their Section 504 programs. The Departments of Health and Human Services and Education did not. What follows is an analysis of each agency's Section 504 enforcement program.

B. The Department of Health and Human Services

1. Reviving the Office for Civil Rights and Expanding Department-wide Coordination

As the largest grant-making agency in the Federal Government,²¹ the U.S. Department of Health and Human Services (HHS) has had extraordinary power to enforce the nondiscrimination provisions of Section 504.²² When its programs were part of the Department of Health, Education and Welfare (HEW), HHS played the critical role of issuing the first Section 504 regulations, as well as model regulations for all other federal agencies. HEW was also lead agency for the enforcement of Section 504.²³ In 1980, HEW's programs were divided between the new Departments of Health and Human Services and Education. As a result, both agencies began with Section 504 programs and implementing regulations as well as several HEW staff who had been part of the original Section 504 enforcement efforts. An analysis of the Federal Government's civil rights enforcement efforts during the 1980s is not within the scope of this report, but their "dramatic decline" has been well documented.²⁴

From 1990 to 2000, HHS took several steps to revive its civil rights program and, in doing so, enhanced its enforcement program in ways that other agencies did not. As a result, HHS was better prepared than it would otherwise have been to respond to the Supreme Court's landmark

²¹ In fiscal year (FY) 1996, HHS grant outlays were \$319.8 billion.

²² In FY 2000, HHS spent \$73.5 billion on programs serving people with disabilities: Medicaid, Medicare, Social Services Block Grant, Substance Abuse Block Grant, and Older Americans Act grants. HHS Report to the President on E.O. 13217, *Delivering on the Promise, Self-Evaluation to Promote Community Living for People with Disabilities*, p. I-1.

²³ Executive Order 11914, 41 Fed. Reg. 17871, April 28, 1976. The Executive Order required HEW to issue general standards for other federal departments and agencies to follow in their Section 504 regulations.

²⁴ See, e.g., *Report of the Citizens' Commission on Civil Rights, One Nation, Indivisible: The Civil Rights Challenge for the 1990's*, Chapter II, Washington, D.C., 1989.

disability decision, *Olmstead v. L.C.*, in 1999. These practices included interagency Memoranda of Understanding (MOUs) describing how HHS's Office for Civil Rights (OCR) and HHS regulatory programs would coordinate their work; OCR's outreach to disability advocacy organizations; and HHS's incorporation of civil rights objectives in its department-wide planning pursuant to the Government Performance and Results Act of 1993 (GPRA).²⁵

The goal of GPRA was to institute planning and evaluation standards in federal agency programs to make them more accountable to the public. For the first time, GPRA required agencies to develop five-year strategies and to publish annual reports describing how they were meeting department-wide goals and to what extent they were meeting their goals. As the General Accounting Office (GAO) explained:

The Results Act seeks to shift the focus of federal management and decision-making from staffing, activity levels, and tasks completed toward results. Under the Results Act, federal agencies must develop (1) strategic plans by September 30, 1997; (2) annual performance plans for fiscal year 1999 and beyond; and (3) annual performance reports beginning on March 31, 2000.²⁶

Unlike the other agencies reviewed for this report, HHS incorporated its civil rights program and, in particular, its disability rights program into its planning processes in significant and meaningful ways.²⁷ For example, HHS identified input from advocacy groups as an important source of information for planning and enforcement purposes. Other agencies may have relied on and valued input from the public through advocacy groups, but none of their Strategic Plans reflected that information.

²⁵ 31 U.S.C. Sec. 1116.

²⁶ GAO Report: *The Results Act: Observations on the Department of Health and Human Services' April 1997 Strategic Plan*, 7/11/97, GAO/HEHS-97-173R. For GAO Reports, see <http://www.gao.gov>.

²⁷ Both the Departments of Education and Labor included their Section 504 enforcement program in their Strategic Plans, but in ways that reflected less coordination between the enforcement offices and the funding programs.

Even before its GPRA review and planning, and perhaps in at least partial response to highly critical reports by the Citizens' Commission on Civil Rights about HHS's civil rights program,²⁸ HHS issued a Civil Rights Plan in 1995 that established three goals for OCR:

(1) Leading in the creation and evolution of a Department-wide civil rights program, (2) increasing nondiscriminatory access to and participation in HHS programs, and (3) redeveloping OCR's infrastructure and investing in its staff.²⁹

By developing this plan, HHS recognized that its coordination of civil rights activities and its enforcement program were in need of significant upgrading in almost every area. HHS made major improvements in its civil rights program overall, including its enforcement of Section 504. One of the most promising strategies that the agency adopted was to develop MOUs between OCR and HHS grant programs. As of the date of this report, OCR reports having developed such MOUs with the Administration for Children and Families, the Administration on Aging, the Centers for Disease Control and Prevention, the Agency for Toxic Substances Disease Registry, and the Food and Drug Administration. Each MOU is tailored to meet the distinct mission of the agency. Each participating grant program acknowledges its civil rights and Section 504 responsibilities. Each MOU includes the following paragraph:

In carrying out this responsibility, [the program] will ensure that there are no barriers that tend to exclude people from the benefits of its programs because of race, color, national origin, disability, age and sex under limited circumstances. The purposes of the activities undertaken by [the program] are to help prevent discrimination before it occurs and to assist recipients' compliance with the civil rights authorities prior to initiation of formal reviews or complaint investigations by OCR.

To ensure their continuing vitality, the MOUs spell out the reciprocal obligations of OCR and the subagency.

²⁸ *Citizens' Commission on Civil Rights, supra*, Chapter XV. Also see later Citizens' Commission Reports. The U.S. Commission on Civil Rights Report of 1996, *supra*, reported systemic problems with HHS's civil rights enforcement programs, indicating that it took HHS several years to make significant improvements in its civil rights program.

²⁹ Office for Civil Rights, GPRA Annual Performance Plan, p. 1, at <http://www.hhs.gov/ocr/swagenda.htm>; *Id.* at p. 221 (1995).

Since there is never sufficient funding for any civil rights office to review every grantee's compliance with the civil rights laws, the benefit of obtaining the grantor's cooperation in understanding and enforcing these responsibilities is immeasurable. These MOUs were signed in 2000 and 2001, and it is too early to assess their impact.³⁰ But the goals, the development of "contracts" between OCR and the grantor agencies, and HHS's response to GPRA pressures to operate all of its various programs in a coordinated way have the potential for promoting important, institution-wide change. OCR's development of similar MOUs with all HHS offices would reinforce this approach.

A second promising change in the HHS civil rights operation has been the Department's automation of its Medicare Pre-Grant Award system. Although OCR has conducted pre-grant reviews of facilities that participate in Medicare since the inception of the Medicare program in the 1960s, the use of the Automated Pre-Grant process began in October 1998. Many of the questions concern Section 504 issues:

- communication with persons who have sensory or speech impairments;
- provision of auxiliary aids to persons with sensory, manual, or speech impairments;
- grievance procedures for disability discrimination allegations;
- Section 504 coordination; and
- Section 504 self-evaluation.

HHS gathers information about non-Medicare recipients' compliance with civil rights laws through complaint investigations, compliance reviews, and technical assistance and outreach activities, as do the Departments of Education, Labor, and Justice. These data collection methods, while important, produce less consistent and less comprehensive civil rights data than does the automated Medicare system. Adding a similar automated system to the approaches that

³⁰ A clearly positive result of the MOU is OCR's published guidance to Temporary Assistance for Needy Families (TANF) agencies regarding their Section 504 and ADA responsibilities. See "Prohibition Against Discrimination on the Basis of Disability in the Administration of TANF" at www.hhs.gov/ocr/prohibition.html.

HHS already uses to enforce the civil rights obligations of its non-Medicare recipients would enhance the agency's ability to implement its enforcement goals with all of its grantees, as well as serving as a model for other federal civil rights agencies.

Third, federal agencies have long been criticized for not communicating with disability advocacy organizations and for being inaccessible when such organizations attempt to bring critical civil rights issues to their attention. The criticism has been leveled against both offices for civil rights and grant program offices. HHS has specifically included contact with advocacy groups in its GPRA plans. For example, in its fiscal year 1999 Annual Performance Plan, OCR mentions working with advocacy groups to identify data needs, provide technical assistance, and identify recipients of HHS funds for review in all HHS programs.

OCR indicated that it planned to increase its outreach to and partnership activities with advocacy organizations to enhance their access to OCR's planning processes. OCR increased its numbers to 20 partnerships and 26 outreach activities in the context of the Temporary Assistance for Needy Families (TANF) program in 1999–2000. In 2000–2001, OCR increased its outreach efforts and partnerships to 35 partnerships and 41 outreach activities.³¹ These rising numbers provide hope that OCR will leverage its resources by enhancing the ability of consumers and advocates to achieve better compliance with Section 504.

2. HHS Response to the *Olmstead* Decision

The most dramatic and encouraging actions that HHS took during the 1990s were in response to the U.S. Supreme Court's decision in *Olmstead v. L.C.*³² The Court ruled that unnecessary institutionalization of qualified individuals with disabilities was a form of discrimination

³¹ FY 2001 Performance Report at Section 2.1.2, Goal I.D. Also see OCR FY 2003 final GPRA Annual Performance Plan, FY 2002 final Revised GPRA Annual Performance Plan..

³² 119 S.Ct. 2176 (1999). The plaintiffs were two women with mental and physical disabilities who had entered Georgia's state mental hospital voluntarily. When their medical team and they agreed that it was time for them to leave, the discharge planning committee disagreed, saying that the state's community placement program was full, and there were no placements available for the plaintiffs.

prohibited by the ADA. The Court held that states were required to provide community-based services for persons with disabilities who would otherwise be entitled to institutional services when (a) treatment professionals reasonably determined that such placement was appropriate; (b) the affected persons did not oppose such treatment; and (c) the community placement could be reasonably accommodated, taking into account the resources available to the state and the needs of others who were receiving state-supported services. Although the opinion did not preclude the existence of waiting lists for community programs, it made clear that waiting lists had to move at a reasonable pace so that those who could leave the institution had a real chance of doing so.

Since 76,000 people were in state mental hospitals nationwide at the time of the decision³³ and many thousands more in other types of institutions, the Court's decision constituted a groundbreaking directive to the states to administer their services, programs, and activities "in the most integrated setting appropriate to the needs of qualified individuals with disabilities."³⁴ This ADA standard replicates the Section 504 regulation and, although the Court did not mention Section 504, its decision affected compliance with both laws.

Instead of OCR's routinely issuing an analysis of the case, the decision prompted an agency-wide response. First, Secretary Donna Shalala sent a letter to the governors of all the states, alerting them to the decision and describing the ruling as reflecting "a shared belief that no person should have to live in a nursing home or other institution if he or she can live in his or her community."³⁵ This letter indicated that HHS would be actively providing technical assistance and support to comply with the desegregation mandate. It reminded the states that HHS had made available an additional \$2 million for "deinstitutionalization" and "community-based services" actions eight months earlier.³⁶ Next, the directors of both OCR and the Health Care Finance Administration (HCFA; now the Center for Medicaid and Medicare Services) sent a joint letter to

³³ Bazelon Center for Mental Health Law, *Under Court Order: What the Community Integration Mandate Means for People with Mental Illnesses*, August 15, 2000, at p. 3 (<http://www.bazelon.org/lcru ling.html>).

³⁴ 28 CFR Sec. 35.130(d).

³⁵ "Dear Governor" letter from Donna Shalala, Secretary, HHS, January 14, 2000.

³⁶ Tim Westmoreland, Director, Health Care Finance Administration, HHS, to State Medicaid Directors, April 28, 2000.

all state Medicare and Medicaid agencies concerning *Olmstead*. The letter included specific suggestions as to how the states could analyze their programs to determine whether they were in compliance with the decision and with the ADA and Section 504 regulations.

HHS followed these initial letters with four more jointly issued technical assistance letters;³⁷ established an *Olmstead* addition to the HHS Web site;³⁸ began working closely with the Departments of Justice and Education; and attempted to work with the Department of Housing and Urban Development to develop a government-wide strategy to help the states meet their disability rights obligations.

HHS's response was unusually thorough but appropriate. HCFA's programs had subsidized the institutionalization of tens of thousands of individuals with disabilities. For the first time since the enactment of Section 504, one federal agency acted to focus and coordinate the work of its enforcement and granting arms toward altering decades of Medicaid policies and practices that had created "a significant barrier to the community integration of individuals with disabilities."³⁹ HHS could have waited to receive civil rights complaints from individuals who believed that their states were not complying with the Court's decision, as federal agencies have done since the first Section 504 regulations were published. Instead, HHS responded in a much more forceful, proactive, and effective way.

When OCR did begin to receive administrative complaints that state agencies were not complying with *Olmstead*, OCR attempted conciliation in every case, in part by getting state and local agency respondents to convene appropriate stakeholders to do *Olmstead* planning while holding in abeyance the usual investigation and enforcement efforts available to OCR. This new approach resulted in the respondents' focus on root problems in many of the cases.

³⁷ The letters can be found at <http://cms.hhs.gov/olmstead/smdltrs.asp>.

³⁸ See <http://www.hhs.gov/ocr/mis.html>.

³⁹ Letter from Robinsue Frohboese, Principal Deputy Director, Office for Civil Rights, DHHS, to Jeffrey Rosen, General Counsel, National Council on Disability, September 27, 2002.

HHS's *Olmstead* efforts were reinforced on June 19, 2001, by the White House's issuance of Executive Order 13217, *Community-Based Alternatives for Individuals with Disabilities*. The President appointed the secretary of HHS to take the lead in working with the Departments of Justice, Education, Labor, and Housing and Urban Development and the Social Security Administration "to ensure that the *Olmstead* decision is implemented in a timely manner."

Specifically, the Order required the agencies to work with the states; to evaluate the agencies' own federal programs, practices, regulations, and statutes; and to issue a report to the President. The Order also required HHS and DOJ to "fully enforce Title II of the ADA," which outlaws disability discrimination in state and local programs. Since Title II incorporates and expands Section 504, this was the first Executive Order that focused on helping states comply with the two laws and that required each of the named agencies to review its own programs for the purpose of "removing barriers that impede opportunities for community placement."

In response, each of the agencies conducted the required evaluation and contributed to the final Report to the President. HHS's evaluation constituted a serious assessment of its own programs, identified ways in which its programs contributed to unnecessary institutionalization, and reported how the Department responded to its own findings. Two of these responses are particularly relevant to this report. One was HHS's creation of the Office on Disability and Community Integration (ODCI). Its purpose is to "serve as the focal point within the Department for disability issues, including the coordination of disability science, policy, programs and special initiatives within the Department and with other agencies." To assist the ODCI, HHS also created a Disability Advisory Committee that includes individuals with disabilities, family members, advocacy organizations, providers, and state and local government officials.

Since these HHS components are brand-new, it is too early to determine what impact they will have on the agency's Section 504 and ADA Title II enforcement programs. However, these are promising developments, particularly since many people with disabilities, especially those who are low and very low income, depend on HHS programs. Enforcing Section 504's requirements

can only improve as HHS becomes more effective and proactive in monitoring its own programs to ensure that their focus is integration.

Finally, HHS also recommended that the President formalize the Interagency Council on Community Living (ICCL). HHS convened the Council to accomplish the Executive Order tasks and recommended that it be expanded to include other relevant agencies, such as the Equal Employment Opportunity Commission (EEOC) and the Internal Revenue Service (IRS). If made permanent, the ICCL might accomplish the work originally envisioned for the moribund Interagency Disability Coordinating Council (IDCC), created by Section 507 of the Rehabilitation Act in 1973.⁴⁰

C. The Department of Education

1. Readjusting Enforcement Strategies

Until 1993, the Department of Education's civil rights program focused on complaints. OCR reported to Congress that "nearly 90 percent of OCR resources were spent in a complaint mode."⁴¹ At that time, and throughout the 1990s, more than 50 percent of the complaints received by OCR concerned discrimination based on disability. That meant that OCR staff were spending the majority of their time resolving disability complaints filed on the basis of Section 504 and/or the ADA.

Though focusing the majority of OCR's resources on disability was potentially good news for the disability community, it raised serious questions among OCR leadership and staff "about whether

⁴⁰ Later in this chapter, the report addresses the Department of Justice's failure to convene the IDCC during most of the past decade. It is worth assessing whether the ICCL should replace the IDCC, and whether HHS is better positioned to coordinate the activities of the IDCC than the Department of Justice is.

⁴¹ Department of Education, Office for Civil Rights, Annual Report to Congress – FY1993, p. 10. In its comments on the draft of this report, the Department indicated that its OCR staff spent the remainder of the time conducting compliance reviews and providing technical assistance. Letter from Gerald A. Reynolds, Assistant Secretary for Civil Rights, to Jeffrey T. Rosen, General Counsel/Director of Policy, National Council on Disability, October 9, 2002, attachment.

the enforcement program was balanced to address all issues for which OCR had responsibility.”⁴² They were concerned that if OCR remained a complaint-driven agency, it would not be able to fulfill its obligations to enforce the race, national origin, age, and sex discrimination statutes.⁴³

To facilitate a responsible civil rights enforcement program that did not “overemphasize” disability complaints and therefore was not complaint driven, OCR made several organizational changes. It radically altered its program and decentralized the location of its staff; improved and increased its outreach and training program; emphasized its reliance on parents, students, and community groups to identify civil rights issues and monitor compliance agreements; and reinforced its technical assistance communications and publications. These changes led the U.S. Commission on Civil Rights to find that “the organizational structure of external civil rights enforcement at the U.S. Department of Education is exemplary.”⁴⁴

2. Organizational Restructuring

Between 1994 and 1996, OCR reduced its Washington staff by 44 percent and increased the number of staff in the field. Eighty-eight percent of OCR’s staff were placed in four enforcement divisions--eastern, southern, midwestern, and western--and the divisions included 12 enforcement offices. OCR changed the role of headquarters staff so that their work became providing headquarters support to field staff, making it easier for field staff to enforce the civil rights laws, provide technical assistance to recipients, and work with community advocates and families. In addition, headquarters staff were responsible for coordinating OCR’s civil rights work within the Department and among other federal agencies.⁴⁵

⁴² *Id.*

⁴³ “This approach did not adequately address the variety of civil rights problems faced by vulnerable groups in the United States unable or afraid to complain. For example, LEP [limited English proficiency] students were largely unserved by the OCR complaint process.” Department of Education, Office for Civil Rights, Annual Report to Congress, FY 1993, p. 10.

⁴⁴ U.S. Commission on Civil Rights, *supra*, at p. 209.

⁴⁵ Department of Education, Fiscal Year 2000, Justifications of Appropriation Estimates to the Congress, Vol. II, pp. 9–11.

From its inception in 1980, OCR's structure has been different from that of other agencies in two ways. The head of the agency is not a director but an assistant secretary. Many of the original staff had worked at HEW. They had learned how difficult it was to integrate civil rights issues into the funding programs. Therefore, the Education Department began its existence with a commitment to treat civil rights with the same level of importance as all the other parts of the agency that were headed by assistant secretaries. The benefit of this approach has been that OCR has continuously worked closely with the programs that focus on disability issues, such as the ones sponsored by the Office of Special Education and Rehabilitative Services (OSERS) and the Office of Elementary and Secondary Education.⁴⁶

One benefit that students with disabilities have derived from this structure has been the issuance of "Dear Colleague" letters to state and local education agencies from the assistant secretaries of both OCR and OSERS. One such letter, sent in 1997, addressed the importance of including students with disabilities in national reading and math assessments. The letter explained both the civil rights and programmatic issues and recommended practices. A similar letter, issued on July 25, 2000, addressed school harassment based on disability. It defined the issue; provided guidance and recommended actions; explained how harassment might violate Section 504, the Individuals with Disabilities Education Act (IDEA), and the ADA; and offered technical assistance.

Given the close relationships between the funding programs and OCR and OCR's shrinking staff size, an additional approach for OCR to explore is the development of MOUs with its funding partners, like the ones HHS developed.⁴⁷ For example, the MOU might require the Post-Secondary Office to (a) determine how many of its grantees had conducted self-evaluations and

⁴⁶ Titles and organizational standing often count for less than does departmental leadership, however, as was clear in the Department of Health and Human Services response to the *Olmstead* decision, for example. See *supra* at pp. 30–33.

⁴⁷ See *supra* at p.28.

fulfilled the goals of the resulting Transition Plans, as required by Section 504,⁴⁸ and (b) develop materials and technical assistance guidance for its grantees, with guidance from OCR.

The second difference between OCR's organization and that of other agencies also resulted from HEW experience. There, as in many agencies, the civil rights office depended on the Office of General Counsel for all its legal needs, from the most mundane questions on legal standing to approval for issuing a letter of findings determining whether the recipient was in compliance.

When the Department of Education was created in 1980, it had its own legal staff. Most reviewers agree that one reason OCR was able to process its complaints more efficiently, refer more cases to the Department of Justice, and respond more quickly and effectively to enforcement issues than were other agencies was because OCR was able to identify and resolve legal issues without requesting assistance from a separate office. While OCR had coordinated closely with its General Counsel's Office, it was not dependent on it for regulation and policy development. This organization reduced delays in producing publications and, more important, reflected input by staff whose focus and experience were based on actual civil rights enforcement experience.

OCR still maximizes the benefit of having its own legal staff by having its lawyers work with investigators and other program staff to conduct compliance reviews and assess the compliance status of the funding recipients. In OCR's 12 enforcement offices, "case resolution teams"⁴⁹ consist of attorneys, investigators, and support staff. "The teams have authority, with minimal levels of review, to reach final determinations in all but a small number of OCR cases."⁵⁰

⁴⁸ In comments on the draft of this Report, *supra*, fn. 41, Assistant Secretary Reynolds objected to this recommendation, saying, "OCR is the only office in Education that can determine compliance." While that is true, the recommendation was that the granting office include questions that require only yes and no answers, such as, "Has your education institution conducted a Section 504 self-evaluation and, if so, when?" Some of the benefits of the granting agency's including such questions are that it can provide critical information to OCR; the funding agency could include the questions in documents that it sends in the normal course of the grant process; and it could increase the funding staff's understanding of Section 504 requirements.

⁴⁹ Department of Education, Fiscal Year 2000, *supra*, fn. 45, at p. Y-9.

⁵⁰ *Id.*, at p. Y-10.

3. Issue Networks

A novel result of OCR's shift of resources has been the creation of "issue networks."⁵¹ When OCR changed from a complaint-driven agency, it chose to expand and strengthen its community and internal communication networks so it could focus its resources on the civil rights issues that were of most concern to the public and the agency's civil rights staff. The OCR-OSERS letter on harassment of students with disabilities, for example, resulted from conference calls between OCR and OSERS staff, and calls and letters from students, parents, and disability advocates. Before drafting the letter, OCR and OSERS held a focus group to gain more information about the problem from those directly affected.

It would be useful for OCR to publicize any other actions it has taken to respond to this problem and to publicize any investigations, administrative enforcement actions, or consultations with DOJ that it has undertaken regarding prosecuting harassment complaints. The purpose of the reorganization was to help OCR become more effective in its ability to respond quickly and effectively to civil rights problems when they arose. OCR's ability to publicize and explain the civil rights aspects of student harassment—a current topic of substantial public interest—would be one measure of the reorganization's success.

The "networks" that OCR has established include the Disability Network, the Testing Network, and the Minorities in Special Education Network. The remaining networks focus on the education of gifted and talented students, racial harassment/discipline, education of limited English proficient students, and elementary and secondary school racial desegregation. Participants in the networks include staff from each of the field and headquarters offices that work on Section 504 and ADA enforcement. When appropriate—as with the testing issue that was the subject of the OCR-OSERS letter mentioned above—the Disability and Testing Networks conduct joint calls. These calls help staff learn from each other and create a coordinated approach to overarching problems.

⁵¹*Id.*, at p. Y-21.

During fiscal year (FY) 2000, the calls included the following subjects: the application of the Family Educational Rights and Privacy Act to disability complaint investigations; recent court decisions on sovereign immunity; Section 508⁵² technology advances; homeless children with disabilities; and postsecondary academic adjustments and services. The last two calls were conducted by OCR but consisted of presentations by officials of the Association of Higher Education and Disability, representatives of Educational Services to Homeless Children with Disabilities in Baltimore, and the Women's Collective in Washington, D.C.⁵³

The Disability Network maintains an intranet site that can be accessed by all OCR staff. The site includes links to significant court decisions, laws, and regulations; relevant law review articles; and technical assistance presentations. This site is reinforced with a quarterly newsletter, *The Disability Networker*, that discusses developments in OCR cases, as well as court decisions and other relevant and useful news.

Few agencies, much less their offices for civil rights, have designed systems such as ED's networks to incorporate the expertise and vision of disability advocates outside the agency and make them available to line staff. The potential benefit of such interchange is obvious. The question that it raises, however, is how well OCR has succeeded in using this "outsider" focus and internal coordination to increase staff competence and the agency's ability to avert and resolve violations of Section 504.⁵⁴

It is important to note, however, that OCR has taken unusual steps to implement its goals. For example, when its Seattle office addressed harassment in the schools, it worked with a state

⁵² Congress added Section 508 to the Rehabilitation Act in 1998. It is codified at 29 U.S.C. 794d. Section 508 requires that federal agencies' electronic and information technology be accessible to people with disabilities, including employees and members of the public. For information, see <http://www.usdoj.gov/crt/508.html>.

⁵³ Description of OCR's training activities and accomplishments prepared for NCD and provided on June 1, 2001, by Rhonda Weiss, U.S. Department of Education, to Robert Ardinger.

⁵⁴ In his letter to Jeffrey Rosen, *supra* at fn. 41, OCR Assistant Secretary Reynolds indicated that "[t]he draft report could be read to suggest a greater role of members of outside organizations than is accurate. While networks sometimes invite individuals from outside organizations to address the networks as guest speakers, the networks do not regularly interact with outside organizations and such individuals are not members of the network; the membership of the networks includes OCR staff only."

Office of Education to develop a Web site that would include all available laws, regulations, and policies on harassment, as well as policies and links to self-evaluation resource materials. For students with disabilities, who have always been an easy target of harassment, this kind of federal-state partnership could be dramatic and empowering.

4. Monitoring Civil Rights, by OCR and by the Community

As difficult and time-consuming as it sometimes is for civil rights agencies to investigate a complaint or conduct a compliance review, issue a letter of findings, and structure a settlement or a voluntary compliance agreement, effective civil rights enforcement requires an additional step. Achieving full and lasting relief requires monitoring the settlement or agreement designed to correct noncompliance. OCR addressed this issue, too, in its restructuring. It added the task of monitoring resolution agreements to its Strategic Plan and Annual Performance Plans and listed monitoring as a separate activity to which it would devote its resources. As an example of its success, OCR reported that it monitored 2,083 complaint resolution agreements and 807 compliance review resolution agreements in 1999.⁵⁵

What is novel about OCR's monitoring its agreements is that the agency has actively sought the assistance of parents. Beginning in 1993, OCR determined that it would strengthen its partnership with students and parents, partly to expand the reach of its technical assistance efforts and partly to "help others to learn to solve their problems of securing equal access to quality education."⁵⁶ Encouraging beneficiaries to help ensure that their schools comply with civil rights agreements is a very effective way for OCR to maximize its resources, and it is consistent with OCR's turning to its beneficiary community and to the Department's recipients for help in identifying discrimination and technical assistance needs.

⁵⁵ Department of Education, Office for Civil Rights, FY 1999 Annual Report to Congress, p. 12.

⁵⁶ Department of Education, Office for Civil Rights, FY 1993 Annual Report to Congress, p. 10.

In 1999, OCR refined its monitoring activities further. In addition to tracking a recipient's compliance with complaint resolution agreements, OCR started to focus "not only on whether the recipient has taken the specific steps required in its agreement, but also on whether those steps have achieved goals established for the compliance activity and improved students' access to high quality education."⁵⁷

This is possibly the best argument that OCR could make for moving away from being a complaint-driven office. Rather than investigating similar complaints from a variety of sources and solving each of them individually and repeatedly, OCR has adopted a much more sophisticated approach to civil rights enforcement. Reviewing whether an agreement actually accomplishes a Section 504 goal on a case-by-case basis is unique among civil rights agencies. Having the flexibility to work with a recipient to modify agreements and generate better outcomes for students is a goal that every civil rights agency should adopt; it places the emphasis on results over process.

5. The Department of Education's Response to *Olmstead*

Like HHS, the Department of Education (ED) responded to *Olmstead* when it was decided in 1999. According to its Executive Order 13217 Self-Evaluation, OSERS took the lead for ED's response to the *Olmstead* decision. OSERS created a joint project with the Department of Labor and HHS "to promote grass-roots advocacy in support of home/community-based waivers under Medicaid."⁵⁸ As the Department describes the project, its focus is on helping states develop five-year plans "for providing supports and services for people with significant disabilities" that include "strong consumer-directed home and community-based services for persons with disabilities."⁵⁹

⁵⁷ Department of Education, Office for Civil Rights, FY 1999 Annual Report to Congress, pp. 11–12.

⁵⁸ "Delivering on the Promise: U.S. Department of Education Self-Evaluation to Promote Community Living for People with Disabilities," Report to the President on Executive Order 13217, <http://www.hhs.gov/newfreedom/final/edinit.html>, III, p.1.

⁵⁹ *Id.*, at pp. 1–2.

ED's *Olmstead* response lists nine additional efforts, eight of which are led by program components of the agency. The ninth effort, led by OCR, is not focused on enforcement but rather on "targeted technical assistance and training initiatives" and the preparation of "a resource document in the area of transition from secondary school to post-school opportunities." Nowhere does the OCR report refer to any compliance reviews or enforcement actions, either past or future, that would reinforce ED's collaborative activities with states, parents, and advocates or that would ensure that its recipients are complying with relevant statutory and regulatory mandates.⁶⁰ In fact, the only mention of civil rights enforcement in support of *Olmstead* activities comes in the description of protection and advocacy activities, which are funded by the Department's Rehabilitative Services Administration.⁶¹

The Office for Civil Rights is responsible for ensuring that the schools, universities, state vocational rehabilitation agencies, nonprofit organizations, assistive technology providers, businesses, and others that the Department describes as being involved in its *Olmstead* efforts conduct their activities so that they are accessible to beneficiaries with disabilities. Recipients whose policies deny services to those on psychiatric medication or whose services are located in inaccessible sites, for example, impede the ability of students and workers with disabilities to obtain education and employment services and benefits, in violation of Section 504 regulations and the ADA. It is both puzzling and worrisome that ED's report to the President mentions nothing about how it intends to enforce the regulations and statutes it cites as supporting its *Olmstead* efforts. It is particularly troubling that OCR's discussion of its *Olmstead* actions, as encouraging as they sound, does not include any mention of enforcement activities, other than stating that OCR "vigorously enforces...the ADA and Section 504."⁶² The Department of Education knows how to enforce Section 504, and it should demonstrate that capacity in its *Olmstead* activities.

⁶⁰ *Id.*, at pp. 10–12.

⁶¹ *Id.*, at pp. 5–6.

⁶² Federal Agency Actions to Eliminate Barriers and Promote Community Integration, p. 24, <http://www.hhs.gov/newfreedom/final.html>.

D. The Department of Labor

1. The Civil Rights Center: A Minimalist Approach

When Congress expanded the Rehabilitation Act in 1973 to include disability rights, it covered recipients of federal financial assistance through Section 504 and contractors doing business with the Federal Government through Section 503. The Department of Labor (DOL) was designated as the lead agency to promulgate regulations under Section 503 of the Rehabilitation Act,⁶³ and it assigned Section 503 responsibilities to its Office of Federal Contract Compliance (OFCCP), which had been responsible for working with contractors to enforce its other civil rights laws. To enforce the civil rights laws that applied to the recipients of the DOL's grant programs, it created the Office for Civil Rights, which was renamed the Directorate of Civil Rights in the early 1980s and renamed again in the mid-1990s as the Civil Rights Center (CRC).⁶⁴

From its inception, CRC has had limited funding and a small staff. It has had to stretch its resources to administer the agency's Title VII⁶⁵ employment discrimination program for DOL employees. Unlike the Offices for Civil Rights in HHS and ED, CRC has never had regional staff, with the exception of one staff person in each regional office, who is responsible for internal Title VII implementation. All Section 504 investigations, technical assistance, compliance reviews, prefunding award reviews, and regulatory and policy development have been conducted in Washington, D.C. CRC has no separate policy office. It rarely works with OFCCP; the two offices consult each other only when they receive Section 503 and 504 complaints that are filed against the same entity or when compliance review efforts are directed against entities that both contract with DOL and receive federal financial assistance from one or

⁶³ Executive Order 11914.

⁶⁴ Letter from Patrick Pizzella, Assistant Secretary for Administration and Management, Department of Labor, to Jeffrey Rosen, General Counsel/Director of Policy, National Council on Disability, October 4, 2002.

⁶⁵ Title VII of the Civil Rights Act of 1964 prohibits discrimination against employees on the basis of race, color, national origin, religion, and sex.

more of its programs. Joint training is limited to “almost every year, [when OFCCP] conducts a workshop(s) at CRC’s annual national equal opportunity training conference.”⁶⁶

During the 1980s, CRC spent the majority of its resources on complaints and compliance reviews. For example, the office spent only \$10,000 on technical assistance activities in 1988.⁶⁷ While the budget for the office increased during the 1980s, the additional funds supported internal, DOL employee Title VII complaint processing. The budget for enforcement of all of the civil rights laws affecting recipients dropped to a low of \$1.9 million in 1988. Similarly, the size of the enforcement staff dropped from 66 in 1981 to 32 in 1988.⁶⁸ By 1994, the number of full-time enforcement staff had risen from 32 to only 34, and CRC’s budget had increased to \$2.5 million. By 2002, DOL’s budget request for all of CRC’s activities, including its internal Title VII program, was \$5.8 million.⁶⁹ Since the Title VII program absorbed at least half of CRC’s resources, the budget to enforce recipients’ civil rights obligations would be no higher than \$2.9 million, or slightly more than the 1994 budget. In contrast, OFCCP’s budget request was for \$76.2 million.⁷⁰

CRC conducted no prefunding award grant fund reviews in the early 1990s, and no post-award desk audits in 1992 and 1993, despite an increase in the number of cities and counties that newly became DOL program recipients when Congress enacted the Job Training Partnership Act (JTPA), providing federal funds for job training and placement services. The 1990 passage of the ADA also increased CRC’s workload.⁷¹

⁶⁶ Letter from Patrick Pizzella, *supra*, at fn. 64.

⁶⁷ U.S. Commission on Civil Rights, at p. 356.

⁶⁸ *Id.*

⁶⁹ Department of Labor Budget Overview FY 2002, 8/24/2001; http://www.dol.gov/dol_sec/public/Budget2002/budgetfy2002.htm

⁷⁰ *Id.* The size of OFCCP’s staff and budget were 11 times those of CRC every year during the 1990s.

⁷¹ U.S. Commission on Civil Rights, p. 358.

DOL distributes most of its federal financial assistance through continuing state programs.⁷² This fact, combined with CRC's small size and few resources, has resulted in its reliance on Methods of Administration (MOA) documents. Required by both the JTPA in 1984⁷³ and the Workforce Investment Act (WIA) in 1998, the MOA

is a document that describes the actions an individual State will take to ensure that its WIA Title I-financially assisted programs, activities, and recipients are complying, and will continue to comply, with the nondiscrimination and equal opportunity requirements of WIA and its implementing regulations.⁷⁴

One potential benefit of the MOA approach was that it required states to employ equal opportunity staff and train them to be able to identify discrimination, conduct investigations, and obtain corrective action and sanctions. When CRC focused its attention in 1994 on the MOA requirement in the JTPA regulations, nine years after DOL published the regulatory requirement,⁷⁵ the Civil Rights Center required every state to submit an MOA so that CRC could review them for compliance with CRC's detailed guidance.

The CRC issued a letter finding at least one state recipient of JTPA funds in noncompliance with Title VI for not having submitted an MOA.⁷⁶ This was apparently the only time that CRC found a state out of compliance with its MOA from 1984 until 2000. On August 25, 2000, after Congress replaced the JTPA with the Work Incentives Improvement Act, DOL published its "State Guidance for Developing Methods of Administration Required by Regulations Implementing

⁷² *Id.*, at p. 366. Since the U.S. Commission on Civil Rights Report in 1996, Congress replaced the JTPA in 1998 with the WIA, which is one of the job training statutes that the Department of Labor funds and operates, with the states, as a continuing state program. Other continuing state programs that receive federal financial assistance from the Department are the Veterans' Employment and Training Services, Unemployment Insurance Services, and Welfare to Work programs.

⁷³ 29 CFR 37.54. Also see Supplementary Information, 29 CFR Part 37, "State Guidance for Developing Methods of Administration Required by Regulations Implementing Section 188 of the Workforce Investment Act of 1998," 65 Fed. Reg. 51983 (8-25-2000).

⁷⁴ *Id.*, at 51984.

⁷⁵ U.S. Commission on Civil Rights, p. 367.

⁷⁶ *Id.*, at p. 368. It is unclear whether CRC found the state in violation of Title VI only or of all of its civil rights obligations, and what the outcome of the finding was.

Section 188 of the Workforce investment Act of 1998.”⁷⁷ According to Patrick Pizzella, Assistant Secretary for Administration and Management, “The CRC initially rejected a substantial number of MOAs submitted by States pursuant to the WIA nondiscrimination regulations.... In addition, we understand that CRC required at least some such States to sign Conciliation Agreements to accompany their amended MOA’s....”⁷⁸ According to CRC staff, assessment of the MOA is a paper review, limited to determining whether the MOA includes all the required documentation.⁷⁹ Severely limited resources and insufficient staff prevent CRC from conducting on-site assessments. Instead, as the Guidance makes clear, it is the governor’s responsibility to review the state’s MOA every two years and to notify CRC when the state modifies its MOA. Once CRC approves the MOA, it is the responsibility of the state to enforce it. As the Guidance explains,

...the MOA is intended to be a document that State and local level staff and management, through the EO [Equal Opportunity] Officer, can consult when determining appropriate steps to take when confronted with an EO issue....It has been CRC’s intent that the MOA be a living document, a guide describing how the State will ensure that its WIA Title I-financially assisted programs will operate in a nondiscriminatory manner.⁸⁰

Although the Guidance and the regulations indicate that a state’s failure to follow the dictates of its own MOA might subject the state to a finding of noncompliance and the conditioning or loss of federal funds, in truth, CRC does not have the resources or staff to conduct on-site reviews. It would be appropriate for GAO or a similar investigative body to determine whether CRC’s long-distance oversight and the states’ willingness and ability to comply with the WIA regulations and guidance are sufficient to generate compliance with Section 504, the additional disability provisions of the WIA, and all the other civil rights laws covered by the MOA.

⁷⁷ 65 Fed. Reg. 51984 (8-25-2000).

⁷⁸ Letter from Patrick Pizzella, *supra* at fn. 64.

⁷⁹ Letter from Annabelle T. Lockhart, Director of Civil Rights Center, Department of Labor, to Barbara Stewart of Ardinger Consultants and Associates, March 2, 2001, at p. 1.

⁸⁰ State Guidance, *supra* at fn. 73, p. 51990.

2. Creating Consistent Enforcement Standards

In its 1996 report on federal enforcement of Title VI (which bars discrimination based on race, color, and national origin), the U.S. Civil Rights Commission found that DOL's JTPA regulations were more extensive, more comprehensive, and more specific about recipients' obligations than were its race discrimination regulations applicable to other DOL grantees. The Commission recommended that DOL either update its Title VI regulations to make them consistent with the JTPA regulations or make the JTPA regulations applicable to all of DOL's grant programs.⁸¹ The same could be said for Section 504. In fact, the WIA replaced the JTPA program in 1998,⁸² and DOL published a final implementing rule on November 12, 1999.⁸³

The sections of the WIA regulations that address disability discrimination are far more extensive, comprehensive, and specific than are the Section 504 regulations, and they are an improvement over the JTPA regulations. Not only do they incorporate the amendments to the Rehabilitation Act and the requirements of the ADA, they also incorporate best practices that have been developed by disability organizations and individuals over the course of the past 20 years.

If all the DOL recipients are included in the WIA and are required to comply with the WIA regulations, the differences between the stronger and more comprehensive disability nondiscrimination regulations of the WIA and those of Section 504 would be theoretical. However, as that is not the case, it is incumbent on the Department to republish its Section 504 regulations to include the more expansive provisions of the WIA regulations. Otherwise, it will perpetuate an unfair and confusing two-class system under which beneficiaries of WIA programs have greater protections than do beneficiaries of other DOL programs.

⁸¹ *Id.*, at p. 376.

⁸² 29 U.S.C. 2801 et seq.

⁸³ 29 CFR Part 37.

The one prominent Section 504 provision that the WIA regulations do not include is the self-evaluation requirement.⁸⁴ On the basis of DOL guidance, recipients of WIA funds might be led to believe that they are not required to conduct self-evaluations, and they would be reinforced in their belief by the statements of Assistant Secretary for Administration and Management Patrick Pizzella. In correspondence with NCD, the assistant secretary interprets the Department's Section 504 regulations as requiring only those entities that were recipients in 1980, when the regulations were published, to conduct self-evaluations.⁸⁵ Although DOL documents make it clear that this is not Department policy,⁸⁶ it would behoove the Disability Rights Section of the Department of Justice to resolve the conflict within DOL and to recommend that it clarify to its recipients that Section 504 continues to require self-evaluations and Transition Plans.

In spite of a lack of resources, the CRC Section 504 enforcement program does have a computerized case-tracking system. CRC monitors all its conciliation agreements and keeps the cases open until the recipient meets all the terms of the agreements. However, NCD received conflicting information as to whether CRC seeks relief that would make the complainant "whole" by, for example, seeking out-of-pocket expenses and monetary relief for pain, suffering, or humiliation. Such relief is consistent with DOJ guidance and is sought by other civil rights

⁸⁴ 29 CFR 32.6c.

⁸⁵ Pizzella asserted in a letter to NCD that the self-evaluation requirement applied to DOL's recipients only at the time it published its Section 504 regulation, and "no language in the regulation indicates that any recipient has been required to conduct a self-evaluation since 1981." Letter from Patrick Pizzella, Assistant Secretary for Administration and Management, to Jeffrey Rosen, General Counsel/Director of Policy, NCD, April 19, 2002, p.15. See also Letter from Assistant Secretary Patrick Pizzella, October 4, 2002, *supra* at fn. 64, pp. 4–5.

While the fact, as stated, may be true, the interpretation of the regulatory requirement is incorrect and conflicts with other DOL statements as well as with binding guidance from DOJ. The letter also asserts that the Methods of Administration regulations at 65 FR 51983, 51987 require states to give DOL "any evaluation conducted to determine the programmatic or architectural accessibility of a WIA Title I-financially assisted program or activity..." *Id.*, at p. 25. That description also contradicts Section 504's requirement (not recommendation or suggestion) that recipients conduct self-evaluations.

⁸⁶ See, e.g., U.S. Department of Labor, Section 504 Compliance Handbook, pp. 17–18 (Thompson Publishing Group, Inc. July 2001). The Civil Rights Center endorsed this handbook and indicated to NCD that it uses it as a reference and for training purposes.

offices. CRC Director Annabelle Lockhart reported that her office did not seek make whole relief.⁸⁷ Pizzella indicated the opposite in his comments on the draft version of this report.⁸⁸

With regard to compliance reviews, CRC did not seek the involvement of community organizations or disability advocacy agencies. This practice differs from the approaches adopted by HHS and ED. In another departure from enforcement practices used by HHS and ED, CRC ceased all compliance review work with the exception of WIA MOA reviews, beginning in 2000. Apart from those paper reviews, CRC focused its efforts on training and technical assistance, also aimed primarily at WIA participants. Since it is apparent from the Department's Strategic Plans and Olmstead Report that many of the Department's offices have been addressing training and technical assistance needs related to the WIA, CRC could, instead, emphasize its civil rights enforcement mission in its work.

CRC, unlike the Department of Education's OCR, does not have its own lawyers and depends on DOL's Office of the Solicitor to enforce findings of civil rights violations. The Solicitor receives few referrals from CRC, which is consistent with CRC's emphasis on training and technical assistance. Without an active Section 504 enforcement program, DOL's grantees have less incentive to comply voluntarily with the law. If an individual beneficiary or an advocacy group identifies discriminatory practices and files an administrative complaint with CRC, the Department will learn that its recipient may be violating Section 504. That is too haphazard a way to ensure that federal tax dollars are being spent lawfully.

When asked what would improve CRC's ability to respond to Section 504 enforcement matters, Lockhart answered that both recipients and DOL program staff needed more training about Section 504 obligations. Lockhart did not identify any Section 504 enforcement operations that the agency believed were particularly successful or that could serve as a model for other

⁸⁷ *Id.*, Letter from Annabelle Lockhart to Barbara Stewart of Ardinger Consultants, *supra* at fn.79, question #11(b).

⁸⁸ Pizzella, in his comments on the draft of this report, indicated the opposite--that CRC does, as a matter of policy and practice, provide make-whole relief, including compensatory and punitive damages. See Letter from Assistant Secretary Patrick Pizzella, October 4, 2002, *supra* at fn. 64, p. 3.

agencies. She identified a lack of resources, in terms of both dollars and personnel, as being the major impediment to more effective Section 504 enforcement.⁸⁹

3. DOL's response to *Olmstead* and Executive Order 13217

Although the Department of Labor's CRC has backed away from Section 504 enforcement programs, it and several other DOL offices are investing extensive resources into technical assistance and interagency coordination and collaboration programs on behalf of people with disabilities. This is nowhere more clear than in its *Olmstead* Report to the President. CRC is mentioned twice in the report, both times as providing technical assistance and training support in furtherance of the Department's WIA initiatives. Both as administrator of DOL's Equal Employment Office and as the Department's Section 504 enforcement office, the Civil Rights Center has been and will be in the position of collecting information that would support the development of enforcement strategies. Nothing in the *Olmstead* Report suggests that CRC is fulfilling this role.

For example, the Department's *Olmstead* Report says that CRC will conduct "disability-focused reviews and evaluations" of Section 504 and the other nondiscrimination obligations of the WIA.⁹⁰ However, instead of using the reviews for the purpose of bringing WIA participants into compliance, DOL plans to use them "to identify further areas in which federal training and technical assistance activities are needed to eliminate barriers and to prevent disability discrimination in the WIA programs."⁹¹ In other words, DOL will not emphasize the enforcement of Section 504, or of any of the civil rights laws, in the WIA programs.

⁸⁹ Letter from Annabelle Lockhart to Barbara Stewart, *supra* at fn. 79, question #29.

⁹⁰ U.S. Department of Labor, Report to the President on Executive Order 13217, III. Actions and Recommendations, p. 8 (<http://www.hhs.gov/newfreedom/final/dolaction.html>).

⁹¹ *Id.*

CRC will also participate in “listening sessions.” These listening sessions will bring CRC in contact with people with disabilities, employers, parents and family members, providers of employment supports and services, and “other relevant stakeholders...about changes needed to ensure meaningful and effective service delivery to people with significant disabilities.”⁹² These are precisely the beneficiaries of the DOL programs who know how the programs are not working and, with the help of CRC, could identify which of the malfunctions are the result of discrimination that CRC was created to address. That, however, is not the purpose for including CRC in the meetings, according to the *Olmstead* Report. Nor is there any indication that CRC plans to investigate, let alone prosecute, any evidence of Section 504 noncompliance that arises in these listening sessions.

On the other hand, DOL’s technical assistance, collaboration, and coordination plans, as described in its *Olmstead* Report, are both resource intensive and coordinated throughout the Department. Although enforcement has proven to be a necessary component of federal efforts to bring people with disabilities into the mainstream, technical assistance and training are also important, and DOL is building on a history of technical assistance activity in the disability field. It has collaborated with the President’s Committee on the Employment of People with Disabilities (PCEPD) since the committee’s establishment in 1945, and its Job Accommodation Network (JAN) has long provided very good technical assistance and outreach materials about a wide range of reasonable accommodation options at worksites to employers, job seekers with disabilities, and employees. The JAN has a toll-free number and a user-friendly Web site that describes resources for technical assistance, funding, education, and services related to the employment of people with disabilities.

Its Office of Disability Employment Policy (ODEP) has accomplished most of DOL’s more recent work on behalf of people with disabilities. Created by Congress in 1998, ODEP replaced the PCEPD. ODEP’s mission is

⁹² *Id.*

[t]o increase opportunities for adults and young people with disabilities by expanding access to training, education, employment supports, assistive technology, integrated employment, entrepreneurial development, and small business opportunities. It also builds partnerships with employers and state and local agencies to increase awareness of the benefits of hiring people with disabilities, and to facilitate the use of effective and lawful strategies for such hiring.⁹³

In contrast to CRC's \$5.8 million budget for FY 2002, ODEP's budget is \$38.1 million. Judging by its funding decisions, DOL has apparently decided that ODEP, not CRC or even the Office of Federal Contract Compliance, has the primary responsibility for furthering the Department's interests in the disability field. This is clear not only from its funding allocations, but from DOL's decision to assign the lead to ODEP, and not CRC, on any revisions of the Section 504 regulations.

That said, DOL has developed thoughtful and potentially groundbreaking approaches for helping people with mental and physical disabilities be successful in finding, getting, and keeping jobs. DOL's *Olmstead* Report reflects a clear understanding of the barriers to employment that exist and a commitment to spending the resources to address them. For example, the report discusses "customized employment," tailored to each individual's needs; an emphasis on integrated employment; and expanding the network of collaborations that are the foundation of DOL's One-Stop Employment Centers. The collaborations would include nonemployment entities that support the participation of many people with disabilities in the workforce, such as state Medicaid agencies and community mental health centers, ED's Office of Special Education Programs, and relevant offices in Housing and Urban Development and the Department of Transportation.⁹⁴

The self-evaluation that DOL conducted as part of its *Olmstead* Report did, like HHS's self-evaluation, help the agency identify ways to make its programs more accessible to people with

⁹³ Letter from Patrick Pizzella, Assistant Secretary for Administration and Management, Department of Labor, to Jeffrey Rosen, General Counsel/Director of Policy, National Council on Disability, April 19, 2002, p.4.

⁹⁴ U.S. Department of Labor, Report to the President on E.O. 13217, at pp. 6–10.

disabilities. For example, the report says that DOL's Pension and Welfare Benefits Administration will expand its "education campaigns and...outreach...to address specific information and questions to assist Americans with disabilities" in such areas as health benefits, pensions, and other retirement benefits.⁹⁵

The DOL self-evaluation identifies plans to (a) help youth transition into the workforce, (b) work more closely with advocacy and community organizations, and (c) increase the employment of individuals with psychiatric disabilities, the supply of personal care assistants, and the use of technology in job finding and job retention.⁹⁶ DOL follows the discussions of the barriers in each of these areas with specific proposals and work plans that suggest both a willingness to change the agency and excitement about increasing the employment of individuals with disabilities.

Unlike that of HHS, DOL's self-evaluation addresses its future plans with respect to *Olmstead* but does not effectively assess the agency's own programs, their institutional biases, and the barriers they create for individuals with disabilities. But, if DOL Secretary Elaine Chao is serious about directing "each DOL agency to aggressively implement the policies and programs contained in this response to President Bush's Executive Order,"⁹⁷ she must also make effective demands on states and other recipients to adhere to the disability-related goals of the WIA and create a serious Section 504 enforcement program to accomplish the goals of the WIA. Whether or not that will happen is not clear. Whether or not the effort to accomplish the goals of the statute also reveals the need to generate a serious Section 504 enforcement program is even less clear.

⁹⁵ *Id.* at pp. 11–12.

⁹⁶ *Id.*, *passim*.

⁹⁷ *Id.*, "Self-Evaluation to Promote Community Living for People with Disabilities, II. Barriers and Efforts to Date," p. 5.

E. The Department of State

In 1996, NCD raised serious concerns about the Department of State's treatment of disability issues, both in substantive policies and in the administration of its programs. As NCD reported,

The study found that the United States does not have a comprehensive foreign policy on disability. Those responsible for creating and implementing U.S. overseas policies and programs generally lack awareness of disability issues, cannot articulate our national policies with respect to people with disabilities, do not incorporate the interests of people with disabilities into U.S. foreign policy objectives, and do not see the importance of U.S. disability advances and achievements for people with disabilities in other countries.⁹⁸

Although it may not seem apparent to many, the Department of State (State) funds domestic as well as foreign programs, including research, training, and cultural exchanges. It therefore has an obligation to enforce Section 504.⁹⁹ Nonetheless, State has yet to create a Section 504 enforcement program. The obligation to create such a program has been placed in the agency's Office of Civil Rights (OCR). However, OCR describes its responsibilities as enforcing nondiscrimination in employment within the agency, and OCR's Director also serves as Director of Equal Employment Opportunity for the Department. The OCR Web page does not mention Section 504, the ADA, or any statutes other than those related to employment.

When NCD asked the Department of State about its Section 504 enforcement program, State officials responded by saying that the agency relied on EEOC's Management Directive 110¹⁰⁰ for complaint investigation guidance. The only Section 504-related document that State provided to NCD, in addition to its 504 regulations, was the Policies and Procedures Directive on Barrier-Free Accessibility and Barrier-Free Accessibility ACTION PLAN and POLICY

⁹⁸ National Council on Disability, *Foreign Policy and Disability*, August 1, 1996. Located at <http://www.ncd.gov/newsroom/publications/foreign.html>.

⁹⁹ The grant-funding statutes that State administers include Section 503 of the Foreign Service Act of 1980, 22 U.S.C. Sec. 3983; the Mutual Educational and Cultural Exchange Act of 1961, as amended, 22 U.S.C. Sec. 2451, et seq.; the Soviet-Eastern European Research and Training Act of 1983, as amended, 22 U.S.C. Sec. 4501, et seq.; and Section 703 of the Foreign Service Act of 1980, 22 U.S.C. Sec. 4022.

¹⁰⁰ <http://www.eeoc.gov>.

IMPLEMENTATION PLAN.¹⁰¹ When it submitted its answers to NCD in March 2001, State indicated that it was in the process of creating a Section 504 Web site. As of November 2002, the Web site did not exist.

Though the State Department has compliance review procedures, it has never conducted a Section 504 compliance review of any recipient of the agency's federal financial assistance. Instead, the agency uses the term "compliance review" to describe its analysis of a State Department building's structural accessibility.¹⁰²

State receives no funding earmarked for Section 504 activities. In response to NCD's questions, the Department said that it had never communicated with its recipients and consumers about Section 504 enforcement but that its officials "are now considering that question."¹⁰³

Acknowledging the small size of the agency's civil rights staff, the officer indicated that to obtain a meaningful program, State was likely

to identify other federal agencies with larger programs and delegate our compliance and enforcement activities to those agencies. If none exist, the Department must conduct its own compliance reviews and enforcement activities....The Department has an MOU with the Department of Education regarding federal financial assistance to education institutions.¹⁰⁴

Since the Department does provide federal financial assistance through various grant programs, and since it has published Section 504 regulations, it is required to fulfill the mandates of its own regulations. The fact that it does not do so has a direct bearing on the lives of tens of thousands of people. Some of these are employees, students, and parents who are involved with the Department of State's American-Sponsored Elementary and Secondary Schools Program. During

¹⁰¹ The written answers said that the document was attached, but it wasn't. It was not possible to find it on State's Web site, <http://www.state.gov>.

¹⁰² Although federal agencies are required to ensure nondiscrimination on the basis of disability in programs they conduct directly as well as those they fund, the former is beyond the scope of this report.

¹⁰³ *Supra*, fn. 101, at question 24.

¹⁰⁴ *Supra*, fn. 101, at questions 29 and 30.

the 2001–2002 academic year, the Department’s Office of Overseas Schools assisted 182 schools, where 5,334 of the employees were Americans employed by the Department and 28,854 of the children were children of State Department officials.¹⁰⁵ While the Department might deliver information about civil rights generally and disability rights in particular, its Web page does not include any information about how an employee would ask for a reasonable accommodation or whether American-sponsored schools are accessible to students who use wheelchairs.

State’s MOU with the Department of Education might be the reason that the Department of State has no Section 504 program. In 1966, State and HEW signed an MOU through which State delegated its Title VI (race, national origin, and color discrimination) responsibilities to HEW.¹⁰⁶

In 1980, the Departments of Education and Health and Human Services replaced HEW, which ceased to exist. Ten years later, in 1990, the Department of State redelegated its Title VI responsibilities and, for the first time, its Section 504 federally assisted responsibilities to the Department of Education.¹⁰⁷ ED agreed to be responsible for all “pre-approval and post-approval reviews, complaint investigations, and actions to resolve noncompliance of the education institutions” that received grants from State.¹⁰⁸ The MOU describes the roles that each agency agrees to play in the case of administrative and judicial enforcement, as well as the documents and support that the agencies agree to provide.

Judging only by the Department of State’s responses to NCD about its Section 504 program, the Department has little understanding of and may have had little actual contact with the

¹⁰⁵ www.state.gov/m/a/os/1253.htm

¹⁰⁶ Since Congress had not yet enacted Section 504 (1973), Section IX (1973 – sex discrimination in education), the Education of the Handicapped Act (1975 – superseded by the IDEA, Individuals with Disabilities in Education Act), or the Age Discrimination and Age Discrimination in Employment Acts (1975), the State Department did not delegate any responsibilities under any of those laws in 1966.

¹⁰⁷ Nondiscrimination in federally assisted programs; Enforcement Coordination Agreements Between State and Justice Departments, May 23, 1990, 55 Fed. Reg. 21217, 1990 WL 339628.

¹⁰⁸ *Id.*

Department of Education in connection with the Section 504 MOU. If the only recipients of State's grant funds are education institutions, there is good reason that it never developed a federally assisted Section 504 program. That was not, however, the Department's answer to NCD's questions. However the MOU works, though, State is ultimately responsible for ensuring compliance with Section 504.

The Department does not indicate that it provides information on the disability rights laws to its employees or their family members, or any materials that explain the elements of a Section 504 complaint or a description of how to file and to pursue a complaint, nor has it indicated that it converts any of its printed materials into Braille or tape. State has not allocated funds, staff, or other resources to accomplish the varied tasks that are the responsibility of federal grant agencies.

F. The Department of Justice

1. Federally Funded Justice Programs

The Department of Justice (DOJ) is best known as an enforcement agency. It also administers programs that award grants to courts, police departments, jails and prisons, and other entities in state and local justice systems. The Bureau of Justice Assistance (BJA) in the Office of Justice Programs (OJP) contributes to the funding of most, if not all, state and local agencies and institutions involved with law enforcement and the administration of justice. DOJ administers separate funds for state and local juvenile justice programs through the Office of Juvenile Justice and Delinquency Prevention (OJJDP). Both BJA and OJJDP administer a combination of block grant funds, discretionary funds, and formula grants.¹⁰⁹

¹⁰⁹ See OJJDP Fact Sheet, April 1998 #76, www.ncjrs.org/ojjhome.htm, and Bureau of Justice Assistance Fact Sheet, April 2000, www.ojp.usdoj.gov/BJA.

In 1995 the Assistant Attorney General for Civil Rights created the Disability Rights Section (DRS)¹¹⁰ to enforce and to provide technical assistance throughout the Federal Government on all Section 504 and ADA matters.¹¹¹ Responsibility for enforcing the Section 504 obligations of DOJ funding recipients was also transferred to DRS.

DRS has enforced Section 504 only on a case-by-case approach, either on the basis of an individual complaint or as a “pattern and practice” case. It has not conditioned or threatened to terminate the funds of any of the BJA or OJP grant recipients because of Section 504 violations, although it has done so for the violation of non-civil rights requirements. For example, BJA has withheld funds for the construction of jails and prisons from states that did not establish a registry of “sexually violent predators.”¹¹²

Many of the cases filed by DRS have involved state and local corrections agencies, requiring specific jails to become wheelchair accessible, police departments to hire sign language interpreters, and courthouses to provide materials to jurors on tape and in Braille.¹¹³ As important as these victories have been, each has resulted in the correction of a single Section 504 violation by a single department of the entity receiving DOJ funds, rather than broad-based systemic reform by ensuring compliance throughout the entity’s programs. Neither DRS nor OCR has ever attempted to withhold federal funds from grantees that violated Section 504. If DOJ does not

¹¹⁰ The Department of Justice’s Office for Civil Rights does not have sufficient resources to investigate complaints alleging a pattern and practice of discrimination on the basis of disability; complaints alleging employment discrimination; complaints involving prisoners with HIV and AIDS; or complaints raising complex legal issues under Title II of the Americans with Disabilities Act and Section 504. These responsibilities were transferred first to the Office of Coordination and Review and then, in 1995, to the Disability Rights Section. Ninth Report to the President on Executive Order 12250, 10-1-94 – 9-30-96, September 28, 1998, at p. 30.

¹¹¹ Ninth report to the President on Executive Order 12250, 10/1/94 – 9/30/96, September 28, 1998, at p. 19. Apparently, DOJ does not keep separate Section 504 enforcement statistics. According to the Civil Rights Division’s 1996–1997 Report to the Rehabilitative Services Administration (RSA) (Department of Education), the Civil Rights Division (CRD) says that it does not “directly implement Section 504” but that most federal grantees are subject to Title II or III of the ADA, and therefore DRS’s “development of the legal requirements under the ADA will directly affect the nondiscrimination obligations of these entities” (p. 104). The Rehabilitation Services Administration apparently agrees, as it ceased reporting numbers of Section 504 enforcement actions in 1998 and did not request submissions from DOJ for any reports after the 1997 entry (e-mail to Bonnie Milstein, one of the NCD report authors, from Joseph F. Talian, CRD, RSA, 8-28-02).

¹¹² Bureau of Justice Fact Sheet, *supra* at n. 50, at pp. 3,4.

¹¹³ Ninth Report to the President on Executive Order 12250, 10/1/94 – 9/30/96, September 28, 1998, at p. 30.

have the political authority to threaten to withhold all of a state's criminal justice funds until the state embarks on a plan to provide sign language interpreters in all its jails and prisons, DOJ will continue to have difficulty persuading the civil rights offices of other federal agencies to enforce their Section 504 regulations as forcefully and effectively as possible.

In light of DOJ's role as the nation's lead law enforcement agency, it should provide a model of effective civil rights enforcement. Where DRS can demonstrate that the proven Section 504 violations affect more than a single courthouse, prison, jail, or probation department, DOJ could greatly expand the reach of its victories by requiring states to address systemic violations of Section 504. One of the reasons Title VI and Section 504 were adopted was to replace "litigation and its arduous route" with administrative enforcement.¹¹⁴ DOJ has yet to accomplish this goal in its enforcement of Section 504.

2. Coordinating Federal Civil Rights Enforcement: Executive Order 12250

In addition to enforcing Section 504 among its own grantees, DOJ is also responsible, under Executive Order 12250, for coordinating disability rights enforcement throughout the Federal Government. DOJ has had the responsibility of enforcing Executive Order 12250 to ensure that federal agencies follow a consistent approach in their enforcement of civil rights laws. Until 1995, DOJ's Office of Coordination and Review provided this coordination on all such laws, including Section 504. Its primary focus during the 1990s was on the development and review of regulations, since all civil rights regulations require DOJ approval before publication. It also worked on a prototype Section 504 regulation that incorporated the changes made in the law through the Civil Rights Restoration Act and various amendments to the Rehabilitation Act; worked on Architectural Barriers Act matters; collected agency civil rights workload and performance data; reviewed civil rights implementation plans; and provided technical assistance to the agencies, including the DOJ litigation and appeal sections.¹¹⁵

¹¹⁴ U.S. Commission on Civil Rights, at p. 25. See fn. 28, 1996 Report.

¹¹⁵ *Id. passim*.

While the Office of Coordination and Review provided valuable assistance to the other federal agencies in each of these areas, it did not coordinate the enforcement of Section 504 throughout the Federal Government, as required under Section 507 of the Rehabilitation Act. Congress amended Section 507 in 1993 by renaming the Interagency Coordinating Council the Interagency Disability Coordination Council (IDCC). Congress also added the Departments of Transportation and Housing and Urban Development to the Council and expanded its—and DOJ’s—responsibilities “to include monitoring and coordinating *all* efforts of the federal agencies concerning the rights of individuals with disabilities (e.g., the ADA as well as Title V of the Rehabilitation Act).”¹¹⁶ Apart from notifying the member agencies of these changes and asking them to designate representatives, the Department did not take any other action for the next nine years. In fact, DOJ has yet to convene its first meeting of the IDCC.

It is clear from its Executive Order 12250 Reports to the President that DOJ’s DRS has performed its oversight responsibilities outside the IDCC. Without the IDCC meetings, DOJ could not discuss and coordinate government-wide disability rights *enforcement* issues simultaneously with assistant secretaries of the IDCC’s member agencies. That was the goal of Section 507, and it was not met. Further, by not convening the meetings, DOJ has stymied the role that Section 507 envisioned for NCD: to provide advice, recommendations, and suggestions for agency studies. The fact that DRS actively meets with agencies about their technical assistance activities but does not convene meetings on enforcement matters, through the IDCC or otherwise, reflects the degree to which the Federal Government chooses to emphasize collaboration and education over enforcement.

DOJ does a better job coordinating government-wide technical assistance on the ADA. DOJ’s DRS chairs an ADA Technical Assistance Coordinating Committee of 17 agencies. The Committee discusses issues of common interest and exchanges information on the agencies’ technical assistance activities and initiatives.¹¹⁷ In addition, DRS has worked with federal

¹¹⁶ *Id.*, at p. 13.

¹¹⁷ *Id.*, at p. 41.

agencies on an individual basis to ensure that each agency's policies and regulations conformed to those of DOJ. For example, DRS issued policy instruction in 1995 to the Department of Agriculture (USDA) regarding USDA's guide to feeding children with special health care needs in schools.¹¹⁸

With more funding than any federal civil rights office has ever received from Congress, and with a dedicated and very experienced staff, DRS produced the ADA regulations and guidance manuals on Title II and Title III in a remarkably short time. It developed and distributed close to two million ADA documents to the public, fielded thousands of phone calls through its ADA hotline, worked with the IRS to notify six million businesses about the ADA in an IRS mailing, organized public hearings, distributed millions of dollars in grant funds for education projects, and conceived and implemented other outstanding outreach and technical assistance activities, shortly after the passage of the ADA.¹¹⁹

Executive Order 12250 requires each federal agency to submit to DOJ Annual Civil Rights Implementation Reports that describe their efforts to enforce the civil rights obligations of their grantees. The DRS and the Office of Coordination and Review have not received complete reports from the agencies that are the subject of this report, nor are they able to provide a complete set of agency reports they did receive. The Annual Civil Rights Implementation Reports that are available are notable for their dissimilarities. Some are testaments to the work that has been done by the agency, and, in some instances, the only place where detailed complaint and compliance data are reported. Other agency reports can only be described as minimal and perfunctory, and some reports contain data that are inconsistent with data found elsewhere, such as budget and staffing figures.

There is little evidence that DOJ has spent time reviewing the reports or the substantive work they reflect, even to the extent of asking for clarification or additional information. The agency

¹¹⁸ *Id.*, at p. 41.

¹¹⁹ Department of Justice Report to the President pursuant to E.O. 12250, January 19, 1993, at p. 10.

reports provide a telling profile of the work that has or has not been done by the agency during the previous year. Examining the reports for progress made, for deficiencies, for best practices, or for areas where DOJ could usefully provide coordination or technical assistance and providing feedback on these issues to the agencies would be a useful function for DOJ to perform. DOJ could also provide a summary of some of the best work being done by the enforcing agencies, provide updates on court decisions interpreting Section 504, and help agencies that lag behind others in enforcement, compliance, training, or technical assistance abilities.

In addition, DOJ could provide other helpful coordination services. Its manual about enforcement activities under Title VI of the 1964 Civil Rights Act has been a useful resource for many agencies.¹²⁰ It should develop additional materials specific to Section 504 compliance. DOJ could also develop core training about Section 504 compliance basic skills, such as investigator strategies, conduct of compliance reviews, and so forth, to avoid having each agency replicate the same kind of training. Agencies could then use their limited resources to develop advanced training on enforcement and compliance activities specific to their programs.

3. The DOJ Response to *Olmstead* and E.O. 13217

In response to the *Olmstead* Executive Order, DOJ conducted an effective review of its own grant, litigation, and administrative programs to determine whether they promoted or impeded the goals of the ADA. DOJ also identified new litigation and education plans to respond to deinstitutionalization and integration barriers that it discovered from members of the public, other agencies, and their own litigation.

¹²⁰ DOJ makes available its Title VI and Title IX legal manuals on line at www.usdoj.gov/crt/cor/coord/invmanual.htm, as well as information about identification of sources of federal financial assistance. Similar documents for Section 504 compliance are not available. A manual for enforcement of Title VI in block grant programs can be found at www.usdoj.gov/crt/cor/12250.htm. Both documents state that they are applicable to all the civil rights laws that cover recipients of federal funds, including Section 504.

For example, DOJ stated that “a lack of awareness of the ADA’s requirements contributes to the problem of unnecessary institutionalization.”¹²¹ As a result, DOJ proposed new technical assistance actions that “address the types of community services that are critical to sustaining persons with disabilities in community-based settings.”¹²² DOJ’s self-evaluation also identified barriers that limit the technical assistance and enforcement capacities of its Civil Rights of Institutionalized Persons Act office, its Housing and Civil Enforcement office, and its Corrections and Community Relations programs. While the *Olmstead* Report also listed the actions that the Department proposed to take to address these barriers, there were few specifics, no numbers, and no timetables. Nor did the report include adequate discussion about the Department’s plans to employ its coordination authority and persuade other federal agencies to expand their civil rights programs beyond technical assistance activities.

If the only consequence of violating Section 504 is receipt of technical assistance to help an entity obey the law, there is little incentive in bothering with voluntary compliance, or even learning what the law requires. Congress understood that funding termination was a powerful tool to ensure compliance. Unfortunately, that is a tactic that DOJ and the other agencies discussed in this report have not successfully adopted.

¹²¹ U. S. Department of Justice, Self-Evaluation to Promote Community Living for People with Disabilities, Report on Executive Order 13217, www.hhs.gov/newfreedom/final/dojfinal.html, at p.16.

¹²² Letter from Ralph Boyd, Jr., Assistant Attorney General, Civil Rights Division, to Jeffrey Rosen, NCD General Counsel and Director of Policy, October 2, 2002, p. 2, commenting on the draft of this report.

CHAPTER III

ADMINISTRATIVE ENFORCEMENT OF SECTION 504

Each of the five federal agencies examined in this Report is charged with the responsibility of enforcing Section 504. Each has adopted federal regulations describing the obligations of recipients of federal financial assistance, prohibited practices, and agency processes for enforcing the law.¹²³

The most common form of Section 504 enforcement is the investigation of complaints filed with the agency by individuals who claim to have been discriminated against by one or more recipients of federal financial assistance. Enforcement of complaints requires an agency to provide staff support for an intake and prospective complainant counseling function, for information-gathering about the recipient or recipients involved in the complaint, and for the conduct of investigations, including substantial travel costs associated with on-site investigations. Staff must also identify possible discrimination, conduct data collection and analysis, and research judicial and administrative decisions that outline the law's application in particular situations. In addition, the investigative function requires an ability to identify issues and gather information that is relevant to resolving complaints.

When the investigation results in the identification of civil rights violations, staff typically develop proposals that address statutory or regulatory deficiencies and negotiate resolutions. Where necessary, Section 504 enforcement can include the imposition of sanctions or referrals to DOJ for litigation. Those referrals typically require the preparation of detailed written findings of a violation, provide an opportunity for a recipient or recipients to respond, and, in the absence of an agreed-upon resolution of the complaint, require a final agency determination that the law has been violated.

¹²³ To reiterate, a review and evaluation of the agencies' federally conducted activities was beyond the scope of this snapshot report on Section 504 activities.

Agencies that enforce Section 504 may also conduct agency-initiated reviews of the performance of a recipient. In contrast to complaint investigations, which are generated by external complaints, compliance reviews are typically initiated by the agency. In some instances, these reviews are characterized as “preventive” reviews and are described by the agency as a form of technical assistance. In other instances, the reviews are aimed at enforcement and may be agency-generated, entail a broad look at a recipient’s conduct based on individual complaints, or be based on reports that describe problems that do not fit the usual complaint parameters.¹²⁴

The key resources that a civil rights office needs to enforce any civil rights law are enough staff and resources to support sometimes complex and lengthy investigations. In addition, there should be sufficient resources to support the more discretionary functions of compliance reviews and education and outreach. If there are insufficient funds for enforcement, priority is often given to complaints, leaving little or no funds for compliance reviews, which are a discretionary agency function. If enforcement funding is inadequate, there may not be enough money available to train and manage staff, conduct efficient investigations, or educate recipients and the public about the law.

This chapter will review the performance of the agencies that are the subject of this report in the following key areas: complaint investigation and resolution, conduct of compliance reviews, agency information on enforcement and compliance issues, and agency resources for enforcement and compliance.¹²⁵ NCD requested Section 504-specific data from all the agencies about complaints and compliance reviews. Among the data requested were the numbers of complaints filed and compliance reviews initiated, the outcomes of these enforcement-related activities, details of settlements, and other information about the agency’s enforcement activities,

¹²⁴ Some agencies also conduct pre-grant award or other reviews of funding applications for civil rights compliance. Although this can be a significant workload responsibility within an individual agency, it amounts to internal, not external, enforcement of civil rights obligations, and for that reason it is not examined in detail in this report.

¹²⁵ Each of the agencies evaluated in this report was asked to provide detailed information about its complaint processing and compliance review information, both in general and with respect to Section 504 enforcement activity. In a number of cases, this information was not provided. Where the information was found in other published documents, such as budget submissions or agency reports to Congress or to the Department of Justice, it has been included.

including staffing and budget numbers. When this information was not provided by the agencies, publicly available sources, including budget submissions, annual reports to Congress, and agency Web sites, were reviewed and relevant information from those sources, if available, was incorporated into this report. Only the Department of Education appeared to have a centralized database capable of generating detailed information on subjects such as the number or percentage of cases in which the agency found violations and negotiated settlements, complaints were withdrawn, or the agency took other action. The Department of Health and Human Services (HHS) states that it is developing such a system.

A. Complaint Investigations

1. The Department of Health and Human Services Office of Civil Rights

In FY 2001, HHS awarded over \$44 billion to 230,000 recipients.¹²⁶ In the past 10 years, HHS's Office of Civil Rights (OCR) has conducted, on average, slightly more than 2,000 complaint investigations annually regarding all civil rights obligations of grantees, including Section 504. The overall agency workload is an important consideration in evaluating agency efforts, as competing priorities may affect an agency's ability to enforce Section 504.

Complaints filed with HHS dipped significantly during the mid-1990s, with only 1,548 complaints filed in FY 1998, down from 2,222 in FY 1994. The number of complaints filed has risen steadily since FY 1999, with a projected 2,253 complaints anticipated during FY 2003.

¹²⁶ HHS Annual Implementation Report to the United States Department of Justice pursuant to Executive Order 12550, FY 2001.

Complaints Filed with HHS Office of Civil Rights

| <i>Fiscal Year</i> | <i>Number of Complaints Filed</i> |
|--------------------|-----------------------------------|
| 1994 | 2,222 |
| 1995 | 2,094 |
| 1996 | 1,827 |
| 1997 | 1,741 |
| 1998 | 1,548 |
| 1999 | 1,950 |
| 2000 | 2,185 |
| 2001 | 2,148 |
| 2002 | 2,200 (estimated) |
| 2003 | 2,253 (estimated) |

Source: FY 1997, 1998, 1999, 2000, 2001, 2002, 2003 Budget Submissions to Congress

HHS provided data relating to its handling of Section 504 complaints for all but two years since 1994. The number of Section 504 complaints filed dropped during fiscal years 1998 and 1999; it has since slightly rebounded but has not returned to the high of 1994. In every year reported, HHS closed more Section 504 complaints than it opened.

HHS Section 504 Complaints

| <i>Fiscal Year</i> | <i>Number of Complaints Filed</i> | <i>Number of Complaints Resolved</i> |
|--------------------|-----------------------------------|--------------------------------------|
| 1994 | 689 | 796 |
| 1995 | Not Provided | Not Provided |
| 1996 | Not Provided | Not Provided |
| 1997 | 380 | 483 |
| 1998 | 295 | 412 |
| 1999 | 311 | 359 |
| 2000 | 409 | 362 |
| 2001 | 404 | 483 |
| 2002 | 363 | 416 |
| 2003 | Not Provided | Not Provided |

Source: Information provided to NCD, 2002

The rate at which agencies close complaints is an indicator of both efficiency and resources. Case closures ideally will roughly equal or exceed the number of complaints filed to prevent the development of a backlog of cases that remain open and to ensure that complaints are promptly investigated. Similar to the pattern seen in its complaint filings, the HHS numbers reflect a dip in its FY 1998 complaint closure rate. The number of complaints closed annually since FY 1998 has increased.

Complaints Resolved by HHS Office of Civil Rights

| <i>Fiscal Year</i> | <i>Number of Complaints Resolved</i> |
|--------------------|--------------------------------------|
| 1994 | 2,231 |
| 1995 | 2,358 |
| 1996 | 1,996 |
| 1997 | 1,901 |
| 1998 | 1,644 |
| 1999 | 1,758 |
| 2000 | 1,749 |
| 2001 | 2,138 |
| 2002 | 2,320 (estimated) |
| 2003 | 2,291 (estimated) |

Source: FY 1997, 1998, 1999, 2000, 2001, 2002, 2003 Budget Submissions to Congress

HHS projects that its OCR will have a backlog of 983 cases at the end of FY 2003. That number is 30 percent of the total number of complaints that OCR anticipates will be its annual workload in FY 2003 (3,224 cases).

2. The Department of Education's Office for Civil Rights

In FY 2001, the Department of Education (ED) provided federal financial assistance to more than 25,000 recipients, including approximately 15,000 local education agencies, 10,000 post-secondary institutions, 57 state education agencies, and 82 state rehabilitation agencies and their subrecipients. Federal financial assistance to these recipients amounted to over \$37 billion.¹²⁷

ED's OCR received almost 38,000 complaints under all its authorities during the period 1994-2000, or an average of 5,244 complaints annually. As with HHS, the number of complaints filed

¹²⁷ The Department of Education's Annual Implementation Report to the Department of Justice pursuant to Executive Order 12550, FY 2000.

with ED dropped in the late 1990s, to 4,846 complaints filed in FY 1998 in comparison with 5,229 in FY 1997 and 6,628 in FY 1999. ED has filed and investigated many more complaints than HHS, despite the fact that HHS disperses more funding and has more recipients.

Complaints Filed with Department of Education

| <i>Fiscal Year</i> | <i>Number of Complaints Filed</i> |
|--------------------|-----------------------------------|
| 1994 | 5,302 |
| 1995 | 4,981 |
| 1996 | 4,828 |
| 1997 | 5,229 |
| 1998 | 4,846 |
| 1999 | 6,628 |
| 2000 | 4,897 |
| 2001 | Not Provided* |
| 2002 | Not Provided |

*The number of complaints filed with the Department of Education in FY 2001 and 2002 has not been found in any published documents.

Source: Department of Education OCR 's 2000 budget justification

ED was the only agency examined in this report to have detailed information readily available to the general public about its work on disability complaints. It publishes annually a breakdown of complaints by type, with disability complaints routinely comprising over 50 percent of its complaint workload. ED's Section 504 complaint filings, unlike ED's overall complaint numbers, did not drop in FY 1998, although overall its complaint filings during the period 1996-1998 were down from 1995 levels.

Department of Education Section 504 Complaints

| <i>Fiscal Year</i> | <i>Number of Complaints Filed</i> | <i>Number of Complaints Resolved</i> |
|--------------------|-----------------------------------|--------------------------------------|
| 1994 | Not Provided | Not Provided |
| 1995 | 3,002 | 3,428 |
| 1996 | 2,533 | 2,996 |
| 1997 | 2,836 | 3,032 |
| 1998 | 2,949 | 2,901 |
| 1999 | 4,245 | 3,296 |
| 2000 | 2,693 | 4,208 |
| 2001 | Not Provided | Not Provided |
| 2002 | Not Provided | Not Provided |

Source: Office for Civil Rights Annual Report to Congress, FY 1995–2000, available online at www.ed.gov/offices/OCR/congress.html, data sheet dated 12/12/2000 provided by Department of Education to NCD

ED reports a high rate of complaint closures. In four of the six years for which data were available, it reported closing more Section 504 complaints in a fiscal year than were filed, thus making inroads into its case backlog. In the chart above, ED closed more Section 504 complaints than were filed in fiscal years 1995, 1996, 1997, and 2000. In addition, ED has reported for several years that it routinely closes nearly 80 percent of its complaints within 180 days from the date on which they are filed—an unusually efficient record for a federal agency.

Number of Complaints Resolved by ED

| <i>Fiscal Year</i> | <i>Number of Complaints Resolved</i> |
|--------------------|--------------------------------------|
| 1994 | 5,751 |
| 1995 | 5,559 |
| 1996 | 4,886 |
| 1997 | 4,900 |
| 1998 | 4,753 |
| 1999 | 5,369 |
| 2000 | 6,364 |
| 2001 | Not Provided |
| 2002 | Not Provided |

Source: FY 1995–2000 OCR Annual Reports to Congress

3. The Department of Labor’s Civil Rights Center

In FY 2001, the Department of Labor (DOL) reported that it provided 1,036 grantees with a total of \$40 billion of financial assistance.¹²⁸

Unlike the Departments of Education and Health and Human Services, DOL has two civil rights offices. DOL’s Office of Federal Contract Compliance Programs (OFCCP) is the better known of the two offices. It enforces Section 503 of the 1973 Rehabilitation Act, which bars federal contractors from discriminating on the basis of disability. The Civil Rights Center (CRC) enforces Section 504 against recipients of DOL’s grant funds. As noted in the previous chapter, OFCCP has 11 times the staff and resources of CRC. It also has more direct access to the Secretary. While a deputy assistant secretary heads OFCCP, a director, who reports to a deputy assistant secretary, heads CRC. From internal and external appearances, OFCCP has greater credibility and more importance in DOL than does its Section 504 office, CRC.

Over the past 10 years, CRC has handled, on average, about 1,000 complaints annually against grant recipients alleging discrimination on the basis of race, color, national origin, religion, sex,

¹²⁸ DOL Annual Implementation Report submitted to the Department of Justice pursuant to Executive Order 12550, FY 2001.

and/or disability. The number of complaints filed has dropped every year since 1997. DOL did not produce data for the years preceding 1997.

Number of Complaints Filed with DOL under All Civil Rights Laws

Fiscal Year Number of Complaints Filed

| | |
|------|---------------|
| 1994 | Not Provided |
| 1995 | Not Provided |
| 1996 | Not Provided |
| 1997 | 1,224 |
| 1998 | 1,232 |
| 1999 | 984 |
| 2000 | 818 |
| 2001 | 766 |
| 2002 | Not Provided |
| 2003 | Not Provided* |

*Information for FY 1994-1996 and 2002-2003 has not been found in any published document.

Source: Information provided to NCD, 2001

The CRC devotes most of its staff time and resources to fulfilling its role as DOL’s equal employment opportunity office. With its remaining resources, it enforces Section 504, the ADA, Title VI, Title IX, and the other civil rights laws that apply to recipients of the Department’s grants. This chart reflects the numbers of complaints that were filed with DOL under both Section 504 and Title II.

Complaints Filed with DOL under Section 504 and Title II

| <i>Fiscal Year</i> | <i>Number of Section 504/ADA Complaints Filed</i> |
|--------------------|---|
| 1994 | Not Provided |
| 1995 | Not Provided |
| 1996 | Not Provided |
| 1997 | 40 |
| 1998 | 31 |
| 1999 | 36 |
| 2000 | 25 |
| 2001 | 33 |
| 2002 | Not Provided |
| 2003 | Not Provided |

Source: Annual Implementation Plan filed with the United States DOJ pursuant to Executive Order 12550, FY 1997–2000

Information about the number of complaints and the number of Section 504/Title II complaints resolved during the past decade by DOL, and how they have been resolved, was not available from public sources.

4. The Department of State's Office of Equal Opportunity and Civil Rights

In FY 2000, the Department of State reported that it had 313 recipients of federal financial assistance and provided federal financial assistance amounting to over \$139 million.¹²⁹

Until October 1, 1999, the U.S. Information Agency (USIA) conducted enforcement of civil rights laws involving recipients of funding from the Department of State. At that time, civil rights enforcement responsibilities for recipients were assigned to the Office of Equal Opportunity and Civil Rights, which reported to the deputy secretary of state. These recipients

¹²⁹ Department of State Annual Implementation Report submitted to the Department of Justice pursuant to Executive Order 12550, FY 2000.

did not include educational institutions, whose compliance with the civil rights laws had been delegated to the Department of Education, as discussed in Chapter 2.

The Department of State has reported no federally assisted civil rights enforcement activity over the 10 years covered by this report. It effectively has no Section 504 enforcement program. The agency reports that it has had no formal Section 504 complaints filed against recipients during the period covered by this report. The lack of complaints likely reflects the agency's lack of public education and outreach about the rights of people with disabilities under Section 504 rather than a lack of discrimination against people with disabilities.

Complaints Filed with the Department of State

| <i>Fiscal Year</i> | <i>Complaints Filed</i> |
|--------------------|-------------------------|
| 1994 | 0 |
| 1995 | 0 |
| 1996 | 0 |
| 1997 | 0 |
| 1998 | 0 |
| 1999 | 0 |
| 2000 | 0 |
| 2001 | 0 |
| 2002 | 0 |

Source: Annual Implementation Plans filed with the United States DOJ pursuant to Executive Order 12550

B. Compliance Reviews

Agencies enforcing Section 504 have the authority to conduct proactive reviews of recipients' compliance, or noncompliance, with Section 504. This authority is discretionary in the sense that it is not driven by complaints. Compliance reviews permit a comprehensive examination of the activities of a particular recipient for compliance with the law. A compliance review may be used

to identify hitherto undisclosed compliance issues, can provide an early alert about emerging problems, and can be used as a vehicle for training or technical assistance.

It should not be overlooked, however, that compliance reviews may be, and sometimes are, used as an effective enforcement tool, carrying with them the possibility of a wide variety of sanctions, including suspension or termination of funding. Compliance reviews are an effective way to conduct systemic enforcement of the law without an individual complaint. Especially when victims of discrimination do not, or cannot, speak for themselves, compliance reviews help ensure that congressional intentions for civil rights laws are met.

The Department of Health and Human Services has initiated, on average, 210 compliance reviews annually during each of the past 10 years.

HHS Compliance Reviews Initiated

| <i>Fiscal Year</i> | <i>Total Compliance Reviews</i> | <i>Section 504 Compliance Reviews</i> |
|--------------------|---------------------------------|---------------------------------------|
| 1994 | 203 | Not Provided |
| 1995 | 122 | Not Provided |
| 1996 | 181 | Not Provided |
| 1997 | 328 | Not Provided |
| 1998 | 301 | Not Provided |
| 1999 | 287 | Not Provided |
| 2000 | 317 | Not Provided |
| 2001 | 137 | Not Provided |
| 2002 | 201 (projected) | Not Provided* |
| 2003 | 208 (projected) | Not Provided |

*The number of Section 504 compliance reviews conducted by HHS by fiscal year has not been identified in any published documents.

Source: HHS Annual Budget Submissions to Congress, 1997, 1998, 1999, 2000, 2001, 2002, and 2003

The Department of Education has conducted, during the same 10-year period, an average of 100 reviews annually under all the civil rights laws that it enforces, including Section 504. An annual average of only 11 of the compliance reviews have addressed Section 504 issues. The number of Section 504 compliance reviews is tiny in comparison with the number of entities that receive financial assistance from ED. As described earlier in the report, ED has embarked on other strategies that may have resulted in fewer compliance reviews in recent years, including compliance monitoring and broadening the scope of complaint investigations.

Department of Education Compliance Reviews Initiated

| <i>Fiscal Year</i> | <i>Total Compliance Reviews</i> | <i>Section 504 Compliance Reviews</i> |
|--------------------|---------------------------------|---------------------------------------|
| 1994 | 144 | Not Provided |
| 1995 | 96 | 5 |
| 1996 | 146 | 13 |
| 1997 | 152 | 11 |
| 1998 | 102 | 11 |
| 1999 | 76 | 15 |
| 2000 | 47 | 11 |
| 2001 | Not Provided | Not Provided |
| 2002 | Not Provided | Not Provided* |
| 2003 | Not Provided | Not Provided |

*The number of Section 504 compliance reviews initiated by Education by fiscal year has not been identified in any published documents.

Source: Annual Implementation Report to DOJ pursuant to Executive Order 12550, FY 1994–2000

Very few data are available about compliance activity at the Department of Labor. The data that were reported indicate minimal compliance activity, given DOL’s administration of over \$40 billion annually.

DOL Compliance Reviews Initiated

| <i>Fiscal Year</i> | <i>Total Compliance Reviews</i> | <i>Section 504 Compliance Reviews</i> |
|--------------------|---------------------------------|---------------------------------------|
| 1994 | Not Provided | Not Provided |
| 1995 | Not Provided | Not Provided |
| 1996 | Not Provided | Not Provided |
| 1997 | Not Provided | 2 |
| 1998 | Not Provided | 84 |
| 1999 | 0 | 0 |
| 2000 | 0 | 0 |
| 2001 | Not Provided | Not Provided |
| 2002 | Not Provided | Not Provided |
| 2003 | Not Provided | Not Provided |

Source: Annual Implementation Plan Submitted to DOJ pursuant to Executive Order 12550, FY 1998–2000

The Department of State reports that it incorporates compliance reviews into inspections conducted by the Office of the Inspector General and field visits of Office of Building Operations staff. However, it is not clear that these “compliance reviews” are consistent with either the nature or the scope of the typical Section 504 compliance review conducted of recipients by other federal agencies. They are reviews of the agency’s own buildings to determine whether they comply with the accessibility standards of the Architectural Barriers Act, which is an aspect of a federal agency’s assessment of its own performance rather than of the performance of recipients.

State Department Compliance Reviews Initiated

| <i>Fiscal Year</i> | <i>Total Compliance Reviews</i> | <i>Section 504 Compliance Reviews</i> |
|--------------------|---------------------------------|---------------------------------------|
| 1994 | Not provided | Not provided |
| 1995 | Not provided | Not provided |
| 1996 | Not provided | Not provided |
| 1997 | Not provided | Not provided |
| 1998 | Not provided | Not provided |
| 1999 | Not provided | Not provided |
| 2000 | Not provided | Not provided |
| 2001 | 22 | 22 |
| 2002 | 46 | 46 |
| 2003 | 30 (projected) | 30 (projected) |

Source: Agency information provided to Robert Ardinger, July 2001

C. Data Collection Deficiencies

None of the agencies have developed information systems that comprehensively collect, aggregate, or summarize detailed information about complaints or compliance reviews and their outcomes. This information is important both to the public and to consumers and recipients. Among the information that should be readily available are the numbers of complaints and compliance reviews initiated, completed, and remaining for every fiscal year, which the agencies discuss in congressional budget submissions but which are not readily available publicly from any agency other than ED. Additionally, data routinely compiled should include the length of investigations and reviews, the issues or claims reviewed and findings on each, detailed information about findings of compliance and noncompliance made, and similarly detailed information about the ways complaints and compliance reviews are resolved. The Department of

Education was the only agency that provided detailed information about the length of time its investigations and reviews took.

These data are important in assessing trends and themes in Section 504 issues, identifying the workload and the outcomes of cases, and assessing the quality and quantity of work done. The information is important to agencies for internal management purposes, but it is also critically important to consumers, advocates, and recipients, who rightfully expect to be informed about the types of enforcement activities being conducted and their outcomes. DOJ could provide useful assistance in developing technology that can be used by all the agencies.¹³⁰

D. Agency Guidance on Section 504 Enforcement Issues

Civil rights agencies examined in this report offer a varying degree of information to the public about their work. This report reviews the information available through agency Web sites, because Web sites now contain much of the information that is available in written form from federal agencies as well as some information that is available only on the Internet. Agencies generally have written information that is available through local and regional offices, including information about how to file complaints. The agencies' annual reports to Congress are also available publicly. Some of the agency Web sites were user-friendly, while others proved difficult to navigate.

1. Department of Health and Human Services Office for Civil Rights

The Department of Health and Human Services OCR has a wide array of technical assistance materials available online. The HHS Web site contains references to a large number of technical assistance materials (easily accessed through a drop-down menu that includes "civil rights" and "disabilities"), including complaint filing information, fact sheets, regulations, and case

¹³⁰ NCD has identified similar concerns about the data collection systems for Section 504 information at the Department of Housing and Urban Development. "Reconstructing Fair Housing," November 2001, pp. 123–136, available at www.ncd.gov/newsroom/publications/fairhousing.html.

summaries, at www.hhs.gov/ocr/generalinfo.html and www.hhs.gov/ocr/selectacts. Notably, the case summaries include examples of HHS enforcement actions and summaries of several resolutions of Section 504 complaints. The civil rights resource page contains useful links to other federal enforcement agencies. In addition, the HHS Web site offers information on agency programs that serve people with disabilities and, in particular, on agency efforts to implement the New Freedom Initiative¹³¹ advanced by the Bush administration as a response to the *Olmstead* decision discussed in the previous chapter (www.hhs.gov/news/press/2002pres/disable.html).

2. Department of Education Office for Civil Rights

The Department of Education's Web site has a number of technical assistance materials, including a short list of frequently asked questions, case decisions, and a useful description of OCR's complaint investigation process, at www.ed.gov/offices/OCR/disabilityresources.html. ED also has technical assistance materials directed at recipients, including guidance on developing a nondiscrimination policy and developing effective grievance policies and other similar resources (www.ed.gov/offices/OCR/prevention.html). ED provides an online complaint form for electronic filing, but it was difficult to identify a mailing address for submission of paper complaints.

ED uses a case resolution manual to guide its investigations. Available on its Web site at www.ed.gov/offices/OCR/docs/ocrcrm.html, the manual is a useful guide for parties to a complaint as well as the public about investigation activities. In general, however, ED's material is less detailed than the material provided by HHS.

¹³¹ The New Freedom Initiative is a comprehensive set of proposals to fulfill America's promise to the 54 million Americans with disabilities. The initiative is intended to help Americans with disabilities increase access to innovative new technologies that help them participate fully in society, expand their educational opportunities, better integrate them into the workforce, and promote their full access to community life. For more information, go to www.whitehouse.gov/news/releases/20010201-3.html.

3. Department of Labor Civil Rights Center

Although DOL's Web site contains an extremely helpful list of reasonable accommodation technical assistance guidance at www.dol.gov/odep/pubs/publicat.htm, this guidance is developed in the employment context as part of DOL's materials on compliance with Section 503. In contrast, DOL has limited materials about compliance with Section 504. There are no Section 504 links readily available from DOL's home page. There was no readily available information about filing Section 504 complaints, the investigation process, or the obligations of recipients. DOL's Section 504 regulations are available online at www.dol.gov/dol/allcfr/OASAM/Title_29/Part_32/toc.htm.

4. Department of State

The Department of State's home page has no evident link relating to civil rights obligations. A search for "Section 504," "disability," "complaint," and "civil rights" yielded no useful results in the first 50 subjects identified from each search. Searches did not provide access to information about filing complaints against recipients, about disability rights, or about the obligations of recipients to comply with Section 504, or about the Department's delegation of its Section 504 enforcement responsibilities to the Department of Education.

E. Agency Resources for Section 504 Compliance

Two key resources are required for an effective civil rights enforcement program: adequate staffing and adequate funds to support enforcement. Civil rights compliance is a labor-intensive effort. Without sufficient staff, investigations and compliance reviews may be delayed or deferred. Financial resources are required to support investigations, pay for travel, provide training and technical assistance materials, underwrite new initiatives, and provide expertise that is not otherwise available to the agency.

The agency funding process is based on a combination of agency funding requests and congressional action on those requests. The budget process may permit as much as two years to pass between preliminary actions to develop a budget proposal and use of the funds. Because of inflation and the high costs associated with personnel salaries and benefits, such as health care, retirement, and cost-of-living increases--a flat-line appropriation likely represents a net loss of staff and resources.

1. Department of Health and Human Services Office of Civil Rights

Funding of the civil rights function at HHS over the past 10 years took a significant dip in the mid-1990s. In the past three years, it has noticeably increased.

HHS Appropriations (\$ millions)

| <i>Fiscal Year</i> | <i>President's Budget Request</i> | <i>Congressional Appropriation</i> |
|--------------------|-----------------------------------|------------------------------------|
| 1994 | 22.2 | 22.21 |
| 1995 | 22.4 | 21.9 |
| 1996 | 21.2 | 19.7* |
| 1997 | 21.8 | 20.0** |
| 1998 | 20.5 | 19.7 |
| 1999 | 20.7 | 20.6 |
| 2000 | 22.2 | 22.5*** |
| 2001 | 27.4 | 28.0 |
| 2002 | 32.0 | 32 |
| 2003 | 33.6 | — |

*Including \$330,000 transfer added on the Secretary's authority after this appropriation.

**Including \$475,000 transfer added on the Secretary's authority after this appropriation.

***Including \$445,000 net transfer added on the Secretary's authority after this appropriation.

Source: HHS budget information, FY 2003, documented by letter from Robinsue Frohboese, Principal Deputy Director, HHS Office for Civil Rights, to NCD, dated September 27, 2002

During the same period, OCR staffing patterns dropped from their highest level in 1994, with a significant dip between 1998 and 2000, followed by recent staff increases. Levels of staff dedicated to complaint processing took a similar dip. Neither has returned to its 1994 levels.

HHS Staffing

| <i>Fiscal Year</i> | <i>OCR Staff</i> | <i>Complaint Processing Staff</i> |
|--------------------|------------------|-----------------------------------|
| 1994 | 284 | 141 |
| 1995 | 259 | 145 |
| 1996 | 242 | 129 |
| 1997 | 232 | 84 |
| 1998 | 216 | 74 |
| 1999 | 210 | 79 |
| 2000 | 215 | 74 |
| 2001 | 223 | 83 |
| 2002 | 273 (projected) | 96 (projected) |
| 2003 | 271 (projected) | 87 (projected) |

Source: HHS Budget justifications, 1996–2003, information provided by HHS to NCD, August 2002

2. Department of Education, Office for Civil Rights

The Department of Education’s Office for Civil Rights budget request and appropriations, like that of HHS, dropped slightly in the middle of the 1990s.

ED Appropriations (\$ millions)

| <i>Fiscal Year</i> | <i>President's Budget Request</i> | <i>Congressional Appropriation</i> |
|--------------------|-----------------------------------|------------------------------------|
| 1994 | 56.6 | 56.6 |
| 1995 | 61.5 | 58.3 |
| 1996 | 62.8 | 55.3 |
| 1997 | 60 | 54.9 |
| 1998 | 61.5 | 61.5 |
| 1999 | 68 | 66 |
| 2000 | 73.3 | 71.2 |
| 2001 | 76 | 75.8 |
| 2002 | 79.9 | 79.9 |
| 2003 | 89.7 Projected | Not Provided |

Source: Department of Education's budget requests and justifications, FY 2003, 2002, 2000, and 1998

During the same period, OCR staff also dropped from a 1994 high of 821 staff to 681 staff in 1997. Up to FY 2003 (projected), staff levels have not returned to their 1994 levels.

ED Staffing

| <i>Fiscal Year</i> | <i>OCR Staffing</i> | <i>Complaint Processing Staffing</i> |
|--------------------|---------------------|--------------------------------------|
| 1994 | 821 | Not Provided |
| 1995 | 788 | Not Provided |
| 1996 | 745 | Not Provided |
| 1997 | 681 | Not Provided |
| 1998 | 685 | Not Provided |
| 1999 | 724 | Not Provided |
| 2000 | 712 | Not Provided |
| 2001 | 724 | Not Provided |
| 2002 | 714 | Not Provided |
| 2003 | Not Provided | Not Provided |

*Staffing numbers for complaint processing have not been located in any published documents.

Source: Department of Education's budget requests and justifications, FY 2003, 2002, 2000, and 1998

3. Department of Labor Civil Rights Center

The DOL's Civil Rights Center has had a nearly flat-line budget over the past 10 years. Funding levels in 2001 reflect virtually no increase since 1994.

DOL Appropriations (\$ millions)

| <i>Fiscal Year</i> | <i>President's Budget Request</i> | <i>Congressional Appropriation</i> |
|--------------------|-----------------------------------|------------------------------------|
| 1994 | 4.9 | 4.9 |
| 1995 | 4.8 | 4.8 |
| 1996 | 4.5 | 4.5 |
| 1997 | 4.5 | 4.5 |
| 1998 | 4.6 | 4.5 |
| 1999 | 4.9 | 4.9 |
| 2000 | 5.7 | 5.6 |
| 2001 | 6.4 | 5.8 |
| 2002 | 5.8 | 5.8 |
| 2003 | 6.0 | Not Available |

Source: Letter from Patrick Pizzella, Assistant Secretary for Administration and Management, DOL to NCD, October 4, 2002

Staffing of DOL's civil rights function has not seen significant change since 1997. Given its static appropriation levels, this is unsurprising. Projected staff levels in 2002 do not meet even the minimal levels of 1994.

DOL Staffing

| <i>Fiscal Year</i> | <i>OCR Staff</i> | <i>Complaint Processing Staff</i> |
|--------------------|------------------|-----------------------------------|
| 1994 | 61 | Not Provided |
| 1995 | 60 | Not Provided |
| 1996 | 56 | Not Provided |
| 1997 | 52 | Not Provided |
| 1998 | 47 | Not Provided |
| 1999 | 52 | Not Provided |
| 2000 | 53 | Not Provided |
| 2001 | 53 | Not Provided |
| 2002 | 50 | Not Provided |
| 2003 | 48 | Not Provided |

Source: DOL annual budget submissions, 1997–2003

4. Department of State

Astonishingly, the Department of State responded to NCD’s questions by saying that its OCR was fully funded and had available all necessary resources for Section 504 compliance. State’s nonexistent Section 504 enforcement program indicates otherwise. In fact, as discussed in Chapter 2, the Department of State delegated its Section 504 enforcement responsibilities to the Department of Education, with regard to the education institutions that constitute most if not all of State’s grantees. The Department’s assurance is not supported by the experience of other agencies that provide outreach and education about Section 504 and its obligations to people with disabilities. With no Section 504 complaints filed, in theory, State needs no Section 504 enforcement funding at all. A more realistic assessment is that if State performed its outreach and education work more effectively, it would receive complaints that would require resources to investigate or to refer to the Department of Education. That is, if State were even performing its functions effectively, under its agreement with the Department of Education, the tiny resources that State devotes to Section 504 compliance would be inadequate. The requisite intent to develop an effective Section 504 program appears to be lacking at the Department of State.

State Department Appropriations (\$ millions)

| <i>Fiscal Year</i> | <i>President's Budget Request</i> | <i>Congressional Appropriation</i> |
|--------------------|-----------------------------------|------------------------------------|
| 1994 | Not Provided | Not Provided |
| 1995 | Not Provided | Not Provided |
| 1996 | Not Provided | Not Provided |
| 1997 | Not Provided | Not Provided |
| 1998 | Not Provided | Not Provided |
| 1999 | 1.0 | Not Provided |
| 2000 | Not Provided | 0.83 |
| 2001 | Not Provided | 0.800 |
| 2002 | Not Provided | 1.800* |
| 2003 | 0.800 (projected) | Not Available |

*Annual budget requests and appropriations were not provided by the Department of State despite requests and were not located in any published documents.

Source: Information provided to NCD, 2002

Staffing for State's civil rights enforcement function has been almost nonexistent.

State Department Staffing

| <i>Fiscal Year</i> | <i>Civil Rights Staffing</i> | <i>Complaint Processing Staffing</i> |
|--------------------|------------------------------|--------------------------------------|
| 1994 | Not Provided | Not Provided |
| 1995 | Not Provided | Not Provided |
| 1996 | Not Provided | Not Provided |
| 1997 | Not Provided | Not Provided |
| 1998 | 12 | Not Provided |
| 1999 | Not Provided | Not Provided |
| 2000 | Not Provided | Not Provided |
| 2001 | 17 | Not Provided |
| 2002 | 25 | 6 |
| 2003 | 25 | 6 |

Source: Information provided to NCD, 2002

RECOMMENDATIONS

1. Conduct periodic and thorough Section 504 self-evaluations.

The agencies that are the subject of this report should routinely reevaluate programs using self-evaluation(s) that identify challenges to full participation by people with disabilities in their programs, policies, regulations, and practices. Moreover, all the agencies should assess legislation they propose, policies they intend to publish, and regulations they draft to ensure that each affirmatively furthers the goals of Section 504.

2. Improve data collection and dissemination of data about Section 504 enforcement activities.

People with disabilities want to easily read data about Agency 504 compliance. Such data include complaint filings and compliance reviews initiated, specific Section 504 issues and trends in complaint and compliance reviews, and outcomes and enforcement actions. Routinely reporting Section 504 activities on their Web sites would allow agencies to publicize Section 504 and ADA accomplishments.

DOJ should support and assist agencies in developing and implementing more effective data collection systems.

3. Use funding sanctions to enforce Section 504.

Congress included an effective remedy to address discrimination on the basis of disability by recipients of federal funds. Thus far, the agencies studied in this report have not used funding sanctions to bring recipients into compliance with Section 504, although notice of the possibility of sanctions is generally given as part of agency enforcement processes.

To combat disability discrimination in the most effective way possible, federal agencies should use their sanctioning authority, including making recipients ineligible to apply for continued or new funding while they are not in compliance with federal civil rights laws. This strategy could effectively be incorporated into Notices of Funding Availability (NOFAs) and program eligibility requirements, so that no recipient or potential recipient can be funded while a preliminary or final finding of noncompliance is pending. This strategy should become an integral part of agency Section 504 enforcement efforts. Agencies should also develop and apply a range of sanctions to help bring recipients of federal funds into compliance with Section 504. Additionally, agencies should publicize their efforts to maximize deterrence against violations of the rights of people with disabilities.

4. Direct agency civil rights enforcement by the assistant secretary.

HHS and DOL should review the impact of the Department of Education's decision to have an assistant secretary lead its Office for Civil Rights as a way of improving the visibility and enforcement of Section 504 within each agency's funding programs. In August 2001, State elevated the head of the Office of Civil Rights to an assistant secretary, with no discernable change in the visibility or enforcement of Section 504 for State's federally assisted grant programs.

5. Increase funding for Section 504 enforcement.

This administration should continue to improve its efforts to increase funding for civil rights enforcement. Presidential budget requests and congressional appropriations for federal agency civil rights enforcement should be adequate to staff those agencies to conduct effective civil rights enforcement and compliance. Adequate staffing is the most critical factor in providing prompt and effective enforcement of Section 504. When appropriations—and staffing—drop, the number of complaints investigated drop.

Three of the agencies' staffing levels should be restored, at a minimum, to their 1994 staffing levels by FY 2004. The recommended staffing level for HHS' OCR is 284; for ED's OCR, 821; and for DOL's Civil Rights Center, 61. No recommendation for staffing for the Department of State's Section 504 enforcement program for grantees can be made because to date it has been nonexistent. Because there is some correlation between the number of staff and the number of complaints and compliance reviews conducted and resolved, it is important that the agencies be funded and staffed at levels that will support all the enforcement work necessary to ensure compliance with Section 504 and protection of the rights of people with disabilities. While there is no clear "bright line" standard for staffing civil rights functions, this report recommends sustaining staffing at 1994 levels for a minimum of three years, followed by a comprehensive evaluation and analysis of the results accomplished with staffing levels that are more appropriate than the current low levels.

The Departments of Labor, Justice, and State should evaluate their Section 504 programs according to their legislative mandates and the Government Performance and Results Act standards. None of the three agencies has provided sufficient staff, resources, or stature within their departments, or coordination with other civil rights offices, to have effective Section 504 programs. The lack of Section 504 enforcement at the Department of State is so significant that the Department of Justice should undertake a review of the agency's Section 504 activities, including its education and outreach, and make recommendations about strengthening its Section 504 enforcement program.

Agencies must be given enough resources to provide training and technical assistance for their staffs, for consumers, and for recipients. Limited resources should not require agencies to limit enforcement, or to choose between technical assistance and enforcement.

6. Improve leadership and guidance to agencies on Section 504 enforcement.

The Interagency Disability Coordinating Council (IDCC) was created to provide critically needed leadership of disability rights enforcement throughout the Federal Government, but it has ceased to function. DOJ should revive the IDCC. DOJ should provide substantive guidance to agencies to help them enforce Section 504, including basic training and technical assistance, updates on key court decisions, guidance on investigation and resolution of Section 504 complaints, and information to help agencies conduct effective Section 504 compliance reviews. DOJ should create guidance specific to Section 504 enforcement that builds on the agency's manuals on enforcement of Title VI and Title IX. DOJ should use its authority under Executive Order 12550 to review and comment on agency Annual Implementation Reports, assess progress in agency activities, and make recommendations for improvement. DOJ should also create and make publicly available summaries of the information reported by federal agencies in their Annual Implementation Reports, as well as highlights of the Federal Government's enforcement of Section 504 compiled from other agency reports.

DOJ should perform a rigorous review of the Department of State's lack of Section 504 complaint and compliance activities and its education and outreach efforts to people with disabilities and make recommendations to State about improvements to its Section 504 enforcement program.

DOJ should address DOL's misunderstanding of the self-evaluation requirement of the Section 504 government-wide regulations, and should require DOL to issue a Notice to all of its recipients, clarifying their responsibility to conduct Section 504, or ADA, self-evaluations.

The Department of Justice should involve its funding offices in its civil rights enforcement activities, ensuring that the funding office understands, supports, and enforces the systemic changes that are necessary when federal funds are involved in discriminatory activity. The

Disability Rights Section should ensure that the DOJ funding offices understand the requirements of Section 504 and the ADA.

7. Apply successful practices in Section 504 technical assistance and enforcement used by federal agencies.

During the course of its study, NCD encountered a number of successful practices that should be reviewed by other federal agencies. For example, other federal agencies should review the HHS Web site and consider producing relevant Section 504 information in a user-friendly format. Even such basic information as how to file a Section 504 complaint is not easily found on the other agencies' Web sites. The HHS material is rich in detail and includes helpful case studies and links to other relevant Web sites. Agencies should also review and consider including in their Web sites information similar to ED's technical assistance guidance to recipients and DOL's list of reasonable accommodation information resources. In addition, ED has successfully expanded its resources and effectiveness in a number of ways. It has included disability experts in discussions of activities that the community perceives as disability discrimination. It has encouraged parents and students to monitor recipients' implementation of compliance agreements. It has encouraged both school officials and parents to suggest changes to compliance agreements that have made them produce better results for students with disabilities. It has established an intranet service that makes policies, decisions, law review articles, regulations, handbooks, manuals, and letters available to all civil rights staff. It has made it possible for civil rights staff from different offices to communicate with each other for the purpose of expanding and improving the approaches they adopt to address common and novel discrimination issues. This type of flexibility and creativity has the potential to improve each federal agency's Section 504 enforcement program.

CONCLUSIONS

Section 504 was enacted to ensure that federal agencies operated their programs and activities without discrimination based on disability. Congress also intended the federal agencies to address and correct the ways in which recipients of their funds were discriminating against individuals with disabilities. The agencies have had wide latitude to construct different types of Section 504 programs. Except for the Department of State, each of the agencies in this report established various types of enforcement, training, and technical assistance strategies to meet its Section 504 obligations. Some developed much better funded and more successful training and technical assistance programs than did others.

The political risk to an agency when it threatens to withhold federal funds is real, and no civil rights office has been able to construct and implement an effective enforcement program without encouragement from the leadership of the agency itself, bolstered by support from the administration and members of Congress. That type of leadership, support, and dedication is not reflected.

Civil rights enforcement, to be most effective, must be readily available to people with disabilities who believe that they may be victims of discrimination or feel discriminated against, and the results of enforcement actions that are taken must be easily known. Reporting to the public about the results accomplished on behalf of complainants and the changes accomplished through enforcement is limited, with only ED making information about its enforcement work available to the general public.

Discrimination in federally funded activities must be effectively addressed. Without effective enforcement and program initiatives, the Federal Government remains complicit in advancing disability discrimination, because it lacks the tools to address that discrimination consistently and meaningfully. It is painfully clear that the availability of these tools depends on the level of political will that is exerted to counteract discrimination. Now is the time for that political will to

be exerted. Each of the agencies that has a Section 504 program has emphasized technical assistance and training over enforcement. The Department of Labor has created a new disability office and has funded it generously to provide technical assistance and training. HHS has created a new disability office to generate a more systemic, department-wide focus on disability issues and provide more technical assistance and training. ED has so limited its enforcement activities that it points to the state Protection and Advocacy Systems for examples of enforcement in its *Olmstead* Report. The Department of State has neither an enforcement nor a technical assistance Section 504 program. DOJ has focused its attention on the ADA, the Fair Housing Act, and the Civil Rights of Institutionalized Persons Act, while underemphasizing its government-wide coordination responsibilities and avoiding opportunities to enforce Section 504 through its own grant programs.

Many of the agencies' actions, including their technical assistance and training programs, have produced meaningful changes in the lives of individuals with disabilities and in the equally important perception of people with disabilities by the general public. But none of these activities substitutes for ending the expenditure of federal tax dollars on the establishment and perpetuation of disability discrimination. That requires more courage, more leadership, and more attention to the enforcement of our civil rights than people with disabilities have seen thus far.

APPENDIX

MISSION OF THE NATIONAL COUNCIL ON DISABILITY

Overview and Purpose

The National Council on Disability (NCD) is an independent federal agency with 15 members appointed by the President of the United States and confirmed by the U.S. Senate. The overall purpose of NCD is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or significance of the disability, and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

Specific Duties

The current statutory mandate of NCD includes the following:

- Reviewing and evaluating, on a continuing basis, policies, programs, practices, and procedures concerning individuals with disabilities conducted or assisted by federal departments and agencies, including programs established or assisted under the Rehabilitation Act of 1973, as amended, or under the Developmental Disabilities Assistance and Bill of Rights Act, as well as all statutes and regulations pertaining to federal programs that assist such individuals with disabilities, in order to assess the effectiveness of such policies, programs, practices, procedures, statutes, and regulations in meeting the needs of individuals with disabilities.
- Reviewing and evaluating, on a continuing basis, new and emerging disability policy issues affecting individuals with disabilities at the federal, state, and local levels and in the private sector, including the need for and coordination of adult services, access to personal assistance services, school reform efforts and the impact of such efforts on individuals with disabilities, access to health care, and policies that act as disincentives for individuals to seek and retain employment.
- Making recommendations to the President, Congress, the secretary of education, the director of the National Institute on Disability and Rehabilitation Research, and other

officials of federal agencies about ways to better promote equal opportunity, economic self-sufficiency, independent living, and inclusion and integration into all aspects of society for Americans with disabilities.

- Providing Congress, on a continuing basis, with advice, recommendations, legislative proposals, and any additional information that NCD or Congress deems appropriate.
- Gathering information about the implementation, effectiveness, and impact of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).
- Advising the President, Congress, the commissioner of the Rehabilitation Services Administration, the assistant secretary for Special Education and Rehabilitative Services within the Department of Education, and the director of the National Institute on Disability and Rehabilitation Research on the development of the programs to be carried out under the Rehabilitation Act of 1973, as amended.
- Providing advice to the commissioner of the Rehabilitation Services Administration with respect to the policies and conduct of the administration.
- Making recommendations to the director of the National Institute on Disability and Rehabilitation Research on ways to improve research, service, administration, and the collection, dissemination, and implementation of research findings affecting persons with disabilities.
- Providing advice regarding priorities for the activities of the Interagency Disability Coordinating Council and reviewing the recommendations of this council for legislative and administrative changes to ensure that such recommendations are consistent with NCD's purpose of promoting the full integration, independence, and productivity of individuals with disabilities.
- Preparing and submitting to the President and Congress an annual report titled *National Disability Policy: A Progress Report*.

International

In 1995, NCD was designated by the Department of State to be the U.S. government's official contact point for disability issues. Specifically, NCD interacts with the special rapporteur of the United Nations Commission for Social Development on disability matters.

Consumers Served and Current Activities

Although many government agencies deal with issues and programs affecting people with disabilities, NCD is the only federal agency charged with addressing, analyzing, and making recommendations on issues of public policy that affect people with disabilities regardless of age, disability type, perceived employment potential, economic need, specific functional ability, veteran status, or other individual circumstance. NCD recognizes its unique opportunity to facilitate independent living, community integration, and employment opportunities for people with disabilities by ensuring an informed and coordinated approach to addressing the concerns of people with disabilities and eliminating barriers to their active participation in community and family life.

NCD plays a major role in developing disability policy in America. In fact, NCD originally proposed what eventually became the Americans with Disabilities Act. NCD's present list of key issues includes improving personal assistance services, promoting health care reform, including students with disabilities in high-quality programs in typical neighborhood schools, promoting equal employment and community housing opportunities, monitoring the implementation of the ADA, improving assistive technology, and ensuring that those persons with disabilities who are members of diverse cultures fully participate in society.

Statutory History

NCD was initially established in 1978 as an advisory board within the Department of Education (P.L. 95-602). The Rehabilitation Act Amendments of 1984 (P.L. 98-221) transformed NCD into an independent agency.