

[4110-12]

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

PART 85—IMPLEMENTATION OF EXECUTIVE ORDER 11914, NONDISCRIMINATION ON THE BASIS OF HANDICAP IN FEDERALLY ASSISTED PROGRAMS

Coordination of Federal Agency Enforcement of Section 504 of the Rehabilitation Act of 1973

AGENCY: Department of Health, Education, and Welfare.

ACTION: Final rule.

SUMMARY: This rule implements Executive Order 11914, "Nondiscrimination With Respect to the Handicapped in Federally Assisted Programs," under which the Department of Health, Education, and Welfare is required to coordinate governmentwide enforcement of section 504 of the Rehabilitation Act of 1973, as amended. In particular, the rule sets forth enforcement procedures, standards for determining which persons are handicapped, and guidelines for determining what practices are discriminatory. These procedures, standards, and guidelines are to be followed by each federal agency that provides federal financial assistance in issuing regulations implementing section 504.

EFFECTIVE DATE: January 13, 1978.
FOR FURTHER INFORMATION, CONTACT:

Anne Beckman, Office for Civil Rights, Department of Health, Education, and Welfare, 330 Independence Avenue SW., Washington, D.C. 20201, 202-245-6118.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of the Rehabilitation Act of 1973 (Pub. L. 93-112), Congress enacted section 504, which provides that "no otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, 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." The definition of "handicapped individual" applicable to section 504 is contained in section 111(a) of the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516).

On April 28, 1976, the President issued Executive Order 11914 (41 FR 17871) to provide for consistent governmentwide enforcement of section 504; the executive order is reprinted at Appendix A to this rule. The order directs the Secretary of Health, Educa-

tion, and Welfare to coordinate the implementation of section 504 by all Federal departments and agencies that extend financial assistance to any program or activity. Specifically, section 1 directs the Secretary to establish standards for determining who are handicapped individuals and to establish guidelines for determining what are discriminatory practices under section 504 and to assist other agencies as necessary to assure the coordinated and consistent implementation of section 504. Sections 2 and 3 also contemplate that this Department will establish procedures to guide other Federal departments and agencies in implementing section 504.

In addition to setting forth the responsibilities of this Department, the executive order directs other agencies to issue regulations consistent with HEW standards and procedures, to furnish the Secretary with reports and information upon request, and to cooperate with this Department in their implementation of section 504.

Finally, the executive order, in section 3, contains general procedures and sanctions for securing compliance with section 504 and, in section 5, requires the consistent implementation of all of Title V of the Rehabilitation Act of 1973 as well as the Architectural Barriers Act of 1968 (Pub. L. 90-480).

On May 4, 1977, this Department issued its final regulation implementing section 504 as to recipients of financial assistance from HEW.

On June 24, 1977, the Department issued a proposed rule to carry out its responsibilities under the executive order by specifying procedures for the promulgation and enforcement of section 504 regulations by all agencies providing financial assistance, standards for determining who are handicapped individuals, and guidelines for determining what practices are discriminatory under section 504. Fifty comments were received during the 30-day public comment period. The Secretary's response to these comments and the explanation for changes in the proposed rule are set forth below in the summary of the final regulation.

SUMMARY OF RULE AND ANALYSIS OF COMMENTS

Subpart A of this regulation sets forth general definitions and uniform procedures for the enforcement of section 504.

Section 85.3(e) defines the term "federal financial assistance." Several commenters objected to the exclusion of contracts of insurance and guaranty from that definition because programs whose only federal assistance is in the form of federal loan guarantees, such as the Federal Deposit Insurance Corporation (FDIC) and Federal Housing

Administration (FHA) programs, are thereby exempt from coverage. In light of this concern, the Department asked the Department of Justice for an opinion as to whether contracts of insurance and guaranty are covered by section 504. The Department of Justice has advised this Department, on the basis of its analysis of the legislative history of section 504, that Congress intended the reach of section 504 to be "co-extensive with that of (titles VI and IX), thus excluding programs of guarantee and insurance." The final regulation reflects that determination.

Despite some difference in the wording of the definitions of federal financial assistance in the regulations implementing section 504 and title VI, the substance of the two definitions does not differ. Several commenters misunderstood the exclusion of "ultimate beneficiaries" in § 85.3(d); an ultimate beneficiary is not the final "recipient," but the student, patient, or other individual who participates in the assisted program.

One comment asked whether the definition of facility in § 85.3(f) applies only to land-based facilities. Although the definition is not so limited, the Department agrees with the observation that different standards may be needed for vessels than for other facilities. The appropriate mechanism for the recognition of such differences, however, is in the regulations of the agencies that provide assistance to programs involving vessels.

Section 85.4 contains procedures for the promulgation of agency regulations. In accordance with section 2 of the executive order, such regulations are required to be consistent with the standards and guidelines contained in this regulation. Agencies are encouraged to examine Subparts A, B, and C of the HEW section 504 regulation to determine whether their regulations should include any of the more detailed provisions to be found there. In addition, each agency should examine the programs and activities to which it provides assistance to determine whether detailed requirements concerning any such program or activity should be included in its regulation, similar to those contained in Subparts D, E, and F of the HEW section 504 regulation.

A number of recipients objected to the requirement in paragraph (a) that each agency issue a separate section 504 regulation and would have preferred implementation through one regulation enforced by one agency—the system used for section 503. Although the provision for interagency cooperation set forth in § 85.6 should take care of many of the problems foreseen by these commenters, there are admitted advantages to the single agency system. This approach is precluded here, however, because section

504, unlike section 503, does not place rulemaking authority in a single agency and the executive order itself directs each federal agency to issue its own regulation. Furthermore, because section 504 covers the provision of services as well as employment, it does not lend itself as readily to a single regulation as does section 503: While employment presents fairly uniform issues from agency to agency, the problems that arise in various service programs differ widely.

Section 85.4(b) sets forth the schedule for issuing agency regulations. In response to comment, the time for preparation of a proposed rule has been extended to 90 days. Three agencies commented that more than 90 days would be required for this purpose. While the Department recognizes that the problems to be resolved by these agencies are complex, it believes that every effort should be made to meet this schedule.

As stated in the proposed regulation, the Secretary believes that the provision for review of each agency's draft final regulation by the Director of the HEW Office for Civil Rights before it is finally issued is an effective and appropriate method of promoting consistency of regulation under section 504 throughout the government. Although a few commenters suggested the need for some additional, formal mechanism for determining whether an agency regulation conforms to this regulation, we believe that public comment, together with review by the Office for Civil Rights, will suffice.

One change has been made in paragraph 4(c). The phrase "aid, benefits, or services" has been substituted for the word "services" so as to describe more adequately the nonemployment elements of various assisted programs and activities.

One comment requested a statement by the Department that this regulation creates no judicially enforceable rights. Such a statement, we believe, is inappropriate and unnecessary. Whether any legally enforceable rights are created by this regulation is a matter for courts to decide. We would only observe that the regulation applies to Federal agencies, not to recipients, and that it has no retroactive reach.

Comments led to three changes in section 85.5 (Enforcement). Adoption of title VI enforcement procedures is not a required element of the enforcement system; even those commenters who do not entirely support the title VI procedures favored their inclusion because of the advantages of a single complaint mechanism. The language of the consultation requirement has been made consistent with the corresponding language of the HEW section 504 regulation. A requirement that recipients conduct self-evaluations has

also been added because of the benefits to be gained by agencies, recipients, and handicapped persons of a mechanism for effecting compliance without Federal intervention. More specific guidance for conducting an evaluation, as well as a specific time for its completion, should be provided in each agency's regulation.

Despite these additions, § 85.5 is still not intended to be exhaustive. Agencies may wish to consider other additions from the HEW section 504 regulation, such as the designation by a recipient of an employee to coordinate 504 enforcement. Although § 85.5 has not been amended to require agencies to conduct pre-grant compliance reviews, as suggested, the Department does agree that they are an effective means of ensuring compliance and therefore encourages agencies to conduct such reviews as a routine matter, especially with respect to major grants.

Section 85.6 contains provisions concerning interagency cooperation. Although commenters were pleased that the issue of coordination of enforcement among the various Federal agencies had been addressed, many felt that this section failed to resolve adequately problems of the recipient who receives grants from more than one agency: Multiple assurance forms, inconsistent regulations or enforcement procedures, multiple investigations. Several commenters also suggested that the final regulation incorporate some method for determining the primary enforcement agency (such as the agency that provides the largest grants). While the Department is sympathetic with recipients' concerns, it believes that these problems can be resolved by the agencies themselves without further regulation. As noted in the proposed regulation, agencies are encouraged to extend existing title VI delegations to section 504. Ensuring consistent regulations should alleviate the problem as well. If, however, these mechanisms prove to be inadequate, the Department will issue further rules on the subject.

One comment suggested the need for standardized referral procedures when complainants appeal to the wrong agency. Although no change has been made in the regulation, the Department feels the issue is an important one. Each agency should adopt internal procedures to ensure that misdirected complaints are referred to the proper agency, rather than being returned to complainants, and to ensure that complainants are promptly notified of the referral.

Section 85.7 contains provisions for coordination with sections 502 and 503 of the Rehabilitation Act; two minor clarifying changes have been made.

One commenter inquired as to the precise meaning of "consult" and "co-

ordinate" as used in this section. The terms are not meant to specify any explicit procedures. The requirement for consultation with the Architectural and Transportation Barriers Compliance Board (ATBCB) in developing requirements for the accessibility of new construction and alteration is based simply on the Department's belief that agencies should take advantage of the Board's expertise in this area.

The coordination requirement is designed to avoid inconsistent or duplicative enforcement where the jurisdiction of sections 502 or 503 overlaps with that of section 504. The ATBCB itself suggested that each agency be required to enter into a memorandum of understanding with the Board. Requiring formal agreements for this purpose, we believe, is neither necessary nor advisable.

Two agencies suggested that all matters of employment discrimination against handicapped persons be coordinated by the Department of Labor (DOL) to avoid inconsistent requirements being imposed upon entities that are both federal recipients and federal contractors. We believe that the requirements of the two regulations are not inconsistent despite some variance in language. There must, of course, be close coordination of enforcement with DOL when a recipient is also a contractor. A general rule that DOL should be the primary enforcement agency in this situation would not, however, be appropriate. Where a corporation that is a federal contractor gets minimal assistance from another agency, DOL would be the natural lead agency. But where, for example, a university with a major HEW grant is also a federal contractor, HEW would more appropriately take the primary enforcement role, even with respect to employment.

Several suggestions were received concerning consultation and coordination with other agencies in areas of potential overlap. The Department is reluctant to build in any more of these requirements. The opportunity that each agency will have to comment on the regulation proposed by each of the other agencies should suffice to handle any other similar situations.

As noted in the proposal, the Department will, on a continuing basis, fulfill its responsibilities under the executive order to assist and consult with other agencies in their implementation of section 504 and to monitor compliance with the executive order.

Subpart B of this regulation contains the standards for determining who are "handicapped persons" and "qualified handicapped persons" within the meaning of section 504. Except for the addition noted below, the definition of handicapped person (§ 85.31) is identical to the one contained in § 84.3(j) of HEW's section 504

regulation. Further discussion of its provisions may be found in paragraph 3 of Appendix A of that regulation (42 FR at 22685-6). A final sentence has been added to the definition listing, for illustrative purposes, some of the diseases and impairments that are included in the term "physical or mental impairment." It should be noted that this definition of handicapped person does not supersede or interfere with the narrower definitions of the term established by statute for specific purposes, such as reduced transportation fares or eligibility for vocational rehabilitation services. Agencies using such definitions may not, however, substitute them for the definition prescribe in this regulation in connection with their implementation of section 504.

It is again noted that drug addiction and alcoholism are included in the list of diseases and impairments. As stated in the proposal, the question of section 504's application to drug addicts and alcoholics was a difficult one on which the Secretary of HEW sought the advice of the Attorney General. In an opinion dated April 12, 1977, the Attorney General concluded that drug addiction and alcoholism are physical or mental impairments and are thus handicaps for the purpose of section 504 if they result in a substantial limitation of a "major life activity."

A detailed analysis of the implications of the inclusion of drug addicts and alcoholics within the scope of section 504 is set forth in paragraph 4 of Appendix A of the HEW regulation (42 FR at 22686). In response to concern again expressed in a number of comments, we emphasize that the fact that drug addiction and alcoholism may be handicaps does not mean that the behavioral manifestations of these conditions must be ignored in determining whether a person is qualified for services or employment. The statute applies only to qualified handicapped persons.

The definition of qualified handicapped person in §85.32 has been adapted from §84.3(k) of the HEW section 504 regulation. Other agencies may wish to supplement its provisions with additional guidance concerning qualifications for specific programs, as was done in §84.3(k) (2) and (3) of the HEW section 504 regulation. Several comments objected to the difference in wording between §85.32(a) of this regulation and section 60-741.2 of the Department of Labor section 503 regulation. No difference in substance is thereby intended; this Department believes that its definition more adequately emphasizes the prohibition against deeming a handicapped person to be unqualified on the basis of functions that are not necessary to the successful performance of the job in question.

A number of comments from the transportation field raised the ques-

tion of whether such factors as safety may be considered in determining whether a handicapped person, especially one who is or has been alcoholic or emotionally ill, is qualified for a job. The Secretary again wishes to reassure recipients that such considerations are appropriate and are not considered a violation of section 504, so long as they are based on facts relating to the individual applicant's qualifications, rather than on assumptions or stereotypes.

Subpart C of this regulation, sets forth guidelines for determining discriminatory practices; these are, in general, minimum requirements. Except where obvious discrepancies in implementation would result, other agencies may exceed these standards if they wish. The subpart is divided into three parts: General, based on §84.4 of the HEW section 504 regulation; Employment, based on Subpart B of the HEW section 504 regulation, and Program Accessibility, based on Subpart C of the HEW section 504 regulation. A more detailed discussion of these subparts than is contained below may be found in Appendix A of the HEW regulation.

The general prohibitions against discrimination on the basis of handicap set forth in §85.51 incorporate basic principles that the Department determined, in developing its own regulation, to be inherent in section 504. First, section 504, like other nondiscrimination statutes, prohibits not only those practices that are overtly discriminatory but also those that have the effect of discriminating. And it is equal opportunity, not merely equal treatment, that is essential to the elimination of discrimination on the basis of handicap. Thus, in some situations, identical treatment of handicapped and nonhandicapped persons is not only insufficient but is itself discriminatory. On the other hand, separate or different treatment can be permitted only where necessary to ensure equal opportunity and truly effective benefits and services. Federally assisted programs and activities must thus be provided in the most integrated setting appropriate to the needs of participating handicapped persons.

Several commenters asked about the effect of §85.51 on the previously issued regulation of the Department of Transportation (DOT) implementing the Urban Mass Transportation Act (UMTA Act) with respect to handicapped persons. This Department has not reviewed the UMTA regulation because it was issued before the promulgation of these guidelines. In the course of developing its regulation to implement section 504, DOT will undoubtedly examine its prior regulations with a view toward incorporating or revising their underlying concepts in its 504 regulation. The DOT section

504 regulation will be subject to public comment and to review by this Department.

Furthermore, the Department's interpretation of §85.51 on matters of physical accessibility is set forth in §§85.56-58; it is these sections that, in general, should be looked to for guidance on this subject. This observation is also relevant to the many questions raised by commenters concerning the application of various provisions of §85.51 to specific transportation situations. In response to comment, the Department wishes to make clear that it does not construe this section, nor §§85.56-58, to preclude in all circumstances the provision of specialized services as a substitute for, or supplement to, totally accessible services, nor do these sections require door-to-door transportation service. Neither does paragraph (b)(4) of this section require buses to move their regular route stops to the doors of handicapped riders.

Section 85.51 (b)(3) prohibits recipients from utilizing criteria or methods of administration that would have the effect of subjecting handicapped persons to discrimination on the basis of handicap. The main application of this provision is to state agencies that receive federal funds and then distribute the funds to other entities. These state agencies are obligated to develop methods of administering the distribution of federal funds so as to ensure that handicapped persons are not subjected to discrimination on the basis of handicap either by the second-tier recipients or by the manner in which the funds are distributed. The prohibitions of this paragraph, as well as of paragraph (b)(1), apply not only to direct actions of a recipient but also to actions committed through contractual agreements or similar arrangements. This provision is based on the premise that a recipient should not be able to do indirectly that which it cannot do directly.

Sections 85.52-55 contain the basic requirements for the elimination of discrimination on the basis of handicap in employment. These sections should be augmented, where possible, with provisions appropriate to the programs assisted by each agency. Specifically, §85.53 could be supplemented, as is the corresponding §84.12 of the HEW section 504 regulation, with examples of actions constituting reasonable accommodation and with factors to be considered in determining undue hardship; and §85.54, with provisions adapted from the more specific requirements of the parallel §84.13 of the HEW section 504 regulation.

One comment raised an issue of interest to those agencies that decide to augment §85.53 with examples of reasonable accommodation. Because of the tendency of some readers to

equate this requirement with physical accommodations, any list of examples should include other types of actions, such as job restructuring and modified work schedules.

One comment to §85.52, raised in the context of the transportation industry but of general applicability, inquired about the effect of this section on local, state, and federal laws that govern, in the interest of safety, driver eligibility. Local and state laws affecting the eligibility of handicapped persons for employment may continue to be applied, but only if they set standards that are job related and that do not unjustifiably disqualify such persons for particular jobs. Federal regulations as well should be reviewed to determine whether they meet this standard.

In response to comment, a new paragraph (b), taken from the HEW section 504 regulation, has been added to this section. It is designed to emphasize the prohibition on such practices as classifying certain jobs as being for handicapped persons.

In §85.54, the word "nonjob-related" has been deleted as redundant. A test or other selection criterion "discriminates" if it screens out or tends to screen out handicapped persons but is not job related.

Although §85.55, like §84.14 of the HEW section 504 regulation, generally bans preemployment medical examinations and inquiries concerning handicap, certain qualifications to this general prohibition, found in §84.14 and cross-referenced in §85.55, should be noted. First, while employers may not, during the application process, inquire about the existence of a specific handicap (for example, epilepsy), they may ask about the applicant's ability to perform duties necessary to the job in question. Second, they may make voluntary inquiries as to handicap if they are subject to remedial or affirmative action obligations or if they are undertaking voluntary action to increase their employment of handicapped persons. Third, they may condition an offer of employment on the successful completion of a medical examination: *Provided*, That the examination follows the requirements of §84.14(c) and that no offer is withdrawn on the basis of medical conditions that are not job related.

Several comments objected to the difference between the positions taken in the section 503 regulation and §85.55 of this regulation on the question of preemployment inquiries and medical examinations. As discussed above, §85.55 requires physical examinations and inquiries as to handicap to be postponed until after the hiring decision (which, again, may be conditioned on the result of the examination), whereas the section 503 regulation allows such examinations and inquiries

to be made before an offer of employment.

The issuance of the DOL section 503 regulation preceded that of the HEW section 504 regulation by several years. During that time, the Department received extensive comment on the need to limit inquiries as to handicap in order to reduce the potential for discrimination, especially with respect to persons with nonvisible handicaps. We believe that the standard outlined above, although different from that of the DOL section 503 regulation, is necessary to achieve that objective; one virtue of this standard is that it makes it possible to determine whether the reason for not hiring a handicapped person is because of handicap. We also believe that legitimate purposes for obtaining such information are fulfilled as well at this later stage in the hiring process.

The misunderstanding of this section apparent in many comments makes it important to emphasize again that this provision does not prohibit taking job-related conditions into account in making employment decisions, nor does it preclude a recipient from obtaining information as to such conditions. It merely affects the time at which and the manner in which the information may be obtained.

Sections 85.56-58 concern "program accessibility," a term that summarizes the concept of prohibiting the exclusion of handicapped persons from programs by virtue of architectural barriers to such facilities as buildings, vehicles, and walks, while not requiring that existing facilities be completely barrier-free. Although new facilities are to be designed and constructed so as to be physically accessible to handicapped persons, structural modifications of existing facilities need be undertaken only where other methods are inadequate to assure that a program is available to handicapped persons. This final regulation has been amended to take into account the special problems of making various modes of transportation "program accessible," and the Department recognizes that the implementation of the concept of program accessibility will necessarily vary in other programs. As stated in the proposal, however, the Department believes that the basic principles contained in §§85.56-58, as amended, are appropriate governmentwide and are essential to the effective and consistent implementation of section 504.

Section 85.56 establishes the general standard for nondiscriminatory physical access to federally assisted programs and activities under section 504. It does not prohibit architectural barriers; it does prohibit exclusion of handicapped people from federally assisted programs and activities by virtue of such barriers. Sections 85.57-

8 describe the means by which this standard is to be reached.

Section 85.57 has been amended and divided into three paragraphs. A new sentence has been added to paragraph (a) to rectify the misunderstanding, evident in some comments, that each existing facility must be altered.

Agencies are urged to set forth in their regulations illustrative types of actions that recipients may use as alternatives to structural changes to existing facilities. If they do so, agencies should also include the requirement, intrinsic to section 504, that priority be given to methods that offer programs and activities to handicapped persons in the most integrated setting appropriate. (See §84.22(b) of the HEW section 504 regulation.) Agencies may also wish to consider supplementing §85.57 with other details from section 84.22 of the HEW section 504 regulation.

In response to comment, the Department wishes to make clear that §85.57 does not preclude other agencies from allowing recipients to choose among appropriate alternative methods of achieving program accessibility, so long as the agency itself sets an acceptable standard for what constitutes program accessibility.

Several transportation comments proposed that the word "program," for purposes of program accessibility, be interpreted to mean the entire transportation system of a certain geographic area, as opposed to particular modes of transportation (bus, rail) in the area. The Department rejects this concept as a general matter.

We recognize, however, that there are special problems to achieving program accessibility with the three-year time period for certain modes of transportation. Paragraph (b) has, therefore, been amended to allow more than three years for compliance for any mode of transportation in which program accessibility can be achieved within that period only through extensive alterations entailing extraordinary costs. Such exceptions may be allowed only where alternate, accessible modes of transportation are available. The specific period of time for compliance is to be established by the federal agency administering the transportation program (the Department of Transportation, in practically all cases); it may vary from mode to mode. The Department believes that this departure from the general scheme is justified by the lack of acceptable alternatives to extremely expensive alterations in the provision of some transportation services.

The Department recognizes that special problems may also be encountered in achieving program accessibility in existing public housing projects within the three-year schedule. Because the program accessibility stan-

standard itself requires only that a small percentage of units be accessible (and that there be access to the project itself), the Department believes that the standard can be met within the prescribed schedule. We are prepared to consult with the Department of Housing and Urban Development as compliance progresses and will reexamine the situation if circumstances so warrant.

Another issue raised during the comment period is the question of the effect of §85.57 upon the requirements of the Architectural Barriers Act of 1968, Pub. L. 90-480. The relevant portion of that Act requires that, after 1968, all new construction and alteration receiving direct Federal financial assistance be accessible. One commenter feared that recipients who had undertaken construction subject to the Architectural Barriers Act but who had failed to comply with the Act might feel that compliance with the Architectural Barriers Act would be excused if its program, on the whole, were accessible and thus in compliance with §85.57. Such is not the case. The Department does not intend, and has no authority, to interfere in any way with the requirements of the Architectural Barriers Act.

Two comments requested that an exception be added to §85.57 for modifications of historic structures. While we agree that it is important to preserve historical structures, we believe that the flexibility of the program accessibility standard will permit recipients, with appropriate technical assistance and advice, to make their programs accessible without impairing the integrity of historic buildings.

Paragraph (c), added in response to comment, requires that transition plans be developed in cases where structural modifications are necessary to achieve program accessibility. The schedule for completion of these plans, as well as any further requirements deemed appropriate, is left to the determination of each regulating agency. The plan is to be developed with the aid of handicapped persons or their organizations.

Section 85.58 requires new facilities and, to the maximum extent feasible, alterations in existing facilities to be readily accessible. No accessibility standards have been specified here, but agencies should note that the HEW section 504 regulation requires HEW recipients either to meet the standards developed by the American National Standards Institute, Inc. (ANSI), or to provide equivalent accessibility. Each agency should, in the interest of governmentwide consistency, carefully consider adoption of the ANSI standards or their equivalent for any of its programs to which the standards are applicable.

A difficult problem that has arisen during the comment period with re-

spect to §85.58 is its effect upon buses ordered in the interval between the final issuance of individual agency 504 regulations and the effective date of the Department of Transportation's ruling concerning Transbus. (That ruling requires that all buses acquired with the assistance of the Urban Mass Transportation Administration (UMTA), ordered after September 30, 1979, meet the specifications for Transbus—a low-floor, ramped bus.) Because of the complexity of the bus accessibility issue, the final regulation has been amended to allow the Department of Transportation (DOT) to defer the effective date for requiring all new buses to be accessible if DOT concludes during its section 504 rule-making process that it is not possible to do so by the effective date of its own section 504 regulation and if comparable, accessible services are available to handicapped persons in the meantime. The date may not, however, be deferred beyond the present effective date of the Transbus decision—October 1, 1979.

Because this Department agrees that Transbus is the most effective means of providing handicapped persons with accessible bus transportation, it encourages the Department of Transportation to take all possible steps to expedite the purchase of Transbus by its recipients.

The effective date of this regulation is January 13, 1978. Because the regulation applies only to other federal agencies rather than to the public and because the governmentwide implementation of section 504 should proceed without further delay, the Department believes that this departure from the normal 30-day waiting period is warranted.

NOTE.—The Department of Health, Education, and Welfare has determined that this document does not contain a major proposal requiring preparation of an economic impact analysis (EIA) statement under Executive Orders 11821 and 11949 and OMB Circular A-107.

In consideration of the foregoing, Part 85 is hereby added to Title 45 of the Code of Federal Regulations to read as set forth below.

Dated: January 3, 1978.

JOSEPH A. CALIFANO, Jr.,
Secretary.

Subpart A—Federal Agency Responsibilities

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85.4 Agency regulations.
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85.7 Coordination with sections 502 and 503.
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Subpart B—Standards for Determining Who Are Handicapped Persons

- 85.31 Handicapped person.

- 85.32 Qualified handicapped person.
85.33-85.50 [Reserved]

Subpart C—Guidelines for Determining Discriminatory Practices

GENERAL

- 85.51 General prohibitions against discrimination.

EMPLOYMENT

- 85.52 General prohibitions against employment discrimination.
85.53 Reasonable accommodation.
85.54 Employment criteria.
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PROGRAM ACCESSIBILITY

- 85.56 General requirement concerning program accessibility.
85.57 Existing facilities.
85.58 New construction.
85.59-85.99 [Reserved]
Appendix A—Executive Order 11914.

AUTHORITY: Executive Order 11914, 41 FR 17871; sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706).

Subpart A—Federal Agency Responsibilities

§ 85.1 Purpose.

The purpose of this part is to implement Executive Order 11914, which requires the Department of Health, Education, and Welfare to coordinate the implementation of section 504 of the Rehabilitation Act of 1973.

§ 85.2 Application.

This part applies to each Federal department and agency that is empowered to extend Federal financial assistance.

§ 85.3 Definitions.

As used in this regulation, the term:
(a) "Executive order" means Executive Order 11914, titled "Nondiscrimination with respect to the Handicapped in Federally Assisted Programs," issued on April 28, 1976.

(b) "Section 504" means section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(c) "Agency" means a Federal department or agency that is empowered to extend financial assistance.

(d) "Recipient" means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(e) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a con-

tract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

- (1) Funds;
- (2) Services of Federal personnel; or
- (3) Real and personal property or any interest in or use of such property, including:
 - (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
 - (ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(f) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

§ 85.4 Issuance of agency regulations.

(a) Each agency shall issue, after notice and opportunity for comment, a regulation to implement section 504 with respect to the programs and activities to which it provides assistance. The regulation shall be consistent with this part.

(b) Each agency shall issue a notice of proposed rulemaking no later than 90 days after the effective date of this part. Each agency shall issue a final regulation no later than 135 days after the end of the period for comment on its proposed regulation: *Provided*, That the agency shall submit its proposed final regulation to the Director of the Office for Civil Rights, HEW, for review at least 45 days before it is to be issued.

(c) Each such agency regulation shall: (1) Define appropriate terms, consistent with the definitions set forth in § 85.3 and with the standards for determining who are handicapped persons set forth in Subpart B of this Part; and (2) prohibit discriminatory practices against qualified handicapped persons in employment and in the provision of aid, benefits, or services, consistent with the guidelines set forth in Subpart C of this Part. The regulation shall include, where appropriate, specific provisions adapted to the particular programs and activities receiving financial assistance from the agency.

§ 85.5 Enforcement.

(a) Each agency shall establish a system for the enforcement of section 504 and its implementing regulation with respect to the programs and activities to which it provides assistance. The system shall include: (1) The enforcement and hearing procedures that the agency has adopted for the enforcement of title VI of the Civil Rights Act of 1964, and (2) a requirement that recipients sign assurances of compliance with section 504.

(b) Each agency regulation shall also include requirements that recipients: (1) Notify employees and beneficiaries of their rights under section 504, (2) conduct a self-evaluation of their compliance with section 504, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, and (3) otherwise consult with interested persons, including handicapped persons or organizations representing handicapped persons, in achieving compliance with section 504.

§ 85.6 Interagency cooperation.

(a) Where each of a substantial number of recipients is receiving assistance for similar or related purposes from two or more agencies or where two or more agencies cooperate in administering assistance for a given class of recipients, the agencies shall: (1) Coordinate compliance with section 504, and (2) designate one of the agencies as the primary agency for section 504 compliance purposes.

(b) Any agency conducting a compliance review or investigating a complaint of an alleged section 504 violation shall notify any other affected agency upon discovery of its jurisdiction and shall inform it of the findings made. Reviews or investigations may be made on a joint basis.

§ 85.7 Coordination with sections 502 and 503.

(a) Agencies shall consult with the Architectural and Transportation Barriers Compliance Board in developing requirements for the accessibility of new facilities and alterations, as required in § 85.58, and shall coordinate with the Board in enforcing such requirements with respect to facilities that are subject to section 502 of the Rehabilitation Act of 1973, as amended, as well as to section 504.

(b) Agencies shall coordinate with the Department of Labor in enforcing requirements concerning employment discrimination with respect to recipients that are also federal contractors subject to section 503 of the Rehabilitation Act of 1973, as amended.

§§ 85.8-85.30 [Reserved]

Subpart B—Standards for Determining Who are Handicapped Persons

§ 85.31 Handicapped person.

(a) "Handicapped person" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(b) As used in paragraph (a) of this section, the phrase:

(1) "Physical or mental impairment" means (i) any physiological disorder or

condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

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

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

(4) "Is regarded as having an impairment" means (i) has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (ii) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (iii) has none of the impairments defined in paragraph (b)(1) of this section but is treated by a recipient as having such an impairment.

§ 84.32 Qualified handicapped person.

"Qualified handicapped person" means (a) with respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and (b) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

§§ 85.33-85.50 [Reserved]

Subpart C—Guidelines for Determining Discriminatory Practices

GENERAL

§ 85.51 General prohibitions against discrimination.

(a) No qualified handicapped person, shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

(b)(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

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

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

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

(2) A recipient may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(4) A recipient may not, in determining the site or location of a facility, make selections (i) that have the effect of excluding handicapped per-

sons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

(d) Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

(e) Recipients shall take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.

EMPLOYMENT

§ 85.52 General prohibitions against employment discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives or benefits from federal financial assistance.

(b) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(c) The prohibition against discrimination in employment applies to the following activities:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship,

professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(d) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

§ 85.53 Reasonable accommodation.

A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

§ 85.54 Employment criteria.

A recipient may not use employment tests or criteria that discriminate against handicapped persons and shall ensure that employment tests are adapted for use by persons who have handicaps that impair sensory, manual, or speaking skills.

§ 85.55 Preemployment inquiries.

A recipient may not conduct a preemployment medical examination or make a preemployment inquiry as to whether an applicant is a handicapped person or as to the nature or severity of a handicap except under the circumstances described in 45 CFR 84.14.

PROGRAM ACCESSIBILITY

§ 85.56 General requirement concerning program accessibility.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

§ 85.57 Existing facilities.

(a) A recipient shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not necessarily require

a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons.

(b) Where structural changes are necessary to make programs or activities in existing facilities accessible, such changes shall be made as soon as practicable, but in no event later than three years after the effective date of the agency regulation: *Provided*, That, if the program is a particular mode of transportation (e.g., a subway system) that can be made accessible only through extraordinarily expensive structural changes to, or replacement of, existing facilities and if other accessible modes of transportation are available, the federal agency responsible for enforcing section 504 with respect to that program may extend this period of time, but only for a reasonable and definite period, such period to be set forth in the agency's regulation.

(c) In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within a definite period to be established in each agency's regulation, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons.

§ 85.58 New construction.

(a) Except as provided in paragraph (b) of this section, new facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall, to the maximum extent feasible, be designed and constructed to be readily accessible to and usable by handicapped persons.

(b) The Department of Transportation may defer the effective date for requiring all new buses to be accessible if it concludes on the basis of its section 504 rulemaking process that it is not feasible to require compliance on the effective date of its regulation: *Provided*, That comparable, accessible services are available to handicapped persons in the interim and that the date is not deferred later than October 1, 1979.

§ 85.59-85.99 [Reserved]

APPENDIX A.—NONDISCRIMINATION WITH RESPECT TO THE HANDICAPPED IN FEDERALLY ASSISTED PROGRAMS

EXECUTIVE ORDER 11914, APRIL 28, 1976

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including section 301 of title 3 of the United States Code, and as President of the United States, and in order to provide for consistent implementation within the Federal Government of section

504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it is hereby ordered as follows:

SECTION 1. The Secretary of Health, Education, and Welfare shall coordinate the implementation of section 504 of the Rehabilitation Act of 1973 as amended, hereinafter referred to as section 504, by all Federal departments and agencies empowered to extend Federal financial assistance to any program or activity. The Secretary shall establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504. The Secretary shall assist Federal departments and agencies to coordinate their programs and activities and shall consult with such departments and agencies, as necessary, so that consistent policies, practices, and procedures are adopted with respect to the enforcement of section 504.

SEC. 2. In order to implement the provisions of section 504, each Federal department and agency empowered to provide Federal financial assistance shall issue rules, regulations, and directives, consistent with the standards and procedures established by the Secretary of Health, Education, and Welfare.

SEC. 3. (a) Whenever the appropriate department or agency determines, upon all the information available to it, that any recipient of, or applicant for, Federal financial assistance is in noncompliance with the requirements adopted pursuant to this order, steps to secure voluntary compliance shall be carried out in accordance with standards and procedures established pursuant to this order.

(b) If voluntary compliance cannot be secured by informal means, compliance with section 504 may be effected by the suspension or termination of, or refusal to award or continue, Federal financial assistance or by other appropriate means authorized by law, in accordance with standards and procedures established pursuant to this order.

(c) No such suspension or termination of, or refusal to award or continue, Federal financial assistance shall become effective unless there has been an express finding, after opportunity for a hearing, of a failure by the recipient of, or applicant for, Federal financial assistance to comply with the requirements adopted pursuant to this order; however, such suspension or termination of, or refusal to award or continue, Federal financial assistance shall be limited in its effect to the particular program or activity or part thereof with respect to which there has been such a finding of noncompliance.

SEC. 4. Each Federal department and agency shall furnish the Secretary of Health, Education, and Welfare such reports and information as the Secretary requests and shall cooperate with the Secretary in the implementation of section 504.

SEC. 5. The Secretary of Health, Education, and Welfare may adopt rules and regulations and issue orders which he deems necessary to carry out his responsibilities under this order. The Secretary shall ensure that such rules, regulations, and orders are not inconsistent with, or duplicative of, other Federal Government policies relating to the handicapped, including those policies adopted in accordance with sections 501, 502, and 503 of the Rehabilitation Act of 1973, as amended, or the Architectural Barriers Act of 1968 (42 U.S.C. 4151 *et seq.*).

GERALD R. FORD

The White House,
April 28, 1976.

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