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DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 42

Docket No. OAG 154; AG Order No. 3818-2017

RIN: 1105-AB50

**Amendment of Regulations Implementing Section 504 of the Rehabilitation Act of 1973—
Nondiscrimination Based on Disability in Federally Assisted Programs or Activities**

AGENCY: Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice is issuing this notice of proposed rulemaking to revise its regulation implementing section 504 of the Rehabilitation Act of 1973, as applicable to programs and activities receiving financial assistance from the Department, in order to incorporate amendments to the statute, including the changes in the meaning and interpretation of the applicable definition of disability required by the ADA Amendments Act of 2008; incorporate requirements stemming from judicial decisions; update accessibility standards applicable to new construction and alteration of buildings and facilities; update certain provisions to promote consistency with comparable provisions implementing title II of the Americans with Disabilities Act; and make other non-substantive clarifying edits, including updating outdated terminology and references that currently exist in 28 CFR part 42, such as changing the word “handicapped” and similar variations of that word to language referencing “individuals with disabilities,”

modifying the order of the regulatory provisions to group like provisions together, and adding some headings to make the regulation more user-friendly.

DATES: All comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 1105-AB50, by any one of the following methods:

- Federal eRulemaking portal: <http://www.regulations.gov>. Follow the Web site's instructions for submitting comments.
- Regular U.S. mail: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031-0885.
- Overnight, courier, or hand delivery: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 1425 New York Avenue, N.W., Suite 4055, Washington, D.C. 20005.

FOR FURTHER INFORMATION CONTACT: Rebecca Bond, Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307-0663 (voice or TTY) (not a toll-free number); or Michael Alston, Director, Office for Civil Rights, Office of Justice Programs, U.S. Department of Justice, at (202) 307-0690 (not a toll-free number). Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514-0301 (voice), or (800) 514-0383 (TTY).

You may obtain copies of this notice of proposed rulemaking (NPRM) in an alternative format by calling the ADA Information Line at (800) 514-0301 (voice), or (800) 514-0383 (TTY). This NPRM is also available on the ADA Home Page at <http://www.ada.gov>.

SUPPLEMENTARY INFORMATION:

Electronic Submission of Comments and Posting of Public Comments

You may submit electronic comments to <http://www.regulations.gov>. When submitting comments electronically, you must include “RIN 1105-AB50” in the subject field, and you must include your full name and address. Electronic files should avoid the use of special characters or any form of encryption and should be free of any defects or viruses.

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Submission postings will include any personal identifying information (such as your name, address, etc.) included in the text of your comment. If you include personal identifying information (such as your name, address, etc.) in the text of your comment but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also include all the personal identifying information you want redacted along with this phrase. Similarly, if you submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

I. Executive Summary

Purpose

The Department of Justice (Department) is issuing this rule in order to revise and update its regulation implementing section 504 of the Rehabilitation Act of 1973 (section 504) as applicable to programs and activities receiving financial assistance from the Department.

Section 504 prohibits discrimination on the basis of disability in federally conducted and assisted programs or activities. The Department implements the requirements of section 504 for federally assisted programs through its regulation at 28 CFR part 42, subpart G (federally assisted regulation).

Major Provisions

The major provisions of this proposed rule can be summarized as follows.

First, the NPRM proposes to revise the regulatory text to incorporate a range of statutory amendments to the Rehabilitation Act, including the following: (1) changes in the meaning and interpretation of the definition of “disability” required by the ADA Amendments Act of 2008, which also amended section 504’s definition of “disability;” (2) the addition of definitions of “drugs” and “illegal use of drugs” and the exclusion from coverage of an individual who is currently engaging in the illegal use of drugs, all of which are definitions used in the ADA; (3) the adoption of “person first” language, such as changing the term “handicapped person” to “individual with a disability”; and (4) the application of the ADA title I standards to determinations of employment discrimination under section 504.

Second, the proposed regulation incorporates into the regulatory text existing requirements, which stem from longstanding Supreme Court decisions interpreting section 504, by adding provisions setting forth the “direct threat” defense and the obligation to provide reasonable accommodations.

Third, the proposed rule updates the section 504 accessibility standards applicable to new construction and alteration of buildings and facilities from the Uniform Federal Accessibility Standards to the 2010 ADA Standards for Accessible Design.

Fourth, the proposed rule revises the language of certain provisions, including the general nondiscrimination prohibitions and the requirement to provide auxiliary aids and services, in order to promote consistency with comparable provisions implementing title II of the ADA. The rule also eliminates the exception for provision of auxiliary aids and services for recipients that have fewer than fifteen employees.

Fifth, the proposed rule revises the regulation's compliance procedures: (1) to provide alternative remedies for the Department in cases where a recipient of Federal assistance fails to provide compliance information, such as compliance reports or information sought by beneficiaries; (2) to provide for the protection of confidential information without barring the responsible Department official or designee from accessing information necessary for evaluating or seeking to enforce compliance with the federally assisted regulation; and (3) to direct the filing of complaints alleging violations of section 504 by recipients of financial assistance from the Department with the Office of Justice Programs.

Summary of Benefits and Costs

This rulemaking is not considered economically significant under Executive Order 12866. Additionally, the Department is certifying that the rule will not have a significant economic impact on a substantial number of small entities in accordance with the Regulatory Flexibility Act, as amended.

II. Background

A. Section 504 Legislative and Regulatory History

The Department of Justice (Department) implements the requirements of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 (section 504), which prohibits discrimination on the basis of disability in federally conducted and assisted programs or

activities, through its regulations at 28 CFR part 39, applicable to programs and activities conducted by the Department (federally conducted regulation), and 28 CFR part 42, subpart G, applicable to recipients to whom the Department extends Federal financial assistance (federally assisted regulation).

On June 3, 1980, the Department published its section 504 federally assisted regulation. *See* 28 CFR part 42, subpart G, 45 FR 37620. Since then, Congress has amended certain provisions of the Rehabilitation Act of 1973, Public Law 93–112 (Sept. 26, 1973) (Rehabilitation Act), necessitating revisions to the Department’s section 504 federally assisted regulation.¹ The Americans with Disabilities Act of 1990, Public Law 101–336 (July 26, 1990) (ADA), revised the Rehabilitation Act to include definitions of the terms “drugs” and “illegal use of drugs,” explaining that these terms were to be interpreted consistent with the principles of the Controlled Substances Act, 21 U.S.C. 801 *et seq.* *See* 29 U.S.C. 705(10). The ADA also amended the Rehabilitation Act to expressly exclude from coverage an individual who is currently engaging in the illegal use of drugs. *See* 29 U.S.C. 705(10), (20)(C). The Rehabilitation Act Amendments of 1992, Public Law 102–569 (Oct. 29, 1992) (the 1992 Amendments), adopted the use of “person first” language by changing the term “handicapped person” to “individual with a disability” and provided that the standards applied under title I of the ADA shall apply to determinations of employment discrimination under section 504. More recently, the ADA Amendments Act of 2008 (ADA Amendments Act), Public Law 110–325 (Sept. 25, 2008), revised the meaning and interpretation of the definition of “disability” under section 504 to align them with the ADA. In addition, there have been significant Supreme Court decisions

¹ *See, e.g.*, Public Law 99–506 (Oct. 21, 1986); Public Law 100–259 (Mar. 22, 1988); Public Law 100–630 (Nov. 7, 1988); Public Law 101–336 (July 26, 1990); Public Law 102–569 (Oct. 29, 1992); Public Law 103–382 (Oct. 20, 1994); Public Law 105–220 (Aug. 7, 1998); Public Law 107–110 (Jan. 8, 2002); Public Law 110–325 (Sept. 25, 2008); Public Law 113–128 (July 22, 2014).

interpreting section 504 requirements relating to the principles of “direct threat” and reasonable accommodation. *See, e.g., Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987); *Alexander v. Choate*, 469 U.S. 287 (1985); *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979). Although *Arline*, *Choate*, and *Davis* have been applied by lower courts since their issuance, the Department’s existing section 504 federally assisted regulation does not clearly enunciate the Court’s holdings. The Department has not amended its section 504 federally assisted regulation since its original publication other than through the adoption in 2003 of certain amendments to implement the provisions of the Civil Rights Restoration Act of 1987. *See* 68 FR 51334 (Aug. 26, 2003); Public Law 100–259 (Mar. 22, 1988). The revisions to this regulation are part of the Department’s retrospective plan under Executive Order 13563, completed in 2011.

B. Relationship Between Section 504 and the ADA

Title II of the ADA prohibits discrimination on the basis of disability by public entities (*i.e.*, State and local governments and their agencies) and is modeled on section 504. 42 U.S.C. 12132 (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”). A significant amount of financial assistance from the Department goes to entities that are also covered by title II of the ADA. In addition, the Department provides financial assistance to some entities covered by title III of the ADA.² Title II and section 504 are generally understood to impose similar requirements, given the similar

² Title III prohibits discrimination on the basis of disability by: (1) public accommodations (*i.e.*, private entities that own, operate, lease, or lease to places of public accommodation); (2) newly constructed and altered commercial facilities; and (3) private entities that offer certain examinations and courses related to educational and occupational certification. Recipients of Federal assistance that are also title III entities must comply with both the section 504 and the title III regulations.

language employed in the ADA and the Rehabilitation Act and the congressional directive that the ADA be construed to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act. *See, e.g.*, 42 U.S.C. 12201(a).³ Many of the changes that the Department is proposing are intended to conform the language of specific provisions in the section 504 regulation to corresponding provisions in the title II regulation, many of which were updated in 2010. The Department believes it is in the interest of the recipients who have to apply the requirements of both section 504 and title II that, where appropriate, the comparable requirements in the corresponding regulations for both statutes are expressed in comparable language.

II. Section-by-Section Analysis

This section provides a detailed description of the Department’s proposed changes to the section 504 federally assisted regulation and the reasoning behind the proposals. If the Department is not proposing a change to a regulation section, the unchanged section is not discussed. The Department is proposing to modify the order and names of some of the regulatory provisions to group like provisions together and make the regulation more user-friendly. This section-by-section analysis follows the revised order of the regulatory text.

General

Section 42.502—Application, broad coverage, and relationship to other laws

³ The 1992 Amendments revised the Rehabilitation Act’s findings, purpose, and policy provisions to incorporate language acknowledging the discriminatory barriers faced by persons with disabilities, and recognizing that persons with disabilities have the right to “enjoy full inclusion and integration in the economic, political, social, cultural and educational mainstream of American society.” 29 U.S.C. 701(a)(3) as amended. The legislative history to the 1992 Amendments states “[t]he statement of purpose and policy is a reaffirmation of the precepts of the Americans with Disabilities Act, which has been referred to as the 20th century emancipation proclamation for individuals with disabilities. It is the Committee’s intent that these principles guide the policies, practices, and procedures developed under all titles of the [Rehabilitation] Act.” S. Rep. 102–357 at 14 (Aug. 3, 1992); H.R. Rep. 102–822 at 81 (Aug. 10, 1992).

The Department proposes to revise existing § 42.502 to add clarifying language to the discussion of the application of this subpart, to add a new paragraph (b), which addresses the broad scope of coverage required by the ADA Amendments Act and the section 504 federally assisted regulation, and to move and revise the discussion of the relationship to other laws from existing § 42.505(h) to a new paragraph (c) in this section.

Section 42.502(a)—Application.

The Department proposes to add a sentence clarifying that this subpart does not apply to programs or activities conducted by the Department. The Department’s section 504 federally conducted regulation is found at 28 CFR part 39.

Section 42.502(b)—Broad scope of coverage.

The ADA Amendments Act was signed into law on September 25, 2008, and became effective on January 1, 2009. Congress enacted the ADA Amendments Act in order to ensure that the definition of disability is broadly construed and applied without extensive analysis, and to supersede Supreme Court decisions that had too narrowly interpreted the ADA’s definition of disability.⁴ The ADA Amendments Act not only amended the meaning and interpretation of the definition of disability applicable to the ADA, it also amended the Rehabilitation Act of 1973 to require similar changes to the meaning and interpretation of section 504’s definition of disability at 29 U.S.C. 705(20)(B).

The ADA Amendments Act does not alter the basic elements of the definition of disability in the ADA and section 504, but it significantly clarifies how the term “disability” is to be

⁴ Congress specifically found that the holdings of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), narrowed the broad scope of protection intended to be afforded by the ADA. ADA Amendments Act, sec. 2. Congress also stated that one of the purposes of the ADA Amendments Act is “to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations * * *.” *Id.*, sec. 2(b)(5).

interpreted and adds important rules of construction to inform that interpretation. Specifically, Congress directed that the definition of disability shall be construed broadly and that the determination of whether an individual has a disability should not demand extensive analysis. ADA Amendments Act, sec. 2(b)(5), 4(a).

Congress also authorized the Equal Employment Opportunity Commission (EEOC) and the Department to issue regulations implementing the ADA Amendments Act changes, including rules of construction. *See id.*, sec. 6(a)(2); 42 U.S.C. 12205a. The Department’s ADA Amendments Act regulation, along with the EEOC’s title I ADA Amendments Act regulation, include introductory sections describing the requirement to construe the definition of disability broadly and sets forth rules of construction consistent with that goal. *See* 28 C.F.R. 35.101(b) and 29 CFR 1630.1(c)(4).⁵ The Department’s proposed “scope of coverage” provision at § 42.502(b) is modeled on the ADA’s broad construction provision and provides that, consistent with the ADA Amendments Act’s purpose of reinstating a broad scope of protection under both the ADA and section 504, the definition of “disability” in the pertinent subpart “shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of section 504.” The new provision further provides that the primary object of attention in cases brought under that subpart “should be whether entities covered under section 504 have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of ‘disability.’” The question of whether an individual meets the definition of “disability” under this subpart should not demand extensive analysis.

Section 42.502(c)—Relationship to other laws.

⁵The Department’s ADA Amendments Act regulation followed the EEOC approach in incorporating a broad construction provision and rules of construction to embody the requirements of the ADA Amendments Act. *See* 81 FR 53203 (Aug. 11, 2016).

The Department is proposing to move its provision addressing the relationship of section 504 to State and local laws that provide lesser protections for persons with disabilities from its location in the current regulation at § 42.505(h) to § 42.502(c)(1) in the revised regulation. The Department is proposing a minor edit to this provision by adding “obviated by or otherwise” before “affected” so that the provision would read: “The obligation to comply with this subpart is not obviated by or otherwise affected by the existence of any State or local law or other requirement that, on the basis of disability, imposes prohibitions or limits upon the eligibility of qualified individuals with disabilities to receive services or to practice any occupation or profession.”

In addition, the Department is proposing to add a new provision at § 42.502(c)(2) that addresses the relationship between section 504 and other Federal, State, and local laws that provide greater protections to persons with disabilities. In the ADA, Congress expressly provided that nothing in the ADA invalidated or limited the remedies, rights, and procedures of any Federal law, or State or local law that provides greater or equal protection for the rights of individuals with disabilities. *See* 42 U.S.C. 12201(b). The Department incorporated this principle into its ADA title II and title III regulations at 28 CFR 35.103(b) and 28 CFR 36.103(c), respectively. The Department believes that these principles are equally applicable to section 504. Proposed § 42.502(c)(2) incorporates these principles and provides that “[t]his subpart does not invalidate or limit the remedies, rights, and procedures of any other Federal law, or State or local law (including State common law), that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.”

Section 42.503—Definitions

The Department proposes revising certain definitions to make them consistent with the language used to define corresponding terms in the Department’s ADA regulations; deleting terminology that is no longer necessary or has become obsolete; revising or adding certain terms to incorporate statutory changes to the Rehabilitation Act; adding other definitions for clarity; and making minor technical edits to existing definitions. Also, for ease of reference, the Department proposes moving the “definitions” section, currently codified at § 42.540, to the beginning of the subpart at § 42.503.

First, in order to ensure consistency of terminology between section 504 and the ADA, the Department is proposing to add definitions of the following terms from the Department’s ADA title II regulation at 28 CFR 35.104: “2004 ADAAG,” “2010 Standards,” “Auxiliary aids and services,” “Current illegal use of drugs,” “Historic preservation programs,” “Qualified interpreter,” “Qualified reader,” and “Video remote interpreting (VRI) service.”

The Department also proposes to delete several terms from the regulation, including “Alcohol abuse,” “Benefit,” and “Handicap,” as well as obsolete references to Departmental components that no longer exist within the Department. First, with respect to “alcohol abuse,” the Department believes the term is no longer necessary given that the definition was only applicable to the regulation’s employment provisions, and those provisions are being revised to reference the requirements in title I of the ADA, in accordance with section 503(b) of the 1992 Amendments (codified at 29 U.S.C. 791(f)). Second, the Department also proposes to delete the definition of “benefit” as unnecessary given that the meaning of “benefit” is commonly understood. Third, the Department proposes to delete the definition of “handicap,” as it is neither necessary nor appropriate following the “people first” language changes from the 1992 Amendments, which use the term “disability.” And fourth, the Department proposes to delete

the definitions of “LEAA,” “NIJ,” “BJS,” “OJARS,” and “OJJDP.” Some of these offices no longer exist, and to account for future changes in organization, the regulation, where appropriate, will refer generally to “grant-making components of the Department.”

Finally, the Department proposes the following revisions and additions to the “definitions” section to incorporate statutory changes to the Rehabilitation Act and to provide greater clarity and consistency of terminology.

“Applicant”

The Department proposes to add the definition of “applicant” to the proposed regulation using language consistent with the definition in the Department’s regulation implementing title VI of the Civil Rights Act, at 28 CFR 42.102(h).

“Component”

The Department proposes to add a definition of “component” to the proposed regulation. Given the various names for the Department’s subagencies (*e.g.*, bureaus, agencies, boards, etc.), the Department believes that the term “component” would provide a simpler and less confusing reference.

“Department”

The Department proposes to revise the definition of “department” to clarify that the term includes all of the Department’s components.

“Direct threat”

The Department proposes to add, with respect to non-employment services, programs, and activities, a definition of “direct threat” that is based upon the definition provided in the Department’s title II regulation at 28 CFR 35.104. The Department also proposes to include, for

the employment context, an additional paragraph that adopts the definition of “direct threat” in the EEOC’s regulation at 29 CFR 1630.2(r).

“Disability”

As previously discussed, the ADA Amendments Act not only amended the meaning and interpretation of the definition of “disability” applicable to the ADA, it also amended the Rehabilitation Act of 1973 to require similar changes to the meaning and interpretation of the definition of “disability” at 29 U.S.C. 705(20)(B), applicable to section 504. The Department has decided that rather than spelling out the meaning and interpretation of the definition of disability in this regulation, it will incorporate by reference the Department’s title II definition of disability found at 28 CFR part 35, which has recently undergone revisions to reflect the requirements of the ADA Amendments Act. Due to the changes that the ADA Amendments Act made to the meaning and interpretation of the definition of disability, participants in recipients’ programs and activities who, before, may not have been determined to have a disability under section 504, may now be found to have a disability.

The Rehabilitation Act and the ADA define “disability” as including: (1) a physical or mental impairment that substantially limits a major life activity; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 29 U.S.C. 705(9)(B); 42 U.S.C. 12102(1). The ADA Amendments Act does not alter these three basic elements of the definition of disability, but it does significantly clarify how the term “disability” is to be interpreted and adds important rules of construction to inform that interpretation. Congress directed that the definition of disability shall be construed broadly and that the determination of whether an individual has a disability should not demand extensive analysis. 42 U.S.C. 12102.

The Department proposes to update its section 504 federally assisted regulation to reflect these changes.

“Drug”

The ADA amended the Rehabilitation Act to include a definition of “drug.” *See* ADA sec. 512(b) (codified at 29 U.S.C. 705(10)). The Department proposes to add that definition to its regulation.

“Facility”

The Department proposes to revise the existing definition of “facility” to conform more closely to the definition of “facility” in the Department’s title II regulation by including within the definition’s scope sites, complexes, rolling stock or other conveyances.

“Historic Properties”

The Department proposes to include a definition of “historic properties” that is substantially similar to that provided in the Department’s title II regulation, 28 CFR 35.104.

“Illegal use of drugs”

The Department proposes to replace the existing definition of “drug abuse” with a definition that is substantially similar to the definition of “illegal use of drugs” that was added to the Rehabilitation Act by the ADA in 1990. *See* ADA § 512(b) (codified at 29 U.S.C. 705(10)).

“Individual with a disability”

The Department proposes to replace the definition of “handicapped person” with “individual with a disability,” consistent with the 1992 Amendments, which provide “people first” language (*e.g.*, “individuals with disabilities”) and which define “individual with a disability” as “any person who has a disability as defined in [section 3 of the ADA].” *See* 29 U.S.C. 705(20)(B). Consistent with the definition in the Department’s ADA title II

regulation, the proposed definition also clarifies that the term “individual with a disability” does not include an individual who is currently engaging in the illegal use of drugs, when a recipient acts on the basis of such use. The proposed definition eliminates references to individuals who would not be considered to have a disability for purposes of employment, as such references are no longer necessary because the regulation now references the EEOC regulation at 29 CFR part 1630 with respect to discrimination on the basis of disability in employment.

“Primary recipient”

The Department proposes to add a definition of “primary recipient” to the regulation. The Department proposes to adopt a definition that is substantially similar to the definition of “primary recipient” provided in the Department’s regulation implementing title VI of the Civil Rights Act, at 28 CFR 42.102(g). The revised regulation defines “primary recipient” as “any recipient that is authorized or required to extend Federal financial assistance to another recipient.”

“Qualified individual with a disability”

The Department proposes to replace the definition of “qualified handicapped person” with “qualified individual with a disability.” With respect to employment, the proposed definition incorporates the definition of “qualified” as provided in the EEOC regulation at 29 CFR 1630.2(m), which implements the employment standards of title I of the ADA, in accordance with section 503(b) of the 1992 Amendments (codified at 29 U.S.C. 791(f)). With respect to programs or activities, the proposed definition is substantially similar to the definition of “qualified individual with a disability” from the Department’s ADA title II regulation, 28 CFR 35.104.

“Subrecipient”

The Department proposes to add a definition of “subrecipient” to the proposed regulation. Entities receiving Federal financial assistance through a primary recipient also must comply with the Department’s section 504 federally assisted regulation.

General Nondiscrimination Requirements

Section 42.510—General prohibitions against discrimination

Section 42.510(b)–(f)—Prohibited discriminatory actions.

The Department proposes to update and clarify the discriminatory actions prohibited under § 42.503 of the Department’s current regulation. With the exception of the revisions addressed below, the Department proposes retaining the same prohibited discriminatory actions as in the current regulation but, where applicable, adopting the language that is provided in the Department’s ADA title II regulation for consistency, and reorganizing and re-titling some of the provisions, as appropriate. For instance, the provision relating to the prohibition on retaliation and intimidation at § 42.503(b)(1)(vii) in the current regulation has been moved to a new section at proposed § 42.510(k). The Department also proposes to add several regulatory provisions that are consistent with provisions in the Department’s ADA title II regulation and that further illustrate the types of actions that are prohibited discrimination under section 504. The Department notes that current § 42.503(g) (renumbered as § 42.510(l)) states that “[t]he enumeration of specific forms of prohibited discrimination in this subpart is not exhaustive but only illustrative.”

The Department’s current regulation at § 42.503(b)(iv) prohibits a recipient from denying “a qualified [person with a disability] an equal opportunity to participate in the program or activity by providing services to the program.” This prohibition does not clearly explain how a qualified individual with a disability would be denied an equal opportunity to participate in a

program or activity “by providing services” to the program. The Department is proposing to revise this paragraph for clarity but is not changing the meaning. The revised paragraph (renumbered as § 42.510(b)(1)(v)) states that a recipient may not “[d]eny a qualified individual with a disability an equal opportunity to provide services to the program or activity.” Under this provision, for example, a recipient that uses volunteers to provide services may not refuse to allow individuals with disabilities to work as volunteers.

The Department proposes to delete the provision in the Department’s current regulation at § 42.503(b)(5), which provides that “[a] recipient is prohibited from discriminating on the basis of handicap in aid, benefits, or services operating without Federal financial assistance where such action would discriminate against the handicapped beneficiaries or participants in any program or activity of the recipient receiving Federal financial assistance.” This provision no longer appears to be necessary given the expanded definition of “program or activity” provided under the Civil Rights Restoration Act, 42 U.S.C. 2000d-4a, which, in the case of assistance to a State or local government, includes all the operations of the department or agency to which funding is extended.

The Department proposes to move the requirements in existing § 42.503(e) and (f), which currently address the recipient’s obligation to ensure effective communication to applicants, employees and beneficiaries, to new § 42.511, which specifically addresses the recipient’s communication requirements in greater detail, consistent with the Department’s title II regulation at 28 CFR 35.160, 35.161, and 35. 164. The Department has also conformed the language of these provisions to the language of the title II regulation. It notes that the definition of “auxiliary aids” that is in § 42.503(f) of the existing regulation is replaced by the revised definition of

“auxiliary aids and services” provided in the renumbered definitional section at proposed § 42.503.

Section 42.510(g)—Reasonable accommodations.

The Department proposes to add a new provision at § 42.510(g)(1) that affirmatively states the longstanding section 504 obligation to provide reasonable accommodations by making changes to policies, practices, and procedures unless those changes can be shown to pose a fundamental alteration to the program or activity or an undue financial and administrative burden.⁶ The obligation to modify policies, practices, or procedures was first enunciated by the Supreme Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), which held that while section 504 prohibits the exclusion of an otherwise qualified individual with a disability from participation in a federally funded program solely by reason of the individual’s disability, that person is not protected by section 504 if, in order to meet reasonable eligibility standards, the person needs program or policy modifications that would fundamentally alter the nature of the provider’s program. Because the *Davis* Court analyzed the case in terms of the proper interpretation of the statutory term “otherwise qualified,” agency section 504 regulations promulgated immediately after *Davis* addressed the obligation to provide reasonable accommodations outside of the employment arena by defining “qualified handicapped person,” as one who meets the essential eligibility requirements of the program and who can achieve the purpose of the program or activity without modifications in the program or activity that the

⁶ Courts generally have interpreted the obligation to provide reasonable accommodations under section 504 consistently with the obligation to provide reasonable modifications under title II. *See, e.g., Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 151 (2d Cir. 1999) (analyzing reasonable accommodations in the same way under the FHA, ADA, and Section 504); *Super v. J. D’Amelia & Associates, LLC*, No. 3:09CV831 SRU, 2010 WL 3926887, at *3 (D. Conn. Sept. 30, 2010) (“The relevant portions of the FHA, ADA, and Section 504 offer the same guarantee that a covered entity . . . must provide reasonable accommodations in order to make the entity’s benefits and programs accessible to people with disabilities.”).

agency can demonstrate would result in a fundamental alteration in its nature. *See, e.g.*, 28 CFR 39.103 (the Department's section 504 federally conducted regulation).

Subsequently, in *Alexander v. Choate*, 469 U.S. 287 (1985), which addressed a section 504 challenge to a State policy reducing the annual number of days of inpatient hospital care covered by the State's Medicaid program, the Court implicitly acknowledged that the obligation to provide reasonable accommodations could be considered as an affirmative obligation, noting, "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under the section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications [accommodations] in its programs for the needs of the handicapped." *Id.* at 299 n.19.

Alexander also introduced the concept of undue financial and administrative burden as a limitation on the reasonable accommodation obligation. In responding to the petitioners' contention that *any* durational limitation on inpatient coverage in a State Medicaid plan is a violation of section 504, the court stated: "It should be obvious that the administrative costs of implementing such a regime would be well beyond the accommodations that are required under *Davis*." *Id.* at 308.

Over the past decades, in keeping with these Supreme Court decisions, Federal courts and Federal agencies have regularly acknowledged Federal agencies' affirmative obligation to ensure that recipients provide qualified individuals with disabilities reasonable accommodations in programs and activities unless the recipient can demonstrate that making these accommodations would fundamentally alter the program or activity or result in an undue financial and

administrative burden. However, traditionally, agencies' section 504 regulations have lacked a specific provision implementing this requirement outside of the employment arena.⁷

The Department notes that title I of the ADA also uses the term “reasonable accommodation” to apply to the job application process, work environment, or manner or circumstances under which the position held or desired is customarily performed, and the ability to enjoy equal benefits and privileges of employment. However, the specific ADA title I regulatory requirements related to this term should not be applied to non-employment related requests for reasonable accommodations under section 504, and the Department proposes to clarify at proposed § 42.510(g)(3) that with respect to employment, the definitions and standards that apply to “reasonable accommodation” and “undue hardship” in the EEOC’s regulation implementing title I of the ADA apply to this subpart.

In addition, when Congress enacted the ADA Amendments Act, it expressly provided that a covered entity need not provide a reasonable modification [or accommodation] to policies, practices, or procedures to an individual who meets the definition of disability under the “regarded as” prong. ADA Amendments Act, sec. 6(a)(1). While Congress did not specifically apply this provision of the ADA Amendments Act to section 504, the Department believes that it is equally appropriate to apply this limitation to reasonable accommodations under section 504 and proposes to adopt this limitation at § 42.510(g)(2) of this regulation.

Lastly, the Department notes that the necessary reasonable accommodations will vary based on the need of the individual and the impact of the accommodation on the recipient. Where the recipient receives funding from multiple Federal agencies, each Federal agency’s particular

⁷The principle of “reasonable accommodation” is addressed in agency section 504 regulations with respect to employment. *See, e.g.*, the Department’s current section 504 federally assisted regulation at 28 CFR 42.511 and U.S. Department of Health and Human Services’ section 504 federally assisted regulation at 45 CFR 84.12.

requirements will also impact the types of reasonable accommodations that a recipient must provide.

Section 42.510(h)—Prohibition on surcharges.

It has been a longstanding principle under both section 504 and the ADA that recipients or covered entities may not charge affected individuals or groups for the cost of measures required to provide an individual or group with nondiscriminatory treatment. This principle is already set forth in the Department’s title II regulation at 28 CFR 35.130(f), and the Department is proposing to add it to § 42.510(h) of the Department’s section 504 federally assisted regulation as well.

Section 42.510(i)—Prohibition on associational discrimination.

The Department’s ADA regulations provide protection for individuals associated with individuals with disabilities.⁸ While the Rehabilitation Act does not expressly refer to individuals associated with individuals with disabilities, it does permit “any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance” to bring suit under the Rehabilitation Act. 29 U.S.C. 794a(a)(2) (emphasis added). Courts have recognized this provision as providing the basis for associational standing under the Rehabilitation Act and noted that despite the differences in authorizing language under the

⁸Titles I and III of the ADA explicitly forbid discrimination because of the known disability of an individual with whom the individual is known to have a “relationship or association.” 42 U.S.C. 12112(b)(4), 12182(b)(1)(E). Although title II does not have corresponding language, the legislative history of the ADA demonstrates Congress’s intent to include association within the scope of discrimination prohibited by title II. The House Committee on Education and Labor indicated that title II’s prohibitions should be “identical to those set out in the applicable provisions of titles I and III.” H.R. Rep. No. 101–485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367. The House Report went on to indicate that: “Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. * * * [T]he Attorney General [is directed] to issue regulations setting forth the forms of discrimination prohibited. The Committee intends that the regulations under title II incorporate interpretations of the term discrimination set forth in titles I and III of the ADA to the extent that they do not conflict with the Section 504 regulations.” H.R. Rep. No. 101-485(III), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 475. Thus, the Department’s regulations under both titles II and III prohibit associational discrimination. *See* 28 CFR 35.130(g) and 28 CFR 36.205.

Rehabilitation Act and the ADA, “[i]t is widely accepted that under both the [Rehabilitation Act] and the ADA, non-disabled individuals have standing to bring claims when they are injured because of their association with a disabled person.” *McCullum v. Orlando Reg’l Healthcare Sys., Inc.*, 768 F.3d 1135, 1142 (11th Cir. 2014) (citing cases). Accordingly, the Department is proposing to add § 42.510(i), which specifically prohibits a recipient from excluding or otherwise denying aid, benefits, or services of its programs or activities to an individual because of that individual’s relationship or association with an individual with a known disability.

Section 42.510(j)—Eligibility criteria.

The Department proposes to add a new provision at § 42.510(j) that prohibits a recipient from imposing or applying eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any aid, benefit, or service, unless such criteria can be shown to be necessary for the provision of the aid, benefit, or service being offered. This principle is already set forth in the Department’s title II regulation at 28 CFR 35.130(b)(8). The prohibition of the imposition of “criteria that ‘tend to’ screen out an individual with a disability” actually had its origins in the Department of Health and Human Services’ section 504 regulation at 45 CFR 84.13 (1991), which was cited by the Department in its 1991 title II rulemaking. *See* 28 CFR part 35, app. B, 56 FR 35694, 35705 (July 26, 1991). Accordingly, the Department believes that it is appropriate to add this provision to the general prohibitions against discrimination section.

Section 42.511—Communications

The Department is proposing to reorganize and revise its articulation of recipients’ longstanding obligation to ensure that communications are effectively conveyed to individuals with disabilities and to provide appropriate auxiliary aids and services, using language that

generally conforms with the effective communication provisions in the Department’s title II regulation at 28 CFR 35.160, 35.161, and 35.164. Specifically, the Department is proposing to move the provisions addressing communication in the section 504 regulation from the general nondiscrimination obligations in current § 42.503(e) and (f), place these revised provisions in a new § 42.511, and generally conform the language to the title II provisions. As mentioned earlier, the Department has revised the definitions section of the regulation at proposed § 42.503 to include definitions of the terms “auxiliary aids and services,” “qualified interpreter,” “qualified reader,” and “video remote interpreting (VRI) service.” Finally, the Department is proposing to remove the limitation on the obligation to provide auxiliary aids for recipients with fewer than 15 employees, currently found in § 42.503(f).

Section 42.511(a)—General obligation.

Proposed § 42.511(a) sets forth the general obligation (formerly set forth in § 42.503(e)) that a recipient take “appropriate steps to ensure that communications with applicants, participants, beneficiaries, members of the public, and companions with disabilities are as effective as communications with others.” This general obligation parallels the general communications requirement in the ADA title II regulation, at 28 CFR 35.160(a)(1). The Department recognizes that since the Department’s section 504 federally assisted regulation was first issued in 1980, electronic and information technology has changed the way that recipients communicate with interested persons. Individuals with disabilities—like other members of the public—should be able to equally engage with a recipient’s services, programs, and activities using electronic and information technology. Opportunities for such engagement require that electronic and information technology be accessible to ensure that communication with individuals with disabilities is as effective as communication with others.

Section 42.511(b)—Auxiliary aids and services.

Proposed § 42.511(b)(1), which tracks language in existing § 42.503(f), provides that “[a] recipient shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, beneficiaries, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a recipient.” Proposed § 42.511(b)(2) provides that “[t]he type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a recipient entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.”

An example of an auxiliary aid, which would apply in the corrections setting, would be the provision of videophones or other video-based telecommunication services to ensure that incarcerated individuals with disabilities can communicate as effectively as others who use public telephones made available by the facility.

Section 42.511(c)—Limitations on use of accompanying adults or children as interpreters.

Proposed § 42.511(c) includes the express limitations on the use of accompanying adults or children as interpreters that are specified in the ADA title II rule at 28 CFR 35.160. Under section 504, responsibility for providing effective communication, including the use of interpreters, falls directly on recipients, and they may not require an individual to bring someone to serve as an interpreter. Consistent with the ADA provisions, proposed § 42.511(c) provides

that a recipient may rely on an adult or minor child companion to interpret only in very limited emergency circumstances when no qualified interpreters are available. Specifically, proposed § 42.511(c)(2)-(3) only apply to emergencies involving an “imminent threat to the safety or welfare of an individual or the public.” The imminent threat exception is not intended to apply to the typical and foreseeable emergency situations that are part of the normal operations of institutions, such as visits to the emergency room or responses by law enforcement to situations involving a threat to the safety or welfare of an individual or the public. As such, a recipient may rely on an accompanying individual to interpret or facilitate communication under the proposed § 42.511(c)(2)-(3) imminent threat exception only in truly exigent circumstances, i.e., where any delay in providing immediate services to the individual could have life-altering or life-ending consequences.

In nonemergency circumstances, a recipient may rely on an adult companion (but not a minor child) to interpret only when, (1) the individual requests this, (2) the accompanying adult agrees, and (3) reliance on the accompanying adult is appropriate under the circumstances. Under no circumstances may a recipient rely on an accompanying adult to interpret when there is reason to doubt the individual’s impartiality or effectiveness.

Section 42.511(d)—Video remote interpreting (VRI) services.

When the Department updated its title II effective communication provisions to include performance requirements for VRI, at 28 CFR 35.160(d), the intent was to ensure that if VRI is used, it would be used in a manner that makes it as effective as when sign language interpreters are provided on site. The Department certainly has recognized that VRI can be an effective method of providing interpreting services in certain circumstances, but not in others. *See* 75 FR 56164, 56196 (Sept. 15, 2010). For example, VRI should be effective in many situations

involving routine medical care, as well as in the emergency room where urgent care is important, but no in-person interpreter is available; however, VRI may not be effective in situations involving surgery or other medical procedures where the patient is limited in his or her ability to see the video screen. Similarly, VRI may not be effective in situations where there are multiple people in a room and the information exchanged is highly complex and fast-paced. The Department recognizes that in these and other situations, such as where communication is needed for persons who are deaf-blind, it may be necessary to summon an in-person interpreter to assist certain individuals.

Since the Department added this language to its title II regulation, it has become aware that some entities subject to title II, particularly in the medical environment, have not properly evaluated whether VRI is effective in particular situations, nor have they understood that these standards require that the VRI image is actually positioned so that it can be seen by the individual with a hearing disability. For example, in some circumstances, a patient who is lying prone while receiving medical treatment may have difficulty seeing the image on the screen and thus may be unable to communicate effectively using the remote sign language interpreter. Similarly, a pregnant woman who is deaf and who needs to regularly change positions while receiving medical assistance during labor and delivery may not always be able to see the image on the screen. Accordingly, the Department is adding language in its proposed VRI provision to expressly clarify that the VRI image must be positioned so that the individual with a hearing disability can easily see the interpreter on the screen.

Proposed § 42.511(d) states that a recipient that provides qualified interpreters via VRI services shall ensure that it provides “[a] sharply delineated image that is large enough to display the interpreter’s face, arms, hands, and fingers, and the participating individual’s face, arms,

hands, and fingers, and can be seen by the participating individual regardless of the individual's body position.”

Section 42.511(e)—Telecommunications.

Proposed § 42.511(e) incorporates the ADA title II regulatory requirement, at 28 CFR 35.161, that where a public entity communicates by telephone with applicants and beneficiaries, text telephones (TTY) or equally effective telecommunications systems must be used to communicate with individuals with disabilities. Unlike the corresponding ADA requirement at 28 CFR 35.161(a), however, § 42.511(e)(1) eliminates a specific reference to TTYs. The Department has become aware that individuals with hearing and speech disabilities are increasingly using other forms of telecommunication systems, including cellular phones, videophones, video relays, and internet-based communication systems, in lieu of TTYs. Thus, § 42.511(e)(1) provides that “[w]here a recipient communicates by telephone with applicants, participants, beneficiaries, members of the public, and companions with disabilities, the recipient shall communicate with individuals who are deaf or hard of hearing or have speech disabilities using telecommunication systems that provide equally effective communication.”

Additionally, the Department is aware that individuals with disabilities are concerned that, in some cases, emergency response services lack the ability to communicate with individuals who use methods of communication other than TTYs, such as text messaging or videophones, to communicate effectively. In July 2010, the Department issued an Advance Notice of Proposed Rulemaking on the Accessibility of Next Generation 9-1-1 Services, in which the Department made clear its intention to modify title II's telephone emergency services provision, at 28 CFR 35.162, to address these and other changes, and included a specific reference to video relay service as an example of a type of relay service. 75 FR 43446 (July 26, 2010). Although

that regulation has not yet been released, the Department maintains that, under title II's general requirement at 28 CFR 35.161(a), emergency response public safety answering points always have been covered by the general obligation to ensure effective communication. Similarly, under section 504, recipients' provision of emergency response services, like other aid, benefits, or services provided by recipients in their programs or activities, is covered by the overarching obligation to provide effective communication.

Proposed § 42.511(e)(2) addresses the use of automated-attendant systems and specifies that “[w]hen a recipient uses an automated-attendant system, including, but not limited to, voice mail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including, but not limited to TTYs and all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems.”

In proposed § 42.511(e)(3), the Department proposes a requirement that recipients must respond to all types of relay services, including video relay services, in the same manner that they respond to other telephone calls. This provision tracks title II, at 28 CFR 35.161(c), but includes an updated reference to the U.S. Code citation establishing the types of FCC-approved relay services, which include telephone relay, video relay, and IP relay.

Section 42.511(f)—Limitations.

Finally, the Department is proposing to remove a limitation that currently appears in § 42.503(f). This provision directs that the obligation to provide auxiliary aids is mandatory for recipients with 15 or more employees, but indicates that Departmental officials may require recipients employing fewer than 15 persons to comply with this requirement “when [compliance] would not significantly impair the ability of the recipient to provide its benefits or services.” The

Department is proposing to remove this limitation for several reasons. First, this limitation is of minimal consequence because the vast majority of recipients of Federal financial assistance from the Department are already required by either title II or title III of the ADA to provide auxiliary aids or services in order to ensure effective communication. Second, all recipients, regardless of size, are not required, in providing effective communication, to take any action that the recipient can demonstrate would result in a fundamental alteration to the program or activity or pose undue financial and administrative burdens. Third, the Department already has the discretion whether to impose these obligations on recipients with fewer than 15 employees. Finally, given that Congress specifically intended that the principles of the ADA guide the policies, practices, and procedures developed under the Rehabilitation Act,⁹ the Department believes the removal of this limitation better serves the purpose shared by both the ADA and Rehabilitation Act to enable individuals with disabilities to “enjoy full inclusion and integration into the economic, political, social, cultural, and educational mainstream of American society.” 29 U.S.C. 701(a)(3). The Department is interested in public comment about its proposal to eliminate the fifteen employee threshold for provision of auxiliary aids and services.

Section 42.512—Employment

The Department maintains the prohibition of discrimination in employment against any qualified individual with a disability and proposes to revise § 42.512 to conform to the 1992 Amendments, which amended title V of the Rehabilitation Act to apply the same employment standards set forth in title I of the ADA to employment discrimination claims under section 504. Accordingly, the proposed rule deletes the existing requirements related to discriminatory employment practices and references the standards applied under title I of the ADA, 42 U.S.C.

⁹ See S. Rep. 102–357 at 14 (Aug. 3, 1992); H.R. Rep. 102–822 at 82 (Aug. 10, 1992).

12111 *et seq.*, the EEOC’s title I regulation at 29 CFR part 1630, and, to the extent such sections relate to employment, the provisions of sections 501 through 504 and 511 of the ADA, as amended. Note that the Department’s regulation at 28 CFR part 37 continues to govern the procedures to be followed by the Federal agencies responsible for processing and resolving complaints or charges of employment discrimination filed against recipients when jurisdiction exists under both section 504 and title I of the ADA.

Section 42.513—Direct threat

The Department proposes to add a new provision at § 42.513 addressing direct threat to others as a limitation on the requirement to comply with this subpart, in accordance with the ADA. The applicability of the “direct threat” concept to section 504 of the Rehabilitation Act was first set forth in the Supreme Court decision *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987). In *Arline*, the Supreme Court directed that under section 504 of the Rehabilitation Act, the determination of whether a person with a contagious disease is otherwise qualified must be made on an individualized basis, taking into account the: nature of the risk to others (how the disease is transmitted); duration of the risk to others (how long the carrier is infectious); severity of the risk to others (what the potential harm is to third parties); and probability the disease will be transmitted and will cause varying degrees of harm to others. The Court made it clear that the individualized inquiry required appropriate findings of fact about these factors, based on reasonable medical judgments given the current state of medical knowledge. While *Arline* arose out of allegations that an individual was not “otherwise qualified” under section 504 because she had a “contagious disease” that arguably posed a danger to the health and safety of others, the individualized inquiry and the specific analysis required by *Arline* apply to any exclusion on the basis of an allegation that a person with a disability poses a

“direct threat” to the health or safety of others, including outside the communicable disease context. *See, e.g., EEOC v. Amego, Inc.*, 110 F.3d 135, n.6 (1st Cir. 1997) (“While the language of the ‘direct threat’ provision is not limited to instances where the threat comes from communicable diseases, the provision originated in the communicable disease context.” (citing H.R. Rep. No. 101–485 (II), at 76, 1990 U.S.C.C.A.N. at 358–59)).

Congress turned to *Arline* as the foundation for incorporating the “direct threat” concept into the ADA. *See* H.R. Rep. No. 101–485 (III), at 45; 42 U.S.C 12111(3). The House Report stated: “While the *Arline* case involved a contagious disease, * * * the reasoning in that case is applicable to other circumstances. A person with a disability must not be excluded, or found to be unqualified, based on stereotypes or fear.” *Id.* Congress conceived of the “direct threat” concept arising in the context of a challenge to an individual’s qualifications, or standing alone as a basis for exclusion. The Department’s 1991 section-by-section analysis for the title II regulation indicated that the incorporation of the *Arline* “direct threat” concept and analysis was essential, “if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks.” 28 CFR part 35, app. B. The ADA regulatory language for titles II and III addresses determinations of “direct threat[s]” at 28 CFR 35.104, 36.104 (definitions) and at 28 CFR 35.139, 36.208 in a substantially similar manner. The title II and III regulations define “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services * * *.” 28 CFR 35.104, 36.104. Consistent with *Arline*, the regulations set forth evaluative criteria directing that determinations as to whether an individual’s disability constitutes a direct threat to

others must be based on individualized findings of fact that take into account the nature, duration, and severity of the risk to others, the likelihood that injury might occur, and whether reasonable accommodations could mitigate the risk to others. Accordingly, the Department is proposing to revise its section 504 regulation to include language addressing a “direct threat” that will be consistent with the standards articulated in *Arline* and the language in the Department’s ADA title II and III regulations.

Additionally, the Department proposes to include a new paragraph at proposed § 42.513(c) that addresses “direct threat” in the employment discrimination context. As provided in the definitions section, the applicable definition of “direct threat” in the employment discrimination context includes significant risk of substantial harm to self. The Department is therefore proposing to include a paragraph that provides that an employer does not have to employ an individual who would pose a “direct threat” as that term is defined in the EEOC’s regulation implementing title I of the ADA at 29 CFR 1630.2(r) and 1630.15(b).

Section 42.514—Illegal use of drugs

The ADA amended the Rehabilitation Act to exclude individuals engaging in illegal drug use from coverage of section 504. *See* ADA, sec. 512 (codified at 29 U.S.C. 705(10)). The Department proposes to include a new provision at § 42.514 that reflects this requirement and uses the same language that is set forth in the comparable provision in the regulation implementing title II of the ADA at 28 CFR 35.131.

Section 42.515—Claims of no disability

In § 42.515, the Department proposes to add a new provision stating that “[n]othing in this subpart shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a

disability was granted a reasonable accommodation that was denied to an individual without a disability.” This provision is consistent with a recent amendment to title V of the ADA by section 6 of the ADA Amendments Act. *See* ADA Amendments Act, sec. 6 (codified at 42 U.S.C. 12201(g)). While Congress did not expressly apply this provision to section 504 at that time, the Department believes that in order to maintain appropriate consistency between title II of the ADA and section 504, this principle should be equally applicable to the Department’s regulatory provisions for federally assisted programs and activities.

Program Accessibility

Section 42.521—Existing facilities

Section 42.521 addresses the obligations of recipients to operate each program or activity subject to this subpart so that when viewed in its entirety, the program or activity is readily accessible to and usable by individuals with disabilities. This obligation, which applies to existing facilities, is generally known as “program accessibility.” The comparable obligation is found in the ADA title II regulation at 28 CFR 35.150. The Department is proposing to make non-substantive changes to certain provisions in § 42.521 in order to conform them to the corresponding language in the title II regulation, including adding a specific provision at § 42.521(b)(3) to address how a historic preservation program shall achieve program accessibility where structural changes would threaten or destroy the historically significant features of a historic property. Aligning the section 504 provision addressing historic preservation programs with the title II provision will ensure that recipients subject to both the ADA and section 504 may follow the same rules with respect to historic preservation.

In conforming the language of § 42.521 to the corresponding title II provision, the Department is also proposing to add an affirmative statement to the regulation at § 42.521(a)(2)

making it clear that the longstanding limitations of undue financial and administrative burden and fundamental alteration apply to the obligation to provide program accessibility. *See Alexander v. Choate*, 469 U.S. 287 (1985); *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979).

The Department is also proposing several other revisions to § 42.521. In § 42.521(b)(1), the Department is proposing to update the references to the accessibility standards that apply to structural changes to buildings and facilities made for the purposes of providing program accessibility so that the section references the 2010 ADA Standards for Accessible Design (2010 Standards), which the Department is proposing to adopt in § 42.522 below.

The Department's proposed adoption of the 2010 Standards as the standard under section 504 for new construction and alterations raises the question of whether recipients will have to update elements in buildings or facilities currently compliant with the Uniform Federal Accessibility Standards (UFAS) that are not otherwise being altered, in order to comply with the 2010 Standards. In order to provide certainty to recipients and individuals with disabilities alike, the Department is proposing to add a safe harbor provision at § 42.521(b)(2), which specifies that "elements that have not been altered in existing facilities on or after [INSERT EFFECTIVE DATE OF THE RULE], and that comply with the corresponding technical and scoping specifications for those elements in the Uniform Federal Accessibility Standards (UFAS), * * * are not required to be modified to be brought into compliance with the requirements set forth in the 2010 Standards." This provision is similar to the safe harbor provision in the Department's ADA title II regulation at 28 CFR 35.150(b)(2)(i).

Section 42.521(c)—Small providers.

The Department's current regulation at § 42.521(c) provides that "[i]f a recipient with fewer than fifteen employees finds, after consultation with [an individual with a disability] seeking its

services, that there is no method of complying with § 42.521(a) other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the [individual with a disability] to other available providers of those services that are accessible.” When the Civil Rights Restoration Act (CRRA) took effect in 1988, it amended section 504 to provide that small providers are not required “to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection.” *See* Public Law 100–259, sec. 4 (Mar. 22, 1988), codified at 29 U.S.C. 794(c). The legislative history of the CRRA referenced, and explicitly affirmed, provisions similar to the proposed § 42.521(c) that existed in certain Federal agency section 504 regulations on March 22, 1988, including those from the U.S. Department of Agriculture (USDA) and the U.S. Department of Veterans Affairs (VA). *See* S. Rep. No. 100–64(I) at 23-24 (June 5, 1987). The USDA’s section 504 regulation provided (and continue to provide) that a recipient who is a small provider may, as an alternative, refer an individual with a disability “to other providers of those services that are accessible at no additional cost” to the individual with a disability. 7 CFR 15b.18(c). The VA’s section 504 regulation provided (and continue to provide) that “[w]here referrals [by small providers] are necessary, transportation costs shall not exceed costs to and from recipients’ programs or activities.” 38 CFR 18.422(c). The legislative history also set forth expectations about small providers’ obligations to individuals with disabilities when making their facilities accessible would involve a significant structural alteration. The legislative history cited to the Department of Health and Human Services’ (HHS) regulation, noting that under the regulation, small providers may exercise the exception only after determining “that the other provider’s program is, in fact, accessible and that

the other provider is willing to provide the services.” S. Rep. No. 100–64 (I), at 23-24 (citing to HHS rule at 45 CFR 84.22(c)); *see* 42 FR 22676, 22689 (May 4, 1977). The legislative history further observed that under the regulation, prior to making any referral, the small providers must ensure that there are “no resulting additional obligations to the [individual with a disability].” S. Rep. No. 100–64 (I), at 23; *see* 42 FR 22676, 22689 (May 4, 1977). Referencing the HHS, VA, and USDA regulations, the legislative history affirmed that the new statutory “subsection makes it clear that the special rules now contained in the above described regulations are now specifically statutorily authorized.” S. Rep. No. 100–64 (I), at 24.

The Department is proposing to revise its small provider provision to reflect Congress’s intent when it revised section 504. Accordingly, the Department proposes to revise § 42.521(c) to provide that a recipient with fewer than 15 employees who finds, after consultation with an individual with a disability seeking its services, that there is no method of complying with § 42.521(a) other than making a significant alteration to its existing facilities, may, as an alternative, refer the individual with a disability to alternative providers of available accessible services. The proposed revision further provides that for these purposes, in order to ensure that the services are available, the small provider “must first determine that the alternative provider’s services are accessible, the alternative provider is willing to provide the services, the services are available at no additional cost to the individual with a disability, and transportation costs to and from the alternative provider do not exceed costs to and from the small provider.” As with all providers subject to section 504, if the cost of making structural changes as a means of providing program accessibility in existing facilities is an undue financial and administrative burden, then the small provider is not obligated to make those changes. The Department notes that in the vast

majority of cases, small providers are also subject either to the program accessibility requirements of title II of the ADA or the barrier removal obligation of title III of the ADA.

Section 42.521(d)—Written plan required for certain recipients to achieve program accessibility.

The Department is proposing to revise § 42.521(d) to clarify that this provision only refers to those circumstances where a written plan was originally required for recipients subject to the rule when it first took effect. The Department is proposing to replace all references in this section that set compliance dates for specific requirements in relation to the “effective date of this subpart” with references to the actual dates when compliance was required. These changes will maintain continuity of regulatory requirements by clarifying that the original effective date of the subpart (and other deadlines based on this original effective date), and not the date these proposed amendments take effect, is the operative date for compliance with this section of the regulation.

Section 42.521(e)—Notice of location of accessible facilities.

Under § 42.521(e) of the Department’s current regulation, the recipient is required to adopt and implement procedures to ensure that interested persons, including persons with various types of disabilities, can obtain information as to the existence and location of accessible services, activities, and facilities. The Department proposes to make a non-substantive revision to the provision on notice of location of accessible facilities (renumbered as § 42.521(e)(1)) to reflect updated terminology describing certain disabilities.

Proposed § 42.521(e)(2) clarifies the obligation to provide notice by adding language consistent with the existing title II obligation at 28 CFR 35.163(b) requiring signs at a primary

entrance to each of the recipient's inaccessible facilities, if any, directing users to an accessible facility or a location where they can obtain information about accessible facilities.

Section 42.522—Program accessibility in jails, detention and correctional facilities, and community correctional facilities

The Department is proposing to add a new section entitled “Program accessibility in jails, detention and correctional facilities, and community correctional facilities.” This section, which is modeled after the Department’s title II regulation at 28 CFR 35.152, provides additional guidance about the specific application of section 504’s general requirements to these facilities operated by or on behalf of recipients of Federal financial assistance from the Department. While all of the jails, detention and correctional facilities, and community correctional facilities funded by the Department are also public entities subject to the title II requirements, because the Department provides assistance to so many of the agencies that operate these facilities, it believes it will be helpful to recipients to understand that the same requirements apply under both statutes. The Department has added some language that clarifies that the requirements in this section are in addition to the general requirements of this subpart and intends that this section be interpreted consistent with 28 CFR 35.152.

Section 42.523—New construction and alterations

Section 42.523(a) and (b)—Design and construction; alteration.

Section 42.522(a) of the Department’s current regulation requires that, if construction of a recipient’s facility commenced after the effective date of the regulation, the facility must be designed and constructed so that it is readily accessible to and usable by individuals with disabilities. In proposed § 42.523(a), the Department proposes to replace the reference to the “effective date of this subpart” with “July 3, 1980,” which was the date the Department’s

original section 504 regulation took effect. This will maintain continuity of regulatory requirements by clarifying that the original effective date of the subpart, and not the date these proposed amendments take effect, is the operative date for compliance with this section of the regulation.

Section 42.522(a) of the Department's existing regulation also requires that facility alterations commenced after the effective date of the regulation that affect or may affect the facility's usability must be carried out so that, to the maximum extent feasible, the altered portion of the facility is readily accessible to and usable by individuals with disabilities. The Department proposes to separate this requirement into its own paragraph at proposed § 42.523(b) and to update its phrasing for clarity. For the same purposes as the new construction paragraph above, the Department proposes to replace the reference to the "effective date of this subpart" with "July 3, 1980."

Section 42.523(c)(1)—Adoption of updated accessibility standards.

The Department proposes to revise § 42.523 to adopt the 2010 Standards for new construction and alterations in lieu of the Uniform Federal Accessibility Standards (UFAS).¹⁰ Section 42.522 of the Department's current regulation provides that any new construction or structural alterations made by recipients must be made in compliance with UFAS, 49 FR 31528, app. A (Aug. 7, 1984). UFAS was adopted in 1991 as the applicable accessibility standard for section 504 as part of a joint rulemaking with several other agencies, moderated by the Department pursuant to its coordinating authority for section 504 under Executive Order 12250.

¹⁰ In the preamble to the revised final title II regulation that adopted the 2010 Standards as new ADA accessibility standards, the Department stated that Federal agencies that extend Federal financial assistance should revise their section 504 regulations to adopt the 2010 Standards as updated standards for new construction and alterations that supersede UFAS. 75 FR 56164, 56213 (Sept. 15, 2010). The Department also stated its intent to work with Federal agencies to revise their section 504 regulations in the near future to adopt the 2010 Standards as the appropriate accessibility standard for their recipients.

The Department and participating agencies adopted UFAS to diminish the possibility that some recipients of Federal financial assistance would face conflicting enforcement standards either between section 504 and the Architectural Barriers Act of 1968 (which applies to all buildings and facilities built, altered, or leased with Federal dollars), or among the section 504 regulations of different Federal agencies. 55 FR 52136, 52136-37 (1990). The Department adopted the 2010 Standards for all new construction and alterations commenced on or after March 15, 2012, for entities subject to titles II or III of the ADA. 75 FR 56164, 56182 (Sept. 15, 2010). Until that time, both UFAS and the 1991 ADA Standards for Accessible Design were options for compliance with title II.

The Department's proposed § 42.523(c)(1) would require that recipients comply with the 2010 Standards beginning one year from the publication date of the final rule. In addition, the Department recognizes that many but not all of its recipients are also subject to the ADA and are already required to comply with the 2010 Standards. In order to minimize the timeframe during which recipients subject to section 504 and the ADA must comply with two separate accessibility standards, the Department proposes that beginning with the publication of the final rule in the Federal Register and until the 2010 Standards take effect under section 504, recipients will have the choice of complying with either UFAS or the 2010 Standards.¹¹ Regardless of which accessibility standard recipients choose to use during this time period, recipients must consistently rely on one accessibility standard and may not designate one accessibility standard for one part of a facility and the other for the remainder.

¹¹ This choice is in keeping with the Department's March 2011 memorandum advising Federal agencies that until such time as they update their agency's regulation implementing the federally assisted provisions of section 504, they may notify covered entities that they may use the 2010 Standards as an acceptable alternative to UFAS. Memorandum from Thomas E. Perez on Permitting Entities Covered by the Federally Assisted Provisions of Section 504 of the Rehabilitation Act to Use the 2010 ADA Standards for Accessible Design as an Alternative Accessibility Standard for New Construction and Alterations (Mar. 29, 2011), www.ada.gov/504_memo_standards.htm (last visited Mar. 10, 2016).

While in some circumstances the ADA imposes different obligations on public entities as compared to private entities, section 504 does not differentiate between public and private recipients of Federal financial assistance. Accordingly, neither the Department's section 504 regulation nor UFAS imposes different scoping and technical accessibility requirements on recipients based upon their status as public or private entities.

Although in nearly all circumstances the requirements in the 2010 Standards for buildings and facilities subject to either title II or title III of the ADA are the same, there are several instances where the requirements differ. Most significantly, Exception 1 of section 206.2.3 of the 2010 Standards exempts certain multistory buildings owned by private entities from the requirement to provide an elevator to facilitate an accessible route throughout the building. This exemption does not apply to buildings owned by public entities.¹² Section 217.4.3 of the 2010 Standards also specifies TTY requirements for public buildings that are different than those required for private buildings. In order to maintain the required consistency in the accessibility requirements applicable to all its recipients, regardless of whether they are public or private entities, the Department proposes to require all buildings and facilities subject to its section 504 federally assisted regulation to comply with the 2010 Standards' scoping and technical requirements for a "public building or facility," which are the requirements for buildings subject to title II of the ADA.

¹²The Department also notes that the current accessibility standard, UFAS, has no elevator exemption for private entities. Therefore, requiring private entities that are subject to both title III of the ADA and section 504 to comply with the requirements for public buildings and facilities in the 2010 Standards imposes no new burdens on those entities.

UFAS and the 2010 Standards also have differing requirements for employee work areas.¹³ Sections 4.1.2(17) and 4.1.4(4-13) of UFAS require that most employee work areas be accessible where those areas would result in the employment of individuals with disabilities, and that 5% of all work stations in an employee work area be accessible. Sections 203.9 and 207.1 of the 2010 Standards require only that work areas be designed for approach, entry, and exit by individuals with disabilities. Subject to certain exceptions, section 206.2.8 of the 2010 Standards requires common use circulation paths in employee work areas to be accessible to allow individuals with disabilities to move within the space. As the Department previously noted in its “Analysis and Commentary on the 2010 Standards for Accessible Design,” the 2010 Standards’ approach to work areas provides access for individuals with disabilities to approach, enter, and exit work areas such that reasonable accommodations to those work areas can then be made as required by the ADA and section 42.511 of the Department’s current regulation. 28 CFR part 36, app. B, https://www.ada.gov/regs2010/titleIII_2010/reg3_2010_appendix_b.htm. The Department expects that maintaining consistent application of the 2010 Standards will streamline compliance for many recipients, particularly those that are subject to titles II or III of the ADA.

In addition, the Department’s current section 504 federally assisted regulation at § 42.522(b) allows departures from the requirements of UFAS if the other methods used provide “substantially equivalent or greater access to and usability of the building.” This concept of departure from the accessibility standards is retained in this regulation (renumbered as § 42.523(c)(1)(v)), but the phrasing is adjusted for consistency with the title II regulation.

¹³ In addition, section 4.1.2(13) of UFAS requires visual alarms where warning systems are provided. Section 215.3 of the 2010 Standards require that audible alarms in employee work areas have wiring such that visual alarms can be integrated into the alarm system.

Lastly, the Department notes that a recipient that receives funding from multiple Federal agencies must ensure that it is compliant with the accessibility standards of each agency from which it receives Federal funding.

Section 42.523(c)(2) and (3)—Triggering events for compliance with the applicable accessibility standards.

As discussed above, the Department is proposing that all recipients must comply with the 2010 Standards in lieu of UFAS one year from the publication date of the final rule in the Federal Register. In recognition of the fact that buildings and facilities may be in the planning, design, or construction phases for a number of years, the Department is proposing to specify “triggering events” that would determine which buildings and facilities must comply as of the compliance date. The Department is proposing, however, to use different “triggering events” for application of the 2010 Standards to new construction and alterations for “public entities” that receive financial assistance from the Department as compared to “private entities” that receive such assistance. These two different categories of “triggering events” are based upon the “triggering events” specified in the Department’s title II and title III rules at 28 CFR 35.151(c) and 28 CFR 36.406(a), respectively. The Department expects that maintaining consistency with the ADA requirements in this regard will simplify application of the 2010 Standards for recipients already subject to either title II or title III.

Thus, the Department is proposing that recipients that are private entities may choose either UFAS or the 2010 Standards when one of the following events has occurred on or after the date of publication of the final rule in the Federal Register but before the compliance date for the 2010 Standards: (1) the last application for a building permit or permit extension is certified to be complete by a State, county, or local government; (2) in those jurisdictions where the

government does not certify completion of applications, the last application for a building permit or permit extension is received by the State, county, or local government; or (3) if no permit is required, the commencement of physical construction or alterations.

Similarly, the Department is proposing that recipients that are private entities must comply with the 2010 Standards as of one year from publication of this rule in the Federal Register when one of the following events has occurred on or after one year from the date of publication of the final rule in the Federal Register: (1) the last application for a building permit or permit extension is certified to be complete by a State, county, or local government; (2) in those jurisdictions where the government does not certify completion of applications, the last application for a building permit or permit extension is received by the State, county, or local government; or (3) if no permit is required, the commencement of physical construction or alterations.

For public entities receiving Federal financial assistance from the Department, the Department is proposing to use the commencement of physical construction or alterations on or after the publication date of the final rule but before the required compliance date of the 2010 Standards as the “triggering event” for the choice of standards permitted by § 42.523(c)(1). Similarly, the Department is proposing to use the commencement of physical construction or alterations on or after one year from publication of the final rule in the Federal Register as the “triggering event” for the requirement to comply with the 2010 Standards. This is consistent with the approach the Department took for compliance with the 2010 Standards under title II of the ADA.

The Department is proposing at § 42.523(c)(3) to add a provision similar to the language in the ADA regulations at 28 CFR 35.151(c)(4) in title II and 28 CFR 36.406(a)(4) in title III that

states that “ceremonial groundbreaking or razing of structures prior to site preparation will not be considered to commence or start physical construction or alterations.”

42.523(c)(4)—Compliance with the Architectural Barriers Act of 1968.

Facilities designed, built, altered, or leased with Federal funds are subject to the requirements of the Architectural Barriers Act of 1968, as amended, 42 U.S.C. 4151-57 (ABA). Facilities that receive Federal financial assistance from the Department are required to comply with the ABA accessibility standards adopted by the General Services Administration (GSA), which is the Federal agency responsible for adopting ABA standards for all buildings subject to the ABA except for residential structures; buildings, structures, and facilities of the Department of Defense (DOD); and buildings, structures and facilities of the U.S. Postal Service (USPS).¹⁴ The U.S. Access Board is the enforcing authority with respect to complaints under the ABA.

Many, but not all, buildings and facilities used by recipients for their programs or activities are also covered by the ABA. Until recently, UFAS served as the applicable accessibility standard under both section 504 federally assisted regulations and the ABA, and, therefore, facilities that complied with UFAS were also in compliance with the ABA. While there is significant overlap between the current ABA standards and the 2010 Standards, there are a number of differences. Recipients subject to both statutes need to be aware of the requirements of both accessibility standards and need to comply with both. Thus, the Department is proposing at § 42.523(c)(4) to add a provision reminding recipients that “[n]othing in this section relieves recipients whose facilities are covered by the Architectural Barriers Act of 1968, as amended

¹⁴The U.S. Access Board is charged with promulgating accessibility guidelines that form the basis of the ABA standards adopted by GSA, Department of Housing and Urban Development (HUD), DOD, and USPS. *See* 42 U.S.C. 4151 *et seq.* On July 23, 2004, the Access Board published its final revised ABA Accessibility Guidelines (2004 ABAAS). *See* 69 FR 44084. In 2005, GSA adopted the 2004 ABAAS as the enforceable standard for Federal facilities under its jurisdiction. *See* 41 CFR 102–76.65.

(42 U.S.C. 4151-4157), from their responsibility of complying with the requirements of that Act and any implementing regulations.”

Procedures

Section 42.530—Administrative procedures for recipients

Certain provisions of § 42.505 of the existing regulation (renumbered as § 42.530) impose administrative requirements related to the designation of a responsible employee for compliance with this subpart (§ 42.505(d) of the current regulation), adoption of grievance procedures (§ 42.505(e) of the current regulation), and provision of notice of nondiscrimination (§ 42.505(f) of the current regulation). The existing regulatory provisions apply these specific requirements automatically to all recipients: employing 50 or more persons; and receiving Federal financial assistance from the Department of \$25,000 or more (in the case of the designated employee and grievance procedures) or more than \$25,000 (in the case of the provision of notice). However, the existing regulatory provisions also give the Department discretion whether to apply these requirements to “any recipient with fewer than fifty employees and receiving less than \$25,000” in financial assistance from the Department. *See* § 42.505(g).

The Department is seeking public comment on whether it should revise paragraphs 42.505(d), (e) and (f) of the existing regulation (renumbered as 42.530(c), (d) and (e)), to delete any references to size of grant award, so that the number of employees (50 or more) is the only criteria triggering the application of the administrative requirements in these three paragraphs. State and local governments already are subject to comparable requirements under title II of the ADA. *See* 28 CFR 35.104, 35.105. The Department is interested in public comment on how many recipients with 50 or more employees receive grants from the Department of less than \$25,000 and thus, would be affected if the Department were to revise the rule in this manner.

The Department is also interested in public comment on whether it should change or eliminate the number of employees or the grant amount that triggers these requirements, what the new threshold number of employees or grant amount should be to trigger the obligation to meet these requirements, the number of affected recipients if the Department makes this change, and the costs related to making this change.

Section 42.530(b)—Self-evaluation.

The Department is maintaining the provision requiring recipients to conduct a self-evaluation as a historical requirement but is revising it to refer to the requirements in the past tense. The Department's current regulation at § 42.505(c) requires in part that a recipient, "within one year of the effective date of this subpart, evaluate and modify its policies and practices that do not meet the requirements of this subpart." The Department is proposing to make a non-substantive revision to § 42.530(b) of this paragraph by replacing the phrase "within one year of the effective date of this subpart," with the actual date that was a year from when the subpart originally took effect, which is "July 3, 1981." While this provision does not require recipients to conduct a self-evaluation beyond the original deadline of July 3, 1981, the Department is retaining this provision because the self-evaluation requirement under section 504 is cross-referenced in the Department's ADA title II regulation at 28 CFR 35.105(d).

Section 42.530(d)—Adoption of grievance procedures.

Section 42.505(e) of the current regulation requires recipients to adopt grievance procedures. The Department proposes to make a non-substantive change to this provision (renumbered as § 42.530(d)) to clarify that the procedures adopted by the recipient must incorporate appropriate due process standards. The Department also proposes to revise this

paragraph to clarify that any individual may file a complaint with the Department without having first used the recipient's grievance procedures.

Section 42.530(e)—Notice.

Section 42.505(f) of the current regulation requires a recipient that employs 50 or more persons and that receives Federal financial assistance from the Department of more than \$25,000 to take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, employees, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of disability in violation of section 504 and this subpart. This provision also delineates the methods of initial and continuing notification to include “the posting of notices, publication in newspapers and magazines, placement of notices in recipients’ publication, and distribution of memoranda or other written communications.”

The proposed regulation maintains the requirement that the notice shall state that the recipient does not discriminate in its programs or activities with respect to access, treatment, or employment and shall include the identification of the person responsible for coordinating compliance with this subpart and where to file section 504 complaints with the Department and, where applicable, with the recipient. The Department encourages recipients to consider including in their notice information relating to the availability of auxiliary aids and services, procedures for obtaining such aids and services, contact information for the responsible employee, and the availability of grievance procedures.

The Department recognizes that the methods by which a recipient communicates with interested persons have changed significantly since this regulation was promulgated and that this regulation, as currently written, does not reflect the current and future state of information

dissemination. With the growth of the Internet and the World Wide Web, the Department has determined that the regulation should also reference postings on a recipient's Web site as a permissible method of communication and is proposing to include "publications on the recipient's internet Web site" as a method of initial and continuing notification in the regulation (renumbered as § 42.530(e)(1)). Many of the publications that previously were available in print such as pamphlets, brochures, maps, course catalogs, policies, and procedures are now posted on recipients' Web sites and can be printed or downloaded by an interested person viewing the Web site.

The Department has deleted the reference in this section to the initial notification deadline because the requirement to provide notice is a continuing obligation and the initial notification deadline has long passed.

Section 42.530(f)

The Department is proposing to remove the reference to paragraph (c)(2) in the current § 42.505(g) (renumbered as § 42.530(f)), which addresses self-evaluation as a potential requirement for recipients with fewer than 50 employees. The self-evaluation provision at paragraph (c)(2) (renumbered as paragraph (b)(2) in this section) is a historical requirement and does not apply to current or future recipients.

Section 42.531—Assurances required

Section 42.531(a)—Assurances required.

The Department is proposing to revise its provisions on assurances from government agencies at current § 42.504(b) and assurances from institutions at current § 42.504(c) to align these provisions with the definition of "program or activity" that was adopted by the Department in 2003 as a result of the Civil Rights Restoration Act and *Cureton v. NCAA*, 198 F.3d 107 (3d

Cir. 1999). *See* 68 FR 51334, 51364 (Aug., 26, 2003). Before the CRRA, the definition of “program” was limited to “the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, *e.g.*, a police department or department of corrections.” 45 FR 37620, 37626 (June 3, 1980). Therefore, it was necessary, for instance, to clarify that the assurance applied to the entire agency or agency of the same governmental unit if the policies of the other agency would affect the “program” (as defined at that time) for which Federal financial assistance was requested. However, it is no longer necessary to include that clarification, given that the definition of “program or activity” that was adopted in 2003 encompasses “all of the operations of the entity of a State or local governmental agency or department that distributes the federal assistance to another State or local governmental agency or department and all of the operations of the State or local governmental entity to which the financial assistance is extended.” *See* 68 FR 51334, 51336, 51364 (Aug. 26, 2003).

Additionally, the definition of “program or activity” adopted in 2003 also includes educational institutions, corporations and other private organization, and plants. The Department is proposing to revise current § 42.504(c) to ensure that the applicability of the nondiscrimination requirements is also addressed with respect to these entities consistent with the definition of “program or activity.”

Section 42.531(b)—Duration of obligation.

The Department’s current section 504 federally assisted regulation at § 42.504(d) provides that “[w]here the Federal financial assistance is to provide or is in the form of real or personal property, the assurance will obligate the recipient and any transferee for the period during which the property is being used for the purpose for which the Federal financial

assistance is extended or for another purpose involving the provisions of similar benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.” The Department proposes several clarifications to the duration of obligation requirement. First, the Department proposes to have the assurance apply to improvements provided by Federal financial aid and assistance, in addition to real or personal property. Second, the Department proposes to reference the provision of federally assisted services, in addition to benefits, as a determinant of the duration of assurance obligations. Finally, the Department proposes to replace the reference “[i]n all other cases” with “[w]hen the Federal financial assistance is not in the form of real or personal property or improvements” to clarify the particular circumstances under which the assurance continues to apply to the recipient during the period for which Federal financial assistance is extended.

Section 42.532—Compliance and enforcement procedures

The Department is maintaining the compliance and enforcement procedures provision from § 42.530 of its current regulation and has renumbered it as § 42.532. In an effort to account for future changes in organization and to eliminate obsolete references to some components that no longer exist within the Department, the Department proposes to replace the references to “LEAA, NIJ, BJS, OJARS, and OJDDP” with the phrase “a grant-making component of the Department.” In addition, the Department is proposing to revise § 42.530(c) which currently provides that “[i]n the case of programs or activities funded by LEAA, NIJ, BJS, OJARS, and OJDDP, the refusal to provide requested information under paragraph (a) of this section and [28 CFR] 42.106 *will be enforced* pursuant to the provisions of section 803(a) of title I of the Omnibus Crime Control and Safe Streets Act” as amended (emphasis added). The Department

believes that, in addition to the termination of funds as a remedy under Section 803(a) and its successor statute, 42 U.S.C. 3783, the Department should also have the discretion to consider, where appropriate, a more measured response to a recipient's refusal to provide requested information and therefore, should be able to avail itself of "the remedies, procedures and rights set forth in title VI of the Civil Rights Act of 1964 * * * available to any person aggrieved by any act or failure to act by any recipient of Federal assistance," consistent with the Rehabilitation Act. *See* 29 U.S.C. 794a(a)(2). Accordingly, the Department proposes to revise § 42.530(c) of the existing regulation (renumbered as § 42.532(a)(2)) to read "[i]n the case of programs or activities funded by a grant-making component of the Department, the refusal to provide access to sources of information pursuant to 28 CFR 42.106(c) *may be enforced* using the procedures cited in paragraph (a)(i) of this section or using the provisions of section 803(a) of title I of the Omnibus Crime Control and Safe Streets Act" as amended (emphasis added). The Department proposes to delete paragraphs (d) and (e) of existing § 42.530. Paragraph (d) established a 180-day limitation period from July 3, 1980, to file complaints of acts of discrimination that occurred prior to July 3, 1980. This provision is no longer necessary. Similarly, the Department proposes deleting paragraph (e) because it establishes a procedure for which the statute of limitations has long passed and is thus no longer necessary.

The Department also proposes to move its existing provision addressing remedial action from existing § 42.505(a) to proposed § 42.532(c) because the requirement for remedial action arises after a finding of discrimination has been made in accordance with the procedures set forth in this section. The Department believes that the placement of the remedial action provision in the compliance procedures section is a more logical placement than its current location in the

administrative requirements section. The Department also proposes making non-substantive edits to the existing language.

Lastly, the Department proposes to add a new paragraph at proposed § 42.532(d) that directs complaints alleging violations of section 504 by recipients of financial assistance from the Department to be filed with the Office of Justice Programs. The Office of Justice Programs is the entity within the Department that enforces section 504.

III. Regulatory Analysis

A. Executive Order 13563 and 12866—Regulatory Planning and Review

This NPRM has been drafted in accordance with Executive Order 13563 of January 18, 2011, 76 FR 3821, Improving Regulation and Regulatory Review, and Executive Order 12866 of September 30, 1993, 58 FR 51735, Regulatory Planning and Review. Executive Order 13563 directs agencies, to the extent permitted by law, to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The Department has determined that this proposed rule is a “significant regulatory action” as defined by Executive Order 12866, sec. 3(f). The Department has determined, however, that this proposed rule is not an economically significant regulatory action, as it will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the

economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This NPRM has been reviewed by the Office of Management and Budget (OMB) pursuant to Executive Orders 12866 and 13563.

This rule provides necessary revisions to the Department's current section 504 federally assisted regulation to: (1) incorporate amendments to the statute including the changes in the meaning and interpretation of the applicable definition of disability required by the ADA Amendments Act; (2) incorporate requirements stemming from judicial decisions; (3) update accessibility standards applicable to new construction and alteration of buildings and facilities; (4) update certain provisions to promote consistency with comparable provisions implementing title II of the ADA; and (5) make other non-substantive clarifying edits. The proposed regulation is intended to promote consistency of judicial interpretations and predictability of executive enforcement of section 504 of the Rehabilitation Act, as it pertains to federally assisted programs.

This rule does not significantly change any existing substantive obligations of recipients subject to the Department's federally assisted regulation because, with the exception of the updated accessibility standard, the Department is incorporating into its section 504 regulation definitions and requirements arising out of statutory amendments to the Rehabilitation Act and longstanding Supreme Court decisions. Moreover, the Department's adoption of the 2010 Standards as the updated accessibility standard under section 504 will have the effect of simplifying the obligations of its recipients. It should not result in any substantial costs since the vast majority of its recipients are already required to comply with the 2010 Standards because they are either State or local governments covered by title II of the ADA or public

accommodations subject to title III of the ADA. The harmonization of the section 504 accessibility requirements with the ADA's requirements will result in recipients being subject to only one accessibility standard (the 2010 Standards) instead of two and could have the effect of reducing costs since recipients will no longer have to be familiar with and apply up to two sets of requirements. Lastly, the conformance of section 504's regulatory provisions with the existing comparable regulatory provisions implementing title II of the ADA will not result in any substantial costs because the requirements under section 504 will remain substantially the same. Title II of the ADA is modeled on section 504 of the Rehabilitation Act of 1973, and Congress intended, through its 1992 Amendments to the Rehabilitation Act, that the principles underlying the ADA also apply to all sections of the Rehabilitation Act, including section 504. As a result, courts have generally treated claims under title II and section 504 the same.

Title III of the ADA applies to the activities of all public accommodations (including nonprofit organizations) funded by the Department with the exception of those recipients that fall within the ADA's exemption for "religious organizations or entities controlled by religious organizations." *See* 42 U.S.C. 12187. Based on the following data from the Department's grant-making components, the Department estimates that:

- Of the approximately 6395 recipients¹⁵ directly funded by the Office of Justice Programs (OJP), approximately 34 have self-identified as faith-based organizations and may well qualify for the ADA exemption.
- Of the approximately 1478 recipients¹⁶ funded by the Community Oriented Policing Services (COPS) Office, 0 have self-identified faith-based organizations.

¹⁵ This number is based upon OJP's data on active awards as of June 7, 2016. While it is possible that multiple awards may be provided to a single recipient, the Department is assuming a one to one correspondence between award and recipient for purposes of this analysis. The Department has no data on the number of subrecipients funded by OJP, or the number of those subrecipients that may qualify for the ADA religious exemption.

- Of the approximately 1739 discretionary grantees and 2934 discretionary subgrantees¹⁷ funded by the Office on Violence Against Women (OVW), approximately 84 have self-identified as faith-based organizations and may well qualify for the ADA exemption.

This data suggests a total of approximately 118 grantees and subgrantees collectively that are self-identified as faith-based organizations. However, because the Department has no data on the number of subrecipients funded by OJP or whether any of them are in fact religious entities, this number may be higher. OJP has previously estimated that there are approximately 100 total faith-based grantees and subgrantees funded by OVW and 50 total faith-based grantees and subgrantees funded by OJP, for a total estimate of 150 grantees and subgrantees from OJP and OVW collectively that are faith-based organizations.¹⁸ Therefore, we estimate between 118 and 150 total faith-based grantees and subgrantees.

The recipients falling under the ADA's religious exemption could be affected by any incremental changes in the accessibility requirements that result from the change in the applicable standard from UFAS to the 2010 Standards if they engage in new construction or alterations of the facilities serving the program or activity funded by the Department. As discussed in the preamble, however, because of the safe harbor set forth in proposed § 42.521(b)(2), these recipients will not have any obligation to modify any elements in their

¹⁶ This number is based upon COPS' data on active awards as of June 6, 2016. While it is possible that multiple awards may be provided to a single recipient, the Department is assuming a one to one correspondence between award and recipient for purposes of this analysis

¹⁷ This data reflects information that OVW collects from its discretionary grantees in their July-December 2014 semi-annual progress reports and from its subgrantees in their annual 2014 progress reports.

¹⁸ This number comes from the Department's proposed rule to amend 28 CFR part 38, titled "Partnerships with Faith-Based and Other Neighborhood Organizations; Proposed Rule," 80 FR 47316, 47322 (Aug. 6, 2015).

existing facilities that are compliant with UFAS unless they alter those elements after the compliance date for the Standards takes effect.

A subset of these recipients falling under the ADA religious exemption—those with fewer than 15 employees that were previously exempt from the automatic obligation to provide auxiliary aids and services—may be affected by the proposed elimination of the 15 employee threshold for that obligation. Some of these entities may have fewer than 15 employees.

Given the small subset of recipients who could potentially be affected and the infinite variations of the type of new construction or alteration that could occur along with the type of auxiliary aid or service that could be provided, it would not be feasible to quantify the impact of these changes on an individual basis. However, the Department believes that generally costs for individual recipients would not likely be significant.

The Department is interested in public comment on whether its assumptions are correct as to the following: 1) the number of recipients that fall within the ADA exemption for religious organizations or organizations controlled by religious organizations; 2) how many subrecipients funded by OJP may fall within the ADA religious exemption; 3) how many of these recipients also have fewer than 15 employees and whether this particular provision should have a compliance date later than the general effective date of the rule; and 4) the costs to individual recipients not being significant. The Department believes that the costs of this rule will be significantly less than \$100 million in any given year. The Department is interested in public comment on its assumptions that the costs of this rule will be significantly less than \$100 million in any given year.

B. Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation, and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. With the exception of the updated accessibility standard, the substantive changes to the section 504 regulation reflect the Department's incorporation of definitions and requirements arising out of statutory amendments to the Rehabilitation Act and longstanding Supreme Court decisions. Moreover, the Department's adoption of the 2010 Standards as the updated accessibility standard under section 504 will have the effect of simplifying the obligations of its recipients and should not result in any additional costs since the vast majority of its recipients are already required to comply with the 2010 Standards because they are either State or local governments covered by title II of the ADA or public accommodations subject to title III of the ADA. The harmonization of the section 504 accessibility requirements with the ADA requirements will result in recipients being subject to only one accessibility standard (the 2010 Standards) instead of two. Additionally, the conformance of section 504's regulatory provisions with existing comparable provisions implementing title II of the ADA will not result in any additional costs for the vast majority of recipients funded by the Department. Lastly, the rule does not include reporting requirements and imposes no new recordkeeping requirements. Even if the Department assumed that all of the recipients that may be subject to the ADA's religious exemption qualify as "small organizations" and would be affected by the incremental changes in the accessibility standards and the elimination of the 15-employee threshold for the requirement to provide auxiliary aids and services, the Department believes that the number of small entities affected by this rule, compared to the thousands of recipients funded by the Department's grant-making components does not constitute a "significant number of small entities" affected by this rule. The Department

is interested in public comment on its assumptions about the impact of the revisions to its section 504 regulation on small entities that receive Federal financial assistance from the Department.

C. Executive Order 13132: Federalism

Executive Order 13132 directs that, to the extent practicable and permitted by law, an agency shall not promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, that is not required by statute, or that preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. Because each change proposed by this rule does not have federalism implications as defined in the Executive Order, does not impose direct compliance costs on State and local governments, is required by statute, or does not preempt State law within the meaning of the Executive Order, the Department has concluded that compliance with the requirements of section 6 is not necessary.

D. Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and drafting language that gives full effect to issues of legal interpretation. The Department is proposing a number of changes to this regulation to enhance its clarity and satisfy the plain language requirements, including revising the organizational scheme and adding headings to make it more user-friendly. The Department operates a toll-free ADA Information Line (800) 514-0301 (voice) and (800) 514-0383 (TTY) that the public is welcome to call to obtain assistance in understanding anything in this proposed rule. If any commenter has suggestions for how the regulation could be written more clearly, please provide comments using the contact

information provided in the introductory section of this proposed rule entitled, “FOR FURTHER INFORMATION CONTACT.”

E. Paperwork Reduction Act

This proposed rule does not contain any new or revised “collection[s] of information” as defined by the Paperwork Reduction Act of 1995. 44 U.S.C. 3501 *et seq.*

F. Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

List of Subjects for 28 CFR Part 42

Administrative practice and procedure, Buildings and facilities, Civil rights, Communications, Grant programs, Individuals with disabilities, Reporting and recordkeeping requirements.

By the authority vested in me as Attorney General by law, including 5 U.S.C. 301, 28 U.S.C. 509, 510, 29 U.S.C. 794, Executive Order 12250, part 42 of title 28 of the Code of Federal Regulations is proposed to be amended as follows:

Part 42 -- Nondiscrimination; Equal Employment Opportunity; Policies and Procedures.

1. Revise Subpart G to read as follows:

Subpart G—Nondiscrimination Based on Disability in Federally Assisted Programs or Activities—Implementation of Section 504 of the Rehabilitation Act of 1973

GENERAL

Sec.

42.501 Purpose.

42.502 Application, broad coverage, and relationship to other laws.

42.503 Definitions.

42.504–42.509 [Reserved]

GENERAL NONDISCRIMINATION REQUIREMENTS

42.510 General prohibitions against discrimination.

42.511 Communications.

42.512 Employment.

42.513 Direct threat.

42.514 Illegal use of drugs.

42.515 Claims of no disability.

42.516–42.519 [Reserved]

PROGRAM ACCESSIBILITY

42.520 Discrimination prohibited.

42.521 Existing facilities.

42.522 Program accessibility in jails, detention and correctional facilities, and community correctional facilities.

42.523 New construction and alterations.

42.524–42.529 [Reserved]

PROCEDURES

42.530 Administrative procedures for recipients.

42.531 Assurances required.

42.532 Compliance and enforcement procedures.

42.533–42.539 [Reserved]

Appendix -- Appendix A to Subpart G of Part 42 -- Federal Financial Assistance Administered by the Department of Justice to Which This Subpart Applies.

Appendix – Appendix B to Subpart G of Part 42 [Reserved].

Appendix – Appendix C to Subpart G of Part 42 -- Department Regulations Under Title VI of the Civil Rights Act of 1964 (28 CFR 42.106-42.110) Which Apply to This Subpart

Appendix -- Appendix C to Subpart G of Part 42 -- OJARS' Regulations Under the Omnibus Crime Control and Safe Streets Act, as Amended, Which Apply to This Subpart (28 CFR 42.205 and 42.206)

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 29 U.S.C. 794; E.O. 12250.

GENERAL

42.501 Purpose.

The purpose of this subpart is to implement section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of disability in any program or activity receiving Federal financial assistance.

42.502 Application, broad coverage, and relationship to other laws.

(a) *Application.* This subpart applies to each recipient of Federal financial assistance from the Department of Justice and to each program or activity receiving such assistance. The requirements of this subpart do not apply to the ultimate beneficiaries of Federal financial assistance in the program or activity receiving Federal financial assistance. This subpart does not apply to programs or activities conducted by the Department of Justice.

(b) *Broad scope of coverage.* Consistent with the ADA Amendments Act’s purpose of reinstating a broad scope of protection under both the Americans with Disabilities Act and section 504, the definition of “disability” in this subpart shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of section 504. The primary object of attention in cases brought under this subpart should be whether entities covered under section 504 have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of “disability.” The question of whether an individual meets the definition of “disability” should not demand extensive analysis.

(c) *Relationship to other laws.*

(1) The obligation to comply with this subpart is not obviated by or otherwise affected by the existence of any State or local law or other requirement that, on the basis of disability, imposes prohibitions or limits upon the eligibility of qualified individuals with disabilities to receive aid, benefits, or services or to practice any occupation or profession.

(2) This subpart does not invalidate or limit the remedies, rights, and procedures of any other Federal law, or State or local law (including State common law), that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

42.503 Definitions.

As used in this subpart the term—

2004 ADAAG means the requirements set forth in appendices B and D to 36 CFR part 1191 (2009).

2010 Standards means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in 28 CFR 35.151.

The Act means the Rehabilitation Act of 1973, Public Law 93–112, as amended, 29 U.S.C. 701 *et seq.*

Applicant means one who submits an application, request, or plan required to be approved by the designated Department official or by a primary recipient, as a condition to eligibility for Federal financial assistance.

Auxiliary aids and services include—

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; note takers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing.

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

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

(4) Other similar services and actions.

Component means any specific division, operating bureau, or other organizational unit of the Department of Justice.

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

Department means the Department of Justice, including each of its specific divisions, operating bureaus, and other organizational units.

Direct threat means

(1) With respect to any aid, benefit, or service provided under a program or activity subject to this subpart, a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.

(2) With respect to employment, the term as defined by the Equal Employment Opportunity Commission's regulation implementing title I of the Americans with Disabilities Act of 1990, at 29 CFR section 1630.2(r).

Disability has the same meaning as given in 28 CFR part 35.

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

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

Federal financial assistance means any grant, cooperative agreement, loan, contract (other than a direct Federal procurement contract or a contract of insurance or guaranty), subgrant, contract under a grant, or any other arrangement by which the Department provides or otherwise makes available assistance in the form of—

- (1) Funds;
- (2) Services of Federal personnel;
- (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; and
- (4) Any other thing of value by way of grant, loan, contract or cooperative agreement.

Historic preservation programs means programs conducted by recipients of Federal financial assistance that have preservation of historic properties as a primary purpose.

Historic Properties means those buildings or facilities that are eligible for listing in the National Register of Historic Places, or such properties designated as historic under a statute of the appropriate State or local government body.

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

Individual with a disability means any person who has a disability. The term *individual with a disability* does not include an individual who is currently engaging in the illegal use of drugs, when the recipient acts on the basis of such use.

Primary recipient means any recipient that is authorized or required to extend Federal financial assistance to another recipient.

Program or activity means all of the operations of any entity described in paragraphs (1) through (4) of this section, any part of which is extended Federal financial assistance—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency, as defined in 20 U.S.C. 7801, system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship if—

(A) Assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) The corporation, partnership, private organization, or sole proprietorship is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (s)(1), (2), or (3) of this section.

Qualified individual with a disability means—

(1) With respect to any aid, benefit, or service provided under a program or activity subject to this subpart, an individual with a disability who, with or without reasonable accommodations in rules, policies, or procedures, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids or services, meets the essential eligibility requirements for receipt of services or the participation in programs or activities provided by a recipient; and

(2) With respect to employment, the definition of “qualified” in the Equal Employment Opportunity Commission’s regulation implementing title I of the Americans with Disabilities Act of 1990, at 29 CFR section 1630.2(m), applies to this subpart.

Qualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. *Qualified interpreters* include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

Qualified reader means a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.

Recipient means any State or unit of local government, any instrumentality of a State or unit of local government, any public or private agency, institution, organization, or other public or

private 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.

Section 504 means section 504 of the Rehabilitation Act of 1973, Public Law 93–112, 87 Stat. 394, 29 U.S.C. 794, as amended.

Subrecipient means an entity to which a primary recipient extends Federal financial assistance.

Ultimate beneficiary is one among a class of persons who are entitled to benefit from, or otherwise participate in, a program or activity receiving Federal financial assistance and to whom the protections of this subpart extend. The *ultimate beneficiary* class may be the general public or some narrower group of persons.

Video remote interpreting (VRI) service means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 42.511.

GENERAL NONDISCRIMINATION REQUIREMENTS

42.510 General prohibitions against discrimination.

(a) *General.* No qualified individual with a disability shall, solely on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity subject to this subpart.

(b) *Discriminatory actions prohibited.* (1) A recipient may not, in providing any program or activity subject to this subpart directly, or through contractual, licensing, or other arrangements, on the basis of disability—

- (i) Deny a qualified individual with a disability the opportunity accorded others to participate in, or benefit from, the aid, benefit, or service;
- (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
- (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
- (iv) Provide different or separate aid, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than are provided to others unless such action is necessary to provide qualified individuals with disabilities or any class of individuals with disabilities with aid, benefits, or services that are as effective as that provided to others;
- (v) Deny a qualified individual with a disability an equal opportunity to provide services to the program or activity;
- (vi) Deny a qualified individual with a disability an opportunity to participate as a member of a planning or advisory board;
- (vii) Aid or perpetuate discrimination against a qualified individual with a disability by providing assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity;
- (viii) Permit the participation in the program or activity of agencies, organizations, or persons which discriminate against individuals with disabilities who participate in or benefit from the recipient's program; or

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

(2) A recipient may not deny a qualified individual with a disability the opportunity to participate in any aid, benefits, or services that are not separate or different, despite the existence of permissibly separate or different aid, benefits, or services.

(3) A recipient may not, directly or through contractual, licensing, or other arrangements, utilize criteria or methods of administration —

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

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

(iii) That perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are departments or agencies, special purpose districts, or other instrumentalities of the same State or local government unit.

(4) A recipient may not, in determining the site, or a location of a facility, make selections—

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

(5) An entity not otherwise receiving Federal financial assistance but using a facility provided with the aid of Federal financial assistance after the effective date of this subpart is prohibited from discriminating on the basis of disability.

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

(7) A recipient may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a recipient establish requirements for any of the programs or activities of entities that are licensed or certified that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a recipient are not, themselves, covered by this subpart unless those entities are also recipients of Federal financial assistance from the Department.

(c) This subpart does not prohibit the exclusion of individuals without disabilities or specified classes of individuals with disabilities from aid, benefits, or services limited by Federal statute or executive order to individuals with disabilities or a different class of individuals with disabilities.

(d) Nothing in this subpart prohibits a recipient from providing aid, benefits, or services to individuals with disabilities or to a particular class of individuals with disabilities beyond those required by this part.

(e) *Integrated setting.* A recipient shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(f) Nothing in this subpart shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under section 504 or this subpart which such individual chooses not to accept.

(g) *Reasonable accommodations.* (1) A recipient shall make reasonable accommodations in policies, practices, or procedures when such accommodations are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the accommodations would fundamentally alter the nature of the program or activity or result in undue financial and administrative burdens.

(2) A recipient is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong of the definition of disability as defined in 28 CFR 35.104.

(3) With respect to employment, the definitions and standards applied to “reasonable accommodation” and “undue hardship” in the Equal Employment Opportunity Commission's regulation implementing title I of the Americans with Disabilities Act, at 29 CFR sections 1630.2(o) and (p), and 1630.9, apply to this subpart.

(h) *Prohibition on surcharges.* A recipient may not place a surcharge on a particular individual with a disability or any class of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, reasonable accommodations, or program accessibility, that are required to provide that individual or class with the nondiscriminatory treatment required by the Act or this subpart.

(i) *Prohibition on associational discrimination.* A recipient shall not exclude or otherwise deny aid, benefits, or services of its program or activity to an individual because of that individual’s relationship or association with an individual with a known disability.

(j) *Prohibition on discriminatory eligibility criteria.* A recipient shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any aid, benefit, or service unless such criteria can be shown to be necessary for the provision of the aid, benefit, or service being offered.

(k) *Prohibition on intimidation and retaliation.* A recipient shall not intimidate or retaliate against any individual, with or without a disability, for the purpose of interfering with any right secured by section 504 or this subpart.

(l) The enumeration of specific forms of prohibited discrimination in this subpart is not exhaustive but only illustrative.

42.511 Communications.

(a) *General.* (1) A recipient shall take appropriate steps to ensure that communications with applicants, participants, beneficiaries, members of the public, and companions with disabilities are as effective as communications with others.

(2) For purposes of this section, “companion” means a family member, friend, or associate of an individual seeking access to a program, or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate.

(b) *Auxiliary aids and services.* (1) A recipient shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, beneficiaries, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity, of a recipient.

(2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length,

and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a recipient entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(c) *Limitations on use of accompanying adults or children as interpreters.*

(1) A recipient shall not require an individual with a disability to bring another individual to interpret for him or her.

(2) A recipient shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except—

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) When the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(3) A recipient shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public when there is no interpreter available.

(d) *Video remote interpreting (VRI) services.* A recipient that provides qualified interpreters via VRI services shall ensure that it provides—

(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, and can be seen by the participating individual regardless of the individual's body position;

(3) A clear, audible transmission of voices; and

(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

(e) *Telecommunications.* (1) Where a recipient communicates by telephone with applicants, participants, beneficiaries, members of the public, and companions with disabilities, the recipient shall communicate with individuals who are deaf or hard of hearing or have speech disabilities using telecommunication systems that provide equally effective communication.

(2) When a recipient uses an automated-attendant system, including, but not limited to, voice mail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including, but not limited to TTYs and all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems.

(3) A recipient shall respond to telephone calls from a relay service, established under 47 U.S.C. 225, including telephone relay, video relay, and Internet protocol (IP) relay in the same manner that it responds to other telephone calls.

(f) *Limitations.* This section does not require the recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in

undue financial and administrative burdens. In those circumstances where the recipient believes that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the recipient has the burden of proving that compliance with § 42.511 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the recipient or the head's designee after considering all resources available for use in the funding and operation of the program or activity, and it must be accompanied by a written statement of the reasons for reaching that conclusion. If an action otherwise required by this section would result in such an alteration or such burdens, the recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, persons with a disability receive the aid, benefits, and services of the program or activity.

42.512 Employment.

(a) *Discrimination prohibited.* (1) *General.* No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any program or activity to which this subpart applies.

(2) *Employment discrimination standards.* The standards used to determine whether paragraph (a)(1) of this section has been violated shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 *et seq.*, and, as such sections relate to employment, the provisions of sections 501 through 504 and 511 of the ADA of 1990, as amended (codified at 42 U.S.C. 12201-12204, 12210), as implemented in the Equal Employment Opportunity Commission's regulation at 29 CFR part 1630. The

procedures to be used to determine whether paragraph (a) of this section has been violated shall be the procedures set forth in § 42.532 of this subpart.

42.513 Direct threat.

(a) This subpart does not require a recipient to permit an individual to participate in or benefit from the program or activity of that recipient when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a recipient must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain—the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable accommodations in policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

(c) An employer does not have to employ an individual who would pose a direct threat as that term is defined in the Equal Employment Opportunity Commission’s regulation implementing title I of the Americans with Disabilities Act of 1990, at 29 CFR sections 1630.2(r) and 1630.15(b).

42.514 Illegal use of drugs.

(a) *General.* Except as provided in paragraph (c) of this section, “Health and drug rehabilitation services,” this subpart does not prohibit discrimination against an individual based on that individual’s current use of illegal drugs.

(b) *Non-discrimination requirement.* A recipient shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who—

(1) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(2) Is participating in a supervised rehabilitation program; or

(3) Is erroneously regarded as engaging in such use.

(c) *Health and drug rehabilitation services.* (1) A recipient shall not deny health services, or services provided in connection with drug rehabilitation, to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(2) A drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

(d) *Drug testing.* (1) This subpart does not prohibit a recipient from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in paragraph (d)(1) of this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

42.515 Claims of no disability.

Nothing in this subpart shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted a reasonable accommodation that was denied to an individual without a disability.

PROGRAM ACCESSIBILITY

42.520 Discrimination prohibited.

A recipient shall ensure that no qualified individual with a disability is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program or activity receiving Federal financial assistance because the recipient's facilities are inaccessible to or unusable by individuals with a disability.

42.521 Existing facilities.

(a) *Accessibility.* A recipient shall operate its program or activity so that when each part of the program or activity is viewed in its entirety, it is readily accessible to and usable by individuals with disabilities. This section does not—

(1) Necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by individuals with disabilities;

(2) Require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where the recipient believes that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the recipient has the burden of proving that compliance with § 42.521(a) of this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the recipient or the head's designee after considering all resources available for use in the funding and operation of the program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, a recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure to the

maximum extent possible, that individuals with disabilities receive the benefits or services of the program or activity; or

(3) Require a recipient to take any action that would threaten or destroy the historically significant features of a historic property.

(b) *Methods.* (1) *General.* A recipient may comply with the requirements of this section through such means as, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with § 42.522, redesign or acquisition of equipment, use of accessible rolling stock or other conveyances, or any other methods that result in making its service, program, or activity readily accessible to and usable by individuals with disabilities. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. In choosing among available methods for meeting the requirements of this section, a recipient shall give priority to those methods that serve qualified individuals with disabilities in the most integrated setting appropriate.

(2) *Safe harbor.* For the purposes of complying with this section, elements that have not been altered in existing facilities on or after [INSERT EFFECTIVE DATE OF THE RULE], and that comply with the corresponding technical and scoping specifications for those elements in the Uniform Federal Accessibility Standards (UFAS), 49 FR 31528, app. A (Aug. 7, 1984), are not required to be modified to be brought into compliance with the requirements set forth in the 2010 Standards.

(3) *Historic preservation programs.* In meeting the requirements of this section in historic preservation programs, a recipient shall give priority to methods that provide physical

access to individuals with disabilities. In cases where a physical alteration to a historic property is not required because of paragraph (a)(2) or (3) of this section, alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with disabilities into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Small providers.* If a recipient with fewer than fifteen employees finds, after consultation with an individual with a disability seeking its services, that there is no method of complying with § 42.521(a) other than making a significant alteration to its existing facilities, the recipient may, as an alternative, refer the individual with a disability to alternative providers of available accessible services. For the purposes of this paragraph, in order to ensure that the services are available, the small provider must first determine that the alternative provider's services are accessible, the alternative provider is willing to provide the services, the services are available at no additional cost to the individual with a disability, and transportation costs to and from the alternative provider do not exceed costs to and from the small provider.

(d) *Written plan required for certain recipients to achieve program accessibility.*

Recipients subject to this subpart as of October 1, 1980, and required to make structural changes in order to provide program accessibility, were required to develop, by January 3, 1981, a written plan setting forth the steps to be taken to complete the changes, together with a schedule for making the changes. The plan should have been developed with the assistance of interested persons, including individuals with disabilities or organizations representing

individuals with disabilities and was to be made available for public inspection. The plan should have, at a minimum—

(1) Identified physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to individuals with disabilities;

(2) Described in detail the methods that would be used to make the facilities accessible;

(3) Specified the schedule for taking the steps necessary to achieve full accessibility under § 42.521(a) and, if the time period of the transition plan was longer than one year, identified the steps that would be taken during each year of the transition period; and

(4) Indicated the person responsible for implementation of the plan.

(e) *Notice of location of accessible facilities.* (1) *General.* A recipient shall adopt and implement procedures to ensure that interested individuals with disabilities, including individuals with an intellectual disability, learning disability, vision or hearing disability, or other disability, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by individuals with disabilities.

(2) *Signs at primary entrances.* A recipient shall provide signs at a primary entrance to each of its inaccessible facilities directing users to an accessible facility or a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility.

42.522 Program accessibility in jails, detention and correctional facilities, and community correctional facilities.

(a) *Applicability.* This section specifically applies to a recipient that is responsible for the operation or management of adult and juvenile justice jails, detention and correctional facilities, and community correctional facilities, either directly or through contractual,

licensing, or other arrangements with public or private entities, in whole or in part, including private correctional facilities.

(b)(1) In addition to the other requirements of this subpart, a recipient shall ensure that qualified inmates or detainees with disabilities shall not, because a facility is inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a recipient, or be subjected to discrimination by any recipient.

(2) A recipient shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless it is appropriate to make an exception, a recipient—

(i) Shall not place inmates or detainees with disabilities in inappropriate security classifications because of their disabilities;

(ii) Shall not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;

(iii) Shall not place inmates or detainees with disabilities in facilities that do not offer the same aid, benefits, and services as the facilities where they would otherwise be housed; and

(iv) Shall not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed.

(3) A recipient shall implement reasonable policies, including physical modifications to additional cells in accordance with the 2010 Standards, so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing.

42.523 New construction and alterations.

(a) *Design and construction.* Each new facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such a manner that the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after July 3, 1980.

(b) *Alteration.* Each facility or part of a facility, which is altered by, on behalf of, or for the use of, a recipient after July 3, 1980, in a manner that affects or could affect the usability of the facility or part of the facility shall to the maximum extent feasible be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with a disability.

(c) *Accessibility standards, compliance dates, and triggering events.*

(1) Applicable accessibility standards—

(i) New construction and alterations of buildings or facilities undertaken on or after March 7, 1988, but before [INSERT DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER] shall comply with the Uniform Federal Accessibility Standards (UFAS).

(ii) New construction and alterations of buildings or facilities undertaken after [INSERT DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER] but before [INSERT DATE ONE YEAR FROM PUBLICATION DATE OF THE FINAL RULE IN THE FEDERAL REGISTER] must comply with either UFAS or the 2010 Standards.

(iii) New construction and alterations of buildings or facilities undertaken on or after [INSERT DATE ONE YEAR FROM PUBLICATION DATE OF THE FINAL RULE IN THE FEDERAL REGISTER] must comply with the 2010 Standards.

(iv) New construction and alterations of buildings or facilities undertaken in compliance with the 2010 Standards shall comply with the scoping and technical requirements for a “public building or facility” regardless of whether the recipient is a public entity as defined in 28 CFR 35.104 or a private entity.

(v) Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(vi) For purposes of compliance with UFAS, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical disabilities.

(2) *Triggering events for compliance with accessibility standards.* (i) *Private entities.* (A) Private entities may choose one of the Standards specified in paragraph (c)(1)(ii) of this section if: the last application for a building permit or permit extension for such construction or alterations is certified to be complete by a State, county, or local government; or, in those jurisdictions where the government does not certify completion of applications, the last application for a building permit or permit extension is received by the State, county, or local government; or, where no permit is required, physical construction or alterations have commenced, on or after [INSERT PUBLICATION DATE OF THE FINAL RULE IN THE FEDERAL REGISTER] and before [INSERT DATE ONE YEAR FROM PUBLICATION DATE OF THE FINAL RULE IN THE FEDERAL REGISTER].

(B) Private entities must comply with paragraph (c)(1)(iii) of this section if: the last application for a building permit or permit extension for such construction or alterations is certified to be complete by a State, county, or local government; or, in those jurisdictions where the government does not certify completion of applications, the last application for a building permit or permit extension is received by the State, county, or local government; or, in jurisdictions where no permit is required, physical construction or alteration has commenced, on or after [INSERT DATE ONE YEAR FROM PUBLICATION DATE OF THE FINAL RULE IN THE FEDERAL REGISTER].

(ii) *Public entities.* (A) Public entities may choose one of the Standards specified in paragraph (c)(1)(ii) of this section if new physical construction or alterations commence after [INSERT DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER] but before [INSERT DATE ONE YEAR FROM PUBLICATION DATE OF THE FINAL RULE IN THE FEDERAL REGISTER].

(B) Public entities must comply with paragraph (c)(1)(iii) of this section if new physical construction or alterations commence on or after [INSERT DATE ONE YEAR FROM PUBLICATION DATE OF THE FINAL RULE IN THE FEDERAL REGISTER].

(3) For the purposes of this section, ceremonial groundbreaking or razing of structures prior to site preparation will not be considered to commence or start physical construction or alterations.

Table of Applicable Standards for Complying with 28 CFR 42.522

<p>Compliance Dates for New Construction and Alterations</p>	<p>Applicable Standards for Complying with 28 CFR 42.522</p>
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After March 7, 1988 and before [INSERT DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]	UFAS
After [INSERT DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER] and before [INSERT DATE ONE YEAR FROM PUBLICATION DATE OF THE FINAL RULE IN THE FEDERAL REGISTER]	UFAS or the scoping and technical requirements for a “public building or facility” in the 2010 Standards
On or after [INSERT DATE ONE YEAR FROM PUBLICATION DATE OF THE FINAL RULE IN THE FEDERAL REGISTER]	The scoping and technical requirements in the 2010 Standards for a “public building or facility”

(4) *Compliance with the Architectural Barriers Act of 1968.* Nothing in this section relieves recipients whose facilities are covered by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-57), from the responsibility of complying with the requirements of that Act and any implementing regulations.

PROCEDURES

42.530 Administrative procedures for recipients.

(a) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this subpart, to increase the participation of qualified individuals with disabilities in the recipient’s program or activity.

(b) *Self-evaluation.* (1) A recipient was required, by July 3, 1981, to evaluate and modify its policies and practices that did not meet the requirements of this subpart. During this process, the recipient was required to seek the advice and assistance of interested persons, including individuals with disabilities or organizations representing individuals with disabilities. During this period and thereafter, the recipient was required to take any necessary remedial steps to eliminate the effects of discrimination that resulted from adherence to these policies and practices.

(2) A recipient employing 50 or more persons and receiving Federal financial assistance from the Department of \$25,000 or more was required, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, to maintain on file, make available for public inspection, and provide to the Department on request—

- (i) A list of the interested persons consulted;
- (ii) A description of areas examined and problems identified; and
- (iii) A description of modifications made and remedial steps taken.

(c) *Designation of responsible employee.* A recipient employing 50 or more persons and receiving Federal financial assistance from the Department of \$25,000 or more shall designate at least one person to coordinate compliance with this subpart.

(d) *Adoption of grievance procedures.* A recipient employing 50 or more persons and receiving Federal financial assistance from the Department of \$25,000 or more and receiving Federal financial assistance from the Department of \$25,000 or more shall adopt grievance procedures that incorporate appropriate due process standards (*e.g.*, adequate notice, fair hearing) and provide for the prompt and equitable resolution of complaints alleging any action prohibited by this subpart except that such procedures need not be established with respect to

complaints from applicants for employment. Any individual may file a complaint with the Department in accordance with the procedures at § 42.532 without having first used a recipient's grievance procedures.

(e) *Notice.* (1) A recipient employing 50 or more persons and receiving Federal financial assistance from the Department of \$25,000 or more shall, on a continuing basis, notify participants, beneficiaries, applicants, employees and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of disability in violation of section 504 and this subpart. The notification shall state, where appropriate, that the recipient does not discriminate in its programs or activities with respect to access, treatment, or employment. The notification shall also include identification of the person responsible for coordinating compliance with this subpart and where to file section 504 complaints with the Department and, where applicable, with the recipient. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, publication on the recipient's internet Web site, placement of notices in the recipient's publications, and distribution of memoranda or other written communications.

(2) Recruitment materials or publications containing general information that a recipient makes available to participants, beneficiaries, applicants, or employees shall include a policy statement of nondiscrimination on the basis of disability.

(f) The Department may require any recipient with fewer than 50 employees and receiving Federal financial assistance from the Department of \$25,000 or more to comply with paragraphs (c) through (e) of this section.

42.531 Assurances required.

(a) *Assurances.* (1) *General.* Every application for Federal financial assistance covered by this subpart shall contain an assurance that the program or activity will be conducted in compliance with the requirements of section 504 and this subpart. Each component within the Department that provides Federal financial assistance shall specify the form of the foregoing assurance and shall require applicants for Department financial assistance to obtain like assurances from subrecipients, contractors and subcontractors, transferees, successors in interest, and others connected with the program or activity. Each component shall specify the extent to which an applicant will be required to confirm that the assurances provided by secondary recipients are being honored. Each assurance shall include provisions giving notice that the United States has a right to seek judicial enforcement of section 504, this subpart, and the assurance.

(2) *Assurances from government departments or agencies.* Assurances from departments or agencies of State and local governments described in paragraph (1) of the definition of “program or activity” at § 42.503 shall extend to any other department or agency of the same governmental unit if the policies of the other department or agency will affect the aid, benefits, or services for which Federal financial assistance is requested.

(3) *Assurances from other entities.* The assurances required with respect to any entity described in paragraph (3)(ii) of the definition of “program or activity” at section 42.503 shall be applicable to the entire plant or other comparable, geographically separate facility. The assurances required with respect any other entity described in paragraph (2) or (3) of the definition of “program or activity” at § 42.503 shall be applicable to the entire entity.

(b) *Duration of obligation.* Where the Federal financial assistance is to provide or is in the form of real or personal property or improvements, the assurance will obligate the

recipient and any transferee for the period during which the property is being used for the purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. When the Federal financial assistance is not in the form of real or personal property or improvements, the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* With respect to any transfer of real property, the transfer document shall contain a covenant running with the land assuring nondiscrimination on the condition described in paragraph (b) of this section. Where the property is obtained from the Federal Government, the covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant.

(d) *Remedies.* The failure to secure either an assurance or a sufficient assurance from a recipient shall not impair the right of the Department to enforce the requirements of section 504 and this subpart.

42.532 Compliance and enforcement procedures.

(a)(1) The procedural provisions applicable to title VI of the Civil Rights Act of 1964, 28 CFR 42.106–42.110, apply to this subpart, except that the provision contained in § 42.108(c)(3) and § 42.110(e) that requires the Attorney General’s approval before the imposition of any sanction against a recipient, does not apply to programs or activities funded by a grant-making component of the Department. The applicable provisions contain requirements for compliance information (§ 42.106), conduct of investigations (§ 42.107), procedure for effecting compliance (§ 42.108), hearings (§ 42.109), and decisions and notices (§ 42.110). *See* appendix C.

(2) In the case of programs or activities funded by a grant-making component of the Department, the requirement to provide access to sources of information pursuant to 28 CFR 42.106(c) may be enforced using the procedures cited in paragraph (a)(1) of this section or using the provisions of section 803(a) of title I of the Omnibus Crime Control and Safe Streets Act, as amended by the Justice System Improvement Act of 1979, Public Law 96–157, 93 Stat. 1167.

(b) In the case of programs or activities funded by a grant-making component of the Department, the timetables and standards for investigation of complaints and for the conduct of compliance reviews contained in § 42.205(c)(1) through (c)(3) and § 42.206(c) and (d) are applicable to this subpart except that any finding of noncompliance shall be enforced as provided in paragraph (a) of this section. *See* appendix D.

(c) *Remedial action.* (1) If the Department finds that a recipient has discriminated against an individual on the basis of disability in violation of section 504 or this subpart, the recipient shall take such remedial action the Department considers necessary to overcome the effects of the discrimination.

(2) The Department may, where necessary to overcome the effects of discrimination in violation of section 504, or this subpart, require a recipient to take remedial action—

(i) With respect to individuals with disabilities who are no longer participants in the recipient’s program or activity but who were participants in the program when such discrimination occurred; and

(ii) With respect to individuals with disabilities who would have been participants in the program had the discrimination not occurred.

(d) Complaints of violations of section 504 by recipients of Federal financial assistance from the Department should be filed with the Office for Civil Rights at the Office of Justice Programs.

Appendix A to Subpart G of Part 42—Federal Financial Assistance Administered by the Department of Justice to Which This Subpart Applies

Note: Failure to list a type of Federal assistance in appendix A shall not mean, if section 504 is otherwise applicable, that a program or activity is not covered.

Editorial Note: For the text of appendix A to subpart G, see appendix A to subpart C of this part.

Appendix B to Subpart G of Part 42 – [Reserved].

Appendix C to Subpart G of Part 42—Department Regulations Under Title VI of the Civil Rights Act of 1964 (28 CFR 42.106-42.110) Which Apply to This Subpart

Editorial Note: For the text of appendix C, see §§42.106 through 42.110 of this part.

Appendix D to Subpart G of Part 42—OJARS' Regulations Under the Omnibus Crime Control and Safe Streets Act, as Amended, Which Apply to This Subpart (28 CFR 42.205 and 42.206)

Editorial Note: For the text of appendix D, see §§42.205 and 42.206 of this part.

January 11, 2017

Date

Loretta E. Lynch
Attorney General

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