

DISCUSSION DRAFT

OUTLINE OF ELEMENTS OF EQUAL OPPORTUNITY LAW

NCH STAFF DRAFT -- FEBRUARY 1, 1987

I. BACKGROUND

In addition to legislation seeking to undo the Grove City College v. Bell decision, and other legislative proposals that the National Council on the Handicapped is committed to, the Council continues to support the enactment of a comprehensive law prohibiting discrimination against people with disabilities. The Council believes that Section 504 of the Rehabilitation Act of 1973 is probably the most important milestone and tool for persons with disabilities in their struggle to obtain equal rights and opportunities in our society. But the guarantees of Section 504 fall far short of the protection against discrimination provided to other minorities and to women, and fail to address many of the most serious types of discrimination that disadvantage and debilitate many persons with disabilities. In its 1986 report, Toward Independence, the Council recommended the enactment of a comprehensive law guaranteeing equal opportunity for persons with disabilities and providing a broad and clear prohibition of discrimination on the basis of handicap. The Council tentatively entitled its proposed law "The Americans with Disabilities Act." In the Appendix to Toward Independence, sixty pages of text are devoted to explaining the need, purpose, and proposed content of such a law.

II. PURPOSE

The primary goals of a comprehensive equal opportunity law are: (1) to provide coverage commensurate with that afforded in statutes prohibiting race, sex, national origin, and religious discrimination; (2) to provide clear, strong, consistent, enforceable standards for addressing discrimination against persons with disabilities; and (3) to address the major areas of discrimination faced day-to-day by people with disabilities.

III. PROPOSED ELEMENTS OF A COMPREHENSIVE EQUAL OPPORTUNITY
STATUTE

A. Scope of Coverage

In Toward Independence, the Council proposed the enactment of a statute with comprehensive coverage, encompassing many areas such as fair housing, employment by businesses engaged in interstate commerce, and public accommodations, that are currently covered under other types of civil rights laws but not those which prohibit discrimination against persons with disabilities. This comprehensive statute would apply to:

- (1) The Federal Government, any of its agencies and Departments, and the United States Postal Service;
- (2) Any recipient of Federal financial assistance.
- (3) Any Federal contractor, subcontractor, or licensee;
- (4) Any employer engaged in an industry affecting commerce, employment agency, or labor union;
- (5) Any seller, landlord, or other provider of housing covered by Title VIII of the Civil Rights Act of 1968;
- (6) Any public accommodation covered by Title II of the Civil Rights Act of 1964;
- (7) Any person, company, or agency that engages in the business of interstate transportation of persons, goods, documents, or data;
- (8) Any person, company, or agency that makes use of the mails or interstate communications and telecommunications services for the business of selling, arranging or providing insurance; and
- (9) Any State, or agency or political subdivision of a State.

B. Forms of Discrimination Prohibited

The Council's proposal is to spell out the types of actions which constitute illegal discrimination. From existing section 504 regulations, the following actions would be forms of discrimination: (1) intentional exclusion; (2) unintentional exclusion; (3) segregation; (4) unequal or inferior services, benefits, or activities; or (5) less effective services, benefits, or activities.

In addition, three other forms of unlawful discrimination would be delineated: failing to remove architectural, transportation, and communication barriers; refusing to make reasonable accommodations to enable a particular person with a disability to participate; and imposing discriminatory qualifications standards, selection criteria, and eligibility criteria.

It would also be prudent to spell out certain types of actions that do not constitute discrimination, so as to dispel misconceptions, such as hypothetical situations involving a blind bus driver or deaf voice coach. Thus, the statute should declare that it is not illegal discrimination to treat someone unequally for reasons wholly unrelated to disability, nor to apply legitimate qualifications standards, selection criteria, performance standards, or eligibility criteria that are

reasonably necessary and related to ability to perform or participate in the essential components of the job, program, or activity.

C. Limits on Duties of Accommodation and Barrier Removal

A major controversy under existing statutes and regulations has been the question of what limitations there are on the obligation to make reasonable accommodations and to remove architectural, transportation, and communication barriers. Some disability advocates argue that there should not be any limits whatever on the duty not to discriminate against persons with disabilities, just as there are no cost defenses permitted in cases of race or sex discrimination. Current regulations and case law, however, have recognized an "undue hardship" limitation upon barrier removal and reasonable accommodations, which permits the costliness of some proposed modification to be used as a defense to the obligation to make such a modification in order to enable a person with a disability to participate. Between these two extremes, the Council believes that an appropriate approach is to establish a "fundamental alteration" limitation on the duties of reasonable accommodation and barrier removal. This would require the making of changes in facilities and operations to allow persons with disabilities to participate, unless such modifications would threaten the existence of or fundamentally alter the essential nature of the program or business in question. This provides a realistic, yet suitably stringent and narrow limitation upon duties to accommodate and remove barriers.

D. Regulations

To implement the requirements of the comprehensive law and to apply its general prohibitions to the numerous diverse areas which are within its scope, various Federal agencies will be required to issue implementing regulations. ATBCB should be required to issue minimum guidelines, supplementing its existing Minimum Guidelines and Requirements for Accessible Design, for buildings, facilities, vehicles, and rolling stock subject to the law. Other Federal agencies should issue regulations governing their areas of expertise, e.g., EEOC for employment practices, HUD for housing, Commerce for places of public accommodation, DOT for interstate transportation and transit systems, DOJ for state governments, etc.

To insure that nothing in existing regulations is lost, a provision should be added to provide that regulations under this new law may not provide less protection against discrimination to persons with disabilities than under existing regulations issued under such statutes as Section 504.

E. Private Right of Action

As with most other types of civil rights legislation, the equal opportunity law for persons with disabilities should allow a private right of action for persons who have been discriminated against, and successful litigants should be entitled to a reasonable attorneys fee.

F. Who Would Be Protected?

Current statutes such as section 504 apply only to persons who can show that they are a "handicapped individual." other types of nondiscrimination laws do not create a class of persons who may avail themselves of the statutory protection, but simply prohibit discrimination "on the basis of" race, or sex, or religion, etc. In Toward Independence, the Council proposed that the equal opportunity law for people with disabilities should track other statutes and not create an eligibility class of "handicapped individuals." Thus, discrimination against a person because of a physical or mental impairment, perceived impairment, or record of impairment would be prohibited, but the person alleging such discrimination would not have to prove that he or she is, in fact, a "handicapped individual" whose condition interferes with a major life activity.

Another unique aspect of the current statutes such as Section 504 is that they apply only to "otherwise qualified handicapped individuals." The "otherwise qualified" language is not present in other types of nondiscrimination laws. The Council recommends that the issue of qualifications be dealt with in the description of what is and is not discrimination, as discussed above, i.e., that the use of discriminatory qualifications is a form of discrimination, but that the application of reasonable and necessary qualification standards is not prohibited. This focuses the pertinent determination on whether discrimination did or did not occur, and does not illogically focus on whether the person affected is eligible for the protection of the statute.

G. Definitions

The Council's approach would be to employ the definitions of the terms "physical or mental impairment," "regarded as having an impairment," and "record of impairment," from existing section 504 regulations, and the definition of "reasonable accommodation" from the U.S. Commission on Civil Rights report, Accommodating the Spectrum of Individual Abilities.

H. Terminology

The Council proposes to use the phrase "persons with disabilities" in the title and in the findings and purposes section of the proposed new law. The prohibited discrimination, however, would be referred to as "discrimination on the basis of handicap." This is in accordance with many court decisions and journal articles in which the phrase "discrimination on the basis of handicap" has become a term of art. The Council would, thus, draw a distinction between people, who should be referred to as "persons with disabilities," and discrimination, in reference to which the words "on the basis of handicap" would be used.