



## National Council on the Handicapped

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**An Independent  
Federal Agency**

To: National Council on the Handicapped  
From: Lex Frieden, Executive Director  
Robert L. Burgdorf Jr., Attorney/Research Specialist  
(The initials of both writers appear in the document)  
Subject: Proposed Final Draft Changes

We are happy to enclose a proposed final draft of the Americans with Disabilities Act, reflecting the changes agreed to at the February meeting of the Council. You will recall that the Council voted to approve the recommendations of the consumer advisors regarding the inclusion or exclusion of six suggested changes to the bill that they had been asked to consider. Those changes are reflected in this proposed final draft. In addition, there were two major issues upon which staff was directed to do further work -- communication barriers and the question of coverage of Indian tribes.

### Communication Barriers

We have had extensive conversations and meetings with members of the hearing impaired community concerning the issue of communication barriers. Bob has gotten much drafting input from a number of hearing impaired lawyers, and particularly helpful assistance from our former fellow, Ray Fuller. We have learned that there are two different components to the problem of communication barriers. One issue is the coverage of the broadcasting and communications companies; among the problems encountered in this area are the lack of captioned television programs. The other broad issue concerns the types of devices and services that need to be available (e.g. TDDs and interpreters) in other types, of programs and businesses to enable effective communication with people with communication disabilities.

Based upon the direction and considerable input received, we have developed provisions to deal with these problems. Coverage of the broadcasting industry is addressed by specifically adding broadcasting (T.V. and radio) and communication by wire (telephone and telegraph) to the scope of coverage section--insertion of section 4(a) (6) on p. 3. The Federal Communications Commission is directed to promulgate regulations for the enforcement of these requirement -- section 8 (g) on p. 11 -- and the issue of captioning is dealt with by calling for

"progressively increasing the proportion" of captioned programs (the second sentence of section 8 (g)). The strong consensus we heard was that this approach is preferable to trying to arrive at a specific percentage or number of hours per week of captioned programs, applicable alike to the major networks and tiny independent stations. FCC will set the standards but this provision means that they will provide for gradually increasing the proportion of programs that are captioned.

The other types of communication barriers are addressed in a new subsection (h) inserted on pp. 11-12. This is based upon Gary Olsen's advice at the Council meeting that there should be a section providing details and examples in the statutory language as to what constitutes a communication barrier and how one removes them. The definition of communication barriers is intentionally broad, while the examples of systems and devices are much more concrete and specific. We have been assured that if we incorporate these provisions regarding communication barriers and the previously discussed coverage of the broadcasting industry, we can expect the full and enthusiastic support of the hearing impaired community. The recent events at Gallaudet underscore the prudence of the Council in wanting to make our bill more specific in regard to the needs of the hearing impaired community, and to seek the support of that community with its emerging strength as an important advocacy group.

#### Indian Tribes

Based on the advice of the consumer advisors, the Council also directed the staff to provide further information regarding the necessity for additional coverage of Indian tribes. We have pursued this matter in discussion with Ms. Glenna Jojola of the All Indian Pueblo Council in Albuquerque, who was one of the proponents of this idea at the February meeting, as well as with members of the staff of the Senate Select Committee on Indian Affairs. In addition to consulting with the legal staff at the Indian Affairs committee; Bob has done a considerable amount of law library research on this issue. We have also gotten significant assistance and suggestions from Julie Clay, this year's NCH Fellow, based both upon her own experience and her involvement with the National Congress on American Indians and other organizations.

Initially, it is important to underscore that Native Americans are protected from discrimination under our bill. If an Indian person is discriminated against on the basis of handicap by any of the persons or agencies covered in section 4(a) of the bill

(employers, housing providers, public accommodations, transportation systems, broadcasters, or state and local governments), then that person is protected by our bill and could file an action against any such discrimination. And this protection would exist whether the person is on or off the reservation. Indian people with disabilities are protected by the bill.

The only real question is whether the Indian tribes are themselves covered by the bill -- whether tribes are prohibited from discrimination on the basis of handicap. Tribes may be covered already if their activities meet one the categories of entities covered, e.g., as a housing provider, broadcasting company, transportation business, or operators of a public accommodation. The definition of employer, however, is based upon Title VII of the Civil Rights Act, and provides a specific exemption for Indian tribes.

There is not complete agreement on the authority of the Federal Government to regulate the affairs and activities of Indian tribes, but most legal authorities seem to think that it can be done if it is done by Congress in explicit language. Some tribes have continued to argue that such regulation is beyond the authority of the Federal Government. The issue of civil rights regulation of Indian tribes is particularly controversial at present. The U.S. Commission on Civil Rights has been looking into and is planning to hold public hearings on the issue of alleged violations of civil rights by certain tribes, and there has been a storm of protest and reaction by some Indian leaders.

After considerable discussion and examination, we have arrived at a recommendation that appears to represent a consensus of those with whom we have discussed the issue. We have been advised that provisions regulating the tribes should be included until there has been in depth communications with and input received from the tribal organizations themselves. There is a need for considerable education and review of disability discrimination issues with the tribes prior to incorporating such coverage into the bill. Nothing appears more likely to arouse Indian indignation than an attempt to "force something down the throats of the tribes without prior consultation with them". Glenna Jojola has concurred with the need for educational and consciousness raising efforts with the tribes before moving ahead with specific legislative language.

Our recommendation, therefore, is that no additional language, regarding the coverage of Indian tribes be added at this time, but that the Council inform the pertinent Congressional committee members of this concern, and urge them to keep it in mind for resolution as the bill moves forward in the Congress. This will permit people such as Glenna, working with the council, the opportunity to approach the tribal organizations to begin to educate them on the need for such provisions and to obtain their input prior to formalizing such a statutory requirement. We have discussed this approach with Glenna and she has indicated her agreement with it as the most constructive means at this time for addressing the concerns she raised at the February meeting.

#### Tidying Up

The foregoing represent the only substantive changes in the bill that have been made. We have also tried to make this draft truly a final one by cleaning up any remaining grammatical problems and typographical errors. In a few instances, we have incorporated simple word changes that were suggested to correct problems raised in comments at the February meeting; these include:

- 1) Replacement of "protection or rights" with "protection of rights" in section 4(b)(2) at the top of page 4.
- 2) Shortening the definition of "reasonable accommodation" on p. 3 (sec. (5)) so that is less cumbersome to read (No Change in meaning is made).
- 3) Deletion of the word "interstate" from the phrase "business of transportation" in section 4(a) (4) on p. 3 (Courts will still require that transportation services have to affect interstate commerce order to be covered by the Act).
- 4) Changing the word "standards" to "requirements" regarding the guidelines to be established by the ATBCB in section 8(a) on p. 8, (technically, ATBCB issues requirements and minimum guidelines, not, standards).
- 5) Insertion of the word "advancement" in section 8(c) (1) (B) on p. 9 (left out through oversight).

#### Ballot

Pursuant to the expedited process for getting approval of a final draft of the bill you agreed to at the February meeting, we are enclosing a mail ballot for you to sign. Please fill it out and return it to us in the enclosed addressed and stamped envelope at your earliest convenience. We hope to receive all the ballots by the end of next week - March 18. Thank you for your cooperation in taking this momentous step by the Council on behalf of all Americans with disabilities.

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NATIONAL COUNCIL ON THE HANDICAPPED

MAIL BALLOT  
MARCH 11, 1988

Please indicate your approval or disapproval of the attached proposed final draft, "Americans with Disabilities Act of 1988."

\_\_\_\_\_ I approve of the proposed final draft bill

\_\_\_\_\_ I disapprove of the proposed final draft bill.

Comments:

Signature \_\_\_\_\_

Date \_\_\_\_\_

\*Please return as soon as possible in the enclosed envelope.

Thank you.