Using the ADA to Help Clients with Disabilities Get Improved Access to Public Benefits

Friday, September 16, 2016

Albany Marriott

CLE Course Materials and NotePad®

Complete course materials distributed in electronic format online in advance of the program.

Sponsored by the

New York State Bar Association and the Committee on Legal Aid

This program is offered for education purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Patricia Spataro, LAP Director

1.800.255.0569

New York State Bar Association

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form-you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees: please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

You MUST turn in this form at the end of the program for your MCLE credit.

Using the ADA to Help Clients With Disabilities Get Improved Access to Public Benefits, Friday, September 16, 2016 | New York State Bar Association's Committee on Legal Aid, Albany Marriott, Albany, NY

Name:

(Please print)

I certify that I was present for the entire presentation of this program

Signature: Date:

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NEW YORK STATE BAR ASSOCIATION

Live Program Evaluation (Attending In Person)
Please complete the following program evaluation. We rely on your assessment to strengthen teaching methods and improve the programs we provide. The New York State Bar Association is committed to providing high quality continuing legal education courses and your feedback is important to us.

Program Name: Using the ADA to Help Clients with Disabilities Get Improved Access to Public Benefits

Program Code: FRIBENA3

Program Location: Albany Marriott, Albany - NY

Program Date: September 16, 2016

1. What is your overall evaluation of this program? Please include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional Comments____

____

2. Please rate each Speaker's Presentation based on **CONTENT** and **ABILITY** and include any additional comments.

	CONTENT				ABILITY			
	Excellent	Good	Fair	Poor	Excellent	Good	Fair	Poor
Greg Bass	☐	☐	☐	☐	☐	☐	☐	☐
Katie Kelleher	☐	☐	☐	☐	☐	☐	☐	☐
	☐	☐	☐	☐	☐	☐	☐	☐
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(please turn over)

Additional comments (CONTENT)

_____

_____

Additional comments (ABILITY)

_____

_____

3. Please rate the program materials and include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional comments

_____

_____

4. Do you think any portions of the program should be **EXPANDED** or **SHORTENED**? Please include any additional comments.
☐ Yes – Expanded ☐ Yes – Shortened ☐ No – Fine as is

Additional comments

_____

_____

5. Please rate the following aspects of the program: **REGISTRATION**; **ORGANIZATION**; **ADMINISTRATION**; **MEETING SITE** (if applicable), and include any additional comments.

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
Registration	☐	☐	☐	☐	☐
Organization	☐	☐	☐	☐	☐
Administration	☐	☐	☐	☐	☐
Meeting Site (if applicable)	☐	☐	☐	☐	☐

Additional comments

_____

_____

6. How did you learn about this program?
☐ Ad in legal publication ☐ NYSBA web site ☐ Brochure or Postcard
☐ Social Media (Facebook / Google) ☐ Email ☐ Word of mouth

7. Please give us your suggestions for new programs or topics you would like to see offered

_____

_____

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Table of Contents

Using the ADA to Help Clients with Disabilities Get Improved Access to Public Benefits

Outline

BASIC ADA PROTECTIONS FOR PUBLIC BENEFITS APPLICANTS September 16, 2016

1.5 MCLE credits in Areas of Professional Practice for both experienced and newly-admitted attorneys

Trainers: Greg Bass, National Center on Law and Economic Justice, New York, NY
Katie Kelleher, The Legal Aid Society, New York, NY

GOALS FOR THIS TRAINING:

1. Brief Overview of ADA with Reference to New Final DOJ Regulations
2. Elements of a Title II Claim Against State or Local Government
3. Summary of Authority for Disability Screening of Public Benefit Applicants and Recipients
4. Highlights of Title II Recent Cases with Focus on Access to Public Benefits

PART ONE

I. Background: Persons with disabilities:

A. Some numbers:

1. Over 1 in 4 Americans have multiple chronic conditions (MCC)
2. E.g., arthritis, asthma, diabetes, HIV, mental illness, cognitive impairments
3. 56.7 million / 18.7% population have a disability
4. 38.3 million / 12.6% population have severe disability

B. Poverty:

1. National: With disability – 28.4% / without disability – 12.4%
2. New York: With disability – 29.8% / without disability – 12.2%

C. TANF recipients:

1. 17.5% movement limitations
2. 14% with emotional/mental disabilities
3. 10% with cognitive/memory disabilities

II. Disability rights: The basic Federal laws

A. The Statutes

1. Americans with Disabilities Act, as amended by the ADAAmendments Act of 2008 ("ADAAA"), which went into effect on January 1, 2009. Relevant Sections: 42 U.S.C. § 12131-12134 (Title II, pertaining to state and local government programs and services); 42 U.S.C. § 12102 (definitions); 42 U.S.C. § 12201- 12213 (Title V, miscellaneous provisions including on attorneys fees, etc.)

2. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 784

3. Fair Housing Amendments Act of 1988, 42 U.S.C. §3601

B. What do these laws mandate?

1. Meaningful access and equal opportunity to participate or benefit

2. Full participation

3. Reasonable accommodations

4. No discriminatory effect from program administration

5. Independent living

6. Effective communication

C. Americans with Disabilities Act of 1990 - Overview

* Purpose:
    * The purpose of the law is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.
* 42 U.S.C. § 12101(b)(1).
* The three major titles of the statute are:
    * ADA Title I: Employment
    * ADA Title II: Public Entities

* ADA Title III: Public Accommodations

D. ADA - Definitions from the Statute: (42 U.S.C. § 12102)

1. "Disability"

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

2. "Major life activities"

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) "Major bodily functions"

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

3. "Regarded as having such an impairment"

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the

impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

4. Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

I. medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

II. use of assistive technology;

III. reasonable accommodations or auxiliary aids or services; or

IV. learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph—

I. (I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

II. (II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

42 U.S.C. § 12102.

III. Broad protective scope of the ADA clarified by new final implementing regulations from the Department of Justice

A. The ADA is meant to be construed broadly to protect disabled individuals

The ADA Amendments Act, which was passed in 2008____, made it clear that the ADA is meant to be construed broadly to protect people with disabilities. The legislative history states that the amendments were designed to:

> effectuate Congress's intent to restore the broad scope of the ADA by making it easier for an individual to establish that he or she has a disability.

81 Fed. Reg. 53204 Aug 11, 2016.

B. **Major Changes to DOJ Regulations effectuating the ADA Titles II and III**

The Department of Justice published final regulations on August 11, 2016 to become effective October 11, 2016 that are meant to implement the ADAAA.

1. General - Overall, the final rule retains nearly all of the changes included in the proposed rule published on January 30, 2014 (79 Fed. Reg. 4839), although some sections were reorganized and renumbered. The revisions to the regulations include the following:

• Added Attention-Deficit/Hyperactivity Disorder (ADHD) as an example of a physical or mental impairment in §§ 35.108(b)(2) and 36.105(b)(2).

• Added ''writing'' as an example of a major life activity in §§ 35.108(c) and 36.105(c).

• Revised the discussion of the ''regarded as prong'' in §§ 35.108(f) and 36.105(f) to clarify that the burden is on a covered entity to establish that, objectively, an impairment is ''transitory and minor'' and therefore not covered by the ADA.

The changes made by the final rule include a section by section analysis explaining the purpose of each revision, consistent with the statutory changes effectuated by the ADA Amendments Act of 2008. The rules explain that:

2. "Disability" - to be interpreted broadly

The regulations clarify that the primary focus on whether an entity has complied with its obligations not to discriminate and not the question of whether an individual's impairment is a disability.

the primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations not to discriminate based on disability and that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.

81 Fed. Reg. 53204 Aug 11, 2016; 81 Fed. Reg. 53223 (revised rule to be codified at 28 C.F.R. § 35.101(b))

3. "Major Life Activities"- definition expanded

The revised regulation expands the definition of "major life activities" by providing a non-exhaustive list of major life activities that specifically includes the operation of major bodily functions. The revisions also add rules of construction to be applied when determining whether an impairment substantially limits a major life activity.

81 Fed. Reg. 53204 Aug 11, 2016.

4. "Substantially limits" - construed broadly

the term ''substantially limits'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA

81 Fed. Reg. 53204 Aug 11, 2016.

a. Performance is measured as compared to most people in general

an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population

Id.

b. Comparison of individual's performance of a major life activity usually will not require medical, statistical evidence

the comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence

Id.

5. Mitigating measures not considered

> the ameliorative effects of mitigating measures other than ‘‘ordinary eyeglasses or contact lenses’’ shall not be considered in assessing whether an individual has a ‘‘disability’
>
> Id.

6. Episodic impairments and impairments in remission evaluated when active

   an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active

   Id.

7. The regulations also contain examples of physical and mental impairments and of Major Life Activities limited by various types of impairments**.**

   The section to be codified at 28 C.F.R. §35. 108.(b)(2) explains that the term “**Physical or mental impairment”**

   > includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech, and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

   28 C.F.R. §35. 108.(b)(2)(effective Oct. 11, 2016)

   AND

   The new section to be codified at 28 C.F.R. §35. 108.(d)(2) explains that with respect to the term “**Substantially limits”**.

   > (iii) applying these principles it should easily be concluded that the types of impairments set forth in paragraphs (d)(2)(iii)(A) through (K) of this section will, at a minimum, substantially limit the major life activities indicated. The types of impairments described in this paragraph may substantially limit additional major life activities (including major bodily functions) not explicitly listed in paragraphs (d)(2)(iii)(A) through (K).

(A) Deafness substantially limits hearing;

(B) Blindness substantially limits seeing;

(C) Intellectual disability substantially limits brain function;

(D) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;

(E) Autism substantially limits brain function;

(F) Cancer substantially limits normal cell growth;

(G) Cerebral palsy substantially limits brain function;

(H) Diabetes substantially limits endocrine function;

(I) Epilepsy, muscular dystrophy, and multiple sclerosis each substantially limits neurological function;

(J) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and

(K) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function.

28 C.F.R. §35. 108.(d)(2)(effective Oct. 11, 2016)

IV. Disability rights: State and Local Anti-discrimination statutes regarding disability

New York State civil rights laws should not be overlooked. Some jurisdictions, including New York City, have also passed local anti-discrimination laws. These laws offer broader protections than the ADA and the Rehabilitation Act. The definition of disability is broader, the statutes clearly cover welfare offices and in the case of the New York City Human Rights Law, even the attorneys' fees provisions are broader.

A. State Laws Protect Against Disability Discrimination

1. New York State Social Services Law § 331(3)

> No social services district shall, in the exercising of the powers and duties established in this title, permit discrimination on the basis of race, color, national origin, sex, religion or handicap, in the selection of participants, their assignment or reassignment to work activities and duties, and the separate use of facilities or other treatment of participants.

2. New York Executive Law § 290-301, the "New York State Human Rights Law"

> It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee **of any place of public accommodation**, resort or amusement, because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including the extension of credit, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status, or that the patronage or custom thereat of any person of or purporting to be of any particular race, creed,

> color, national origin, sexual orientation, military status, sex or marital status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited.

N.Y. Exec. Law § 296(2)(a) (emphasis added).

*** * NOTE:* * Welfare offices are places of public accommodation under the NYS Human Rights Law.**

Courts have found that welfare offices are public accommodations within the scope of section 296(2)(a) of the state Human Rights Law.

> Section 296(2)(a) of the state Human Rights Law generally provides that it is an "unlawful discriminatory practice for any person, being the owner, lessee, ... manager, ... agent or employee of any place of public accommodation ..., because of the ... disability ... of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof." "Public accommodation" is defined broadly for purposes of this law to include, inter alia, "establishments dealing with goods or services of any kind, dispensaries, clinics and hospitals." N.Y. Exec. Law § 292(9). While the statutory definition expressly excludes public libraries and certain educational institutions from the covered class of public accommodations, it does not specifically exempt public assistance-related facilities from its scope.

Lovely H. v. Eggleston, 235 F.R.D. 248, 259 (S.D.N.Y 2006).

3. State law definitions of disability. See NYS Civil Rights Law, § 40-c and N.Y. Exec. Law § 292(21)

> The New York Civil Rights Law and the New York State Human Rights Law both use the same definition of disability:
>
> **The term "disability" means**
>
> (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or
>
> (b) a record of such an impairment or

> (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

4. N.Y. Soc. Serv. L. § 331(3) – refers to the prohibition against discrimination based on "handicap."

B. New York City law

1. In New York City, the local Human Rights Law protects against disability discrimination in public accommodations. New York City Human Rights Law, N.Y.C. Administrative Code § 8-107(4)

> Public accommodations.
>
> a. It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation, because of the actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, or, directly or indirectly, to make any declaration, publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place or provider shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status or that the patronage or custom of any person belonging to, purporting to be, or perceived to be, of any particular race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status is unwelcome, objectionable or not acceptable, desired or solicited.

2. The City Human Rights Law disability definition is also broad. N.Y.C. Administrative Code § 8-102(16)

> (1) The term "disability" means any physical, medical, mental or psychological impairment, or a history or record of such impairment.
>
> (2) The term "physical, medical, mental, or psychological impairment" means:
>
> > (a) an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or
> >
> > (b) a mental or psychological impairment.
>
> (3) In the case of alcoholism, drug addiction or other substance abuse, the term "disability" shall only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse, and shall not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.
>
> N.Y.C. Administrative Code § 8-102(16).

C. Case law

The City Human Rights Law is to be construed liberally – regardless of how other State and Federal civil rights law are construed – even when those statutes are similarly worded. The New York City Council made this explicit in 2005. Concerned that courts were simply interpreting the City Human Rights Law as coextensive with Federal and State laws, the City Council enacted the Local Civil Rights Restoration Act ("Restoration Act"). N.Y.C. Local Law No. 85 (2005). The council included an explicit finding that the law should be construed liberally to accomplish its remedial purpose and that the statute had previously "been construed too narrowly." Id. at § 7. See also Craig Gurian, A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law 33 Fordham Urban L.J. 101 (2005). As explained by the District Court in Brooklyn Center for

the Independence of the Disabled v. Bloomberg, 980 F. Supp.2d 588 (S.D.N.Y. 2013):

> Although the ADA and the NYCHRL are similar in nature, they are not coextensive. *See Loeffler v. Staten Island Univ. Hosp.,* 582 F.3d 268, 278 (2d Cir.2009). Under the Local Civil Rights Restoration Act of 2005 (the "Restoration Act"), N.Y.C. Local Law No. 85 (2005), the NYCHRL is to "be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of [the NYCHRL], have been so construed." *Id.* § 7. As New York courts have made clear, "[a]s a result of [the Restoration Act], the [NYCHRL] now explicitly requires an independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language." *Williams v. N.Y.C. Hous. Auth.,* 872 N.Y. S.2d 27, 31 (1st Dep't 2009); *accord Loeffler,* 582 F.3d at 278. Accordingly, "[t]here is now a one-way ratchet: 'Interpretations of ... federal statutes with similar wording may be used to aid in interpretation of New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a *floor* below which the City's Human Rights law cannot fall.'" *Loeffler,* 582 F.3d at 278 (quoting the Restoration Act § 1 (emphasis added)).

Id. at 642.

V. Title II of the ADA

A. The basic legal case

1. Qualified individual with a disability;

2. Defendant is subject to the ADA; and

3. Plaintiff was:

   a. Denied the opportunity to participate in or benefit from the defendant's services, programs, or activities, or was

   b. Otherwise discriminated against by the defendant, by reason of her disabilities.

Note: For Section 504 (Rehab Act): Must also show defendants receive federal funding

B. What are reasonable accommodations?

1. "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."

   28 C.F.R. § 35.130(b)(7) but as of October 11, 2016 renumbered as § 35.130(b)(7)(i)

2. Think of a reasonable accommodation as -

   a. Any reasonable change in a program rule or policy,

   b. or in the way that the agency does something,

   c. or in a way that allows the person to do something.

C. More about reasonable accommodations

I. Reasonable accommodations:

   a. Are fact-specific

   b. Are voluntary

   c. Give meaningful access to programs/services

2. Disparate treatment/impact irrelevant

3. Discrimination equals:

   a. Not making reasonable accommodations

   b. To known physical or mental limitations

   c. Of an otherwise qualified individual –

   d. *Unless* public entity can demonstrate modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7) but as of October 11, 2016 renumbered as § 35.130(b)(7)(i); 42 U.S.C. 12112(b)(5)(A) (Title I) (undue hardship is imposed.)

D. Reasonable accommodations for benefits clients: The basic requirements

1. The ADA applies to TANF programs.

   PRWORA, 42 U.S.C. § 608(d)

   a. Equal opportunity to participate in and benefit from programs, services, activities

   b. "Methods of program administration" must not have discriminatory effect

   c. Must make reasonable modifications in policies and practices to avoid discrimination

   d. Cannot exclude qualified individuals with disabilities

      28 C.F.R. § 35.130; HHS/OCR Guidance, available at: http://www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/summaryofpolicyguidancetanf.html

2. OTDA Policy: General principles

   a. 06-ADM-05, "Providing Access to Temporary Assistance Programs for Persons with Disabilities and/or Limited English Proficiency" April 27, 2006 (revision)Available at: http://onlineresources.wnylc.net/pb/docs/06_adm-5.pdf. Covers TA, SNAP, HEAP

   b. Local districts must:

      i) Provide and document reasonable accommodations

      ii) Adopt non-discriminatory methods of administration

      iii) Modify policies, practices, procedures that deny equal access

      iv) Ensure effective communication

      v) Assign ADA contact

3. OTDA policy: Some particulars

    * Districts encouraged to be "flexible and creative."

    * Obligations extend to agencies operating on behalf of district.

    * Documentation of disability/accommodations

    * Notice to clients of ADA rights

    * Initial screening suggested for persons who can't self-disclose

    * Explanation of consequences of refusing accommodations

E. Bringing a Title II challenge

1. Example #1: Raymond v. Rowland

    2003: DSS closed 1/3 of its offices and dramatically reduced staff, for fiscal savings

    Results:

    - DSS caseloads went up

    - Reduced access to benefits and services for clients with disabilities

2. The basic Raymond ADA claims

    a. Failure to make reasonable accommodations

    b. No assistance with applications, verification

    c. Sanctions for noncompliance

    d. No meaningful access

    e. No grievance system

    f. Lack of ADA rights notice

    g. No ADA coordinator

    h. No documentation of recipient disabilities/accommodations

3. Example #2 - *Lovely H. v. Eggleston*, see below at 23.

VI. Disability Screening: Authority and Practice in New York

A. Authority on Screening

1. HHS Guidance Says TANF Agencies Must Offer Screening

In 2001, the U.S. Department of Health and Human Services (HHS) issued a policy guidance stating that TANF agencies must offer TANF applicants and recipients disability screening to determine whether they may have a disability. If the screening suggests that the client may have a disability, the agency must offer the client an opportunity for a more in-depth assessment. Prohibition Against Discrimination on the Basis of Disability in the Administration of TANF, Sec. D(1), HHS OCR, available at: http://www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/summaryofpolicyguidancetanf.html (last visited June 1, 2014).

HHS also decided in a civil rights complaint investigation that Massachusetts violated the ADA and Section 504 by failing to screen, evaluate, and accommodate individuals with learning disabilities in the TANF program. See http://www.hhs.gov/ocr/civilrights/activities/examples/TANF/tanf-resagreement.pdf (last visited June 1, 2014).

2. New York State authority on screening

On the state level, OTDA's 06-ADM-05 provides that:

Districts should make reasonable efforts to recognize potential disabilities . . . . Staff should conduct an initial inquiry to identify an applicant or recipient's disability needs . . . . If there is an initial indication [of a disability]…the district should offer the person an opportunity for a more comprehensive evaluation or assessment . . . .

3. Screening – related to participation in public assistance work activities

a. Screening in the context of the employability determination for public assistance.

In the work context, the agency is required to inquire whether a person might have a mental or physical impairment that would limit their ability to participate in work activities. SSL § §332-b; 18 N.Y.C.R.R. § 385.2(d). If the client claims to have such an impairment or the agency has reason to believe the client may have an impairment, then they must conduct a disability review. See

generally New York State Temporary Assistance and Food Stamp Policy Manual, 385.2, Part B (Policy) Disability Review Procedure.

b. OTDA 11-ADM-06 Employment Assessment Model

In 2011, New York State OTDA issued 11-ADM-06, ("New York State Employment Assessment) http://otda.ny.gov/policy/directives/2011/ a directive on screening related to employment activities. The directive includes a model assessment and guide, but districts are not required to use the model. Districts are advised, that they must comply with assessment and employment plan requirements as established in State regulation (18 NYCRR §385.6 and §385.7). OTDA 11-ADM-06 at 2.

4. Screening related to Mental Health – "The Modified Mini"

a. Background

OTDA commissioned a study to validate such a mental health tool known as the "Modified Mini" and consisting of 23 questions. In 2013 OTDA released the results of this study conducted by the Nathan Kline Institute. http://otda.ny.gov/resources/MMS-Report.pdf. The study found that the Modified Mini was highly effective in identifying clients likely to have mental health problems. While not able to definitively diagnose mental health problems, the Modified Mini is an effective means for welfare agencies to identify clients who should be referred to mental health professionals for diagnostic evaluations.

The Nathan Kline validation study contains important data on the prevalence of current and lifetime mental health and health problems in cash assistance recipients in New York state. Over half the study participants met the diagnostic criteria for having a mental health problem in their lifetime, and over one-third met the criteria for having a current mental health diagnosis. Id.

b. State issues ADM releasing the Modified Mini: OTDA 15 ADM 04 The Modified Mini Screen

Through issuance of tis ADM OTDA made available to local districts the Modified Mini Screen (MMS).

- OTDA did not mandate use of the Modified Mini.

- The ADM includes guidelines on how the MMS should be administered and permits local districts to select the "cut point" score it will use to determine whether a client is to be referred for a mental health evaluation.

5. New York City HRA Policy and Practice Screening Related to Employability: the WeCARE program and its Biopsychosocial Assessment

In New York City disability evaluation with respect to work activities is conducted by a vendor through a program known as "WeCARE." The WeCARE program is operated by a vendor - FEDCAP. Applicants and participants are generally referred to WeCARE by a Job Center when they assert an inability to comply with work requirements because of a mental or physical impairment in the context of an application appointment or "engagement" appointment. For a description to the program see HRA Policy Directive 15-10-ELI "WeCARE." *available at* http://onlineresources.wnylc.net/nychra/docs/pd_15-10-eli_.pdf

a. WeCARE Biopsychosocial ("BPS") Assessment

The WeCARE assessment process is targeted at determining whether the individual has limitations that would affect his or her ability to participate in work activities. As part of the assessment process, an inquiry is supposed to be made as to whether the client needs a Reasonable Accommodation. The tool for conducting the WeCARE assessment is called a Biopsychosocial ("BPS"). Id. At 3.

b. Functional Capacity Outcome (FCO)

After the BPS exams have been completed, the Phase I Physician is responsible for formulating the outcome of the BPS – known as Functional Capacity Outcome or FCO. The FCO amounts to WeCARE's determination regarding the extent to which the client's impairments are disabling and dictates which aspect of the WeCARE program – referred to as "tracks" – the client will be assigned. The range of FCO's include:

Possible FCOs include:

- No limitations to employment;

- Unstable medical and/or mental health conditions that require treatment (a Wellness Plan) before an employability determination can be made;

• Limitations to employment that require vocational rehabilitation services (VRS), and/or work-place accommodations; PD #15-10-ELI FIA Policy, Procedures, and Training 4 Office of Procedures

• Substantial functional limitations to employment due to medical conditions that will last for at least 12 months and make the individual unable to work- including;

• Unstable medical and/or mental health condition(s) that require treatment (a Wellness Plan) and

- substantial functional limitations to employment due to medical conditions that will last for at least 12 months and make the individual unable to work. (SSI)

Id at 3-4.

6. Screening for Disability by New York City HRA at application, recertification and other encounters with the agency.

HRA is in the process of implementing procedures to screen applicants and recipients for disability including mental health and learning and cognitive impairments to comply with the order in *Lovely H. v. Eggleston,* 05 cv. 6920, S.D.N.Y., (Order being made available electronically) See order at ¶¶ 50-55.

PART TWO

ADA Title II Litigation Against Public Benefits Agencies

VII. Cases

A. ***Rafferty v. Doar,*** 13 cv 01410 (S.D.N.Y. filed 2013) (settled 2015)

Conversion of documents into alternate formats for public benefit clients who are blind, visually impaired

B. ***Baez v. NYCHA,*** 13 cv 08916 (S.D.N.Y. filed 2013) (settled 2014)

Mold remediation for public housing tenants with asthma

C. ***Lovely H. v. Eggleston***, 05 cv 6920 (S.D.N.Y. filed 2005)

235 F.R.D. 248 (S.D.N.Y. 2006) (Preliminary injunction). Stipulation of liability: Dec. 2013, Settlement 2015).

Protections against negative case actions, screening, disability tracking, notices, reasonable accommodations for benefits clients

D. ***Harper v. DTA***, 07 cv 12351 (D. Mass. Filed 2007) (settled 2013)

Screening, ADA coordination, disability tracking, notices, reasonable accommodations for benefits clients

E. ***Raymond v. Rowland***, 03 cv 0118 (D. Conn. Filed 2003) (settled 2007)

220 F.R.D. 173 (D. Conn. 2004) (Class certification)

Screening, ADA coordination, disability tracking, notices, reasonable accommodations for benefits clients

VIII. Case Analysis – Problems, Claims and Remedies

A. *Raymond v. Rowland* –

1. Remedies

a. Reasonable accommodations:

i) As needed for program compliance

ii) Prior to TANF sanctioning for noncompliance

b. Notice of ADA rights

c. ADA coordinator

d. Computer tracking of disabilities/accommodations

e. Improved screening tool

f. Improved phone and computer systems

g. Office physical changes

h. Staff ADA training and supervision

i. Performance reporting to plaintiffs

2. Implementation Issues

a. Settlement monitoring issues

i) Plain language notices

ii) Affording reasonable accommodations

iii) Adequate tracking

b. Outreach/legislative forum

c. New DSS dysfunction

i) Call centers

ii) New worker business model

iii) Online applications

B. *Lovely H. v. Eggleston*

1. Background

The case was litigated in phases against the New York City Human Resources administration

a. **Phase one – Preliminary injunction invalidated illegal segregation of individuals into special, segregated, disabled-only welfare centers.**

The original complaint and motions for preliminary injunction focused on the forced transfer of individuals with disabilities at segregated, disabled-only special "hub" welfare offices which would serve only disabled clients. The court found granted the preliminary injunction prohibiting any further involuntary transfers of disabled individuals to segregated disabled-only center, noting:

> The propriety of injunctive relief in connection with the involuntary reassignment of class members to the hub centers is underscored by the nature of the violation. The anti-segregation laws upon which Plaintiffs rely reflect important public policy commitments to equality and access. The statutes and regulations embody strong statements of public policy prohibiting discrimination and differential treatment on the basis of disability. To permit the continued expansion of the current involuntary program and the continued enforcement of involuntary hub center reassignments that are already in place pending final

> adjudication of Plaintiffs' claim for relief would be to turn back the clock not only for the individual who is denied access to the neighborhood center that welcomes her able-bodied neighbors, but also for a society that has made tremendous efforts and strides to improve, rather than constrict, accessibility for and integration of the disabled into all aspects of mainstream life.

235R.D. 238, 262 (S.D.N.Y.2006)

b. Final Phase:

HRA admitted liability by court-ordered stipulation and entered into negotiation on remedy. After a fairness hearing, the court so-ordered a stipulation on remedy. A copy is being made available electronically.

2. Major Principles

Effective systems to consistently accept and record requests for RAs and provide needed RAs to enable class members to access HRA benefits and services and to maintain access to HRA benefits and services.

a. "Menu" of Reasonable Accommodations established

b. Reasonable Accommodations Pending Review of Request: No waiting for a requested accommodation (subject to a few narrow exceptions)

c. Protections to avoid negative case actions for class members (without regard to whether class member has requested a Reasonable Accommodation)

d. Screening to identify needed reasonable accommodations – including general disability screen, mental health screen and learning/cognitive disability screen

e. Effective and adequate notice of Reasonable Accommodation rights

f. Disability Impact Review of all new agency procedures

3. *Lovely H*. Screening for Needed Reasonable Accommodations

a. Screening will consist of

i) Disability Inquiry Scripts to be used to aid staff in identifying client disabilities; and

ii) Screening tools: Mental Health and Learning Disabilities and Cognitive Impairments Screening will be conducted at application and recertification and at other events to be determined.

b. Screening leads to offer of Reasonable Accommodation right away on pending basis

4. *Lovely H.* - Measures to Protect Against Negative Case Actions

a. No Autoposting Negative Case Actions

b. Mandatory appointment reminders: pre- and post- appointment, letters and phone calls

c. Missed recertifications - Phone calls and letters advising to reschedule. Letters include RA form to request Reasonable Accommodation

d. Pre-Conciliation - Enhanced Procedures for Pre-Conciliation to attempt to prevent negative case action and resolve action (for appointments for which Conciliation is available such as Job Center engagement appointments)

e. Conciliation/ Conference - Enhanced Conference/Conciliation Procedures including notice of RA rights, permitting clients to participate by phone, structured questions to guide discussion and to reveal a need for an RA

f. Pre-Notice of Decision Case Review – file review before action is taken and outreach to client to attempt to avert or resolve negative action Pre-Fair Hearing File Review.

g. Pre- Fair Hearing Review- - Prior to Fair Hearings, paper review prior to fair hearing. If the review shows that a failure to provide a pending, granted, or needed RA may have led to the Negative Case Action, HRA will withdraw the Negative Case Action even if the Class Member does not appear at the fair hearing.

5. *Lovely* H. - Case Management

a. Regular Case Management for all Class Members - Case Management Services will be provided to all WeCARE clients, tailored to individual needs as determined through assessments and interviews with Class Members. To the maximum extent feasible, Class Members will be assigned to an individual case manager.

b. Enhanced Case Management – Those individuals identified as needing a higher level of Case Management Services due to anticipated difficulty in maintaining benefits or accessing HRA and Vendor services will receive enhanced Case Management Services designed to assist them in complying with HRA requirements to ensure case continuity, including proactively reviewing upcoming WeCARE and HRA appointments and other responsibilities and assessing and addressing any anticipated needs or possible obstacles to compliance.

6. *Lovely* H. - Communication Provisions

a. Principles to ensure access for blind, visually impaired, deaf, hearing impaired, Class Member right to communication and access to information

b. Specific Class Member Rights regarding communication:

i) Receipts

HRA will provide receipts or confirmation numbers to verify Class Member contact with the Agency and WeCARE including submission of documents and transactions related to case actions such as requests to reschedule appointments, for good cause, for Conferences, and requests related to emergencies

ii) Rescheduling

RA will develop and implement effective procedures to enable Class Members to reschedule appointments with the Agency and WeCARE

iii) Client Telephone Access to Case Info:

Case Status, Upcoming Appointments, Negative Case Actions The HRA Infoline or another similar mechanism which permits effective telephone access to Class Members will have capacity added to enable Class Members to learn

current case status, upcoming appointments, documentation requirements, pending Negative Case Actions, and RA request status

iv) Emergencies

HRA will develop a mechanism through which Class Members can reach staff during business hours to address case emergencies when those Class Members are unable to obtain timely assistance at their Job Centers or WeCARE.

v) Complaints

HRA will maintain a telephone number by which Class Members can communicate complaints regarding requests for and implementation of RAs.

7. *Lovely* H. - Notice Provisions: Readability and Inclusion of Disability Rights Information

a. Readability of Written Materials:

Subject to state approval when applicable, HRA will revise its written materials as set forth in the settlement to improve readability.

b. Inclusion of Disability Rights Information in Written Materials.

HRA will develop a Disability Insert to be included when issuing certain notices to Class Members to notify them of their rights under the ADA and how to request an RA.

Using the ADA to Help Clients with Disabilities Get Improved Access to Public Benefits

PowerPoint

Using the ADA to Help Clients with Disabilities Get Improved Access to Public Benefits

2016 NYSBA Partnership Conference
Albany, NY

What we'll cover in this session

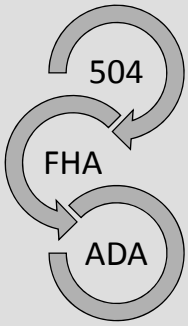
- Basic overview of ADA Title II
  - Who has to comply / Who is protected
  - Reasonable accommodations
- New York State / 06-ADM-05
- ADA litigation against public benefits agencies
  - *Raymond v. Rowland* (D. Conn.)
  - Harper v. DTA (D. Mass.)
  - Lovely H. v. Eggleston (S.D.N.Y.)
  - *Rafferty v. Doar* (S.D.N.Y.)
  - *Baez v. NYCHA* (S.D.N.Y.)
- Achieving systemic reform

Persons with disabilities: Some numbers

- Over 1 in 4 Americans have multiple chronic conditions (MCC)
  - *E.g.,* arthritis, asthma, diabetes, HIV, mental illness, cognitive impairments
- 56.7 million / 18.7% population have a disability
  - 38.3 million / 12.6% population have severe disability
- **Poverty**:
  - National: With disability – 28.4% / without disability – 12.4%
  - New York: With disability – 29.8% / without disability – 12.2%
  - TANF recipients:
    - 17.5% movement limitations
    - 14% with emotional/mental disabilities
    - 10% with cognitive/memory disabilities

Disability rights: The basic laws

- Americans with Disabilities Act
- Rehabilitation Act of 1973
- Fair Housing Amendments Act of 1988



What do these laws mandate?

- Meaningful access and equal opportunity to participate or benefit
- Full participation
- Reasonable accommodations
- No discriminatory effect from program administration
- Independent living
- Effective communication

Americans with Disabilities Act of 1990: An Overview

- *". . . a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."*
  - 42 U.S.C. § 12101(b)(1)
- **ADA Title I: Employment**
- **ADA Title II: Public Entities**
- **ADA Title III: Public Accommodations**
  - ADA Tool Kit, Technical Assistance Manual
    - www.ada.gov

"Disability" defined

- **"Disability"** means -
  - (1) a *physical or mental impairment* that
  - (2) *substantially limits*
  - (3) one or more *major life activities* of an individual

  Also –
  - a *record* of such an impairment; or
  - *being regarded* as having such an impairment."
    - 42 U.S.C. § 12102(1)

"Major life activities"

- Non-exclusive lists:
- ***Tasks -***
  - Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- ***Major bodily functions –***
  - Immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

"Physical or mental impairment"

- Physiological disorders/conditions, cosmetic disfigurement, anatomical loss affecting referenced body systems
  - *Examples*: neurological, respiratory, cardiovascular
- Mental, psychological disorders
  - *Examples*: "mental retardation," organic brain syndrome, specific learning disabilities
- Contagious/noncontagious diseases, conditions
  - *Examples*: orthopedic, speech, hearing, cancer, heart disease, diabetes, emotional illness, HIV
    - 28 C.F.R. § 35.104

"Substantially limits"

- **Proposed DOJ rulemaking (Jan. 30, 2014):**
- Impairment must substantially limit a major life activity –
  - As compared to most people in the general population
  - Won't usually require scientific, medical, statistical evidence
- *Need not* –
  - Prevent/significantly/severely restrict major life activity
- Requires individualized assessment
- Mitigating measures *not* considered
- Active vs. episodic/in remission

Who is a "qualified" individual with a disability?

- An individual with a disability who –
  - *with or without reasonable modifications* to rules, policies, or practices,
  - *meets the essential eligibility requirements* for the receipt of services or the participation in programs or activities provided by a public entity.
    - 42 U.S.C. § 12131(2)

Who must comply with Title II of the ADA?

- Programs and services of "public entities"
  - State or local governments / Departments, agencies, or other instrumentalities
    - 42 U.S.C. § 12131(1)
- Providing service directly or
  - "through contractual, licensing, or other arrangements."
    - 28 C.F.R. § 130(b)(1)
- Reasonable modifications *not required* if they would:
  - *Fundamentally alter* the nature of the program, activity, or service
  - Result in *undue financial and administrative burdens.*
    - 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3)

Title II: The basic legal case

- Qualified individual with a disability;
- Defendant is subject to the ADA; and
- Plaintiff was:
  - Denied the opportunity to participate in or benefit from the defendant's services, programs, or activities, or was
  - Otherwise discriminated against by the defendant, by reason of her disabilities.

- ***504****: Must also show defendants receive federal funding*

What are reasonable accommodations?

- *State and local government programs must make reasonable modifications (accommodations) in policies, practices, and procedures, to avoid discrimination on basis of disability.*
  - 28 C.F.R. § 35.130(b)(7)
- Think of a reasonable accommodation as -
  - Any reasonable change in a program rule or policy,
  - or in the way that the agency does something,
  - or in a way that allows the person to do something.

More about reasonable accommodations

- Reasonable accommodations:
  - Are *fact-specific*
  - Are *voluntary*
  - Give *meaningful access to programs/services*
- Disparate treatment/impact irrelevant
- *Discrimination* equals:
  - *Not making reasonable accommodations* -
  - To known physical or mental limitations -
  - Of an otherwise qualified individual -
  - *Unless* undue hardship is imposed.
    - 42 U.S.C. 12112(b)(5)(A) (Title I)

Reasonable accommodations for benefits clients: The basic requirements

- ***The ADA applies to TANF programs.***
  - PRWORA, 42 U.S.C. § 608(d)
- *Equal opportunity* to participate in and benefit from programs, services, activities
- "*Methods of program administration*" must not have discriminatory effect
- Must make *reasonable modifications* in policies and practices to avoid discrimination
- Cannot *exclude* qualified individuals with disabilities
  - 28 C.F.R. § 35.130
- HHS/OCR Guidance, available at: http://www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/summaryofpolicyguidancetanf.html

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Bringing a Title II challenge: *Raymond v. Rowland*

- 2003: DSS closed 1/3 of its offices and dramatically reduced staff, for fiscal savings
- Results:
  - DSS caseloads went up
  - Reduced access to benefits and services for clients with disabilities

The basic *Raymond* ADA claims

- Failure to make reasonable accommodations
  - No assistance with applications, verification
  - Sanctions for noncompliance
  - No meaningful access
- No grievance system
- Lack of ADA rights notice
- No ADA coordinator
- No documentation of recipient disabilities/accommodations

Connecticut Department of Social Services
Caring for Connecticut

The case for disability screening

- "Hidden" disabilities
  - TANF/SNAP recipients:
    - 14% with emotional/mental disabilities / 10% with cognitive/memory disabilities
- PRWORA –
  - Requires assessment of skills, work experience, employability
    - 42 U.S.C. 608(b)(1)
- OCR Guidance –
  - "It is critical that TANF beneficiaries with disabilities receive an assessment that allows them equal opportunity to benefit from TANF programs…."
- Screening tools:
  - No comprehensive instrument
  - New York "Modified Mini" Mental Health Screening Tool
  - Online CalWORKS Appraisal Tool
  - Washington State Learning Needs Screening Tool

The Raymond settlement

- Reasonable accommodations:
  - As needed for program compliance
  - Prior to TANF sanctioning for noncompliance
- Notice of ADA rights
- ADA coordinator
- Computer tracking of disabilities/accommodations
- Improved screening tool
- Improved phone and computer systems
- Office physical changes
- Staff ADA training and supervision
- Performance reporting to plaintiffs

Raymond implementation

- Settlement monitoring issues
  - Plain language notices
  - Affording reasonable accommodations
  - Adequate tracking
- Outreach/legislative forum
- New DSS dysfunction
  - Call centers
  - New worker business model
  - Online applications

Connecticut
still revolutionary

Communicating with the government

- Public entities must provide:
  - Effective communication with persons with disabilities
  - Auxiliary aids and services needed for effective communication
    - 28 C.F.R. § 35.160
- Auxiliary aids and services:
  - Persons who are blind/visually impaired
    - Alternate formats for written documents
    - Website accessibility
    - *Rafferty v. Doar* (S.D.N.Y. settled 2015)
  - Persons who are deaf, hard of hearing
    - Qualified sign language interpreters
    - Voice, text, video-based systems

ADA Title II litigation against public benefits agencies

- ***Rafferty v. Doar*** (S.D.N.Y. filed 2013) (settled 2015)
  - Conversion of documents into alternate formats for public benefit clients who are blind, visually impaired
- ***Baez v. NYCHA*** (S.D.N.Y. filed 2013) (settled 2014)
  - Mold remediation for public housing tenants with asthma
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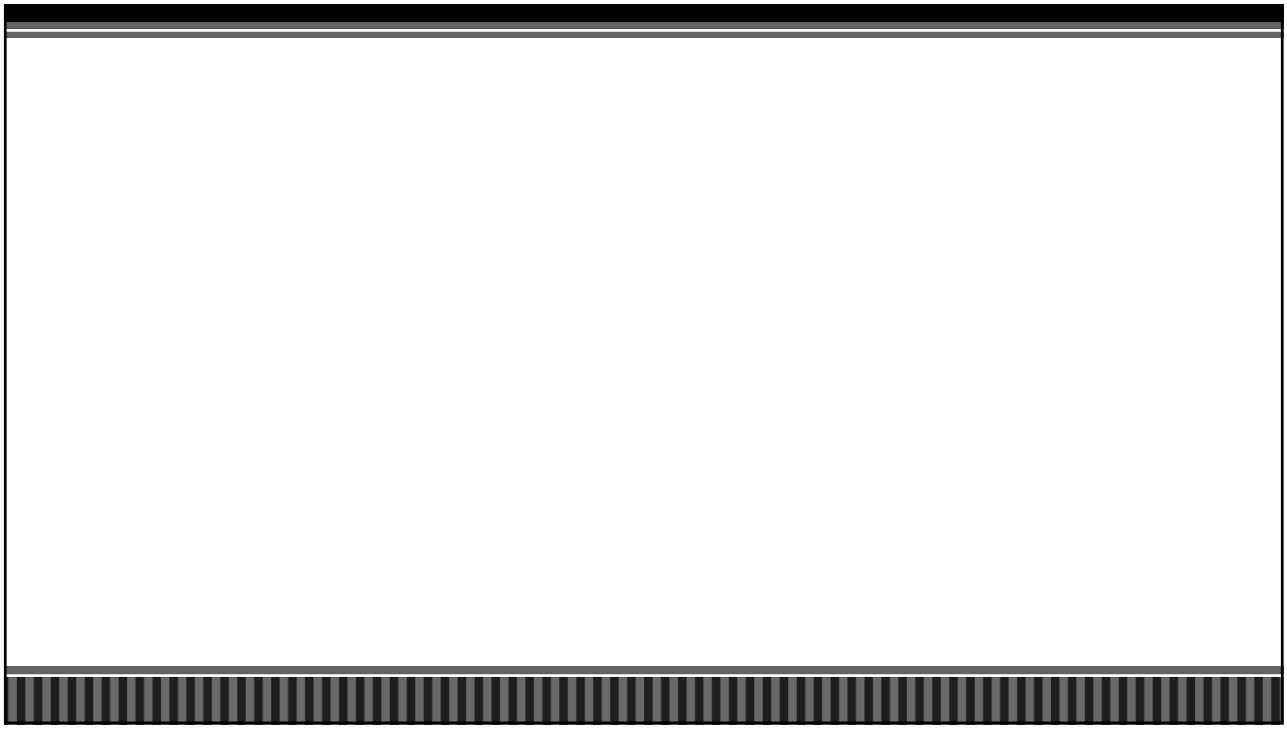

Biographies

Speaker Biographies

Greg Bass, Esq.

As a Senior Attorney with the National Center for Law and Economic Justice, Greg Bass engages in civil rights litigation, policy advocacy, and training around the country on behalf of low-income clients, with an additional focus on disability rights involving access to public benefits. Greg previously brought litigation in individual and class actions in state and federal court as a legal aid attorney in several programs for over 33 years, as well as engaging in legislative and administrative advocacy, in areas of civil rights, employment, public benefits, health, consumer, education, family, housing, and elder law.

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George E. Pataki
Governor

NEW YORK STATE
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE
40 NORTH PEARL STREET
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Robert Doar
Commissioner

Administrative Directive

Section 1

Transmittal:	06-ADM-05 Revised
To:	Local District Commissioners
Issuing Division/Office:	Division of Employment and Transitional Supports
Date:	Revision Date: April 27, 2006/Original Release: March 31, 2006
Subject:	Providing Access to Temporary Assistance Programs for Persons with Disabilities and/or Limited English Proficiency (LEP)
Suggested Distribution:	Temporary Assistance Directors HEAP Coordinators FS Directors Staff Development Coordinators CAP Coordinators Services Directors Medical Assistance Directors
Contact Person(s):	Cash Assistance (TA) at 1-800-343-8859, extension 4-9344; Food Stamps (FS), extension 3-1469; Home Energy Assistance Program (HEAP), extension 3-0332; and Metro Field Support Bureau (212) 961-8207
Attachments:	Attachment 1-District Self-Evaluation/Review Form
Attachment Available On – Line:	☐

Filing References

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
77 ADM-130					
78 ADM-71					
83 ADM-19 86 ADM-26 02 LCM-7 03 LCM-3 04 LCM-7 85 INF-4 90 INF-53 03 INF-20 03 INF-37 03 INF-38 04 INF-15 05-INF-08		Part 303 Part 348.3 Part 351.1 Part 351.26 Part 355.1 Part 355.2 Part 356.2 Part 356.3 Part 357.1 Part 387.7 Part 393.3	29 USC 794 § 504 42 USC § 608 (d)(2) and (3) 45 CFR Part 84 SSL §136 and §331(3) 42 USC § 12101 et seq.	Welfare-to-Work Employment Policy Manual	GIS 99 MA/021

Section 2

I. Summary

The intent of this summary is to provide local social services district (hereafter "district") staff with an overview of the policy and implications of the material in the directive. The summary is not intended to take the place of the ADM itself. This directive consolidates existing policy guidance issued by OTDA (Office) for providing access to persons with disabilities and/or Limited English Proficiency (LEP), who are inquiring about, applying for, or receiving Temporary Assistance (TA), Food Stamps (FS) and assistance under the Home Energy Assistance Program (HEAP). This directive also provides districts with a convenient resource that reiterates existing requirements, including the provision of 12 terms that are defined in the federal Americans with Disabilities Act (ADA), examples of complaints that are not ADA-related and reiteration of applicable policies and regulations that pertain to persons with disabilities and/or LEP. A list of informational pamphlets is provided in the Section entitled Additional Resources, below.

General — Districts have the responsibilities to:

- ensure that applicants for and recipients of TA, FS and HEAP have equal access to all benefits, programs and services for which they are eligible, including those offered by other agencies operating on behalf of a district;
- ensure that emergency/immediate needs are addressed as may be appropriate to the case, and protect the filing or application date when an appointment is rescheduled for a person with a disability and/or LEP because reasonable accommodations cannot be made or no interpreter is available on the date the application is filed;

- document any limitations, necessary accommodations and/or LEP requirements to ensure access and coordinate services (e.g., note in the case record and on the Welfare-to-Work Case Management System that an individual is unable to climb stairs);

- provide information to applicants and recipients of public assistance or care, and not discriminate against anyone making the inquiry based on race, color, religion, national origin, age, sex, handicap (physical or mental impairment), genetic pre-disposition or carrier status, creed, arrest/convictions, marital status, sexual orientation, military status and/or retaliation; and

- assign a person to serve as ADA and LEP contact(s), to investigate any complaints of discrimination or improper case administration, and to inform applicants/recipients with a disability and/or LEP of their complaint procedures.

- ***Access by Persons with Disabilities*** — Districts have the responsibilities to:

- adopt methods of administration which do not discriminate against and which ensure equal access and opportunity to qualified individuals with disabilities;

- reasonably modify policies, practices and procedures that deny equal access to persons with disabilities but are not required to take action that would constitute a fundamental alteration in the benefit, program or services;

- assist applicants/recipients to meet eligibility requirements by eliminating non-essential procedures or rules that deny a person with a disability an equal opportunity to participate in the district's programs, services and benefits;

- make reasonable accommodation to the known physical or mental limitations of otherwise qualified applicants/recipients with disabilities unless the district can show that the accommodation would impose an undue financial and administrative burden on the operation of its program;

- make reasonable efforts to recognize potential disabilities, based on the applicant/recipient's disclosure or on an indication of an apparent disability;

- provide access to district offices, or provide alternative means of access;

- provide information in a manner that is accessible to persons with visual or hearing disabilities, and provide necessary auxiliary aids and services to ensure effective communication with persons with disabilities; and

- complete and submit to OTDA the self-evaluation review form (Attachment 1) and correct any deficiencies.

Access by Persons with LEP — Districts have the responsibilities to:

- obtain a qualified interpreter, but may not deny access to an application for benefits, programs or services based on the inability to provide adequate interpretation services;

- provide applicants/recipients the choice to use a relative or friend as an interpreter, but may not require applicants/recipients to bring their own interpreter; and

- make interpreter services desk guides available to workers and language posters available in all client areas.

II. Purpose

This directive consolidates existing policy guidance issued by OTDA (Office) regarding access to benefits, programs and services by persons with disabilities and/or LEP. The purpose of this directive is to provide districts with a convenient resource that reiterates existing requirements for providing access to persons with disabilities and/or LEP, who are inquiring about, applying for, or receiving Temporary Assistance (TA), Food Stamps (FS) and assistance under the Home Energy Assistance Program (HEAP). However, in recognition of the unique challenges presented in providing access to persons with disabilities and/or LEP, this directive also is intended to provide, within existing policy guidelines, flexibility to districts to develop individualized procedures that ensure access to benefits, programs and services, and that meet the requirements described in this directive operationally. This directive is not intended to imply that districts are not in compliance with existing policies regarding access to benefits, programs and services by persons with disabilities and/or LEP.

III. Background

A. Access by Persons with Physical and/or Mental Disabilities.

The federal ADA, enacted July 26, 1990, provides comprehensive civil rights protections to persons with disabilities in the areas of employment, public accommodations, state and local government services, and telecommunications. Counties are required to have on file a self-evaluation as mandated by ADA regulations to have been completed on or before January 26, 1993, where appropriate, regarding those policies and practices that previously had not been included in a self-evaluation required by section 504 of the federal Rehabilitation Act of 1973. Where structural modifications were needed to achieve program accessibility, all counties were required to have developed a transition plan by July 26, 1992, that provided for the removal of these barriers. Any structural modifications should have been completed as expeditiously as possible, but no later than January 26, 1995. Counties were required to comply with the requirements of Title II of the ADA on January 26, 1992, whether or not they had completed a self-evaluation.

Subtitle A of Title II of the ADA is intended to protect qualified persons with disabilities from discrimination on the basis of disability in the benefits, programs and services of all state and local governments. Title II also extends the protections against discrimination set forth in section 504 of the Rehabilitation Act, as amended, to all activities of state and local governments. All state and local government services and those services that receive state and/or local assistance must be in compliance with these requirements.

The Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), the federal Welfare Reform Law, specifically provides that section 504 and the ADA apply to any program or activity receiving federal TANF funds. 42 U.S.C.A. sections 608(d) (2) and (3), respectively.

In addition, Office regulations (Part 303 of 18 NYCRR) prohibit districts from discriminating against a person because of race, color, national origin, age, sex, religion or handicap (physical or mental impairment). Part 303.7 of 18 NYCRR extends the definition of the term handicap to include those persons having Acquired Immune Deficiency Syndrome (AIDS), testing positive for human immunodeficiency virus (HIV) infection or being perceived as susceptible to AIDS or HIV infection.

B. Access by Persons with LEP.

New York's TA, FS and HEAP programs' applicant/recipient population encompasses people with many different native languages and varying abilities to communicate in English. Since the 1980's, the State has been working with New York City and other districts to revise LEP policies and procedures and to provide increased services to persons with LEP.

On August 13, 1999, the Office and the Department of Health issued a General Information System message (GIS 99 MA/021) reminding districts of State policy regarding civil rights and access to FS, TA and Medical Assistance (MA) benefits. The GIS Message articulated New York State's policy that applicants for and recipients of

social services programs must have timely access to TA, FS and MA benefits regardless of race, color, religion, gender, age, national origin or disability. Each district is required to ensure that programs are administered in a fair and humane manner, and that all staff, especially those who have direct contact with applicants and recipients on a daily basis, understand this obligation and are trained to carry out these policies. Persons with LEP must be able to apply for benefits, programs and services without undue hardship.

On September 22, 2000, a joint "Local District Commissioner" letter was issued by the Department of Health and the Office. This letter introduced a mandated "Interpreter Services Poster" and a recommended district worker's "Interpreter Services Desk Guide". These documents were developed with the purpose of enhancing communication between the workers and clients who had LEP. These communications tools also were intended to expedite the process of engaging interpretation services for the client.

In 2002, the State reached an agreement with advocate groups to resolve litigation concerning the translation of various forms and informational materials as well as the provision of interpreter services to non-English speaking applicants and recipients of the Food Stamp program in New York City. The litigation alleged that New York policies, practices and customs violated federal FS regulations and failed to provide meaningful access to the FS program to persons who are not fluent in English. As part of the agreement, application and certification materials have been translated into Spanish, Russian, Chinese, Haitian-Creole and Arabic. Certain client informational materials also have been translated into those languages as well as French, Korean, Vietnamese and Yiddish. Application materials used at the New York City Food Stamp only centers have also been translated into Spanish, Russian, Chinese, Haitian-Creole, Arabic and Korean.

On March 21, 2005, the Office issued 05-INF-08, entitled "Revisions to PUB-4842: "Interpreter Services Poster" and PUB-4843: Interpreter Services Desk Guide."

The purpose of this release is two fold:

1. To notify districts that the mandated "Interpreter Services Poster" (PUB-4842) and the recommended district worker's "Interpreter Services Desk Guide" (PUB-4843) have been updated, reformatted and are available for ordering.

2. To also inform districts that the information contained on these documents has been translated into six additional languages. The complete list of "Other than English" languages is:

   Albanian, Arabic, Bengali, Bosnian, Chinese, Farsi, French, Haitian Creole, Hindi, Italian, Korean, Polish, Russian, Spanish, Tagalog, Ukrainian, Urdu, Vietnamese, Yiddish and Symbol for Deaf/Hearing Impaired.

As part of its on-going efforts to improve access to Office services and programs for persons with LEP, the Office has posted a variety of client-focused information on its Internet website at http://www.otda.state.ny.us/default.htm. Selected, client-focused information is now available in Spanish, Arabic, Chinese and Russian. Currently available on the website is translated information regarding the following programs:

Temporary Assistance, Food Stamps, Home Energy Assistance Program, and Earned Income Tax credits, Disability Determinations, and Refugee and Immigration Affairs. Also posted on the Internet in translation are key program applications and supportive documents, as well as informational brochures.

IV. Definitions

A. ADA Definitions

The following terms (1-12) are defined in the federal ADA and are provided in this Directive for your convenience.

1. A person with a disability is one who:

   a. Has a physical or mental impairment that substantially limits one or more of the major life activities of such person;

   b. Has a record of such impairment; or

   c. Is regarded as having such impairment.[1]

2. Physical impairment under 1.a means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. Specific examples of physical impairments include orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV disease (symptomatic or asymptomatic), tuberculosis, drug addiction and alcoholism.

3. Mental Impairment under 1.a means any mental or psychological disorder including, but not limited to, mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

4. Major life activities under 1.a means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

5. Substantially limits under 1.a means the person's major life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. For example, a person who is paraplegic is substantially limited in the major life activity of walking; a person who is blind is substantially limited in the major life activity of seeing; and a person who is mentally retarded is substantially limited in the major life activity of learning.

[1] The definition of disability under the ADA is distinctly different from, and more general than, the Social Security Administration definition of disability as used in Social Security disability reviews.

6. Record of impairment under 1.b means that the person has a history of, or has been misclassified as having, a physical or mental impairment that substantially limits one or more major life activities.

- Examples of those who have a history of impairment are those with histories of mental or emotional illness, heart disease or cancer.

- Examples of those who were misclassified as having a record of such impairment, i.e., any record or perception of an alleged impairment that subsequently was found not to be factually correct, may include those who have been erroneously diagnosed as having mental retardation or mental illness. Discrimination on the basis of such a past record of impairment is prohibited.

7. Regarded as having such impairment under 1.c means:

   a. The person has a physical or mental impairment that does not substantially limit major life activities, but the person is treated as having such a limitation; e.g., an individual with mild diabetes controlled by medication, is wrongfully barred by the staff of a county-sponsored summer camp from participation in certain sports because of her diabetes; or

   b. The person has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; e.g., a child born with a prominent facial disfigurement, is wrongfully refused admittance to a county-run day care program because her presence in the program might upset the other children; or

   c. The person has no impairment but is treated as having impairment; e.g., a person is excluded from a county-sponsored activity because the official believes unfounded rumors that the person is infected with the HIV virus. Myths, fears and stereotypes associated with disabilities or perceived physical or mental conditions may limit the person's major life activities and qualify the person for protection under the ADA.

8. Qualified person with a disability means a person with a disability, as defined under paragraph 1., who, with or without reasonable modifications to rules, policies, or practices; the removal of architectural, communication, or transportation barriers; or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a district. A person with a disability is qualified if that person meets the essential eligibility requirements for receipt of services or participation in the program or activity.

9. Auxiliary aids and services include:

   a. Qualified interpreters, note-takers, transcription services, written materials, telephone handset amplifiers, assistive learning devices,

assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning telecommunication devices for deaf persons (TDDs), videotext displays, or other effective methods of making orally-delivered material available to persons with hearing impairments;

b. Qualified readers, taped texts, audio recordings, Braille materials, large print material, or other effective methods of making visually delivered material available to persons with visual impairments;

c. Acquisition or modification of equipment or devices;

d. Interpreter Services, Desk Guide/Posters;

e. Other similar services and actions.

10. A qualified interpreter under paragraph 9.a is an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.

11. Reasonable accommodations may include:

a. Making existing facilities used by disabled applicants for and recipients of benefits, programs and services readily accessible to and usable by such persons;

b. Job restructuring, part-time or modified work schedules, reassignment to a vacant position;

c. Acquisition or modification of equipment or devices;

d. Appropriate adjustment or modifications of examinations, training materials or policies;

e. Provision of qualified readers or interpreters; and

f. Other similar accommodations for persons with disabilities.

12. A complaint is complete for purposes of the federal ADA if it contains a written statement that contains the complainant's name and address and describes the district's alleged discriminatory actions in sufficient detail to inform the Office of the nature and date of the alleged violation of Title II of the ADA. It must be signed by the complainant or by someone authorized to do so on his or her behalf. (A complaint for non-ADA purposes is defined in subsection B. below.)

B. Examples of Complaints that are not ADA Related

1. Complaint, as defined by Office regulations at 18 NYCRR Part 356.1(b), is any written or oral communication made to a social services district or this Office by

or on behalf of an applicant for or a recipient of public assistance or care, other than a complaint for which there is a right to a fair hearing, or a communication from any other source directed or referred to the social services district or this Office alleging, directly or indirectly, dissatisfaction with:

a. The action or failure to act in a particular case;

b. The manner in which a social services district generally handles its cases;

c. The social services districts' facilities and services, or the manner in which it generally conducts its business;

d. Other facilities or services (public or private) employed by a social services district for providing care and services for its clients; or

e. Any other aspect of social services administration not mentioned in this section.

V. Program Implications

A. General Requirements for All Applicants for and Recipients of TA, FS or HEAP.

1. Districts should review their procedures to ensure that the requirements described in this section are met operationally. Districts are encouraged to be flexible and creative in discharging their responsibilities under the ADA and concerning access by persons with LEP.

- It is the responsibility of each district to ensure that applicants for and recipients of TA, FS and HEAP have access to all benefits, programs and services, including those offered by other agencies operating on behalf of a district. If an applicant/recipient is determined eligible for one or more benefits, programs or services, the district should attempt to coordinate activities so the process is as seamless as possible, and that the identified need(s) of the applicant/recipient is (are) met. Districts should document in the case record a person's disability and/or any LEP information to indicate the types of actions taken to ensure access and coordinate the service process. Districts should maintain a record of requests for accommodations and how such requests were addressed by the district.

- Districts must adhere to confidentiality provisions as required by Social Services Law section 136 for applicants for and recipients of TA, FS and HEAP. Districts must also protect the confidentiality and privacy of information regarding the existence of a person's disability. Districts must share only the accommodations required, not the nature of a disability, with individuals providing client services who do not need to know the nature of the disability. Districts also must ensure that persons acting as interpreters for persons with LEP understand their obligation to maintain client confidentiality.

- Applicant/recipient interviews should be conducted to the extent practicable, in areas in which reasonable privacy is afforded; applicant/recipient interviews should be scheduled in a way that will minimize waiting and that will result in a minimum number of return visits. For example, sufficient space should be available to accommodate wheelchair access for compliance with Automated Finger Imaging System (AFIS) requirements, or the district must provide an alternate means of obtaining a photograph of the applicant/recipient.

- Documentation and referral information must be clearly explained to applicants/recipients.

- Waiting areas should be accessible to persons with disabilities and reasonably comfortable, to the extent practicable. There should be reasonable access to rest rooms, water fountains, and other necessities.

- Districts should make interpreter services desk guides available to workers and language posters available in all client areas. The Office has revised its interpreter services desk guide and language preference poster. These revised materials are available to districts as described in Section VII.

B. Requirements Pertaining To Applicants/Recipients under the ADA.

Districts must afford qualified persons with a disability an opportunity to participate in or benefit from a district's benefits, programs and services. Districts are responsible for ensuring that the opportunities afforded to qualified persons with a disability are equal to the opportunities afforded to persons without disabilities. Districts may carry out their activities using contractual arrangements or community resources.

Districts should maintain information that documents limitations and any necessary accommodations to ensure access for individuals with disabilities. This information should be available to all appropriate staff responsible for providing benefits and services. For example, information describing an individual's limitations and need for accommodations should be included in the employability assessment and considered when developing the employability plan. This information should be considered when determining appropriate activity assignments, including treatment for individuals. Districts are also required to notify worksite supervisor(s) in writing of an individual's limitations and need for reasonable accommodation.

An applicant/recipient's right to reasonable accommodations extends beyond work activities, therefore, information describing limitations and necessary accommodations should be available to any appropriate staff responsible for managing the client's case. For example, if an individual cannot have early morning appointments because of medication issues, or cannot climb stairs, the district should maintain documentation of the limitation(s) and necessary accommodation(s) to insure that the individual's needs are accommodated over time and through referrals to various sources.

Districts must adopt methods of administration which do not discriminate against and which ensure equal access and opportunity to qualified individuals with disabilities.

Districts must reasonably modify policies, practices and procedures that deny equal access to persons with disabilities but are not required to take action that would constitute a fundamental alteration in the benefit, program or services. If a proposed action would result in a fundamental alteration or undue burden, the district must take another action that would not cause this result. Districts must operate their programs so that, when viewed in their entirety, they are readily accessible to and usable by persons with disabilities. Districts have discretion in how they discharge this responsibility.

These requirements are subject to the limitations described below.

- The determination of whether a temporary impairment is a disability must be resolved on an individual basis, taking into consideration both the duration (and expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected person.

- The ADA does not cover disadvantages attributable to environmental, cultural or economic factors such as poverty or having a criminal record.

- The ADA also does not cover mere physical characteristics such as hair, skin, or eye color.

- Age by itself is not considered to be a disability under the ADA unless the person has a physical or mental impairment that limits one or more of their major life activities.

- The ADA does not cover personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder, unless the person has a recognizable physical or mental impairment in addition to these characteristics. Although drug addiction is a recognized impairment under the ADA, a district may withhold services or benefits based on an addict's current and illegal use of drugs or abuse of alcohol. Although a district ordinarily must consider good cause when an applicant with a physical or mental disability fails to comply with an eligibility requirement, the district should not consider the applicant's use or abuse of drugs or alcohol as good cause for his/her failure to comply.

Districts must attempt through reasonable means (e.g., posters, client booklets, etc.) to provide sufficient information to applicants/recipients, including persons who fail to self-disclose existing physical or mental impairments, to inform them of their rights under the ADA to reasonable accommodations to access benefits, programs or services provided by the district. Districts should make reasonable efforts to recognize potential disabilities, based on the applicant/recipient's disclosure or on an indication of an apparent disability. Staff should conduct an initial inquiry to identify an applicant or recipient's disability needs if the applicant or recipient agrees to take part in such inquiry. If there is an initial indication that the person has a disability that may impact his/her ability to successfully complete or benefit from the district's benefits, programs or services, based on the applicant's/recipient's disclosure or other information or indication that an apparent disability may exist, the district should offer the person an opportunity for a more comprehensive evaluation or assessment to determine whether an accommodation is necessary. However, districts may not inquire into the nature of the

disability beyond what is necessary to provide reasonable accommodation to access benefits, programs or services. Districts should take appropriate steps to ensure the confidentiality of information concerning a person's disability.

In addition, districts should use behavioral observations, historical data known to the agency or other means to help identify those persons who may not be able to self-disclose existing physical or mental conditions to district staff, and may then offer reasonable modifications in policies, practices, and procedures to make benefits, programs or services accessible for those persons. For example, district staff may observe an applicant/recipient acting in a disruptive or hostile manner toward other applicants/recipients in the waiting area. As a result of such observation, the district should consider making reasonable modifications to policies, practices, and procedures for such person, and may use staff with experience assisting hard-to-serve persons, or mental health professionals, as may be determined appropriate by the district, to speak with the applicant/recipient to assess whether he/she has disability-related needs and what reasonable accommodations are needed. Such staff should possess good communication, listening and assessment skills and the ability to work positively in a team setting. Then, if necessary, the district may re-direct the applicant/recipient to a modified process where the applicant/recipient may be able to effectively articulate his/her needs and adequately complete the application, recertification or other process, or the district may provide someone to assist a person with a physical or mental disability to complete the application or other required form.[2]

Applicants for and recipients of TA may establish good cause for not complying with eligibility requirements. Good cause may include instances when the applicant or recipient has a physical or mental impairment that prevents compliance, pursuant to 18 NYCRR 351.26(a) (1). For example, a recipient is required as a condition of eligibility for TA to attend a group recertification. However, where the session is held on the second floor of a building without elevator access, and where the recipient has a physical impairment that limits his/her mobility, the recipient has good cause for not completing his/her recertification in the manner assigned by the district. In these instances, districts must offer to make alternative arrangements to conduct the recipient's recertification.

The use of a modification or accommodation offered by the district to provide meaningful program access under the ADA is the choice of a person with a disability and not an essential eligibility requirement for the program(s) administered by the district. In some circumstances, an applicant/recipient may fail to complete an essential program eligibility requirement by intentionally declining to make use of a reasonable accommodation. In cases where the refusal to accept reasonable accommodations may result from the person's inability to recognize or acknowledge the existence of his/her disability, the district may need to seek involvement from a mental health professional or other qualified staff if the applicant/recipient does not appear to understand the consequences (such as denial of benefits or sanction) of his/her action when he/she refuses to make use of the reasonable accommodation to facilitate compliance with essential program eligibility requirements. In such cases, the refusal of the

[2] A determination that reasonable accommodation is required is not a determination of disability for any other purposes, e.g., employment exemption.

accommodation and/or any intervention attempt(s) must be documented before the district takes the appropriate negative case action. Districts should consider referral to adult protective services or other resources or services that may be of assistance to such persons.

C. Requirements Pertaining to Access by Persons with LEP.

Districts must continue to post the "Interpreter Services Poster" (PUB-4842) in all TA, MA and FS Benefits client areas. To assure that the most current version of the "Interpreter Services Poster" is posted, districts must order the 6/04 poster as soon as possible. Districts should also order, and make available to their workers in all program areas, the 6/04 version of the "Interpreter Services Desk Guide" (PUB-4843).

D. Inquiries for Information and Complaints

1. Inquiries – 18 NYCRR includes provisions that districts must comply with as follows:

- Part 356.1(a) defines an inquiry as any request for information that does not constitute an application for public assistance or care other than a complaint as defined in Section III.B.13 above.

- Part 356.2(a) requires districts to answer all inquiries promptly. If districts do not have the information requested, they should acknowledge the request and refer the person to the appropriate source for reply.

- Part 355.1(a)(6) specifies that districts are responsible for providing information to applicants and recipients of public assistance or care and are prohibited from discriminating against anyone making the inquiry based on race, color, religion, national origin, age, sex, handicap (physical or mental impairment) or marital status.

- Part 355.1(b) and 45 CFR Part 84, which was issued to effectuate section 504 of the Rehabilitation Act of 1973, requires districts to provide information in a manner that is accessible to visually impaired or blind and hearing impaired or deaf applicants and recipients.

- Part 355.2(a) requires districts to promptly give a copy of the appropriate information pamphlet to each person who inquires or applies. An example of an informational pamphlet that must be provided is: LDSS 4148A "What You Should Know About Your Rights and Responsibilities". A list of additional informational pamphlets is provided in Section VII, Additional Resources, below.

2. Complaints – Districts must investigate complaints of discrimination or improper case administration. Districts should make reasonable efforts to inform applicants/recipients with a disability and/or LEP of such complaint procedures. Districts also are responsible for ensuring that staff understands such agency procedures. In addition, districts must post procedures for filing discrimination

complaints in a conspicuous manner and must list those agencies or persons that will handle complaints, e.g., local commissioner, New York State Division of Human Rights.

When a complaint has been referred by the Office to a district, a report shall be submitted within 20 days of the date of such request and shall cover fully all matters pertaining to the complaint, as required by 18 NYCRR Part 356.3(e). If the time limit cannot be met, an interim report should be sent. The Office may provide feedback to the district concerning any matters covered in the report pertaining to the complaint, and may undertake further review of the complaint, in consultation with the district, if determined necessary.

Regarding complaints of denial of access by persons with disabilities, districts must publish their procedures that provide for prompt and equitable resolution at the local level of complaints alleging any violation of Title II of the ADA. For disability-related complaints concerning the Office's programs, districts must submit a copy of such complaints, and the district's determination thereon, to the Office's Bureau of Equal Opportunity Development (BEOD). In addition, persons may file administrative complaints under Title II of the ADA with an appropriate federal agency or bring a lawsuit in federal district court. Complainants are not required to exhaust the district's internal complaint procedures before filing a complaint with a federal agency.

Districts should document and record investigations of discrimination complaints and their findings. Where such complaints are founded, districts should take appropriate remedial action both to resolve the complaint and to retrain staff regarding their responsibilities. Districts should take appropriate corrective actions when staff discriminates against applicants/recipients of TA, FS and HEAP.

LDSS-4148A includes a section entitled "NONDISCRIMINATION RIGHTS" (see http://sdssnet5/otda/ldss_eforms/eforms/4148A.pdf). This section provides the following information to applicants/recipients regarding discrimination complaint procedures:

- *Discrimination by the New York State Office of Temporary and Disability Assistance (OTDA), by the New York State Department of Health, by the New York State Office of Children and Family Services, by the New York State Department of Labor[3] or by your local Department of Social Services based on race, religion, ethnic background, marital status, disability, sex, national origin, political belief or age is illegal.*

- *If you think you have been discriminated against in a Temporary Assistance Program, which includes Family Assistance and Safety Net Assistance, or*

[3] Part C of Chapter 57 of the Laws of 2005 transferred the functions, powers, duties and obligations of DOL concerning the employment placement and training programs for applicants for and recipients of public assistance, FS and individuals eligible for non-assistance services to the Office.

that your case has been handled improperly due to some type of discrimination, you can complain by calling or writing to the Bureau of Equal Opportunity Development (BEOD).[4]

- *If you think you have been discriminated against in the Food Stamp Benefits Program, you can complain by writing to the USDA.*

  Your discrimination complaint will be investigated, and you will be told in writing of the findings.

- *If you think you have been discriminated against on the basis of disability, you can complain by writing to Disability Rights Section.*

  Your discrimination complaint will be investigated, and you will be told in writing of the findings.

- *If you think you have been discriminated against in the Medical Assistance Program, you can complain by calling or writing to Human Resources Group, New York State Department of Health.*[5]

- *If you feel you have been discriminated against in TA, FS, and their related employment programs, Medical Assistance, Services or Child Care you can contact the Division of Human Rights.*[6] *You can also call or write to one of the regional offices of the New York State Division of Human Rights, which can be found in the Government pages of the telephone book. Some cities and counties in New York State also have human rights commissions that investigate discrimination complaints. Check your telephone book for a listing.*

Districts must comply with the requirements of 18 NYCRR Part 356 outlining a district's responsibility to respond to complaints by or on behalf of an applicant for or recipient of TA, FS or HEAP. This requirement does not include complaints arising from issues for which there is a scheduled fair hearing.

Procedures for handling complaints under the Food Stamp program are the most comprehensive and strictly prescribed by Federal authorities. Food Stamp complaint procedures are outlined in 03 LCM-3, Food Stamp Program Civil Rights Complaint Procedures and displayed on LDSS-8036, Food Stamp Complaint Procedure poster.

For all other programs, districts may use Food Stamp complaint procedures, but have the discretion to implement other appropriate complaint procedures, (except where the complaint includes an allegation of discrimination in relation to food

[4] BEOD will refer the complaint to the local district for investigation, and send a copy of the transmittal letter to the complainant.

[5] The ADA Title II Coordinator for the New York State Department of Health is Anna Colello, who is the contact for making an ADA related complaint involving Medicaid.

[6] Although LDSS 4148A directs applicants/recipients to the Division of Human Rights, the Human Rights Law does not cover all types of applicant/recipient complaints.

stamps). At a minimum, complaint procedures for all other programs must ensure that reasonable procedures have been developed and are in effect to investigate complaints of denial of access by persons with disabilities and/or LEP, as is required by 18 NYCRR 356.3.

VI. Required Action

A. Scheduling Considerations for Persons with Disabilities and/or LEP. When an appointment is rescheduled for a person with a disability and/or LEP because reasonable accommodations cannot be made or no interpreter is available on the date the application is filed, the delay does not affect the application filing date or any other dates relevant to the processing of applications. Districts must also assure that emergency/immediate needs are addressed as may be appropriate to the case.

B. Access by Persons with Disabilities.

Districts should assign a staff person to serve as an ADA contact, who will be responsible for monitoring investigation and resolution of complaints and for overseeing procedures that ensure access to benefits, programs and services, and that meet the requirements described in this directive operationally.

Districts must provide qualified persons with disabilities an equally effective opportunity for access to, and participation in, programs, services and benefits when the person has a disability as defined under the ADA and in Section III. A above. Districts also must assist applicants/recipients to meet eligibility requirements by eliminating non-essential procedures or rules that deny a person with a disability an equal opportunity to participate in the district's programs, services and benefits. For example, if a district's procedure requires a person to travel from one office to a second office in order to comply with child support standards or rules, the district may need to accommodate the person by bringing a child support worker to the first location, rather than requiring the person to travel to a second, inaccessible location. Although the district may modify non-essential procedures, the district may not eliminate the actual child support requirements solely because the person has a disability.

Districts must make reasonable accommodation to the known physical or mental limitations of otherwise qualified applicants/recipients with disabilities unless the district can show that the accommodation would impose an undue financial and administrative burden on the operation of its program. Districts may request that an applicant/recipient provide appropriate documentation where the disability is not readily apparent. Districts may deny reasonable accommodation, when the applicant/recipient, after being given reasonable opportunity, fails or refuses to comply with the request to provide appropriate documentation where the disability is not readily apparent. Programs and services should be provided to all applicants/recipients in the same manner or location, unless separate or different measures are necessary to ensure equal opportunities for individuals with disabilities. Programs that provide special benefits to people with disabilities are permitted but people with disabilities cannot be compelled to participate in those programs.

A district need only make reasonable modifications in its policies, practices, or procedures, to assure that otherwise eligible persons are not denied needed benefits, programs and services. If the district can demonstrate that a modification would fundamentally alter the nature of its benefits, programs and services, it is not required to make the modification. For example, if a district issues food stamp benefits using the Electronic Benefit Transfer system and has no authority to issue the benefits as cash, the district is not required to alter its FS program to provide food stamp benefits in cash to accommodate a request made by a recipient with a mental impairment who is afraid to access benefits electronically. A reasonable modification to accommodate the recipient's disability may be made by using an alternative payee arrangement.

Persons with disabilities must have access to district offices. If there are barriers in the district's buildings that would hinder access, alternative means of access must be available, whether these are alternate entrances and offices or alternate places for conducting interviews. A district may, however, pursue alternatives to structural changes in order to achieve program accessibility. For example, where the second-floor office of a district is entered only by climbing a flight of stairs, a person with a mobility impairment or phobia who is seeking information about, or seeking to apply for benefits, programs and services can be served in an accessible ground floor location or in another accessible building.

Districts must ensure that their communications with persons with disabilities are as effective as communications with others. Districts must provide the necessary auxiliary aids and services, as defined in Section III. A. 9 above, to ensure effective communication, when persons with disabilities seek to access benefits, programs and services provided by the district. The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved and may be determined on a case-by-case basis.

For persons with vision impairments, the use of magnifying lenses, qualified readers, taped texts, audio recordings, Braille materials, or large print materials may be useful for transactions that involve complex or extensive communications. Where a district provides information in written form, it must, when requested, make that information available to persons with vision impairments in a form that is usable by such persons. The requirement for effective communication does not mean that a district must put all of its documents in Braille. The requirement for effective communication means that a district must provide information in Braille, where feasible, or in another comparable format that is usable by persons with vision impairments, as determined appropriate by the district in the particular circumstances.

Districts are not required to have a sign language interpreter present every time they deal with a person who is deaf or hearing impaired. For applicants/recipients who are hearing impaired or deaf, the type of auxiliary aid or service necessary to ensure effective communication may vary in accordance with the length and complexity of the communication involved. More complex or extensive communications may require the use of qualified interpreters, assistive listening systems, videotext displays, or other aids or services.

District staff may communicate with persons who have hearing impairments through written materials and the exchange of written notes. For persons with vision impairments, district staff may provide oral directions or read written instructions. In many transactions, such as filing applications, communications provided through such simple methods are as effective as the communications provided to other persons in similar transactions.

Districts that communicate by telephone must provide equally effective communications with persons with disabilities, including persons with hearing and speech impairments. Districts are not required to have Telecommunications Devices for the Deaf (TDD's) to communicate with people who have hearing or speech impairments. Telephone relay services generally may be used to provide equally effective communications. Such services are available Statewide. Relay services involve a relay operator who uses both a standard telephone and a TDD to type the voice messages to the TDD user and read the TDD messages to the standard telephone user. Where a district uses such services, staff must be instructed to accept and handle relayed calls in the normal course of business.

Districts must document in the case file that the applicant/recipient needs reasonable accommodation, so that an interpreter or other appropriate auxiliary aids and services can be scheduled for any future appointments.

C. Access by Persons with LEP.

Districts should assign a staff person to serve as an LEP contact, who will be responsible for monitoring investigation and resolution of complaints and for overseeing procedures that ensure access to benefits, programs and services, and that meet the requirements described in this directive operationally. (Districts may assign the same staff person to serve as the ADA and LEP contact.)

No person shall be denied access to an application for benefits, programs or services based on a district's inability to provide adequate interpretation services. Persons with LEP must be able to apply without undue hardship.

If an applicant/recipient is a person with LEP, the district is responsible for obtaining a qualified interpreter. District staff should be reminded that an applicant/recipient has the choice to use a relative or friend as an interpreter. If the applicant/recipient does not choose this option or no bilingual staff interpreter is available, the district must set up an appointment for the applicant/recipient to return and must arrange for an interpreter or other interpretive services, e.g., Language Line Services, to be available at the appointment. However, applicants/recipients are not required to bring their own interpreter, and no person may be denied access to benefits, programs or services because of a district's inability to provide adequate interpreters. Districts must protect the filing or application date, as noted in VI. A., and continue to adhere to application interview time frames as required by each program area. Districts should document in the case record: (1) if an interpreter was requested by the applicant/recipient and if so, the date the interpreter was requested; (2) if the district offered to provide an interpreter without the applicant/recipient having made a request for such services; (3) whether the applicant/recipient agreed to use the interpreter provided by the district and if the

applicant/recipient agreed to use such an interpreter, how the services were or will be provided; (4) if the applicant/recipient declines/refuses to use the district's interpreter or interpreter services and brings his or her own interpreter.

When an applicant/recipient with LEP calls or visits the district office in person the district must:

- Ask the person what language he/she speaks (many persons know English well enough to answer the question);

- If the person is unable to answer the question, attempt to identify the applicant's/recipient's language by having him/her point to the language on a poster or Interpreter Services Desk Guide;

- Once the language is identified, solicit (if available) the aid of an on-site bilingual staff person to assist as an interpreter. The district should not seek the aid of a bilingual applicant or recipient. Relatives or friends of the applicant/recipient may be used if the applicant/recipient requests and the district determines that the relative or friend is capable of interpreting;

- Refer to the district's specific procedure for providing access to LEP persons if no qualified interpreter is available on-site;

- Be sure that the applicant/recipient understands the date, time and location of the new appointment if a return appointment is required;

- Address any emergency/immediate needs prior to scheduling a return appointment;

- Document in the case record the language of the LEP person, whether the LEP person chose to use his/her own interpreter, and/or whether a request for an interpreter was made, so that an interpreter can be scheduled, if necessary, for any future appointments;

- Document each attempt to contact an interpreter and if the interpreter appeared in person or by telephone.

VII. Systems Implications

There are no systems implications.

VIII. Additional Resources

Resources Available from the Office:

- Questions concerning the ADA may be directed to the Office's ADA Coordinator, Mr. Larry Ritter, Director, BEOD, 40 North Pearl Street-16 D, Albany, New York 12243; [telephone (518) 473-8555; e-mail larry.ritter@otda.state.ny.us].

- Legal questions concerning the ADA may be directed to Ms. Linda Hunt, Counsel's Office, 40 North Pearl Street-16C, Albany, New York 12243; [telephone (518) 474-9777; e-mail linda.hunt@otda.state.ny.us].

- Technical questions concerning LEP may be directed to Mr. Lynn Stone, Executive Deputy Commissioner's Office, 40 North Pearl Street-9C, Albany, New York 12243; [telephone (518) 402-3417; e-mail lynn.stone@otda.state.ny.us].

- Policy questions concerning LEP may be directed to Ms. Malinka Gutierrez, Counsel's Office, 40 North Pearl Street-16C, Albany, New York 12243; [telephone (518) 474-9496; e-mail malinka.gutierrez@otda.state.ny.us].

- Questions concerning ordering forms and documents should be directed to Document Services, which maintains the Local District Forms and Publications Catalog, Pub-4767. If you have any questions about how to order a specific document, please call Document Services [telephone 1-800-343-8859, ext. 4-9522; or (518) 486-6302; or (518) 402-0159].

- Requests for printed copies of the following documents should be submitted on OTDA-876 "Request For Forms or Publications" form, and should be sent to:

Office of Temporary and Disability Assistance
BMS Document Services and Operational Support
P.O. Box 1990
Albany, New York 12201

- Documents also may be ordered through Outlook. To order the forms you must obtain an OTDA-876 electronically by going to the OTDA Intranet Website at http://otda.state.nyenet/ then to Division of Program Support & Quality Improvement page, then to PSQI E-Forms page (this page contains the electronic OTDA-876).

- For those who do not have Outlook but who have Internet access for sending and receiving email, the Internet email address is: gg7359@dfa.state.ny.us. For a complete list of available forms, please refer to OTDA Intranet site: http://otda.state.nyenet/ldss_eforms/default.htm

Relevant Publications and Forms:

- LDSS-4148A: What You Should Know About Your Rights and Responsibilities *****.
- LDSS-4148B: What you Should Know About Social Services Programs*
- LDSS-4148C: What You Should Know If You Have An Emergency*
- LDSS-8036: Food Stamp Complaint Poster
- PUB-4842 Language Poster (6/04)
- PUB-4843 Interpreter Services Desk Guide (6/04)
- PUB-4702E: NYS Wants You To Know About Food Stamps Tear Off Poster (English) (9/00)
- PUB-4702E/S: NYS Wants You To Know About Food Stamps Tear Off Poster (English/Spanish) (9/00)
- FORM AD-475B**:** USDA Form "And Justice For All" (12/99) (Published by USDA).

*****This informational booklet is available in nine languages in addition to English. The languages are listed alphabetically below, followed by a two-letter language code: Arabic (AR), Chinese (CH), Haitian-Creole (HA), French (FR), Korean (KO), Russian (RU), Spanish (SP), Vietnamese (VI), and Yiddish (YI). The two-letter code follows the form or publication number of translated documents and identifies the language of the publication. For example, the LDSS-4148A in Spanish, Arabic and Chinese are listed as LDSS-4184A-SP, LDSS-4148A-AR, and LDSS-4148A-CH, respectively.

Self-Evaluation

In assuring that TA, FS and HEAP are delivered in a manner compliant with the requirements of Office regulations and in compliance with federal requirements of the ADA, a self-evaluation review form was developed (Attachment 1). The completion of the form and correction of any deficiencies is mandated.

Prior to the issuance of this directive, the self-evaluation form was sent to each district. Districts were asked to return the completed form by November 23, 2004. The Division of Employment and Transitional Supports (DETS) will notify the Commissioner of any district which has not returned the completed self-evaluation form, or has not presented a corrective action plan for any deficiency found. Only districts that are contacted by DETS will have to take action on the mandate to complete the self-evaluation.

Additionally, DETS periodically conducts random compliance reviews using this instrument to assure that districts are meeting ADA requirements.

DTA may require that districts redo and submit the self-evaluations on a schedule to be determined but no more frequently than once in a two year period.

More information on the requirements of Title II of the ADA may be found on the Internet at the U.S. Department of Justice ADA Home Page at www.ada.gov.

IX. Effective Date

The provisions of this directive are effective immediately.

Issued By_____

Name:	**Russell Sykes**
Title:	**Deputy Commissioner**
Division/Office:	**Division of Employment and Transitional Supports**

(Attachment 1)

(Rev. 03/05)

AMERICANS WITH DISABILITIES ACT (ADA)/LIMITED ENGLISH PROFICIENCY (LEP)
Self-Evaluation Form

District _____ Form completed by: _____ Phone #: _____

Access – ADA

1. Do you have an ADA contact person within DSS who is responsible for social services program access and for the taking and resolution of complaints from applicants/recipients (A/Rs)?

   ____ Yes ____ No (*)

2. If yes to #1, who is your ADA contact? _____.

   Please provide the ADA contact's telephone # _____.

3. a. Has your district done a self-evaluation of program access by A/Rs with disabilities?

   Yes ____ (Please attach a copy of the report) No ____(*)

   b. Were deficiencies found in the self-evaluation?

   Yes ____ (go to c.) No _____ (Go to #4)

   c. Were corrective actions taken?

   Yes _____ (Please attach copy of the corrective action plan) No _____ (*)

4. Do you have a written procedure for handling complaints from applicants/recipients who claim to have been denied access to social services programs due to a disability?

   Yes ____ (Please attach copy) No ____ (*)

5. Do you provide applicants/recipients (A/Rs) for social services programs with information about the ADA's prohibitions against discrimination?

   Yes ____ (Please attach copy) No ____

6. Reasonable accommodation means an adaptation or alteration that gives an A/R with disabilities meaningful access to social services programs. Do you have written reasonable accommodation procedures?

   Yes ____ (Please attach copy) No ____ (*)

7. Do you have a procedure to insure that the A/R who is offered reasonable accommodation, but refuses, understands the consequences of that refusal?

   Yes ____ (Please attach copy) No ____ (*)

Access – General Disabilities

1. a. Are your facilities accessible to, and usable by, individuals with disabilities?

   Yes ____ No ____

   b. Are your parking areas and sidewalks accessible to, and usable by, individuals with disabilities?

   Yes ____ No ____

   c. Is the entrance wheelchair accessible?

   Yes ____ No ____

   d. Are bathrooms and drinking fountains wheelchair accessible?

   Yes ____ No ____

   e. Are areas such as the photo ID/finger imaging areas wheelchair accessible?

   Yes ____ No ____

   f. If No to e., are alternate accessible sites available?

   Yes ____ No ____

   g. If the client area is above or below the 1st floor, are there elevators?

   Yes ____ No ____ 1st floor only ____

h. If No to g., are services available at alternate accessible sites?

Yes ____ No ____ (*)

2. In social services districts with more than one district office, are all district offices accessible according to #1. a – e above.

____ Yes ____ No (go to #3)

3. When one or more district office is not handicap accessible, is reasonable accommodation offered?

____ Yes (attach copy of reasonable accommodation plan, or specify) _____
____ No (*)

4. Do you have procedures for determining when home visits will be provided for A/Rs who are physically or mentally unable to travel to the office/center?

____ Yes (go to #6) ____ No (*) (go to #5)

5. If No to #4, what alternate accommodations are provided? _____
_____ .

6. Are the home visit or alternate accommodations procedures in writing?

____ Yes (please attach a copy – go to #7) ____ No (*) (go to #7)

7. How is the district's policy regarding home visits or alternate accommodations conveyed to A/Rs?
_____.
(Go to #8)

8. How is the district's policy regarding home visits or alternate accommodations conveyed to the appropriate LDSS staff?
_____ .

Access – Visually/sight Impaired

1. a. Are there signs in Braille for the visually/sight impaired?

Yes ____	No ____	Men's and Women's rooms
Yes ____	No ____	Room Numbers
Yes ____	No ____	Exits
Yes ____	No ____	Permanent Rooms and Spaces
Yes ____	No ____	Elevators

b. If NO to any of the above, how does the visually impaired person find a necessary location?

_____ .

2. Do you have procedures in place for A/Rs who, due to visual impairment, are unable to read the application, information booklets, notices, etc.?

Yes ____ (Please provide copy) No _____ (*)

Access – Mental Impairment

1. Do you have procedures in place to assist a mentally impaired A/R?

Yes ____ (Please provide copy) No _____ (*)

Access – Hearing Impaired

1. Do you have procedures in place to assist hearing impaired A/Rs?

Yes ___ (Please provide copy) No _____ (*)

2. Is a sign-language interpreter provided?

Yes ____ No ____ (*)

3. Does the office/agency have TTY/TTD equipment or New York Relay Services available?

Yes ____ (Type of Service: _____) No _____

Access – Limited English Proficiency

1. Do you have procedures to assist limited or non-English speaking A/Rs?

Yes ____ (Please provide copy) No ____ (*)

2. Are the following available in other than English language?

Signs	Yes ____ No ____
Posters	Yes ____ No ____
Pamphlets	Yes ____ No ____
Other client handouts:	Yes ____ (Describe: _____) No ____

3. a. Is the “Interpreter Services Poster” (PUB-4842) displayed in the waiting area?

   Yes ____ No ____ (*)

   b. Is the recommended 6/04 version of the “Interpreter Services Desk Guide” (PUB-4843) and/or the optional language palm cards used? Yes ____ No ____

(*) Answers with (*) will require a corrective action plan to be submitted within sixty days of the date that this form is due to the returned to the Division of Employment and Transitional Supports (DETS).

FEDERAL REGISTER

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Part II

Department of Justice

28 CFR Parts 35 and 36
Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008; Final Rule

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Parts 35 and 36

[CRT Docket No. 124; AG Order No. 3702–2016]

RIN 1190–AA59

Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008

AGENCY: Civil Rights Division, Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice (Department) is issuing this final rule to amend its Americans with Disabilities Act (ADA) regulations in order to incorporate the statutory changes to the ADA set forth in the ADA Amendments Act of 2008 (ADA Amendments Act or the Act), which took effect on January 1, 2009. In response to earlier Supreme Court decisions that significantly narrowed the application of the definition of ''disability'' under the ADA, Congress enacted the ADA Amendments Act to restore the understanding that the definition of ''disability'' shall be broadly construed and applied without extensive analysis. Congress intended that the primary object of attention in cases brought under the ADA should be whether covered entities have complied with their statutory obligations not to discriminate based on disability. In this final rule, the Department is adding new sections to its title II and title III ADA regulations to set forth the proper meaning and interpretation of the definition of ''disability'' and to make related changes required by the ADA Amendments Act in other sections of the regulations.

DATES: This rule will take effect October 11, 2016.

FOR FURTHER INFORMATION CONTACT: Rebecca Bond, Section Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307–0663 (voice or TTY); this is 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 final rule in an alternative format by calling the ADA Information Line at (800) 514–0301 (voice) and (800) 514–0383 (TTY). This final rule is also available on the ADA Home Page at *www.ada.gov.*

SUPPLEMENTARY INFORMATION: The meaning and interpretation of the definitions of ''disability'' in the title II and title III regulations are identical, and the preamble will discuss the revisions to both regulations concurrently. Because the ADA Amendments Act's revisions to the ADA have been codified into the U.S. Code, the final rule references the revised U.S. Code provisions except in those cases where the reference is to the Findings and Purposes of the ADA Amendments Act, in which case the citation is to section 2 of Public Law 110–325, September 25, 2008.

This final rule was submitted to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs for review prior to publication in the **Federal Register**.

I. Executive Summary

Purpose

This rule is necessary in order to incorporate the ADA Amendments Act's changes to titles II (nondiscrimination in State and local government services) and III (nondiscrimination by public accommodations and commercial facilities) of the ADA into the Department's ADA regulations and to provide additional guidance on how to apply those changes.

Legal Authority

The ADA Amendments Act was signed into law by President George W. Bush on September 25, 2008, with a statutory effective date of January 1, 2009. Public Law 110–325, sec. 8, 122 Stat. 3553, 3559 (2008). The Act authorizes the Attorney General to issue regulations under title II and title III of the ADA to implement sections 3 and 4 of the Act, including the rules of construction set forth in section 3. 42 U.S.C. 12205a.

Summary of Key Provisions of the Act and Rule

The ADA Amendments Act made important changes to the meaning and interpretation of the term ''disability'' in the ADA in order to effectuate Congress's intent to restore the broad scope of the ADA by making it easier for an individual to establish that he or she has a disability. *See* Public Law 110–325, sec. 2(a)(3)–(7). The Department is making several major revisions to the meaning and interpretation of the term ''disability'' contained in the title II and title III ADA regulations in order to implement the ADA Amendments Act. These regulatory revisions are based on specific provisions in the ADA Amendments Act or on specific language in the legislative history. The revised language clarifies that the term ''disability'' shall be interpreted broadly and explains that the primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations not to discriminate based on disability and that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis. The revised regulations expand the definition of ''major life activities'' by providing a non-exhaustive list of major life activities that specifically includes the operation of major bodily functions. The revisions also add rules of construction to be applied when determining whether an impairment substantially limits a major life activity. These rules of construction state the following:

—That the term ''substantially limits'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA;

—that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population;

—that the primary issue in a case brought under the ADA should be whether an entity covered under the ADA has complied with its obligations and whether discrimination has occurred, not the extent to which the individual's impairment substantially limits a major life activity;

—that in making the individualized assessment required by the ADA, the term ''substantially limits'' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for ''substantially limits'' applied prior to the ADA Amendments Act;

—that the comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence;

—that the ameliorative effects of mitigating measures other than ''ordinary eyeglasses or contact lenses'' shall not be considered in assessing whether an individual has a ''disability'';

—that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and

The Findings and Purposes of the ADA Amendments Act are also referenced in the codification of the ADA as a note to 42 U.S.C. 12101.

—that an impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment. The final rule also states that an individual meets the requirement of ''being regarded as having such an impairment'' if the individual establishes that he or she has been subjected to a prohibited action because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. It also provides that individuals covered only under the ''regarded as'' prong are not entitled to reasonable modifications.

The ADA Amendments Act's revisions to the ADA apply to title I (employment), title II (State and local governments), and title III (public accommodations) of the ADA. Accordingly, consistent with Executive Order 13563's instruction to agencies to coordinate rules across agencies and harmonize regulatory requirements, the Department has adopted, where appropriate, regulatory language that is identical to the revisions to the Equal Employment Opportunity Commission's (EEOC) title I regulations implementing the ADA Amendments Act. *See* 76 FR 16978 (Mar. 25, 2011). This will promote consistency in the application of the ADA and avoid confusion among entities subject to both titles I and II, as well as those subject to both titles I and III.

Changes Made From the Proposed Rule

The final rule retains nearly all of the proposed regulatory text, although some sections were reorganized and renumbered. The section-by-section analysis in appendix C to part 35 and appendix E to part 36 responds to comments and provides additional interpretive guidance on particular provisions. The revisions to the regulatory text, which include substantive changes in response to comments, include the following:

- Added Attention-Deficit/Hyperactivity Disorder (ADHD) as an example of a physical or mental impairment in §§ 35.108(b)(2) and 36.105(b)(2).
- Added ''writing'' as an example of a major life activity in §§ 35.108(c) and 36.105(c).
- Revised the discussion of the ''regarded as prong'' in §§ 35.108(f) and 36.105(f) to clarify that the burden is on a covered entity to establish that, objectively, an impairment is ''transitory and minor'' and therefore not covered by the ADA.
- Modified the rules of construction to make them more consistent with the statute and to provide more clarity, including §§ 35.108(a)(2) and 36.105(a)(2), 35.108(c)(2) and 36.105(c)(2), and 35.108(d)(1) and 36.105(d)(1).
- Revised or added several provisions to more closely conform to the EEOC regulation.

II. Summary of Regulatory Assessment

As noted above, Congress enacted the ADA Amendments Act in 2008 to ensure that persons with disabilities who were denied coverage previously under the ADA would again be able to rely on the protections of the ADA. As a result, the Department believes that the enactment of the law benefits millions of Americans, and that the benefits to many of these individuals are non-quantifiable, but nonetheless significant. This rule incorporates into the Department's titles II and III regulations the changes made by the ADA Amendments Act. In accordance with OMB Circular A–4, the Department estimates the costs and benefits of this proposed rule using a pre-ADA Amendments Act baseline. Thus, the effects that are estimated in this analysis are due to statutory mandates that are not under the Department's discretion. The Department has determined that the costs of this rule do not reach $100 million in any single year, and thus it is not an economically significant rule.

In the Initial Regulatory Assessment (Initial RA), the analysis focused on estimating costs for processing and providing reasonable modifications and testing accommodations to individuals with learning disabilities and ADHD for extra time on exams as a direct result of the ADA Amendments Act. Although the Department's analysis focused only on these specific costs, the Department recognized that the ADA Amendments Act extends coverage to people with the full range of disabilities, and the accommodation of those individuals might entail some economic costs. After review of the comments, and based on the Department's own research, the Department has determined, however, that the above-referenced exam costs represent the only category of measurable compliance costs that the ADA Amendments Act will impose and the Department was able to assess. While other ADA Amendments Act compliance costs might also ensue, the Department has not been able to specifically identify and measure these potential costs. The Department believes, however, that any other potential costs directly resulting from the ADA Amendments Act will likely be minimal and have little impact on the overall results of this analysis.

The data used to support the estimates in this Final Regulatory Assessment (Final RA) focus on (1) the increase in the number of postsecondary students or national examination test takers requesting and receiving accommodations—specifically, requests for extra time on exams—as a result of the changes made to the ADA by the ADA Amendments Act; and (2) the actual cost of these additional accommodations, which involves costs of providing staff with the training on the changes made to the ADA by the ADA Amendments Act, administrative costs to process the additional accommodation requests made as a direct result of the ADA Amendments Act, and the costs of additional proctor time needed for these additional accommodation requests. For both postsecondary institutions and national testing entities, costs are broken down into three components:

- One-time cost of training staff on relevant impact of ADA Amendments Act;
- Annual cost of processing additional accommodation requests for extra exam time made as a direct result of the ADA Amendments Act; and
- Annual cost of proctoring additional time on exams as a direct result of the ADA. Amendments Act.

Based on the Department's calculations, total costs to society for implementing the revisions to the ADA Amendments Act range from $31.4 million to $47.1 million in the first year. The first year of costs will be higher than all subsequent years because the first year includes the one-time costs of

For ease of reference for purposes of the discussion of costs in the Regulatory Assessment, the Department will use the term ''accommodations'' to reference the provision of extra time, whether it is requested as a reasonable modification pursuant to 28 CFR 35.130(b)(7) and 28 CFR 36.302, or as a testing accommodation (modifications, accommodations, or auxiliary aids and services) provided pursuant to 42 U.S.C. 12189 and 28 CFR 36.309. The Department wishes to preserve the legal distinction between these two terms in its guidance on the requirements of the ADA Amendments Act so it will use both terms where appropriate in the Section by Section Analysis and Guidance.

The Department is using the term ADHD in the same manner as it is currently used in the Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition (DSM–5), to refer to three different presentations of symptoms: predominantly inattentive (which was previously known as ''attention deficit disorder); predominantly hyperactive or impulsive; or a combined presentation of inattention and hyperactivity-impulsivity. The DSM–5 is the most recent edition of a widely-used manual designed to assist clinicians and researchers in assessing mental disorders. *See Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition DSM–5,* American Psychiatric Association, at 59–66 (2013).

training. Note that even the high end of this first-year cost range is well within the $100 million mark that signifies an ''economically significant'' regulation. The breakdown of total costs by entity is provided in the table below.

TOTAL COSTS FIRST YEAR (2016), PRIMARY ANALYSIS

Cost category	Low value	Med value	High value
Postsecondary Institutions: ANNUAL Total Costs of Processing Additional Requests and Proctoring Extra Exam Time	$12.8	$18.0	$23.1
Postsecondary Institutions: ONE–TIME Cost for Additional Training at Institutions	9.9	9.9	9.9
National Exams: ANNUAL Total Costs of Processing Additional Requests and Proctoring Extra Exam Time	6.8	9.5	12.2
National Exams: ONE–TIME Cost for Additional Training at Institutions	1.9	1.9	1.9
Total	31.4	39.3	47.1

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Taking these costs over the next 10 years and discounting to present value terms at a rate of 7 percent, the total costs of implementing this final rule are approximately $214.2 million over 10 years, as shown in the table below.

TOTAL COSTS OVER 10 YEARS, PRIMARY ANALYSIS

Total discounted value ($ millions)	Annualized estimate ($ millions)	Year dollar	Discount rate (percent)	Period covered
$214.2	$28.6	2015	7	2016–2025
243.6	26.3	2015	3	2016–2025

III. Background

The ADA Amendments Act was signed into law by President George W. Bush on September 25, 2008, with a statutory effective date of January 1, 2009. Public Law 110–325, sec. 8. As with other civil rights laws, individuals seeking protection in court under the anti-discrimination provisions of the ADA generally must allege and prove that they are members of the ''protected class.'' Under the ADA, this typically means they have to show that they meet the statutory definition of being an ''individual with a disability.'' *See* 154 Cong. Rec. S8840–44 (daily ed. Sept. 16, 2008) (Statement of the Managers); *see also* H.R. Rep. No. 110–730, pt. 2, at 6 (2008) (House Committee on the Judiciary). Congress did not intend, however, for the threshold question of disability to be used as a means of excluding individuals from coverage. H.R. Rep. No. 110–730, pt. 2, at 5 (2008).

In the original ADA, Congress defined ''disability'' as (1) a physical or mental impairment that substantially limits one or more major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. 12202(1). Congress patterned this three-part definition of ''disability''—the ''actual,'' ''record of,'' and ''regarded as'' prongs—after the definition of ''handicap'' found in the Rehabilitation Act of 1973. *See* H.R. Rep. No. 110–730, pt. 2, at 6 (2008). By doing so, Congress intended that the relevant case law developed under the Rehabilitation Act would be generally applicable to the term ''disability'' as used in the ADA. H.R. Rep. No. 101–485, pt. 3, at 27 (1990); *see also* S. Rep. No. 101–116, at 21 (1989); H.R. Rep. No. 101–485, pt. 2, at 50 (1990). Congress expected that the definition of ''disability'' and related terms, such as ''substantially limits'' and ''major life activity,'' would be interpreted under the ADA ''consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act''—*i.e.,* expansively and in favor of broad coverage. Public Law 110–325, sec. 2(a)(1)–(8) and (b)(1)–(6); *see also* 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers) (''When Congress passed the ADA in 1990, it adopted the functional definition of disability from . . . Section 504 of the Rehabilitation Act of 1973, in part, because after 17 years of development through case law the requirements of the definition were well understood. Within this framework, with its generous and inclusive definition of disability, courts treated the determination of disability as a threshold issue but focused primarily on whether unlawful discrimination had occurred.''); H.R. Rep. No. 110–730, pt. 2, at 6 & n.6 (2008) (noting that courts had interpreted the Rehabilitation Act definition ''broadly to include persons with a wide range of physical and mental impairments'').

That expectation was not fulfilled. Public Law 110–325, sec. 2(a)(3). The holdings of several Supreme Court cases sharply narrowed the broad scope of protection Congress originally intended under the ADA, thus eliminating protection for many individuals whom Congress intended to protect. *Id.* sec. 2(a)(4)–(7). For example, in *Sutton* v. *United Air Lines, Inc.,* 527 U.S. 471, 482 (1999), the Court ruled that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures. In *Sutton,* the Court also adopted a restrictive reading of the meaning of being ''regarded as'' disabled under the ADA's definition of ''disability.'' *Id.* at 489–94. Subsequently, in *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams,* 534 U.S. 184 (2002), the Court held that the terms ''substantially'' and ''major'' in the definition of ''disability'' ''need to be interpreted strictly to create a demanding standard for qualifying as disabled'' under the ADA, *id.* at 197, and that to be substantially limited in performing a major life activity under the ADA, ''an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.'' *Id.* at 198.

As a result of these Supreme Court decisions, lower courts ruled in numerous cases that individuals with a range of substantially limiting impairments were not individuals with

disabilities, and thus not protected by the ADA. *See* 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers) (''After the Court's decisions in *Sutton* that impairments must be considered in their mitigated state and in *Toyota* that there must be a demanding standard for qualifying as disabled, lower courts more often found that an individual's impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred.''). Congress concluded that these rulings imposed a greater degree of limitation and expressed a higher standard than it had originally intended, and unduly precluded many individuals from being covered under the ADA. *Id.* at S8840–41 (''Thus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court's narrower standard'' and ''[t]he resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimination under the ADA.'').

Consequently, Congress amended the ADA with the Americans with Disabilities Act Amendments Act of 2008. This legislation is the product of extensive bipartisan efforts, and the culmination of collaboration and coordination between legislators and stakeholders, including representatives of the disability, business, and education communities. *See* 154 Cong. Rec. H8294–96 (daily ed. Sept. 17, 2008) (joint statement of Reps. Steny Hoyer and Jim Sensenbrenner); *see also* 154 Cong. Rec. S8840–44 (daily ed. Sept. 16, 2008) (Statement of the Managers).

The ADA Amendments Act modified the ADA by adding a new ''findings and purposes'' section focusing exclusively on the restoration of Congress's intent in the ADA to broadly interpret the term ''disability'' to ensure expansive coverage. These new ADA Amendments Act-specific findings and purposes are meant to restore a broad scope of protection under the ADA by providing clear and enforceable standards that support the mandate to eliminate discrimination against people with disabilities. The ''purposes'' provisions specifically address the Supreme Court decisions that narrowed the interpretation of the term ''disability,'' rejecting the *Toyota* strict interpretation of the terms ''major'' and ''substantially;'' the *Sutton* requirement that ameliorative mitigating measures must be considered when evaluating whether an impairment substantially limits a major life activity; and the narrowing of the third, ''regarded as'' prong of the definition of ''disability'' in *Sutton* and *School Board of Nassau County* v. *Arline,* 480 U.S. 273 (1987). In addition, the ADA Amendments Act specifically rejects the EEOC's interpretation of ''substantially limited'' as meaning ''significantly restricted,'' noting that it is too demanding of a standard. *See* Public Law 110–325 sec. 2(b).

The findings and purposes section of the ADA Amendments Act ''gives clear guidance to the courts and . . . [is] intend[ed] to be applied appropriately and consistently.'' 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (Statement of the Managers). The Department has amended its regulations to reflect the ADA Amendments Act, including its findings and purposes.

IV. Summary of the ADA Amendments Act of 2008

The ADA Amendments Act restores the broad application of the ADA by revising the ADA's ''Findings and Purposes'' section, expanding the statutory language regarding the meaning and interpretation of the definition of ''disability,'' providing specific rules of construction for interpreting that definition, and expressly superseding the standards enunciated by the Supreme Court in *Sutton* and *Toyota* and their progeny.

First, the ADA Amendments Act deletes two findings that were in the ADA: (1) That ''some 43,000,000 Americans have one or more physical or mental disabilities,'' and (2) that ''individuals with disabilities are a discrete and insular minority.'' 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers); *see also* Public Law 110–325, sec. 3. As explained in the 2008 Senate Statement of the Managers, ''[t]he [Supreme] Court treated these findings as limitations on how it construed other provisions of the ADA. This conclusion had the effect of interfering with previous judicial precedents holding that, like other civil rights statutes, the ADA must be construed broadly to effectuate its remedial purpose. Deleting these findings removes this barrier to construing and applying the definition of disability more generously.'' 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers).

Second, the ADA as amended clarifies Congress's intent that the definition of ''disability'' ''shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.'' 42 U.S.C. 12102(4)(A).

Third, the ADA as amended provides an expanded definition of what may constitute a ''major life activity,'' within the meaning of the ADA. 42 U.S.C. 12102(2). The statute provides a non-exhaustive list of major life activities and specifically expands the category of major life activities to include the operation of major bodily functions. *Id.*

Fourth, although the amended statute retains the term ''substantially limits'' from the original ADA definition, Congress set forth rules of construction applicable to the meaning of substantially limited that make clear that the term must be interpreted far more broadly than in *Toyota.* 42 U.S.C. 12102(4); *see also* Public Law 110–325, sec. 2(b)(5). Congress was specifically concerned that lower courts had applied *Toyota* in a way that ''created an inappropriately high level of limitation necessary to obtain coverage under the ADA.'' Public Law 110–325, sec. 2(b)(5). Congress sought to convey 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, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.'' *Id.*

Fifth, the ADA as amended prohibits consideration of the ameliorative effects of mitigating measures such as medication, assistive technology, or reasonable modifications when determining whether an impairment constitutes a disability. 42 U.S.C. 12102(4)(E)(i). Congress added this provision to address the Supreme Court's holdings that the ameliorative effects of mitigating measures must be considered in determining whether an impairment substantially limits a major life activity. Public Law 110–325, sec. 2(b)(2). The ADA as amended also provides that impairments that are episodic or in remission are disabilities if they would substantially limit a major life activity when active. 42 U.S.C. 12102(4)(D).

Sixth, the ADA as amended makes clear that, despite confusion on the subject in some court decisions, the ''regarded as'' prong of the disability definition does not require the individual to demonstrate that he or she has, or is perceived to have, an impairment that substantially limits a major life activity. 42 U.S.C. 12102(3). With this clarifying language, an individual can once again establish coverage under the law by showing that he or she has been subjected to an action prohibited under the Act because

of an actual or perceived physical or mental impairment. The ADA Amendments Act also clarifies that entities covered by the ADA are not required to provide reasonable modifications to policies, practices, or procedures for individuals who fall solely under the regarded as prong. 42 U.S.C. 12201(h).

Finally, the ADA as amended gives the Attorney General explicit authority to issue regulations implementing the definition of ''disability.'' 42 U.S.C. 12205a.

V. Background on This Rulemaking and Public Comments Received

The Department published its Notice of Proposed Rulemaking (NPRM) proposing to amend its title II and title III ADA regulations in the **Federal Register** on January 30, 2014. 79 FR 4839 (Jan. 30, 2014). The comment period closed on March 31, 2014. The Department received a total of 53 comments on the NPRM from organizations representing persons with disabilities, organizations representing educational institutions and testing entities, individual academics, and other private individuals. The Section-by-Section analysis in the appendix to this rule addresses the comments related to specific regulatory language proposed in the NPRM.

Many commenters on the NPRM noted the value of the regulation to people with disabilities while a number of commenters on the Department's NPRM expressed concern that the Department's regulatory assessment unduly focused on individuals with learning disabilities who sought accommodations in testing or educational situations. These commenters asserted that the Department's discussion of the potential costs for testing entities or educational entities of complying with the ADA Amendments Act and this rule could be misunderstood to mean that the Department believed the changes in the definition of ''disability'' did not have an impact on individuals with other types of disabilities.

As discussed in the regulatory assessment, the Department believes that persons with all types of impairments, including, but not limited to, those enumerated in §§ 35.108(b) and 36.105(b), will benefit from the ability to establish coverage under the ADA as amended, and will therefore be able to challenge the denial of access to goods, services, programs, or benefits based on the existence of a disability. The Department's regulatory assessment is not a statement about the coverage of the ADA. Rather, it is a discussion of identifiable incremental costs that may arise as a result of compliance with the ADA Amendments Act and these implementing regulations. As explained in the regulatory assessment and under Section VII.A below, the Department believes that those costs are limited primarily to the context of providing reasonable modifications in higher education and testing accommodations by testing entities.

VI. Relationship of This Regulation to Revisions to the Equal Employment Opportunity Commission's ADA Title I Regulation Implementing the ADA Amendments Act of 2008

The EEOC is responsible for regulations implementing title I of the ADA addressing employment discrimination based on disability. On March 25, 2011, the EEOC published its final rule revising its title I regulation to implement the revisions to the ADA contained in the ADA Amendments Act. 76 FR 16978 (Mar. 25, 2011).

Because the ADA's definition of ''disability'' applies to title I as well as titles II and III of the ADA, the Department has made every effort to ensure that its proposed revisions to the title II and III regulations are consistent with the provisions of the EEOC final rule. Consistency among the title I, title II, and title III rules will promote consistent application of the requirements of the ADA Amendments Act, regardless of the Federal agency responsible for enforcement or the ADA title that is enforced. Further, because most entities subject to either title II or title III are also subject to title I with respect to employment, they should already be familiar with the revisions to the definition of ''disability'' in the 4-year-old EEOC revised regulation. Differences in language between the title I rules and the Department's title II and title III rules are noted in the Section-by-Section analysis and are generally attributable to structural differences between the title I rule and the title II and III rules or to the fact that certain sections of the EEOC rule deal with employment-specific issues.

On September 23, 2009, the EEOC published its NPRM in the **Federal Register** proposing revisions to the title I definition of ''disability.'' *See* 74 FR 48431. The EEOC received and reviewed more than 600 public comments in response to its NRPM. In addition, the EEOC and the Department held four joint ''Town Hall Listening Sessions'' throughout the United States and heard testimony from more than 60 individuals and representatives of the business/employer industry and the disability advocacy community.

VII. Regulatory Process Matters

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

This final rule 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 rule is a ''significant regulatory action'' as defined by Executive Order 12866, section 3(f). The Department has determined, however, that this 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 rule has been reviewed by the Office of Management and Budget (OMB) pursuant to Executive Orders 12866 and 13563.

Purpose and Need for Rule and Scope of Final Regulatory Assessment

This rule is necessary in order to incorporate into the Department's ADA regulations implementing titles II (nondiscrimination in State and local government services) and III (nondiscrimination by public accommodations and commercial facilities) the ADA Amendments Act's changes to the ADA and to provide additional guidance on how to apply those changes. The ADA Amendments Act, which took effect on January 1, 2009, was enacted in response to earlier Supreme Court decisions that significantly narrowed the application of the definition of ''disability'' under the ADA. *See Sutton* v. *United Air*

Lines, Inc., 527 U.S. 471 (1999); *Toyota Motor Mfg., Kentucky, Inc.* v. *Williams,* 534 U.S. 184 (2002). The ADA Amendments Act clarifies the proper interpretation of the term ''disability'' in the ADA and fulfills congressional intent to restore the broad scope of the ADA by making it easier for individuals to establish that they have a disability within the meaning of the statute. *See* Public Law 110–325, sec. 2(a)(3)–(7). The Act authorizes the Attorney General to issue regulations under title II and title III of the ADA to implement sections 3 and 4 of the Act, including the rules of construction presented in section 3. 42 U.S.C. 12205a. The Department is making several revisions to the title II and title III ADA regulations that are based on specific provisions in the ADA Amendments Act.

The Department notes that the Supreme Court cases limiting the application of the definition of ''disability'' had the most significant impact on individuals asserting coverage under title I of the ADA with respect to employment. The legislative history of the ADA Amendments Act is replete with examples of how individuals with a range of disabilities were unable to successfully challenge alleged discriminatory actions by employers because courts found that they did not qualify as individuals with disabilities under the Supreme Court's narrow standards. *See, e.g.,* S. 154 Cong. Rec. S8840–44 (daily ed. Sept. 16, 2008) (Statement of the Managers). With respect to titles II and III, while the statutory amendments required by the ADA Amendments Act affect persons with all types of disabilities and across all titles of the ADA, Congress anticipated that the ADA Amendments Act's expanded definition would especially impact persons with learning disabilities who assert ADA rights in education and testing situations. *See* H.R. Rep. No. 110–730, pt. 1, at 10–11 (2008); *see also* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008). Congress was concerned about the number of individuals with learning disabilities who were denied reasonable modifications or testing accommodations (*e.g.,* extra exam time) because covered entities claimed these individuals did not have disabilities covered by the ADA.

In the NPRM, the Department requested public comments on whether the changes made by the ADA Amendments Act to titles II and III and that are addressed in the proposed rule would have benefits or costs in areas other than additional time for postsecondary students and national examination test takers with ADHD or learning disabilities. Those comments and the Department's response are discussed below. The Department wishes to stress that, although its economic analysis is focused on estimating costs for processing requests and providing extra time on exams as a direct result of the ADA Amendments Act, the ADA, as amended, extends coverage to individuals with the full range of disabilities and affords such individuals the full range of nondiscrimination protections under the ADA.The Department is aware that the accommodation of those individuals might entail some economic costs; however, it appears that in light of the legislative history and the experience of the Department in resolving ADA claims from 1990 to the present, the above-referenced exam costs represent the only category of measurable compliance costs that the ADA Amendments Act will impose and the Department was able to assess. While other ADA Amendments Act compliance costs might also ensue, the Department has not been able to specifically identify and measure these potential costs. The Department believes, however, that any other potential costs directly resulting from restoration of coverage to individuals with disabilities who assert their rights under other ADA nondiscrimination provisions will likely be minimal and have little impact on the overall results of this analysis.

Public Comments on Regulatory Assessment and Department Responses

This section discusses public comments to the Initial RA that accompanied the NPRM, as well as changes made to the estimation of likely costs of this rule in response to those comments.

While more than 50 comments were received during the NPRM comment period, only a few of those directly addressed the assumptions, data, or methodology used in the Initial RA. The Department received comments from persons with disabilities, organizations representing educational institutions and testing entities, individual academics, and other private individuals. The preamble to this final rule provides the primary forum for substantive responses to these comments.

General and Recurring Concerns Expressed in Comments

Many commenters expressed appreciation for the proposed regulation, with several noting that the regulation would offer qualitative and quantitative benefits. Some of the quantitative benefits noted by commenters were a reduction in litigation costs as well as access to educational opportunities for persons with disabilities that would enhance employment prospects, productivity, and future earnings and investments. Qualitative benefits referenced in the comments included enhanced personal self-worth and dignity, as well as the values of equity, fairness, and full participation. Other commenters expressed concern about costs associated with implementation of the regulation.

The Department reviewed a number of comments suggesting that it underestimated the costs that postsecondary schools or national testing entities will incur to comply with the ADA Amendments Act. Commenters stated that the ADA Amendments Act will lead to a significant increase in the number of students seeking accommodations from postsecondary schools, which will lead to substantially increased direct costs (*e.g.,* the costs of providing additional exam time and other accommodations to students with disabilities) and indirect costs (*e.g.,* the costs of processing these requests, complaints to the Office for Civil Rights at the U.S. Department of Education, and lawsuits). Commenters further stated that the Department overlooked the costs that postsecondary schools will incur in providing accommodations other than additional exam time, such as tutors, note takers, auxiliary aids, e-books, etc. These commenters suggested that postsecondary schools will need to hire additional staff to manage the additional administrative burden that the ADA Amendments Act imposes.

Those comments and as well as other related comments, are specifically addressed below. But, as a threshold matter, the Department believes that the concerns predicated on the assumption of a significant rise in students seeking accommodations due to changes brought about by the ADA Amendments Act are overstated. One of the primary purposes of the ADA Amendments Act was to restore ADA coverage to a subset of individuals with disabilities who lost ADA protection as a result of a series of

A number of commenters on the NPRM expressed concern that the Department's focus on the economic impact of the ADA Amendments Act with respect to individuals with learning disabilities and in the area of education and testing might lead the public to think that the Department did not believe the ADA Amendments Act would benefit persons with other disabilities or in the full range of situations and contexts covered by titles II and III of the ADA.

Supreme Court decisions dating back to 1999.

While the Department recognizes that there has been an increase in the number of students with disabilities requesting accommodations at postsecondary institutions, much of this increase is likely not attributable to the passage of the ADA Amendments Act. Commenters and existing data suggest that, for the most part, increases in the number of students with disabilities attending college and seeking accommodations are likely related to the following factors:

- There are more diagnoses of disabilities in children overall since 1997;
- More students are attending college generally;
- Other laws such as the Individuals with Disabilities Education Act (IDEA) and section 504 are causing students with disabilities to be identified more widely and at a younger age;
- The stigma of identifying as a person with a disability appears to have diminished since the passage of the ADA in 1990;
- Diagnoses of autism spectrum disorders among children have increased significantly since 1997, perhaps as a result of improved diagnostic tools and protocols; and
- Postsecondary schools have improved their ability to accommodate students with disabilities, thus encouraging more students to seek such accommodations, and empowering students with disabilities to enroll in college and remain enrolled there.

Most of the students affected by the ADA Amendments Act are students whose impairments did not clearly meet the definition of ''disability'' under the ADA after the series of Supreme Court decisions beginning in 1999 reduced the scope of that coverage. For instance, under the narrowed scope of coverage, some individuals with learning disabilities or ADHD may have been denied accommodations or failed to request them in the belief that such requests would be denied. As a result, the most likely impact of the ADA Amendments Act is seen in the number of students with disabilities eligible to request and receive accommodations in testing situations. There are different types of accommodations requested in testing situations, but requests for additional exam time appear to be the type of accommodation most likely to have a significant, measurable cost impact. Other types of accommodations requested in testing situations are expected to incur few to no additional costs as a result of the ADA Amendments Act and this rule. For instance, requests for accommodations such as the use of assistive technology or the need for alternative text formats were the types of accommodations that would have been granted prior to the passage of the ADA Amendments Act because students with sensory disabilities needing these types of accommodations would have been covered by the ADA even under the narrower scope of coverage arising from the application of the Supreme Court's decisions in *Toyota* and *Sutton.* As a result, those types of accommodations cannot be directly attributed to the ADA Amendments Act. In addition, other types of accommodations such as adjustments to the testing environment (*e.g.,* preferential seating or alternative locations) or the ability to have snacks or drinks would result in minimal or no costs. Therefore, the Department's examination of the costs of this rule is confined to those accommodations that individuals at postsecondary institutions or taking national examinations are most likely to request as a result of the ADA Amendments Act and that are most likely to incur measurable costs—extra time on tests and examinations.

One commenter, however, asserted that costs should be estimated for entities other than postsecondary institutions and testing entities, such as elementary and secondary schools, courthouses, etc. Certain concerns related to elementary and secondary schools are addressed below, but the Department found no direct evidence to indicate that institutions other than postsecondary institutions and testing entities will incur any significant economic impact as a result of accommodating individuals now covered under the ADA after passage of the ADA Amendments Act. Even after conducting further research, the Department was unable to identify any accommodations that would result in compliance costs that could be specifically attributable to the ADA Amendments Act other than those identified and measured in this analysis—*i.e.,* accommodations for extra time on exams. While the Department anticipates that other individuals with disabilities will benefit from the ADA Amendments Act, no specific subsets of individuals with disabilities or specific accommodations were identified. Accordingly, it appears that the economic impact of ADA Amendments Act compliance for entities other than postsecondary schools and testing entities will not significantly affect the overall economic impact of the rule, and thus those costs are not analyzed here.

One commenter cited the 2013–2014 Institutional Disability Access Management Strategic Plan at Cornell University as an example of the kind of careful planning done by postsecondary institutions to address the needs of students with disabilities as a basis for determining that the costs of implementing the ADA Amendments Act will be very high. This document focuses almost exclusively on initiatives taken in furtherance of ADA compliance generally, rather than compliance with the ADA Amendments Act specifically. Further, this document discloses that Cornell University annually updates its plans and policies toward individuals with disabilities. Nothing in this document indicates that Cornell University is absorbing high costs as a result of such ongoing updates, or that the ADA Amendments Act has presented Cornell University with an unusually high burden, over and above the ordinary obligations that the ADA itself imposes. It is true that this document reflects careful, comprehensive, and possibly costly planning on the behalf of students with disabilities, but the expense inherent in such planning is attributable to the overall requirements of the ADA itself, rather than the implementation of the ADA Amendments Act.

Coleen A. Boyle, *et al., Trends in the Prevalence of Developmental Disabilities in US Children, 1997–2008,* 127 Pediatrics 1034 (2011), *available at http://pediatrics.aappublications.org/content/pediatrics/early/2011/05/19/peds.2010-2989.full.pdf* (last visited April 22, 2016); *see also* Matt Krupnick, *Colleges respond to growing ranks of learning disabled,* The Hechinger Report (Feb. 13, 2014), *available at http://hechingerreport.org/colleges-respond-to-growing-ranks-of-learning-disabled/* (last visited Feb. 3, 2016).

U.S. Department of Education, National Center for Education Statistics, *Fast Facts: Enrollment, available at http://nces.ed.gov/fastfacts/display.asp?id=98* (last visited Feb. 3, 2016).

See Stephen B. Thomas, *College Students and Disability Law,* 33 J. Special Ed. 248 (2000), *available at http://www.ldonline.org/article/6082/* (last visited Apr. 22, 2016).

Centers for Disease Control and Prevention, *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years — Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2010,* MMWR 2014; 63 (SS–02), *available at http://www.cdc.gov/mmwr/pdf/ss/ss6302.pdf* (last visited April 22, 2016).

See Justin Pope, *Students with Autism, Other Disabilities Have More College Options Than Ever Before, Huff Post Impact, available at http://www.huffingtonpost.com/2013/09/16/autism-college-options_n_3934583.html* (Sept. 16, 2013) (last visited Feb. 3, 2016).

Cornell University—Disability Information, *Institutional Disability Access Management Strategic Plan for Cornell University, July 1, 2013–June 30, 2014, available at http://disability.cornell.edu/docs/2013-2014-disability-strategic-plan.pdf* (last visited Feb. 3, 2016).

Comments Regarding the ADA and Related Laws

Many of the commenters' points regarding increased costs appear to apply to concerns about the costs of complying with the ADA generally and not to costs related to expanded coverage due to the ADA Amendments Act. It is true that in some cases the costs of accommodating some students with more severe mobility and sensory disabilities could be significant, but these students were clearly covered even under the restrictive standards set forth by *Sutton* and *Toyota,* and accordingly, such costs cannot be attributed to the implementation of the ADA Amendments Act. One commenter expressed a concern that there has been an increase in requests for ''exotic or untrained animals as service or emotional support animals'' in student housing provided by postsecondary institutions. The Department notes that neither ''exotic animals'' nor ''emotional support animals'' qualify as service animals under the existing regulations implementing titles II and III of the ADA and thus, any costs related to allowing such animals are not due to the application of the requirements of this rule.And, similar to the observation noted above, the vast majority of students who use service animals as defined under the ADA have disabilities that would have been covered prior to passage of the ADA Amendments Act, even under the Supreme Court's more narrow application of the definition of ''disability.'' So, although such costs may be measurable, they cannot fairly be attributed to the implementation of the ADA Amendments Act.

Comments Regarding the Costs for the Adjustment of Existing Policies

The Department acknowledges that postsecondary schools and national testing entities will incur some costs to update their written policies and training procedures to ensure that the definition of ''disability'' is interpreted in accordance with the requirements of the ADA Amendments Act, but has found no evidence to indicate that such costs would be high. The Department also notes that even prior to passage of the ADA Amendments Act, many postsecondary schools had policies in place that were broader and more comprehensive than would have been required under the more restrictive coverage set forth in *Sutton* and *Toyota.* As a result, their policies and procedures may require few, if any, updates to conform to the ADA Amendments Act and the revised regulations. The Department has found no evidence to suggest that the changes required by the ADA Amendments Act have placed or will place a significant burden upon the ongoing processes of evaluating and updating policies that already exist at postsecondary schools or with national testing entities. Nevertheless, the Department has attempted in this Final RA to quantify the cost of training staff members and updating policies as a result of the changes that the ADA Amendments Act final rule may require.

Some commenters argued that the Department's estimate of a one-time cost of $500 per institution to change policies and procedures in compliance with the ADA Amendments Act was too low. Instead, one commenter proposed an estimated one-time cost of $2,500 per institution, and another commenter suggested an estimated one-time cost of $5,000 per institution for the first year's training costs. The underlying data and methodology to support these estimates were not provided by these commenters.

The Department has found no data to substantiate the claims that the cost of changing existing policies and training procedures to comply with the ADA Amendments Act will be $2,500 or $5,000 per institution. The commenters proposing those costs did not provide any detailed evidence or arguments in support of such costs, and the Department's research found no evidence to indicate that any institutions have incurred training or policy revision costs of that magnitude since the ADA Amendments Act became effective in 2009. The commenter suggesting a $5,000 cost cites to one institution's disability access plan to suggest some of the types of costs that might be incurred. The referenced document, however, does not provide specific dollar figures and is not ADA Amendments Act specific. Therefore, the Department does not believe that the commenter's projected cost increases are correct because, as discussed above, the programmatic concerns identified in this document pertained to ADA compliance as a whole, but not with changes to the ADA created by the ADA Amendments Act specifically. The Department acknowledges that the absence of evidence of such costs, however, is not necessarily conclusive that some costs do not or will not exist. Nevertheless, the Department believes that, had postsecondary schools incurred $2,500 to $5,000 in such compliance costs since 2009 or if they expected to incur such costs going forward, some indicia of these costs would be readily apparent.

Because no relevant supporting information regarding the commenters' estimates was provided, the Department conducted additional independent research and interviewed representatives at two postsecondary institutions to determine whether any additional formal or informal training had been needed to understand the implications of the ADA Amendments Act (and make adjustments to existing policies and procedures to conform to the Act's requirements). One of those two institutions stated that no additional training had been needed. The second institution said that additional training had been provided during meetings with staff. Approximately two hours per staff member (*i.e.,* two hours per meeting) had been dedicated to this training. Approximately two part-time staff and six graduate students (working part time) received this training. In addition, the staff member providing the training had to attend a one-day conference to receive the information to pass along to the other staff. The Department conducted research to determine the costs of attending such a conference and receiving training on the changes to the law resulting from the ADA Amendments Act. Based on this independent research and feedback from representatives of two postsecondary institutions, the Department increased its estimate for one-time training costs from approximately $500 to $1,371 (*see* below for greater details on how the $1,371 was derived).

Comments Regarding the Costs of Additional Staff Time for the Administration of the Rule

Some commenters argued that the rule will lead to a significant increase in postsecondary institution accessibility support staff time devoted to disability accommodation issues, perhaps even requiring postsecondary institutions to hire additional personnel. One commenter representing higher educational institutions estimated that each affected institution would be required to hire one new full-time staff member, at $40,000 per year, to address increased student requests. This commenter cited a study that indicated that the mean number of staff who assist students with disabilities is four per campus. The Department questions the commenter's estimate that each affected institution would have to increase their

As in other types of housing environments, students who wish to have emotional support animals in housing provided by their place of education may make those requests under the Fair Housing Act, 42 U.S.C. 3601 *et seq.,* and not the ADA.

staff by one full-time staff person, or approximately 25 percent of the mean entire staff, to address the incremental changes created by the ADA Amendments Act. The general increase in accommodation requests is likely attributable to a number of other factors not related to the ADA Amendments Act, including higher enrollment of students with disabilities. While there will likely be an incremental increase in the number of testing accommodations requested and granted as a direct result of the ADA Amendments Act, this incremental increase is unlikely to be the driving factor for hiring additional staff.

Similarly, some commenters argued that the Department needed to incorporate estimates of the additional administrative time needed to review and administer additional requests for testing accommodations for both postsecondary and national testing entities. To address these concerns, the Department contacted several universities and testing entities, but received responses from only one school and one testing entity, and those responses were inconclusive. The postsecondary school said that there has been no noticeable increase in applications for accommodations since the passage of the ADA Amendments Act, but the testing entity stated that it has detected a large increase in requests for additional testing time since the passage of the ADA Amendments Act. In light of the uncertainty regarding any potential additional staff time needed to review additional requests for accommodations, the Department has made several assumptions based on research and discussions with subject matter experts and impacted entities so as to incorporate estimated costs for this item. This information is presented further below.

Comments Regarding the Costs of Additional Disputes

Some commenters argued that the ADA Amendments Act would lead to increased litigation and internal disputes against institutions, as the scope of potential litigants would expand due to the increase in individuals covered by the ADA as a result of the passage of the ADA Amendments Act. Other commenters disagreed, stating that the new regulation would reduce the volume of complaints and litigation and streamline outstanding complaints and litigation due to increased consistency and predictability in judicial interpretation and executive enforcement. The Department does not agree with the commenters who asserted that the impact of the ADA Amendments Act will lead to an increase in litigation and disputes. The ADA Amendments Act clarified several contentious or uncertain aspects of the ADA, and thus may have decreased the overall amount of ADA litigation by reducing ambiguities in the law. However, assessing the impact of covered entities' failures to comply (or alleged failures to comply) with the requirements of the ADA, as amended, and the legal challenges that may result from compliance failures, are not properly within the ambit of the Final RA, nor do we have any relevant information that would assist in an analysis of such issues even if it they were appropriate to include in the Final RA.

Comments Regarding the Computation of Costs for Additional Examinations and Testing

One commenter stated that the Department placed too much emphasis on the cost of proctor supervision when assessing the cost of extra exam time in postsecondary institutions. The commenter posited that many tests are administered electronically; accordingly, the costs of those tests are appropriately based on the cost of ''seat time'' and not the cost of proctor supervision. Unfortunately, no commenter provided a description of what the additional costs per student might be in such circumstances, nor did any commenter explain how such costs could be computed. The Department contacted several postsecondary institutions and testing entities for approximations of seat time costs, but did not receive any relevant information.

Two commenters noted that for some long national examinations, additional testing time would necessitate the provision of an additional testing day that would increase costs substantially. This potential cost was not estimated in the Initial RA because research indicated that prior to the passage of the ADA Amendments Act, national examination institutions were already accommodating individuals who required additional time because of disabilities already explicitly covered by the ADA. As a result, testing entities were already providing an additional testing day where necessary. Therefore, any individuals who would now request additional time on national exams lasting six hours or more as a direct result of the ADA Amendments Act would be accommodated alongside those individuals who would have been covered prior to the ADA Amendments Act, and any potential costs would likely be minimal. Despite this conclusion, the Department has nonetheless conducted a sensitivity analysis to assess these potential costs with the assumption that testing entities were not already providing an additional testing day to accommodate certain individuals with disabilities. Because an additional testing day for these examinations was likely already provided prior to passage of the ADA Amendments Act, the Department continues to believe that the costs of accommodating any additional students who are now seeking additional exam time as a direct result of the ADA Amendments Act will be minimal. As a result, the sensitivity analysis the Department has conducted likely overestimates these potential costs. Further information on the potential range of these costs can be found below.

Comments Regarding the Estimate of ADHD Prevalence Among Postsecondary Students

Several commenters questioned the Department's approach of reducing the portion of students with ADHD who would be impacted by the ADA Amendments Act. In the Initial RA, the Department had assumed based on some available research that 30 percent of those who self-identify as having ADHD as their primary disability would not need additional testing time because they would not meet the clinical definition of the disability. One commenter raised concern about presenting a specific percentage of students with ADHD who would not meet that clinical definition, because that number might inadvertently become a benchmark for postsecondary institutions and national testing entities to deny accommodations to a similar percentage of applicants requesting additional exam time because of their ADHD. The Department did not intend for this percentage to establish a benchmark. Covered entities should continue to evaluate requests for additional exam time by all individuals with disabilities on an individualized basis. In direct response to these concerns, the Department has decided not to reduce the number of individuals with ADHD who could now receive testing accommodations as a direct result of the ADA Amendments Act.

Comments Regarding the Economic Impact of the Rule on Industries

A commenter representing institutions of higher education stated that the rule would have a significant impact on higher education as an industry, such that the rule should be considered ''economically significant.'' For the reasons indicated throughout

the Final RA, however, the Department does not believe that this commenter's points were persuasive. Based on the Department's own research and evaluation, it is convinced that the cost of ADA Amendments Act compliance will be far less than $100 million dollars in any given year.

The commenter stated that the Department erred in its analysis by focusing primarily on college students with learning disabilities or ADHD and did not factor in potential costs related to students with other impairments including depression, schizophrenia, obsessive compulsive disorder, traumatic brain injuries, post-traumatic stress disorder, visual impairments not rising to the level of blindness, anxiety, autism, food allergies, or transitory impairments. Prior to passage of the ADA Amendments Act, higher educational institutions already were incurring costs to accommodate students with the above-referenced impairments that constituted disabilities. These costs are not attributable to this rulemaking and thus not analyzed as such. For the relatively small number of students with the above-referenced disabilities who might not have been covered prior to the passage of the ADA Amendments Act, the Department was unable to specifically identify or measure any potential costs that postsecondary institutions would incur in accommodating these students.

The commenter also stated that the Department's Initial RA should have considered the costs of academic accommodations other than extended testing time, such as ''note takers, tutors, technology-based auxiliary aids, electronic versions of text-books and class materials, and other accommodations and aids,'' as well as ''significant costs resulting from accommodation requests outside the classroom context, such as those involving residence halls, food services or athletics.'' The Department notes that, as with reasonable modifications and testing accommodations required prior to the ADA Amendments Act, the accommodations or auxiliary aids or services described by the commenter were being provided before the passage of the ADA Amendments Act and will not entail new costs specifically attributable to the ADA Amendments Act.

Comments Regarding ADA/IDEA Concerns

Several commenters addressed the possibility that the expanded definition of ''disability'' could result in more cases arising under the ADA, rather than under the IDEA, in elementary and secondary schools. An association focusing on children with learning disabilities noted that students who manage their disabilities well often find that school districts challenge their IDEA claims of disability, but that such claims may meet with more success under the ADA or section 504 of the Rehabilitation Act. One commenter, whose comments were endorsed by several other groups, noted that particular subsets of children may be eligible for benefits under the ADA but not under the IDEA. These include students with episodic conditions, mitigated conditions, and conditions such as diabetes and seizure impairments that may require maintenance support, such as diet or medications. A national association of kindergarten through twelfth-grade educators indicated that, increasingly, in its view, some parents are more likely to seek school-related modifications for their child under the ADA, rather than the IDEA. This commenter suggested, accordingly, that ADA litigation would increase once parents become aware of the application of a broader definition of ''disability'' due to the ADA Amendments Act.

The Department recognizes that the definition of ''disability'' under the IDEA is different than that under the ADA.While many students will be covered by both statutes, some students covered by the ADA will not be eligible for special education services under the IDEA; however, such students are covered by section 504 of the Rehabilitation Act and are entitled to a ''free appropriate public education'' (FAPE) under the Department of Education's section 504 regulation. The Department acknowledges commenters' views that some parents may assert rights for their elementary, middle, and high school students under the ADA due to the expanded definition of ''disability.'' However, the Department believes that the overall number of additional requests for reasonable modifications by elementary and secondary students that can be attributed to the ADA Amendments Act will be small and that any resulting economic impact is likely to be extremely limited. Students with ADHD and learning disabilities who already are covered by section 504 and, in many instances, the IDEA as well, are entitled to needed special education, related aids and services, modifications or auxiliary aids or services under those statutes. Further, prior to filing suit under the ADA, any student that is covered under both the ADA and the IDEA must exhaust administrative remedies under the IDEA if seeking a remedy that is available under that statute. Thus, while the ADA is critical to ensuring that students with disabilities have a full and equal opportunity to participate in and benefit from public education, when viewed in concert with the protections already afforded by section 504 and the IDEA, the economic impact of implementing the ADA Amendments Act in K–12 schools will be minimal. The Department also notes that none of these commenters provided any data demonstrating that elementary and secondary schools have incurred additional costs due to the passage of the ADA Amendments Act more than six years ago.

Comments Regarding Possible Fraudulent Claims of Disability

A number of commenters stated that the rule might encourage some people without learning disabilities to claim that they have learning disabilities, so that they can take advantage of extra exam time. The Department has not identified any study suggesting that the release of this rule—more than six years after the effective date of the ADA Amendments Act—likely will motivate a spike in false claims for students seeking extra time on examinations. While individuals with learning disabilities previously denied accommodations may be motivated to seek recognition of their disabilities under this rule, because it may offer an improved opportunity for consideration of their unmet needs, the Department does not believe that individuals who might feign disabilities in pursuit of extra time would modify their behavior as a result of this rule; to the contrary, the motivation and opportunity to feign such disabilities would have existed prior to the passage of the ADA Amendments Act. The Department acknowledges that there will always be some individuals who seek to take advantage of rules that extend benefits to particular classes of individuals. However, the Department has determined that the costs of such fraudulent behavior cannot readily be computed. It appears that there is no generally accepted metric for

Under the IDEA, a ''child with a disability'' is a child ''with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities [and] who, by reason thereof, needs special education and related services.'' 20 U.S.C. 1401(3). The IDEA regulation elaborates on each disability category used in the statute. *See* 34 CFR 300.8.

determining how many claims of disability are fraudulent, or how the cost of such fraudulent activity should be computed. And, the Department found no evidence to indicate that the rate of fraudulent claims of disability has increased since the implementation of the ADA Amendments Act in 2009. It should be emphasized that individuals seeking accommodations for their disabilities in testing situations under the ADA will still undergo an individualized assessment to determine whether they have disabilities covered by the statute. Extended exam time is an accepted reasonable modification or testing accommodation under the ADA for persons whose disabilities inhibit their ability to complete timed tests. Because the Department is not able to identify or measure an increase in fraudulent claims associated with this rule, those potential costs are not reflected in the economic analysis.

Final Results of the Primary Analysis

This section presents the calculations used to estimate the total costs resulting from the revisions to the title II and title III regulations to incorporate the changes made by the ADA Amendments Act. Costs are first presented for postsecondary institutions and then for national testing entities. For a more detailed explanation of the Department's methodology and data used to calculate these costs, please refer to relevant sections in the Final RA. The Final RA is available on Department's Web site at *www.ada.gov.*

As explained above, total costs to postsecondary institutions will include three components:

- One-time cost of training staff on relevant impact of ADA Amendments Act;
- Annual cost of processing additional accommodation requests for extra exam time made as a direct result of the ADA Amendments Act; and
- Annual cost of proctoring additional time on exams as a direct result of the ADA Amendments Act.

To calculate the annual costs to all postsecondary institutions for processing these additional accommodation requests and proctoring additional exam time as a direct result of the ADA Amendments Act, the potential number of students who could request and receive these accommodations needs to be calculated. Calculations for the three costs listed above plus the number of students who are eligible to receive and likely to request accommodations for extra exam time as a direct result of the ADA Amendments Act are presented below.

The annual one-time training cost for all postsecondary institutions is presented in Table 1 below. The methodology used to calculate this cost is explained further in Section 2.1 of the Final RA, and the sources for the data used are provided in Section 3.1.1 of the Final RA.

TABLE 1—CALCULATION OF ONE-TIME TRAINING COSTS FOR POSTSECONDARY INSTITUTIONS

Variable	Value
Number of Postsecondary Institutions	7,234
One-Time Cost of Training on the Impacts of ADA Amendments Act per Institution	1,371
One-Time Training Cost for Postsecondary Institutions	9,917,633

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

The number of additional eligible students likely to request and receive extra time on exams at postsecondary institutions as a direct result of the ADA Amendments Act is calculated in Tables 2 and 3 below. The methodology used for this calculation is explained further in Section 2.2 of the Final RA, and the sources for the data used are provided in Section 3.1.2 of the Final RA.

TABLE 2—CALCULATION OF NUMBER OF STUDENTS WHO ARE ELIGIBLE TO RECEIVE ACCOMMODATIONS FOR EXTRA EXAM TIME AT POSTSECONDARY INSTITUTIONS

[First year]

Row #	Variable	Value	Source
1	Total Number of Postsecondary Students	20,486,000	See Table 9 of the Final RA.
2	Percentage of Postsecondary Students with a Learning Disability or ADHD	2.96%	See Table 11 of the Final RA.
3	Total Postsecondary Students with a Learning Disability or ADHD	606,386	Calculation (Multiply Row 1 and Row 2).
4	Percentage of Students with Learning Disabilities or ADHD Already Receiving Accommodations for Extra Exam Time Prior to Passage of the ADA Amendments Act.	51.1%	See Table 12 of the Final RA.
5	Total Number of Students with Learning Disabilities or ADHD who were Requesting Accommodations for Extra Exam Time Prior to the ADA Amendments Act.	309,863	Calculation (Multiply Row 3 and Row 4).
6	Percentage of Students with Learning Disabilities or ADHD Not Receiving Accommodations for Extra Exam Time Prior to Passage ADA Amendments Act.	48.9%	See Table 12 of the Final RA.
7	Total Eligible Students who Could Potentially Request and Receive Accommodations for Extra Exam Time as a Direct Result of the ADA Amendments Act.	296,523	Calculation (Multiply Row 3 and Row 6).

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

TABLE 3—CALCULATION OF NUMBER OF STUDENTS WHO ARE ELIGIBLE TO RECEIVE AND LIKELY TO REQUEST ACCOMMODATIONS FOR EXTRA EXAM TIME AT POSTSECONDARY INSTITUTIONS

[First year]

Row #	Variable	Low value	Med value	High value	Source
1	Total Eligible Students who Could Potentially Request and Receive Accommodations for Extra Exam Time as a Direct Result of the ADA Amendments Act.	296,523	296,523	296,523	See Table 2 above.
2	Percentage of Eligible Students Who Were Not Previously Receiving Accommodations for Extra Exam Time Prior to Passage of the ADA Amendments Act Who are Now Likely to Request and Receive this Accommodation.	50%	70%	90%	See Table 13 of the Final RA.
3	Number of Students who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time as a Direct Result of the ADA Amendments Act.	148,261	207,566	266,870	Calculation (Multiply Row 1 and Row 2).

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Table 4 below presents the calculations of the annual cost to postsecondary institutions for processing new accommodation requests for extra exam time. These requests are in addition to the ones currently received and processed by postsecondary institutions that are not being made as a direct result of the ADA Amendments Act. Costs depend on the number of students who will now be eligible to request and receive an accommodation for extra time on an exam as a direct result of the ADA Amendments Act revisions. The methodology used to calculate this cost is explained further in Section 2.3 of the Final RA, and the sources for the data used are provided in Section 3.1.3 of the Final RA.

TABLE 4—CALCULATION OF ANNUAL COST TO POSTSECONDARY INSTITUTIONS FOR PROCESSING ADDITIONAL ACCOMMODATION REQUESTS FOR EXTRA EXAM TIME

[First year]

Variable	Low value	Med value	High value
Number of Students who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time	148,261	207,566	266,870
Number of Staff Hours to Process each Accommodation Request	2	2	2
Total Staff Hours to Process New Requests	296,523	415,132	533,741
Staff Hourly Wage Rate for Processing Accommodation Requests	$24.91	$24.91	$24.91
Annual Cost to Postsecondary Institutions for Processing Additional Accommodation Requests for Extra Exam Time	$7,387,118	$10,341,966	$13,296,813

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Tables 5 and 6 calculate the annual costs to postsecondary institutions for proctoring additional time on exams requested by eligible students as a direct result of the ADA Amendments Act. The methodology used to calculate this cost is explained further in Section 2.4 of the Final RA, and the sources for the data used are provided in Section 3.1.4 of the Final RA.

TABLE 5—CALCULATION OF ANNUAL COST TO POSTSECONDARY INSTITUTIONS FOR PROCTORING EXTRA TIME ON EXAMS, PER STUDENT

[First year]

Variable	Value
Average Length of an Exam at a Postsecondary Institution in Hours	1.5
Average Additional Time Requested, as a Percentage of Total Exam Time	75%
Average Amount of Extra Time per Exam in Hours	1.13
Average Number of Exams per Class	3
Average Number of Classes per Year	8
Average Number of Exams per Student	24
Average Annual Additional Exam Time per Student in Hours	27
Average Proctor to Student Ratio	0.11
Average Hourly Wage of Exam Proctor	$12.90
Annual Cost for Proctoring Additional Time on Exams per Student	$36.67

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

TABLE 6—TOTAL ANNUAL COST TO POSTSECONDARY INSTITUTIONS FOR PROCTORING EXTRA TIME ON EXAMS

[First year]

Variable	Low	Med	High
Annual Cost for Proctoring Additional Time on Exams per Student	$36.67	$36.67	$36.67
Number of Students who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time	148,261	207,566	266,870
Annual Cost to Postsecondary Institutions for Proctoring Extra Time on Exams	$5,437,419	$7,612,387	$9,787,355

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Just as with postsecondary institutions, the costs to national testing entities from the revisions to the ADA Amendments Act will include three components:

- One-time cost of training staff on relevant impact of ADA Amendments Act;
- Annual cost of processing additional accommodation requests for extra exam time made as a direct result of the ADA Amendments Act; and
- Annual cost of proctoring additional time on exams as a direct result of the ADA Amendments Act.

The annual costs of processing additional accommodation requests and proctoring the extra exam time depends on the number of test takers who will request accommodations for extra exam time as a direct result of the ADA Amendments Act. Calculations for the three costs listed above plus the number of test takers who are eligible to receive and likely to request accommodations of extra exam time as a direct result of the ADA Amendments Act are presented below.

The annual one-time training cost for all national testing entities is presented in Table 7 below. The methodology used to calculate this cost is explained further in Section 2.1 of the Final RA, and the sources for the data used are provided in Section 3.2.1 of the Final RA.

TABLE 7—CALCULATION OF ONE-TIME TRAINING COSTS FOR NATIONAL TESTING ENTITIES

Variable	Value
Number of National Testing Entities	1,397
One-Time Cost of Training on the Impacts of ADA Amendments Act per Institution	$1,371
One-Time Training Cost for National Testing Entities	$1,915,252

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

The number of test takers who are now eligible to receive and likely to request extra time on national exams is calculated in Tables 8 and 9 below. The methodology used to calculate this number is explained further in Section 2.2 of the Final RA, and the sources for the data used are provided in Section 3.2.2 of the Final RA.

TABLE 8—CALCULATION OF NUMBER OF TEST TAKERS WHO ARE ELIGIBLE TO RECEIVE ACCOMMODATIONS FOR EXTRA EXAM TIME FROM NATIONAL TESTING ENTITIES

[First year]

Row #	Variable	Value	Source
1	Total Number of Test Takers	10,450,539	See Table 23 of the Final RA.
2	Percentage of Test Takers with a Learning Disability or ADHD*	2.96%	See Table 11 of the Final RA.
3	Total Test Takers with a Learning Disability or ADHD	309,336	Calculation (Multiply Row 1 and Row 2).
4	Percentage of Test Takers with Learning Disabilities or ADHD Already Receiving Accommodations for Extra Exam Time Prior to Passage of the ADA Amendments Act.*	51.1%	See Table 12 of the Final RA.
5	Total Number of Test Takers with Learning Disabilities or ADHD who were Requesting Accommodations for Extra Exam Time Prior to the ADA Amendments Act.	158,071	Calculation (Multiply Row 3 and Row 4).
6	Percentage of Test Takers with Learning Disabilities or ADHD Not Receiving Accommodations for Extra Exam Time Prior to Passage ADA Amendments Act.*	48.9%	See Table 12 of the Final RA.
7	Total Eligible Test Takers who Could Potentially Request and Receive Accommodations for Extra Exam Time as a Direct Result of the ADA Amendments Act.	151,265	Calculation (Multiply Row 3 and Row 6).

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

*For these assumptions, the Final RA assumes the same values for national test takers as found for postsecondary students, since no specific data for national examinations was found and many national exams are designed for students or recent graduates.

TABLE 9—CALCULATION OF NUMBER OF TEST TAKERS WHO ARE ELIGIBLE TO RECEIVE AND LIKELY TO REQUEST ACCOMMODATIONS FOR EXTRA EXAM TIME FROM NATIONAL TESTING ENTITIES

Row #	Variable	Low	Med	High	Source
1	Total Eligible Test Takers who Could Potentially Request and Receive Accommodations for Extra Exam Time as a Direct Result of the ADA Amendments Act.	151,265	151,265	151,265	See Table 8 above.
2	Percentage of Eligible Test Takers Who Were Not Previously Receiving Accommodations for Extra Exam Time Prior to Passage of the ADA Amendments Act Who are Now Likely to Request and Receive this Accommodation.	50%	70%	90%	See Table 13 of the Final RA.
3	Number of Test Takers who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time as a Direct Result of the ADA Amendments Act.	75,633	105,886	136,139	Calculation (Multiply Row 1 and Row 2).

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Table 10 illustrates the calculations of the annual cost to national testing entities for processing additional accommodation requests for extra exam time made as a direct result of the ADA Amendments Act. The methodology used to calculate this cost is explained further in Section 2.3 of the Final RA, and the sources for the data used are provided in Section 3.2.3 of the Final RA.

TABLE 10—CALCULATION OF ANNUAL COST TO NATIONAL TESTING ENTITIES FOR PROCESSING ADDITIONAL ACCOMMODATION REQUESTS FOR EXTRA EXAM TIME

[First year]

Variable	Low value	Med value	High value
Number of Test Takers who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time	75,633	105,886	136,139
Number of Staff Hours to Process each Accommodation Request	2	2	2
Total Staff Hours to Process Additional Accommodation Requests for Extra Exam Time	151,265	211,771	272,278
Staff Hourly Wage Rate for Processing Accommodation Requests	$24.91	$24.91	$24.91
Annual Cost to National Testing Entities for Processing Additional Accommodation Requests for Extra Exam Time	$3,768,396	$5,275,755	$6,783,113

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Finally, Tables 11 and 12 calculate the annual costs to national testing entities for allowing test takers to receive additional time on exams. Again, the cost here may be calculated as the opportunity cost of the seat occupied by the test taker for the additional hours of testing. However, because the seat cost per test taker was not available for this Final RA analysis, the additional time spent by a test proctor to oversee the exam is used as a proxy for the cost. The methodology used to calculate this cost is explained further in Section 2.4 of the Final RA, and the sources for the data used are provided in Section 3.2.4 of the Final RA.

TABLE 11—CALCULATION OF ANNUAL COST TO NATIONAL TESTING ENTITIES FOR PROCTORING EXTRA TIME ON EXAMS, PER TEST TAKER

[First year]

Variable	Value
Average Length of a National Exam in Hours	4.11
Average Extra Time Requested, as a Percentage of Total Exam Time	75%
Average Amount of Extra Time per Exam in Hours	3.09
Average Number of Exams per Test Taker per Year	1
Average Annual Extra Exam Time per Test Taker in Hours	3.09
Average Proctor-to-Test-Taker Ratio	1
Average Hourly Wage of Exam Proctor	$12.90
Cost to National Testing Entities for Proctoring Extra Time on Exams per Test Taker	$39.81

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

TABLE 12—TOTAL ANNUAL COST TO NATIONAL TESTING ENTITIES FOR PROCTORING EXTRA TIME ON EXAMS

[First year]

Variable	Low value	Med value	High value
Cost to National Testing Entities for Proctoring Extra Time on Exams per Test Taker	$39.81	$39.81	$39.81
Number of Test Takers who are Eligible to Receive and Likely to Request Accommodations for Extra Exam Time each year	75,633	105,886	136,139

TABLE 12—TOTAL ANNUAL COST TO NATIONAL TESTING ENTITIES FOR PROCTORING EXTRA TIME ON EXAMS—Continued

[First year]

Variable	Low value	Med value	High value
Annual Cost to National Testing Entities for Proctoring Extra Time on Exams	$3,011,096	$4,215,534	$5,419,973

Note: Due to rounding, totals may not equate exactly to the product of the inputs provided in the table.

Based on the calculations provided above, total costs to society for implementing the ADA Amendments Act revisions into the title II and title III regulations will range between $31.4 million and $47.1 million in the first year. The first year of costs will be higher than all subsequent years because the first year includes the one-time cost of training. Note that even the high end of this first-year cost range is well below the $100 million mark that signifies an ''economically significant'' regulation. The breakdown of total costs by entity is provided in Table 13 below.

TABLE 13—TOTAL COSTS FIRST YEAR (2016) IN PRIMARY ANALYSIS, NON-DISCOUNTED

[$ millions]

Cost category	Low value	Med value	High value
Postsecondary Institutions: ANNUAL Total Costs of Processing Additional Requests and Proctoring Extra Exam Time	$12.8	$18.0	$23.1
Postsecondary Institutions: ONE–TIME Cost for Additional Training at Institutions	9.9	9.9	9.9
National Exams: ANNUAL Total Costs of Processing Additional Requests and Proctoring Extra Exam Time	6.8	9.5	12.2
National Exams: ONE–TIME Cost for Additional Training at Institutions	1.9	1.9	1.9
Total	31.4	39.3	47.1

Note: Due to rounding, totals may not equate exactly to the sum of the inputs provided in the table.

Taking these costs over the next 10 years and discounting to present value terms at a rate of 7 percent, the total cost of implementing the ADA Amendments Act revisions is approximately $214.2 million over 10 years, as shown in Table 14 below.

TABLE 14—TOTAL COSTS OVER 10 YEARS, PRIMARY ANALYSIS

Total discounted value ($ millions)	Annualized estimate ($ millions)	Year dollar	Discount rate (percent)	Period covered
$214.2	$28.6	2015	7	2016–2025
$243.6	26.3	2015	3	2016–2025

Potential Additional Costs to National Testing Entities

The ADA Amendments Act revisions will allow eligible individuals with disabilities to receive additional time on exams, both for course-work exams at postsecondary institutions and standardized national examinations. Some national examinations are long and can last up to eight hours per test. Thus, when test takers request additional time on these longer exams, such requests will inevitably push the exam into an additional day.

As commenters pointed out in response to the Initial RA, there are costs associated with providing exams on an additional day. While there is no data to predict which exams will extend to an additional day, especially given that specific accommodations are determined individually, this Final RA assumes that exams that normally would take six hours or more to administer and be scheduled for one day may require an additional day of testing if the test taker seeks more time as an accommodation. To quantify the total costs of providing an additional day of testing for those individuals who would not previously have received this additional time, prior to the passage of the ADA Amendments Act, the following two costs are quantified:

Exam Revision Costs

While it appears that many national testing entities do not revise the content of exams that span an additional day, the exam format and materials can be affected by such an extension. For instance, computer-based exams are programmed to span a certain amount of time, allowing for timed break periods throughout. When more time is provided to take the exam, the exam must be reprogrammed to span the new amount of time, with planned breaks for the test taker. For paper-based exams, test booklets are often reprinted to allow one set of questions for one day of testing, and another set for the extra day of testing. This form of printing prevents test takers from going home and looking up the answers for the next set of questions.

Room Rental Cost

Exams are delivered in different settings depending on the type of national exam. Some exams are delivered at testing centers where different types of exams are administered at once in the same room. In this case, the cost of an extra day of testing could be captured by the seat cost per test taker. Other exams are delivered to test takers exclusively taking that exam, and those exams are often administered in rooms rented out at a university, hotel, or other building. This cost could be captured by the room rental cost. The Final RA takes a conservative approach, using the room

rental cost to approximate the cost of delivering an exam over an additional day, as this is the larger of the two costs.

Based on the calculations provided in Sections 4.2.1 and 4.2.2 of the Final RA, the total additional costs of providing an extra testing day to eligible test takers will likely range between $2.7 and $4.8 million per year. Table 15 adds this into the total costs in the first year to approximate the range of total costs to society from implementing the ADA Amendments Act revisions. For further information on the methodology, data, and assumptions used to analyze these potential additional costs for national testing entities, please refer to Section 4.2 of the Final RA.

TABLE 15—TOTAL COSTS FIRST YEAR, PLUS POTENTIAL ADDITIONAL COSTS FOR ADDITIONAL DAY OF TESTING, NON-DISCOUNTED

[$ millions]

Cost category	Low value	Med value	High value
Postsecondary Institutions: ANNUAL Total Costs of Processing Additional Requests and Proctoring Extra Exam Time	$12.8	$18.0	$23.1
Postsecondary Institution: ONE–TIME Cost for Additional Training at Institutions	9.9	9.9	9.9
National Exams: ANNUAL Total Costs of Processing Additional Requests and Proctoring Extra Exam Time	6.8	9.5	12.2
National Exams: ONE–TIME Cost for Additional Training at Institutions	1.9	1.9	1.9
National Exams: ANNUAL Potential Additional Costs for Exams that Run over onto an Additional Day	2.7	3.8	4.8
Total	34.1	43.1	52.0

Note: Due to rounding, totals may not equate exactly to the sum of the inputs provided in the table.

Benefits Discussion

The Department believes that the enactment of the ADA Amendments Act benefits millions of Americans, and the benefits to those individuals are non-quantifiable but nonetheless significant. The Department determined, however, that there was a group of individuals with disabilities who would be able to receive benefits in the form of increased access to accommodations in testing from postsecondary institutions and national testing entities, and that these benefits would be associated with specific costs to those institutions and entities, which are analyzed above.

With respect to specific benefits, in the first year, our analysis estimates that approximately 148,261 to 266,870 postsecondary students will take advantage of accommodations for extra exam time that they otherwise would not have received but for this rule. Over 10 years, approximately 1.6 million to 2.8 million students will benefit. An additional 802,196 to 1.4 million national exam test takers would benefit over that same 10 years (assuming that people take an exam one time only).

Some number of these individuals could be expected to earn a degree or license that they otherwise would not have as a result of the testing accommodations they are now eligible to receive as a direct result of the ADA Amendments Act. The Department was unable to find robust data to estimate the number of students who would receive a bachelor's degree or licenses after this rule goes into effect that would not otherwise have received one. However, extensive research has shown notably higher earnings for those with college degrees over those who do not have degrees. Estimates of this lifetime earnings vary, with some studies estimating an earning differential ranging from approximately $300,000 to $1 million.In addition, some number of students may be able to earn a degree in a higher-paying field than they otherwise could, and yet other students would get the same degree, but perhaps finish their studies faster or more successfully (*i.e.,* higher grades) than otherwise would be the case. All of these outcomes would be expected to lead to greater lifetime productivity and earnings.

In addition to these quantitative benefits, this rule will have significant non-quantifiable benefits to individuals with disabilities who, prior to the passage of the ADA Amendments Act and this rule, were denied the opportunity for equal access to an education or to become licensed in their chosen professions because of their inability to receive needed testing accommodations. As with all other improvements in access for individuals with disabilities, the ADA Amendments Act is expected to generate psychological benefits for covered individuals, including reduced stress and an increased sense of personal dignity and self-worth, as more individuals with disabilities are able to successfully complete tests and exams and more accurately demonstrate their academic skills and abilities. Some individuals will now be more likely to pursue a favored career path or educational pursuit, which will in turn lead to greater personal satisfaction.

Additional benefits to society arise from improved testing accessibility. For instance, if some persons with disabilities are able to increase their earnings, they may need less public support—either direct financial support or support from other programs or services. This, in turn, would lead to cross-sector benefits from resource savings arising from reduced social service agency outlays. Others, such as family members of individuals with disabilities, may also benefit from reduced financial and psychological pressure due to the greater independence and earnings of the family member whose disability is now covered by the ADA under the revised definition of ''disability.''

In addition to the discrete group of individuals with learning disabilities and ADHD who will benefit from the changes made to the definition of ''disability,'' there is a class of individuals who will now fall within the nondiscrimination protections of the ADA if they are refused access to or participation in the facilities, programs,

See Mark Schneider, *How Much Is That Bachelor's Degree Really Worth?: The Million Dollar Misunderstanding,* American Enterprise Institute, AEI Online (May 2009), available at *http://www.aei.org/article/education/higher-education/how-much-is-that-bachelors-degree-really-worth/* (last visited Feb. 3, 2016); U.S. Census Bureau, *Work-Life earnings by Field of Degree and Occupation for People with a Bachelor's Degree: 2011,* American Community Survey Briefs (Oct. 2012), *available at http://www.census.gov/prod/2012pubs/acsbr11-04.pdf* (last visited Feb. 3, 2016); Anthony P. Carnevale *et al., The College Payoff–Education, Occupations, Lifetime Earnings,* Georgetown University Center on Education and the Workforce (2011), *available at https://cew.georgetown.edu/wp-content/uploads/2014/11/collegepayoff-complete.pdf* (last visited April 22, 2016).

services, or activities of covered entities. The benefits to these individuals are significant, but unquantifiable. The Department believes (as did Congress when it enacted the ADA) that there is inherent value that results from greater accessibility for all Americans. Economists use the term ''existence value'' to refer to the benefit that individuals derive from the plain existence of a good, service, or resource—in this case, the increased accessibility to postsecondary degrees and specialized licenses that would arise from greater access to testing accommodations or the increased accessibility to covered entities' facilities, programs, services, or activities as a result of the ADA Amendments Act. This value can also be described as the value that people both with and without disabilities derive from the guarantees of equal protection and nondiscrimination. In other words, people value living in a country that guarantees the rights of persons with disabilities, whether or not they themselves are directly or indirectly affected by disabilities. There can be a number of reasons why individuals might value accessibility even if they do not require it now and do not ever anticipate needing it in the future. These reasons include bequest motives and concern for relatives or friends who require accessibility. People in society value equity, fairness, and human dignity, even if they cannot express these values in terms of money. These are the exact values that agencies are directed to consider in Executive Order 13563.

B. Regulatory Flexibility Act

In the NPRM, the Department stated that, based on its analysis, it ''can certify that the rule will not have a significant economic impact on a substantial number of small entities.'' The Department sought public comment on this proposed certification and its underlying analysis, including the costs to small entities, but received no public comments on these issues. The Attorney General has again reviewed this regulation in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), and by approving it hereby certifies that it will not have a significant economic impact on a substantial number of small entities for the reasons discussed more fully below.

First, the ADA Amendments Act took effect on January 1, 2009; all covered entities have been required to comply with the Act since that date and thus should be familiar with the requirements of the law. Second, the rule does not include reporting requirements and imposes no new recordkeeping requirements. Third, as shown above, the only title II and title III entities that would be significantly affected by the proposed changes to the ADA regulations are national testing entities and postsecondary institutions. The type of accommodations that most likely will be requested and required by those whose coverage has been clarified under titles II and III of ADA Amendments Act will be additional time in testing situations. While many of these national testing or postsecondary institutions are small businesses or small governmental entities, the costs associated with additional testing time are minimal; therefore, the Department believes the economic impact of this rule will be neither significant for these small entities nor disproportionate relative to the costs for larger entities.

The Department estimates that approximately 7,234 postsecondary institutions could be impacted based on data from the U.S. Department of Education National Center for Education Statistics.The Department used data from the U.S. Census Bureau from 2012 for Junior Colleges (NAICS 6112) and Colleges, Universities, and Professional Schools (NAICS 6113) to estimate the proportion of those entities that would meet the Small Business Administration's criteria for small business or small governmental entity.As shown in Table 18 and Table 19 below, small postsecondary institutions are estimated to account for approximately 35.3 percent of all postsecondary institutions. Therefore, the Department estimates that 2,556 small postsecondary institutions would be impacted by this rule.

The overall costs of this rule for postsecondary institutions were calculated based on the number of entities and number of postsecondary students affected. The cost of processing additional accommodation requests for extra exam time and the cost of additional time spent proctoring exams depend on the number of students. This methodology assumes that per-student costs are roughly the same for institutions of differing sizes. Because larger entities have more students on average than smaller ones, the Department used the proportion of the industry sub-group's revenues for small and large entities as a proxy for the number of students. Thus, using receipts for Junior Colleges (NAICS 6112) and Colleges, Universities, and Professional Schools (NAICS 6113) as a proxy for number of students, small postsecondary institutions are estimated to bear 4 percent of the processing and proctoring costs for providing additional exam time for that industry sub-group—or approximately $726,534 of the $17.95 million first-year costs. Additionally, postsecondary institutions are expected to incur one-time costs for additional training of $1,371 per entity (*see* Tables 6–8 in the Final RA). In total, small postsecondary institutions would incur $4.2 million in costs in the first year, which would average approximately $1,655 for each of the 2,556 small postsecondary institutions. The average annual revenue for each these small postsecondary institutions is $501,600. The cost is 0.33 percent of their revenue. Therefore, the costs will not be substantial for these small entities.

In comparison to the number of small postsecondary entities, there are approximately 4,678 postsecondary institutions (64.7 percent of the 7,234) that would be considered larger entities, and these larger entities would incur $23.6 million in costs during the first year, which would average out to approximately $5,053 per large postsecondary institution during the first year. This $5,053 per large postsecondary institution during the first year is approximately 3.1 times higher than the cost that would be incurred by small postsecondary institutions during that same time.

U.S. Department of Education, National Center for Education Statistics (2015). *Digest of Education Statistics,* 2013 (NCES 2015–011), Chapter 2. 2011–2012 academic year—Number of Title IV institutions, by level and control of institution and state or other jurisdiction, *available at https://nces.ed.gov/fastfacts/display.asp?id=84* (last visited Feb.3, 2016).

U.S. Census Bureau, Number of Firms, Number of Establishments, Employment, Annual Payroll, and Estimated Receipts by Enterprise Receipt Sizes for the United States, NAICS Sectors: 2012, *available at http://www.census.gov/econ/susb/* (last visited Feb. 3, 2016).

North American Industry Classification System.

U.S. Small Business Administration, *Table of Small Business Size Standards, available at https://www.sba.gov/content/small-business-size-standards* (last visited April 22, 2016).

TABLE 16—FIRM, ESTABLISHMENT, AND RECEIPTS DATA FOR JUNIOR COLLEGES (NAICS 6112) IN 2012

	Firms	Establishments	Est. receipts ($000,000)
All Junior Colleges	464	953	8,449
Small Junior Colleges (estimated)*	378	427	1,723
Small Junior Colleges as a Percentage of All Junior Colleges	81.5%	44.8%	20.4%

*SBA small business standard is $20.5 million; small business totals here include those with receipts under $25 million. This is due to data being reported in size categories that do not exactly match industry small business classifications: *i.e.* from $10 million to $14.99 million, and from $15 million to $19.99 million; and from $20 million to $24.99 million, and from $25 million to $29.99 million.

Source: Calculated from data provided by the U.S. Census Bureau, Statistics of U.S. Businesses. *See* SBA Office of Advocacy and U.S. Census Bureau, *Statistics of U.S. Businesses, Table 2—Number of firms, establishment, receipts, employment, and payroll by firm size (in receipts) and industry, 2012, available at https://www.sba.gov/advocacy/firm-size-data* (last visited April 22, 2016).

TABLE 17—FIRM, ESTABLISHMENT, AND RECEIPTS DATA FOR COLLEGES, UNIVERSITIES, AND PROFESSIONAL SCHOOLS (NAICS 6113) IN 2012

	Firms	Establishments	Est. receipts ($000,000)
All Colleges, Universities, and Professional Schools	2,282	4,329	222,854
Small Colleges, Universities, and Professional Schools (estimated)*	1,369	1,439	7,637
Small Colleges, Universities, and Professional Schools as a Percentage of All Colleges, Universities, and Professional Schools	60.0%	33.2%	3.4%

*SBA small business standard is $27.5 million; small business totals here include those with receipts under $30 million. This is due to data being reported in size categories that do not exactly match industry small business classifications: *i.e.* from $10 million to $14.99 million, and from $15 million to $19.99 million; and from $20 million to $24.99 million, and from $25 million to $29.99 million.

Source: Calculated from data provided by the U.S. Census Bureau, Statistics of U.S. Businesses. *See* SBA Office of Advocacy and U.S. Census Bureau, *Statistics of U.S. Businesses, Table 2—Number of firms, establishment, receipts, employment, and payroll by firm size (in receipts) and industry, 2012, available at https://www.sba.gov/advocacy/firm-size-data* (last visited April 22, 2016).

TABLE 18—FIRM, ESTABLISHMENT, AND RECEIPTS DATA FOR BOTH JUNIOR COLLEGES (NAICS 6112) AND SMALL COLLEGES, UNIVERSITIES, AND PROFESSIONAL SCHOOLS (NAICS 6113), COMBINED, IN 2012

	Firms	Establishments	Est. receipts ($000,000)
All Junior Colleges, and Colleges, Universities, and Professional Schools	2,746	5,282	231,303
Small Junior Colleges, and Colleges, Universities, and Professional Schools (estimated)*	1,747	1,866	9,360
Small Junior Colleges, and Colleges, Universities, and Professional Schools as a Percentage of All Junior Colleges, and Colleges, Universities, and Professional Schools	63.6%	35.3%	4.0%

*SBA small business standard for Junior Colleges is $20.5 million; small business totals here include Junior Colleges with receipts under $25 million. This is due to data being reported in size categories that do not exactly match industry small business classifications: *i.e.* from $10 million to $14.99 million, and from $15 million to $19.99 million; and from $20 million to $24.99 million, and from $25 million to $29.99 million. The SBA small business standard for Colleges, Universities, and Professional Schools is $27.5 million; small business totals here include Colleges, Universities, and Professional Schools with receipts under $30 million. This is due to data being reported in size categories that do not exactly match industry small business classifications: *i.e.* from $10 million to $14.99 million, and from $15 million to $19.99 million; and from $20 million to $24.99 million, and from $25 million to $29.99 million.

Source: Calculated from data provided by the U.S. Census Bureau, Statistics of U.S. Businesses. *See* SBA Office of Advocacy and U.S. Census Bureau, *Statistics of U.S. Businesses, Table 2—Number of firms, establishment, receipts, employment, and payroll by firm size (in receipts) and industry, 2012, available at https://www.sba.gov/advocacy/firm-size-data* (last visited April 22, 2016).

TABLE 19—ESTIMATED SMALL ENTITY ESTABLISHMENTS FOR POSTSECONDARY INSTITUTIONS IN 2011–12

Total Postsecondary Establishments (All Firms/Entities); Academic year 2010–2011*	7,234
Percent Small Entities (2012)**	35.3%
Total Impacted Small Entity Establishments***	2,556

*U.S. Department of Education, National Center for Education Statistics, (2015), *Digest of Education Statistics,* 2013 (NCES 2015–011), available at *https://nces.ed.gov/fastfacts/display.asp?id=84* (last visited Feb. 3, 2016).

**Derived from Tables 16–18 above.

***Estimated using percentage of small establishments for NAICS sectors 6112 and 6113.

In addition to postsecondary institutions, some national testing entities would also be impacted. The Department used data on Educational Test Development and Evaluation Services (NAICS 6117102) to estimate the number of affected entities. Approximately 1,397 national testing entities would be impacted by this rule, irrespective of size. Small entity establishments are estimated to account for 923 (66.1 percent) of these.

TABLE 20—FIRM AND RECEIPTS DATA FOR NATIONAL TESTING ENTITIES IN 2007: EDUCATIONAL TEST DEVELOPMENT AND EVALUATION SERVICES (NAICS 6117102)

	Firms	Establishments	Est. receipts ($000,000)
Small, Medium, and Large Entities*	748	1,144	2,843
Small Entities**	734	756	704
Percentage Small Entities	98.1%	66.1%	24.8%
Total Entities	1,000	1,397	2,907
Estimated Total Small Entities***	981	923	720

* Includes only those entities which were categorized by annual revenue in the available data.

** Data is reported in size categories that do not exactly match industry small business classifications: *i.e.* from $5 million to $9.99 million, and from $10 million to $24.99 million. *SBA small business standard is $15.0 million for all Educational Support Services; small business totals here include those with receipts under $25 million.*

*** Applying the estimated percentage of small entities to the total number of entities.

Source: Calculated from data provided by the U.S. Census Bureau. *See* U.S. Census Bureau, *2007 Economic Census, Educational Services: Subject Series—Estab and Firm Size: Receipts/Revenue Size of Establishments for the United States: 2007* (EC0761SSSZ4*), available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_61SSSZ1&prodType=tableE:* (last visited Feb. 3, 2016).

Small entity establishments in the Educational Test Development and Evaluation Services industry group account for 24.8 percent of that industry's receipts. If receipts are used as a proxy for number of test takers in a manner similar to that described above for postsecondary institutions, then small national testing entities can be expected to bear 24.8 percent of the industry's $9.49 million first-year costs of processing additional accommodation requests for extra exam time and additional time spent proctoring exams—or approximately $2.35 million. Additionally, national testing entities are expected to incur a fixed cost for additional training of $1,371 per entity. Thus, for the approximately 923 small national testing entities, total costs in the first year are estimated to average $3,918 each. Average revenue for these entities is $780,264. The cost is 0.50 percent of their revenue. Therefore, the costs will not be substantial for these small entities.

In comparison to the number of small testing entities, approximately 474 national testing center establishments (33.9 percent of the 1,397) would be considered larger entities, and they would incur $7.79 million in costs during the first year, which would average out to approximately $16,440 per large national testing center establishment during the first year. This $16,440 per large national testing center establishment is approximately 4.2 times as high as the cost that would be incurred by small national testing center establishments during that same time.

As explained above, the Department estimates that approximately 2,556 small postsecondary establishments and 923 small national testing establishments would be impacted by this rule, for a total of approximately 3,479 small business establishments. The estimates were based on average estimates for all entities, irrespective of size. The Department notes that the average first-year cost estimates presented above for small entities are higher than the first-year cost estimates presented in the NPRM because the Department's estimates for the initial training costs (which will be incurred during the first year) are now higher based on public comment and further research and analysis conducted by the Department. However, the overall costs of this rule for small entities over the 10-year period are lower because the Department's final overall cost estimates in the Final RA are lower as a result of refinements made to the analysis in response to public comment and based on further research conducted by the Department.

Based on the above analysis, the Attorney General can certify that the rule will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 13132: Federalism

Executive Order 13132 of August 4, 1999, Federalism, 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 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, and 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 operates a toll-free ADA Information Line (800) 514–0301 (voice); (800) 514–0383 (TTY) that the public is welcome to call to obtain assistance in understanding anything in this final rule.

E. Paperwork Reduction Act

This final rule does not contain any new or revised ''collection[s] of information'' as defined by the

Using data reported by the Census Bureau for 2007, the most recent year for which information on NAICS 6117102 was available.

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 Parts 35 and 36

Administrative practice and procedure, Buildings and facilities, Business and industry, Civil rights, Communications equipment, Individuals with disabilities, Reporting and recordkeeping requirements, State and local governments.

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 42 U.S.C. 12134, 12186, and 12205a, and Public Law 110–325, 122 Stat. 3553 (2008), parts 35 and 36 of title 28 of the Code of Federal Regulations are amended as follows:

PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

■ 1. Revise the authority citation for part 35 to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134, 12131, and 12205a.

■ 2. Revise § 35.101 to read as follows:

§ 35.101 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131–12134), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Pub. L. 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public entities.

(b) *Broad coverage.* The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of ''disability'' in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA 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 part should not demand extensive analysis.

■ 3. Amend § 35.104 by revising the definition of ''Disability'' to read as follows:

§ 35.104 Definitions.

* * * * *

Disability. The definition of *disability* can be found at § 35.108.

* * * * *

■ 4. Add § 35.108 to subpart A to read as follows:

§ 35.108 Definition of ''disability.''

(a)(1) *Disability* means, with respect to an individual:

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (f) of this section.

(2) *Rules of construction.* (i) The definition of ''disability'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.

(ii) An individual may establish coverage under any one or more of the three prongs of the definition of ''disability'' in paragraph (a)(1) of this section, the ''actual disability'' prong in paragraph (a)(1)(i) of this section, the ''record of'' prong in paragraph (a)(1)(ii) of this section, or the ''regarded as'' prong in paragraph (a)(1)(iii) of this section.

(iii) Where an individual is not challenging a public entity's failure to provide reasonable modifications under § 35.130(b)(7), it is generally unnecessary to proceed under the ''actual disability'' or ''record of'' prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the ''regarded as'' prong of the definition of ''disability,'' which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the ''actual disability'' or ''record of'' prong regardless of whether the individual is challenging a public entity's failure to provide reasonable modifications.

(b)(1) *Physical or mental impairment* means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.

(2) *Physical or mental impairment* includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech, and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(3) *Physical or mental impairment* does not include homosexuality or bisexuality.

(c)(1) *Major life activities* include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and

(ii) The operation of a *major bodily function,* such as the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) *Rules of construction.* (i) In determining whether an impairment substantially limits a major life activity, the term *major* shall not be interpreted strictly to create a demanding standard.

(ii) Whether an activity is a *major life activity* is not determined by reference to whether it is of *central* importance to daily life.

(d) *Substantially limits*—(1) *Rules of construction.* The following rules of

construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(i) The term ''substantially limits'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. ''Substantially limits'' is not meant to be a demanding standard.

(ii) The primary object of attention in cases brought under title II of the ADA should be whether public entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

(iii) An impairment that substantially limits one major life activity does not need to limit other major life activities in order to be considered a substantially limiting impairment.

(iv) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(v) An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(vi) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term ''substantially limits'' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.

(vii) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph (d)(1) is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.

(viii) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(ix) The six-month ''transitory'' part of the ''transitory and minor'' exception in paragraph (f)(2) of this section does not apply to the ''actual disability'' or ''record of'' prongs of the definition of ''disability.'' The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(2) *Predictable assessments.* (i) The principles set forth in the rules of construction in this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA.

(ii) Applying these principles, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraph (a)(1)(i) of this section (the ''actual disability'' prong) or paragraph (a)(1)(ii) of this section (the ''record of'' prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying these principles it should easily be concluded that the types of impairments set forth in paragraphs (d)(2)(iii)(A) through (K) of this section will, at a minimum, substantially limit the major life activities indicated. The types of impairments described in this paragraph may substantially limit additional major life activities (including major bodily functions) not explicitly listed in paragraphs (d)(2)(iii)(A) through (K).

(A) Deafness substantially limits hearing;

(B) Blindness substantially limits seeing;

(C) Intellectual disability substantially limits brain function;

(D) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;

(E) Autism substantially limits brain function;

(F) Cancer substantially limits normal cell growth;

(G) Cerebral palsy substantially limits brain function;

(H) Diabetes substantially limits endocrine function;

(I) Epilepsy, muscular dystrophy, and multiple sclerosis each substantially limits neurological function;

(J) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and

(K) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function.

(3) *Condition, manner, or duration.* (i) At all times taking into account the principles set forth in the rules of construction, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the ''actual disability'' or ''record of'' prongs of the definition of ''disability,'' the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or

learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in this section, it may often be unnecessary to conduct an analysis involving most or all of the facts related to condition, manner, or duration. This is particularly true with respect to impairments such as those described in paragraph (d)(2)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(4) *Mitigating measures* include, but are not limited to:

(i) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable modifications or auxiliary aids or services as defined in this regulation;

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(e) *Has a record of such an impairment.* (1) An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) *Broad construction.* Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of ''disability'' if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (d)(1) of this section apply.

(3) *Reasonable modification.* An individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.

(f) *Is regarded as having such an impairment.* The following principles apply under the ''regarded'' as prong of the definition of ''disability'' (paragraph (a)(1)(iii) of this section):

(1) Except as set forth in paragraph (f)(2) of this section, an individual is ''regarded as having such an impairment'' if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, even if the public entity asserts, or may or does ultimately establish, a defense to the action prohibited by the ADA.

(2) An individual is not ''regarded as having such an impairment'' if the public entity demonstrates that the impairment is, objectively, both ''transitory'' and ''minor.'' A public entity may not defeat ''regarded as'' coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the public entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment), objectively, both ''transitory'' and ''minor.'' For purposes of this section, ''transitory'' is defined as lasting or expected to last six months or less.

(3) Establishing that an individual is ''regarded as having such an impairment'' does not, by itself, establish liability. Liability is established under title II of the ADA only when an individual proves that a public entity discriminated on the basis of disability within the meaning of title II of the ADA, 42 U.S.C. 12131–12134.

(g) *Exclusions.* The term ''disability'' does not include—

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

Subpart B—General Requirements

■ 5. Amend § 35.130 by revising paragraph (b)(7) and adding paragraph (i) to read as follows:

§ 35.130 General prohibitions against discrimination.

* * * * *

(b) * * *

(7)(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(ii) A public entity is not required to provide a reasonable modification to an individual who meets the definition of ''disability'' solely under the ''regarded as'' prong of the definition of ''disability'' at § 35.108(a)(1)(iii).

* * * * *

(i) Nothing in this part 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 modification that was denied to an individual without a disability.

* * * * *

■ 6. Add Appendix C to part 35 to read as follows:

Appendix C to Part 35—Guidance to Revisions to ADA Title II and Title III Regulations Revising the Meaning and Interpretation of the Definition of ''Disability'' and Other Provisions in Order To Incorporate the Requirements of the ADA Amendments Act

Note: This appendix contains guidance providing a section-by-section analysis of the revisions to 28 CFR parts 35 and 36 published on August 11, 2016.

Guidance and Section-by-Section Analysis

This section provides a detailed description of the Department's changes to the meaning and interpretation of the definition of ''disability'' in the title II and title III regulations, the reasoning behind those changes, and responses to public comments received on these topics. *See* Office of the Attorney General; Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 79 FR 4839 (Jan. 30, 2014) (NPRM).

Sections 35.101 and 36.101 — Purpose and Broad Coverage

Sections 35.101 and 36.101 set forth the purpose of the ADA title II and title III regulations. In the NPRM, the Department proposed revising these sections by adding references to the ADA Amendments Act in renumbered §§ 35.101(a) and 36.101(a) and by adding new §§ 35.101(b) and 36.101(b), which explain that the ADA is intended to have broad coverage and that the definition of ''disability'' shall be construed broadly. The proposed language in paragraph (b) stated that the primary purpose of the ADA Amendments Act is to make it easier for

people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of ''disability'' in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in ADA cases should be whether covered entities 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.

Many commenters supported inclusion of this information as reiterating the statutory language evincing Congress' intention ''to restore a broad definition of 'disability' under the ADA. . . .'' Several commenters asked the Department to delete the last sentence in §§ 35.101(b) and 36.101(b), arguing that inclusion of this language is inconsistent with the individualized assessment required under the ADA. Some of these commenters acknowledged, however, that this language is drawn directly from the ''Purposes'' of the ADA Amendments Act. *See* Public Law 110–325, sec. 2(b)(5). The Department declines to remove this sentence from the final rule. In addition to directly quoting the statute, the Department believes that this language neither precludes nor is inconsistent with conducting an individualized assessment of whether an individual is covered by the ADA.

Some commenters recommended that the Department add a third paragraph to these sections expressly stating that ''not all impairments are covered disabilities.'' These commenters contended that ''[t]here is a common misperception that having a diagnosed impairment automatically triggers coverage under the ADA.'' While the Department does not agree that such a misperception is common, it agrees that it would be appropriate to include such a statement in the final rule, and has added it to the rules of construction explaining the phrase ''substantially limits'' at §§ 35.108(d)(1)(v) and 36.105(d)(1)(v).

Sections 35.104 and 36.104 – Definitions

The current title II and title III regulations include the definition of ''disability'' in regulatory sections that contain all enumerated definitions in alphabetical order. Given the expanded length of the definition of ''disability'' and the number of additional subsections required in order to give effect to the requirements of the ADA Amendments Act, the Department, in the NPRM, proposed moving the definition of ''disability'' from the general definitional sections at §§ 35.104 and 36.104 to a new section in each regulation, §§ 35.108 and 36.105, respectively.

The Department received no public comments in response to this proposal and the definition of ''disability'' remains in its own sections in the final rule.

Sections 35.108(a)(1) and 36.105(a)(1) Definition of ''disability'' – General

In the ADA, Congress originally defined ''disability'' as ''(A) a physical or mental impairment that substantially limits one or more major life activities of an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.'' Public Law 101–336, sec. 3 (1990). This three-part definition—the ''actual,'' ''record of,'' and ''regarded as'' prongs—was modeled after the definition of ''handicap'' found in the Rehabilitation Act of 1973. H.R. Rep. No. 110–730, pt. 2, at 6 (2008). The Department's 1991 title II and title III ADA regulations reiterate this three-part basic definition as follows:

Disability means, with respect to an individual,

- a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- a record of such an impairment; or
- being regarded as having such an impairment.

56 FR 35694, 35717 (July 26, 1991); 56 FR 35544, 35548 (July 26, 1991).

While the ADA Amendments Act did not amend the basic structure or terminology of the original statutory definition of ''disability,'' the Act revised the third prong to incorporate by reference two specific provisions construing this prong. 42 U.S.C. 12102(3)(A)–(B). The first statutory provision clarified the scope of the ''regarded as'' prong by explaining that ''[a]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.'' 42 U.S.C. 12102(3)(A). The second statutory provision provides an exception to the ''regarded as'' prong for impairments that are both transitory and minor. A transitory impairment is defined as ''an impairment with an actual or expected duration of 6 months or less.'' 42 U.S.C. 12102(3)(B). In the NPRM, the Department proposed revising the ''regarded as'' prong in §§ 35.108(a)(1)(iii) and 36.105(a)(1)(iii) to reference the regulatory provisions that implement 42 U.S.C. 12102(3). The NPRM proposed, at §§ 35.108(f) and 36.105(f), that ''regarded as'' having an impairment would mean that the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not both ''transitory and minor.''

The first proposed sentence directed that the meaning of the ''regarded as prong'' shall be understood in light of the requirements in §§ 35.108(f) and 36.105(f). The second proposed sentence merely provided a summary restatement of the requirements of §§ 35.108(f) and 36.105(f). The Department received no comments in response to this proposed language. Upon consideration, however, the Department decided to retain the first proposed sentence but omit the second as superfluous. Because the first sentence explicitly incorporates and directs the public to the requirements set out in §§ 35.108(f) and 36.105(f), the Department believes that summarizing those requirements here is unnecessary. Accordingly, in the final rule, §§ 35.108(a)(1)(iii) and 36.105(a)(1)(iii) simply reference paragraph (f) of the respective section. *See also,* discussion in the Guidance and Section-by-Section analysis of §§ 35.108(f) and 36.105(f), below.

Sections 35.108(a)(2) and 36.105(a)(2) Definition of ''disability'' – Rules of Construction

In the NPRM, the Department proposed §§ 35.108(a)(2) and 36.105(a)(2), which set forth rules of construction on how to apply the definition of ''disability.'' Proposed §§ 35.108(a)(2)(i) and 36.105(a)(2)(i) state that an individual may establish coverage under any one or more of the prongs in the definition of ''disability''—the ''actual disability'' prong in paragraph (a)(1)(i), the ''record of'' prong in paragraph (a)(1)(ii) or the ''regarded as'' prong in paragraph (a)(1)(iii). *See* §§ 35.108(a)(1)(i) through (iii); 36.105(a)(1)(i) through (iii). The NPRM's inclusion of rules of construction stemmed directly from the ADA Amendments Act, which amended the ADA to require that the definition of ''disability'' be interpreted in conformance with several specific directives and an overarching mandate to ensure ''broad coverage . . . to the maximum extent permitted by the terms of [the ADA].'' 42 U.S.C. 12102(4)(A).

To be covered under the ADA, an individual must satisfy only one prong. The term ''actual disability'' is used in these rules of construction as shorthand terminology to refer to an impairment that substantially limits a major life activity within the meaning of the first prong of the definition of ''disability.'' *See* §§ 35.108(a)(1)(i); 36.105(a)(1)(i). The terminology selected is for ease of reference. It is not intended to suggest that an individual with a disability who is covered under the first prong has any greater rights under the ADA than an individual who is covered under the ''record of'' or ''regarded as'' prongs, with the exception that the ADA Amendments Act revised the ADA to expressly state that an individual who meets the definition of ''disability'' solely under the ''regarded as'' prong is not entitled to reasonable modifications of policies, practices, or procedures. *See* 42 U.S.C. 12201(h).

Proposed §§ 35.108(a)(2)(ii) and 36.105(a)(2)(ii) were intended to incorporate Congress's expectation that consideration of coverage under the ''actual disability'' and ''record of disability'' prongs of the definition of ''disability'' will generally be unnecessary except in cases involving requests for reasonable modifications. *See* 154 Cong. Rec. H6068 (daily ed. June 25, 2008) (joint statement of Reps. Steny Hoyer and Jim Sensenbrenner). Accordingly, these provisions state that, absent a claim that a covered entity has failed to provide reasonable modifications, typically it is not necessary to rely on the ''actual disability'' or ''record of'' disability prongs. Instead, in such cases, the coverage can be evaluated exclusively under the ''regarded as'' prong,'' which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. Whether or not an individual is challenging a covered entity's failure to provide reasonable modifications, the

individual may nevertheless proceed under the ''actual disability'' or ''record of'' prong. The Department notes, however, that where an individual is challenging a covered entity's failure to provide effective communication, that individual cannot rely solely on the ''regarded as prong'' because the entitlement to an auxiliary aid or service is contingent on a disability-based need for the requested auxiliary aid or service. *See* 28 CFR 35.160(b), 28 CFR 36.303(c).

The Department received no comments objecting to these proposed rules of construction. The final rule retains these provisions but renumbers them as paragraphs (ii) and (iii) of §§ 35.108(a)(2) and 36.105(a)(2) and replaces the reference to ''covered entity'' in the title III regulatory text with ''public accommodation.''

The Department has added a third rule of construction at the beginning of §§ 35.108(a)(2) and 36.105(a)(2), numbered §§ 35.108(a)(2)(i) and 36.105(a)(2)(i). Closely tracking the amended statutory language, these provisions state that ''[t]he definition of disability shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.'' *See* 42 U.S.C. 12102(4)(A). This principle is referenced in other portions of the final rule, but the Department believes it is important to include here underscore Congress's intent that it be applied throughout the determination of whether an individual falls within the ADA definition of ''disability.''

Sections 35.108(b) and 36.105(b) – Physical or Mental Impairment

The ADA Amendments Act did not change the meaning of the term ''physical or mental impairment.'' Thus, in the NPRM, the Department proposed only minor modifications to the general regulatory definitions for this term at §§ 35.108(b)(1)(i) and 36.105(b)(1)(i) by adding examples of two additional body systems—the immune system and the circulatory system—that may be affected by a physical impairment.

In addition, the Department proposed adding ''dyslexia'' to §§ 35.108(b)(2) and 36.105(b)(2) as an example of a specific learning disability that falls within the meaning of the phrase ''physical or mental impairment.'' Although dyslexia is a specific diagnosable learning disability that causes difficulties in reading, unrelated to intelligence and education, the Department became aware that some covered entities mistakenly believe that dyslexia is not a clinically diagnosable impairment. Therefore, the Department sought public comment regarding its proposed inclusion of a reference to dyslexia in these sections.

The Department received a significant number of comments in response to this proposal. Many commenters supported inclusion of the reference to dyslexia. Some of these commenters also asked the Department to include other examples of specific learning disabilities such as dysgraphia and dyscalculia.Several commenters remarked that as ''research and practice bear out, dyslexia is just one of the specific learning disabilities that arise from 'neurological differences in brain structure and function and affect a person's ability to receive, store, process, retrieve or communicate information.' '' These commenters identified the most common specific learning disabilities as: ''Dyslexia, dysgraphia, dyscalculia, auditory processing disorder, visual processing disorder and non-verbal learning disabilities,'' and recommended that the Department rephrase its reference to specific learning disabilities to make clear that there are many other specific learning disabilities besides dyslexia. The Department has considered all of these comments and has decided to use the phrase ''dyslexia and other specific learning disabilities'' in the final rule.

Another commenter asked the Department to add a specific definition of dyslexia to the regulatory text itself. The Department declines to do so as it does not give definitions for any other physical or mental impairment in the regulations.

Other commenters recommended that the Department add ADHD to the list of examples of ''physical or mental impairments'' in §§ 35.108(b)(2) and 36.105(b)(2).Some commenters stated that ADHD, which is not a specific learning disability, is a very commonly diagnosed impairment that is not always well understood. These commenters expressed concern that excluding ADHD from the list of physical and mental impairments could be construed to mean that ADHD is less likely to support an assertion of disability as compared to other impairments. On consideration, the Department agrees that, due to the prevalence of ADHD but lack of public understanding of the condition, inclusion of ADHD among the examples set forth in §§ 35.108(b)(2) and 36.105(b)(2) will provide appropriate and helpful guidance to the public.

Other commenters asked the Department to include arthritis, neuropathy, and other examples of physical or mental impairments that could substantially impair a major life activity. The Department declines to add any other examples because, while it notes the value in clarifying the existence of impairments such as ADHD, it also recognizes that the regulation need not elaborate an inclusive list of all impairments, particularly those that are very prevalent, such as arthritis, or those that may be symptomatic of other underlying impairments already referenced in the list, such as neuropathy, which may be caused by cancer or diabetes. The list is merely illustrative and not exhaustive. The regulations clearly state that the phrase ''physical or mental impairment'' includes, but is not limited to'' the examples provided. No negative implications should be drawn from the omission of any specific impairment in §§ 35.108(b) and 36.105(b).

The Department notes that it is important to distinguish between conditions that are impairments and physical, environmental, cultural, or economic characteristics that are not impairments. The definition of the term ''impairment'' does not include physical characteristics such as eye color, hair color, or left-handedness, or height, weight, or muscle tone that are within ''normal'' range. Moreover, conditions that are not themselves physiological disorders, such as pregnancy, are not impairments. However, even if an underlying condition or characteristic is not itself a physical or mental impairment, it may give rise to a physical or mental impairment that substantially limits a major life activity. In such a case, an individual would be able to establish coverage under the ADA. For example, while pregnancy itself is not an impairment, a pregnancy-related impairment that substantially limits a major life activity will constitute a disability under the first prong of the definition.Major life activities that might be substantially limited by pregnancy-related impairments could include walking, standing, and lifting, as well as major bodily functions such as the musculoskeletal, neurological, cardiovascular, circulatory, endocrine, and reproductive functions. Alternatively, a pregnancy-related impairment may constitute a ''record of'' a substantially limiting impairment, or may be covered under the ''regarded as'' prong if it is the basis for a prohibited action and is not both ''transitory and minor.''

Sections 35.108(c) and 36.105(c) – Major Life Activities

Prior to the passage of the ADA Amendments Act, the ADA did not define ''major life activities,'' leaving delineation of illustrative examples to agency regulations. Paragraph 2 of the definition of ''disability'' in the Department's current title II and title III regulations at 28 CFR 35.104 and 36.104 states that ''major life activities'' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The ADA Amendments Act significantly expanded the range of major life activities by directing that ''major'' be interpreted in a more expansive fashion, by adding a significant new category of major life activities, and by providing non-exhaustive

Dysgraphia is a learning disability that negatively affects the ability to write.

Dyscalculia is a learning disability that negatively affects the processing and learning of numerical information.

The Department is using the term ADHD in the same manner as it is currently used in the Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition (DSM–5), to refer to three different presentations of symptoms: Predominantly inattentive (which was previously known as ''attention deficit disorder); predominantly hyperactive or impulsive; or a combined presentation of inattention and hyperactivity-impulsivity. The DSM–5 is the most recent edition of a widely-used manual designed to assist clinicians and researchers in assessing mental disorders. *See Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition DSM–5,* American Psychiatric Association, at 59–66 (2013).

Pregnancy-related impairments may include, but are not limited to: Disorders of the uterus and cervix, such as insufficient cervix or uterine fibroids; and pregnancy-related anemia, sciatica, carpal tunnel syndrome, gestational diabetes, nausea, abnormal heart rhythms, limited circulation, or depression. *See* EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, EEOC Notice 915.003, June 25, 2015, *available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm* (last visited Feb. 3, 2016).

lists of examples of major life activities. The amended statute's first list of major life activities includes, but is not limited to, ''caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.'' 42 U.S.C. 12102(2)(A). The ADA Amendments Act also broadened the definition of ''major life activity'' to include physical or mental impairments that substantially limit the operation of a ''major bodily function,'' which include, but are not limited to, the ''functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.'' 42 U.S.C. 12102(2)(B). These expanded lists of examples of major life activities reflect Congress's directive to expand the meaning of the term ''major'' in response to court decisions that interpreted the term more narrowly than Congress intended. *See* Public Law 110–25, sec. 3 (b)(4).

Examples of Major Life Activities, Other Than the Operations of a Major Bodily Function

In the NPRM, at §§ 35.108(c) and 36.105(c), the Department proposed revisions of the title II and title III lists of examples of major life activities (other than the operations of a major bodily function) to incorporate all of the statutory examples, as well as to provide additional examples included in the EEOC title I final regulation—reaching, sitting, and interacting with others. *See* 29 CFR 1630.2(i)(1)(i).

A number of commenters representing persons with disabilities or the elderly recommended that the Department add a wide variety of other activities to this first list. Some commenters asked the Department to include references to test taking, writing, typing, keyboarding, or executive function.Several commenters asked the Department to include other activities as well, such as the ability to engage in sexual activity, perform mathematical calculations, travel, or drive. One commenter asked the Department to recognize that, depending upon where people live, other life activities may fall within the category of major life activities.

This commenter asserted, for example, that tending livestock or operating farm equipment can be a major life activity in a farming or ranching community, and that maintaining septic, well or water systems, or gardening, composting, or hunting may be a major life activity in a rural community.

On consideration of the legislative history and the relevant public comments, the Department decided to include ''writing'' as an additional example in its non-exhaustive list of examples of major life activities in the final rule. The Department notes Congress repeatedly stressed that writing is one of the major life activities that is often affected by a covered learning disability. *See, e.g.,* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers); H.R. Rep. No. 110–730 pt. 1, at 10–11 (2008).

Other than ''writing,'' the Department declines to add additional examples of major life activities to these provisions in the final rule. This list is illustrative, and the Department believes that it is neither necessary nor possible to list every major life activity. Moreover, the Department notes that many of the commenters' suggested inclusions implicate life activities already included on the list. For example, although, as commenters pointed out, some courts have concluded that test taking is a major life activity,the Department notes that one or more already-included major life activities—such as reading, writing, concentrating, or thinking, among others—will virtually always be implicated in test taking. Similarly, activities such as operating farm equipment, or maintaining a septic or well system, implicate already-listed major life activities such as reaching, lifting, bending, walking, standing, and performing manual tasks.

The commenters' suggested additions also implicate the operations of various bodily systems that may already be recognized as major life activities. *See* discussion of §§ 35.108(c)(1)(ii) and 36.105(c)(1)(ii), below. For example, it is the Department's view that individuals who have cognitive or other impairments that affect the range of abilities that are often described as part of ''executive function'' will likely be able to assert that they have impairments that substantially limit brain function, which is one of the major bodily functions listed among the examples of major life activities.

Examples of Major Life Activities—Operations of a Major Bodily Function

In the NPRM, the Department proposed revising the regulatory definitions of disability at §§ 35.108(c)(1)(ii) and 36.105(c)(1)(ii) to make clear that the operations of major bodily functions are major life activities, and to include a non-exhaustive list of examples of major bodily functions, consistent with the language of the ADA as amended. Because the statutory list is non-exhaustive, the Department also proposed further expanding the list to include the following examples of major bodily functions: The functions of the special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal systems. These six major bodily functions also are specified in the EEOC title I final regulation. 29 CFR 1630.2(i)(1)(i).

One commenter objected to the Department's inclusion of additional examples of major life activities in both these lists, suggesting that the Department include only those activities and conditions specifically set forth in the ADA as amended. The Department believes that providing other examples of major life activities, including major bodily functions, is within the Attorney General's authority to both interpret titles II and III of the ADA and promulgate implementing regulations and that these examples provide helpful guidance to the public. Therefore, the Department declines to limit its lists of major life activities to those specified in the statute. Further, the Department notes that even the expanded lists of major life activities and major bodily functions are illustrative and non-exhaustive. The absence of a particular life activity or bodily function from the list should not create a negative implication as to whether such activity or function constitutes a major life activity under the statute or the implementing regulation.

Rules of Construction for Major Life Activities

In the NPRM, proposed §§ 35.108(c)(2) and 36.105(c)(2) set out two specific principles applicable to major life activities: ''[i]n determining other examples of major life activities, the term 'major' shall not be interpreted strictly to create a demanding standard for disability,'' and ''[w]hether an activity is a 'major life activity' is not determined by reference to whether it is of 'central importance to daily life.' '' The proposed language furthered a main purpose of the ADA Amendments Act—to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams* that (1) strictly interpreted the terms ''substantially'' and ''major'' in the definition of ''disability'' to create a demanding standard for qualifying as disabled under the ADA, and that (2) required an individual to have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives to be considered as ''substantially limited'' in performing a major life activity under the ADA. Public Law 110–325, sec. 2(b)(4).

The Department did not receive any comments objecting to its proposed language. In the final rule, the Department retained these principles but has numbered each principle individually and deemed them ''rules of construction'' because they are intended to inform the determination of whether a particular activity is a major life activity.

Sections 35.108(d)(1) and 36.105(d)(1)—Substantially Limits

Overview. The ADA as amended directs that the term ''substantially limits'' shall be ''interpreted consistently with the findings and purposes of the ADA Amendments Act.'' 42 U.S.C. 12102(4)(B). *See also* Findings and Purposes of the ADA Amendments Act, Public Law 110–325, sec. 2(a)–(b). In the

''Executive function'' is an umbrella term that has been described as referring to ''a constellation of cognitive abilities that include the ability to plan, organize, and sequence tasks and manage multiple tasks simultaneously.'' *See, e.g.* National Institute of Neurological Disorders and Stroke, *Domain Specific Tasks of Executive Functions, available at grants.nih.gov/grants/guide/notice-files/NOT-NS-04-012.html* (last visited Feb. 3, 2016).

In *Bartlett* v. *N.Y. State Bd. of Law Exam'rs,* 970 F. Supp. 1094, 1117 (S.D.N.Y. 1997), *aff'd in part and vacated in part,* 156 F.3d 321 (2d Cir. 1998), *cert. granted, judgment vacated on other grounds,* 527 U.S. 1031 (1999), and *aff'd in part, vacated in part,* 226 F.3d 69 (2d Cir. 2000), then-Judge Sotomayor stated, ''[I]n the modern era, where test-taking begins in the first grade, and standardized tests are a regular and often life-altering occurrence thereafter, both in school and at work, I find test-taking is within the ambit of 'major life activity.' '' *See also Rawdin* v. *American Bd. of Pediatrics,* 985 F. Supp. 2d 636 (E.D. Pa. 2013), *aff'd. on other grounds,* 2014 U.S. App. LEXIS 17002 (3d Cir. Sept. 3, 2014).

NPRM, the Department proposed to add nine rules of construction at §§ 35.108(d) and 36.105(d) clarifying how to interpret the meaning of ''substantially limits'' when determining whether an individual's impairment substantially limits a major life activity. These rules of construction are based on the requirements of the ADA as amended and the clear mandates of the legislative history. Due to the insertion of the rules of construction, these provisions are renumbered in the final rule.

Sections 35.108(d)(1)(i) and 36.105(d)(1)(i) – Broad Construction, Not a Demanding Standard

In accordance with Congress's overarching directive to construe the term ''disability'' broadly, *see* 42 U.S.C. 12102(4)(A), the Department, in its NPRM, proposed §§ 35.108(d)(1)(i) and 36.105(d)(1)(i), which state: ''The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.'' These provisions are also rooted in the Findings and Purposes of the ADA Amendments Act, in which Congress instructed that ''the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.'' *See* Public Law 110–325, sec. 2(b)(1), (4)–(5).

Several commenters on these provisions supported the Department's proposal to include these rules of construction, noting that they were in keeping with both the statutory language and Congress's intent to broaden the definition of ''disability'' and restore expansive protection under the ADA. Some of these commenters stated that, even after the passage of the ADA Amendments Act, some covered entities continued to apply a narrow definition of ''disability.''

Other commenters expressed concerns that the proposed language would undermine congressional intent by weakening the meaning of the word ''substantial.'' One of these commenters asked the Department to define the term ''substantially limited'' to include an element of materiality, while other commenters objected to the breadth of these provisions and argued that it would make the pool of people who might claim disabilities too large, allowing those without substantial limitations to be afforded protections under the law. Another commenter expressed concern about the application of the regulatory language to the diagnosis of learning disabilities and ADHD.

The Department considered all of these comments and declines to provide a definition of the term ''substantially limits'' or make any other changes to these provisions in the final rule. The Department notes that Congress considered and expressly rejected including language defining the term ''substantially limits'': ''We have concluded that adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under this Act. The resulting need for further judicial scrutiny and construction will not help move the focus from the threshold issue of disability to the primary issue of discrimination.'' 154 Cong. Rec. S8441. (daily ed. Sept. 16, 2008) (Statement of the Managers).

The Department believes that the nine rules of construction interpreting the term ''substantially limits'' provide ample guidance on determining whether an impairment substantially limits a major life activity and are sufficient to ensure that covered entities will be able to understand and apply Congress's intentions with respect to the breadth of the definition of ''disability.''

Moreover, the commenters' arguments that these provisions would undermine congressional intent are unsupported. To the contrary, Congress clearly intended the ADA Amendments Act to expand coverage: ''The managers have introduced the ADA Amendments Act of 2008 to restore the proper balance and application of the ADA by clarifying and broadening the definition of disability, and to increase eligibility for the protections of the ADA. It is our expectation that because this bill makes the definition of disability more generous, some people who were not covered before will now be covered.'' 154 Cong. Rec. S8441 (daily ed. Sept. 16, 2008) (Statement of the Managers).

The Department has also considered the comments expressed about the interplay between the proposed regulatory language and the diagnosis of learning disabilities and ADHD disorders. The Department believes that the revised definition of ''disability,'' including, in particular, the provisions construing ''substantially limits,'' strikes the appropriate balance to effectuate Congress's intent when it passed the ADA Amendments Act, and will not modify its regulatory language in response to these comments.

Sections 35.108(d)(1)(ii) and 36.105(d)(1)(ii) – Primary Object of ADA Cases

In the ADA Amendments Act, Congress directed that rules of construction should ensure that ''substantially limits'' is construed in accordance with the findings and purposes of the statute. *See* 42 U.S.C. 12102(4)(B). One of the purposes of the Act was to convey that ''the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with the obligations and to convey that the question of whether an individuals' impairment is a disability should not demand extensive analysis.'' Public Law 110–325, sec. 2(b)(5). The legislative history clarifies that: ''Through this broad mandate [of the ADA], Congress sought to protect anyone who is treated less favorably because of a current, past, or perceived disability. Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage. Nevertheless, as the courts began interpreting and applying the definition of disability strictly, individuals have been excluded from the protections that the ADA affords because they are unable to meet the demanding judicially imposed standard for qualifying as disabled.''). H.R. Rep. No. 110–730, pt. 2, at 5 (2008) (House Committee on the Judiciary).

In keeping with Congress's intent and the language of the ADA Amendments Act, the rules of construction at proposed §§ 35.108(d)(1)(iii) and 36.105(d)(1)(iii) make clear that the primary object of attention in ADA cases should be whether public or other covered entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity. In particular, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

A number of commenters expressed support for these rules of construction, noting that they reinforced Congress's intent in ensuring that the primary focus will be on compliance. Several commenters objected to the use of the word ''cases'' in these provisions, stating that it lacked clarity. The word ''cases'' tracks the language of the ADA Amendments Act and the Department declines to change the term.

A few commenters objected to these provisions because they believed that the language would be used to supersede or otherwise change the required analysis of requests for reasonable modifications or testing accommodations. *See* 28 CFR 35.130(b)(7), 36.302, 36.309. The Department disagrees with these commenters. These rules of construction relate only to the determination of coverage under the ADA. They do not change the analysis of whether a discriminatory act has taken place, including the determination as to whether an individual is entitled to a reasonable modification or testing accommodation. *See* discussion of §§ 35.108(d)(1)(vii) and 36.105(d)(1)(vii) below.

The Department retained the language of these rules of construction in the final rule except that in the title III regulatory text it has changed the reference from ''covered entity'' to ''public accommodation.'' The Department also renumbered these provisions as §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii).

Sections 35.108(d)(1)(iii) and 36.105(d)(1)(iii) – Impairment Need Not Substantially Limit More Than One Major Life Activity

Proposed §§ 35.108(d)(1)(viii) and 36.105(d)(1)(viii) stated that ''[a]n impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.'' *See* 42 U.S.C. 12102(4)(C). This language reflected the statutory intent to reject court decisions that had required individuals to show that an impairment substantially limits more than one major life activity. *See* 154 Cong. Rec. S8841–44 (daily ed. Sept. 16, 2008) (Statement of the Managers). Applying this principle, for example, an individual seeking to establish coverage under the ADA need not show a substantial limitation in the ability to learn
if that individual is substantially limited in another major life activity, such as walking, or the functioning of the nervous or endocrine systems. The proposed rule also was intended to clarify that the ability to perform one or more particular tasks within a broad category of activities does not

preclude coverage under the ADA. *See* H.R. Rep. No. 110–730, pt. 2, at 19 & n.52 (2008) (House Committee on the Judiciary). For instance, an individual with cerebral palsy could have a capacity to perform certain manual tasks yet nonetheless show a substantial limitation in the ability to perform a ''broad range'' of manual tasks.

The Department received one comment specifically supporting this provision and none opposing it. The Department is retaining this language in the final rule although it is renumbered and is found at §§ 35.108(d)(1)(iii) and 36.105(d)(1)(iii).

Sections 35.108(d)(1)(iv) and 36.105(d)(1)(iv) – Impairments That Are Episodic or in Remission

The ADA as amended provides that ''an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.''

42 U.S.C. 12102(4)(D). In the NPRM, the Department proposed §§ 35.108(d)(1)(vii) and 36.105(d)(1)(vii) to directly incorporate this language. These provisions are intended to reject the reasoning of court decisions concluding that certain individuals with certain conditions—such as epilepsy or post traumatic stress disorder—were not protected by the ADA because their conditions were episodic or intermittent. The legislative history provides that ''[t]his . . . rule of construction thus rejects the reasoning of the courts in cases like *Todd* v. *Academy Corp.* [57 F. Supp. 2d 448, 453 (S.D. Tex. 1999)] where the court found that the plaintiff's epilepsy, which resulted in short seizures during which the plaintiff was unable to speak and experienced tremors, was not sufficiently limiting, at least in part because those seizures occurred episodically. It similarly rejects the results reached in cases [such as *Pimental* v. *Dartmouth-Hitchcock Clinic,* 236 F. Supp. 2d 177, 182–83 (D.N.H. 2002)] where the courts have discounted the impact of an impairment [such as cancer] that may be in remission as too short-lived to be substantially limiting. It is thus expected that individuals with impairments that are episodic or in remission (*e.g.,* epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (*e.g.,* seizures) substantially limits a major life activity.'' H.R. Rep. No. 110–730, pt. 2, at 19–20 (2008) (House Committee on the Judiciary).

Some examples of impairments that may be episodic include hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia. The fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity. For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking.

The Department received three comments in response to these provisions. Two commenters supported this provision and one commenter questioned about how school systems should provide reasonable modifications to students with disabilities that are episodic or in remission. As discussed elsewhere in this guidance, the determination of what is an appropriate modification is separate and distinct from the determination of whether an individual is covered by the ADA, and the Department will not modify its regulatory language in response to this comment.

Sections 35.108(d)(1)(v) and 36.105(d)(1)(v) – Comparisons to Most People in the Population, and Impairment Need Not Prevent or Significantly or Severely Restrict a Major Life Activity

In the legislative history of the ADA Amendments Act, Congress explicitly recognized that it had always intended that determinations of whether an impairment substantially limits a major life activity should be based on a comparison to most people in the population. The Senate Managers Report approvingly referenced the discussion of this requirement in the committee report from 1989. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers) (citing S. Rep. No. 101–116, at 23 (1989)). The preamble to the Department's 1990 title II and title III regulations also referenced that the impact of an individual's impairment should be based on a comparison to most people. *See* 56 FR 35694, 35699 (July 26, 1991).

Consistent with its longstanding intent, Congress directed, in the ADA Amendments Act, that disability determinations ''should not demand extensive analysis'' and that impairments do not need to rise to the level of ''prevent[ing] or severely restrict[ing] the individual from doing activities that are of central importance to most people's daily lives.'' *See* Public Law 110–325, sec. 2(b)(4)–(5). In giving this direction, Congress sought to correct the standard that courts were applying to determinations of disability after *Toyota,* which had created ''a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court's narrower standard.'' 154 Cong. Rec. S8840–8841 (daily ed. Sept. 16, 2008) (Statement of the Managers). The ADA Amendments Act thus abrogates *Toyota*'s holding by mandating that ''substantially limited'' must no longer create ''an inappropriately high level of limitation.'' *See* Public Law 110–325, sec. 2(b)(4)–(5) and 42 U.S.C. 12102(4)(B). For example, an individual with carpal tunnel syndrome, a physical impairment, can demonstrate that the impairment substantially limits the major life activity of writing even if the impairment does not prevent or severely restrict the individual from writing.

Accordingly, proposed §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii) state that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. However, an impairment does not need to prevent, or significantly or severely restrict, an individual from performing a major life activity in order to be substantially limiting. The proposed language in the NPRM was rooted in the corrective nature of the ADA Amendments Act and its explicit rejection of the strict standards imposed under *Toyota* and its progeny. *See* Public Law 110–325, sec. 2(b)(4).

The Department received several comments on these provisions, none of which recommended modification of the regulatory language. A few commenters raised concerns that are further addressed in the ''Condition, manner, or duration'' section below, regarding the Department's inclusion in the NPRM preamble of a reference to possibly using similarly situated individuals as the basis of comparison. The Department has removed this discussion and clarified that it does not endorse reliance on similarly situated individuals to demonstrate substantial limitations. For example, the Department recognizes that when determining whether an elderly person is substantially limited in a major life activity, the proper comparison is most people in the general population, and not similarly situated elderly individuals. Similarly, someone with ADHD should be compared to most people in the general population, most of whom do not have ADHD. Other commenters expressed interest in the possibility that, in some cases, evidence to support an assertion that someone has an impairment might simultaneously be used to demonstrate that the impairment is substantially limiting. These commenters approvingly referenced the EEOC's interpretive guidance for its ADA Amendments Act regulation, which provided an example of an individual with a learning disability. *See* 76 FR 16978, 17009 (Mar. 25, 2011). In that example, evidence gathered to demonstrate the impairment of a learning disability showed a discrepancy between the person's age, measured intelligence, and education and that person's actual versus expected achievement. The EEOC noted that such individuals also likely would be able to demonstrate substantial limitations caused by that impairment to the major life activities of learning, reading, or thinking, when compared to most people in the general population, especially when the ameliorative effects of mitigating measures were set aside. The Department concurs with this view.

Finally, the Department added an explicit statement recognizing that not every impairment will constitute a disability within the meaning of the section. This language echoes the Senate Statement of Managers, which clarified that: ''[N]ot every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA. An impairment that does not substantially limit a major life activity is not a disability under this prong.'' 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (Statement of the Managers).

Sections 35.108(d)(1)(vi) and 36.105(d)(1)(vi) – ''Substantially Limits'' Shall Be Interpreted To Require a Lesser Degree of Functional Limitation Than That Required Prior to the ADA Amendments Act

In the NPRM, proposed §§ 35.108(d)(1)(iv) and 36.105(d)(1)(iv) state that determining

whether an impairment substantially limits a major life activity requires an individualized assessment. But, the interpretation and application of the term ''substantially limits'' for this assessment requires a lower degree of functional limitation than the standard applied prior to the ADA Amendments Act.

These rules of construction reflect Congress's concern that prior to the adoption of the ADA Amendments Act, courts were using too high a standard to determine whether an impairment substantially limited a major life activity. *See* Public Law 110–325, sec. 2(b)(4)–(5); *see also* 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (Statement of the Managers) (''This bill lowers the standard for determining whether an impairment constitute[s] a disability and reaffirms the intent of Congress that the definition of disability in the ADA is to be interpreted broadly and inclusively.'').

The Department received no comments on these provisions. The text of these provisions is unchanged in the final rule, although they have been renumbered as §§ 35.108(d)(1)(vi) and 36.105(d)(1)(vi).

Sections §§ 35.108(d)(1)(vii) and 36.105(d)(1)(vii) – Comparison of Individual's Performance of Major Life Activity Usually Will Not Require Scientific, Medical, or Statistical Analysis

In the NPRM, the Department proposed at §§ 35.108(d)(1)(v) and 36.105(d)(1)(v) rules of construction making clear that the comparison of an individual's performance of a major life activity to that of most people in the general population usually will not require scientific, medical, or statistical evidence. However, this rule is not intended to prohibit or limit the use of scientific, medical, or statistical evidence in making such a comparison where appropriate.

These rules of construction reflect Congress's rejection of the demanding standards of proof imposed upon individuals with disabilities who tried to assert coverage under the ADA prior to the adoption of the ADA Amendments Act. In passing the Act, Congress rejected the idea that the disability determination should be ''an onerous burden for those seeking accommodations or modifications.'' *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). These rules make clear that in most cases, people with impairments will not need to present scientific, medical, or statistical evidence to support their assertion that an impairment is substantially limiting compared to most people in the general population. Instead, other types of evidence that are less onerous to collect, such as statements or affidavits of affected individuals, school records, or determinations of disability status under other statutes, should, in most cases, be considered adequate to establish that an impairment is substantially limiting. The Department's proposed language reflected Congress's intent to ensure that individuals with disabilities are not precluded from seeking protection under the ADA because of an overbroad, burdensome, and generally unnecessary requirement.

The Department received several comments in support of these provisions and a number of comments opposing all or part of them. One commenter representing individuals with disabilities expressed support for the proposed language, noting that ''[m]any people with disabilities have limited resources and requiring them to hire an expert witness to confirm their disability would pose an insurmountable barrier that could prevent them from pursuing their ADA cases.''

Commenters representing testing entities objected to this language arguing that they needed scientific, medical, or statistical evidence in order to determine whether an individual has a learning disability or ADHD. These commenters argued that, unlike other disabilities, assessment of learning disabilities and ADHD require scientific, medical, or statistical evidence because such disabilities have no overt symptoms, cannot be readily observed, and lack medical or scientific verifiability. One commenter stated that the proposed language ''favor[s] expedience over evidence-based guidance.''

In opposing these provisions, these commenters appear to conflate proof of the existence of an impairment with the analysis of how an impairment substantially limits a major life activity. These provisions address only how to evaluate whether an impairment substantially limits a major life activity, and the Department's proposed language appropriately reflects Congress's intent to ensure that individuals with disabilities are not precluded from seeking protection under the ADA because of overbroad, burdensome, and generally unnecessary evidentiary requirements. Moreover, the Department disagrees with the commenters' suggestion that an individual with ADHD or a specific learning disability can never demonstrate how the impairment substantially limits a major life activity without scientific, medical, or statistical evidence. Scientific, medical, or statistical evidence usually will not be necessary to determine whether an individual with a disability is substantially limited in a major life activity. However, as the rule notes, such evidence may be appropriate in some circumstances.

One commenter suggested that the words ''where appropriate'' be deleted from these provisions in the final rule out of concern that they may be used to preclude individuals with disabilities from proffering scientific or medical evidence in support of a claim of coverage under the ADA. The Department disagrees with the commenter's reading of these provisions. Congress recognized that some people may choose to support their claim by presenting scientific or medical evidence and made clear that ''plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting.'' *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). The language ''where appropriate'' allows for those circumstances where an individual chooses to present such evidence, but makes clear that in most cases presentation of such evidence shall not be necessary.

Finally, although the NPRM did not propose any changes with respect to the title III regulatory requirements applicable to the provision of testing accommodations at 28 CFR 36.309, one commenter requested revisions to § 36.309 to acknowledge the changes to regulatory language in the definition of ''disability.'' Another commenter noted that the proposed changes to the regulatory definition of ''disability'' warrant new agency guidance on how the ADA applies to requests for testing accommodations.

The Department does not consider it appropriate to include provisions related to testing accommodations in the definitional sections of the ADA regulations. The determination of disability, and thus coverage under the ADA, is governed by the statutory and regulatory definitions and the related rules of construction. Those provisions do not speak to what testing accommodations an individual with a disability is entitled to under the ADA nor to the related questions of what a testing entity may request or require from an individual with a disability who seeks testing accommodations. Testing entities' substantive obligations are governed by 42 U.S.C. 12189 and the implementing regulation at 28 CFR 36.309. The implementing regulation clarifies that private entities offering covered examinations need to make sure that any request for required documentation is reasonable and limited to the need for the requested modification, accommodation, or auxiliary aid or service. Furthermore, when considering requests for modifications, accommodations, or auxiliary aids or services, the entity should give considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations or provided in response to an Individualized Education Program (IEP) provided under the IDEA or a plan describing services provided under section 504 of the Rehabilitation Act of 1973 (often referred as a Section 504 Plan).

Contrary to the commenters' suggestions, there is no conflict between the regulation's definitional provisions and title III's testing accommodation provisions. The first addresses the core question of who is covered under the definition of ''disability,'' while the latter sets forth requirements related to documenting the need for particular testing accommodations. To the extent that testing entities are urging conflation of the analysis for establishing disability with that for determining required testing accommodations, such an approach would contradict the clear delineation in the statute between the determination of disability and the obligations that ensue.

Accordingly, in the final rule, the text of these provisions is largely unchanged, except that the provisions are renumbered as §§ 35.108(d)(1)(vii) and 36.108(d)(1)(vii), and the Department added ''the presentation of,'' in the second sentence, which was included in the corresponding provision of the EEOC final rule. *See* 29 CFR 1630.2(j)(1)(v).

Sections 35.108(d)(1)(viii) and 36.105(d)(1)(viii) – Determination Made Without Regard to the Ameliorative Effects of Mitigating Measures

The ADA as amended expressly prohibits any consideration of the ameliorative effects

of mitigating measures when determining whether an individual's impairment substantially limits a major life activity, except for the ameliorative effects of ordinary eyeglasses or contact lenses. 42 U.S.C. 12102(4)(E). The statute provides an illustrative, and non-exhaustive list of different types of mitigating measures. *Id.*

In the NPRM, the Department proposed §§ 35.108(d)(2)(vi) and 36.105(d)(2)(vi), which tracked the statutory language regarding consideration of mitigating measures. These provisions stated that the ameliorative effects of mitigating measures should not be considered when determining whether an impairment substantially limits a major life activity. However, the beneficial effects of ordinary eyeglasses or contact lenses should be considered when determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses refer to lenses that are intended to fully correct visual acuity or to eliminate refractive errors. Proposed §§ 35.108(d)(4) and 36.105(d)(4), discussed below, set forth examples of mitigating measures.

A number of commenters agreed with the Department's proposed language and no commenters objected. Some commenters, however, asked the Department to add language to these sections stating that, although the ameliorative effects of mitigating measures may not be considered in determining whether an individual has a covered disability, they may be considered in determining whether an individual is entitled to specific testing accommodations or reasonable modifications. The ADA Amendments Act revised the definition of ''disability'' and the Department agrees that the Act's prohibition on assessing the ameliorative effects of mitigating measures applies only to the determination of whether an individual meets the definition of ''disability.'' The Department declines to add the requested language, however, because it goes beyond the scope of this rulemaking by addressing ADA requirements that are not related to the definition of ''disability.'' These rules of construction do not apply to the requirements to provide reasonable modifications under §§ 35.130(b)(7) and 36.302 or testing accommodations under § 36.309 in the title III regulations. The Department disagrees that further clarification is needed at this point and declines to modify these provisions except that they are now renumbered as §§ 35.108(d)(1)(viii) and § 36.105(d)(1)(viii).

The Department notes that in applying these rules of construction, evidence showing that an impairment would be substantially limiting in the absence of the ameliorative effects of mitigating measures could include evidence of limitations that a person experienced prior to using a mitigating measure or evidence concerning the expected course of a particular disorder absent mitigating measures.

The determination of whether an individual's impairment substantially limits a major life activity is unaffected by an individual's choice to forgo mitigating measures. For individuals who do not use a mitigating measure (including, for example, medication or auxiliary aids and services that might alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity. The limitations posed by the impairment on the individual and any negative (non-ameliorative) effects of mitigating measures will serve as the foundation for a determination of whether an impairment is substantially limiting. The origin of the impairment, whether its effects can be mitigated, and any ameliorative effects of mitigating measures that are employed may not be considered in determining if the impairment is substantially limiting.

Sections 35.108(d)(1)(ix) and 36.105(d)(1)(ix) – Impairment That Lasts Less Than Six Months Can Still Be a Disability Under First Two Prongs of the Definition

In §§ 35.108(d)(1)(ix) and 36.105(d)(1)(ix), the NPRM proposed rules of construction noting that the six-month ''transitory'' part of the ''transitory and minor'' exception does not apply to the ''actual disability'' or ''record of'' prongs of the definition of ''disability.'' Even if an impairment may last or is expected to last six months or less, it can be substantially limiting.

The ADA as amended provides that the ''regarded as'' prong of the definition of ''disability'' does ''not apply to impairments that are [both] transitory and minor.'' 42 U.S.C. 12102(3)(B). ''Transitory impairment'' is defined as ''an impairment with an actual or expected duration of six months or less.'' *Id.* The statute does not define the term ''minor.'' Whether an impairment is both ''transitory and minor'' is a question of fact that is dependent upon individual circumstances. The ADA as amended contains no such provision with respect to the first two prongs of the definition of ''disability''—''actual disability,'' and ''record of'' disability. The application of the ''transitory and minor'' exception to the ''regarded as'' prong is addressed in §§ 35.108(f) and 36.105(f).

The Department received two comments on this proposed language. One commenter recommended that the Department delete this language and ''replace it with language clarifying that if a condition cannot meet the lower threshold of impairment under the third prong, it cannot meet the higher threshold of a disability under the first and second prongs.'' The Department declines to modify these provisions because the determination of whether an individual satisfies the requirements of a particular prong is not a comparative determination between the three means of demonstrating disability under the ADA. The Department believes that the suggested language would create confusion because there are significant differences between the first two prongs and the third prong. In addition, the Department believes its proposed language is in keeping with the ADA Amendments Act and the supporting legislative history.

The other commenter suggested that the Department add language to provide greater clarity with respect to the application of the transitory and minor exception to the ''regarded as prong.'' The Department does not believe that additional language should be added to these rules of construction, which relate only to whether there is a six-month test for the first two prongs of the definition. As discussed below, the Department has revised both the regulatory text at §§ 35.108(f) and 36.105(f) and its guidance on the application of the ''transitory and minor'' exception to the ''regarded as'' prong. *See* discussion below.

Sections 35.108(d)(2) and 36.105(d)(2) – Predictable Assessments

In the NPRM, proposed §§ 35.108(d)(2) and 36.105(d)(2) set forth examples of impairments that should easily be found to substantially limit one or more major life activities. These provisions recognized that while there are no ''per se'' disabilities, for certain types of impairments the application of the various principles and rules of construction concerning the definition of ''disability'' to the individualized assessment would, in virtually all cases, result in the conclusion that the impairment substantially limits a major life activity. Thus, the necessary individualized assessment of coverage premised on these types of impairments should be particularly simple and straightforward. The purpose of the ''predictable assessments'' provisions is to simplify consideration of those disabilities that virtually always create substantial limitations to major life activities, thus satisfying the statute's directive to create clear, consistent, and enforceable standards and ensuring that the inquiry of ''whether an individual's impairment is a disability under the ADA should not demand extensive analysis.'' *See* Public Law 110–325, sec. 2(b)(1), (5). The impairments identified in the predictable assessments provision are a non-exhaustive list of examples of the kinds of disabilities that meet these criteria and, with one exception, are consistent with the corresponding provision in the EEOC ADA Amendments Act rule. *See* 29 CFR 1630.2(j)(3)(iii).

The Department believes that the predictable assessments provisions comport with the ADA Amendments Act's emphasis on adopting a less burdensome and more expansive definition of ''disability.'' The provisions are rooted in the application of the statutory changes to the meaning and interpretation of the definition of ''disability'' contained in the ADA Amendments Act and flow from the rules of construction set forth in §§ 35.108(a)(2)(i), 36.105(a)(2)(i), 35.108(c)(2)(i) and (ii), 36.105(c)(2)(i) and (ii). These rules of construction and other specific provisions require the broad construction of the definition of ''disability'' in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. In addition, they lower the standard to be applied to ''substantially limits,'' making clear that an impairment need not prevent or significantly restrict an individual from performing a major life activity; clarify that major life activities include major bodily functions; elucidate that impairments that are

In the NPRM, the Department proposed adding ''traumatic brain injury'' to the predictable assessments list.

episodic or in remission are disabilities if they would be substantially limiting when active; and incorporate the requirement that the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) must be disregarded in assessing whether an individual has a disability.

Several organizations representing persons with disabilities and the elderly, constituting the majority of commenters on these provisions, supported the inclusion of the predictable assessments provisions. One commenter expressed strong support for the provision and recommended that it closely track the corresponding provision in the EEOC title I rule, while another noted its value in streamlining individual assessments. In contrast, some commenters from educational institutions and testing entities recommended the deletion of these provisions, expressing concern that it implies the existence of ''per se'' disabilities, contrary to congressional intent that each assertion of disability should be considered on a case-by-case basis. The Department does not believe that the predictable assessment provisions constitutes a ''per se'' list of disabilities and will retain it. These provisions highlight, through a non-exhaustive list, impairments that virtually always will be found to substantially limit one or more major life activities. Such impairments still warrant individualized assessments, but any such assessments should be especially simple and straightforward.

The legislative history of the ADA Amendments Act supports the Department's approach in this area. In crafting the Act, Congress hewed to the ADA definition of ''disability,'' which was modeled on the definition of ''disability'' in the Rehabilitation Act, and indicated that it wanted courts to interpret the definition as it had originally been construed. *See* H.R. Rep. No. 110–730, pt. 2, at 6 (2008). Describing this goal, the legislative history states that courts had interpreted the Rehabilitation Act definition ''broadly to include persons with a wide range of physical and mental impairments such as epilepsy, diabetes, multiple sclerosis, and intellectual and developmental disabilities . . . even where a mitigating measure—like medication or a hearing aid—might lessen their impact on the individual.'' *Id.; see also id.* at 9 (referring to individuals with disabilities that had been covered under section 504 of the Rehabilitation Act and that Congress intended to include under the ADA—''people with serious health conditions like epilepsy, diabetes, cancer, cerebral palsy, multiple sclerosis, intellectual and developmental disabilities''); *id.* at 6, n.6 (citing cases also finding that cerebral palsy, hearing impairments, intellectual disabilities, heart disease, and vision in only one eye were disabilities under the Rehabilitation Act); *id.* at 10 (citing testimony from Rep. Steny H. Hoyer, one of the original lead sponsors of the ADA in 1990, stating that ''[w]e could not have fathomed that people with diabetes, epilepsy, heart conditions, cancer, mental illnesses and other disabilities would have their ADA claims denied because they would be considered too functional to meet the definition of disability''); 2008 Senate Statement of Managers at 3 (explaining that ''we [we]re faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities [under the Rehabilitation Act] [we]re not considered disabilities'' and citing individuals with impairments such as amputation, intellectual disabilities, epilepsy, multiple sclerosis, diabetes, muscular dystrophy, and cancer as examples).

Some commenters asked the Department to add certain impairments to the predictable assessments list, while others asked the Department to remove certain impairments. Commenters representing educational and testing institutions urged that, if the Department did not delete the predictable assessment provisions, then the list should be modified to remove any impairments that are not obvious or visible to third parties and those for which functional limitations can change over time. One commenter cited to a pre-ADA Amendments Act reasonable accommodations case, which included language regarding the uncertainty facing employers in determining appropriate reasonable accommodations when mental impairments often are not obvious and apparent to employers. *See Wallin* v. *Minnesota Dep't of Corrections,* 153 F.3d 681, 689 (8th Cir. 1998). This commenter suggested that certain impairments, including autism, depression, post-traumatic stress disorder, and obsessive-compulsive disorder, should not be deemed predictable assessments because they are not immediately apparent to third parties. The Department disagrees with this commenter, and believes that it is appropriate to include these disabilities on the list of predictable assessments. Many disabilities are less obvious or may be invisible, such as cancer, diabetes, HIV infection, schizophrenia, intellectual disabilities, and traumatic brain injury, as well as those identified by the commenter. The likelihood that an impairment will substantially limit one or more major life activities is unrelated to whether or not the disability is immediately apparent to an outside observer. Therefore, the Department will retain the examples that involve less apparent disabilities on the list of predictable assessments.

The Department believes that the list accurately illustrates impairments that virtually always will result in a substantial limitation of one or more major life activities. The Department recognizes that impairments are not always static and can result in different degrees of functional limitation at different times, particularly when mitigating measures are used. However, the ADA as amended anticipates variation in the extent to which impairments affect major life activities, clarifying that impairments that are episodic or in remission nonetheless are disabilities if they would be substantially limiting when active and requiring the consideration of disabilities without regard to ameliorative mitigating measures. The Department does not believe that limiting the scope of its provisions addressing predictable assessments only to those disabilities that would never vary in functional limitation would be appropriate.

Other commenters speaking as individuals or representing persons with disabilities endorsed the inclusion of some impairments already on the list, including traumatic brain injury, sought the inclusion of additional impairments, requested revisions to some descriptions of impairments, or asked for changes to the examples of major life activities linked to specific impairments.

Several commenters requested the expansion of the predictable assessments list, in particular to add specific learning disabilities. Some commenters pointed to the ADA Amendments Act's legislative history, which included Representative Stark's remarks that specific learning disabilities are ''neurologically based impairments that substantially limit the way these individuals perform major life activities, like reading or learning, or the time it takes to perform such activities.'' 154 Cong. Rec. H8291 (daily ed. Sept. 17, 2008). Others recommended that some specific types of specific learning disabilities, including dyslexia, dyscalculia, dysgraphia, dyspraxia, and slowed processing speed should be referenced as predictable assessments. With respect to the major life activities affected by specific learning disabilities, commenters noted that specific learning disabilities are neurologically based and substantially limit learning, thinking, reading, communicating, and processing speed.

Similarly, commenters recommended the inclusion of ADHD, urging that it originates in the brain and affects executive function skills including organizing, planning, paying attention, regulating emotions, and self-monitoring. One commenter noted that if ADHD meets the criteria established in the DSM–5, then it would consistently meet the criteria to establish disability under the ADA. The same commenter noted that ADHD is brain based and affects the major life activity of executive function. Another commenter suggested that ADHD should be included and should be identified as limiting brain function, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Other commenters urged the inclusion of panic disorders, anxiety disorder, cognitive disorder, and post-concussive disorder. A number of commenters noted that the exclusion of impairments from the predictable assessments list could be seen as supporting an inference that the impairments that are not mentioned should not easily be found to be disabilities.

The Department determined that it will retain the language it proposed in the NPRM and will not add or remove any impairments from this list. As discussed above, the list is identical to the EEOC's predictable assessments list, at 29 CFR 1630.2(g)(3)(iii), except that the Department's NPRM added traumatic brain injury. The Department received support for including traumatic brain injury and did not receive any comments recommending the removal of traumatic brain injury from the list; thus, we are retaining it in this final rule.

The Department's decision to track the EEOC's list, with one minor exception, stems in part from our intent to satisfy the congressional mandate for ''clear, strong,

consistent, enforceable standards.'' A number of courts already have productively applied the EEOC's predictable assessments provision, and the Department believes that it will continue to serve as a useful, common-sense tool in promoting judicial efficiency. It is important to note, however, that the failure to include any impairment in the list of examples of predictable assessments does not indicate that that impairment should be subject to undue scrutiny.

Some commenters expressed concern about the major life activities that the Department attributed to particular impairments. Two commenters sought revision of the major life activities attributed to intellectual disabilities, suggesting that it would be more accurate to reference cognitive function and learning, instead of reading, learning, and problem solving. One commenter recommended attributing the major life activity of brain function to autism rather than learning, social interaction, and communicating. The Department determined that it will follow the EEOC's model and, with respect to both intellectual disabilities and autism, it will reference the major bodily function of brain function. By using the term ''brain function'' to describe the system affected by various mental impairments, the Department intends to capture functions such as the brain's ability to regulate thought processes and emotions.

The Department considers it important to reiterate that, just as the list of impairments in these sections is not comprehensive, the list of major bodily functions or other major life activities linked to those impairments are not exhaustive. The impairments identified in these sections, may affect a wide range of major bodily functions and other major life activities. The Department's specification of certain major life activities with respect to particular impairments simply provides one avenue by which a person might elect to demonstrate that he or she has a disability.

The Department recognizes that impairments listed in §§ 35.108(d)(2) and 36.105(d)(2) may substantially limit other major life activities in addition to those listed in the regulation. For example, diabetes may substantially limit major life activities including eating, sleeping, and thinking. Major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others. Multiple sclerosis may substantially limit major life activities such as walking, bending, and lifting.

One commenter noted that the NPRM did not track the EEOC's language with respect to the manner in which it identified a major bodily function that is substantially limited by epilepsy, muscular dystrophy, or multiple sclerosis in 29 CFR 1630.2(j)(3)(iii). While the EEOC listed each of these three impairments individually, noting in each case that the major bodily function affected is neurological function, at 29 CFR 1630.2(j)(3)(iii), the NPRM grouped the three impairments and noted that they affect neurological function. In order to clarify that each of the three impairments may manifest a substantial limitation of neurological function, the final rule incorporates ''each'' immediately following the list of the three impairments. Similarly, the Department added an ''each'' to §§ 35.108(d)(2)(iii)(K) and 36.105(d)(2)(iii)(K) to make clear that each of the listed impairments substantially limits brain function.

Some commenters representing testing entities and educational institutions sought the insertion of language in the predictable assessment provisions that would indicate that individuals found to have disabilities are not, by virtue of a determination that they have a covered disability, eligible for a testing accommodation or a reasonable modification. The Department agrees with these commenters that the determination of disability is a distinct determination separate from the determination of the need for a requested modification or a testing accommodation. The Department declines to add the language suggested by the commenters to §§ 35.108(d)(2) and 36.105(d)(2), however, because the requirements for reasonable modifications are addressed separately in §§ 35.130(b)(7) and 36.302 of the title II and III regulations and the requirements related to providing appropriate accommodations in testing and licensing are found at § 36.309.

Sections 35.108(d)(3) and 36.105(d)(3)—Condition, Manner, or Duration

Overview. Proposed §§ 35.108(d)(3) and 36.105(d)(3), both titled ''Condition, manner[,] and duration,'' addressed how evidence related to condition, manner, or duration may be used to show how impairments substantially limit major life activities. These principles were first addressed in the preamble to the 1991 rule. At that time, the Department noted that ''[a] person is considered an individual with a disability . . . when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.'' 56 FR 35544, 35549 (July 26, 1991); *see also* S. Rep. No. 101–116, at 23 (1989).

These concepts were affirmed by Congress in the legislative history to the ADA Amendments Act: ''We particularly believe that this test, which articulated an analysis that considered whether a person's activities are limited in condition, duration and manner, is a useful one. We reiterate that using the correct standard—one that is lower than the strict or demanding standard created by the Supreme Court in *Toyota*—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations or modifications. At the same time, plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting.'' 154 Cong. Rec. S8346 (Sept. 11, 2008). Noting its continued reliance on the functional approach to defining disability, Congress expressed its belief that requiring consistency with the findings and purposes of the ADA Amendments Act would ''establish[ ] an appropriate functionality test for determining whether an individual has a disability.'' *Id.* While condition, manner, and duration are not required factors that must be considered, the regulations clarify that these are the types of factors that may be considered in appropriate cases. To the extent that such factors may be useful or relevant to show a substantial limitation in a particular fact pattern, some or all of them (and related facts) may be considered, but evidence relating to each of these factors often will not be necessary to establish coverage.

In the NPRM, proposed §§ 35.108(d)(3)(i) and 35.105(d)(3)(i) noted that the rules of construction at §§ 35.108(d)(1) and 35.105(d)(1) should inform consideration of how individuals are substantially limited in major life activities. Sections 35.108(d)(3)(ii) and 36.105(d)(3)(ii) provided examples of how restrictions on condition, manner, or duration might be interpreted and also clarified that the negative or burdensome side effects of medication or other mitigating measures may be considered when determining whether an individual has a disability. In §§ 35.108(d)(3)(iii) and 36.105(d)(3)(iii), the proposed language set forth a requirement to focus on how a major life activity is substantially limited, rather than on the ultimate outcome a person with an impairment can achieve.

The Department received comments on the condition, manner, or duration provision from advocacy groups for individuals with disabilities, from academia, from education and testing entities, and from interested individuals. Several advocacy organizations for individuals with disabilities and private individuals noted that the section title's heading was inconsistent with the regulatory text and sought the replacement of the ''and'' in the section's title, ''Condition, manner, and duration,'' with an ''or.'' Commenters expressed concern that retaining the ''and'' in the heading title would be inconsistent with congressional intent and would incorrectly suggest that individuals are subject to a three-part test and must demonstrate that an impairment substantially limits a major life activity with respect to condition, manner, and duration. The Department agrees that the ''and'' used in the title of the proposed regulatory provision could lead to confusion and a misapplication of the law and has revised the title so it now reads ''Condition, manner, *or* duration.'' Consistent with the regulatory text, the revised heading makes clear that any one of the three descriptors—''condition,'' ''manner,'' or ''duration''—may aid in demonstrating that an impairment substantially limits a major life activity or a major bodily function.

Condition, Manner, or Duration

In the NPRM, proposed §§ 35.108(d)(3)(i) and 36.105(d)(3)(i) noted that the application of the terms ''condition'' ''manner,'' or ''duration'' should at all times take into account the principles in § 35.108(d)(1) and § 36.105(d)(1), respectively, which referred to the rules of construction for ''substantially limited.'' The proposed regulatory text also included brief explanations of the meaning of the core terms, clarifying that in appropriate cases, it could be useful to consider, in comparison to most people in the general population, the conditions under which an individual performs a major life activity; the manner in which an individual performs a major life activity; or the time it takes an

individual to perform a major life activity, or for which the individual can perform a major life activity.

Several disability rights advocacy groups and individuals supported the NPRM approach, with some referencing the value of pointing to the rules of construction and their relevance to condition, manner, or duration considerations. Some commenters noted that it was helpful to highlight congressional intent that the definition of ''disability'' should be broadly construed and not subject to extensive analysis. Another commenter recommended introducing a clarification that, while the limitation imposed by an impairment must be important, it does not need to rise to the level of severely or significantly restricting the ability to perform a major life activity. Some commenters sought additional guidance regarding the meaning of the terms ''condition,'' ''manner,'' and ''duration'' and recommended the addition of more illustrative examples.

In response to commenters' concerns, the Department has modified the regulatory text in §§ 35.108(d)(3)(i) and 36.105(d)(3)(i) to reference all of the rules of construction rather than only those pertaining to ''substantially limited.'' The Department also added §§ 35.108(d)(3)(iv) and 36.105(d)(3)(iv), further discussed below, to clarify that the rules of construction will not always require analysis of condition, manner, or duration, particularly with respect to certain impairments, such as those referenced in paragraph (d)(2)(iii) (predictable assessments). With these changes, the Department believes that the final rule more accurately reflects congressional intent. The Department also believes that clarifying the application of the rules of construction to condition, manner, or duration will contribute to consistent interpretation of the definition of ''disability'' and reduce inadvertent reliance on older cases that incorporate demanding standards rejected by Congress in the ADA Amendments Act.

It is the Department's view that the rules of construction offer substantial guidance about how condition, manner, or duration must be interpreted so as to ensure the expansive coverage intended by Congress. Except for this clarification, the Department did not receive comments opposing the proposed regulatory text on condition, manner, or duration in §§ 35.108(d)(3)(i) and 36.105(d)(3)(i) and did not make any other changes to these provisions.

Some commenters objected to language in the preamble to the NPRM which suggested that there might be circumstances in which the consideration of condition, manner, or duration might not include comparisons to most people in the general population. On reconsideration, the Department recognizes that this discussion could create confusion about the requirements. The Department believes that condition, manner, or duration determinations should be drawn in contrast to most people in the general population, as is indicated in the related rules of construction, at §§ 35.108(d)(1)(v) and 36.105(d)(1)(v).

Condition, Manner, or Duration Examples, Including Negative Effects of Mitigating Measures

Proposed §§ 35.108(d)(3)(ii) and 36.105(d)(3)(ii) set forth examples of the types of evidence that might demonstrate condition, manner, or duration limitations, including the way an impairment affects the operation of a major bodily function, the difficulty or effort required to perform a major life activity, the pain experienced when performing a major life activity, and the length of time it takes to perform a major life activity. These provisions also clarified that the non-ameliorative effects of mitigating measures may be taken into account to demonstrate the impact of an impairment on a major life activity. The Department's discussion in the NPRM preamble noted that such non-ameliorative effects could include negative side effects of medicine, burdens associated with following a particular treatment regimen, and complications that arise from surgery, among others. The preamble also provided further clarification of the possible applications of condition, manner, or duration analyses, along with several examples. Several commenters supported the proposed rule's incorporation of language and examples offering insight into the varied ways that limitations on condition, manner, or duration could demonstrate substantial limitation. One commenter positively noted that the language regarding the ''difficulty, effort, or time required to perform a major life activity'' could prove extremely helpful to individuals asserting a need for testing accommodations, as evidence previously presented regarding these factors was deemed insufficient to demonstrate the existence of a disability. Some commenters requested the insertion of additional examples and explanation in the preamble about how condition, manner or duration principles could be applied under the new rules of construction. Another commenter sought guidance on the specific reference points that should be used when drawing comparisons with most people in the general population. The commenter offered the example of delays in developmental milestones as a possible referent in evaluating children with speech-language disorders, but noted a lack of guidance regarding comparable referents for adults. The commenter also noted that guidance is needed regarding what average or acceptable duration might be with respect to certain activities. An academic commenter expressed support for the Department's reference to individuals with learning impairments using certain self-mitigating measures, such as extra time to study or taking an examination in a different format, and the relevance of these measures to condition, manner, and duration.

The Department did not receive comments opposing the NPRM language on condition, manner, or duration in §§ 35.108(d)(3)(ii) and 36.105(d)(3)(ii) and is not making any changes to this language. The Department agrees that further explanation and examples as provided below regarding the concepts of condition, manner, or duration will help clarify how the ADA Amendments Act has expanded the definition of ''disability.'' An impairment may substantially limit the ''condition'' or ''manner'' in which a major life activity can be performed in a number of different ways. For example, the condition or manner in which a major life activity can be performed may refer to how an individual performs a major life activity; *e.g.*, the condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that most people in the general population would perform the same tasks. Condition or manner also may describe how performance of a major life activity affects an individual with an impairment. For example, an individual whose impairment causes pain or fatigue that most people would not experience when performing that major life activity may be substantially limited. Thus, the condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limited if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects. An individual with specific learning disabilities may need to approach reading or writing in a distinct manner or under different conditions than most people in the general population, possibly employing aids including verbalizing, visualizing, decoding or phonology, such that the effort required could support a determination that the individual is substantially limited in the major life activity of reading or writing.

Condition or manner may refer to the extent to which a major life activity, including a major bodily function, can be performed. In some cases, the condition or manner under which a major bodily function can be performed may be substantially limited when the impairment ''causes the operation [of the bodily function] to over-produce or under-produce in some harmful fashion.'' *See* H.R. Rep. No. 110–730, pt. 2, at 17 (2008). For example, the endocrine system of a person with type I diabetes does not produce sufficient insulin. For that reason, compared to most people in the general population, the impairment of diabetes substantially limits the major bodily functions of endocrine function and digestion. Traumatic brain injury substantially limits the condition or manner in which an individual's brain functions by impeding memory and causing headaches, confusion, or fatigue—each of which could constitute a substantial limitation on the major bodily function of brain function.

''Duration'' refers to the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population. For example, a person whose back or leg impairment precludes him or her from standing for more than two hours without significant pain would be substantially limited in standing, because most people can stand for more than two hours without significant pain. However, ''[a] person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she

begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.'' *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers) (quoting S. Rep. No. 101–116, at 23 (1989)). Some impairments, such as ADHD, may have two different types of impact on duration considerations. ADHD frequently affects both an ability to sustain focus for an extended period of time and the speed with which someone can process information. Each of these duration-related concerns could demonstrate that someone with ADHD, as compared to most people in the general population, takes longer to complete major life activities such as reading, writing, concentrating, or learning.

The Department reiterates that, because the limitations created by certain impairments are readily apparent, it would not be necessary in such cases to assess the negative side effects of a mitigating measure in determining that a particular impairment substantially limits a major life activity. For example, there likely would be no need to consider the burden that dialysis treatment imposes for someone with end-stage renal disease because the impairment would allow a simple and straightforward determination that the individual is substantially limited in kidney function.

One commenter representing people with disabilities asked the Department to recognize that, particularly with respect to learning disabilities, on some occasions the facts related to condition, manner, or duration necessary to reach a diagnosis of a learning disability also are sufficient to establish that the affected individual has a disability under the ADA. The Department agrees that the facts gathered to establish a diagnosis of an impairment may simultaneously satisfy the requirements for demonstrating limitations on condition, manner, or duration sufficient to show that the impairment constitutes a disability.

Emphasis on Limitations Instead of Outcomes

In passing the ADA Amendments Act, Congress clarified that courts had misinterpreted the ADA definition of ''disability'' by, among other things, inappropriately emphasizing the capabilities of people with disabilities to achieve certain outcomes. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more of the major life activities of reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, speak, write, or learn compared to most people in the general population. As the House Education and Labor Committee Report emphasized:

[S]ome courts have found that students who have reached a high level of academic achievement are not to be considered individuals with disabilities under the ADA, as such individuals may have difficulty demonstrating substantial limitation in the major life activities of learning or reading relative to ''most people.'' When considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. As such, the Committee rejects the findings in *Price* v. *National Board of Medical Examiners*, *Gonzales* v. *National Board of Medical Examiners*, and *Wong* v. *Regents of University of California.*

The Committee believes that the comparison of individuals with specific learning disabilities to ''most people'' is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual's impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (*e.g.*, dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life. The Committee expects that individuals with specific learning disabilities that substantially limit a major life activity will be better protected under the amended Act.

H.R. Rep. No. 110–730 pt. 1, at 10–11 (2008).

Sections 35.108(d)(3)(iii) and 36.105(d)(3)(iii) of the proposed rule reflected congressional intent and made clear that the outcome an individual with a disability is able to achieve is not determinative of whether an individual is substantially limited in a major life activity. Instead, an individual can demonstrate the extent to which an impairment affects the condition, manner, or duration in which the individual performs a major life activity, such that it constitutes a substantial limitation. The ultimate outcome of an individual's efforts should not undermine a claim of disability, even if the individual ultimately is able to achieve the same or similar result as someone without the impairment.

The Department received several comments on these provisions, with disability organizations and individuals supporting the inclusion of these provisions and some testing entities and an organization representing educational institutions opposing them. The opponents argued that academic performance and testing outcomes are objective evidence that contradict findings of disability and that covered entities must be able to focus on those outcomes in order to demonstrate whether an impairment has contributed to a substantial limitation. These commenters argued that the evidence frequently offered by those making claims of disability that demonstrate the time or effort required to achieve a result, such as evidence of self-mitigating measures, informal accommodations, or recently provided reasonable modifications, is inherently subjective and unreliable. The testing entities suggested that the Department had indicated support for their interest in focusing on outcomes over process-related obstacles in the NPRM preamble language where the Department had noted that covered entities ''may defeat a showing of substantial limitation by refuting whatever evidence the individual seeking coverage has offered, or by offering evidence that shows that an impairment does not impose a substantial limitation on a major life activity.'' NPRM, 79 FR 4839, 4847–48 (Jan. 30, 2014). The commenters representing educational institutions and testing entities urged the removal of §§ 35.108(d)(3)(iii) and 36.105(d)(3)(iii) or, in the alternative, the insertion of language indicating that outcomes, such as grades and test scores indicating academic success, are relevant evidence that should be considered when making disability determinations.

In contrast, commenters representing persons with disabilities and individual commenters expressed strong support for these provisions, noting that what an individual can accomplish despite an impairment does not accurately reflect the obstacles an individual had to overcome because of the impairment. One organization representing persons with disabilities noted that while individuals with disabilities have achieved successes at work, in academia, and in other settings, their successes should not create obstacles to addressing what they can do ''in spite of an impairment.'' Commenters also expressed concerns that testing entities and educational institutions had failed to comply with the rules of construction or to revise prior policies and practices to comport with the new standards under the ADA as amended. Some commenters asserted that testing entities improperly rejected accommodation requests because the testing entities focused on test scores and outcomes rather than on how individuals learn; required severe levels of impairment; failed to disregard the helpful effect of self-mitigating measures; referenced participation in extracurricular activities as evidence that individuals did not have disabilities; and argued that individuals diagnosed with specific learning disabilities or ADHD in adulthood cannot demonstrate that they have a disability because their diagnosis occurred too late.

Commenters representing persons with disabilities pointed to the discussion in the legislative history about restoring a focus on process rather than outcomes with respect to learning disabilities. They suggested that such a shift in focus also would be helpful in evaluating ADHD. One commenter asked the Department to include a reference to ADHD and to explain that persons with ADHD may achieve a high level of academic success but may nevertheless be substantially limited in one or more major life activities, such as reading, writing, speaking, concentrating, or learning. A private citizen requested the addition of examples demonstrating the application of these provisions because, in the commenter's view, there have been many problems with decisions regarding individuals with learning disabilities and an inappropriate focus on outcomes and test scores.

The Department declines the request to add a specific reference to ADHD in these provisions. The Department believes that the principles discussed above apply equally to persons with ADHD as well as individuals with other impairments. The provision already references an illustrative, but not exclusive, example of an individual with a learning disability. The Department believes that this example effectively illustrates the concern that has affected individuals with other impairments due to an inappropriate emphasis on outcomes rather than how a major life activity is limited.

Organizations representing testing and educational entities asked the Department to add regulatory language indicating that testing-related outcomes, such as grades and test scores, are relevant to disability determinations under the ADA. The Department has considered this proposal and declines to adopt it because it is inconsistent with congressional intent. As discussed earlier in this section, Congress specifically stated that the outcome an individual with a disability is able to achieve is not determinative of whether that individual has a physical or mental impairment that substantially limits a major life activity. The analysis of whether an individual with an impairment has a disability is a fact-driven analysis shaped by how an impairment has substantially limited one or more major life activities or major bodily functions, considering those specifically asserted by the individual as well as any others that may apply. For example, if an individual with ADHD seeking a reasonable modification or a testing accommodation asserts substantial limitations in the major life activities of concentrating and reading, then the analysis of whether or not that individual has a covered disability will necessarily focus on concentrating and reading. Relevant considerations could include restrictions on the conditions, manner, or duration in which the individual concentrates or reads, such as a need for a non-stimulating environment or extensive time required to read. Even if an individual has asserted that an impairment creates substantial limitations on activities such as reading, writing, or concentrating, the individual's academic record or prior standardized testing results might not be relevant to the inquiry. Instead, the individual could show substantial limitations by providing evidence of condition, manner, or duration limitations, such as the need for a reader or additional time. The Department does not believe that the testing results or grades of an individual seeking reasonable modifications or testing accommodations always would be relevant to determinations of disability. While testing and educational entities may, of course, put forward any evidence that they deem pertinent to their response to an assertion of substantial limitation, testing results and grades may be of only limited relevance.

In addition, the Department does not agree with the assertions made by testing and educational entities that evidence of testing and grades is objective and, therefore, should be weighted more heavily, while evidence of self-mitigating measures, informal accommodations, or recently provided accommodations or modifications is inherently subjective and should be afforded less consideration. Congress's discussion of the relevance of testing outcomes and grades clearly indicates that it did not consider them definitive evidence of the existence or non-existence of a disability. While tests and grades typically are numerical measures of performance, the capacity to quantify them does not make them inherently more valuable with respect to proving or disproving disability. To the contrary, Congress's incorporation of rules of construction emphasizing broad coverage of disabilities to the maximum extent permitted, its direction that such determinations should neither contemplate ameliorative mitigating measures nor demand extensive analysis, and its recognition of learned and adaptive modifications all support its openness for individuals with impairments to put forward a wide range of evidence to demonstrate their disabilities.

The Department believes that Congress made its intention clear that the ADA's protections should encompass people for whom the nature of their impairment requires an assessment that focuses on how they engage in major life activities, rather than the ultimate outcome of those activities. Beyond directly addressing this concern in the debate over the ADA Amendments Act, Congress's incorporation of the far-reaching rules of construction, its explicit rejection of the consideration of ameliorative mitigating measures—including ''learned behavioral or adaptive neurological modifications,'' 42 U.S.C. 12102(4)(E)(i)(IV), such as those often employed by individuals with learning disabilities or ADHD—and its stated intention to ''reinstat[e] a broad scope of protection to be available under the ADA,'' Public Law 110–325, sec. 2(b)(1), all support the language initially proposed in these provisions. For these reasons, the Department determined that it will retain the language of these provisions as they were originally drafted.

Analysis of Condition, Manner, or Duration Not Always Required

As noted in the discussion above, the Department has added §§ 35.108(d)(3)(iv) and 36.105(d)(3)(iv) in the final rule to clarify that analysis of condition, manner, or duration will not always be necessary, particularly with respect to certain impairments that can easily be found to substantially limit a major life activity. This language is also found in the EEOC ADA title I regulation. *See* 29 CFR 1630(j)(4)(iv). As noted earlier, the inclusion of these provisions addresses several comments from organizations representing persons with disabilities. This language also responds to several commenters' concerns that the Department should clarify that, in some cases and particularly with respect to predictable assessments, no or only a very limited analysis of condition, manner, or duration is necessary.

At the same time, individuals seeking coverage under the first or second prong of the definition of ''disability'' should not be constrained from offering evidence needed to establish that their impairment is substantially limiting. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). Such evidence may comprise facts related to condition, manner, or duration. And, covered entities may defeat a showing of substantial limitation by refuting whatever evidence the individual seeking coverage has offered, or by offering evidence that shows that an impairment does not impose a substantial limitation on a major life activity. However, a showing of substantial limitation is not defeated by facts unrelated to condition, manner, or duration that are not pertinent to the substantial limitation of a major life activity that the individual has proffered.

Sections 35.108(d)(4) and 36.105(d)(4)—Examples of Mitigating Measures

The rules of construction set forth at §§ 35.108(d)(1)(viii) and 36.105(d)(1)(viii) of the final rule make clear that the ameliorative effects of mitigating measures shall not be considered when determining whether an impairment substantially limits a major life activity. In the NPRM, proposed §§ 35.108(d)(4) and 36.105(d)(4) provided a non-inclusive list of mitigating measures, which includes medication, medical supplies, equipment, appliances, low-vision devices, prosthetics, hearing aids, cochlear implants and implantable hearing devices, mobility devices, oxygen therapy equipment, and assistive technology. In addition, the proposed regulation clarified that mitigating measures can include ''learned behavioral or adaptive neurological modifications,'' psychotherapy, behavioral therapy, or physical therapy, and ''reasonable modifications'' or auxiliary aids and services.

The phrase ''learned behavioral or adaptive neurological modifications,'' is intended to include strategies developed by an individual to lessen the impact of an impairment. The phrase ''reasonable modifications'' is intended to include informal or undocumented accommodations and modifications as well as those provided through a formal process.

The ADA as amended specifies one exception to the rule on mitigating measures, stating that the ameliorative effects of ordinary eyeglasses and contact lenses shall be considered in determining whether a person has an impairment that substantially limits a major life activity and thereby is a person with a disability. 42 U.S.C. 12102(4)(E)(ii). As discussed above, §§ 35.108(d)(4)(i) and 36.105(d)(4)(i) incorporate this exception by excluding ordinary eyeglasses and contact lenses from the definition of ''low-vision devices,'' which are mitigating measures that may not be considered in determining whether an impairment is a substantial limitation.

The Department received a number of comments supporting the Department's language in these sections and its broad range of examples of what constitutes a mitigating measure. Commenters representing students with disabilities specifically supported the inclusion of ''learned behavioral or adaptive neurological modifications,'' noting that the section ''appropriately supports and highlights that students [and individuals in other settings] may have developed self-

imposed ways to support their disability in order to perform major life activities required of daily life and that such measures cannot be used to find that the person is not substantially limited.''

The Department notes that self-mitigating measures or undocumented modifications or accommodations for students who have impairments that substantially limit learning, reading, writing, speaking, or concentrating may include such measures as arranging to have multiple reminders for task completion; seeking help from others to provide reminders or to assist with the organization of tasks; selecting courses strategically (such as selecting courses that require papers instead of exams); devoting a far larger portion of the day, weekends, and holidays to study than students without disabilities; teaching oneself strategies to facilitate reading connected text or mnemonics to remember facts (including strategies such as highlighting and margin noting); being permitted extra time to complete tests; receiving modified homework assignments; or taking exams in a different format or in a less stressful or anxiety-provoking setting. Each of these mitigating measures, whether formal or informal, documented or undocumented, can improve the academic function of a student having to deal with a substantial limitation in a major life activity such as concentrating, reading, speaking, learning, or writing. However, when the determination of disability is made without considering the ameliorative effects of these measures, as required under the ADA as amended, these individuals still have a substantial limitation in major life activities and are covered by the ADA. *See also* discussion of §§ 35.108(d)(1) and 36.105(d)(1), above.

Some commenters argued that the Department's examples of mitigating measures inappropriately include normal learning strategies and asked that the Department withdraw or narrow its discussion of self-mitigating measures. The Department disagrees. Narrowing the discussion of self-mitigating measures to exclude normal or common strategies would not be consistent with the ADA Amendments Act. The Department construes learned behavioral or adaptive neurological modifications broadly to include strategies applied or utilized by an individual with a disability to lessen the effect of an impairment; whether the strategy applied is normal or common to students without disabilities is not relevant to whether an individual with a disability's application of the strategy lessens the effect of an impairment.

An additional commenter asked the Department to add language to the regulation and preamble addressing mitigating measures an individual with ADHD may employ. This commenter noted that ''[a]n individual with ADHD may employ a wide variety of self-mitigating measures, such as exertion of extensive extra effort, use of multiple reminders, whether low tech or high tech, seeking a quiet or distraction free place or environment to do required activities.'' The Department agrees with this commenter that these are examples of the type of self-mitigating measures used by individuals with ADHD, but believes that they fall within the range of mitigating measures already addressed by the regulatory language.

Another commenter asked the Department to add language to the regulation or preamble addressing surgical interventions in a similar fashion to the approach taken in the EEOC's title I preamble, 76 FR 16978, 16983 (Mar. 25, 2011). There, the EEOC noted that a surgical intervention may be an ameliorative mitigating measure that could result in the permanent elimination of an impairment, but it also indicated that confusion about how this example might apply recommended against its inclusion in the regulatory text. Therefore, the EEOC eliminated that example from the draft regulatory text and recommended that, ''[d]eterminations about whether surgical interventions should be taken into consideration when assessing whether an individual has a disability are better assessed on a case-by-case basis.'' The Department agrees with the EEOC and underscores that surgical interventions may constitute mitigating measures that should not be considered in determining whether an individual meets the definition of ''disability.'' The Department declines to make any changes to its proposed regulatory text for these sections of the final rule.

The ADA Amendments Act provides an ''illustrative but non-comprehensive list of the types of mitigating measures that are not to be considered.'' 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers) at 9; *see also* H.R. Rep. No. 110–730, pt. 2, at 20 (2008). The absence of any particular mitigating measure should not convey a negative implication as to whether the measure is a mitigating measure under the ADA. *Id.* This principle applies equally to the non-exhaustive list in §§ 35.108(d)(4) and 36.105(d)(4).

Sections 35.108(e) and 36.105(e) – Has a Record of Such an Impairment

The second prong of the definition of ''disability'' under the ADA provides that an individual with a record of an impairment that substantially limits or limited a major life activity is an individual with a disability. 42 U.S.C. 12102(1)(B).

Paragraph (3) of the definition of ''disability'' in the existing title II and title III regulations states that the phrase ''has a record of such an impairment'' means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. 28 CFR 35.104, 36.104. The NPRM proposed keeping the language in the title II and title III regulations (with minor editorial changes) but to renumber it as §§ 35.108(e)(1) and 36.105(e)(1). In addition, the NPRM proposed adding a new second paragraph stating that any individual's assertion of a record of impairment that substantially limits a major life activity should be broadly construed to the maximum extent permitted by the ADA and should not require extensive analysis. If an individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population or was misclassified as having had such an impairment, then that individual will satisfy the third prong of the definition of ''disability.'' The NPRM also proposed adding paragraph (3), which provides that ''[a]n individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.''

The Department received no comments objecting to its proposed language for these provisions and has retained it in the final rule. The Department received one comment requesting additional guidance on the meaning of these provisions. The Department notes that Congress intended this prong of the definition of ''disability'' to ensure that people are not discriminated against based on prior medical history. This prong is also intended to ensure that individuals are not discriminated against because they have been misclassified as an individual with a disability. For example, individuals misclassified as having learning disabilities or intellectual disabilities are protected from discrimination on the basis of that erroneous classification. *See* H.R. Rep. No. 110–730, pt. 2, at 7–8 & n.14 (2008).

This prong of the definition is satisfied where evidence establishes that an individual has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. The terms ''substantially limits'' and ''major life activity'' under the second prong of the definition of ''disability'' are to be construed in accordance with the same principles applicable under the ''actual disability'' prong, as set forth in §§ 35.108(b) and 36.105(b).

There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records. The Department notes that past history of an impairment need not be reflected in a specific document. Any evidence that an individual has a past history of an impairment that substantially limited a major life activity is all that is necessary to establish coverage under the second prong. An individual may have a ''record of'' a substantially limiting impairment—and thus establish coverage under the ''record of'' prong of the statute—even if a covered entity does not specifically know about the relevant record. For the covered entity to be liable for discrimination under the ADA, however, the individual with a ''record of'' a substantially limiting impairment must prove that the covered entity discriminated on the basis of the record of the disability.

Individuals who are covered under the ''record of'' prong may be covered under the first prong of the definition of ''disability'' as well. This is because the rules of construction in the ADA Amendments Act and the Department's regulations provide that an individual with an impairment that is episodic or in remission can be protected under the first prong if the impairment would be substantially limiting when active. *See* §§ 35.108(d)(1)(iv); 36.105(d)(1)(iv). Thus, an individual who has cancer that is currently in remission is an individual with

a disability under the ''actual disability'' prong because he has an impairment that would substantially limit normal cell growth when active. He is also covered by the ''record of'' prong based on his history of having had an impairment that substantially limited normal cell growth.

Finally, these provisions of the regulations clarify that an individual with a record of a disability is entitled to a reasonable modification currently needed relating to the past substantially limiting impairment. In the legislative history, Congress stated that reasonable modifications were available to persons covered under the second prong of the definition. *See* H.R. Rep. No. 110–730, pt. 2, at 22 (2008) (''This makes clear that the duty to accommodate . . . arises only when an individual establishes coverage under the first or second prong of the definition.''). For example, a high school student with an impairment that previously substantially limited, but no longer substantially limits, a major life activity may need permission to miss a class or have a schedule change as a reasonable modification that would permit him or her to attend follow-up or monitoring appointments from a health care provider.

Sections 35.108(f) and 36.105(f)—Is Regarded as Having Such an Impairment

The ''regarded as having such an impairment'' prong of the definition of ''disability'' was included in the ADA specifically to protect individuals who might not meet the first two prongs of the definition, but who were subject to adverse decisions by covered entities based upon unfounded concerns, mistaken beliefs, fears, myths, or prejudices about persons with disabilities. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). The rationale for the ''regarded as'' part of the definition of ''disability'' was articulated by the Supreme Court in the context of section 504 of the Rehabilitation Act of 1973 in *School Board of Nassau County* v. *Arline,* 480 U.S. 273 (1987). In *Arline,* the Court noted that, although an individual may have an impairment that does not diminish his or her physical or mental capabilities, it could ''nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.'' *Id.* at 283. Thus, individuals seeking the protection of the ADA under the ''regarded as'' prong only had to show that a covered entity took some action prohibited by the statute because of an actual or perceived impairment. At the time of the *Arline* decision, there was no requirement that the individual demonstrate that he or she, in fact, had or was perceived to have an impairment that substantially limited a major life activity. *See* 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). For example, if a daycare center refused to admit a child with burn scars because of the presence of the scars, then the daycare center regarded the child as an individual with a disability, regardless of whether the child's scars substantially limited a major life activity.

In *Sutton* v. *United Air Lines, Inc.,* 527 U.S. 471 (1999), the Supreme Court significantly narrowed the application of this prong, holding that individuals who asserted coverage under the ''regarded as having such an impairment'' prong had to establish either that the covered entity mistakenly believed that the individual had a physical or mental impairment that substantially limited a major life activity, or that the covered entity mistakenly believed that ''an actual, nonlimiting impairment substantially limit[ed]'' a major life activity, when in fact the impairment was not so limiting. *Id.* at 489. Congress expressly rejected this standard in the ADA Amendments Act by amending the ADA to clarify that it is sufficient for an individual to establish that the covered entity regarded him or her as having an impairment, regardless of whether the individual actually has the impairment or whether the impairment constitutes a disability under the Act. 42 U.S.C. 12102(3)(A). This amendment restores Congress's intent to allow individuals to establish coverage under the ''regarded as'' prong by showing that they were treated adversely because of an actual or perceived impairment without having to establish the covered entity's beliefs concerning the severity of the impairment. *See* H.R. Rep. No. 110–730, pt. 2, at 18 (2008).

Thus, under the ADA as amended, it is not necessary, as it was prior to the ADA Amendments Act and following the Supreme Court's decision in *Sutton,* for an individual to demonstrate that a covered entity perceived him as substantially limited in the ability to perform a major life activity in order for the individual to establish that he or she is covered under the ''regarded as'' prong. Nor is it necessary to demonstrate that the impairment relied on by a covered entity is (in the case of an actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be ''regarded as having such an impairment.'' In short, to be covered under the ''regarded as'' prong, an individual is not subject to any functional test. *See* 154 Cong. Rec. S8843 (daily ed. Sept. 16, 2008) (Statement of the Managers) (''The functional limitation imposed by an impairment is irrelevant to the third 'regarded as' prong.''); H.R. Rep. No. 110–730, pt. 2, at 17 (2008) (''[T]he individual is not required to show that the perceived impairment limits performance of a major life activity.'') The concepts of ''major life activities'' and ''substantial limitation'' simply are not relevant in evaluating whether an individual is ''regarded as having such an impairment.''

In the NPRM, the Department proposed §§ 35.108(f)(1) and 36.105(f)(1), which are intended to restore the meaning of the ''regarded as'' prong of the definition of ''disability'' by adding language that incorporates the amended statutory provision: ''An individual is 'regarded as having such an impairment' if the individual is subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, except for an impairment that is both transitory and minor.''

The proposed provisions also incorporate the statutory definition of transitory impairment, stating that a ''transitory impairment is an impairment with an actual or expected duration of six months or less.'' The ''transitory and minor'' exception was not in the third prong in the original statutory definition of ''disability.'' Congress added this exception to address concerns raised by the business community that ''absent this exception, the third prong of the definition would have covered individuals who are regarded as having common ailments like the cold or flu.'' *See* H.R. Rep. No. 110–730, pt. 2, at 18 (2008). However, as an exception to the general rule for broad coverage under the ''regarded as'' prong, this limitation on coverage should be construed narrowly. *Id.* The ADA Amendments Act did not define ''minor.''

In addition, proposed §§ 35.108(f)(2) and 36.105(f)(2) stated that any time a public entity or covered entity takes a prohibited action because of an individual's actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action, that individual is ''regarded as'' having such an impairment. Commenters on these provisions recommended that the Department revise its language to clarify that the determination of whether an impairment is in fact ''transitory and minor'' is an objective determination and that a covered entity may not defeat ''regarded as'' coverage of an individual simply by demonstrating that it subjectively believed that the impairment is transitory and minor. In addition, a number of commenters cited the EEOC title I rule at 29 CFR 1630.15(f) and asked the Department to clarify that ''the issue of whether an actual or perceived impairment is 'transitory and minor' is an affirmative defense and not part of the plaintiff's burden of proof.'' The Department agrees with these commenters and has revised paragraphs (1) and (2) of these sections for clarity, as shown in §§ 35.108(f)(2) and 36.105(f)(2) of the final rule.

The revised language makes clear that the relevant inquiry under these sections is whether the actual or perceived impairment that is the basis of the covered entity's action is objectively ''transitory and minor,'' not whether the covered entity claims it subjectively believed the impairment was transitory and minor. For example, a private school that expelled a student whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the student's impairment was transitory and minor, because bipolar disorder is not objectively transitory and minor. Similarly, a public swimming pool that refused to admit an individual with a skin rash, mistakenly believing the rash to be symptomatic of HIV, will have ''regarded'' the individual as having a disability. It is not a defense to coverage that the skin rash was objectively transitory and minor because the covered entity took the prohibited action based on a perceived impairment, HIV, that is not transitory and minor.

The revised regulatory text also makes clear that the ''transitory and minor'' exception to a ''regarded as'' claim is a defense to a claim of discrimination and not part of an individual's prima facie case. The

Department reiterates that to fall within this exception, the actual or perceived impairment must be *both* transitory (less than six months in duration) *and* minor. For example, an individual with a minor back injury could be ''regarded as'' an individual with a disability if the back impairment lasted or was anticipated to last more than six months. The Department notes that the revised regulatory text is consistent with the EEOC rule which added the transitory and minor exception to its general affirmative defense provision in its title I ADA regulation at 29 CFR 1630.15(f). Finally, in the NPRM, the Department proposed §§ 35.108(f)(3) and 36.105(f)(3) which provided that an individual who is ''regarded as having such an impairment'' does not establish liability based on that alone. Instead, an individual can establish liability only when an individual proves that a private entity or covered entity discriminated on the basis of disability within the meaning of the ADA. This provision was intended to make it clear that in order to establish liability, an individual must establish coverage as a person with a disability, as well as establish that he or she had been subjected to an action prohibited by the ADA.

The Department received no comments on the language in these paragraphs. Upon consideration, in the final rule, the Department has decided to retain the regulatory text for §§ 35.108(f)(3) and 36.105(f)(3) except that the reference to ''covered entity'' in the title III regulatory text is changed to ''public accommodation.''

Sections 35.108(g) and 36.105(g) – Exclusions

The NPRM did not propose changes to the text of the existing exclusions contained in paragraph (5) of the definition of ''disability'' in the title II and title III regulations, *see* 28 CFR 35.104, 36.104, which are based on 42 U.S.C. 12211(b), a statutory provision that was not modified by the ADA Amendments Act. The NPRM did propose to renumber these provisions, relocating them at §§ 35.108(g) and 36.105(g) of the Department's revised definition of ''disability.'' The Department received no comments on the proposed renumbering, which is retained in the final rule.

Sections 35.130(b)(7)(i) – General Prohibitions Against Discrimination and 36.302(g) – Modifications in Policies, Practices, or Procedures

The ADA Amendments Act revised the ADA to specify that a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, ''need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability'' solely on the basis of being regarded as having an impairment. 42 U.S.C. 12201(h). In the NPRM, the Department proposed §§ 35.130(b)(7)(i) and 36.302(g) to reflect this concept, explaining that a public entity or covered entity ''is not required to provide a reasonable modification to an individual who meets the definition of disability solely under the 'regarded as' prong of the definition of disability.'' These provisions clarify that the duty to provide reasonable modifications arises only when the individual establishes coverage under the first or second prong of the definition of ''disability.'' These provisions are not intended to diminish the existing obligations to provide reasonable modifications under title II and title III of the ADA.

The Department received no comments associated with these provisions and retains the NPRM language in the final rule except for replacing the words ''covered entity'' with ''public accommodation'' in § 36.302(g).

Sections 35.130(i) and 36.201(c) – Claims of No Disability

The ADA as amended provides that ''[n]othing in this [Act] shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.'' 42 U.S.C. 12201(g). In the NPRM the Department proposed adding §§ 35.130(*i*) and 36.201(c) to the title II and title III regulations, respectively, which incorporate similar language. These provisions clarify that persons without disabilities do not have an actionable claim under the ADA on the basis of not having a disability.

The Department received no comments associated with this issue and has retained these provisions in the final rule.

Effect of ADA Amendments Act on Academic Requirements in Postsecondary Education

The Department notes that the ADA Amendments Act revised the rules of construction in title V of the ADA by including a provision affirming that nothing in the Act changed the existing ADA requirement that covered entities provide reasonable modifications in policies, practices, or procedures unless the entity can demonstrate that making such modifications, including academic requirements in postsecondary education, would fundamentally alter the nature of goods, services, facilities, privileges, advantages, or accommodations involved. *See* 42 U.S.C. 12201(f). Congress noted that the reference to academic requirements in postsecondary education was included ''solely to provide assurances that the bill does not alter current law with regard to the obligations of academic institutions under the ADA, which we believe is already demonstrated in case law on this topic. Specifically, the reference to academic standards in post-secondary education is unrelated to the purpose of this legislation and should be given no meaning in interpreting the definition of disability.'' 154 Cong. Rec. S8843 (daily ed. Sept. 16, 2008) (Statement of the Managers). Given that Congress did not intend there to be any change to the law in this area, the Department did not propose to make any changes to its regulatory requirements in response to this provision of the ADA Amendments Act.

PART 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES

■ 7. Revise the authority citation for part 36 to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12186(b) and 12205a.

■ 8. Revise § 36.101 to read as follows:

§ 36.101 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement subtitle A of title III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181–12189), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Pub. L. 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by covered public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.

(b) *Broad coverage.* The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of ''disability'' in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA 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 part should not demand extensive analysis.

■ 9. Amend § 36.104 by revising the definition of ''Disability'' to read as follows:

§ 36.104 Definitions.

* * * * *

Disability. The definition of *disability* can be found at § 36.105.

* * * * *

■ 10. Add § 36.105 to subpart A to read as follows:

§ 36.105 Definition of ''disability.''

(a)(1) *Disability* means, with respect to an individual:

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (f) of this section.

(2) *Rules of construction.* (i) The definition of ''disability'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.

(ii) An individual may establish coverage under any one or more of the three prongs of the definition of ''disability'' in paragraph (a)(1) of this section, the ''actual disability'' prong in paragraph (a)(1)(i) of this section, the ''record of'' prong in paragraph (a)(1)(ii) of this section, or the ''regarded as'' prong in paragraph (a)(1)(iii) of this section.

(iii) Where an individual is not challenging a public accommodation's failure to provide reasonable modifications under § 36.302, it is generally unnecessary to proceed under the ''actual disability'' or ''record of'' prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the ''regarded as'' prong of the definition of ''disability,'' which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the ''actual disability'' or ''record of'' prong regardless of whether the individual is challenging a public accommodation's failure to provide reasonable modifications.

(b)(1) *Physical or mental impairment* means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.

(2) *Physical or mental impairment* includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: Orthopedic, visual, speech and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(3) *Physical or mental impairment* does not include homosexuality or bisexuality.

(c)(1) *Major life activities* include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and

(ii) The operation of a *major bodily function,* such as the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) *Rules of construction.* (i) In determining whether an impairment substantially limits a major life activity, the term *major* shall not be interpreted strictly to create a demanding standard.

(ii) Whether an activity is a *major life activity* is not determined by reference to whether it is of *central* importance to daily life.

(d) *Substantially limits*—(1) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(i) The term ''substantially limits'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. ''Substantially limits'' is not meant to be a demanding standard.

(ii) The primary object of attention in cases brought under title III of the ADA should be whether public accommodations have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

(iii) An impairment that substantially limits one major life activity does not need to limit other major life activities in order to be considered a substantially limiting impairment.

(iv) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(v) An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(vi) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term ''substantially limits'' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.

(vii) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph (d)(1) is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.

(viii) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(ix) The six-month ''transitory'' part of the ''transitory and minor'' exception in paragraph (f)(2) of this section does not apply to the ''actual disability'' or ''record of'' prongs of the definition of ''disability.'' The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(2) *Predictable assessments.* (i) The principles set forth in the rules of

construction in this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA.

(ii) Applying these principles, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraph (a)(1)(i) of this section (the ''actual disability'' prong) or paragraph (a)(1)(ii) of this section (the ''record of'' prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying these principles it should easily be concluded that the types of impairments set forth in paragraphs (d)(2)(iii)(A) through (K) of this section will, at a minimum, substantially limit the major life activities indicated. The types of impairments described in this paragraph may substantially limit additional major life activities (including major bodily functions) not explicitly listed in paragraphs (d)(2)(iii)(A) through (K).

(A) Deafness substantially limits hearing;

(B) Blindness substantially limits seeing;

(C) Intellectual disability substantially limits brain function;

(D) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;

(E) Autism substantially limits brain function;

(F) Cancer substantially limits normal cell growth;

(G) Cerebral palsy substantially limits brain function;

(H) Diabetes substantially limits endocrine function;

(I) Epilepsy, muscular dystrophy, and multiple sclerosis each substantially limits neurological function;

(J) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and

(K) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function.

(3) *Condition, manner, or duration.*(i) At all times taking into account the principles set forth in the rules of construction, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the ''actual disability'' or ''record of'' prongs of the definition of ''disability,'' the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in this section, it may often be unnecessary to conduct an analysis involving most or all of the facts related to condition, manner, or duration. This is particularly true with respect to impairments such as those described in paragraph (d)(2)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(4) *Mitigating measures* include, but are not limited to:

(i) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable modifications or auxiliary aids or services as defined in this regulation;

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(e) *Has a record of such an impairment.* (1) An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) *Broad construction.* Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of ''disability'' if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (d)(1) of this section apply.

(3) *Reasonable modification.* An individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.

(f) *Is regarded as having such an impairment.* The following principles apply under the ''regarded as'' prong of the definition of ''disability'' (paragraph (a)(1)(iii) of this section):

(1) Except as set forth in paragraph (f)(2) of this section, an individual is ''regarded as having such an impairment'' if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, even if the public accommodation asserts, or may or does ultimately establish, a defense to the action prohibited by the ADA.

(2) An individual is not ''regarded as having such an impairment'' if the public accommodation demonstrates that the impairment is, objectively, both

''transitory'' and ''minor.'' A public accommodation may not defeat ''regarded as'' coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the public accommodation must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment), objectively, both ''transitory'' and ''minor.'' For purposes of this section, ''transitory'' is defined as lasting or expected to last six months or less.

(3) Establishing that an individual is ''regarded as having such an impairment'' does not, by itself, establish liability. Liability is established under title III of the ADA only when an individual proves that a public accommodation discriminated on the basis of disability within the meaning of title III of the ADA, 42 U.S.C. 12181–12189.

(g) *Exclusions.* The term ''disability'' does not include—

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

Subpart B—General Requirements

■ 11. Amend § 36.201 by adding paragraph (c) to read as follows:

§ 36.201 General.

* * * * *

(c) *Claims of no disability.* Nothing in this part 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 modification that was denied to an individual without a disability.

Subpart C—Specific Requirements

■ 12. Amend § 36.302 by adding paragraph (g) to read as follows:

§ 36.302 Modifications in policies, practices, or procedures.

* * * * *

(g) *Reasonable modifications for individuals ''regarded as'' having a disability.* A public accommodation is not required to provide a reasonable modification to an individual who meets the definition of ''disability'' solely under the ''regarded as'' prong of the definition of ''disability'' at § 36.105(a)(1)(iii).

* * * * *

■ 13. Add appendix E to part 36 to read as follows:

Appendix E—Guidance to Revisions to ADA Title II and Title III Regulations Revising the Meaning and Interpretation of the Definition of ''disability'' and Other Provisions in Order To Incorporate the Requirements of the ADA Amendments Act

For guidance providing a section-by-section analysis of the revisions to 28 CFR parts 35 and 36 published on August 11, 2016, see appendix C of 28 CFR part 35.

Dated: July 15, 2016.

Loretta E. Lynch,

Attorney General.

[FR Doc. 2016–17417 Filed 8–10–16; 8:45 a.m.]

Exhibit 1

NYC Human Resources Administration | Family Independence Administration
Department of Social Services

Computer Match Processing Desk Guide

Name of Computer Match	Verified Upon Receipt?	CA/FS Cases	NCA FS Cases	Special Instructions (See Notes below)	
		Processed by		For CA/FS cases	For NCA FS cases
Death	Yes	Division of Financial Review and Processing (DFRP)*	NCA FS Centers	• Review the match information from State Department of Health and NYC Vital Statistics. • Remove the deceased individual from the case (or close the case if the household size equals one).	• Review the match received from the Income Clearance Program (ICP). • Remove the deceased individual from the case (or close the case if the household size equals one). • Send notification of action taken on FS case. • Annotate the match with the action(s) taken and return it to ICP.
Financial Institution Recipient Match (FIRM)	No (collateral contact is required)	Job Center	Not Applicable	• Retrieve the match information from the Resource File Integration (RFI) subsystem in the Welfare Management System (WMS) when preparing for initial or recertification interviews. • Review the case record to determine whether or not the amounts exceed the CA resource limits, and take no further action if the amounts do not exceed the resource limit. • Contact the participant and request that he/she provide documentation to verify or refute the information if combined resources exceed the CA resource limit. • If the participant submits documentation supporting a dollar amount above the resource limit for CA or fails to respond, close the case. • If the participant responds but is unable to provide documentation of the account(s), send the Bank Inquiry and Clearance Report (**LDSS-760**) form to the financial institution, and if the documentation from the financial institution supports a dollar amount above the resource limit for CA, close the case. • Send notification of action taken on the case.	Not Applicable

* When DFRP is unable to process the computer match information for CA cases, DFRP will notify the Regional Manager of the issue and request a timely resolution. Once the issue is resolved, DFRP must take the required action(s) in WMS.

Note 1: If an FS overpayment results, establish an FS claim according to current procedure (See PD #07-11-ELI).

Note 2: DFRP and ICP must submit relevant documents for scanning and indexing into the HRA OneViewer. NCA FS Centers and Job Centers (including HASA) must scan relevant documents into the POS browser. All documents pertaining to computer matches must be scanned/indexed into the electronic case record.

Note 3: For matches that are not verified upon receipt, NCA FS Centers cannot take action on an FS case until the next recertification.

Computer Match Processing Desk Guide (continued)

Name of Computer Match	Verified Upon Receipt?	CA/FS Cases	NCA FS Cases	Special Instructions (See Notes below)	
		Processed by		For CA/FS cases	For NCA FS cases
Fleeing Felon	No	DFRP*	NCA FS Centers	• Review the match information and recommendation from the Bureau of Fraud Investigation (BFI). • Remove the participant with outstanding felony warrants from the case if the household size is greater than one. • Close, rebudget, and/or enter recoupment(s) as appropriate. • Send notification of action taken on case.	• Review the match information and recommendation from BFI. • Remove the participant with outstanding felony warrants from the case if the household size is greater than one. • Close, rebudget, and/or enter recoupment(s) as appropriate. • Send notification of action taken on case.
Marriage	No (collateral contact is required)	DFRP*	NCA FS Centers	• Review the match information and recommendation from BFI. • Use standard budgeting procedure to determine continued eligibility. • Close the case if the reported spouse is in the household and has income or resources that make(s) the household ineligible for Cash Assistance. • Inform the Job Center of the changes in the household, if any, if the reported spouse is in the household and the household is still potentially eligible for assistance. • Initiate recoupment if an overpayment was made. • Close the case if: the casehead failed to appear for an interview with BFI or to comply with the BFI's request for documentation. (If household member [not casehead] failed to appear or comply with documentation request, remove the individual line.) • Send notification of action taken on case to the household. • If no change results (e.g., reported spouse not in household due to incarceration), enter case note indicating that no action is required.	• Review the match received from BFI. • If the casehead failed to appear for interview or did not comply with request for documentation, close the case. (If household member [not casehead] failed to appear or comply with documentation request, remove the individual line.) • Send notification of action taken on FS case. • Annotate the match with the action(s) taken and return it to BFI. • If no change results, enter case note indicating that no action is required.

* When DFRP is unable to process the computer match information for CA cases, DFRP will notify the Regional Manager of the issue and request a timely resolution. Once the issue is resolved, DFRP must take the required action(s) in WMS.

Note 1: If an FS overpayment results, establish an FS claim according to current procedure (See PD #07-11-ELI).

Note 2: DFRP and ICP must submit relevant documents for scanning and indexing into the HRA OneViewer. NCA FS Centers and Job Centers (including HASA) must scan relevant documents into the POS browser. All documents pertaining to computer matches must be scanned/indexed into the electronic case record.

Note 3: For matches that are not verified upon receipt, NCA FS Centers cannot take action on an FS case until the next recertification.

Computer Match Processing Desk Guide (continued)

Name of Computer Match	Verified Upon Receipt?	CA/FS Cases	NCA FS Cases	Special Instructions (See Notes below)	
		Processed by		For CA/FS cases	For NCA FS cases
National Crime Information Center (NCIC)/Federal Bureau of Investigation (FBI) Fleeing Felon	Yes	DFRP*	NCA FS Centers	• Review the match information and recommendation from BFI. • Remove the participant with outstanding felony warrants from the case if the household size is greater than one. • Close, rebudget, and/or enter recoupment(s) as appropriate. • Send notification of action taken on case.	• Review the Required Statistical Action memo received from BFI. • Remove the participant with outstanding felony warrants from the case if the household size is greater than one. • Close, rebudget, and/or enter recoupment(s), as appropriate. • Send notification of action taken on FS case. • Notify BFI of the action(s) taken by the date indicated on the memo.
National Directory of New Hires (NDNH)	Yes	DFRP*, ICP, Job Centers and HASA	Not Applicable	• Retrieve TALX detailed information through Internet access. Retrieve Manual Eligibility Verification (MEV) detailed information from downloaded PDF file that is transmitted from OTDA. • Review WMS, NYCWAY and electronic case folder and compare case information with NDNH employment information. • If income is not already known to the Agency, budget income and take appropriate action to close, reduce budget and/or initiate recoupment for overpayment. • Send notification of action(s) taken. • If no changes are necessary, enter detailed case note(s) specifying reason that no action is required. • If follow-up actions are needed, refer case to Job Center.	Not Applicable
Prison	Yes	DFRP*	NCA FS Centers	• Review the match information and recommendation from BFI. • Remove the incarcerated individual from the case (or close the case if the household size equals one). • Send notification of action taken on case.	• Review the Required Statistical Action memo received from BFI. • Remove the incarcerated individual from the case (or close the case if the household size equals one). • Send notification of action taken on FS case. • Notify BFI of the action(s) taken by the date indicated on the memo.

* When DFRP is unable to process the computer match information for CA cases, DFRP will notify the Regional Manager of the issue and request a timely resolution. Once the issue is resolved, DFRP must take the required action(s) in WMS.

Note 1: If an FS overpayment results, establish an FS claim according to current procedure (See PD #07-11-ELI).

Note 2: DFRP and ICP must submit relevant documents for scanning and indexing into the HRA OneViewer. NCA FS Centers and Job Centers (including HASA) must scan relevant documents into the POS browser. All documents pertaining to computer matches must be scanned/indexed into the electronic case record.

Note 3: For matches that are not verified upon receipt, NCA FS Centers cannot take action on an FS case until the next recertification.

Computer Match Processing Desk Guide (continued)

Name of Computer Match	Verified Upon Receipt?	CA/FS Cases	NCA FS Cases	Special Instructions (See Notes below)	
		Processed by		For CA/FS cases	For NCA FS cases
Probation Violator Parole Violator	Yes	DFRP*	NCA FS Centers	• Review the match information and recommendation from BFI. • Remove the Probation/Parole Violator from the case if the household size is greater than one. • Close, rebudget, and/or enter recoupment(s), as appropriate. • Send notification of action taken on case.	• Review the match information and recommendation from BFI. • Remove the Probation/Parole Violator from the case if the household size is greater than one. • Close, rebudget, and/or enter recoupment(s), as appropriate. • Send notification of action taken on case.
Public Assistance Reporting Information System (PARIS)	Yes	DFRP*	Special Projects Change Food Stamp Center (F25)	• Review the match information and recommendation from BFI. • Remove the individual collecting benefits in multiple states from the case (or close the case if the household size equals one). • Send notification of action taken on case.	• Review the Required Statistical Action memo received from BFI. • Remove the individual collecting benefits in multiple states from the case (or close the case if the household size equals one). • Send notification of action taken on FS case. • Notify BFI of action(s) taken by the date indicated on the memo.
Social Security Beneficiary Data Exchange (BENDEX match) (for Retirement, Survivors and Disability Insurance [RSDI] benefits or Old Age, Survivors and Disability Insurance [OASDI])	Yes	ICP	NCA FS Centers	• Review the match information. • Budget the RSDI (or OASDI) for CA and FS purposes, per current procedure. • Send notification of action(s) taken on the case. • If no change results, enter case note indicating that no action is required.	• Review the match information from ICP. • Budget the RSDI (or OASDI) for FS purposes, per current procedure. • Send notification of action(s) taken on FS case. • Annotate the match with the action(s) taken and return it to ICP. • If no change results, enter case note indicating that no action is required.

* When DFRP is unable to process the computer match information for CA cases, DFRP will notify the Regional Manager of the issue and request a timely resolution. Once the issue is resolved, DFRP must take the required action(s) in WMS.

Note 1: If an FS overpayment results, establish an FS claim according to current procedure (See PD #07-11-ELI).

Note 2: DFRP and ICP must submit relevant documents for scanning and indexing into the HRA OneViewer. NCA FS Centers and Job Centers (including HASA) must scan relevant documents into the POS browser. All documents pertaining to computer matches must be scanned/indexed into the electronic case record.

Note 3: For matches that are not verified upon receipt, NCA FS Centers cannot take action on an FS case until the next recertification.

Computer Match Processing Desk Guide (continued)

Name of Computer Match	Verified Upon Receipt?	CA/FS Cases	NCA FS Cases	Special Instructions (See Notes below)	
		Processed by		For CA/FS cases	For NCA FS cases
State Data Exchange (SDX match) (for Supplemental Security Income [SSI])	Yes	ICP	NCA FS Centers	• Review the match information. • For FA cases remove the individual receiving SSI from the CA case (or close the case if the household size equals one). The SSI income is only budgeted for FS purposes. For SNCA/SNNC cases, Rice budgeting rules apply. (See the NYS Public Assistance Program Budgeting Manual, page A-48.) • Send notification of the change in benefits. • If no change results, enter case note indicating that no action is required.	• Review the information from ICP. • Budget the SSI for FS purposes. • Send notification of the change in FS benefits. • Annotate the match with the action(s) taken and return it to ICP. • If no change results, enter case note indicating that no action is required.
State Directory of New Hires (SDNH)	No (collateral contact is required)	Job Center	NCA FS Centers	• Retrieve the match information from the Resource File Integration (RFI) subsystem in the Welfare Management System (WMS) when preparing for initial or recertification interviews. • Review the case record for supporting documents. • Make collateral contact to verify the match information. • Initiate an **FIA-3a** to document the employment information and rebudget the case. • Send notification of action taken on the case. • If no change results, enter case note indicating that no action is required.	**6-Month Reporting Household** • Retrieve the match information from the RFI subsystem in WMS when preparing for initial or recertification interviews. • Review the case record for supporting documents. • If household income exceeds the 130% poverty level for household size, authorize the budget and reject/close the FS case. • If the household income does not exceed the 130% poverty level for the household size, enter a case note that no action is required. (See **Note 4** below for 10-day reporting household.)

Note 1: If an FS overpayment results, establish an FS claim according to current procedure (See PD #07-11-ELI).
Note 2: DFRP and ICP must submit relevant documents for scanning and indexing into the HRA OneViewer. NCA FS Centers and Job Centers (including HASA) must scan relevant documents into the POS browser. All documents pertaining to computer matches must be scanned/indexed into the electronic case record.
Note 3: For matches that are not verified upon receipt, NCA FS Centers cannot take action on an FS case until the next recertification.
Note 4: NCA FS households subject to 10-day reporting rules must report changes by the tenth day of the month following the month in which the change occurred. Review the available information and make collateral contact to resolve discrepancies on the new or unresolved computer match information. If benefits are to be reduced or terminated, calculate and save a new budget and send the participant a Client Notices System (CNS) notice of intent indicating the change to the case within 10 days of the notification. If no change results, make case note indicating that no action is necessary.

Computer Match Processing Desk Guide (continued)

Name of Computer Match	Verified Upon Receipt?	CA/FS Cases	NCA FS Cases	Special Instructions (See Notes below)	
		Processed by		For CA/FS cases	For NCA FS cases
Unemployment Insurance Benefits (UIB)	Yes	DFRP*	NCA FS Centers	• Review the computer match information from the Bureau of Eligibility Verification (BEV). • Budget the UIB for CA and FS purposes for the filing unit. • If the benefits exceed the income limit for the household size, close the case and/or enter recoupment(s), as appropriate. • Send notification of action(s) taken. • If no change results, enter case note indicating that no action is required.	**6-Month Reporting Household** • Review the computer match. • Review income to determine if total household income exceeds 130% poverty level for the household size. If so, close the FS case. • Send notification of action taken on the FS case or enter case note if no action is required. • Annotate the match with the action(s) taken and return to ICP. (See **Note 3** below for 10-day reporting household.)
Wage Reporting System (WRS)	No (collateral contact is required)	DFRP*	NCA FS Centers	• Review the computer match information. • Mail form **W-592U** to work-study students. • If completed form **W-592U** or form **W-592R** and/or household questionnaire is received, make collateral contact to verify the match information. • If an incomplete questionnaire is received, schedule appointment with BEV. • If BEV appointment is kept and required documents submitted, budget the case per current procedure. • If BEV appointment is not kept or requested documents not submitted, close the case. • Send notification of action taken. • If no change results, enter case note indicating that no action is required.	**6-Month Reporting Household** • Review computer match and case record for supporting documents when preparing for initial or recertification interviews. • Determine if total household income exceeds 130% poverty level for the household size. • Send participant form **W-138PP** to verify information at next recertification or six-month contact. • Upon receipt of verification, if income exceeds the 130% poverty level for the household size, authorize the budget and close the FS case. • Send notification of action taken. • If no change results, enter case note indicating that no action is required. (See **Note 4** below for 10-day reporting household.)

* When DFRP is unable to process the computer match information for CA cases, DFRP will notify the Regional Manager of the issue and request a timely resolution. Once the issue is resolved, DFRP must take the required action(s) in WMS.

Note 1: If an FS overpayment results, establish an FS claim according to current procedure (See PD #07-11-ELI).

Note 2: DFRP and ICP must submit relevant documents for scanning and indexing into the HRA OneViewer. NCA FS Centers and Job Centers (including HASA) must scan relevant documents into the POS browser. All documents pertaining to computer matches must be scanned/indexed into the electronic case record.

Note 3: For matches that are not verified upon receipt, NCA FS Centers cannot take action on an FS case until the next recertification.

Note 4: NCA FS households subject to 10-day reporting rules must report changes by the tenth day of the month following the month in which the change occurred. Review the available information and make collateral contact to resolve discrepancies on the new or unresolved computer match information. If benefits are to be reduced or terminated, calculate and save a new budget and send the participant a Client Notices System (CNS) notice of intent indicating the change to the case within 10 days of the notification. If no change results, make case note indicating that no action is necessary.

Exhibit 2

NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE

FOOD STAMP CHANGE REPORT FORM

(Please Print Clearly)

CASE NUMBER

YOU MUST REPORT ANY CHANGES IN YOUR CIRCUMSTANCES ACCORDING TO THE RULES LISTED BELOW.

DATE: _____

TO: _____

ADDRESS: _____

_____

_____

COMPLETE THIS FORM AND MAIL TO:

LOCAL DISTRICT NAME, ADDRESS AND TELEPHONE NUMBER:

YOUR RESPONSIBILITY TO REPORT CHANGES

Please read the questions and rules carefully. If you fail to report any changes that you are required to report under the rules, we may have to establish a claim for overpayment of food stamp benefits and collect the amount of the overpayment from you.

The changes that you MUST report are explained below. You may still voluntarily report any change about your food stamp household and, if this change will increase your benefit level and you verify this change, we will increase your benefit.

ARE YOU A "SIX-MONTH REPORTER" OR A "CHANGE REPORTER"? YOU MAY ANSWER THESE QUESTIONS TO FIND OUT WHETHER YOU ARE A "SIX-MONTH REPORTER" OR A "CHANGE REPORTER".

1. Do you receive transitional food stamp benefits (TBA)?	☐ **YES – Go To "TBA" on page 3** (Skip questions 2 through 8)	☐ **NO –** Go To Question #2, below
2. Do you receive New York State Nutrition Improvement Project (NYSNIP) benefits?	☐ **YES – Go To "NYSNIP" on page 3** (Skip questions 3 through 8)	☐ **NO –** Go To Question #3, below
3. Are you certified for food stamp benefits for three months or less at a time?	☐ **YES –Go To "Change Reporting" on page 2** (Skip questions 4 through 8)	☐ **NO –** Go To Question #4, below
4. Does anyone in your household have earned income that is being counted in your food stamp benefit amount?	☐ **YES –Go To "Six-Month Reporting" on page 2** (Skip questions 5 through 8)	☐ **NO –** Go To Question #5, below
5. Are all of the adults (18 or older) in your household either permanently disabled or 60 or older?	☐ **YES –Go To "Change Reporting" on page 2** (Skip questions 6 through 8)	☐ **NO –** Go To Question #6, below
6. Does your household receive $0 income (including $0 Temporary Assistance)	☐ **YES –Go To "Change Reporting" on page 2** (Skip questions 7 and 8)	☐ **NO –** Go To Question #7, below
7. Are you without shelter (undomiciled) or a migrant/seasonal farmworker?	☐ **YES – Go To "Change Reporting" on page 2** (Skip question 8)	☐ **NO –** Go To #8, below
8. You answered "NO" to all 7 questions above	☐ **Go To "Six-Month Reporting" on the top of page 2**	

SIX-MONTH REPORTING RULES: As a food stamp household under the "Six-Month Reporting" rules, you are only required to report changes at the time of your next recertification, except for the following three situations:

1. **If your household's gross monthly income exceeds 130% of the poverty level, you MUST report this monthly amount to your social services district by telephone, in writing, or in person within 10 days after the end of the calendar month in which you exceed the 130% level**. Gross income is the amount of income before taxes and other deductions are taken out, not the amount you receive when you cash your check. We must use the gross income in figuring your eligibility for food stamp benefits. Your worker will explain what 130% of the poverty level means for a family of your size. Any other kind of income that you receive besides earnings must be added to your gross earned income to know if you are over 130% of the poverty level. Examples of other sources of income that count include child support you receive, Unemployment Insurance, Temporary Assistance (TA) payments, Workers Compensation, Social Security Benefits, Supplemental Security Income (SSI) and private disability payments.

   If you fail to report that your gross income is above 130% of the poverty level in any calendar month, all benefits received after that month may be considered an overpayment. This is true even if your gross income falls below the 130% poverty level in a future month.

2. **If your household's certification period is longer than 6 months:** At a six-month checkpoint into your certification period, you will receive a report form that you **MUST** return within ten days after you receive the form. If your household has any of the changes listed below, you **MUST** report them on the report form that is sent to you at the six-month checkpoint.

   List of Changes you must report at the six-month checkpoint:

   - Changes in any **source of income** for anyone in your household
   - Changes in your household's total **earned income** when it goes up or down by more than $100 a month
   - Changes in your household's total **unearned income from a public source** such as Social Security Benefits or Unemployment Insurance Benefits when it goes up or down by more than $50 a month
   - Changes in your household's total **unearned income from a private source** such as Child Support Payments or Private Disability Insurance when it goes up or down by more than $100 a month
   - Changes in the amount of court ordered **child support you pay** to a child outside of your food stamp household
   - Changes in **who lives with you**
   - **If you move**, your new address and your new rent or mortgage costs, heat costs and utility costs
   - **A new or different car**, or other vehicle
   - Increases in your household's **cash, stocks, bonds, money in the bank** or savings institution if the total cash and savings of all household members now amounts to more than $2000 (more than $3000 if anyone in your household is disabled or 60 years old or older)
   - Any changes in your household that would result in a penalty as described on page 6

3. **If anyone in your food stamp household is an Able-Bodied Adult Without Dependents** ("ABAWD"), you **MUST** tell us if their work hours go below 80 hours a month within 10 days after the end of that month.

CHANGE REPORTING RULES:

As a food stamp household under the "Change Reporting" rules, you **MUST** report the following changes within 10 days after the end of the month in which the change happened:

- Changes in any **source of income** for anyone in your household
- Changes in your household's total **earned income** when it goes up or down by more than $100 a month
- Changes in your household's total **unearned income from a public source** such as Social Security Benefits or Unemployment Insurance Benefits when it goes up or down by more than $50 a month
- Changes in your household's total **unearned income from a private source** such as Child Support Payments or Private Disability Insurance when it goes up or down by more than $100 a month
- Changes in the amount of court ordered **child support you pay** to a child outside of your food stamp household
- Changes in **who lives with you**
- **If you move**, your new address and your new rent or mortgage costs, heat costs and utility costs
- **A new or different car**, or other vehicle
- Increases in your household's **cash, stocks, bonds, money in the bank or savings institution** if the total cash and savings of all household members now amounts to more than $2000 for a household **without** an elderly or permanently disabled household member **or** $3000 for a household **with** an elderly or permanently disabled household member.
- If anyone in your food stamp household is an **Able-Bodied Adult Without Dependents** ("ABAWD"), you must tell us if their work hours go below 80 hours a month within 10 days after the end of that month
- Any changes in your household that would result in a penalty as described on page 6

TBA CHANGE REPORTING for household in receipt of transitional benefits:

- Transitional food stamp benefits can continue for up to five months after your Temporary Assistance case closes.
- You are not required to report changes during the transition period. If you have changes that may increase your benefits you can contact your worker to file an early recertification application at any time during your transitional period to receive the increase. The increase cannot be done until a signed recertification application is filed, and the entire recertification process is completed.
- You must recertify near the end of your transitional period to see if you can continue to receive food stamp benefits after your transitional period ends. We will send you a notice reminding you of this recertification requirement. If you do not recertify, we will not send you any other notice and must close your food stamp case.

NYSNIP CHANGE REPORTING for participants in NYSNIP:

- You will receive a contact letter 24 months after you begin participation in NYSNIP that you must complete and return.
- You are not required to report changes during your certification period other than the 24-month contact letter. You may voluntarily report increases in your medical expenses, rent or utility costs, or decreases in your income. If you report and verify these changes, you may be eligible for more food stamp benefits. You may also report your new address if you move, so that you can continue to receive any notices we send to you.

Medical Expenses: You are not required to report changes in your medical expenses during your certification period. However, you may voluntarily report changes in your medical expenses for household members that are:

- 60 years old or older
- disabled spouses or children of a deceased veteran
- getting Supplemental Security Income (SSI)
- getting Social Security Disability payments
- getting veterans' disability benefits
- getting government disability retirement benefits
- getting Railroad Retirement disability benefits
- getting disability-based medical assistance

If you report and verify an increase in your medical expenses, you may be eligible for more food stamp benefits. Changes in medical expenses must be reported at your next recertification.

Temporary Assistance (TA) Reporting Rules: The rules listed above apply only to the Food Stamp program. If you also receive TA, you are still required to report changes for TA within 10 days of the change, on periodic report mailers, TA Eligibility Questionnaires and at recertification.

When to use this form:

This form may be used to report any required or voluntary changes. You can also use this form to report changes in the cost of caring for children or disabled adults, or changes in shelter costs even if you haven't moved. If these expenses go up you may be eligible for more food stamp benefits.

If proof of the changes you are reporting is available, please include it with this form. This will help make sure that you get the correct amount of food stamp benefits. **Reported changes must be verified before we can increase your benefits.**

This form should be mailed or brought to the agency listed above. If for some reason you can't mail or bring in this form, you can report the changes by calling us at the telephone number listed on Page 1.

If you no longer want to receive food stamp benefits, sign here to withdraw from participation in the Food Stamp program. Your food stamp benefits will stop. You have the right to contest this withdrawal if you feel that you were given incorrect or incomplete information about your eligibility for food stamp benefits by requesting a Fair Hearing within 90 days. You may re-apply for food stamp benefits at any time after your withdrawal.

X_____

IF YOU WITHHOLD INFORMATION ABOUT CHANGES IN YOUR HOUSEHOLD THAT YOU ARE REQUIRED TO REPORT, YOU WILL OWE US THE VALUE OF ANY EXTRA FOOD STAMP BENEFITS YOU RECEIVE AS A RESULT. IF YOU INTENTIONALLY WITHHOLD INFORMATION WHEN YOU ARE REQUIRED TO REPORT IT, YOU MAY ALSO BE DISQUALIFIED FROM THE FOOD STAMP PROGRAM AND COULD BE SUBJECT TO CRIMINAL PROSECUTION (SEE ATTACHED "FOOD STAMP PENALTY WARNING" ON PAGE 6).

Use the Form Below to Report Changes

CHANGE IN INCOME OR SOURCE OF INCOME – If you are a Six–Month Reporter, your reporting rules are explained beginning on Page 2. If you are a Change Reporter, your reporting rules are also explained on Page 2.

NAME OF PERSON RECEIVING INCOME	SOURCE OF INCOME	NEW AMOUNT	HOW OFTEN RECEIVED
1.		$	
2.		$	
3.		$	

CHANGE IN HOUSEHOLD - List below all new members to your household including newborn children. Also list members who have moved in or out or have died.

NAME	AGE	RELATIONSHIP	CHANGE (CHECK ONE)	DATE	INCOME AMOUNT	SOURCE
1.			☐ CAME INTO HOUSEHOLD ☐ LEFT HOUSEHOLD		$	
2.			☐ CAME INTO HOUSEHOLD ☐ LEFT HOUSEHOLD		$	
3.			☐ CAME INTO HOUSEHOLD ☐ LEFT HOUSEHOLD		$	
4.			☐ CAME INTO HOUSEHOLD ☐ LEFT HOUSEHOLD		$	

CHANGE OF ADDRESS

NEW MAILING ADDRESS	CITY	STATE	ZIP CODE

IF YOU DON'T HAVE A STREET ADDRESS, GIVE DIRECTIONS TO YOUR HOME (if you are homeless, leave blank)	TELEPHONE NUMBER WHERE YOU CAN BE REACHED ( ) AREA CODE

CHANGE IN HOUSING COSTS - If you have moved, you must list your new costs below. Even if you have not moved, you can use this section to tell us that your rent, mortgage payment or other costs have changed.

Are you a roomer or boarder? ☐ YES ☐ NO If Yes, are meals ☐ INCLUDED ☐ NOT INCLUDED

RENT	YES	NO	IF YES, GIVE MONTHLY AMOUNT	CHANGE (CHECK ONE)
Do you pay **rent?**	☐	☐	$	☐ Same ☐ More ☐ Less
Do you pay for the following **separate** from your **rent?**	YES	NO		
• Heat and/or air conditioning	☐	☐		
• Utilities (electricity, cooking gas, etc.)	☐	☐		
• Telephone	☐	☐		
MORTGAGE PAYMENT	YES	NO	IF YES, GIVE MONTHLY AMOUNT	CHANGE (CHECK ONE)
Do you have a **mortgage** payment?	☐	☐	$	☐ Same ☐ More ☐ Less
Do you pay for the following **separate** from your **mortgage:**	YES	NO	IF YES, GIVE MONTHLY AMOUNT	CHANGE (CHECK ONE)
• Property taxes	☐	☐	$	☐ Same ☐ More ☐ Less
• House Insurance	☐	☐	$	☐ Same ☐More ☐ Less
• Heat and/or air conditioning	☐	☐		
• Utilities (electricity, cooking gas, etc.)	☐	☐		
• Telephone	☐	☐		

Are you living in section 8 or other subsidized housing? ☐ YES ☐ NO

Are you living in public housing? ☐ YES ☐ NO

CHANGE IN NUMBER OF CARS OR VEHICLES - Has anyone in your household purchased, sold or traded a car, truck, boat, camper, motorcycle or other vehicle since the last time you told us about vehicles?

MAKE	MODEL	YEAR	IF SOLD, AMOUNT RECEIVED
1.			**$**
2.			**$**
3.			**$**

CHANGE IN SAVINGS - List the **total** amount of money that the members of your household now have. Include cash, savings accounts, checking accounts, stocks, bonds or other investments. You must tell us if your household savings have **increased** to more than $2,000 (more than $3,000 if anyone in your household is 60 years old or older or been determined to be disabled). **$**

CHANGE IN CHILD CARE, DEPENDENT CARE COSTS OR THE AMOUNT OF CHILD SUPPORT PAID - Have your child care or dependent care costs changed? If so, you may be eligible for more Food Stamp benefits.

CHANGE (CHECK ONE)	FOR WHOM?	WHOM DO YOU PAY?	NEW AMOUNT	HOW OFTEN DO YOU PAY?
1. ☐ NO LONGER HAVE COST ☐ HAVE COST			**$**	
2. ☐ NO LONGER HAVE COST ☐ HAVE COST			**$**	
3. ☐ NO LONGER HAVE COST ☐ HAVE COST			**$**	

CHANGE IN MEDICAL COSTS (Doctors, Dentists, Hospitals, Prescriptions, etc.) – You are only required to report changes in your medical expenses at recertification. However, you may voluntarily report changes in your medical expenses at any time for household members who are:

- 60 years old or older
- disabled spouse or children of a deceased veteran
- getting Supplemental Security Income (SSI)
- getting Social Security Disability payments
- getting veterans' disability benefits
- getting government disability retirement benefits
- getting Railroad Retirement disability benefits
- getting disability-based medical assistance

If you report and verify an increase in your medical expenses, you may be eligible for more food stamp benefits.

NAME	TYPE OF COST	AMOUNT	HOW OFTEN IS EACH PAYMENT DUE?
		$	
		$	
		$	
		$	

DO YOU EXPECT THE CHANGES YOU HAVE REPORTED TO CONTINUE NEXT MONTH? ☐ YES ☐ NO

If **"NO"** explain**:**

CHECK HERE IF YOU HAVE <u>NO CHANGES TO REPORT</u> ABOUT YOUR FOOD STAMP HOUSEHOLD ☐ NO CHANGES

BE SURE TO READ AND SIGN PAGE 6 ➔

CHANGE OF BENEFITS

We will use your answers on this form to see if your household's benefits will change. Before we change your benefits, we will send you a notice explaining what will happen. If you don't agree with our decision, you have the right to a fair hearing to challenge our decision.

FOOD STAMP BENEFITS (FS) PENALTY WARNING

Any information you provide in connection with your application for Food Stamp Benefits will be subject to verification by Federal, State and local officials. If any information is incorrect, you may be denied FS. You may be subject to criminal prosecution for knowingly providing incorrect information.

You will **never** be able to get FS again if you are:

- Found guilty in a court of law for the second time of buying or selling controlled substances (illegal drugs or certain drugs for which a doctor's prescription is required) in exchange for FS: **or**
- Found guilty in a court of law of selling or obtaining firearms, ammunition or explosives in exchange for FS; **or**
- Found guilty in a court of law of trafficking in FS worth $500 or more. Trafficking includes the illegal use, transfer, acquisition, alteration or possession of FS, authorization cards or access devices; **or**
- Found guilty in a court of law of committing a third Intentional Program Violation (IPV).

You will not be able to get FS for two years if you are found guilty in a court of law for the first time of buying or selling controlled substances (illegal drugs or certain drugs for which a doctor's prescription is required) in exchange for FS.

If you have committed your:

- First IPV, you will not be able to get FS for one year.
- Second IPV, you will not be able to get FS for two years.

A court could also bar you from receiving Food Stamp Benefits for an additional 18 months.

If you make a false statement about who you are or where you live in order to get multiple FS, you will not be able to get FS for ten years (or **permanently** if this is the third IPV).

You may be found guilty of an Intentional Program Violation if you:

- Make a false or misleading statement, or misrepresent, conceal or withhold facts; **or**
- Commit any act that constitutes a violation of Federal or State law for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of food stamp benefits, authorization cards or reusable documents used as part of the Electronic Benefit Transfer (EBT) system.

You could also be fined up to $250,000, sent to jail for up to 20 years, or both.

CERTIFICATION

I understand the penalty for hiding or giving false information. I also understand I will owe the value of any extra food stamp benefits I receive because I don't fully report changes in my household. I agree to prove any changes reported if necessary. The answers on this form are correct and complete to the best of my knowledge. I understand that my signature authorizes federal, state and local officials to contact other persons or organizations to verify the information I have provided.

SIGNATURE	DATE
X	

Exhibit 3

Office of Administrative Hearings (OAH) Procedures Transmittal	Transmittal: 16-06
Distribution:	Date: July 1, 2016 Pages: 3
Albany OAH Staff ☒ Rest of State Hearing Officers ☒ Supervising Hearing Officers ☒ NYC OAH Staff ☒ NYC Hearing Officers ☒ Supervising Hearing Officers ☒ Rest of State Social Service Districts ☒ NYC Agencies ☒	Subject: Review of Disqualification Consent Agreement (DCA) and New Issue codes 170 and 443

This transmittal addresses a change in policy concerning jurisdiction to review at a Fair Hearing a Disqualification Consent Agreement (DCA) signed by an accused individual. Previously, the Office of Administrative Hearings (OAH) determined that it did not have jurisdiction to review a DCA at a Fair Hearing. However, various advocacy groups have raised concerns that social services districts (SSDs) have not followed the procedural requirements in State regulations (18 NYCRR 359.4), to ensure the due process rights of accused individuals who sign a DCA to settle a Public Assistance, or SNAP Intentional Program Violation (IPV). Therefore, OAH will conduct a limited review of a DCA at a Fair Hearing to ensure that the SSD followed the procedural requirements outlined in 18 NYCRR 359.4(b)(1) and (b)(4).

91-ADM-51 ("Use of Disqualification Consent Agreement (DCA) in the Food Stamp Program") indicates that there is no further administrative appeal available to a client who has entered into a DCA. Additionally, the fair hearing language on the LDSS-4799 Intentional Program Violation (IPV) Disqualification Notice for the Supplemental Nutrition Assistance Program (SNAP) limits the issues that may be reviewed. The Notice indicates that a fair hearing may only be requested to review: (1) the amount of an overpayment or over-issuance, but only if the amount was not determined when the disqualification was determined; (2) the amount of the SNAP allotment to be provided to the remaining members of the individual's family or household during the disqualification period; and (3) the failure to restore the individual to the household at the end of the disqualification period after a request for such restoration. The LDSS-4799 states that the individual or members of the individual's family or household do not have a right to a fair hearing to review the disqualification. Notwithstanding the language in the ADM and on the notice, OAH is accepting jurisdiction to conduct a limited review of DCAs.

18 NYCRR 359.4(b)(2) provides that when a case is referred, in accordance with 18 NYCRR 359.4(a), to the appropriate district attorney, or any other prosecutor authorized to act on the matter, and is accepted for prosecution, the prosecutor may choose to settle the case or a court of appropriate jurisdiction hearing the case may issue a pre-determination disposition order (e.g., order adjourning the case in contemplation of dismissal), provided that full restitution is made. In these cases, the SSD may use a DCA as described in 18 NYCRR 359.4(b)(1).

18 NYCRR 359.4(b)(1) outlines the format a SSD must use for a DCA. A DCA must include the following:

- notification to the accused individual of the consequences of signing the agreement and consenting to a disqualification penalty;
- a statement for the accused individual to sign indicating that he or she understands the consequences of signing the agreement, along with a statement that any caretaker relative or head of household must also sign the agreement if the accused individual is not the caretaker relative or head of household;
- a statement that signing the agreement will result in disqualification of the accused individual and reduction or discontinuance of assistance or SNAP for the disqualification period, even if the accused individual was not found guilty of civil or criminal misrepresentation or fraud;
- a statement describing the disqualification period which will be imposed as a result of the accused individual's signing the agreement; and
- a statement that the remaining members of the household or assistance unit, if any, will be held responsible for repayment of the overpayment or over-issuance, unless the accused individual has already repaid the overpayment or over-issuance as a result of meeting the terms of any agreement with the prosecutor or any court order.

Additionally, 18 NYCRR 359.4(b)(3) requires that a SSD which uses a DCA must enter into written agreements with the appropriate prosecutors which give the SSD opportunity to send advance written notice of the consequences of signing a DCA to the household when deferred adjudication is contemplated.

Finally, 18 NYCRR 359.4(b)(4) requires that the SSD provide to the accused individual a copy of the DCA, together with the notification of the consequences of signing the DCA, at least ten (10) days prior to the execution of the DCA and advise the accused individual that he/she may obtain a legal or other authorized representative for counsel and advise prior to and at the time the DCA is executed by the accused individual.

At the Fair Hearing, the SSD has the burden to show that the DCA signed by the accused individual meets the requirements in 18 NYCRR 359.4(b)(1) and that the accused individual was provided a copy of the DCA, along with the notification of the consequences, at least ten (10) days prior to the signing and that the accused individual was advised that he/she may obtain a legal or other authorized representative prior to and at the time the DCA is signed, as required by 18 NYCRR 359.4(b)(4). The underlying merits of the claim of alleged fraud will not be reviewed at the Fair Hearing. This review is strictly limited to whether the SSD complied with the procedural requirements in18 NYCRR 359.4(b)(1) and (b)(4) to obtain the DCA from the accused individual.

If the SSD fails to meet its burden of proof, then the DCA cannot be upheld if the SSD did not comply with the procedural requirements of 18 NYCRR 359.4(b)(1) and (b)(4). The SSD should be directed to restore any lost Temporary Assistance (Family Assistance (FA) or Safety Net Assistance (SNA)) or SNAP benefits retroactive to the date of discontinuance. Additionally, the SSD should be advised that if it determines to redo its previous action, it is directed to comply with the requirements of 18 NYCRR 359.4(b).

Effective July 5, 2016, new Fair Hearing Information System (FHIS) issue codes will be available for statewide use. Coding for hearing requests related to this issue is as follows:

AGENCY:
NYC: NBAD
Rest of State: SSD

Category: FA/SNA or SNAP

ISSUE CODE:
FA/SNA: 170 Review of Disqualification Agreement
SNAP: 443 Review of Disqualification Agreement

ACTION: INAD

AID STATUS: NA
Staff should be aware that no other unrelated issues should be included in these requests.

If you have any questions regarding this transmittal, please contact Michael Allen at (518) 473-4969 or via email at mike.allen@otda.ny.gov.

Samuel L. Spitzberg, Director,
Office of Administrative Hearings

Exhibit 4

Informational Letter

Section 1

Transmittal:	15-INF-07
To:	Local District Commissioners
Issuing Division/Office:	Audit and Quality Improvement (A&QI)
Date:	August 20, 2015
Subject:	Investigative Unit Operations Plan (Revised)
Suggested Distribution:	Temporary Assistance Directors SNAP Directors Fraud Directors FEDS Coordinators
Contact Person(s):	Stephen Bach(A&QI) (518) 402-0117 or Stephen.Bach@otda.ny.gov
Attachments:	Investigative Unit Operations Plan Form Protocol for DCA Interview DCA Interview Acknowledgement
Attachment Available Online:	☒

Filing References

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
93-ADM-8 91-ADM-51 06-INF-28	14-INF-03	18 NYCRR 348.2, 359.4	145 145-c	FSSB Section 6	7 CFR 273.16(g)(1)

Section 2

I. Purpose

This Informational Letter (INF) supersedes 14-INF-03 and requires each social services district (SSD) to submit to the Office of Temporary and Disability Assistance (OTDA) for

review and approval a revised Investigative Unit Operations Plan (IUOP). Such plans must be submitted to OTDA within 60 days of this INF. The purpose of this INF is to update the conditions and clarify the requirements regarding portions of the IUOP. Specifically, OTDA is providing additional guidance concerning appropriate procedures, with particular attention to the procedures required when administering a Disqualification Consent Agreement (DCA).

It is critical that SSDs maintain a clear delineation between the process for referrals to the prosecuting authority which could or could not result in a DCA, and the process for referrals for an administrative hearing which could or could not result in a waiver of the administrative hearing. These are two distinct processes and that distinction must be maintained to preserve the integrity of the overall structure for pursuing Intentional Program Violations (IPVs).

Included with this INF is an IUOP template for your use (Attachment 1) and you are encouraged to provide sufficient detail to demonstrate that the Plan is consistent with all applicable regulations and policy guidance. Also provided to assist in completing the IUOP, and to use when conducting DCA interviews, is a sample "Protocol for DCA Interview" (Attachment 2) and a sample "DCA Interview Acknowledgement" form (Attachment 3).

II. Background

93-ADM-8 requires that SSDs file an IUOP with OTDA. The administration of DCAs, specifically, is addressed in 91-ADM-51 and at 18 NYCRR 359.4.

III. Program Implications

Each SSD must submit an updated IUOP to OTDA within 60 days of the date of this INF.

The plan must include:

(1) A description of the organizational unit(s) responsible for the investigation of allegations of client fraud;

(2) A description of any claims establishment (recoupments) and collection activities for which the Fraud referral unit also may be responsible;

(3) Procedures for the referral of fraud cases for administrative hearings;

(4) A description of the organizational unit(s) responsible for the prosecution of allegations of client fraud;

(5) Detailed procedures for the referral of fraud cases to the prosecuting authority;

(6) A detailed, step by step description of the DCA process following the guidelines set forth in 91-ADM-51and 18 NYCRR 359.4. Additionally, attached for your reference are the "Protocol for DCA Interview" (Attachment 2) and "DCA Interview

Acknowledgement" (Attachment 3) forms. These forms are not mandatory, but are included for your consideration and their use is encouraged;

(7) An explanation of how it is proven that the individual was advised on the record of the court of the disqualification provision prior to entering any plea; and

(8) A copy of or a statement of the agreement with the prosecuting authority's office in accordance with 18 NYCRR 348.2(c) and 359.4, and the federal regulation 7 CFR 273.16(g)(1). This agreement must include information on how, and under what circumstances, cases will be accepted for possible prosecution and the criteria set by the prosecutor for accepting cases for prosecution. The criteria should include, but not be limited to, the dollar threshold and the type of violation.

In our effort to update and standardize SSD plans, please submit your IUOP using the attached template (Attachment 1), answering all sections completely and in detail. All plans must be submitted to Stephen Bach at: Stephen.Bach@otda.ny.gov or submitted by mail to:

New York State Office of Temporary & Disability Assistance
Audit and Quality Improvement – Program Integrity
Riverview Center 4th Floor
40 North Pearl Street
Albany, NY 12243

If you have any questions, please contact Mr. Bach prior to submitting your plan.

Issued By
Name: Kevin Kehmna
Title: Director
Division/Office: OTDA/A&QI

Exhibit 5

STATE OF NEW YORK
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE

Case No. [redacted]
Hrg. No. 6817733R

In the Matter of the Appeal of
[redacted]

Appellant,

Appellant's
Post-Hearing
Memorandum

from a determination by the Onondaga County
Department of Social Services,

Respondent.

A Fair Hearing was held in the above matter on October, 24, 2014, before Administrative Law Judge Heydary. At the close of his case, Appellant requested and was granted the opportunity to supplement his arguments in the form of a post-hearing memorandum, which was directed to be submitted by the close of business on October 27, 2014.

As discussed below, the Disqualification Consent Agreement entered in this case was not authorized by law, as it was not a deferred adjudication in a criminal prosecution. Furthermore, even if authorized, the purported DCA did not comply with the requirements of federal and state regulations. For the reasons that follow, Appellant respectfully requests that the Department reverse the Notice of Decision discontinuing his SNAP benefits for one year.

FACTS

During the hearing, the following facts were established:

1. During the relevant time periods, Appellant [redacted] was living in his home

with his teenaged son, [redacted]

2. [redacted] has multiple disabilities, including Attention Deficit Hyperactivity Disorder, Bipolar Disorder, and borderline schizophrenia.

3. Because of his disabilities, [redacted] receives monthly SSI payments.

4. [redacted] was granted custody of his son [redacted] by an Order of the Onondaga County Family Court early in 2012.

5. After obtaining custody of his son and losing his job as a cook due to a work-related injury, Mr. [redacted] applied for public benefits with the Onondaga County Department of Social Services in approximately May of 2012. Mr. [redacted] listed himself and his son [redacted] as being in his household.

6. As per the agency's Investigator Report, the agency became aware of the SSI income to [redacted] in approximately February of 2013, when [redacted] advised the agency of the income as part of his application for cash assistance. (Agency's Fair Hearing Packet at p. 12).

7. Upon receiving notice of the SSI income to [redacted] the agency determined that Mr. [redacted] had received an overpayment in SNAP benefits from May 2012 to February 2013 in the amount of approximately two thousand dollars. (*Id.*)

8. Based upon this information, Marc Wierzbicki, the agency's Coordinator of Eligibility Investigations, checked the box to request a "DCA Letter" be sent by the Onondaga County District Attorney's Office. Mr. Wierzbicki did not check the boxes labeled "Refer to DA" or "Request Prosecution".

9. Mr. Wierzbicki testified that he viewed the case as a civil matter at that point, and

preferred that it be resolved as a civil matter. When he requested that the DCA letter be sent out by the District Attorney's office, he had not tracked the case for a criminal prosecution, nor had the DA's office accepted the matter for prosecution.

10. As a result of Mr. Wierzbicki's request, the Onondaga County District Attorney's Office ("DA") sent Mr. [redacted] a "Fraud Referral" letter dated June 24, 2014. (Agency's Fair Hearing Packet at p. 6). The letter was on District Attorney letterhead, and was signed by an Assistant District Attorney, but directed Mr. [redacted] to contact Mark Wierzbicki at the Department of Social Services, and not to contact the District Attorney's Office. (*Id.*)

11. The letter from the District Attorney's Office informed Mr. [redacted] that the DA's office had "reviewed an investigative report prepared by the Law Division of the Department of Social Services", and that it appears from the report that he "received welfare benefits during a period where you were not eligible to receive." (*Id.*)

12. The letter went on to state that the District Attorney's office had accepted the case for purpose of a "review for criminal prosecution", but that the case could be settled as a "civil action", without prosecution, by having Mr. [redacted] contact the Onondaga County Department of Social Services and resolving the claim. (*Id.*)

13. The letter concluded that unless the matter is "satisfactorily resolved", the District Attorney's Office will be required "to review this matter again to determine if prosecution is then warranted." (*Id.*)

14. Investigator Wierzbicki testified that a DCA letter like the one in this case is sent out by the DA's office in every case which he investigates. He stated that his office prefers to

resolve these cases civilly, by having the accused person sign a DCA, as that resolution is easier and requires less work for the Department of Social Services and the District Attorney's Office.

15. Mr. Wierzbicki states that if the accused person does not sign the DCA, the case will be sent to the District Attorney's office again to consider whether that office wishes to prosecute.

16. If the DA's office declines to prosecute, then the case may be referred to OTDA to bring an administrative disqualification hearing.

17. Mr. Wierzbicki testified that along with the DCA letter, the District Attorney's office typically sends out a Disqualification Consent Agreement (DCA) and a Notice of Consequences of Consenting to a DCA.

18. Mr. [redacted] testified he received the letter from the District Attorney's Office, and went to meet with Mr. Wierzbicki right away. He testified that there were no other papers attached to the letter which he received in the mail.

19. Mr. Wierzbicki acknowledged that he could not testify that the DCA and the Notice of Consequences were mailed out with the District Attorney's letter.

20. The DCA was signed by Mr. [redacted] on June 23, 2014, the day before the date on the DA's letter. (Fair Hearing Packet at pp. 6-8).

21. The final line of the DCA, prior to the signature block, states:

"Further prosecution by social services officials of me regarding the IPVs described in this DCA will be deferred pending the performance of the terms of this agreement and the charges will be withdrawn and/or dismissed upon complete performance of the terms of

this agreement." (Fair Hearing packet at p. 8).

22. Mr. [redacted] testified that he came to Mr. Wierzbicki's office alone, and met with the investigator there.

23. At the meeting, Mr. Wierzbicki told Mr. [redacted] that the agency knew his son was receiving SSI, and that they believed he deliberately withheld that information on his SNAP application. Mr. Wierzbicki apparently had this belief, even though the agency discovered [redacted] SSI income when [redacted] supplied this information to them in an application filed several months later.

24. Mr. [redacted] testified that during their meeting, Mr. Wierzbicki gave Mr. [redacted] the Disqualification Consent Agreement, as well as the Notice of Consequences.

25. Per Mr. [redacted] the investigator wanted Mr. [redacted] to sign the DCA that day, and stated that he would be criminally prosecuted if he did not do so. Mr. Wierzbicki appeared to be angry, as evidenced by his red face and aggressive voice. He told Mr. [redacted] that he needed to sign the DCA.

26. Investigator Wierzbicki denied threatening Mr. [redacted] with jail time, but stated that he could not recall what he told Mr. [redacted] about a criminal prosecution, as he did not recall their conversation specifically.

27. Mr. [redacted] did not know what to do. He was scared by his meeting with Mr. Wierzbicki, and afraid of going to jail. He had not spoken to an attorney prior to the meeting, and was never told he could speak to an attorney, or take the papers home to review with an attorney. Mr. Wierzbicki stated that while Mr. [redacted] had the right to consult with an attorney, and he was so advised in the DA's letter, Mr. Wierzbicki did not

advise Mr. [redacted] that he had the right to have an attorney present for their meeting.

28. Mr. [redacted] left the room briefly to think. A few minutes later, he returned to Mr. Wierzbicki, and agreed to sign the DCA.

29. Mr. [redacted] did not believe he had committed any fraud, but was nervous and scared, and did not want to be prosecuted and risk going to prison.

30. Like the DA letter, the Notice of Consequences was also dated on June 24, 2014. Mr. Wierzbicki and the agency had no explanation for why the letter and notice were dated the day after Mr. [redacted] signature on the DCA.

31. Mr. [redacted] testified he did not have time to fully read any of the documents, and was not provided with a copy of any of the documents after he signed the DCA.

32. He left Mr. Wierzbicki's office feeling upset and confused, and thinking that he had made a mistake in signing the DCA without discussing it with counsel.

33. Mr. [redacted] has only completed school through the tenth grade. In elementary school he received special education services for speech and reading problems.

34. Mr. Wierzbicki was unable to provide a good definition for the concept of "inadvertent household error," but agreed that it could include instances when a recipient household initially forgot to include income on an application without an affirmative misrepresentation, and then subsequently provided that information.

35. Mr. Wierzbicki was unfamiliar with OTDA policy stating that a local district must initially treat an alleged program violation as inadvertent household error and pursue repayment. He stated that he had never been trained on this policy.

ARGUMENT

Disqualification Consent Agreement was not Permitted in this Case

Neither federal nor New York State laws and regulations governing SNAP benefits permit a local social services district to enter into a Disqualification Consent Agreement (DCA) before a case has been referred to and accepted for prosecution by a prosecutor's office. A Disqualification Consent Agreement is intended for cases in which a prosecutor and/or court agree to a "deferred adjudication", after a department of social services has elected to pursue a case through judicial prosecution. This procedure is reserved for "those cases in which a determination of guilt is not obtained from a court due to the accused individual having met the terms of a court order or which are not prosecuted due to the accused individual having met the terms of an agreement with the prosecutor." 7 CFR 273.16(h).

The Food Stamp Act of 1977, Section 6(b)(2) reads, "Each state agency shall proceed against an individual alleged to have engaged in such activity (intentional Program violation) either by way of administrative hearings, after notice and an opportunity for a hearing at the State level, **or** by referring such matters to appropriate authorities for civil or criminal action in a court of law." (emphasis added.) Therefore the Department of Social Services must choose whether it will proceed administratively, or refer the case for prosecution, but it cannot pursue both simultaneously.

Similarly, 18 NYCRR 359 provides that if a case is referred by the social services district to the appropriate prosecutor to review for criminal prosecution, and that prosecutor declines or fails to prosecute, the social services district must formally withdraw its referral to the prosecutor in writing, before it may refer the case to the Department for an administrative disqualification hearing.

18 NYCRR 359.4 and 359.5.

In fact, in a Guidance on Food Stamp Fraud published on February 4, 2004, the Food and Nutrition Service explicitly states, "The State agency must not offer an ADH waiver if it intends to refer the case for prosecution nor suggest prosecution if the waiver is not signed." (FNS Guidance of February 4, 2004, provided as Appellant's Exhibit "1"). As the FNS Guidance cautioned, "these provisions require the State agency to make a determination as to which procedure, administrative or judicial, it believes appropriate for a given case and to pursue that procedure to its conclusion." *Id.* The practice of threatening prosecution if an individual does not sign a waiver or consent agreement, therefore, runs directly contrary to both federal and state regulations governing the SNAP program.

The federal regulations allow states to request DCA agreements only after a criminal case is resolved through a deferred adjudication. David A. Super, *Improving Fairness and Accuracy in Food Stamp Fraud Investigations*, Clearinghouse Review, May, 2005, at p. 83 (submitted as Appellant's Exhibit "3"). Because the DCA is intended to be used exclusively in the context of a criminal case, at the point that the individual would be asked the sign the DCA, a criminal proceeding should have been commenced and prosecuted, with all of its attendant procedural and due process safeguards. The individual would have access to an attorney, typically assigned by the court, who could review the evidence against the individual. Before entering into a DCA, the prosecutor, defense attorney and judge would have all considered the evidence against the individual, and concluded that a deferred adjudication was the appropriate result Any number of protections would attach that protect an individual against frivolous or unproven allegations of fraud. It is only under these circumstances that an accused recipient should be able to voluntarily enter into a DCA.

Asking an individual to sign a DCA before the case is accepted for prosecution runs afoul of the federal regulations. See Super, *supra*.

The DCA Failed to Meet Statutory and Regulatory Requirements

Even if this case represented an appropriate use of the disqualification consent agreement, the purported DCA in this case fails to meet any number of regulatory requirements imposed by state and federal regulation.

18 NYCRR 359.4, which governs referrals to prosecuting authorities and the requirements of disqualification consent agreements, provides that social services districts which contemplate the use of DCA's must enter into written agreements with the appropriate prosecutors, which give the social service districts opportunity to send advance written notification of the consequences of signing a DCA to the household when deferred adjudication is contemplated. 18 NYCRR 359.4(b)(3). Similarly, the federal regulations provide that the state agency shall enter into an agreement with the prosecutor's office which provides for advance written notification to the household member of the consequences of consenting to a DCA in cases of deferred adjudication. 7 CFR 273.16(h)(1)(i).

Specifically, the state regulations provide that if the prosecutor requests or authorizes a social services district to assist in obtaining a DCA, a copy of the DCA, together with the notification of the consequences of signing the DCA, must be provided to the accused individual **at least 10 days prior to the execution of the DCA**. 18 NYCRR 359.4(b)(4).

Furthermore, the accused individual must be advised that he or she may obtain a legal or

other authorized representative for counsel and advice prior to and at the time the DCA is executed by an accused individual. 18 NYCRR 359.4(b)(4).

Moreover, a DCA must be in a format prescribed by the department and must include the following:

(i) notification to the accused individual of the consequences of signing the agreement and consenting to a disqualification penalty;

(ii) a statement for the accused individual to sign indicating that he or she understands the consequences of signing the agreement;

(iii) a statement that signing the agreement will result in a disqualification of the accused individual and a reduction of assistance or food stamps for the disqualification period;

(iv) a statement describing the disqualification period which will be imposed; and

(v) a statement that the remaining members of the household will be responsible for repayment of the overpayment or overissuance.

18 NYCRR 359.4(b)(1).

Contrary to the requirements of federal and state regulation, the proposed DCA and notice of consequences were not given to Mr. [redacted] in advance of his being asked to sign them. In fact, the date that the DCA was signed was the day before the DA letter and the notice of consequences were dated. Clearly Mr. [redacted] was given no opportunity to review the documents or make a decision before he was pressured to sign, much less having the 10 days to consider the information that the regulation requires. 18 NYCRR 359.4(b)(4).

Mr. [redacted] was not advised that he had the right to have counsel present for the meeting with the investigator, nor was he given the opportunity to speak with an attorney at the time of

signing the agreement, or to take the papers back home and consult with an attorney before making a decision. 18 NYCRR 359.4(b)(4). Further, neither the DCA nor the DA letter describes the alleged fraud, so as to put him on notice of what he is alleged to have done, and allow him to consider the matter intelligently prior to the meeting with the investigator.

The DCA in this case was not presented to Mr. [redacted] in the context of a deferred adjudication in a criminal proceeding, as is contemplated in the federal and state regulations. Investigator Wierzbicki testified that the case had not yet been referred to or accepted by the District Attorney's office, and no request for prosecution had been made by DSS. Similarly, the letter from the DA's office makes it clear it had not yet reviewed the matter to determine if prosecution was warranted. Rather, the local Department of Social Services was attempting to settle this matter "as a civil action" by having the District Attorney's office send out the DCA letter. (Hearing Packet at p. 6). Per the testimony of Investigator Wierzbicki, this is the agency's usual practice.

Per the regulations, an intentional program violation (IPV) case may be resolved in one of four ways. 1) The county department of social services may refer the matter to the Department for an administrative disqualification hearing, in which case the agency must prove the intentional program violation by clear and convincing evidence. 7 CFR 273.16(e); 18 NYCRR 359.5. 2) If the case warrants a referral for an administrative disqualification hearing, that hearing may be waived by an adequate administrative hearing waiver, provided that the requirements for such a waiver are met. 7 CFR 273.16(f); 18 NYCRR 359.7. 3) The case can be referred to a prosecutor's office for a judicial prosecution, in which case the prosecutor must prove the IPV beyond a reasonable doubt, and the accused person will have all of the rights of a criminal defendant (counsel, discovery, confrontation, etc). 7 CFR 273.16(g); 18 NYCRR 359.4(a). 4) Having accepted a case for

prosecution, the prosecutor's office and the accused person may agree to enter into a DCA as a deferred adjudication of the prosecution. 7 CFR 273.16(h); 18 NYCRR 359.4(b).

The procedure used in this case represented none of the above four possible dispositions. The agency encountered an instance of non-reported income to Mr. [redacted] son, when Mr. [redacted] himself reported the income some months later in a subsequent application. The agency did not refer the case to the District Attorney's office for prosecution, nor did it refer to the Department to review for an administrative disqualification hearing. Instead, the agency asked the District Attorney's office to send out a letter on DA letterhead, discussing the possibility of future prosecution, and seeking to have Mr. [redacted] settle the matter through some sort of "civil action" in order to avoid the threat of criminal prosecution.

As was found in *Matter of the Appeal of Erie County DSS v. A.C.*, FH No. 3444058J, the agency cannot pursue a civil action through the District Attorney's office. As that decision found, "whatever the Agency was trying to accomplish in its correspondence with the Appellant was outside the scope of the law." In *Matter of Erie County*, as in the case at bar, the agency merely referred a criminal charge to the District Attorney, and then instructed the client to sign disqualification papers. There, as here, there was no evidence that the district attorney accepted the case and authorized the agency to enter into a DCA. Further, in both cases, there is no evidence that the required notice and instruction concerning the DCA were timely provided to the appellant. *Matter of Erie County*, *supra*, at pp. 5-6. The agency did not establish that it had procured either a court conviction, an appropriate DCA, a decision after an administrative disqualification hearing, or a waiver of a disqualification hearing. In the absence of one of these methods, the notice of sanction should not have been issued. *Matter of Erie County*, *supra*, at p. 6.

Moreover, Mr. [redacted] was improperly threatened both in writing and in person with criminal prosecution if he did not immediately sign the Disqualification Consent Agreement . This practice is extremely problematic for several reasons. First, threatening criminal prosecution of an individual suspected of fraud is not only traumatizing for the individual, it is coercive, potentially causing the individual to sign a waiver even if they do not believe they've committed fraud. The 2004 FNS Guidance (Exhibit "I") states, "The consequences of losing a judicial proceeding are potentially so severe when contrasted with "merely" losing one's benefits for 12 months, that it is conceivable that innocent clients will sign . . .waivers rather than risk the alternative." Indeed, the U.S. Supreme Court has found constitutional violations when an individual was given the choice between substantial civil penalties or criminal prosecution. In *Garrity v. New Jersey*, the U.S. Supreme Court stated, "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." 385 U.S. 493 (1967).

Finally, according to the Fraud Investigator's report, the Department became aware of the SSI income to Mr. [redacted] son when it was included on an application for cash assistance made by Mr. [redacted] himself. (Fair Hearing Packet at p. 12). This self-disclosure is indicative of an inadvertent household error at worst, and not an intentional program violation. This is exactly the type of self-reporting that the Department should want to encourage, not pursue as a fraud investigation.

Although Mr. Wierzbicki claimed to have received no training on the treatment of inadvertent household error, the SNAP Sourcebook, in its section on Intentional Program Violations, states that unless specifically granted written authorization to proceed directly on a SNAP IPV, a

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Although Mr. Wierzbicki claimed to have received no training on the treatment of inadvertent household error, the SNAP Sourcebook, in its section on Intentional Program Violations, states that unless specifically granted written authorization to proceed directly on a SNAP IPV, a

local district must initially treat an alleged IPV as an inadvertent household error, prior to either referring the case to the district attorney or processing the allegation for an administrative disqualification hearing. OTDA SNAP Sourcebook, Section 6, p. 156. In this case, absent a referral for either prosecution or administrative disqualification hearing, this unreported income should have been treated as an inadvertent household error, and pursued as an overpayment.

CONCLUSION

For the foregoing reasons, the purported Disqualification Consent Agreement in this case was not authorized by law, nor did the agreement comport with the strict requirements for a DCA, as contained in state and federal regulations. Absent compliance with the regulations, Mr. [redacted] should never have been forced to make a choice between giving up his SNAP benefits or risking his liberty. Because the DCA was invalid, it is respectfully requested that the Notice of Decision dated August 22, 2014, discontinuing Appellant's SNAP benefits for one year, be reversed and set aside.

Moreover, because it appears from the testimony of the agency's Coordinator of Investigations that Onondaga County Department of Social Services engages in a similar process in each case, and that these inappropriate DCA's will continue if unchecked, it is respectfully requested that the Department issue an instruction to Onondaga County to modify its policies and practices regarding DCAs so as to comport with state and federal law and regulations.

Respectfully Submitted,

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(315)-703-6592

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOVELY H., GLORIA Q., AND MICHELE N., individually and on behalf of all other similarly situated,

Plaintiffs,

-v-

VERNA EGGLESTON, as Commissioner of the New York City Human Resources Administration,

Defendant.

05 Civ. 6920 (KBF)

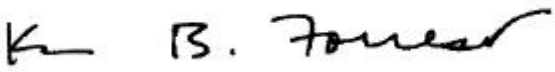
ORDER

KATHERINE B. FORREST, District Judge:

The Court has reviewed the Proposed Stipulation and Order of Settlement (see attached) and preliminarily approves it, subject to the fairness hearing.

SO ORDERED.

Dated: New York, New York
March 11, 2015



KATHERINE B. FORREST
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOVELY H., GLORIA Q., and MICHELE N., COURTNEY B., LAURA S., EULA S., individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

VERNA EGGLESTON,[1] as Commissioner of the New York City Human Resources Administration,

Defendant.

STIPULATION AND ORDER OF SETTLEMENT

05 CV 6920 (KBF)

WHEREAS, Plaintiffs commenced this action by filing a class action Complaint on or about August 3, 2005, alleging, inter alia, that the transfer by the New York City Human Resources Administration ("HRA") of the public assistance cases of individuals from their local Job Centers to one of three specialized centers ("WeCARE hubs" or "hubs") in connection with the implementation of the Wellness, Comprehensive Assessment, Rehabilitation and Employment ("WeCARE") program, violated state, federal, and local law;

WHEREAS, Plaintiffs simultaneously moved for class certification and a preliminary injunction;

WHEREAS, in a decision dated April 19, 2006, the Court certified a class consisting of "recipients of public assistance, food stamps and/or Medicaid who have received or will receive a notice from the New York City Human Resources Administration involuntarily transferring their case to one of three 'hub

[1] Pursuant to Federal Rule of Civil Procedure Rule 25(d)(1), Commissioner Steven Banks is automatically substituted as a party for claims originally brought against Verna Eggleston, the former Commissioner of the Human Resources Administration.

centers' in Manhattan, the Bronx or Brooklyn in connection with the WeCARE program" and a subclass within the main class of members "who (a) have a physical or mental impairment that substantially limits one or more major life activities within the meaning of the Americans with Disabilities Act of 1990, (b) have a record of such an impairment, or (c) are regarded as having such an impairment," Lovely H. v. Eggleston, 235 F.R.D. 248 (S.D.N.Y. 2006);

WHEREAS, in the April 19, 2006, decision, the Court granted Plaintiffs' Motion for a Preliminary Injunction to the extent that Defendant was prohibited from reassigning Class Members' (and their associated persons') cases to the hub centers involuntarily and Defendant was ordered to offer WeCARE participants already reassigned to a hub center the option of conducting through their nearest neighborhood center all of the interactions available to non-disabled benefit recipients through those offices, id. at 262-63;

WHEREAS, by letter dated May 3, 2006, HRA informed the Court that it intended to close the WeCARE hubs and transfer hub clients to the local center that served their zip code of residence, see letter from Martha Calhoun to Hon. Laura Taylor Swain, May 3, 2006;

WHEREAS, the last hub center was closed in July 2006;

WHEREAS, by Notice of Motion dated August 4, 2006, Plaintiffs moved to amend the Complaint;

WHEREAS, by Memorandum Opinion and Order dated November 15, 2006, the Court granted Plaintiffs' motion to amend the Complaint;

WHEREAS, Plaintiffs filed an Amended Complaint dated December 11, 2006;

WHEREAS, by Stipulation so ordered by this Court on February 3, 2010, the class definition was amended to be:

> recipients of public assistance, food stamps and/or Medicaid who (1) are or will be designated as participants in the WeCARE program or (2) individuals who were part of a case that was designated as "homebound" by HRA and had that designation removed through the posting of an HRA NYCWAY computer Action Code 19HC;

WHEREAS, by Stipulation so-ordered by this Court on February 1, 2011, the class definition was further amended to be:

> Individuals who meet one of the following three criteria: (1) individuals who are, were, or will be recipients of public assistance, food stamps and/or Medicaid who are, were, or will be designated as participants in the WeCARE program; or (2) individuals who were recipients of public assistance, food stamps and/or Medicaid who were part of a case that was designated as "homebound" by HRA and had that designation removed through the posting of an HRA NYCWAY computer Action Code 19HC or (3) individuals who are, were, or will be recipients of cash assistance and/or food stamps who have a physical, mental or medical impairment within the meaning of the New York State Human Rights Law § 292(21) and who request to be designated as "homebound" by HRA;

WHEREAS, Plaintiffs and Defendant HRA (collectively, "the Parties") previously entered into a Stipulation submitted to the Court dated March 14, 2012, resolving, subject to approval by the New York State Office of Temporary and Disability Assistance ("OTDA"), issues related to Plaintiffs' claims for benefits lost in connection with the implementation of the WeCARE hubs for Class Members with active Cash Assistance cases, and on March 15, 2012, Plaintiffs submitted a Second Motion for Partial Summary Judgment (ECF Doc. No. 164) concerning entitlement to retroactive Cash Assistance benefits for Class Members with closed cases;

WHEREAS, in December 2013, the Parties asked the Court to adjourn the scheduled trial to permit the Parties to proceed with a settlement process;

WHEREAS, the Parties executed a Stipulation and Order of Partial Settlement dated August 7, 2014 ("Partial Settlement Stipulation"), that resolved Plaintiffs' Second Motion for Partial Summary Judgment regarding claims for retroactive Cash Assistance, SNAP, and Medicaid for Class Members with closed cases;

WHEREAS, by Stipulation so-ordered by this Court on September 19, 2014, the Parties agreed to interim treatment of Class Members, specified therein, that has occurred while settlement negotiations on the remaining issues in this action have proceeded (the "Interim Agreement");

WHEREAS, the Court subsequently held a fairness hearing regarding the Partial Settlement Stipulation on October 31, 2014, and, by Order issued on that date, contingently found the Partial Settlement Stipulation to be fair, reasonable, and adequate;

WHEREAS, the Court stated in its October 31, 2014, Order that its approval of the Partial Settlement Stipulation would be effective on November 24, 2014, assuming no objections were received by that date, in accordance with the requirements of the Class Action Fairness Act of 2005;

WHEREAS, by Order dated November 24, 2014, the Court approved the Partial Settlement Stipulation;

WHEREAS, the Parties have continued to negotiate the injunctive relief portion of the settlement of this litigation;

WHEREAS, the Parties desire to resolve the remaining issues raised in this litigation without further proceedings;

WHEREAS, the Parties desire to settle this action on terms and conditions just and fair to all Parties;

WHEREAS, the Parties have conducted extensive, arms-length negotiations to resolve the remaining issues in this action, and have resolved those issues as specified in this Stipulation and Order of Settlement ("this Stipulation");

WHEREAS, HRA is undertaking a number of agency-wide reforms designed to improve access to benefits, increase participation in programs, and minimize unnecessary Negative Case Actions for all HRA clients;

WHEREAS, HRA is undertaking an agency-wide initiative to review and revise its written materials with the goal of improved clarity and simplicity;

WHEREAS, HRA is undertaking a number of initiatives to improve communication between the Agency and its clients, including expanding the modes of communication available such as the ability to transact business remotely;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, BY AND BETWEEN THE UNDERSIGNED, AS FOLLOWS:

DEFINITIONS

1. "Autoposting Negative Case Actions" means an HRA computer practice by which a Negative Case Action is imposed automatically, without first requiring a staff member to review relevant information in the case file or to contact the client.

2. "BEV" means the HRA "Bureau of Eligibility Verification."

3. "BPS" means the "Biopyschosocial Assessment" conducted by WeCARE to evaluate a client's functional capacity and ability to participate in work activities.

4. "Cash Assistance" or "CA" means Family Assistance benefits authorized by 42 U.S.C. §§ 601 et seq., 42 U.S.C. § 1320b-7, and 8 U.S.C. §§ 1611 et seq., implemented in New York pursuant to N.Y. Soc. Serv. Law §§ 349 et seq.; and/or Safety Net Assistance benefits provided pursuant to N.Y. Soc. Serv. Law §§ 157 et seq.

5. "Class Member" means an individual who falls within the class definition certified by the Court in Lovely H. v. Eggleston, 05 CV 6920 as amended most recently by Order of the Court dated February 1, 2011:

> Individuals who meet one of the following three criteria: (1) individuals who are, were, or will be recipients of public assistance, food stamps and/or Medicaid who are, were, or will be designated as participants in the WeCARE program; or (2) individuals who were recipients of public assistance, food stamps and/or Medicaid who were part of a case that was designated as "homebound" by HRA and had that designation removed through the posting of an HRA NYCWAY computer Action Code 19HC or (3) individuals who are, were, or will be recipients of cash assistance and/or food stamps who have a physical, mental or medical impairment within the meaning of the New York State Human Rights Law § 292(21) and who request to be designated as "homebound" by HRA.

6. "Conciliation" means an opportunity to discuss with HRA staff whether an alleged infraction in an HRA-required work activity was "willful" and without "good cause," as provided by N.Y. Soc. Serv. Law § 341.

7. "Conference" is a client-initiated discussion with HRA staff provided by 18 N.Y.C.R.R § 358-2.4.

8. "CRT" means "Clinical Review Team" and refers to a WeCARE review or reassessment of a Class Member's functional capacity and ability to participate in work activities.

9. "Disability Inquiry Methods" means the range of tools used by the Agency to identify individuals who may need RAs for disabilities, including Disability Inquiry Scripts, Learning Disabilities and Cognitive Impairment Screening tools, Mental Health Screening Tools and any such other tools the Agency may adopt in consultation with the Expert Consultant retained pursuant to paragraph 50(b) of this Stipulation.

10. "Disability Insert" refers to a notice informing clients how to request an RA that also serves as a form for that purpose. The current version of the form is HRA-102c (01/26/15), which may be changed by the agreement of the Parties.

11. "DVE" refers to the Diagnostic Vocational Evaluation conducted for Class Members assigned to the VRS track.

12. "Effective Date" refers to the date on which all of the following have occurred:

    a. The Court has so-ordered and entered the Stipulation and Order of Settlement, following notice to the Class and a fairness hearing as prescribed by Rules 23(c)(2) & 23(e) of the Federal Rules of Civil Procedure and compliance with the Class Action Fairness Act, 28 U.S.C. § 1715;

    b. The Court has entered an Order and Final Judgment in this action, and 30 days have passed after entry of the Order and Final Judgment. If there is an appeal (or if there are multiple

appeals) of the Court's Order and Final Judgment, the Defendant may move for a stay of the Effective Date.

13. "Effective Period" refers to the period that begins on the Effective Date and ends on the date that the Court's jurisdiction over this Stipulation and Order terminates.

14. "FCO" refers to Functional Capacity Outcome, the indication of a Class Member's ability to participate in HRA work activity programs which is the outcome of the WeCARE BPS and/or CRT assessment.

15. "Federal Disability Benefits" means the Supplemental Security Income ("SSI") and Social Security Disability ("SSD") programs administered by the Social Security Administration under Title II and Title XVI of the Social Security Act, 42 U.S.C. § 401, et seq. and 42 U.S.C. § 1381, et seq.

16. "Home Visit Needed/Homebound" or "HVN/HB" is a Reasonable Accommodation that excuses a Class Member from attending HRA or Vendor appointments outside of the home by reason of a physical, mental, or medical impairment.

17. "HRA" or "the Agency" means the Human Resources Administration of the City of New York.

18. "Infoline" means a telephone call center operated by HRA or Vendor staff to address client inquiries and respond to information requests from clients.

19. "Interim Agreement" means the Stipulation so-ordered by the Court on September 19, 2014.

20. "Job Center" means any so-designated HRA office that administers Cash Assistance cases for Class Members.

21. "Medicaid" means the federal medical assistance program authorized by 42 U.S.C. §§ 1396 et seq., 42 U.S.C. § 1320b-7, and 8 U.S.C. §§ 1611 et seq. and implemented in New York State pursuant to N.Y. Soc. Serv. Law §§ 363 et seq.; or the New York State medical assistance program authorized by N.Y. Soc. Serv. Law §§ 363 et seq.

22. "Negative Case Action" is a reduction or discontinuance of Cash Assistance, including a sanction or case closing.

23. "New York State Modified Mini Screen" means the mental health screen that has been validated by the New York State Office of Temporary and Disability Assistance.

24. "Notice of Decision" means a notice HRA uses to advise clients of various case actions that affect their benefits.

25. "OCSE" means the HRA Office of Child Support Enforcement.

26. "Reasonable Accommodation" or "RA" means a change or adjustment to the Agency's policies or procedures to avoid discrimination on the basis of disability and to afford qualified individuals with meaningful access to the benefits and services provided by the Agency.

27. "Residual Functional Capacity" or "RFC" is a term used by the Social Security Administration and defined in regulations at 20 C.F.R. §§ 404.1545, 416.945.

28. "Robo-call" refers to an automated telephone call to clients to communicate a pre-recorded, scripted message.

29. "Successful Instance of Outreach" means outreach resulting in compliance.

30. "Supplemental Nutrition Assistance Program" or "SNAP" (formerly known as "Food Stamps") means the program that provides benefits pursuant to 7 U.S.C. §§ 2011 et seq., 42 U.S.C. § 1320b-7, and 8 U.S.C. §§ 1611 et seq. and implemented in New York by N.Y. Soc. Serv. Law §§ 95 & 97.

31. "SNAP Access Alternatives" means the methods of communicating with HRA regarding a SNAP Only Case other than through a face-to-face appointment at a SNAP Only Center, including telephone, mail, Internet, facsimile, or through the client's authorized representative.

32. "SNAP Only Case" shall mean a case in which the individual is or was a recipient of SNAP but is not currently receiving Cash Assistance benefits. A

SNAP Only Case may or may not include an individual who is a recipient of Medicaid benefits.

33. "SNAP Only Center" is an HRA office that administers SNAP Only Cases.

34. "SSI" means "Supplemental Security Income," a Federal Disability Benefit program administered by the Social Security Administration.

35. "Travel Companion" refers to a person whose availability HRA must take into account when scheduling appointments for a client so that the person can accompany the client to HRA appointments.

36. "Vendor" means an entity that, through contractual, licensing, or other arrangements, provides services or activities on behalf of HRA to HRA clients.

37. "VRS" refers to the WeCARE Vocational Rehabilitation Services track.

38. "WeCARE" refers to the program through which HRA and its vendors, including any subcontractors, assess the extent and impact of applicant and recipient disabilities and provide them with assistance related to employment, training, or other programs. This includes any successor program to WeCARE operated either by HRA itself or through a Vendor that serves essentially the same or similar functions.

39. "Wellness" refers to the WeCARE Wellness Track."

40. "WEP" means the "Work Experience Program" as defined in N.Y. Soc. Serv. Law § 336-c.

DEFENDANT'S OBLIGATIONS

41. HRA agrees to implement the policies and practices contained in this Stipulation within six (6) months of the Effective Date unless otherwise specified herein or the parties agree to a longer implementation period. Defendant will continue to comply with the provisions of the Stipulation so-ordered by the Court on September 19, 2014 (the "Interim Agreement"), for six (6) months after the Effective Date, at which point the Parties will meet

and confer about whether the Interim Agreement or any provision thereof should be terminated or modified. Plaintiffs will not unreasonably refuse a request by Defendants to modify the terms of the Interim Agreement, to the extent that such modification is either (a) necessary to implement a provision of this Stipulation or (b) warranted based on a change in circumstances, including the introduction of other protections of Class Members from unwarranted interruptions of benefits.

42. HRA will provide drafts of all policies and procedures created or modified as a result of this Stipulation, including those of WeCARE, to Plaintiffs' counsel for their review and comment. Plaintiffs' counsel will provide any comments within fourteen (14) days or as otherwise agreed to by the parties. If Plaintiffs' counsel believe that Defendant's failure to incorporate Plaintiffs' counsel's comments and recommendations is not minimal, but is sufficiently significant as to constitute a systemic failure to comply with the provisions of this Stipulation, Plaintiffs may seek relief from the Court consistent with paragraphs 141 through 143.

43. HRA will conduct a review of its current procedures including those of WeCARE and Vendors that serve Class Members to ensure that Class Members are able to obtain benefits and maintain access to benefits and that its methods of administration do not discriminate on the basis of disability and will revise and reissue any procedures as necessary ("Disability Impact Review"). Going forward, HRA will conduct a Disability Impact Review of new policies affecting Class Members before they are published.

44. HRA will not discriminate against Class Members on the basis of disability or handicap in any of its programs, including those programs operated by WeCARE.

45. HRA and WeCARE will have effective systems in place to consistently accept and record requests for RAs and provide needed RAs to Class Members to enable them to access HRA benefits and services and to maintain access to HRA benefits and services.

46. HRA and WeCARE will provide effective and adequate notice of RA rights, determinations, and procedures to Class Members.

47. Class Members can ask for disability help and/or a reasonable accommodation ("RA") at any portal of the Agency and WeCARE.

48. Any request made by a Class Member to obtain help to access benefits or maintain access to benefits that is related to disability will be deemed a request for an RA by HRA and WeCARE.

49. If HRA contracts with outside Vendors to do tasks that HRA is obligated to do under this Stipulation, the relevant provisions of this Stipulation will apply to such Vendors.

REASONABLE ACCOMMODATION PROVISIONS

Reasonable Accommodation Process

50. **Identification of Persons Needing Disability Help/Disability Screening**:

a. Disability Inquiry Methods. HRA will develop and HRA and WeCARE will implement "Disability Inquiry Methods," consisting of a range of tools to identify individuals who may need RAs for disabilities in order to comply with program requirements and maintain their access to benefits as described in paragraphs 51 through 52.

b. Expert Consultant. Defendant will retain an expert consultant to assist in the development and implementation of the Disability Inquiry Methods described in paragraphs 51 through 52 (the "Expert Consultant"). The Expert Consultant may, upon agreement of the Parties, be asked to consult on the development and implementation of other policies pursuant to this Stipulation. Defendant will solicit recommendations from Plaintiffs' counsel and seek their agreement on the expert selected; Plaintiffs will not unreasonably withhold their agreement. Implementation in areas for which the Defendant retains the Expert Consultant will be completed within six (6) months of the recommendations of

the Expert Consultant, which shall be issued within 120 days of the Effective Date, unless an alternative date is agreed upon by the Parties in consultation with the Expert Consultant.

51. **Disability Inquiry Methods**

a. Disability Inquiry Scripts. With the help of the Expert Consultant described in paragraph 50(b) above, HRA will develop and use Disability Inquiry Scripts, which shall be guided questions to aid HRA and Vendor staff in identifying client disabilities that may pose barriers to complying with program requirements and/or maintaining access to benefits as well as needed RAs. Disability Inquiry Scripts shall be used at application and recertification, and a broad range of interactions between clients and the Agency as recommended by the Expert Consultant and in consultation with Plaintiffs' counsel.

b. Learning Disabilities and Cognitive Impairments Screening. With the help of the Expert Consultant, HRA will develop tools to identify clients who have learning disabilities or cognitive impairments to the extent that such tools are brief and can be effectively administered by non-clinical HRA or Vendor staff. This Learning Disability and Cognitive Impairment Screening will be voluntary and will be offered at application (including re-applications), recertification, upon client request, and at any other client interactions and other events recommended by the Expert Consultant and agreed to by the parties.

c. Mental Health Screening. HRA will implement voluntary mental health screening, such as the New York State Modified Mini Screen within six (6) months of the Effective Date of this Stipulation, unless an alternative date is agreed upon by the Parties in consultation with the Expert Consultant. The Mental Health Screening will be made available to be taken voluntarily by clients at application (including re-applications), recertification, upon client request, and other events

recommended by the Expert Consultant and agreed to by the Parties.

52. HRA will review policies with respect to those Class Members who are referred to both Substance Use assessment and WeCARE to provide a process for identifying and implementing needed RAs.

53. Actions based on Information from Disability Inquiry Methods. With the help of the Expert Consultant, HRA will develop protocols for the Agency and WeCARE to act upon the information yielded from the Disability Inquiry Methods to offer RAs, make appropriate referrals, and to prevent inappropriate Negative Case Actions consistent with paragraphs 103 through 109. Clients referred to WeCARE from Job Centers will be screened for needed RAs as described in paragraphs 50 through 52 above and will be offered RAs to address identified needs to enable Class Members to attend WeCARE appointments. WeCARE will review the results of any Disability Inquiries referenced above that have been conducted. To the extent such Disability Inquiries have not been conducted, WeCARE will conduct these inquiries or an equivalent approved by the Expert Consultant. With the help of the Expert Consultant, WeCARE will develop Protocols to act upon the information yielded from the Disability Inquiry Methods. Plaintiffs will be provided with copies of any Disability Inquiry Methods and Protocols for their review and comment. Comments will be provided within fourteen (14) days unless otherwise agreed to by the Parties.

54. Right not to disclose a disability or to accept an RA. Clients cannot be required to disclose a disability or to accept an RA. In instances where HRA, including WeCARE, suspects that a Class Member has a disability and s/he is unwilling to disclose the disability or cooperate with efforts to identify the suspected disability, the need to comply with program requirements and available RAs that may assist the Class Member in complying with program requirements will be discussed. If the Class Member does not disclose or cooperate, s/he may be required to comply with program requirements without RAs. HRA will also offer the Class Member a referral to WeCARE. The Expert Consultant will assist HRA and

WeCARE to develop a protocol for handling such cases to maximize compliance with HRA requirements consistent with existing regulations.

55. Self-identified need for RAs. Clients may self-identify the need for an RA. Clients need not undergo screenings, including those as specified in paragraphs 50 and 51 before requesting an RA of HRA or WeCARE.

56. **Reasonable Accommodations Available to Clients**. HRA and WeCARE will accept for consideration all requests for RAs made by Class Members.

a. Menu of Reasonable Accommodations. HRA will maintain a Menu of Reasonable Accommodations ("RA Menu") which shall be a non-exclusive list of types of RAs that may be provided by the Agency and WeCARE. Even if a particular RA is not on the RA Menu, the request must still be considered. At a minimum, this RA Menu will include the following RAs:

i. No appointments during rush hour;

ii. Flexible Scheduling (because of a disability the Class Member cannot travel at or is not available for certain days and times and needs appointments scheduled consistent with those limitations);

iii. Priority Queuing to minimize wait times;

iv. Assistance with reading applications or forms;

v. Assistance with completing applications or forms;

vi. Scheduling of appointments based on Travel Companion availability;

vii. Individualized assistance for the blind/visually impaired;

viii. Sign Language Interpreter;

ix. Individualized assistance for the hearing impaired;

x. Case transfers or blocking case transfers to new centers;

xi. Temporary travel exemption for pending para-transit (Access-A-Ride) approval; and

xii. Home Visits Needed/Homebound ("HVN/HB") status.

b. Provision of RAs in Waiting Rooms and Non-Job Center locations. HRA and Vendor staff will be trained to identify and to the extent feasible offer RAs to those who need them at reception in Job Centers, BEV, OCSE Borough Offices, and WeCARE. HRA will develop and implement methods to monitor the provision of such RAs.

57. **Recording Requests for Reasonable Accommodations**. The following types of RA requests will be recorded in a manner that allows for their implementation Agency-wide and at Vendor locations:

a. Menu RAs. Requests for RAs that are listed on the RA Menu in paragraph 56(a) ("Menu RA") will be recorded; and, where a Class Member needs a Menu RA to attend an initial appointment at an HRA or Vendor site, the request will be recorded in such a manner that enables the Agency to provide the RA for the initial appointment.

b. Additional time to meet a deadline. Requests from Class Members for additional time to meet a deadline will be recorded.

c. Other RAs Needed More than One Time. Any other type of RA that is reasonably anticipated to be needed more than one time (on an ongoing basis) will be recorded.

d. Work-Related RAs. Any request for an RA needed by a VRS client to participate in work activities, including RAs that are related to a specific job site, such as a piece of adaptive equipment, will be presumed to be needed more than one time and will be recorded.

58. **Submission of Documents in Support of RA Requests**. Clients will be able to submit documents in support of their RA request by mail, fax, or email and will be given receipts for those submissions.

59. **Provisional RA Implementation: RAs provided pending RA determination and appeal**. When a Class Member requests an RA from the

RA Menu, other than those related to center transfers, the RA will be provided provisionally during the period that the RA request is being processed and until the appeal period has ended. HRA and WeCARE will provide RAs not included on the RA menu during the period that the RA request is being processed and until the appeal period has ended, unless doing so is not operationally feasible.

60. **Job Center Transfer RAs**. When Class Members request RAs for Job Center transfers, their cases will be monitored so that no Negative Case Actions related to failures to appear at their Job Centers will be implemented.

61. **Notice Confirming Request for Reasonable Accommodation.** Clients who request ongoing RAs (those recorded pursuant to paragraph 57) will be given written notice confirming receipt of the RA request, listing the RA requested, and explaining that the RA will be implemented pending a final determination. The notice will include a telephone number to contact HRA or WeCARE for any inquiries related to the RA request. The notice will be provided in-person when Class Members make requests at Job Centers and, wherever possible, the information will also be conveyed orally. Clients who are provided an RA to attend an initial appointment at an HRA Vendor will be given a notice describing the RA.

62. **Medical Documentation and Provision of RAs**

a. RAs that will be granted without medical documentation. HRA workers and Vendor staff will grant the following RAs on an ongoing basis without any medical documentation from Class Members:

i. Sign Language Interpreter;

ii. Individualized assistance for the hearing impaired;

iii. Individualized assistance for the blind/visually impaired;

iv. Assistance with reading applications or forms;

v. Assistance with completing applications or forms;

vi. RAs, except for Home Visits Needed/Homebound ("HVN/HB") status and priority queuing, for Class Members permanently exempt from work requirements, such as those of at least 60 years of age;

vii. RAs needed to attend initial appointments at HRA programs and other vendor sites, including WeCARE, and/or otherwise comply with initial WeCARE requirements.

b. Where medical documentation is required. For Class Members required to submit medical documentation in support of a request for an RA, HRA and WeCARE will:

i. accept documentation from all providers and weigh the documentation provided consistent with the Social Security Administration ("SSA") "Treating Physician Rule" as specified in paragraph 79 below;

ii. inform Class Members that assistance is available when needed to help secure medical documentation and provide such assistance when it is requested;

iii. give Class Members thirty (30) days to submit any required medical documentation and an additional fifteen (15) days upon request;

iv. in circumstances where a provider demands payment for Class Member records, either assist with obtaining the records or pay for the records;

v. for Class Members who have requested HVN/HB status, HRA will search its own records for documentation regarding home care services or home attendant services, supportive housing applications filed (HRA 2010e forms), and WeCARE records from the past 12 months. Where such records are located, they will be used to inform the decision on the HVN/HB request and will only be used to deny the HVN/HB request if no other documentation is available and Outreach pursuant to paragraph 62(b)(viii) has been conducted.

vi. For Class Members who have requested an RA and have been evaluated by WeCARE within the past 12 months, and who are being required to submit medical documentation, WeCARE records will be searched for the past 12 months for relevant documentation; and will be used to inform the decision on the RA request and will only be used to deny the RA request when no other documentation is available and Outreach pursuant to paragraph 62(b)(viii) has been conducted.

vii. Where the medical documentation in a Class Member's file indicates that the Class Member has a chronic or persistent medical condition that imposes permanent functional impairments, an RA request will not be denied on the basis that the information is out of date;

viii. Where a Class Member has been required to submit medical documentation in support of an RA request and no such documentation has been received, HRA will conduct outreach to inform the Class Member of the need to submit medical documentation and the availability of assistance to obtain documentation prior to sending a Final Notice of Determination denying the RA request for lack of medical documentation.

63. **Reasonable Accommodation Determination Process**

a. Client Phone Number Inquiry and Additional Contacts. During the RA request process HRA will record client contact information along with (1) a secondary telephone number, if the Class Member chooses to provide it at which a Class Member wishes to be contacted; and (2) HRA will use the secondary telephone number when attempting to reach the Class Member by telephone. HRA will explain to Class Members that they have the option to use a mailing address that is different from their residential address.

b. Process for Review of RA and HVN/HB Requests.

i. Questions about medical documentation/other questions. If an initial reviewer of an RA request finds issues with the submitted medical documentation that need to be resolved to complete the review, such as if the documentation is unclear, illegible, or if there are contradictions in the documentation, HRA will reach out to the Class Member and/or provider to attempt to resolve these issues in order to make a more fully informed determination.

ii. Decision to Grant RA Requested. If the decision is to grant the requested RA, HRA will issue a "Final Notice of Determination" (as defined in accordance with paragraph 63(c), infra) granting the RA request.

iii. Decisions to Deny RA Requests or offer Alternatives. Initial decisions based on medical documentation to deny requested RAs or to offer alternatives will be reviewed by a supervisor. The review will include confirmation that any outreach required by this paragraph has been conducted.

(a) If the supervisor disagrees with an initial decision to deny the requested RA or offer an alternative, HRA will issue a Final Notice of Determination granting the original RA request.

(b) If a supervisor agrees with the decision to deny the requested RA or offer an alternative, a supervisor who is empowered to change the RA decision will contact the Class Member by telephone to discuss the RA request and, if appropriate, alternative RAs or offer more time to provide additional supporting documentation. HRA will then issue the appropriate notice based on the information obtained by telephone. If that information confirms the initial decision, HRA will issue a Final Notice of Determination denying the RA request or granting an

alternative RA. If that information leads to a reversal of the initial decision, HRA will issue a Final Notice of Determination granting the RA request.

(c) When supervisors approve initial decisions to deny requested RAs or to offer alternatives and Class Members cannot be reached by telephone within five (5) business days or the Class Member has not reached out to the Agency or WeCARE, HRA will issue a Final Notice of Determination in accordance with the initial decision.

c. Reasonable Accommodation Final Notices of Determination and Appeal Rights. HRA will issue RA Final Notices of Determination with the determination on the RA request. The notice will include (i) the determination as to whether the RA was granted, denied, or an alternative was offered along with a clear statement explaining why an RA was denied or an alternative was offered; (ii) a list of any documents reviewed; (iii) if the RA has been granted, instructions for Class Members on how the RA will be implemented (e.g., if the RA is Priority Queuing what to do when arriving at a Job Center; if assistance in reading or completing forms is needed, how to get that help); (iv) what Class Members should do if a granted RA is not being implemented; (v) instructions on how to appeal HRA's determination; and (vi) a telephone number for Class Members to call to discuss (i)-(vi) above. To the extent possible, the RA will also be communicated orally.

d. Appeals. Clients will have 30 days to appeal an RA determination of HRA or WeCARE. The RA will remain in effect during the 30-day period and pending the outcome of any appeal.

64. Termination of RAs. If HRA or WeCARE intend to stop providing an RA, HRA will issue a notice to the Class Member of this intention. This notice will include instructions on how to appeal HRA's determination to

discontinue the RA. The Class Member will have 30 days to appeal HRA's determination. The RA will continue to be provided during this period and pending the outcome of any appeal. The notice to the Class Member will include a statement to this effect. HRA may only initiate the termination of an RA if there is documented, new information that the Class Member no longer needs an RA. However, where an RA is granted for a fixed period of time the Class Member will receive notice in advance of its expiration and have the opportunity to submit documentation supporting the continuation of the RA. Where documentation is received the procedures in paragraph 63 will be followed; where no documentation is received the RA will expire if the outreach procedures in paragraph 62(b)(viii) have been followed.

65. System Deadlines. HRA and WeCARE will develop a mechanism to override certain system deadlines consistent with all legal requirements.

66. Client Telephone Access Related to RAs, RA Requests, and RA Complaints. At any time, a Class Member may inquire about the RA process; the status of a pending RA request, including whether all documentation has been submitted; report any changes in their own telephone numbers; discuss their RA needs; or make complaints about the RA process (e.g., that an RA has not been accepted, processed, or implemented) by calling his or her case worker, a supervisor, or a central number, which will be answered live during business hours. The Class Member contact will be recorded promptly (within 24 hours), and the Class Member will be provided an answer within a reasonable time defined as enough time to meet a deadline, or avert and/or abate an emergency. When appropriate, Class Members will be advised of fair hearing rights when they call to make such inquiries and complaints.

67. Client Services Screen. A Client Services Screen shall be accessible to client contact staff including staff at Job Centers, BEV, OCSE, and WeCARE which will include at a minimum the following information: pending and granted RAs, including HVN/HB status; the result of the most recent disability screen; current WeCARE status/track; Employability status;, and SSI status, if any.

WeCARE Provisions

WeCARE Reasonable Accommodation Determinations

68. RAs requested or identified at WeCARE will be provisionally granted and treated as ongoing RAs until a determination is made and notice will be provided to the Class Member pursuant to paragraph 61. RAs granted by WeCARE will be clearly communicated to the Class Member in writing, and to the extent possible, orally; and will be recorded in such a manner that they can be implemented agency-wide.

69. If a Class Member requests an RA at WeCARE and it is denied, the Class Member will be provided the opportunity to speak to a WeCARE supervisor who is empowered to change the RA decision. HRA will provide Final Notices of Determination to Class Members granted RAs at WeCARE. Final Notices of Determination for Class Members denied RAs at WeCARE or offered alternative RAs at WeCARE will explain appeal rights, including the right to keep an RA in place until the appeal period has terminated.

70. Final Notices of Determination for RA denials and offers of alternative RAs will include a clear statement explaining why an RA was denied or an alternative was offered. The determination will include a list of any documents reviewed.

71. WeCARE decision-makers who make RA determinations and who disagree with an RA identified by other individuals in the BPS assessment process will be required to articulate their reasoning in writing and this will be included in the BPS report offered to the Class Member pursuant to paragraph 82 infra.

72. The need for new RAs will be assessed and the need for RAs granted at WeCARE will be reassessed at Biopsychosocial ("BPS") or Clinical Review Team ("CRT") appointments and upon completion of Wellness Plans. Class Members undergoing reassessment will be given notice of the reassessment, including explanations of what documentation may be required and that they may receive assistance in obtaining this documentation. RAs may only be

terminated as a result of this reassessment if there is documented, new information that there is no longer a need for the RA.

73. WeCARE Vendors will assist WeCARE clients in applying for Access-a-Ride and will provide an exemption from in-office appointments while they apply for the service.

74. For Staten Island residents who cannot, for documented clinical reasons, take public transportation to their WeCARE appointments, HRA will provide transportation to the extent feasible. Staten Island Class Members determined to be unable to use the provided transportation for documented clinical reasons, will be exempted from attending WeCARE in person.

75. **Submission of Documents**. WeCARE clients will be able to submit documents by mail, fax, or email and will be given receipts for their submissions.

76. HRA will develop a mechanism at WeCARE Vendor sites to grant HVN/HB status or refer such cases for appropriate review.

WeCARE Evaluation/Biopsychosocial Assessments

77. When requested by Class Members or when Class Members are unable to obtain medical documentation, WeCARE will attempt to obtain releases from Class Members and assist them in obtaining medical documentation when needed by WeCARE in connection with WeCARE BPS or CRT evaluations, Wellness, Federal Disability Benefits applications, and RA (including HVN/HB) requests. WeCARE Vendors will inquire whether the Class Member needs assistance to obtain medical documentation when no such documentation is presented, assist in obtaining medical documentation when requested, and offer to do so when it appears Class Members may need assistance. Clients will not be infracted for being unable to provide medical documentation.

78. WeCARE physicians and other clinicians will review all medical documentation, including documentation from Class Members' treating providers, and make medical documentation provided by the Class Member

part of the Class Member's WeCARE record. The Class Member will be provided with a list of the medical documentation the clinicians considered in determining the Functional Capacity Outcome ("FCO").

79. WeCARE physicians and other clinicians will consider medical documentation provided by the Class Member as a factor in determining the Class Member's functional capacity, attributing weight to such documentation consistent with the SSA "treating physician rule," 20 C.F.R. § 404.1527, including the following factors set forth therein:

a. Examining vs. non-examining physician, type of specialty, and treatment relationship;

b. Length of treatment;

c. Type or frequency of treatment;

d. Detail and comprehensiveness of the documentation;

e. Consistency with other records;

f. Specialization; and

g. Other factors, including the treating source's understanding of Social Security disability programs and their evidentiary requirements.

80. As part of the BPS process, WeCARE will utilize the SSA's sequential evaluation process to determine whether Class Members are potentially eligible for Federal Disability Benefits. As per SSA's procedures; the sequential evaluation process will be conducted in a set order and Class Members who meet one of SSA's listings, equal an SSA listing, cannot perform any past relevant work based on Residual Functional Capacity ("RFC"), or cannot perform any type of work based on the medical-vocational guidelines, or "grid rules," will be referred to the SSI track.

81. As part of the CRT process, the sequential process will also be utilized. If a Class Member is found to meet or equal an SSA listing for disability, the reviewing CRT clinician will refer the Class Member to the SSI track. If the Class Member does not meet or equal a listing, then the CRT clinician will

need to determine the RFC. If the RFC can be determined based on the Class Member's WeCARE history, CRT review, and any documents a Class Member may bring in at the time of CRT, then the CRT clinician will continue to determine if a Class Member can perform any past relevant work or any type work. If the RFC cannot be determined, then the Class Member will be referred for a new BPS evaluation.

82. Class Members will be offered copies of their BPS reports.

Enhanced WeCARE Outreach

83. "Enhanced Outreach" will be conducted using specialized scripts for all missed WeCARE appointments. The purpose of Enhanced Outreach is to assist Class Members in overcoming barriers to participating in WeCARE, including identifying whether a clinical condition or need for an RA affected the Class Member's ability to attend the appointment, and to address any needs for RAs.

84. Components of Enhanced Outreach.

a. Enhanced Outreach will include the use of telephone calls; letters (where time permits); email where available; and, in limited circumstances, home visits to contact Class Members following missed appointments based on Client Contact Information; and additional Enhanced Outreach if the rescheduled appointment is also missed.

b. For the Vocational Rehabilitation Services ("VRS") track, WeCARE will conduct five (5) Successful Instances of Outreach per cycle of engagement before an infraction is posted without outreach.

c. Class Members in VRS who have reached their limit of five (5) Successful Instances of Outreach as referenced in paragraph b above will be assessed to determine if they need additional Case Management Services and, if appropriate, a referral to CRT before any infraction is posted.

d. Class Members in the Wellness track will not be subject to any limit on Successful Instances of Outreach.

e. WeCARE Vendors will use of the "test of reason" to excuse absences when the absence appears to be related to known clinical conditions.

f. WeCARE Vendors will record all outreach conducted in a form that can be tracked electronically.

WeCARE Wellness Track

85. Wellness track clients will have the option to conduct follow-up appointments by telephone.

WeCARE Vocational Rehabilitation Services Track

86. For those Class Members 50 years of age or older, the DVE assessment will include an assessment of Class Members' RFC to determine the likelihood of being found disabled under the SSA rules. If a Class Member is determined to be likely disabled pursuant to the SSA rules, he or she will be referred to the SSI track.

87. RAs found to be needed as a result of the DVE process will be provided to Class Members in all VRS activities and implemented and recorded as ongoing RAs as described in paragraph 57.

88. VRS participants will be assigned required hours not to exceed 35 per week. If reduced hours are appropriate consistent with the Class Member's functional capacity as determined in the DVE and needed RAs, the number of assigned hours will be reduced to 30, 25, or 20 hours as appropriate.

89. VRS track clients will have the option to participate in a range of activities consistent with the activities available to fully employable clients pursuant to HRA's Employment Plan consistent with Class Member preference and the results of the DVE. WeCARE Vendors will count job search activity hours as a work activity unless exempt. WeCARE will phase out WEP and replace it with other opportunities for Class Members on the VRS track.

Assisting Clients with SSI Applications

90. HRA will develop and implement standard protocols for WeCARE with respect to handling Class Members in the WeCARE SSI track (i) who have an appointed representative and (ii) those who do not have an appointed representative, with the goal of facilitating successful Federal Disability Benefits applications and appeals as applicable. Case Management Services for Class Members on the SSI track will include coordination with representatives for those Class Members with outside representation for their Federal Disability Benefits applications and appeals. WeCARE will inquire whether Class Members in the SSI track have a representative. Neither HRA nor its Vendors will contact SSA with respect to a pending Federal Disability Benefit claim or appeal if a Class Member is known to be represented without the consent of such representative, other than to ascertain if an appeal has been filed.

91. **Referral of Appeals**. HRA will develop a contract with a Vendor to which Class Members who have been denied Federal Disability Benefits on appeal can be referred for assistance with the SSA Appeals Council review process.

92. HRA will develop a contract with Vendors to evaluate and assist appropriate HVN/HB clients to apply for Federal Disability Benefits.

93. HRA will also consider and investigate developing a contract with a provider other than the WeCARE Vendors to assist SSI track clients and/or HVN/HB clients who need assistance with SSA Appeals Council Reviews and federal court appeals.

94. Clients who are placed on the WeCARE SSI track but who are not eligible for Federal Disability Benefits due to immigration status will remain exempt but will not be called in to apply for Federal Disability Benefits.

WeCARE Re-Engagement

95. Consistent with Agency-wide efforts to minimize unnecessary appointments, HRA will develop a procedure by which unengaged Class Members who have been referred to WeCARE within the past 12 months can elect to

accept a direct referral to WeCARE, rather than being called in to the Job Center.

96. For unengaged Class Members with a prior WeCARE history, HRA will review current HRA and WeCARE policies regarding track placement with the goals of minimizing the need for unnecessary appointments and increasing the accuracy of track placement and incorporate the principles specified below in a procedure:

a. When, during re-engagement at WeCARE, a Class Member (a) claims his previous track assignment was not appropriate; (b) has a case that has been remanded for re-assessment following a Fair Hearing request; or (c) reports a change in medical and/or mental health status to HRA or WeCARE, the Class Member will receive a new BPS or CRT.

b. WeCARE clients will be told about the outcome of the BPS or CRT and given the opportunity to disagree with the FCO/track placement. If Class Members provide copies of any documents not reviewed at a BPS or CRT, those documents will be reviewed. WeCARE may change the FCO/track assignment if appropriate.

c. Track Placement Presumption. Where Class Members were referred to WeCARE within a year of a previous WeCARE activity, they will not be placed in a track with greater engagement requirements than the track from their previous assignment unless a WeCARE clinician explains the placement in writing, including a clinical justification that the Class Member's functional capacity has improved in ways that would make the track requiring greater engagement appropriate.

97. **Voluntary participation after infraction**. WeCARE clients in VRS who are alleged to have infracted with WeCARE program requirements and are entitled to Conciliation may continue to voluntarily attend the program. If Conciliation is not successful or results in an appointment for a re-evaluation

of a Class Member's FCO, the VRS participation would end with the scheduling of a BPS or CRT appointment.

WeCARE Case Management Provisions

98. HRA will assess the case management needs of Class Members at BPS, CRT, and at such other intervals as appropriate.

99. Case Management Services will be provided to all WeCARE clients. Case Management Services will be tailored to the Class Members' individual needs as determined through assessments and interviews with Class Members. Case Management Services, including those listed in paragraph 101, will be set forth in a procedure.

100. Individual Case Managers. To the maximum extent feasible, Class Members will be assigned to an individual case manager. If teams of case managers are used to provide services for a cohort of Class Members, Class Members will be provided the names, contact numbers, and email addresses of the team members.

101. Focus. The focus of Case Management Services will be to assist Class Members to understand WeCARE program requirements, keep eligible cases active for Cash Assistance, and secure Federal Disability Benefits for those Class Members who are eligible. Case Management Services will include the services and interactions listed in Paragraphs (a) through (l) below as needed or appropriate for the individual Class Member.

a. Enhanced Outreach as described in Paragraphs 83 and 84 for missed WeCARE appointments, though Enhanced Outreach may be conducted by specialized WeCARE outreach workers rather than a Class Member's case manager.

b. Explain to Class Members Functional Capacity Outcomes/WeCARE Tracks assigned to Class Members (VRS, Wellness, Wellness Plus, SSI, or Fully Employable Without Limitations) and explain program requirements per FCO/WeCARE track.

c. Provide Class Members with Notification of Work Requirement ("NOWR") and explain Fair Hearing rights if Class Members disagree with determinations.

d. Clarify WeCARE program requirements for Class Members when necessary and assist Class Members with problem-solving regarding WeCARE program requirements.

e. Assist in the process to identify and secure RAs, including HVN/HB status, needed to comply with HRA and/or WeCARE requirements.

f. At any time in the WeCARE process Class Members may submit new medical documentation. Case Managers will review new medical documentation and, if indicated, refer Class Members to CRT when they have new or worsened clinical conditions and will consider the need for additional RAs and assist with securing needed RAs.

g. Assist in obtaining medical documentation when requested and offer to do so when it appears Class Members may need assistance.

h. Assist with completing forms, including HRA recertification mailer forms, when assistance is requested and offer to do so when it appears Class Members may need assistance based on observations or available information with respect to impairments, illiteracy, or other factors.

i. When meeting with Class Members will review NYCWAY records, remind Class Members of upcoming or missed HRA and WeCARE appointments, and address any anticipated needs or possible obstacles to compliance.

j. Provide referrals to community-based organizations for services as needed and appropriate.

k. Allow Class Members to communicate with WeCARE in-person, by email, and by phone. Case Managers will reply within a reasonable period of time not to exceed two (2)

business days if a message is left unless a shorter time frame is required to meet a deadline or avert and/or abate an emergency.

l. Determine whether Class Members need or receive other services, such as home care services, and either direct them to those services or work with their contacts there to connect Class Members with needed services.

102. Those individuals identified as needing a higher level of Case Management Services due to anticipated difficulty in maintaining benefits or accessing HRA and Vendor services will receive enhanced Case Management Services designed to assist them in complying with HRA requirements to ensure case continuity, including proactively reviewing upcoming WeCARE and HRA appointments and other responsibilities and assessing and addressing any anticipated needs or possible obstacles to compliance.

PROTECTIONS AGAINST UNNECESSARY NEGATIVE CASE ACTIONS

103. Going forward, HRA and WeCARE will not implement any new procedures for utilizing the practice of Autoposting Negative Case Actions.

104. Reduction of Unnecessary Appointments. HRA and WeCARE will continue to minimize mandatory appointments for Class Members.

105. **Appointment Reminders, Outreach, and Resolution Procedures**. The steps described below are in addition to the outreach described in the WeCARE and Case Management Sections in paragraphs 83 through 84 and 98 through 102 above and will be included in an HRA procedure:

a. Pre-appointment reminders. HRA will conduct Robo-calls to provide reminders of application and recertification appointments and recertification mailer obligations to Class Members with phone numbers, as well as agreed-upon RA information. A special Robo-call script will be developed for the 6-month recertification mailer reminder calls.

b. Post-appointment reminders.

i. Phone. Following missed recertification and application appointments, HRA will conduct Robo-calls to advise Class Members to reschedule their appointments within five (5) days from the scheduled appointment. HRA will prevent the Notice of Decision Process from initiating until after the 5-day period expires. The Robo-calls will include agreed-upon RA information.

ii. Letter. Following missed application or recertification interview appointments, HRA will send Class Members letters to inform them of the missed appointments and instructions for rescheduling the appointments. The letter will include the Disability Insert.

106. **Conference/Conciliation Procedures.**

a. The Conciliation notice will advise Class Members that they may request an RA needed to participate in Conciliation and include a phone number to make such requests. HRA will confer with Plaintiffs on the revised Conciliation notice. Information provided by a Class Member when requesting an RA, including RAs needed to participate in Conciliation or Conferences, may be used as a basis for a good cause determination.

b. HRA's Conciliation and Conference appointments will address disabilities and the need for RAs to comply with HRA requirements.

c. HRA will revise its Conciliation and Conference process to use a set of structured questions to guide discussion and to reveal a need for an RA.

d. When a participant raises a physical or mental impairment as a reason for the alleged infraction, HRA will grant the participant good cause and refer the participant to WeCARE.

e. Pre-Conciliation Outreach. HRA will provide Class Members with Pre-conciliation Outreach for non-WeCARE appointments for which Conciliation is available such as Job Center engagement appointments. Pre-conciliation Outreach will be conducted prior to issuance of a Conciliation Notice to Class Members who fail to comply with employment requirements and will include attempts to contact the Class Members by telephone and letter to attempt to resolve the infraction and address any barriers to compliance. If Pre-Conciliation Outreach is successful, the Class Member will not experience a related Negative Case Action.

f. Class members will be able to participate in Conference appointments by telephone, and a telephone number to request a telephone Conference will be listed in the appropriate notices.

107. **"Pre-Notice of Decision Case Review" for Class Members.** Before issuing a Notice of Decision pertaining to a Negative Case Action for Class Members HRA will:

a. conduct file reviews of Class Members' cases to determine, to the extent evident from the case record, whether there were factual errors, including a failure to provide a pending or granted RA prior to the issuance of Notices of Decision regarding Negative Case Actions. If the review shows a factual error or that a failure to provide a pending, granted, or needed RA may have led to the Negative Case Action, no Notice of Decision will issue.

b. If the review does not avert the negative action, HRA will conduct outreach to determine whether the Negative Case Action can be averted or resolved.

108. **Pre-Fair Hearing File Review**. Prior to Fair Hearings, HRA will review cases to determine, to the extent evident from the case record, whether the failure to provide a pending or granted RA may have led to the Negative Case Action at issue. If the review shows that a failure to provide a pending, granted, or needed RA may have led to the Negative Case Action, HRA will

withdraw the Negative Case Action even if the Class Member does not appear at the fair hearing.

109. **Treatment for Certain Vulnerable Cohorts**

a. HVN/HB

i. When a Class Member requests HVN/HB status

(a) For Cash Assistance clients, HRA will record the request and schedule a home appointment with the client. While HRA is evaluating the request, the Class Member will be treated as HVN/HB.

(b) HRA will make a determination on the request for HVN/HB designation based on medical documentation. HRA will provide a written explanation to the Class Member explaining the HVN/HB determination process and how to provide medical documentation. At the initial home visit, the HRA worker will ask the Class Member for any medical documentation supporting their request for HVN/HB status. The worker will also ask whether the Class Member wants HRA's assistance in gathering medical documentation from his or her health care provider. Clients who request HRA's assistance will be asked to sign medical releases so that HRA can request medical documentation.

(c) HRA will issue a notice to the Class Member with the outcome of HRA's determination on the request to be treated as HVN/HB. This notice will include instructions on how to appeal HRA's determination. The Class Member will have 30 days to appeal HRA's determination. Cash Assistance clients will be treated as HVN/HB during this 30-day period and pending the outcome of any appeal. The notice to the Class Member will include a statement to

this effect.

(d) If a class member refuses a home appointment, HRA will provide written notice to the individual that a home appointment was offered and refused. HRA will include in this notice instructions on how to comply with program requirements by mail, phone, or facsimile or any other means HRA designates when a face-to-face interview is not required by law.

(e) If HRA intends to stop treating the Class Member as HVN/HB, HRA will issue a notice to the Class Member of this intention. This notice will include instructions on how to appeal HRA's determination to stop treating the Class Member as HVN/HB. The Class Member will have 30 days to appeal HRA's determination. Clients will be treated as HVN/HB during this 30-day period and pending the outcome of any appeal. The notice to the Class Member will include a statement to this effect.

(f) Eligibility issues For SNAP-Only Cases will be handled by HRA via SNAP Access Alternatives. If SNAP Access Alternatives prove unsuccessful and the individual was previously coded HVN/HB, HRA will conduct a home visit to attempt to resolve the issue.

(g) HVN/HB Denied or Expired. For clients who are denied HVN/HB status or whose HVN/HB status has expired, HRA supervisors will review their cases before HRA schedules the first Job Center appointments following the HVN/HB denial or expiration. HRA will review those cases again for clients who fail to report to their Job Center appointments. HRA may refer clients whose requests for HVN/HB status have been denied or whose HVN/HB status has expired directly to WeCARE.

(h) HRA will assess the case management needs of HVN/HB clients at the initial visit and at such other intervals as appropriate. Case Management Services will be tailored to the client's individual needs. Those individuals identified as needing a higher level of Case Management Services due to anticipated difficulty in maintaining benefits or accessing HRA services will receive enhanced Case Management Services designed to assist them in complying with HRA requirements to ensure case continuity. Case Management Services will be set forth in a procedure.

(i) Nothing in this section precludes HRA from integrating the HVN/HB determination process with the RA determination process described above in a manner that is consistent with these paragraphs.

b. Homeless Clients.

i. HRA will coordinate with Community Based Organizations (CBOs) that participate in the Department of Homeless Services' street homelessness outreach project to provide HVN/HB status to clients of these programs. HRA will serve these clients at the CBO offices or other locations agreed upon by HRA, the client and the CBO. HRA will accept documentation from the CBOs indicating client eligibility for HVN/HB status and exemption from participation in work activities consistent with 18 NYCRR §385.2(d). HRA will conduct Escalating Outreach before rejecting an application or issuing a Negative Case Action against Street Homeless Outreach Program clients

c. Hospitalized Class Members. HRA will establish a procedure with respect to Class Members about whom a temporary hospitalization is reported to the Agency or WeCARE with the

goal of avoiding Negative Case Actions that may be related to a clinical condition or need for RAs.

COMMUNICATIONS PROVISIONS

110. HRA will take steps such that communications of the Agency and WeCARE with Class Members are effective and available in multiple formats to afford meaningful access to Agency and Vendor services, programs, and activities in accordance with Title II of the Americans with Disabilities Act and applicable regulations issued by the Department of Justice pursuant to that title.

111. In determining the format of communication to Class Members, HRA and WeCARE will give primary consideration to the format requested by the Class Member.

112. HRA will enhance and/or implement systems to enable Class Members to communicate effectively with the Agency and WeCARE via telephone, email, fax, and mail. HRA will consider using text messaging to the extent feasible and agreed to by clients. HRA will take the steps necessary to make its Website accessible to Class Members.

113. HRA will provide receipts or confirmation numbers to verify Class Member contact with the Agency and WeCARE including submission of documents and transactions related to case actions such as requests to reschedule appointments, for good cause, for Conferences, and requests related to emergencies.

114. HRA will enhance and/or implement systems to enable effective, real-time communication for deaf and hearing impaired Class Members with the Agency and WeCARE as follows:

    a. For in-person appointments, sign language interpreters for the deaf and hearing impaired will be provided;

    b. HRA will pilot a program to implement the use of video remote interpreting by which Job Centers and SNAP Centers will use video conferencing equipment to provide real-time sign

language interpreting services as provided in 28 C.F.R. § 35.160(d). Video remote interpreting may be used in place of in-person interpreters when agreed to by clients; and

c. HRA will train Agency and Vendor staff with client contact on the methods used by the deaf and hearing impaired to communicate by telephone, including the telecommunications relay service and the video relay service.

115. HRA and WeCARE will respond on a case by case basis to requests for RAs from Class Members who are blind or visually impaired.

116. HRA will develop and implement effective procedures to enable Class Members to reschedule appointments with the Agency and WeCARE.

117. The HRA Infoline or another similar mechanism which permits effective telephone access to Class Members will have capacity added to enable Class Members to learn current case status, upcoming appointments, documentation requirements, pending Negative Case Actions, and RA request status.

118. HRA will develop a mechanism through which Class Members can reach staff during business hours to address case emergencies when those Class Members are unable to obtain timely assistance at their Job Centers or WeCARE.

119. HRA will maintain a telephone number by which Class Members can communicate complaints regarding requests for and implementation of RAs.

120. In conjunction with Plaintiffs' counsel, HRA will devise standards and develop effective procedures for regularly auditing:

a. the "Rescheduling" Phone Numbers listed on HRA and Vendor notices to confirm that Class Members can get through on these numbers to reschedule appointments;

b. Class Members' access to Infoline or another similar mechanism for information;

c. the mechanism in paragraph 118 by which Class Members can reach HRA workers and WeCARE;

d. provision of receipts or confirmation numbers as provided in paragraph 113; and

e. other communications between Class Members and HRA or Vendor staff.

121. HRA will report the results of the audits discussed in paragraph 120 to Plaintiffs' counsel quarterly and will meet with Plaintiffs' counsel after the issuance of each quarterly Communications Report to discuss performance.

122. Within 90 days of the Effective Date, unless the Parties agree upon a later deadline, as part of developing the Monitoring Protocol described in paragraphs 130 through 137, the Parties will negotiate in good faith to reach consensus on the standards, auditing methodologies, and reporting referenced in paragraph 120 above and will incorporate these into the Monitoring Protocol which will be filed with the Court and incorporated into the terms of this Stipulation by reference as provided in paragraph 130 below.

NOTICE PROVISIONS

123. **Readability of Written Materials**: Subject to state approval when applicable, HRA will revise its written materials as set forth below to improve readability.

a. Guidelines for Written Materials. Consistent with the recommendations of an Expert, HRA will consider the following Guidelines in revising those HRA-developed notices specified in paragraph 123(b):

i. Written materials will have the lowest possible reading level, measured by the appropriate readability measure, that is consistent with content that must be included in the material to comply with any legal requirements;

ii. Use active sentences as much as possible and avoid use of the passive voice;

iii. Use short sentences and simple words as much as possible. When possible, select words likely to be familiar and easily recognizable;

iv. Use the first or second person whenever appropriate;

v. Avoid long paragraphs wherever possible; and

vi. Effectively use headings; bullets; typeface; and where possible, graphic layout, including pictures, symbols, and icons.

b. Priority for Readability Review and Revision. HRA will prioritize the review and revision of the following HRA-developed documents:

i. Notices of appointment;

ii. Notices that require a response from the Class Member;

iii. Notices that concern the denial, termination, reduction, increase, or issuance of a benefit or service;

iv. Notices that convey disability-related information to Class Members, such as concerning WeCARE and the RA process; and

v. Written materials that are most frequently provided to Class Members.

124. **Timing for Implementing Readability Revisions.** Consistent with the categories set forth in paragraph 123(b), the parties will develop a reasonable list of HRA-developed documents to be revised. HRA will confer with Plaintiffs to identify a reasonable number of documents from this list that will be revised within eighteen (18) months from the Effective Date. HRA will commence revising the identified documents as soon as practicable and provide Plaintiffs' counsel with the revised documents referenced in paragraph 123(b) for review and comment on a rolling basis. Plaintiff's counsel will provide any comments within fourteen (14) days. At

the end of eighteen (18) months the Parties will meet and confer to develop a schedule for revising the remaining documents on the list.

125. **Inclusion of Disability Rights Information in Written Materials.** With the help of an Expert, HRA will develop a Disability Insert to be included when issuing certain notices to Class Members. For notices that meet the criteria in paragraph 123(b), HRA will either include a Disability Insert or develop and include Notice of Disability Rights language. Such language may be developed with the assistance of an Expert and will notify Class Members of their rights under the ADA and how to request an RA. Notices that are accompanied by the Disability Insert will include a reference to the Disability Insert. Plaintiffs will have the opportunity to review and comment on the Disability Insert and Disability Rights language. Plaintiffs' counsel will provide any comments within fourteen (14) days.

TRAINING AND STAFF DEVELOPMENT

126. **Disability Advisory Community Panel**

a. HRA will form a Disability Advisory Community Panel ("Panel"), which is intended as a collaborative entity through which HRA can gather expertise, input, and feedback from disability community organizations and members of the disability community regarding policies, practices, and initiatives of the Agency.

b. The Panel will meet quarterly and include representatives from organizations that have an interest in, advocate for, and/or provide services to people with disabilities, as well as people with disabilities including HRA clients.

c. The Legal Aid Society will have an opportunity to propose two members of the panel, one of whom may be a non-attorney employee or contractor of The Legal Aid Society. Defendants will not unreasonably reject Plaintiffs' proposed panel members.

d. The Panel will address emerging issues, challenges, and solutions related to disability and other access and functional

needs as they relate to HRA policy and the delivery of services to clients with disabilities.

127. **Staff Training**

a. HRA agrees to develop new ADA training curricula ("ADA Training") for various levels of staff across the Agency as well as a Disability Evaluation training curricula for Agency and Vendor staff charged with evaluating disability and RA requests. Defendant will provide Plaintiffs' counsel with draft training materials for their review and comment. Plaintiffs' counsel will provide any comments within fourteen (14) calendar days. If Plaintiffs' counsel believe that Defendant's failure to incorporate Plaintiffs' counsel's comments and recommendations constitutes a systemic failure to comply with the provisions of the Settlement, Plaintiffs may seek relief from the Court consistent with paragraphs 141 through 143. Defendant will seek input in developing training curricula from the Disability Advisory Community Panel, the Mayor's Office for People with Disabilities, the Executive Director for ADA Policy, and others with expertise in effectively working with and meeting the needs of people with disabilities.

b. The ADA Training will focus on specific Agency policies and procedures, as well as areas of cultural competence, disability awareness, and effective communication with people with disabilities.

c. Using the new ADA Training curricula HRA will conduct cross training throughout various units at HRA, most notably at the key points of entry and the programs most likely to serve people with disabilities.

d. Defendant will develop quality assurance mechanisms and reinforcement trainings to ensure that all HRA and Vendor staff has the skill set to serve disabled clients and that all appropriate HRA and Vendor staff has the skill set to evaluate disability and RA requests.

e. Defendant will also develop other methods of building the capacity of staff to effectively address the needs of people with disabilities through effective supervision and coaching. Defendants will develop supervisory trainings that will include coaching methods to assist front-line staff with difficult cases. A workgroup will be convened to explore the most effective training tools for ongoing support at all levels of the Agency.

128. **Disability Awareness**. HRA will use a variety of media to continue to publically affirm its commitment to serving clients with disabilities and to providing those clients with meaningful access to HRA's benefits and services. HRA's Executive Director of Disability Affairs, with input from the Disability Advisory Committee, will develop mechanisms to effectively explain disability-related barriers clients may experience in attempting to access HRA programs and services and the various types of RAs available to overcome these barriers.

129. **Executive Director of Disability Affairs**. HRA has developed a new position of Executive Director of Disability Affairs. The Executive Director will collaborate with HRA program areas to assess policies and procedures and coordinate with program areas to improve service delivery for persons with disabilities so that they have meaningful access to HRA programs. The Executive Director will also investigate complaints alleging noncompliance with the ADA and implement solutions.

MONITORING

130. The parties will jointly develop a protocol for monitoring the Defendants' compliance with the terms of this Stipulation ("Monitoring Protocol") within three (3) months of the Effective Date, which shall be submitted to the Court and deemed incorporated into this Stipulation.

131. The primary objective of the Monitoring Protocol will be to measure compliance with the goals of this Stipulation: to identify, process, and provide necessary RAs so that Class Members have meaningful access to HRA programs and services including those of WeCARE; to prevent Class Members from experiencing unnecessary Negative Case Actions; to protect

Class Members from disability-based discrimination; and to enhance the Defendants' ability to promptly identify and take corrective actions with respect to any deficiencies in complying with the Stipulation.

132. The Monitoring Protocol will be primarily based on data available through HRA systems.

133. To the maximum extent practicable, the Monitoring Protocol will be developed such that it can also serve as an internal quality management tool for HRA.

134. In the event that the parties, after good faith negotiations, are unable to reach consensus on the Monitoring Protocol, the matter will be submitted to the Court for resolution.

135. Until the parties agree on a final Monitoring Protocol, the monitoring provisions negotiated in conjunction with the Stipulation so-ordered by the Court on September 19, 2014 (the "Interim Agreement"), will remain in effect unless the parties agree that a particular monitoring provision is no longer relevant.

136. Plaintiffs' counsel shall have reasonable access, upon reasonable notice, to additional information to confirm or supplement information provided pursuant to the Monitoring Protocol and Interim Agreement in order to confirm Defendants' compliance with the terms of this Stipulation. Plaintiffs will request any additional information within a reasonable period before the expiration of this Stipulation.

137. The Monitoring Protocol will specify the monitoring methodologies, as well as the form, content, timing, and frequency of reporting. The initial report generated pursuant to the monitoring protocol cannot form the basis of a motion for enforcement or contempt. However, the parties will meet and confer within 30 days of production of the first Monitoring Report/s to discuss compliance.

JURISDICTION

138. The provisions of this Stipulation shall not take effect until the Effective Date. Defendant's obligations under this Stipulation shall be in effect during the Effective Period.

139. Except for the remedies to which the Parties have previously agreed as set forth in the Stipulation entered on November 24, 2014 (Dkt. 270), all remedies sought in the Amended Complaint are limited to the provisions of this Stipulation, as well as monitoring compliance with provisions, including the communications monitoring, that the parties have agreed to negotiate in this Stipulation pursuant to paragraphs 130 through 137.

140. The jurisdiction of this Court over the provisions of this Stipulation shall end at the conclusion of forty-eight (48) months following the Effective Date, unless Plaintiffs move for and are granted an extension pursuant to paragraphs 144 through 147 of this Stipulation. When the Court's jurisdiction ends, all rights and claims arising under the provisions of this Stipulation shall terminate; the provisions of this Stipulation shall be deemed satisfied; all claims arising in the Amended Complaint shall be dismissed with prejudice in their entirety; and no further relief in this action shall be sought or granted.

ENFORCEMENT

141. In the event of a motion by Plaintiffs for enforcement or contempt based upon Defendant's alleged non-compliance with this Stipulation, Defendant shall be considered to be in compliance with the provisions of this Stipulation unless Plaintiffs establish that Defendant's failures or omissions to comply with the provisions of this Stipulation were not minimal or isolated but were sufficiently significant or recurring as to be systemic. Non-systemic individual and isolated violations of this Stipulation shall not form a basis for a finding that Defendant has acted in contempt of this Stipulation or as a basis for a motion for enforcement.

142. During the Effective Period, if Plaintiffs' counsel believes that Defendant has failed to comply, as defined in paragraph 141 above, with the provisions of this Stipulation, Plaintiffs' counsel shall notify Defendant's counsel in writing of the nature and specifics of the alleged failure to comply and shall specify the basis for such belief, including but not limited to any monitoring reports upon which such a belief is based. Such written notice shall be provided at least thirty (30) days before any motion is made for enforcement of this Stipulation or for contempt. Unless otherwise resolved, the Parties' counsel shall meet within this thirty-day period following notice to Defendant's counsel in an attempt to arrive at a resolution of the alleged failure to comply.

143. If no resolution is reached within thirty (30) days from the date of notice, and if the Parties have met pursuant to paragraph 142 above in an attempt to arrive at a resolution of the alleged failure to comply, Plaintiffs may move this Court for an order enforcing the provisions of this Stipulation and/or for contempt. No motion for contempt or enforcement shall be brought to remedy those violations that the Parties agree (a) have been cured or (b) will be cured pursuant to a plan agreed upon by the Parties. In the event that the Parties agree to a plan to cure an alleged violation and Plaintiffs believe that the violation has still not been cured, Plaintiffs must provide at least ten (10) days' notice before any motion is made for enforcement of this Stipulation or for contempt.

EXTENSION OF THE TERM OF THE STIPULATION

144. Plaintiffs may move this Court for an order extending the jurisdiction of the Court over this Stipulation and shall make any such motion no later than thirty (30) days before the scheduled termination of this Court's jurisdiction, unless another date is agreed upon by the Parties. The Court's jurisdiction shall only be extended over the provision(s) of this Stipulation with which the Court finds Defendant has failed to comply, except that, if the Court determines that a provision or provisions with which Defendant has complied is/are interdependent with a provision or provisions with which

Defendant has failed to comply, the Court shall also, in its discretion, extend its jurisdiction over the interdependent provision(s). The standard for measuring Defendant's compliance with the provisions of this Stipulation for the purposes of a motion to extend this Court's jurisdiction is that set out in paragraph 141 above.

145. Any such extension(s) of the jurisdiction of this Court shall be for a period of not more than one (1) year from the date that the Court's jurisdiction was otherwise scheduled to terminate, unless another date is agreed to by the Parties, except that the Court may extend its jurisdiction for a period greater than one (1) year for good cause shown.

146. Plaintiffs may also move for a further extension of the jurisdiction of the Court beyond any extension granted pursuant to a motion made in accordance with paragraph 144 of this Stipulation, but only after giving Defendant prior notice and an opportunity to address any alleged noncompliance. Such motion for a further extension of this Court's jurisdiction shall also be made in accordance with paragraph 144 of this Stipulation, and any extension granted pursuant to such a motion shall be for a time period that accords with paragraph 145 of this Stipulation.

147. Prior to the expiration of any period of extended jurisdiction (extended pursuant to paragraphs 144 - 146 of this Stipulation), Plaintiffs may move for contempt or enforcement consistent with the provisions set forth in the "Enforcement" section above (paragraphs 141 through 143 of this Stipulation).

GENERAL PROVISIONS

148. Defendant agrees that Plaintiffs are entitled to reasonable counsel fees and costs as though they are prevailing parties. The Parties agree to attempt to negotiate the amount of such counsel fees and costs. If they are unable to agree on an amount within ninety (90) days of the Effective Date, Plaintiffs may submit an application for counsel fees and costs to the Court, and Defendant reserves the right to respond to such an application in a manner that is consistent with this paragraph.

149. The Parties' Protective Order regarding confidential information, entered by the Court on September 28, 2005, shall remain in effect during the Effective Period of this Stipulation.

150. Nothing contained in this Stipulation shall be deemed to be a finding or an admission that Defendant has in any manner violated Plaintiffs' rights as contained in the constitutions, statutes, ordinances, rules, or regulations of the United States, the State of New York, or the City of New York.

151. This Stipulation shall not be admissible in, nor is it related to, any other proceeding.

152. In the event of any change in federal statute or regulation or state statute or regulation that any party believes changes his or her responsibilities pursuant to this Stipulation, such party shall so notify all other parties and the Parties shall attempt to come to an agreement as to any modifications of this Stipulation that are warranted by said changes in federal or state law. If, after thirty (30) days, the Parties have not been able to agree, the dispute shall be submitted to the Court by motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure by the party seeking to modify the Stipulation. Thirty (30) days after filing such motion, Defendant shall be permitted to implement the modification pending the Court's decision on the motion unless the Court has ordered a stay of such implementation pending its decision or the Court permits Defendant to implement earlier. The filing by Plaintiffs of an appeal of an adverse decision shall not operate as a stay of Defendant's right to implement the proposed modification without further order of the District Court or the Court of Appeals.

153. Without diminishing the right of Plaintiffs to seek enforcement of this Stipulation, HRA will provide Plaintiffs' counsel with a mechanism to notify the Agency in writing of complaints regarding the individual cases in which HRA allegedly violated the terms of this Stipulation. HRA will investigate the alleged incident(s), take any appropriate steps required to resolve the issue(s) concerning each individual case (including issuing benefits to eligible applicants and recipients, withdrawing inappropriate Negative Case Actions, and providing RAs as specified in this Stipulation),

and report the results of such investigation, including what steps, if any, were taken to resolve the issue(s), in writing to Plaintiffs' counsel. Such report shall be provided within five (5) business days of receiving Plaintiffs' counsel's report of the alleged incident(s) or in time to meet a deadline or avert and/or abate an emergency.

154. No provision in this Settlement shall infringe upon any individual Class Member's right to request a fair hearing concerning that individual's Cash Assistance, SNAP, or Medicaid benefits, to seek judicial review of the fair hearing decision, or to appeal or challenge an RA determination.

155. All written notifications sent pursuant to this Stipulation and all other correspondence concerning this Stipulation shall be sent by electronic mail or facsimile to the following addresses or to such other address as the recipient named below shall specify by notice in writing:

To Plaintiffs' counsel

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156. Any party may change its designated addressee(s) or address(es) by written notice to the other parties.

157. This Stipulation is final and binding upon the Parties, their successors, and their assigns.

Dated: March 10, 2015
New York, New York

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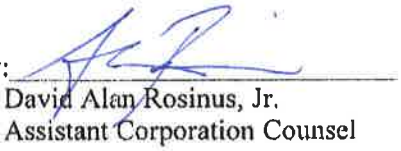
By: 
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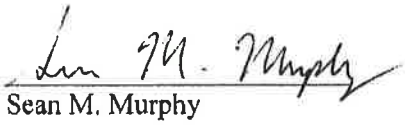
By: 
Sean M. Murphy

Attorneys for Plaintiffs

So Ordered this _____ day of _____, 2015

_____
Katherine B. Forrest, United States District Court Judge

Human Resources Administration
Department of Social Services

FAMILY INDEPENDENCE ADMINISTRATION

James K. Whelan, Executive Deputy Commissioner

Jill Berry, Deputy Commissioner
Office of Program Support

Stephen Fisher, Assistant Deputy Commissioner
Office of Procedures

POLICY DIRECTIVE # 15-10-ELI

(This Policy Directive replaces PD #13-31-ELI)

WELLNESS, COMPREHENSIVE ASSESSMENT, REHABILITATION AND EMPLOYMENT (WECARE)

Date:	Subtopic(s):
April 27, 2015	Eligibility, Employment

AUDIENCE

The instructions in this policy directive are for Job Center staff and are informational for all other staff.

REVISION TO ORIGINAL PROCEDURE

This policy directive is being revised to inform staff that Fedcap is now the vendor that will provide services under the Wellness, Comprehensive Assessment, Rehabilitation and Employment (WeCARE) program for the Bronx, Manhattan, and Staten Island (region one).

POLICY

As a condition of eligibility for Cash Assistance (CA), resources must be evaluated and verified to determine an individual's potential to remove or reduce the need for CA. One such resource is potential employability. All applicants/participants are mandated to participate in employment activities unless determined exempt from work rules requirements.

CA applicants/participants who claim they are unable to fulfill work rules requirements due to a mental health or physical condition must comply with Human Resources Administration (HRA)'s efforts to clinically assess their claim and comply with all services, that can help them achieve their highest possible level of self-sufficiency.

BACKGROUND

CA applicants/participants who are work rules required and claim a physical or mental health barrier to employment are referred to WeCARE program. WeCARE is designed to provide a full range of services such as psychosocial, medical, wellness, vocational rehabilitation and federal disability application assistance. Applicants/participants may be referred for an assessment at a WeCARE medical site or for those with WeCARE history, to a WeCARE non-medical service site to be re-engaged in WeCARE activities.

WeCARE program is divided into two regions with one contracted vendor operating the two contracts separately, and their subcontractors providing WeCARE services in each region.

New Information
Fedcap is replacing FEGS for region one.

Effective April 1, 2015 Fedcap also began providing services in region one: the Bronx, Manhattan and Staten Island. The Federation of Employment and Guidance Services (FEGS) is no longer the assigned vendor for region one. Fedcap is currently providing services in region two: Brooklyn and Queens.

HRA's Customized Assistance Services (CAS) is responsible for administration and oversight of the WeCARE program. CAS monitors and evaluates WeCARE vendors to ensure provision of appropriate and timely services. In addition to WeCARE related services, the vendors are responsible for updating and completing the Employability Plan (EP) as well as reporting noncompliance to the Family Independence Administration (FIA) via New York City Work Accountability and You (NYCWAY).

Eligibility determinations and related issues will continue to be made by FIA.

Note: The medical verification procedure for applicants/ participants who request Home Visit Needed (HVN) see **PB #15-31-OPE**

All employment activity is stopped and no employment referral call-in appointments can be made until the WeCARE vendor makes a medical determination of the individual's employability. All other eligibility requirements continue (e.g., face-to-face recertifications, Bureau of Eligibility Verification [BEV] review, or the Office of Child Support Enforcement [OCSE] requirement).

OVERVIEW OF WeCARE SERVICES

WeCARE services provided by HRA vendors and their subcontractors include:

Biopsychosocial (BPS) Assessment

The BPS identifies medical and/or mental health conditions as well as psychosocial and community circumstances that can affect an individual's health and employability.

The BPS assessment consists of up to four components:

Psychosocial evaluation

- A psychosocial evaluation will identify issues that may affect employability, such as mental health, substance abuse, education, literacy, work history, social functioning and supports, domestic violence, housing, legal, and child-related issues.

Initial medical evaluation

- A Phase I comprehensive medical evaluation will be provided by a board certified physician.

Medical evaluation by a specialist

- A Phase II evaluation will be initiated by the Phase I physician whenever he/she believes that an individual needs an evaluation by a medical specialist to determine his/her employability. An appointment with an appropriate medical specialist (e.g., psychiatrist, orthopedist) will be scheduled.

CASAC assessment

- HRA contracted Certified Alcoholism and Substance Abuse Counselors (CASACs) are outstationed at WeCARE medical assessment sites. Applicants/participants who complete the WeCARE BPS who report substance use, are suspected of having a Substance Abuse (SA) problem, or are determined through a systemic search to have an SA treatment history will be referred for a CASAC assessment to be completed at the WeCARE medical site.

Functional Capacity Outcome (FCO)

A Functional Capacity Outcome (FCO) will be determined after all appropriate components of the BPS assessment are completed.

Possible FCOs include:

- No limitations to employment;
- Unstable medical and/or mental health conditions that require treatment (a Wellness Plan) before an employability determination can be made;
- Limitations to employment that require vocational rehabilitation services (VRS), and/or work-place accommodations;

- Substantial functional limitations to employment due to medical conditions that will last for at least 12 months and make the individual unable to work;
- Unstable medical and/or mental health condition(s) that require treatment (a Wellness Plan) and substantial functional limitations to employment due to medical conditions that will last for at least 12 months and make the individual unable to work.

Comprehensive Service Plan (CSP)

A CSP is developed for all individuals who complete a BPS evaluation, except those found to have no limitations to employment.

The CSP may include any of the following determinations and actions.

Applicants/participants found employable with limitations or unemployable will remain in WeCARE

No clinical barriers to employment

Applicants/participants found to be Employable without Limitations will be referred back to the Job Center for assignment Temporarily Unemployable (Wellness Plan).

Wellness Plan

Applicants/participants with medical and/or mental health condition(s) that are untreated or unstable will be assigned to a Wellness Plan.

The Wellness Plan requires that the individual attend treatment and follow his/her own doctor's recommendations, as a condition of eligibility. If the individual does not have a doctor, the WeCARE vendor will help the individual identify one.

The time frame of the plan is determined by a WeCARE physician based upon the individual's limitations to employment. The initial Wellness Plan can be 30, 60 or 90 days and requires that the individual attend and comply with treatment in order to resolve or improve his/her medical condition. However, if the condition is not stabilized at the end of the initial Wellness Plan, the plan can be extended up to a maximum of 180 days. The WeCARE vendor will monitor the individual's compliance with treatment through regularly scheduled Wellness Plan Follow Up appointments. If at the end of the 180-day period the vendor determines that the participant requires a longer period of wellness, the plan may be extended with CAS authorization up to 270 days.

Work Limited/Requiring Vocational Rehabilitation Services (VRS)

Vocational Rehabilitation Services

Participants determined to be work-limited due to the need for accommodations or those who require VRS are engaged in appropriate work-related activities that provide for the required accommodations or that are consistent with their limitations.

Diagnostic Vocational Evaluation

VRS services begin with a referral for a Diagnostic Vocational Evaluation (DVE). CA applicants who have an FCO of employable with minimal accommodations or those that require vocational rehabilitation services are not engaged until their CA cases become active AC status. During the evaluation period, which can be up to 21 days, participants are engaged for 25 hours per week.

Individual Plan for Employment

Based on the results of the DVE, the vendors will develop an Individual Plan for Employment (IPE). The IPE is a comprehensive vocational plan encompassing work activity preferences, as appropriate, and specifying the individual's employment goal, the services and supports that will be provided, and specific time frames to achieve the plan.

Employability Plan

The Employability Plan (EP) will be updated by the vendor after completion of the IPE. Activities based on the IPE include, but are not limited to, Work Experience Programs (WEP), Adult Basic Education (ABE), English as a Second Language (ESL) classes, HRA-approved education and training programs, and job readiness and search preparation.

Significant Functional Impairment

A significant functional impairment is when there is an impairment that, due to medical/mental health condition(s), prevents participation in work activities for 12 months or longer.

Applicants/participants determined to have significant functional impairments to employment receive assistance with filing a mandatory federal disability application. In addition, the CAS Disability Service Program (DSP) assists individuals who have been medically denied federal disability benefits with filing for an appeal of the determination.

Requiring a Wellness Plan and Significant Functional Impairment

Applicants/participants determined to have significant functional impairments to employment and requiring a Wellness Plan, receive assistance with filing a mandatory federal disability application and participate in a Wellness Plan. The Wellness Plan can be for 30, 60 or 90 days and requires that the individual attend and comply with treatment in order to resolve or improve his/her medical condition. However, if the condition is not stabilized at the end of the initial Wellness Plan, the plan can be extended up to a maximum of 180 days.

Case Management Services/Outreach

WeCARE vendors provide case management services and outreach when appropriate. Case management may include ensuring that applicants/participants receive the correct services and providing help in accessing and maintaining engagement in these services. Applicants/participants may also receive outreach as part of their case management services when they Fail to Report (FTR) or Fail to Comply (FTC) with program requirements.

Clinical Review Team (CRT)

Applicants/participants who have had a BPS and FCO completed within the past 12 months and again claim to be clinically unemployable may be referred to a WeCARE vendor's Clinical Review Team (CRT). The CRT will complete a clinical interview with the applicant/participant and a review of past and current medical documentation. The CRT will determine if the prior FCO remains accurate, if a new FCO is appropriate or if a new WeCARE BPS or specialty assessment is required.

REQUIRED ACTION

Scheduling a WeCARE Appointment

Referrals to WeCARE are made only for CA applicants/ participants who are work rules required

When a work rules required applicant/participant claims to be unable to participate in work activities due to a medical and/or mental health condition, the JOS/Worker at the Job Center must:

- complete the task list in the **Pre-Referrals** window in the Paperless Office System (POS);
- initiate/update the Employability Plan (EP) in NYCWAY;
- schedule an online mandatory assessment appointment to WeCARE via the EP. Action Code **968W** (applicants) or **168W** (participants) will post in NYCWAY;
- give the applicant/participant the Physician's Functional Assessment Report (**W-538**) to take to his/her own medical provider to complete prior to the WeCARE appointment, if possible; and

Refer to **Attachment A** for all WeCARE action codes

CA individuals in receipt of Federal Disability Benefits (SSI/SSDI) must not be referred to WeCARE

- request that he/she take the completed form to the WeCARE appointment. This form is available in the **Print Forms** window in POS;
- give the applicant/participant the system-generated Medical Provider Appointment Notice (**W-538C**) for the WeCARE assessment;
- ask the applicant/participant to sign the Authorization for Disclosure of Individually Identifiable Information, Drug Treatment Records and Confidential HIV Related Information Form (**CASW-333T**) which is a voluntary consent form;

See WeCARE Medical Consent Form (**PB #09-139-OPE)** for the POS process

  - if the individual signs the consent, enter Action Code **16WS** (WeCARE Consent for Disclosure Signed) in NYCWAY; or
  - if the individual refuses to sign the consent, enter Action Code **16WD** (WeCARE Consent for Disclosure Declined);

There is no penalty for refusing to sign the voluntary consent form

- scan and index copies of the consent, and/or WeCARE appointment notice into the viewer.

Scheduling a WeCARE Referral for Individuals in Sanction Status

Refer to Removal of Sanction Status at the Point of Referral to WeCARE (**PB #10-59-ELI**), or (**PD #10-32-ELI**) instructions.

Note: a WeCARE referral must be made when a CA applicant/participant with a non-durational, expired, or not expired sanction period is willing to comply with employment requirements.

When a CA applicant/participant with a non-durational or expired sanction is willing to comply with employment requirements but claims a physical or mental health barrier to employment, a WeCARE referral must be made. The sanction must be lifted at the point that the WeCARE referral is made. However, when a CA applicant/participant with an unexpired sanction period has verified that he/she is exempt from engagement requirements a WeCARE referral must be made, and once the individual has completed the WeCARE assessment he/she must live out the balance of the CA sanction period. CA benefits must be restored from the day after the sanction expires.

Scheduling a WeCARE Appointment for Individuals in Substance Abuse (SA) Treatment

Applicants/participants who are mandated into SA treatment and also claim a medical condition must be referred to WeCARE. A referral to WeCARE can be made by the appropriate Job Center, the Substance Abuse Service Center (SASC) or a SA case management vendor.

SASC and East River Job Center referrals

When Workers at SASC and the East River Job Center make a referral to WeCARE, Action Code **968U** (applicants) or **168U** (participants) will post to indicate that the individual is SA identified.

SA Case Management Vendor referrals

Referrals to WeCARE by the Comprehensive Service Management (CSM) or other SA case management vendors will be indicated in NYCWAY by Action Code **968I** (applicants) or **168I** (participants).

SA individuals, who are being case managed by vendors and are determined to require WeCARE services in addition to SA treatment, will continue to be case managed by the SA case management vendors.

SA individuals who are in treatment, but are not being case managed by SA vendors, and who are determined not to require WeCARE services, will be referred back to the appropriate Job Center.

WeCARE Re-engagement or Referral to the Clinical Review Team (CRT)

Refer to Revision to the WeCARE Clinical Review Team (**PB #07-43-EMP**)

Applicants/participants who were previously assessed by WeCARE and received an FCO based on a BPS assessment within the past 12 months can be re-engaged in WeCARE services without another assessment or may require a subsequent review of their current functional capacity.

This review may be necessary after case reopening. Instead of a new WeCARE BPS assessment, these individuals will be referred to a Clinical Review Team (CRT). The CRT process includes an interview with the individual and a review of past and current medical documentation.

When the JOS/Worker initiates an EP and answers “Yes” to the medical question, NYCWAY will systemically look back to determine if the applicant/participant has any WeCARE history or if a WeCARE FCO was posted for the individual within the last 12 months.

If there is WeCARE history or if an FCO was posted within the previous 12 months, the following will occur:

- If Within 60 Days of the WeCARE termination:
  - Applicants/participants, who were engaged in a WeCARE wellness plan (WP) that has not yet expired, will be re-engaged in the WP and referred to the appropriate WeCARE service site.

- If Within 90 Days of the WeCARE termination:

  - Applicants/participants, who completed the BPS but did not receive an FCO or initiate a service, will be referred to the appropriate WeCARE service site for re-engagement.
  - Applicants/participants, who completed the first phase of the BPS process and were referred for a medical specialty assessment, but did not complete the specialty assessment, will be referred to the appropriate medical specialty site.
  - Applicants/participants, who received an FCO of VRS and initiated a WeCARE service, will be referred to the appropriate service site for re-engagement in that service.
  - Any applicants/participants, who was SSI pending will be returned to the SSI pending status without a new WeCARE referral.
  - For applicants/participants who do not meet any of the above criteria, a drop down menu will prompt the JOS/Worker to select Action Code **16JR** (Referral to WeCARE Review Board – Previous FCO).

Referral to Clinical Review Team as a Result of Fair Hearing

CRT referral due to a Fair Hearing decision.

If a WeCARE referral needs to be provided as a result of a Fair Hearing Compliance and there is a FCO posted within the previous 12 months, an EP is not required. Instead, the Processing Unit JOS/Worker must:

- post Action Code **16HR** (Referral to WeCARE Review Board – Fair Hearing Result) outside the EP; and
- send the applicant/participant the Fair Hearing Compliance Statement form (**W-186C**), advising him/her of the CRT appointment that was made on his/her behalf.

The system-generated Referral to Wellness, Comprehensive Assessment, Rehabilitation and Employment (WeCARE) for a Clinical Review form (**CAS-322**) will be batch mailed to the applicant/participant.

Rescheduling WeCARE Appointments

The applicant/participant must contact the WeCARE vendor to reschedule the initial WeCARE appointment. Applicants/participants are advised on the WeCARE appointment notice to contact the vendor if they need to reschedule an appointment. If the applicant/participant contacts the Job Center after the initial WeCARE appointment is made, the Job Center Staff cannot reschedule the appointment. Staff must instruct the applicant/participant to contact the WeCARE vendor.

WeCARE Vendor Review of the BPS Assessment Outcome

Upon completion of the BPS, the WeCARE vendor will:

- enter Action Code **969B** (applicants) or Action Code **169B** (participants) in NYCWAY to indicate completion of the BPS;
- schedule the FCO appointment by entering Action Code **969F** (applicants) or Action Code **169F** (participants);
- meet with the applicant/participant to discuss the FCO and CSP;
- enter the appropriate FCO action code in NYCWAY and provide the applicant/participant with the appropriate NOWR;
- update the EP;
- assign WeCARE eligible applicants/participants to the WeCARE activity based on the FCO, as appropriate. The assignment code will generate the WeCARE Assignment Information Summary form (**CASW-333K**);
- address any additional barriers (e.g., domestic violence, substance abuse, housing problems, or needed at home) with applicants/participants determined to require WeCARE services;
- provide follow-up appointments/referrals, as needed.

Refer to **Attachment B** for all FCO codes

Individuals determined to be fully employable will be given a return appointment to the Job Center by the vendor via a WeCARE Return to Job Center (Mandatory) form (**CASW-333L**).

Job Center Return Appointment for Applicant/Participants Determined to be Fully Employable

At the Job Center return appointment, the JOS/Worker must:

- initiate/update the EP;
- resolve any nonmedical barriers to employment, including child care arrangements if appropriate; and

Refer to PB #06-101-EMP and the Employment Process Manual.

- make a referral to a Back to Work (B2W) vendor, provide a work activity, training, or educational assignment, considering the individual's preferences, as appropriate, through the EP and according to current procedure.

SA Identified During WeCARE Assignment

The WeCARE vendor will refer participants who are already enrolled in WeCARE activities who disclose an SA problem, or are suspected of having an SA problem, for a CASAC assessment at the Substance Abuse Service Center (SASC).

The vendor posts Action Code **915G** (applicants) or **193G** (participants) in NYCWAY and will give the participant the system-generated SASC Referral for Assessment form (**W-456AA**).

No SA treatment required

If SASC determines that the applicant/participant does not have an SA problem, he/she will continue in the WeCARE activity determined appropriate based on his/her functional capacity outcome. SASC will give the applicant/participant the WeCARE Mandatory Return Appointment (**CAS-319**).

Non-exempt SA

Applicants/participants determined to require SA treatment but are deemed nonexempt from work activities will continue to participate in the activity determined appropriate based on their functional capacity. SA treatment hours are coordinated with work activity hours.

Concurrent Wellness and SA treatment

SA applicants/participants in Wellness Plans who need SA treatment that requires more than 15 hours of treatment per week will continue in Wellness Plans, concurrent with SA treatment.

VRS and concurrent SA treatment

SA applicants/participants in Vocational Rehabilitation Services (VRS) who require SA treatment for more than 15 hours per week are exempt from work requirements and will discontinue VRS until a CASAC reassessment determines that intensive treatment is no longer required and the hours can be reduced. Once the hours are reduced below 15 hours per week, the individual is nonexempt and can participate in SA treatment and concurrent work activities. Participants in the Federal Disability Application/Appeal process will continue the process concurrent with SA treatment.

Residential SA treatment

Participants who require residential treatment will be assigned to a Residential Treatment Program (RTP) and transferred to the Residential Treatment Service Center (RTSC), according to current procedure.

Referrals to the HIV/AIDS Services Administration (HASA)

Applicants/participants determined to be HIV positive and who meet the medical criteria for HASA services will be offered the option of being referred to HASA or continuing to be serviced by FIA/WeCARE. If the individual accepts the HASA transfer option, the WeCARE vendor will contact the WeCARE liaison at the HASA ServiceLine at (212) 971-0626.

The ServiceLine will determine if an applicant/participant is potentially medically eligible for HASA services and will provide an appointment. If the applicant/participant is deemed eligible for HASA services and accepts the HASA referral, the vendor will alert CAS, who will close the individual's WeCARE case by entering Action Code **169X** (WeCARE activity terminated) in NYCWAY.

Outreach Activity for Applicants/Participants who FTR/FTC with WeCARE

When an applicant/participant fails to report (FTR) or fails to comply (FTC) with a WeCARE activity or appointment, the WeCARE vendor may make escalating efforts to contact the individual. If needed, outreach will be performed by the vendor's staff, and may include telephoning, sending letters, or making home visits, as necessary.

The outreach period, if necessary, can be up to eleven (11) business days.

Refer to **Attachment C** for outreach/infraction codes

The vendor will enter the appropriate outreach action code in NYCWAY to indicate that outreach has been initiated for individuals who FTR or FTC. The outreach action code used is based on the activity assigned when the infraction occurs.

If outreach efforts are successful, the vendor will enter the appropriate outreach successful Action Code in NYCWAY.

If outreach efforts are not successful at the end of the 11 day outreach period, the appropriate infraction code will autopost in NYCWAY to initiate the infraction process (e.g., a case rejection, line closing or sanction, as appropriate).

Applicants/participants whose exemption statuses have yet to be determined or must be reviewed due to a change in their medical/mental health condition(s) and fail, without good cause, to cooperate with efforts to verify their claim will be denied CA.

PROGRAM IMPLICATIONS	
Paperless Office System (POS) Implications	There are no POS implications.
Supplemental Nutrition Assistance Program Implications	Individuals who must otherwise comply with the Supplemental Nutrition Assistance Program work requirements may claim an exemption due to medical reasons. However, if the individual fails to comply without good cause with the Agency's efforts to verify the claim of exempt status due to medical reasons, s/he is deemed employable and a separate Supplemental Nutrition Assistance Program determination must be made.
Medicaid Implications	There are no work requirements for Medical Assistance (MA) and employability is not deemed a resource for MA purposes. If an individual fails to comply with employability determination requests or work activity requirements, a separate Medicaid determination must be made.
LIMITED ENGLISH PROFICIENCY AND HEARING IMPAIRED IMPLICATIONS	For Limited English Speaking Proficiently (LEP) and hearing-impaired applicants/participants, make sure to obtain appropriate interpreter services in accordance with PD #14-24-OPE and PD #14-18-OPE.
FAIR HEARING IMPLICATIONS	Applicants/participants who disagree with being determined employable by WeCARE or whose Cash Assistance cases/benefits have been closed, denied or reduced for failure to report or failure to comply with Agency efforts to determine employability or related issues have the right to request a Fair Hearing.
Avoidance/ Resolution	Ensure that all case actions are processed in accordance with current procedures and that electronic case files are kept up to date. Remember that applicants/participants must receive timely and adequate notification of all actions taken on their case.
Conferences	An applicant/participant can request and receive a conference with a Fair Hearing and Conference (FH&C) AJOS/Supervisor I at any time in a Job Center. If an applicant/participant comes to the Center requesting a conference, the Receptionist must alert the FH&C Unit that the individual is waiting to be seen.

The FH&C AJOS/Supervisor I will listen to and evaluate the applicant/participant's complaint. After reviewing the case file and discussing the issue(s) with the JOS/Worker responsible for the case and/or the JOS/Worker's Supervisor and the WeCARE liaison, if appropriate, s/he will determine if the action taken was correct. If the determination is that the action taken was correct, the FH&C AJOS/Supervisor I will explain the reason for the determination to the applicant/participant. If the explanation is accepted, no further action is necessary. The AJOS/Supervisor I must complete a Conference Report (**M-186a**).

If the determination is that the action taken was incorrect, or correct but lacking the supporting documentation, the FH&C AJOS/Supervisor I will settle in conference (SIC), enter detailed case notes in NYCWAY, and forward all verifying documentation submitted by the applicant/participant to the appropriate JOS/Worker for corrective action.

In addition, if the adverse case action still shows on the "Pending" (**08**) screen in WMS and the case has been granted aid to continue (ATC), the AJOS/Supervisor I must prepare and submit a Fair Hearing/Case Update Data Entry Form (**LDSS- 3722**) to change the **02** to an **01**, or a PA Recoupment Data Entry Form (**LDSS-3573**), to delete a recoupment. The **M-186a** must also be prepared.

Evidence Packets

If the applicant/participant elects to continue his/her appeal by requesting or proceeding to an already requested Fair Hearing, the FH&C AJOS/Supervisor I is responsible for ensuring that further appeal is properly controlled and that appropriate follow-up action is taken in all phases of the Fair Hearing process.

REFERENCES

18 NYCRR 385.2(d)
18 NYCRR 385.12(a)(c)(d)
18 NYCRR 385..2(e)
18 NYCRR 351.2
18 NYCRR 351.8(a)(2)
18 NYCRR 351.21(a)
SSL § 131(5) and (7)
SSL § 332
SSL § 336-a (1)

RELATED ITEMS

PB #06-101-EMP
PB #07-43-EMP
PB #09-139-OPE
PB #15-31-OPE
PB #10-59-ELI
PB #14-56-OPE
Employment Process Manual

ATTACHMENTS

💻 Please use Print on Demand to obtain copies of forms.

Attachment A	Action Codes Associated with WeCARE
Attachment B	Functional Capacity Outcome (FCO) Codes
Attachment C	WeCARE Outreach/Infraction Codes
W-538C	Medical Provider Appointment (Rev. 11/16/11)
W-538C (S)	Medical Provider Appointment (Rev. 11/16/11)
CAS-319 (E)	WeCARE Mandatory Return Appointment
CAS-319 (S)	WeCARE Mandatory Return Appointment
CAS-322 (E)	Referral to WeCARE for a Clinical Review
CAS-322 (S)	Referral to WeCARE for a Clinical Review
CAS-324 (E)	WeCARE Nonmedical Referral for Mandatory Services
CAS-324 (S)	WeCARE Nonmedical Referral for Mandatory Services
CAS W-333K	WeCARE Assignment Information Summary
CAS W-333K(S)	WeCARE Assignment Information Summary
CAS W-333L	WeCARE Return to Job Center (Mandatory)
CAS W-333L(S)	WeCARE Return to Job Center (Mandatory)
CAS W-333T	Authorization for Disclosure of Individually Identifiable Information Drug Treatment Records and Confidential HIV Related Information
CAS W-333T(S)	Authorization for Disclosure of Individually Identifiable Information Drug Treatment Records and Confidential HIV Related Information

ACTION CODES ASSOCIATED WITH WeCARE

ISSUE	VENDOR ACTION	ACTION CODE		COMMENTS
		APPLICANTS	PARTICIPANTS	
Initial Referral to WeCARE	BPS initiated.	**968W**	**168W**	
WeCARE initial appointment cancelled		**968X**	**168X**	FIA Worker will use these codes to cancel the **initial** WeCARE appointment.
SASC Referral to WeCARE	BPS initiated.	**968U**	**168U**	Individual from SASC requiring a medical assessment
SA CSM Referral to WeCARE	BPS initiated.	**968I**	**168I**	SA case management vendor referral to WeCARE.
New and acute medical condition	Vendor enters action codes to indicate the need for a medical for a new and acute condition.	**NA**	**168C**	
Fair hearing returns applicant to WeCARE		**NA**	**16FH**	Fair hearing resolves issue.
WeCARE initial appointment rescheduled	Vendor reschedules the initial appointment.	**96RE**	**16RE**	
WeCARE completion of the BPS	Vendor enters action codes to indicate completion of BPS.	**969B**	**169B**	
WeCARE Referral to CASAC	Vendor refers individual to onsite WeCARE CASAC.	**968F**	**168F**	
WeCARE return from CASAC	CASAC refers individual back to WeCARE vendor.	**96WC**	**16WC**	
BPS II completed	Vendor completes referral to one of 13 specialty exams	**969T**	**169T**	Specialty exam completed
WeCARE return appointment for FCO/Service Initiation & CSP	Vendor schedules a WeCARE appointment to review FCO and initiate services	**969F**	**169F**	
Applicant return appointment to Job Center		**968R**	**N/A**	Applicant is fully employable and keeps return appointment to JC.
Consent for disclosure signed		**16WS**	**16WS**	
Consent for disclosure declined		**16WD**	**16WD**	Vendor will not have access to NYCWAY for these individuals.
CORE WeCARE DVE initiated	Vendor initiates Diagnostic Vocational Evaluation (DVE).	**NA**	**169D**	

ACTION CODES ASSOCIATED WITH WeCARE (continued)

ISSUE	VENDOR ACTION	ACTION CODE		COMMENTS
		APPLICANTS	PARTICIPANTS	
Supplemental assessments to the initiated DVE	Vendor initiates Supplemental Diagnostic Vocational Evaluation (s)	**NA**	**16SD**	
Additional CORE WeCARE DVE initiated	Vendor initiates a consequent Diagnostic Vocational Evaluation (DVE).	**NA**	**16DI**	Client would have already received a complete set of CORE assessments.
Additional Supplemental assessments to WeCARE DVE initiated	Vendor initiates additional Supplemental Diagnostic Vocational Evaluation (s).	**NA**	**16SI**	Client already received a complete set of CORE and/or supplemental assessments
	Vendor re-initiates DVE assessments.	**NA**	**16DV**	Client is returned to DVE process after disengagement from WeCARE before the DVE process was completed
WeCARE Wellness Plan extended		**NA**	**169G**	
WeCARE Disability benefits application initiated	Vendor initiates application for SSI/SSDI.	**969S**	**169S**	SSI/SSDI application filed.
WeCARE Vocational Rehabilitation Services (VRS) initiated	Vendor initiates VRS assignments.	**NA**	**169E**	
WeCARE CSP has been completed	Vendor enters action codes to indicate completion of the CSP.	**169C**	**169C**	
WeCARE CSP has been updated	Vendor enters action codes to indicate completion of the CSP.	**169U**	**169U**	
Wellness/Rehabilitation Plan is initiated	Vendor enters action codes to indicate that a Wellness/ Rehabilitation Plan is initiated.	**969W**	**169W**	
Client needs to follow up on Wellness Plan.	Vendor schedules a follow up appointment for client to report on Wellness progress.	**969Q**	**169Q**	
Wellness/Rehabilitation Plan is completed	Vendor enters action codes to indicate the Wellness/ Rehabilitation Plan is complete.	**969V**	**169V**	
WeCARE Referral for special assessment	Refer for a Special Assessment via the EP. Action Codes will post in NYCWAY.	**991S**	**191A**	
WeCARE Referral to the Job Center	Vendor refers individual for appointment slot at Job Center.	**968J**	**168J**	To send applicant to Job Center if BPS assessment is completed **before** scheduled return appt.

ACTION CODES ASSOCIATED WITH WeCARE (continued)

ISSUE	VENDOR ACTION	ACTION CODE		COMMENTS
		APPLICANTS	PARTICIPANTS	
WeCARE Specialty exam appointment	Vendor enters action codes to indicate one of 14 specialty exams appointment.	**96AC** **96AD** **96AE** **96AF** **96AG** **96AH** **96AL** **96AM** **96AN** **96AO** **96AP** **96AR** **96AS** **96AT**	**16AC** **16AD** **16AE** **16AF** **16AG** **16AH** **16AL** **16AM** **16AN** **16AO** **16AP** **16AR** **16AS** **16AT**	Cardiology Dermatology Endocrinology Orthopedics Gastroenterology Hematology/Oncology Pulmonology Other Specialty Neurology Obstetrics/Gynecology Psychiatry Rheumatology General Surgery Physiatry (Physical Therapy)
WeCARE Specialty exam complete (BPS II)	Vendor enters action codes in NYCWAY to indicate the specialty exam is complete.	**969T**	**169T**	
WeCARE outreach successful			**168G**	Action Code will stop infraction from being posted in NYCWAY.
SSI/SSDI application is initiated	Vendor enters action codes to indicate SSI/SSDI application initiated.	**969S**	**169S**	
WeCARE referral to SASC for CASAC	Vendor enters action codes for WeCARE participant to be assessed by CASAC at SASC.	**915G**	**193G**	
Failure to Report (FTR) to initial WeCARE appointment (BPS phase I)	System-generated	**469B**	**468B**	If outreach is not successful by expiration of the FAD, the FTR code autoposts in NYCWAY.
Failure to Comply (FTC) with initial WeCARE appointment (BPS phase I)	System-generated	**469K**	**468K**	If outreach is not successful by expiration of the FAD, the FTC code autoposts in NYCWAY.
FTR to the disability assessment/appeal process	System-generated	**469D**	**468D**	If outreach is not successful by expiration of the FAD, the FTR code autoposts in NYCWAY.
FTC with disability assessment/appeal process	System-generated	**469E**	**468E**	If outreach is not successful by expiration of the FAD, the FTC code autoposts in NYCWAY.

ACTION CODES ASSOCIATED WITH WeCARE (continued)

ISSUE	VENDOR ACTION	ACTION CODE	COMMENTS
Outreach efforts to contact individuals who FTR/FTC with WeCARE	Vendor enters action codes to initiate outreach efforts.	**173K (FTC)** **173U/173V(FTC VRS)** **173G/173J(FTR/FTC FCO)** **173R(FTR Child care)** **173W/173C(FTR/FTC Wellness)** **173Y(FTR DSP)** **16BC/16CC(FTR/FTC Cardiology)** **16BD/16CD(FTR/FTC Dermatology)** **16BE/16CE(FTR/FTC Endocrinology)** **16BG/16CG(FTR/FTC Gastroenterology)** **16BS/16CS(FTR/FTC General surgery)** **16BH/16CH(FTR/FTC Hematology/Oncology)** **16BN/16CN(FTR/FTC Neurology)** **16BO/16CO(FTR/FTC Obstetrics)** **16BF/16CF(FTR/FTC Orthopedics)** **16BN/16CN(FTR/FTC Psychiatry)** **16BL/16CL(FTR/FTC Pulmonology)** **16BR/16CR(FTR/FTC Rheumatology)** **16BM/16CM(FTR/FTC Other)** **16BT/16CT(FTR/FTC Physiatry)**	Outreach can be a telephone call, letter or home visit by the case manager, as appropriate.

ACTION CODES ASSOCIATED WITH WeCARE (continued)

ISSUE	VENDOR ACTION	ACTION CODE		COMMENTS
		APPLICANTS	PARTICIPANTS	
FTC with VRS appointment	System-generated	**968V**	**468V**	If outreach is not successful by expiration of FAD, the infraction code autoposts in NYCWAY.
FTR to Vocational Rehabilitation Services	System-generated	**968U**	**468U**	If outreach is not successful by expiration of FAD, the infraction code autoposts in NYCWAY.
FTR to specialty exam appointment	System-generated	**469S**	**468S**	If outreach is not successful by expiration of FAD, the infraction code autoposts in NYCWAY.
FTC with WeCARE specialty exam (BPS phase II)	System-generated	**469H**	**468H**	If outreach is not successful by expiration of FAD, the infraction code autoposts in NYCWAY.
FTR to specialty exam appointment	System-generated	**469S**	**468S**	If outreach is not successful by expiration of FAD, the infraction code autoposts in NYCWAY.
FTC with WeCARE specialty exam (BPS phase II)	System-generated	**469H**	**468H**	If outreach is not successful by expiration of FAD, the infraction code autoposts in NYCWAY.
FTR to Wellness/ Rehabilitation Plan	System-generated	**469W**	**468W**	If outreach is not successful by expiration of FAD, the infraction code autoposts in NYCWAY.
FTC with Wellness/ Rehabilitation Plan	System-generated	**469C**	**468C**	If outreach is not successful by expiration of FAD, the infraction code autoposts in NYCWAY.
WeCARE job placement		**169J**	**169J**	
Assigned to WeCARE WEP		**NA**	**172P**	
Assigned to WeCARE job search		**NA**	**172N**	
Assigned to WeCARE job training		**NA**	**172T**	
Assigned to WeCARE Education		**NA**	**172E**	
WeCARE Assignment termination		**172X**		
Referral to WeCARE Review Board-Fair Hearing Result		**16HR**		

Attachment B

FUNCTIONAL CAPACITY OUTCOME (FCO) CODES

OUTCOME	*ACTION CODE APPLICANTS	*ACTION CODE PARTICIPANTS	DESCRIPTION	COMMENTS
Employable - No Limitations	**968E**	**168E**	Individuals determined to have no limitations that affect employability	When the applicant/participant returns to the Job Center, the JOS is responsible for assigning the appropriate work activities.
Employable with Limitations Requiring Vocational Rehabilitation	**969L**	**169L**	Individuals who can participate in work activities if minimal accommodations are provided to address their medical or mental health conditions. Action Code **169I** identifies completion of the IPE	These services include, but are not limited to, a work experience program (WEP), HRA-approved training program, Education (Adult Basic Education [ABE] or English as a Second Language [ESL] classes); or Job Search. Participants whose medical/mental health conditions require a reduction in hours will have their work-required hours adjusted.
Temporarily Unemployable/ Requiring a Wellness/ Rehabilitation Plan	**968T**	**168T**	Individuals with a medical and/or psychiatric condition(s) that are untreated or unstable	The Wellness Plan requires that the individual attend treatment and follow his/her own doctor's recommendations. If the individual does not have a doctor, the WeCARE vendor will help the individual identify one and help him/her schedule an appointment. The individual is initially given up to three months to attend and comply with treatment in order to resolve or improve his/her medical condition, but the plan may be extended if more time is necessary to stabilize the condition.
Unable to Work and requiring a Wellness Plan to stabilize an unstable medical or mental health condition	**969Y**	**169Y**	Individuals with significant functional impairment that will last 12 months or longer and prevents participation in work activities and thus potentially eligible for Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI), who also have an unstable medical or mental health condition	The WeCARE vendor will help the individual file an application for the appropriate Federal Disability Benefits and then initiate a wellness plan. Upon completion of the wellness plan the individual is expected to remain exempt and SSI pending. If the initial application is denied, the CAS Disability Assessment Unit (DAU) helps with filing an appeal and monitor the appeal process
Unable to Work : Apply for SSI/SSDI	**968S**	**168S**	Individuals with significant functional impairment that will last 12 months or longer and prevents participation in work activities and thus potentially eligible for Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI)	The WeCARE vendor will help the individual file an application for the appropriate Federal Disability Benefits. If the initial application is denied, the CAS Disability Assessment Unit (DAU) helps with filing an appeal and monitor the appeal process

WeCARE Outreach/Infraction Codes

This chart associates the codes posted by the vendor with the infraction codes posted by NYCWAY and the subsequent manual process codes that will appear on the **NOI** worklist.

Vendor Posts	Description	NYCWAY Posts	Description	Manual Process*	Close/Sanction Code
173G	WeCARE Outreach- FTR FCO Service Initiation Appointment	**468A**	WeCARE FTR to FCO appointment	**411H**	**N17**
173J	WeCARE Outreach- FTC FCO Service Initiation Appointment	**468F**	WeCARE FTC to FCO appointment	**411H**	**N17**
173C	WeCARE Outreach Initiated for FTC to Wellness Plan	**468C**	WeCARE FTC with Wellness Plan	**411Y**	**W40**
173R	WeCARE Outreach Initiated for FTR to Child Care Appointment	N/A	N/A	N/A	N/A
173U	WeCARE Outreach – FTR to VRS Referral	**468U**	WeCARE FTR to VOC Rehab Services	**411F**	**WE1 (for sanctions) or WX1 (for closings)**
173V	WeCARE Outreach – FTC to VRS Referral	**468V**	WeCARE FTC to VOC Rehab Services	**411F**	**WE1 (for sanctions) or WX1 (for closings)**
173W	WeCARE Outreach Initiated for FTC to Wellness Referral	**468W**	WeCARE FTR to Wellness Plan	**411Y**	**W40**
173Y	Outreach Required for WC Client FTR to DAU	**491D**	WeCARE FTR to DAU	**468Y**	**EZ2**

Workers must manually post action code **N12H** in NYCWAY after manual action to close/sanction is initiated. These codes will be posted on cases requiring conciliation: **404V** – Conciliation Initiated – FTC **404U** – Conciliation Initiated – FTR

WeCARE Outreach Codes for FTR/FTC to Medical Specialty Appointments

★NYCWAY Posts 468S (FTR)/468H (FTC) for All Medical Special Appointments

Vendor Posts	Description
16BC	WC OUTREACH FTR-SPECIALTY MEDICAL APPT-CARDIOLOGY
16CC	WC OUTREACH FTC-SPECIALTY MEDICAL APPT-CARDIOLOGY
16BD	WC OUTREACH FTR-SPECIALTY MEDICAL APPT-DERMATOLOGY
16CD	WC OUTREACH FTC-SPECIALTY MEDICAL APPT-DERMATOLOGY
16BE	WC OUTREACH FTR-SPECIALTY MEDICAL APPT-ENDCRINOLOGY
16CE	WC OUTREACH FTC-SPECIALTY MEDICAL APPT-ENDCRINOLOGY
16BG	WC OUTREACH FTR-SPECIALTY MEDICAL MED-GASTROENTEROLOGY
16CG	WC OUTREACH FTC-SPECIALTY MEDICAL MED-GASTROENTEROLOGY
16BS	WC OUTREACH FTR-SPECIALTY MEDICAL APPT-GENERAL SURGERY
16CS	WC OUTREACH FTC-SPECIALTY MEDICAL APPT-GENERAL SURGERY
16BH	WC OUTREACH FTR-SPECIALTY MED APPT-HEMATOLOGY/ONCOLOGY
16CH	WC OUTREACH FTC-SPECIALTY MED APPT-HEMATOLOGY/ONCOLOGY
16BN	WC OUTREACH FTR-SPECIALTY MEDICAL APPT-NEUROLOGY
16CN	WC OUTREACH FTC-SPECIALTY MEDICAL APPT-NEUROLOGY
16BO	WC OUTREACH FTR-SPECIALTY MED APPT-OBSTETRICS/GYN
16CO	WC OUTREACH FTC-SPECIALTY MED APPT-OBSTETRICS/GYN
16BF	WC OUTREACH FTR-SPECIALTY MEDICAL APPT-ORTHOPEDICS
16CF	WC OUTREACH FTC-SPECIALTY MEDICAL APPT-ORTHOPEDICS
16BP	WC OUTREACH FTR-SPECIALTY MEDICAL APPT-PSYCHIATRY
16CP	WC OUTREACH FTC-SPECIALTY MEDICAL APPT-PSYCHIATRY
16BL	WC OUTREACH FTR-SPECIALTY MEDICAL APPT-PULMONOLOGY
16CL	WC OUTREACH FTC-SPECIALTY MEDICAL APPT-PULMONOLOGY
16BR	WC OUTREACH FTR-SPECIALTY MEDICAL APPT-RHEUMATOLOGY
16CR	WC OUTREACH FTC-SPECIALTY MEDICAL APPT-RHEUMATOLOGY
16BM	WC OUTREACH FTR-SPECIALTY MEDICAL APPT-OTHER SPECIALTY
16CM	WC OUTREACH FTC-SPECIALTY MEDICAL APPT-OTHER SPECIALTY
16BT	WC OUTREACH FTR-SPECIALTY MEDICAL APPT-PHYSIATRY
16CT	WC OUTREACH FTC-SPECIALTY MEDICAL APPT-PHYSIATRY

NYC Human Resources Administration Department of Social Services | Family Independence Administration

Date: _____
Case Number: _____
Case Name: _____
Case Type: _____
Center: _____
Action Code: _____

Medical Provider Appointment

You must report to HRA's medical provider for the reason listed below.

Appointment Date: _____ Time: _____ Telephone: _____
Location Name: _____
Address: _____
City: _____ State: _____ Zip: _____

Travel Directions:

The goal of a medical assessment is to identify medical problems. Based on the outcome of your assessment, if it is determined that you have medical/mental health problems, the medical provider will work with you to develop a plan that will restore you to the best possible level of health and self-sufficiency. Please be aware that the initial assessment can take approximately four hours.

This is a mandatory cash assistance eligibility appointment. Failure to report and comply with this appointment may result in the denial/closing of your cash assistance case. If you are receiving non-cash assistance food stamps and fail to keep this appointment, you may be considered work rules required.

If you cannot keep the medical provider appointment or need special accommodations, please call the phone number listed above for assistance before your scheduled appointment time.

Please bring this letter, your Social Security card and your photo ID/Medicaid card, if available. You should also bring any recent doctor's letter, prescriptions or other forms that may provide information on your condition.

You may have someone accompany you to this appointment if you require assistance. All HRA medical provider facilities are handicapped accessible.

If you do not report to HRA's medical provider within one (1) hour of your appointment, you may not be seen.

Human Resources Administration
Department of Social Services
Family Independence Administration

Fecha: _____

Nombre del Caso: _____

Número del Caso: _____

Tipo de Caso: _____

Centro: _____

Código de Acción: _____

Cita con el Proveedor Médico

Se le esta enviando a un proveedor médico de la HRA por el siguiente motivo:

Fecha de la Cita: _____ Hora: _____ Teléfono: _____

Nombre del Local: _____

Dirección: _____

Cuidad: _____ Estado: _____ Código Postal: _____

Indicaciones de Viaje:

El objetivo de la evaluación médica es el detectar problemas de salud que le afecten. Conforme a los resultados de su evaluación, si se determina que usted padece de problemas de salud físicos/mentales, el proveedor médico elaborará un plan junto a usted que le ayudará a restaurar su mejor nivel de salud y autosuficiencia posible. Favor de tener presente que la evaluación inicial podría tomar aproximadamente cuatro horas.

Esta es una cita obligatoria de elegibilidad de asistencia en efectivo. El no presentarse y no cumplir esta cita como debido puede resultar en el rechazo o el cierre de su caso de asistencia pública. Si usted recibe cupones para alimentos fuera de asistencia pública, y no cumple la cita, puede ser considerado como persona obligado(a) a cumplir las reglas de trabajo.

Si usted no puede acudir a la cita con el proveedor médico o si necesita que se hagan adaptaciones especiales, por favor comuníquese al número anotado más arriba antes de su cita programada.

Favor de traer esta carta, su tarjeta de Seguro Social y de identificación con foto/de Medicaid, si están disponibles. Usted debe además traer cualquier carta del médico, receta u otros formularios que puedan proveer información sobre su estado.

Usted puede venir acompañado(a) de alguien a esta cita si necesita ayuda. Todos los locales de proveedores médicos de la HRA están dotados de acceso para incapacitados.

Si no se presenta al local del proveedor médico de la HRA dentro de (1) hora de su cita, puede que no se le atienda.

Human Resources Administration
Department of Social Services
Customized Assistance Services

Date:
Case Number:
Case Name:
Action Code:

Wellness, Comprehensive Assessment, Rehabilitation and Employment (WeCARE)
Mandatory Return Appointment

You must report to the WeCARE appointment indicated below:

Appointment Date: **Time:** **Telephone:**
Location Name:
Address Line 1:
Address Line 2:
City: **State:** **Zip Code:**

Travel Directions:

<u>Please bring this letter and a photo ID/Medicaid Card to the appointment</u>

If you cannot keep this appointment or you require a reasonable accommodation to keep this appointment, please contact WeCARE at the number listed above prior to your appointment. You must contact us prior to your reporting time to arrange for a new appointment.

This is a mandatory appointment. Failure to keep this appointment or cooperate may result in the reduction or closing of your cash assistance case. Please note that failure to comply with this cash assistance resource requirement has no effect on your Medicaid eligibility.

You may have someone accompany you to this appointment if you require assistance. All WeCARE facilities are wheelchair accessible.

Human Resources Administration
Department of Social Services
Customized Assistance Services

Fecha:
Número del caso:
Nombre del caso:
Código de acción:

Bienestar, evaluación completa, rehabilitación y empleo (WeCARE)
Cita obligatoria para volver a presentarse

Se debe reportar a la cita de WeCARE que se indica a continuación:

Fecha de la cita: **Hora:** **Teléfono:**
Nombre de la sede:
Dirección línea 1:
Dirección línea 2:
Ciudad: **Estado:** **Código postal**

Indicaciones de cómo llegar:

<u>Lleve esta carta y un documento de identidad con foto / tarjeta de Medicaid a la cita</u>

Si no puede asistir a esta cita o si necesita una adaptación razonable para asistir a esta cita, comuníquese con WeCARE al número que aparece arriba antes de su cita. Se debe comunicar con nosotros antes de su hora para presentarse para programar una nueva cita.

Esta es una cita obligatoria. Si no cumple con esta cita o si no coopera, esto puede resultar en la reducción o cierre de su caso de asistencia monetaria. Tenga en cuenta que el incumplimiento con este requisito de recurso de asistencia monetaria no tiene efecto en su elegibilidad de Medicaid.

Si necesita asistencia, puede pedir que alguien le acompañe a esta cita. Todas las instalaciones de WeCARE tienen acceso para sillas de ruedas.

Human Resources Administration
Department of Social Services
Customized Assistance Services

Notice Date:
Case #:
Case Name:
Action Code:

Referral to
Wellness, Comprehensive Assessment, Rehabilitation and Employment (WeCARE)
for a Clinical Review

You must report to WeCARE for an appointment with a Clinical Review Team (CRT). The goal of the clinical review is to determine if your most recent Functional Capacity Outcome (FCO) is still appropriate.

Your appointment is at the WeCARE Vendor Site indicated below:

Appointment Date: **Time:** **Telephone:**
Location Name:
Address:
City: **State:** **Zip Code:**

Travel Directions:

Please bring copies of any medical documentation to the CRT appointment. In addition, if you recently had a Fair Hearing, please bring any documents submitted at the Fair Hearing and your Fair Hearing decision notice to this meeting.

If you cannot keep this appointment or you require a reasonable accommodation to keep this appointment, please contact WeCARE at the number listed on page 1 prior to your appointment. You must contact us prior to your reporting time to arrange for a new appointment.

This is a mandatory appointment. Failure to keep this appointment or cooperate may result in the reduction or closing of your cash assistance case. Please note that failure to comply with this cash assistance resource requirement has no effect on your Medicaid eligibility.

You may have someone accompany you to this appointment if you require assistance. All WeCARE facilities are wheelchair accessible.

Human Resources Administration
Department of Social Services
Customized Assistance Services

Fecha del aviso:
Número de caso:
Nombre del caso:
Código de acción:

Referencia para
Bienestar, evaluación completa, rehabilitación y empleo (WeCARE)
para una revisión clínica

Se debe reportar a WeCARE para una cita con un Equipo de revisión clínica (CRT). El objetivo de la revisión clínica es determinar si su resultado de capacidad funcional (FCO) más reciente es todavía adecuado.

Su cita es en el lugar del proveedor de WeCARE que se indica a continuación:

Fecha de la cita: **Hora:** **Teléfono:**
Nombre de la sede:
Dirección:
Ciudad: **Estado:** **Código postal:**

Indicaciones de cómo llegar:

Traiga copias de toda su documentación médica a la cita de CRT. Además, usted tuvo recientemente una Audiencia imparcial, traiga todos los documentos presentados en la Audiencia imparcial y su aviso de decisión de la Audiencia imparcial a esta reunión.

Si no puede asistir a esta cita o si necesita una adaptación razonable para asistir a esta cita, comuníquese con WeCARE al número que aparece en la página 1 antes de su cita. Se debe comunicar con nosotros antes de su hora para presentarse para programar una nueva cita.

Esta es una cita obligatoria. Si no cumple con esta cita o si no coopera, esto puede resultar en la reducción o cierre de su caso de asistencia monetaria. Tenga en cuenta que el incumplimiento con este requisito de recurso de asistencia monetaria no tiene efecto en su elegibilidad de Medicaid.

Si necesita asistencia, puede pedir que alguien le acompañe a esta cita. Todas las instalaciones de WeCARE tienen acceso para sillas de ruedas.

CAS-324 (E) 05/01/2012

Human Resources Administration
Department of Social Services
Customized Assistance Services

Date:
Case Number:
Case Name:
Case Type:
Center:
Action Code:

Wellness, Comprehensive Assessment, Rehabilitation and Employment (WeCARE)
Nonmedical Referral for Mandatory Services

Based on the outcome of our medical assessment, which includes any independent medical information that you may have provided, the medical provider has determined that:

Appointment Date: Time: Telephone:
Location:
Address:
City: State: Zip:

Travel Directions:

Please bring this letter and a photo ID/Medicaid Card to the appointment

If you cannot keep this appointment or you require a reasonable accommodation to keep this appointment, please contact WeCARE at the number listed above prior to your appointment. You must contact us prior to your reporting time to arrange for a new appointment.

This is a mandatory appointment. Failure to keep this appointment or cooperate may result in the reduction or closing of your cash assistance case. Please note that failure to comply with this cash assistance resource requirement has no effect on your Medicaid eligibility.

You may have someone accompany you to this appointment if you require assistance. All WeCARE facilities are wheelchair accessible.

CAS-324 (S) 5/1/2012

Human Resources Administration
Department of Social Services
Customized Assistance Services

Fecha:
Número del caso:
Nombre del caso:
Tipo de caso:
Centro:
Código de acción:

Bienestar, evaluación completa, rehabilitación y empleo (WeCARE)
Remisión no médica para servicios obligatorios

En base al resultado de nuestra evaluación médica, que incluye la información médica de cualquier dependiente que pueda haber proporcionado, el proveedor médico determinó que:

Fecha de la cita: Hora: Teléfono:
Lugar:
Dirección:
Ciudad: Estado: Código postal:

Indicaciones de cómo llegar:

<u>Lleve esta carta y un documento de identidad con foto/tarjeta de Medicaid a la cita</u>

Si no puede asistir a esta cita o si necesita una adaptación razonable para asistir a esta cita, comuníquese con WeCARE al número que aparece arriba antes de su cita. Se debe comunicar con nosotros antes de su hora para presentarse para programar una nueva cita.

Esta es una cita obligatoria. Si no cumple con esta cita o si no coopera, esto puede resultar en la reducción o cierre de su caso de asistencia monetaria. Tenga en cuenta que el incumplimiento con este requisito de recurso de asistencia monetaria no tiene efecto en su elegibilidad de Medicaid.

Si necesita asistencia, puede pedir que alguien le acompañe a esta cita. Todas las instalaciones de WeCARE tienen acceso para sillas de ruedas.

Form W-333K (E) 11/04/2011

NYC Human Resources Administration
Department of Social Services
Customized Assistance Services

Notice Date:
Case #:
Case Name:
Center:
FH&C Tel. #:
Action Code:

WeCARE Assignment Information Summary

You have been assigned to the following work activity in the WeCARE Program: _____.

The number of hours you are required to work every week is: _____.

You have been scheduled for an orientation on the date listed below. Please bring your HRA photo ID Card. Your orientation date and location is as follows:

Your appointment is indicated below:

Appointment Date: **Time:** **Telephone:**
Location Name:
Address:
City: **State:** **Zip Code:**

Contact Person:

Travel Directions:

This is a mandatory engagement appointment. Your participation in this program is mandatory unless you receive another assignment, you become employed or HRA determines that you have become unable to work or exempt for another reason as:

- You have reached age 60 years of age
- You are in the last 30 days of pregnancy
- You are a single parent caring for a child less than thirteen (13) weeks of age
- HRA has determined you are needed at home to take care of a member of your household who is ill or incapacitated

In order to receive your benefits, you must work the assigned number of hours at your work site, unless you have a good cause not to work. If you fail to work the assigned hours without good cause, your benefits will be reduced or terminated.

This notice tells you what to do if you believe that you should receive a different assignment because of a medical problem, or you cannot come to work for another reason.

If you disagree with the determination of hours that you are able to work, you may ask for a conference or a Fair Hearing, or both.

What to do if you think that you should be given a different work assignment:

You have already been determined as work limited by an HRA-authorized medical practitioner. Your assignment is based on your functional capacity as outlined in your individual plan of employment (IPE). We have informed your work site supervisor of your limitations, and to the extent possible, we have made every effort to accommodate your limitations. You may still contest the WeCARE assignment as medically inappropriate. The proper way to contest the assignment is as follows:

1. Report to your assigned work site and find out about your assignment. You may discuss any issues you have about whether the assignment is appropriate with the person who gives you your assignment, your supervisor at the assignment, or the agency's WEP coordinator.
2. If you have not resolved the issue at your WeCARE vendor, you can also make an appointment to discuss your objections at a conference at your job center location.
3. If you are not able to resolve your issues at the conference, you may request a Fair Hearing.

What to do if your medical condition changes in a way that affects your ability to work:
Discuss any problem related to your medical condition with your work site supervisor, and provide written documentation on your doctor's stationery which includes the doctor's name, the date, your diagnosis and prognosis, and states what work activities your condition prevents you from doing and why. The documentation must be an original, not a photocopy, and must be current.

WeCARE may change your assignment to another one based on the medical condition described on the documentation you provide, or the agency may refer you for a medical assessment.

You may refuse to work at an assignment on the basis that it is inconsistent with your medical condition without an immediate loss of benefits. However, if it is determined at a Fair Hearing that there is no basis for your claim that you are unable to engage in the assigned work activities and that you intentionally misrepresented your medical condition, your benefits will be reduced as a sanction.

Follow the instructions in the **What if you receive a Notice of Intent to discontinue benefits?** section below if you receive a Notice of Intent as a result of a change in your medical condition of which the agency is unaware.

When can you be absent from your assignment?
You do not have to report to your assignment on holidays observed by your assigned agency, on your days of religious observance (must be documented), or when you have "good cause".

What is "good cause" for missing a day or days of work?
"Good cause" includes circumstances beyond your control such as, but not limited to, illness, family emergency, jury duty, appointments at an HRA office, school closings, lack of child care or child care payment problems, or lack of transportation. "Good cause" also includes employment interviews and temporary or part-time employment.

What to do if you cannot come to work or you are going to be late:
You must notify your supervisor by telephone as soon as you know that you are going to be absent or late. Give notice before your scheduled starting time. If you do not do so, you may lose benefits. When you return to your work site, you must bring any documentation that you can reasonably obtain to show why you were absent or late.

What happens when you are absent or late without good cause, fail to notify your supervisor that you will be absent or late, or fail to provide documentation?
If you are absent or late without good cause, you will receive a notice of failure to comply with your work assignment. You may also receive a notice for failing to notify your supervisor or failing to provide documentation. You will have the right to request a conciliation, conference and/or Fair Hearing within the time limit stated on the notice.

What if you receive a Notice of Intent to discontinue benefits?
If you receive a Notice of Intent to discontinue benefits because of failure to comply with your work assignment, you have a right to a Fair Hearing. Your benefits will continue, pending the Fair Hearing decision, as long as you make a request for a Fair Hearing within the time frame stated in the Notice of Intent.

Conference and Fair Hearing Information

CONFERENCE

If you think our decision is wrong, or if you do not understand our decision, please call us to set up a conference (informal meeting with us). To do this, call the Fair Hearing and Conference (FH&C) unit phone number on **page 1** of this notice or write to us at the address on **page 1** of this notice. Sometimes this is the fastest way to solve a problem you may have. We encourage you to do this even if you have asked for a Fair Hearing. If you ask for a conference, you are still entitled to a Fair Hearing.

STATE FAIR HEARING

How to Ask for a Fair Hearing: If you believe the decision(s) we are making is/are wrong, you may request a State Fair Hearing by telephone, in writing, fax, in person or online.

(1) TELEPHONE: Call **(800) 342-3334**. (Please have this notice in hand when you call.)

(2) WRITE: Send a copy of the entire notice, with the "Fair Hearing Request" section completed, to:
Office of Administrative Hearings
New York State Office of Temporary and Disability Assistance
P.O. Box 1930, Albany, NY 12201
(Please keep a copy for yourself.)

(3) FAX: Fax a copy of the entire notice, with the "Fair Hearing Request" section completed, to: **(518) 473-6735**.

(4) IN PERSON: Bring a copy of the entire notice, with the "Fair Hearing Request" section completed, to the Office of Administrative Hearings, New York State Office of Temporary and Disability Assistance at: **14 Boerum Place, Brooklyn, NY 11201**.

(5) ONLINE: Complete an online request form at: **http://www.otda.ny.gov/oah/forms.asp**

What to Expect at a Fair Hearing: The State will send you a notice that tells you when and where the Fair Hearing will be held. At the hearing, you will have a chance to explain why you think our decision is wrong. To help explain your case, you can bring a lawyer and/or witnesses such as a relative or a friend to the hearing, and/or give the Hearing Officer any written documentation related to your case such as: pay stubs, leases, receipts, bills and/or doctor's statements, etc. If you cannot come yourself, you can send someone to represent you. If you are sending someone who is not a lawyer to the hearing instead of you, you must give that person a letter to show the Hearing Officer that you want that person to represent you. At the hearing, you, your lawyer or your representative can also ask questions of witnesses whom we bring, or you bring, to explain the case.

If you have a disability, and cannot travel, you may appear through a representative, either a friend, relative or lawyer**.** If your representative is not a lawyer, or an employee of a lawyer, your representative must bring the hearing officer a written letter, signed.

LEGAL ASSISTANCE: If you need free legal assistance, you may be able to obtain such assistance by contacting your local Legal Aid Society or other legal advocate group. You may locate the nearest Legal Aid Society or advocate group by checking the Yellow Pages under "Lawyers."

ACCESS TO YOUR FILE AND COPIES OF DOCUMENTS: To help you get ready for the hearing, you have a right to look at your case files. If you call, write or fax us, we will send you free copies of the documents from your files, which we will give to the Hearing Officer at the Fair Hearing. Also, if you call, write or fax us, we will send you free copies of specific documents from your files which you think you may need to prepare for your Fair Hearing. To ask for documents or to find out how to look at your file, call **(718) 722-5012**, fax **(718) 722-5018** or write to **HRA Division of Fair Hearing, 14 Boerum Place, Brooklyn, New York 11201**. If you want copies of your documents from your case file, you should ask for them ahead of time. Usually, they will be sent to you within three working days of when you asked for them. If you make your request less than five working days before your hearing, your case file documents may be given to you at your hearing.

INFORMATION: If you want more information about your case, how to ask for a Fair Hearing, how to see your file or how to get additional copies of documents, call or write to us at the phone number/address listed on the front of this notice.

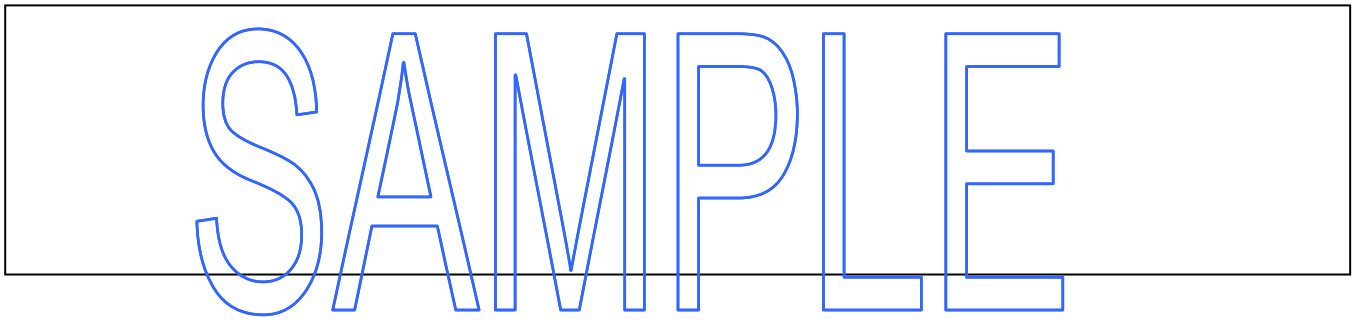
FAIR HEARING REQUEST

Continuing Your Benefit(s): Your benefits will continue unchanged, until a Fair Hearing decision is issued, if you ask for a Fair Hearing before the effective date stated in this notice.
Please be reminded that if you ask for a conference only, and not a State Fair Hearing, within the time frame indicated in the Continuing Your Benefits section, your benefits will not stay the same.
If you lose the Fair Hearing, you will have to pay back any benefits you received, but should not have received, while you were waiting for the decision. If you do not want your benefits to stay the same until the decision is issued, you must tell the State when you call for a Fair Hearing or, if you send back this notice, check the box below:

☐ **I do not want to keep my benefits the same until the Fair Hearing decision is issued.**

Deadline: If you want the State to review our decision, you must ask for a Fair Hearing within sixty (60) days from the date of the notice for Cash Assistance issues. If you cannot reach the New York State Office of Temporary and Disability Assistance by phone, by fax, in person or online, please write to ask for a Fair Hearing before the deadline.

☐ **I want a Fair Hearing. The Agency's decision is wrong because:**



Print Name:_____ Case Number:_____
Name M.I. Last Name

Address:_____ Telephone:_____

City:_____ State:_____ Zip Code:_____

Signature:_____ Date:_____

Form W-333K (S) 11/04/2011

Human Resources Administration
Department of Social Services
Customized Assistance Services

Fecha del aviso:
No. de caso:
Nombre del caso:
Centro:
Tel FH&C :
Código de acción:

Resumen de información de la asignación de WeCARE

Se le ha asignado la siguiente actividad de trabajo en el Programa WeCARE: _____.

Cada semana deberá trabajar _____ horas.

Se le ha programado para recibir una orientación en la fecha que se indica a continuación. Debe traer su tarjeta de identificación con fotografía de la HRA. La fecha y el lugar de su orientación es la siguiente:

A continuación se indican los datos de su cita:

Fecha de la cita: **Hora:** **Teléfono:**
Nombre de la ubicación:
Dirección:
Ciudad: **Estado:** **Código postal:**

Persona de contacto:

Indicaciones para llegar:

Esta es una cita de participación obligatoria. Su participación en este programa es obligatoria, a menos que reciba otra asignación, obtenga un empleo o la HRA determine que ya no es capaz de trabajar o que esté exento por otras razones como:

- Cumplió 60 años de edad
- Está en los últimos días del embarazo
- Es madre(padre) soltera a cargo de un hijo menor de trece (13) semanas de edad
- La HRA determinó que es necesario que se quede en casa para cuidar a un miembro de su familia que está enfermo o incapacitado

Para poder recibir sus beneficios debe trabajar la cantidad de horas que se le asignó en su sitio de trabajo, a menos que tenga una buena causa para no trabajar. Si no trabaja las horas asignadas sin tener una buena causa, se reducirán o cancelaran sus beneficios.

Este aviso contiene información sobre lo que debe hacer si considera que debería haber recibido una asignación diferente por tener un problema médico o si no puede presentarse a trabajar por otra razón.

Si no está de acuerdo con la determinación de las horas que puede trabajar, puede pedir una conferencia, una audiencia imparcial o ambas.

Lo que debe hacer si considera que le deben dar una asignación de trabajo diferente:

El profesional médico autorizado de la HRA y determinó que usted tiene limitaciones para trabajar. Su asignación se basa en su capacidad de funcionamiento según la descripción de su plan individual de empleo (IPE). Hemos informado a su supervisor del lugar de trabajo sobre sus limitaciones, y en la medida de lo posible, hemos hecho los esfuerzos necesarios de adaptación para sus limitaciones. Todavía puede impugnar la asignación de WeCARE como médicamente inapropiada. La siguiente es la forma adecuada de impugnar la asignación:

1. Preséntese a su lugar de trabajo asignado y averigüe sobre su asignación. Si tiene algún problema en cuanto a la idoneidad de la asignación, puede discutirlo con la persona que le dio la asignación, con su supervisor de la asignación o con el coordinador WEP de la agencia.
2. Si no resuelve su problema con su proveedor de WeCARE, también puede hacer una cita para discutir sus objeciones durante una conferencia en la ubicación de su centro de trabajo.
3. Si no logra resolver sus problemas durante la conferencia, puede solicitar una audiencia imparcial.

Lo que debe hacer si su condición médica cambia de alguna manera que afecte su capacidad para trabajar:
Discuta cualquier problema respecto a su condición médica con su supervisor del lugar de trabajo y presente documentos escritos en papel membretado, que incluya el nombre de su médico, la fecha, el diagnóstico y el pronóstico, indicando cuáles actividades de trabajo no puede realizar debido a su condición y la razón por la que no puede realizarlas. El documento debe ser original, no una fotocopia y debe ser reciente.

WeCARE puede cambiar su asignación por otra con base en la condición médica descrita en el documento que proporcione, o bien, la agencia puede referirle para que le realicen una evaluación médica.

Puede negarse a trabajar en una asignación basándose en que no es consistente con su condición médica sin perder inmediatamente sus beneficios. Sin embargo, si en la audiencia imparcial se determina que no existen bases para su reclamo porque no es capaz de participar en las actividades de trabajo que se le asignaron y que intencionalmente mintió sobre su condición médica, como sanción se reducirán sus beneficios.

Siga las instrucciones de la sección **¿Qué sucede si recibe un Aviso de intención de descontinuar los beneficios?** a continuación si recibe un Aviso de intención como resultado de algún cambio en su condición médica, que la agencia desconozca.

¿Cuándo puede ausentarse de su asignación?
No tiene que presentarse al trabajo los días feriados asignados por la agencia, los días de práctica de su religión (deben ser documentados) o cuando tenga una “buena causa”.

¿Qué es una “buena causa” para faltar al trabajo?
Una “buena causa” incluye circunstancias que está fuera de su control, incluyendo entre otras, enfermedad, emergencia familiar, obligación de jurado, citas en oficinas de la HRA, cierre de escuelas, falta de servicio de cuidado de niños o problemas con el pago del mismo, o falta de transporte. Una “buena causa” también incluye las entrevistas de empleo y los empleos temporales o de medio tiempo.

Lo que debe hacer si no se presentará a trabajar o llegará tarde:
Debe avisar por teléfono a su supervisor tan pronto como sepa que no se presentará a trabajar o que llegará tarde. Avise antes de su hora de inicio programada. Si no lo hace, puede perder sus beneficios. Cuando vuelva a su lugar de trabajo, debe llevar cualquier documento que pueda obtener razonablemente para demostrar por qué llegó tarde o no se presentó a trabajar.

¿Qué sucede cuando usted falta o llega tarde sin una buena causa, no avisa a su supervisor que faltará o llegará tarde o no presenta documentos de respaldo?
Si falta o llega tarde sin una buena causa, recibirá un aviso de incumplimiento con su asignación de trabajo. También puede recibir un aviso por no avisar a su supervisor o por no presentar los documentos. Tendrá derecho a solicitar una conciliación, una conferencia y una audiencia imparcial en un plazo limitado especificado en el aviso.

¿Qué sucede si recibe un Aviso de Intención de descontinuar los beneficios?
Si recibe un Aviso de intención de descontinuar los beneficios porque no cumplió con su asignación de trabajo, tiene derecho a una audiencia imparcial. Continuará recibiendo sus beneficios mientras esté pendiente la decisión

de la audiencia imparcial, siempre que solicite la audiencia imparcial dentro del plazo especificado en su Aviso de intención.

Información sobre la conferencia y la audiencia imparcial

CONFERENCIA

Si piensa que nuestra decisión no es correcta, o si no entiende nuestra decisión, llámenos para programar una conferencia (reunión informal con nosotros). Para hacerlo, llame a la unidad de Audiencias Imparciales y Conferencias (FH&C) al número de teléfono que se indica en la **página 1** de este aviso o escríbanos a la dirección que se indica en la **página 1** de este aviso. Algunas veces esta es la forma más rápida de resolver algún problema que tenga. Recomendamos que haga esto aunque haya solicitado una audiencia imparcial. Si solicita una conferencia, aún tiene derecho a una audiencia imparcial.

AUDIENCIA IMPARCIAL DEL ESTADO

Cómo solicitar una audiencia imparcial: Se cree que nuestras decisiones son incorrectas, puede solicitar una Audiencia imparcial del estado por teléfono, por escrito, por fax, en persona o en línea.

(1) TELÉFONO:	Llame al **(800) 342-3334**. (Tenga a mano este aviso cuando llame).
(2) ESCRIBIR:	Envíe una copia del aviso completo con la sección "Solicitud de audiencia imparcial" llena a: Office of Administrative Hearings New York State Office of Temporary and Disability Assistance **P.O. Box 1930, Albany, NY 12201** (Conserve una copia para usted).
(3) FAX:	Envíe por fax una copia del aviso completo con la sección "Solicitud de audiencia imparcial" llena al: **(518) 473-6735**.
(4) EN PERSONA:	Lleve una copia del aviso completo con la sección "Solicitud de audiencia imparcial" llena a la: Office of Administrative Hearings, New York State Office of Temporary and Disability Assistance en: **14 Boerum Place, Brooklyn, NY 11201**.
(5) EN LÍNEA:	Llene en línea el formulario de solicitud en: **http://www.otda.ny.gov/oah/forms.asp**

Lo que debe esperar que suceda durante la Audiencia imparcial: El Estado le enviará un aviso indicándole cuándo y dónde se llevará a cabo la audiencia imparcial. En la audiencia tendrá oportunidad de explicar por qué piensa que nuestra decisión no es correcta. Para ayudarle a explicar su caso, puede venir a la audiencia con un abogado o testigo, que puede ser un pariente o amigo, y presentar al Oficial de la audiencia cualquier documento escrito relacionado con su caso, por ejemplo: boletas de pago, arrendamientos, recibos, facturas, declaraciones de un médico, etc. Si no puede venir, puede enviara a un representante. Si envía a la audiencia a un representante que no es abogado, debe darle a la persona una carta para demostrar al Oficial de la audiencia que desea que esa persona sea su representante. Durante la audiencia, usted, su abogado o su representante también pueden hacer preguntas a los testigos que traigamos o que usted traiga para explicar el caso.

Si tiene una discapacidad y no puede viajar, en su lugar puede presentarse un representante, que puede ser un amigo, un pariente o un abogado. Si su representante no es abogado o empleado de un abogado, debe traer al oficial de la audiencia una carta firmada.

ASISTENCIA LEGAL: Si necesita asistencia legal gratuita, puede obtener dicha ayuda al comunicarse con su Sociedad de ayuda legal local u otra asociación de defensa legal. Puede localizar la Sociedad de ayuda legal más cercana o asociación de defensa legal en las Páginas Amarillas en "Abogados".

ACCESO A SU EXPEDIENTE Y COPIAS DE LOS DOCUMENTOS: Para prepararse para la audiencia tiene derecho a revisar el expediente de su caso. Si nos llama, escribe o envía un fax, le enviaremos gratuitamente las copias de loso documentos de su expediente, las cuales le daremos al Oficial de la audiencia durante la audiencia imparcial. Además, si nos llama, escribe o envía un fax, le enviaremos gratuitamente las copias de documentos específicos de su expediente que usted piense que son necesarios para prepararse para la audiencia imparcial. Para solicitar documentos o enterarse de cómo buscar en su expediente, llame al **(718) 722-5012**, envíe un fax al **(718) 722-5018** o escriba a **HRA Division of Fair Hearing, 14 Boerum Place, Brooklyn, New York 11201**. Si desea copias de sus documentos del expediente, debe pedirlos anticipadamente. Por lo general se los enviaremos en un plazo de tres días hábiles a partir de su solicitud. Si hace la solicitud menos de

cinco días hábiles antes de la audiencia, los documentos de su expediente se le entregarán durante la audiencia.

INFORMACIÓN: Si desea más información sobre su caso, cómo solicitar una audiencia imparcial, como tener acceso a su expediente o cómo obtener copias adicionales de los documentos, llámenos o escríbanos utilizando el número de teléfono y la dirección que se indica en la portada de este aviso.

SOLICITUD DE AUDIENCIA IMPARCIAL

Continuación de sus beneficios: Sus beneficios continuarán sin cambios hasta que se emita una decisión de la audiencia imparcial, si la solicita antes de la fecha límite que se indica en el aviso. Recuerde que si solo solicita una conferencia y no una audiencia imparcial, en el plazo indicado en la sección Continuación de sus beneficios, sus beneficios cambiarán.

Si después de la audiencia imparcial los resultados son en su contra, tendrá que pagar cualquier beneficio que haya recibido mientras esperaba la decisión, pero que no debía haber recibido. Si no desea que los beneficios permanezcan iguales hasta que se emita la decisión, debe indicarlo al Estado cuando llame para solicitar la audiencia imparcial, o bien, si envía de vuelta este aviso, marque la siguiente casilla:

☐ **No deseo que mis beneficios permanezcan iguales hasta que se emita la decisión de la audiencia imparcial.**

Fecha límite: Si desea que el Estado revise nuestra decisión, debe solicitar una audiencia imparcial en un plazo de sesenta (60) días después de recibir el aviso de asuntos de Asistencia monetaria. Si no se puede comunicar con la New York State Office of Temporary and Disability Assistance por teléfono, por fax, en persona o en línea, escriba para solicitar la audiencia imparcial antes de la fecha límite.

☐ **Deseo una audiencia imparcial. La decisión de la agencia es errónea porque:**

Nombre en letra de molde: _____ Número de caso: _____
Nombre Inicial del segundo nombre Apellido

Dirección: _____ Teléfono: _____

Ciudad: _____ Estado: _____ Código postal: _____

Firma: _____ Fecha: _____

Form W-333L
8/28/08

Human Resources Administration
Department of Social Services
Customized Assistance Services

Date of Action:
Case Number:
Case Name:
Center:
Action Code:

WeCARE Return to Job Center (Mandatory)

You must return to the Job Center for eligibility review and determination.

Your appointment with the Job Center is indicated below:

Appointment Date: **Time:** **Telephone:**
Location Name:
Address:
City: **State:** **Zip Code:**

If you cannot keep the appointment or need reasonable accommodation or have questions, please call for assistance before your scheduled appointment time.

Travel Directions:

This is a mandatory appointment. You must report to and cooperate with this mandatory appointment as a condition of continued Cash Assistance benefits. Failure to report for and comply with this appointment without good cause may result in a reduction or closing of your cash assistance case.

Form W-333L (S)
10/5/08 (ENG 8/28/08)

Human Resources Administration
Department of Social Services
Customized Assistance Services

Fecha de la acción:
Número de caso:
Nombre del caso:
Centro:
Código de Acción:

Retorno a Centro de Trabajo WeCARE (Obligatorio)

Usted debe regresar al Centro de trabajo para una revisión y determinación de elegibilidad.

Su cita con el Centro de trabajo se indica abajo:

Fecha de la cita:	**Hora:**	**Teléfono:**
Nombre de la ubicación:		
Dirección:		
Ciudad:	**Estado:**	**Código Postal:**

Si usted no puede mantener la cita, si necesita acomodaciones razonables o si tiene alguna pregunta, por favor llame para obtener ayuda antes de la hora programada de su cita.

Instrucciones de Viaje:

Esta es una cita obligatoria. Usted debe presentarse y cooperar con esta cita obligatoria como condición de la continuación de sus beneficios de asistencia en efectivo. Si no se presenta ni cumple con esta cita sin tener razones justificadas, podría resultar en la reducción o cierre de su caso de asistencia en efectivo.

W-333T (E) 05/01/2012

New York City Human Resources Administration
HIPAA[1] Compliant Authorization for Disclosure of Individually Identifiable Information
Drug Treatment Records and Confidential HIV* Related Information

Client Name _____
Date of Birth _____ SSN # _____
CA Case #_____

Federal and New York State law and regulations protect the confidentiality of your individually identifiable health information. This information includes your medical, mental health, HIV-related and alcohol and drug treatment records. The New York City Human Resources Administration (HRA) Wellness, Comprehensive Assessment, Rehabilitation and Employment (WeCARE) program provides services to individuals receiving Cash Assistance who may have medical and/or mental health conditions to assist them in attaining their highest possible level of health and self-sufficiency. HRA will not disclose any health information about you without your written consent, unless otherwise permitted or required to do so by law.

By signing this authorization, you consent to HRA obtaining your health information including your medical, mental health, HIV-related and alcohol and drug treatment records and disclosing your health information and current or past Cash Assistance and Food Stamps records to FEGS Health and Human Services System (FEGS WeCARE), Fedcap (Fedcap WeCARE) and Arbor Education and Training (Arbor WeCARE) to enable the vendor to assist you.

By signing this authorization, you also consent to FEGS WeCARE, Fedcap WeCARE and Arbor WeCARE disclosing your medical, mental health, HIV-related and alcohol and drug treatment records to HRA in order to help you receive needed services and attain your highest possible level of self-sufficiency.

You may ask questions about anything you do not understand.

By signing this form, I authorize HRA to review my medical and other relevant treatment records and to disclose this information as necessary to FEGS WeCARE, Fedcap WeCARE and Arbor WeCARE. I also authorize HRA to disclose my current or past Cash Assistance and Food Stamps records to FEGS WeCARE, Fedcap WeCARE and Arbor WeCARE.

By signing this form, I authorize FEGS WeCARE, Fedcap WeCARE and Arbor WeCARE to disclose any medical and other relevant treatment records to HRA.

By signing this consent, I am authorizing the release of the following types of health information, which may also be derived from my treatment records, if applicable: a) medical information, b) HIV-related information, c) alcohol and drug treatment related information and d) mental health information.

I understand that I can withdraw my consent at any time by notifying HRA[2], in writing, except to the extent that HRA or the WeCARE vendor has already taken action based on this consent.

I understand that signing this authorization is voluntary and that my refusal will not affect my eligibility for HRA benefits.

If I am authorizing the release of alcohol/drug treatment records, I understand these records are protected under the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. Part 2 and

[1] The Health Insurance Portability and Accountability Act (HIPAA) of 1996 governs the privacy of Protected Health Information. If you feel your HIPAA rights have been violated, you may file a complaint with the Office for Civil Rights, Department for Health and Human Services, Jacob Javits Federal Building, 26 Federal Plaza, Suite 3312, New York, NY 10228: (212) 264-3313; or fax (212) 264-3039.
[2] WeCARE Director, HRA Customized Assistance Services, 2 Washington Street, New York, NY 10004

cannot be disclosed or re-disclosed by FEGS WeCARE, Fedcap WeCARE or Arbor WeCARE without my written consent unless otherwise provided for in the federal regulations.

If I am authorizing the release of mental health information, I understand that this information is protected under New York State Mental Hygiene Law Section 33.13. None of these records can be re-disclosed by FEGS WeCARE, Fedcap WeCARE or Arbor WeCARE without my written authorization, unless otherwise provided for by law.

If I am authorizing the release of HIV-related information, I understand that this information is protected by Article 27-F of the New York State Public Health Law and cannot be re-disclosed by FEGS WeCARE, Fedcap WeCARE or Arbor WeCARE without my authorization unless otherwise permitted by the regulations. I understand that I have the right to request a list of people who may receive or use my HIV-related information without authorization. If I experience discrimination because of the release or disclosure of HIV related information, I may contact the New York State Division of Human Rights at (212) 961-8650 or the New York City Commission of Human Rights at (212) 306-7450. These agencies are responsible for protecting my rights.

I understand that no recipient may re-disclose any HIV-AIDS related information, alcohol or drug treatment records or mental health treatment information about me except for the purpose described in this consent and to the authorized recipients named in this consent. I also understand that other types of information described in this consent may be redisclosed by the recipients and the confidentiality of such re-disclosures may no longer be protected by federal or state law.

Date or Event on which this Authorization will expire: This consent will terminate two years after I am no longer receiving services from the WeCARE program.

_____

Name *(Print)*

_____ Date _____

Signature of Client or Person
Authorized to Consent to the Release of Health Care Information

Basis of Authority to Sign on Behalf of Client:

_____

W-333T (S) 5/01/12

New York City Human Resources Administration
Autorización para la Divulgación de Información de Salud Individualmente Identificable en Cumplimiento con HIPAA[1]
Información, Registros de Tratamiento de Drogas e Información Confidencial Relacionada con el VIH*

Nombre del cliente _____
Fecha de nacimiento _____ No. de Seguro Social _____
No. de Caso CA_____

La ley y reglamentos Federal y del Estado de Nueva York protegen la confidencialidad de su información de salud identificable individualmente. Esta información incluye sus registros médicos, de salud mental, aquella relacionada con el VIH y de tratamiento para el alcohol y drogas. El programa de Bienestar, Evaluación Integral, Rehabilitación y Empleo (WeCare) de la New York City Human Resources Administration (HRA) ofrece servicios a las personas que reciben Asistencia en Efectivo que puedan tener condiciones médicas y/o de salud mental con el fin de que logren su nivel más alto posible de salud y autosuficiencia. La HRA no divulgará ningún tipo de información de salud sin su consentimiento por escrito, a menos que de otro modo lo permita o sea requerido por la ley.

Al firmar esta autorización, usted da su consentimiento para que HRA obtenga su información de salud, incluyendo sus registros médicos, de salud mental, de tratamiento de drogas y alcohol y aquella relacionada con el VIH, y además para que divulgue su información de salud y registros pasados o actuales de Asistencia en Efectivo y de Cupones de Alimentos a F·E·G·S Health and Human Services System (FEGS WeCARE), Fedcap (Fedcap WeCARE) y Arbor Education and Training (Arbor WeCARE) con el fin de que el vendedor lo pueda ayudar.

Al firmar esta autorización, usted también da su consentimiento a FEGS WeCARE, Fedcap WeCARE y a Arbor WeCARE para que divulguen sus registros médicos, de salud mental, de tratamiento de drogas y alcohol y aquella relacionada con el VIH a HRA para ayudarle a recibir los servicios necesarios y a obtener el nivel más alto posible de autosuficiencia.

Puede hacer preguntas sobre cualquier cosa que no entienda.

Al firmar este formulario, autorizo a HRA para que revise mis registros médicos y de otros tratamientos pertinentes y para que divulgue esta información como sea necesario a FEGS WeCARE, Fedcap WeCare y Arbor WeCARE. Además autorizo a HRA para que divulgue mis registros pasados y actuales de Asistencia en Efectivo y de Cupones de Alimentos a FEGS WeCARE, Fedcap WeCARE y a Arbor WeCARE.

Al firmar este formulario, autorizo a FEGS WeCARE, Fedcap WeCARE y Arbor WeCARE para que divulguen cualquier registro médico y otros tratamientos pertinentes a la HRA.

Al firmar este consentimiento, estoy autorizando la entrega de los siguientes tipos de información de salud, que también pueden derivarse de mis registros de tratamiento, si corresponde: a) información médica, b) información relacionada con el VIH, c) información relacionada con el tratamiento de alcohol y drogas d) información de salud mental.

Entiendo que tengo el derecho a revocar esta autorización en cualquier momento notificando a HRA[2], por escrito, excepto cuando HRA o el vendedor WeCare ya haya tomado acción basándose en este consentimiento.

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[1] La Ley de Portabilidad y Responsabilidad de Seguros de Salud (HIPAA) de 1996 controla la privacidad de la información de salud protegida. Si usted cree que sus derechos HIPAA han sido violados, puede presentar una queja en la Office for Civil Rights, Department for Health and Human Services, Jacob Javits Federal Building, 26 Federal Plaza, Suite 3312, New York, NY 10228: (212) 264-3313; o por fax al (212) 264-3039.

[2] WeCARE Director, HRA Customized Assistance Services, 2 Washington Street, New York, NY 10004

Entiendo que firmar esta autorización es un acto voluntario y que si me rehúso, mi elegibilidad para beneficios de HRA no se verá afectada.

Si estoy autorizando la entrega de registros de tratamiento de alcohol/drogas, entiendo que estos registros están protegidos bajo los reglamentos federales que gobiernan la Confidencialidad de los Registros de Alcohol y Abuso de Drogas del Paciente, 42 C.F.R Parte 2 y que no pueden ser divulgados, o vueltos a divulgar por FEGS WeCARE, Fedcap WeCARE o Arbor WeCARE, sin mi consentimiento por escrito, a menos que esté estipulado de otro modo en los reglamentos.

Si estoy autorizando la entrega de mi información de salud mental, entiendo que esta información está protegida por la Ley de Salud Mental del Estado de Nueva York, Sección 33.13. Ninguno de estos registros pueden ser divulgados nuevamente por FEGS WeCARE, Fedcap WeCARE o Arbor WeCARE, sin mi autorización por escrito, a menos que de otro modo esté estipulado en los reglamentos.

Si estoy autorizando la entrega de información relacionada con HIV, entiendo que esta información está protegida por el Artículo 27-F de la Ley de Salud Pública del Estado de Nueva York y que no puede volver a divulgarse nuevamente por FEGS WeCare, Fedcap WeCARE o Arbor WeCare sin mi autorización, a menos que de otro modo lo permitan los reglamentos. Entiendo que tengo el derecho a solicitar una lista de las personas que pueden recibir o usar mi información relacionada con el VIH sin autorización. Si soy objeto de discriminación debido a la entrega o divulgación de información relacionada con el VIH, puedo ponerme en contacto con la New York State Division of Human Rights llamando al (212) 961-8650 o con la New York City Commission of Human Rights llamando al (212) 306-7450. Estas agencias son responsables de proteger mis derechos.

Entiendo que ningún receptor puede volver a divulgar cualquier información relacionada con el VIH-SIDA, registros de tratamiento por alcohol o drogas o información de tratamiento de salud mental sobre mí, excepto con el fin descrito en este consentimiento y a los receptores autorizados mencionados en este consentimiento. También entiendo que los receptores pueden volver a divulgar otros tipos de información descrita en este consentimiento y que es posible que la confidencialidad de dichas nuevas divulgaciones ya no estará protegida por la ley federal o estatal.

Fecha o Evento cuando vencerá ésta Autorización: este consentimiento terminará dos años después de que yo deje de recibir servicios del programa WeCARE.

_____

Nombre *(Escriba en letra de molde)*

_____ Fecha: _____

Firma del Cliente o Persona
Autorizada para Consentir la Entrega de Información
de Cuidado de la Salud

Base de la Autoridad para Firmar a Nombre del Cliente:

_____