



National Disability Policy: A Progress Report

Has the Promise Been Kept?

Federal Enforcement of Disability Rights Laws (Part 2)

National Council on Disability

October 31, 2019

National Council on Disability (NCD)
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Washington, DC 20004

***National Disability Policy: A Progress Report
Has the Promise Been Kept? Federal Enforcement of Disability Rights Laws (Part 2)***

National Council on Disability, October 31, 2019

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National Council on Disability

An independent federal agency making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families.

Letter of Transmittal

October 31, 2019

The White House
1600 Pennsylvania Ave., NW
Washington, D.C. 20500

Dear Mr. President,

The National Council on Disability (NCD) is pleased to present the 2019 *National Disability Policy: A Progress Report*, titled *Has the Promise Been Kept? Federal Enforcement of Disability Rights Laws (Part 2)*. Each year, NCD submits a statutorily mandated report to the White House and Congress to offer recommendations on continuing, new, and emerging issues which affect the lives of people with disabilities.

This report is the second in a two-part series in which the Council revisits the NCD report, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act*, released in 2000. NCD reviews the efforts of U.S. Departments of Justice (DOJ), Housing and Urban Development (HUD), and the Federal Communications Commission (FCC) to implement and enforce federal disability rights laws.

The federal agencies examined in this report play a key role to ensure that people with disabilities have the same opportunity to live in and access the community, and to enjoy the benefits of new technology as any other American. This report assesses how these agencies implement and enforce the ADA and other federal disability rights laws and programs.

Promises to Keep was published just one year after the U.S. Supreme Court held in the seminal case of *Olmstead v. L.C.* that the Americans with Disabilities Act (ADA) requires that services to people with disabilities be provided in the most integrated setting appropriate. Since that time, the *Olmstead* decision has had a significant impact on the enforcement and education efforts of DOJ and to some degree HUD. In 2010 Congress passed the Twenty-First Century Communications and Video Accessibility Act (CVAA) to ensure accessibility to people with disabilities to the rapidly changing telecommunications and information technology sector.

NCD submits this report at a time when an entire generation of people with disabilities have grown up with the statutory rights of the ADA, the Fair Housing Act, and other laws passed during the latter part of the last century. Enforcement and effective implementation of federal disability civil rights laws and housing statutes are vital for people with disabilities to share fully in the American economy, to participate in the local and national community, and to interact with the Federal Government. While some progress in reaching the goal of full equality and justice for Americans with disabilities has been made since the release of *Promises to Keep*, continued progress and more consistent enforcement efforts are needed. NCD offers recommendations for DOJ, HUD, and the FCC to enhance their implementation, investigative,

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and compliance efforts in order to respond to ongoing and emerging barriers faced by people with disabilities. NCD encourages these agencies to both improve communications with people with a wide range of disabilities, including cognitive, mental, sensory, and physical disabilities, and to better utilize existing resources in investigations and compliance efforts.

NCD looks forward to working with the Administration to ensure the ongoing protection of people with disabilities from discrimination in all aspects of their lives through oversight and enforcement of our nation's disability rights laws.

Respectfully,

A handwritten signature in black ink that reads "Neil Romano". The signature is written in a cursive style with a long, vertical tail on the letter "o".

Neil Romano
Chairman

(The same letter of transmittal was sent to the President Pro Tempore of the U.S. Senate and the Speaker of the U.S. House of Representatives.)

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Executive Summary

For the past 46 years, as measured from the enactment of the Rehabilitation Act on September 26, 1973, the United States has through legislation gradually improved the ability of people with disabilities to realize their right to live, work, and participate fully in the community. Passage of the 1988 amendments to the Fair Housing Act (FHA), the 1990 Americans with Disabilities Act (ADA), the 2008 ADA Amendments Act (ADAAA), and the 2010 Twenty-First Century Communications and Video Accessibility Act (CVAA) have played major roles in the increased protection of the rights of people with disabilities and the promotion of greater inclusion into society. In between these landmark statutes, numerous other federal laws, regulations, and Executive Orders have sought to increase the opportunities for people with disabilities. The legislative enactment of federal disability civil rights laws and programs, however, is only one step in the full realization of equal opportunities for people with disabilities. Effective federal implementation, oversight, and enforcement of these laws are critical to sustain and advance justice and equality for people with disabilities.

This Progress Report, *Has the Promise Been Kept? Federal Enforcement of Disability Rights Laws*, is the second in a two-part series to revisit a National Council on Disability (NCD) report

titled *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act*, published in 2000. *Promises to Keep* considered the ADA enforcement efforts of the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Department of Justice (DOJ), the U.S. Department of Transportation (DOT), and the Federal Communications Commission (FCC), with minor consideration of the Architectural and Transportation Barriers Compliance Board (Access Board). Similar to the 2018 NCD Progress Report which considered the EEOC, the Access Board, and the Department of Labor in light of *Promises to Keep*,¹ this Progress Report again uses the 11 guidepost elements created in *Promises to Keep* to assess the efforts of DOJ, the Department of Housing and Urban Development (HUD), and the FCC to enforce and implement the ADA and other federal disability rights laws. NCD also assesses any progress made by DOJ and the FCC in response to the Council's recommendations in *Promises to Keep*.

Some progress to ensure greater opportunities for people with disabilities has occurred since *Promises to Keep*, best exemplified by the bipartisan passage of the ADAAA, and later the CVAA. The federal enforcement agencies considered in this report, however, still face budgetary and staffing issues; are too slow to respond to rapidly changing social, technical,

and other environmental changes; are inconsistent in their enforcement efforts; and in some cases, lack transparency in enforcement efforts.

Among some of the key findings in this report:

- DOJ, HUD, and FCC have developed helpful guidance documents to assist people with disabilities understand their federal rights.
- DOJ fails to make critical enforcement data available to enable a proper assessment of the Department's efforts to enforce federal disability rights laws.
- DOJ has improved transparency through publishing letters of findings, settlement agreements, and consent decrees on the ADA.gov website.
- DOJ has been inconsistent since *Promises to Keep* in using various litigation strategies to enforce federal disability rights laws, including in the critical area of community integration.
- HUD is required to rely heavily on state and local fair housing enforcement agencies, which can impact the consistency of investigations of disability rights housing complaints.
- HUD enforcement efforts are negatively impacted by decreasing staff levels in the Office of Fair Housing and Equal Opportunity (FHEO).
- The FCC is able to resolve all complaints by people with disabilities through negotiations without the need for any investigative or enforcement action, but such resolutions negatively impact the transparency of the work of the FCC.

- Rapid changes in the development and use of telecommunications technology, such as text messaging and Internet Protocol Captioned Telephone Service often outpace the ability of the FCC and DOJ to ensure the availability and quality of such services to people with disabilities.

Among a number NCD's recommendations in this report:

- DOJ should develop regulations on web accessibility for entities covered under Title II and III of the ADA, adopt the Access Board's guidance on accessible medical equipment and diagnostic equipment, increase *Olmstead* investigations and enforcement, and maintain a stronger and more consistent level of litigation around disability rights.
- HUD should increase training and technical assistance around the application of the Fair Housing Act to multifamily housing, increase the use of Secretary-initiated complaints, and increase the number of Section 504 reviews.
- The FCC should ensure that pay rates for the various telecommunications relay services available are sufficient to attract providers and provide quality service to people with disabilities who rely on such services.
- Congress should require DOJ to collect and make available statistical information on disability rights complaints and enforcement as already occurs for HUD and the EEOC.

Acronyms

ABA	Architectural Barriers Act
ACS	Advanced Communications Services
ADA	Americans with Disabilities Act of 1990
ADAAA	ADA Amendments Act of 2008
ADAAG	ADA Accessibility Guidelines (1991 & 2010)
AFFH	Affirmatively Furthering Fair Housing
ASL	American Sign Language
ASR	Automated Speech Recognition
CRIPA	Civil Rights of Institutionalized Persons Act
CRT	Civil Rights Division (Dept. of Justice)
CVAA	Twenty-First Century Communications and Video Accessibility Act
DAC	Disability Advisory Committee (Federal Communications Commission)
DOL	Department of Labor
DOJ	Department of Justice
DOT	Department of Transportation
DRO	Disability Rights Office (Federal Communications Commission)
DRS	Disability Rights Section of the Civil Rights Division (Dept. of Justice)
EAS	Emergency Alert System
ED	Department of Education
EEOC	Equal Employment Opportunity Commission
FCC	Federal Communications Commission
FHA	Fair Housing Act of 1964, as amended
FHAP	Fair Housing Assistance Program (Dept. of Housing & Urban Development)
FHEO	Fair Housing and Equal Opportunity (Dept. of Housing & Urban Development)
FHIP	Fair Housing Initiative Program (Dept. of Housing & Urban Development)
FTE	Full-Time Equivalent
FY	Fiscal Year
GAO	Government Accountability Office
HAC	Hearing Aid Compatible
HCES	Housing & Civil Enforcement Section of the Civil Rights Division (Dept. of Justice)
HUD	Department of Housing and Urban Development
IP CTS	Internet Protocol Captioned Telephone Service

iTRS	Interstate Telecommunications Relay Service
MOU	Memorandum of Understanding
PSAPs	Public Safety Answering Points
SPL	Special Litigation Section of the Civil Rights Division (Dept. of Justice)
SRO	Single Room Occupancy
TA	Technical Assistance
TRS	Telecommunications Relay Services
TTY	Text Telephone
TVPA	Trafficking Victims Protection Act
USAO	United States Attorney's Office
VRS	Video Relay Services
VRI	Video Remote Interpreting
VoIP	Voiceover Internet Protocol
WEA	Wireless Emergency Alert



As the nation recognizes the 20th anniversary of the *Olmstead* decision, and with the 30th anniversary of the ADA less than a year away, we must continue to ask, “Has the promise been kept?”

Introduction

The National Council on Disability (NCD) is congressionally mandated to advise the President, Congress, and other policymakers on disability policies and practices that enhance equal opportunity for people with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society. This Progress Report, the second in a two-part series entitled, *Has the Promise Been Kept? Federal Enforcement of Disability Rights Laws*, fulfills NCD's congressional mandate to advise policymakers on policies and practices that enable federal agencies to effectively enforce federal disability rights laws.

The United States, led by people with disabilities who demand equality and justice, has been at the forefront of the movement to advance the legal rights of people with disabilities. The legislative recognition by the United States that disability rights are civil rights has not been swift and has required the dedicated effort of the disability rights movement to spur a number of federal civil rights laws, most notably the Americans with Disabilities Act (ADA),² that ensure equal opportunity for people with disabilities. Several of these federal laws considered in this report are described in Appendix B.

The enforcement of federal disability rights laws is critical to providing equal opportunity across all aspects of community life for people

with disabilities. In 2000, NCD issued *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act*, the third in a series of reports around the turn of the century on ADA enforcement.³ *Promises to Keep* considered the ADA enforcement activities of the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Department of Justice (DOJ), the U.S. Department of Transportation (DOT), and the Federal Communications Commission (FCC), and addressed the technical assistance activities of the Architectural and Transportation Barriers Compliance Board (Access Board), the National Institute on Disability and Rehabilitation Research, and the former President's Committee on the Employment of People with Disabilities.

In *Promises to Keep*, NCD recognized that "the placement of disability discrimination on par with race or gender discrimination exposed the common experiences of prejudice and segregation and provided clear rationale for the elimination of disability discrimination in this country."⁴ The report further found that federal agencies charged with ADA enforcement and policy development were "overly cautious, reactive, and lacking a coherent and unifying national strategy."⁵ Enforcement efforts largely followed "a case-by-case approach based on individual complaints rather than one based on compliance monitoring and a cohesive, proactive

enforcement strategy.”⁶ The five federal agencies tasked to enforce the ADA were also found to not be working in collaboration to develop a national strategy on enforcement.⁷

This Progress Report is the second in a two-part series to use the 11 elements created in *Promises to Keep* to assess the implementation and enforcement of federal disability rights laws and programs. The 2018 Progress Report considered the efforts of the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor (DOL), and the Architectural and Transportation Barriers Compliance Board (Access Board). This Progress Report assesses the enforcement work of the U.S. Department of Justice (DOJ), the U.S. Department of Housing and Urban Development (HUD), and the Federal Communications Commission (FCC), again using the 11 guidepost elements. A number of the NCD recommendations in *Promises to Keep* are further revisited to evaluate progress made by DOJ and FCC, while for the first time using the *Promises to Keep* framework to consider the role of HUD in the enforcement of federal housing laws, which impact people with disabilities. The first three chapters provide an analysis of, and recommendations for, these agencies. Appendix C contains a further overview of the 11 elements develop in *Promises to Keep* and a description of the research methodology used in this report.

The legal, social, economic, and technological landscape has changed since *Promises to Keep*. The nation has witnessed the reorientation of services to people with disabilities following the landmark U.S. Supreme Court determination in *Olmstead v. L.C.* which clarified that the ADA requires that services be provided in the most integrated community setting appropriate to a person’s needs. Technological advances,

especially the rapid expansion of wireless communications, the Internet, and social media, have revolutionized telecommunications and social interaction. Personal digital devices have offered people with autism new ways to interact and communicate with family, friends, and the larger community. Improvements in screen-reading, text-to-speech, dictation, and similar software have increased the ability of the Deaf or Hard of Hearing and people who are blind or have low vision to communicate and access information. In 2008, with overwhelming bipartisan support, Congress passed the ADA Amendments Act (ADAAA) in response to the weakening of the ADA by the federal courts.⁸ In 2010, Congress similarly passed the Twenty-First Century Communications and Video Accessibility Act (CVAA) to address the rapid changes in telecommunications and enable people with disabilities to fully participate in such advances.⁹

In a 1992 speech, Justin Dart, Jr., the “father of the ADA,” offered prophetic remarks:

[the ADA] . . . is a landmark breakthrough. People with disabilities have been granted full, legally enforceable equality by one of the world’s most influential nations. . . . The ADA is an absolutely essential legal and educational tool to achieve equality and to achieve employment. But the ADA is not equality and it is not employment. ADA is a promise to be kept. And what is that promise? For whatever the law says legally, the clear promise of the ADA is that all people with disabilities will be fully equal, fully productive, fully prosperous, and fully welcome participants in the mainstream. Keeping the promise of the ADA is not going to be easy.¹⁰

As the nation recognizes the 20th anniversary of the *Olmstead* decision, and with the 30th anniversary of the ADA less than a year away, we must continue to ask, “Has the promise been kept?” While federal legal advances still continue in disability rights following the pivotal moments

of the passage of the Rehabilitation Act in 1973 and the ADA in 1990, legal developments alone are insufficient without consistent vigorous enforcement and oversight. This report discusses to what extent such vigorous enforcement has occurred.

Chapter 1: U.S. Department of Justice

Based on the analysis contained in this chapter, NCD recommends that the responsible entities within DOJ:

- Revise regulations concerning movie captioning and audio descriptions to require that digital theaters show only movies equipped with accessibility features.
- Respond to technological and other social changes, which includes guidance developed from the Access Board, by issuing regulations in a reasonable timeframe that ensure access to and for people with disabilities.
- Proceed with the development of web accessibility regulations under both Title II and Title III of the ADA.
- Develop Next Generation 9-1-1 regulations applicable to Public Safety Answering Points.
- Promptly adopt the U.S. Access Board's Accessibility Standards for Diagnostic Medical Equipment as the enforceable standard.
- Reinstate the October 2017 Guidance Document on the application of *Olmstead* to state employment systems.
- Update the ADA Title II and Title III Technical Assistance Manuals.
- Significantly reorganize the enforcement documents (letters of findings, letters of resolutions, settlement agreements, and consent decrees) available on ADA.gov by topic and setting type, as well as alphabetically and by date.
- Maintain disability rights enforcement as a priority and amend the current Strategic Plan to include disability rights as such.
- Significantly increase the number of Project Civic Access reviews to the levels conducted between 2001 and 2005 and obtain more agreements with state and local governments to ensure access to public facilities for people with disabilities.

(continued)

Based on the analysis contained in this chapter, NCD recommends that the responsible entities within DOJ: *continued*

- The Disability Rights and Special Litigation Sections increase their investigations and enforcement activities around *Olmstead* violations in facilities covered under the ADA and CRIPA.
- Consider the implications of the November 2018 memorandum which places restrictions on agreements involving state and local governments and excludes application of the memorandum in settlements to address any *Olmstead* violations.
- Continue to work closely with disability advocates to address ways to prevent and react to hate crimes and the trafficking of people with disabilities.
- Provide expansive training to all personnel employed within the Voting Section on ADA requirements at polling locations and the authority to remedy such violations.
- Simplify the language on its website to enable people with intellectual and other cognitive disabilities to effectively use the website and file a complaint.
- All websites that explain the filing of complaints prominently indicate how to request a reasonable accommodation as part of the description.
- Improve the complaint phone line by reducing wait times, informing callers about the wait time, and allowing for easier access to an agent.
- Increase and maintain greater consistency in its litigation efforts involving disability rights.
- File statements of interest, where appropriate, in support of private *Olmstead* cases in federal court.
- Continue to emphasize community integration and community service delivery requirements under *Olmstead* in any investigation of the conditions for people with disabilities within a state mental health, nursing, or intellectual or developmental disabilities facility.
- Continue to include unnecessary educational segregation as part of its *Olmstead* enforcement work.
- HCES work closely with HUD to create comprehensive training and technical assistance guidance outlining the applicability of the FHA and ADA to multifamily housing developers, property designers, property owners, and managers, and to develop methods for effective distribution of such assistance.
- Conduct a study to better understand the steady decline in calls to the ADA information line.
- Prominently display information about the ADA information line to increase awareness of its benefits to the public.

NCD recommends that Congress:

- Ensure that DOJ has the resources necessary to maintain stable staffing levels within the Civil Rights Division to ensure consistent disability rights enforcement efforts.
- Require DOJ to track and publish data on the timeliness of resolving disability rights complaints on an annual basis.
- Commission a study on the problem of human trafficking of people with disabilities to better understand the scope of the problem, ways to prevent such trafficking, and how to best support trafficking victims with disabilities.
- Require DOJ to collect and make available comprehensive statistical information about the number of disability rights complaints received by DOJ and the outcome of such complaints on at least an annual basis.
- Require DOJ to establish stringent oversight of the ADA mediation program to include audits of the work of the contract mediator on a regular basis.

Overview

The U.S. Department of Justice is responsible for the enforcement of numerous federal laws which have a direct and indirect impact on people with disabilities. These laws include Title II of the ADA which applies to state and local governments, and Title III of the ADA which applies to businesses and commercial facilities, and other private entities which provide public accommodations. DOJ enforces the Civil Rights of Institutionalized Persons Act (CRIPA), which requires compliance with the rights of people confined to facilities such as prisons, mental health facilities, intermediate care facilities and nursing homes; and Section 504 of the Rehabilitation Act of 1973, as amended, which includes rights for people with disabilities similar to the ADA in regard to federal contractors, entities that receive federal financial assistance, and federal government agencies. DOJ shares responsibilities with the

EEOC to enforce Title I of the ADA in cases of employment discrimination based on disability by a state or local government agency, covered in the 2018 Progress Report.¹¹ Similarly, DOJ shares responsibilities with HUD to enforce the Fair Housing Act when certain cases are brought to federal court.

The Civil Rights Division (CRT), created in 1957, is the primary entity within DOJ to enforce federal civil rights laws, including disability rights. CRT is composed of 11 separate enforcement-related sections, plus an administrative management section.¹² This chapter focuses particularly on CRT's Disability Rights and Special Litigation sections which play the most active role in DOJ's disability rights enforcement. The work of the CRT Criminal, Housing and Civil Enforcement, and Voting sections are also addressed, but in less detail.

The Disability Rights Section (DRS) is the principal entity which enforces and develops

regulations for the ADA, and Section 504 of the Rehabilitation Act (Appendix B provides an explanation of important provisions in the Rehabilitation Act). The Special Litigation Section (SPL) enforces CRIPA and the ADA. Through DRS and SPL, the Civil Rights Division enforces the ADA Title II integration mandate as interpreted by the Supreme Court in *Olmstead v. L.C.* involving people in institutions, or at serious risk of unnecessary institutionalization or segregation. CRT enforcement actions involve private institutions, such as adult homes of private nursing facilities, and public institutions, such as state-operated Intermediate Care Facilities for Individuals with Intellectual and Developmental Disabilities (ICF-IDDs), state-operated psychiatric hospitals, and public nursing facilities.

DRS, in collaboration with SPL, issues guidance documents on the requirements of *Olmstead*. In prior years, DOJ had a formal

Olmstead Task Force to coordinate various efforts. While the Task Force no longer exists, DOJ still maintains formal intra-departmental coordination to enforce *Olmstead*. DRS and SPL also engage in inter-agency coordination around *Olmstead* and community integration issues with other federal entities including HUD, and the Centers for Medicare and Medicaid Services (CMS) in the Department of Health and Human Services (HHS).

Regulatory, Sub-Regulatory and Policy Guidance

DOJ issues regulations and guidance documents for ADA Titles II and III.¹³ Since *Promises to*

Keep, DOJ has made substantive changes to the original ADA regulations and issued a number of new guidance documents. Some revisions were the result of changes to the definition of disability contained in the ADAAA,¹⁴ but most regulations and guidance documents issued since 2000 have dealt with issues unrelated to the ADAAA.

Promises to Keep recommended that DOJ set, and meet, a prompt deadline to adopt updated accessibility guidelines created by the U.S. Access Board, an independent federal agency with authority to develop accessibility guidelines for DOJ to set as the enforceable standard.¹⁵ With rapid changes in technology and the built environment, DOJ's record in issuing timely

regulations related to physical accessibility for people with disabilities has been at best mixed and often disappointing. In many instances, DOJ moved far slower in the development of new ADA regulations than the

disability and business community desired.

The Access Board established the original minimum guidelines for the accessibility of buildings and facilities, known as the ADA Accessibility Guidelines (ADAAG), in July 1991.¹⁶ DOJ adopted the 1991 ADAAG at the same time as the federally enforceable accessibility requirements.¹⁷ Between 1994 and 2002, the Access Board developed new standards for areas not addressed in the 1991 ADAAG.¹⁸ The Access Board finalized a revised ADAAG in July 2004,¹⁹ which included specific guidelines on the accessibility of state and local government facilities,²⁰ building elements designed for use by children,²¹ play areas,²² and recreational facilities.²³

With rapid changes in technology and the built environment, DOJ's record in issuing timely regulations related to physical accessibility for people with disabilities has been at best mixed and often disappointing.

Though DOJ quickly began the process to establish the revised ADAAG as the enforceable federal standard, the process stalled. After seeking public comments, it took 4 years for DOJ to propose regulations to adopt the revised ADAAG.²⁴ On July 26, 2010, the 20th anniversary of the signing of the ADA, DOJ announced it was considering a number of other ADA regulatory revisions sought by the disability community. The possible revisions announced at that time included the accessibility of non-fixed equipment and furniture, including medical equipment; exercise equipment; accessible golf cars; accessible beds; and electronic and information technology.²⁵ DOJ also announced potential changes to the Title II

ADA regulations for the accessibility of Public Safety Answering Points (PSAPs, more commonly known as 9-1-1 call-taking centers which handle

emergency 9-1-1 calls) to reflect changes in telecommunication technology.²⁶ At the same time, DOJ announced plans to consider establishing specific requirements to make websites accessible to people with disabilities,²⁷ and to require theaters to provide movie captioning and video description.²⁸

In September 2010, DOJ issued the revised ADA Titles II²⁹ and III³⁰ regulations which included the updated ADAAG. However, gaps still remain. Under the 2010 ADA regulations, the Federal Government for the first time had enforceable accessibility standards to cover facilities such as (1) courtrooms, holding cells and visiting areas; (2) cells, medical care facilities, and visiting areas in detention facilities; (3) housing at a place of education; (4) new and permanently

installed amusement rides; (5) recreational boating facilities, fishing piers and platforms, and golf facilities; (6) children’s play areas; and (7) swimming pools, wading pools, and spas. Other new provisions in the 2010 ADA regulations required public and private entities to follow nondiscriminatory policies for the sale and distribution of tickets to limited access events and venues, reservations for hotel and motel rooms at places of lodging, and a new requirement to provide direct access to raised stages in theaters, auditoriums, and other “assembly areas.”

Through the 2010 regulations DOJ clarified certain provisions in an attempt to reduce

confusion by entities covered under Title II and III.³¹ DOJ strengthened requirements on the provision of auxiliary aids and services by clarifying the definition of

a qualified interpreter and a qualified reader and added detailed provisions for what is considered effective communications. For example, the revisions included, among other things, that in certain situations companions of people seeking access to a service, program, or activity who are Deaf may be entitled to interpreters, added a definition for Video Remote Interpreting (VRI), and restricted the permissible uses of family members or friends as interpreters. Specific to entities covered under Title III, DOJ revised the definition of a place of lodging to include timeshare properties and added provisions to mandate nondiscriminatory policies for hotel reservations.

The disability community was generally pleased with the 2010 revised ADA regulations,

After seeking public comments, it took 4 years for DOJ to propose regulations to adopt the revised ADAAG.

with the notable exception that DOJ narrowed the definition of a service animal to generally include only dogs and explicitly excluded from the definition emotional support animals who do not work or perform tasks. Some persons with disabilities who use trained guide or service dogs expressed a concern that a more expansive definition of “service animals” might result in unnecessary questions or restrictions on the use of trained dogs.³² Other advocates, however, had urged DOJ to continue to include as service animals a broader range of animals that assist people with disabilities,³³ and while DOJ did allow a trained miniature horse to be permitted as a reasonable modification in some circumstances, it otherwise imposed a narrow definition of a service animal.

DOJ failed to move forward on a handful of other issues contained in the proposed regulations, the most significant

being effective communications in stadiums and standards for accessible golf carts. DOJ recognized, however, the rapid rate at which movie theaters were converting from analog to digital projection, and in 2016 completed regulations to require that movie theaters provide closed captioning and audio description whenever the theater shows a digital movie with such accessible features.³⁴ The regulations took effect on January 17, 2017, but DOJ gave theaters an additional 18 months to comply. DOJ refused to adopt a consensus recommendation from a group of theater owners and the Deaf and Hard of Hearing community to require theaters in an area with a high population of Deaf and Hard of

Hearing people to acquire additional captioning devices if needed based on demand.³⁵ The regulations continue to allow theaters to show digital movies that are not made with captioning and audio description features, and does not require that movies be shown with open captioning. **NCD recommends that DOJ revise regulations concerning movie captioning and audio descriptions to require that digital theaters show only movies equipped with accessibility features.**

In other areas, DOJ delays and reversals to establish specific ADA accessibility regulations have created uncertainty about the appropriate legal standard. In January 2017, DOJ proposed to

revise its regulation to implement section 504 of the Rehabilitation Act for federally assisted programs and activities,³⁶ last updated in 2003, but as of this report DOJ has issued no updated

regulations. In December 2017, after beginning the process over 7 years earlier, DOJ withdrew plans to develop ADA standards on website accessibility, Next Generation 9-1-1, and accessible furniture and equipment, including medical equipment. Both the disability and business communities have criticized DOJ delays in proceeding with regulations in these areas. **NCD recommends that DOJ respond to technological and other social changes, which includes guidance developed from the Access Board, by issuing regulations in a reasonable timeframe that ensure access to and for people with disabilities.**

The lack of web accessibility regulations remains the most significant gap in DOJ’s ADA

In other areas, DOJ delays and reversals to establish specific ADA accessibility regulations have created uncertainty about the appropriate legal standard.

regulatory requirements. In the fall of 2015, DOJ created one process to develop web accessibility regulations for state and local governments under Title II, and another separate process for private entities under Title III of the ADA.³⁷ DOJ later decided to move ahead first with the Title II web accessibility regulations and in May 2016 sought additional public input on a wide range of issues pertaining to the accessibility of web information and services by public entities.³⁸ Following Executive Orders 13771 and 13777, which constrain the issuance of new regulations, CRT is not planning to promulgate any new regulations.³⁹ In December 2017 CRT formally withdrew four pending regulations, including the Title II rulemaking on accessibility of web information of state and local governments.⁴⁰

The business community has criticized DOJ for the lack of requirements and standards for the accessibility of web information and services under Title III.⁴¹ In addition, litigation of web accessibility under Title III spiked in 2018, arguably in part because of a lack of clarity on the appropriate standard. Members of Congress have also expressed displeasure with the failure of DOJ to issue regulatory standards.⁴² DOJ responded to these complaints in September 2018 stating that it “first articulated its interpretation that the ADA

applies to public accommodations’ websites over twenty years ago” and reiterated that the ADA applies to websites.⁴³ With the proliferation of Internet communications, however, a simple reference that the ADA applies to websites without clear standards does little to enable people with disabilities to understand their specific rights to accessible websites. Adding to

the complexity, courts across the country are further issuing slightly conflicting decisions about the ADA’s application to websites creating confusion

and inconsistency.⁴⁴ **NCD recommends that DOJ proceed with the development of web accessibility regulations under both Title II and Title III of the ADA.**

Similarly, the failure of DOJ to move forward with Next Generation 9-1-1 ADA regulations has

impeded the ability of people with disabilities to utilize more advanced accessible technologies in emergency situations. Advocates in Arizona and other states and localities have brought cases in federal court against

entities operating PSAPs that have failed to progress toward accepting text messages or other advanced communication technologies used by people with disabilities. The Arizona case settled in 2018 through creation of a fund to allow all PSAPs in the state to begin to install equipment necessary to receive text to 9-1-1 calls over the next several years.⁴⁵ Without DOJ

The lack of web accessibility regulations remains the most significant gap in DOJ’s ADA regulatory requirements.

Adding to the complexity, courts across the country are further issuing slightly conflicting decisions about the ADA’s application to websites creating confusion and inconsistency.

regulations, inconsistent and conflicting decisions on the text to 9-1-1 issue could occur in federal courts, as has already been seen in the context of websites. **NCD recommends that DOJ develop Next Generation 9-1-1 regulations applicable to Public Safety Answering Points.**

People with disabilities, as well as businesses and public entities, continue to complain about the lack of standards for equipment and furniture. This includes the use of new inaccessible technology for exchanging information such as at kiosks that provide information, check-in, or ordering; self-serve check-out devices at grocery stores and other retail establishments; and inaccessible beds in hotel rooms which are too high for wheelchair users to transfer onto. A particularly critical issue for people with disabilities is the lack of accessible diagnostic medical equipment, a problem complicated by the absence of DOJ regulations.⁴⁶

In the absence of specific accessibility standards, DOJ has enforced the ADA's nondiscrimination obligations against medical providers. In 2005 and 2006, DOJ entered into settlement agreements with five medical providers about the obligation to provide access to medical diagnostic equipment such as exam tables and radiology and MRI equipment.⁴⁷ In 2010, DOJ issued a Guidance Document entitled "Access to Medical Care for Individuals with Mobility Disabilities," which offers an overview and discusses the general requirements for accessible examination rooms, exam tables, certain medical equipment, and scales.⁴⁸

Nevertheless, after the flurry of enforcement activity in 2005 and 2006, and the issuance of the 2010 Guidance Document, DOJ has posted only three additional accessible medical equipment settlements in recent years.⁴⁹

The 2010 Patient Protection and Affordable Care Act (ACA) authorized the Access Board to develop accessibility standards for medical diagnostic equipment.⁵⁰ After a multiyear process, in early 2017 the Access Board published "Accessibility Standards for Diagnostic Medical Equipment," which DOJ has yet to adopt. Without specific enforceable regulations, medical providers do not know if new available equipment is accessible and patients with disabilities do not know what the ADA specifically requires at a medical office.

A particularly critical issue for people with disabilities is the lack of accessible diagnostic medical equipment, a problem complicated by the absence of DOJ regulations.

The lack of enforceable standards severely curtails access to already limited choices for medical specialists, when needed transfer equipment is either unavailable or not usable

because of an inaccessible design. Even the simple act of taking a patient's weight is impossible for a wheelchair user unless an accessible scale is made available. Public accommodations and government entities also need standards to ensure accessibility when procuring new furniture and equipment.

NCD recommends that DOJ promptly adopt the U.S. Access Board's Accessibility Standards for Diagnostic Medical Equipment as the enforceable standard.

DOJ regulations on the community integration mandate have also been delayed and in some cases reversed since *Promises to Keep*. DOJ regulations defined the ADA Title II community integration mandate in 1991,⁵¹ years before

Olmstead, but no formal regulations directly related to the integration mandate as interpreted by the Supreme Court in *Olmstead* have been issued.⁵² While DOJ has issued sub-regulatory guidance documents as a tool to educate public entities about their obligations and others about their rights under *Olmstead*, the first formal DOJ guidance was not issued until June 2011, 12 years after the decision.⁵³ This technical assistance guidance was developed as part of the “Year of Community Living” initiative that directed federal agencies to vigorously enforce the civil rights of people with disabilities. The guidance includes a series of questions and answers about *Olmstead* enforcement, including states’ obligations; actions which may give rise to an *Olmstead* violation; an explanation of integrated versus segregated settings; a description of the affirmative defense of “fundamental alteration”; the interplay of *Olmstead* and Medicaid; affirmative *Olmstead* planning by public entities; remedies for violations; and private enforcement.⁵⁴

In December 2014, DOJ issued a second *Olmstead* guidance document in partnership with the HHS Office of Civil Rights (OCR) in response to concerns raised by the disability community about changes in pay and overtime requirements for home health care workers.⁵⁵ DOJ and HHS guidance outlines the ADA and *Olmstead* obligations of states in light of the Department of Labor (DOL)’s decision to extend federal minimum wage and overtime protection to most home health care workers. Some

states were imposing work hour caps on health care workers in response to the DOL wage and overtime changes. The guidance makes clear that states need to consider reasonable modifications, including exceptions to policies around work hour caps, to prevent placing people at serious risk of institutionalization.⁵⁶

DOJ issued further guidance in October 2016 focused on the application of *Olmstead* to states’ employment systems⁵⁷ to complement and supplement the June 2011 *Olmstead* guidance. The employment systems guidance answered many questions with respect to the application of the integration mandate to employment and

The employment systems guidance answered many questions with respect to the application of the integration mandate to employment and day programs, including what is an integrated versus segregated employment setting . . .

day programs, including what is an integrated versus segregated employment setting, what may give rise to an *Olmstead* violation in an employment system, and the remedies to address violations. DOJ, however, withdrew this guidance in

December 2017 “to afford further discussion with relevant stakeholders, including public entities and the disability community, as to how best to provide technical assistance in this area.”⁵⁸ The discussion has not yet occurred with all stakeholders. DOJ further noted that the withdrawal did not change the legal responsibilities of state and local governments under the ADA, including *Olmstead*, and that the withdrawal “should not be understood as expressing any view on the legal merits of the principles set forth in this Statement, or on the merit of any specific procedures currently in place in any state or local jurisdictions.”⁵⁹



Over 200 disability organizations opposed the withdrawal of the guidance.⁶⁰ **NCD recommends that DOJ reinstate the October 2017 Guidance Document on the application of *Olmstead* to state employment systems.**

In November 2016, DOJ and HUD’s Office of Fair Housing and Equal Opportunity (FHEO) partnered to issue a guidance document entitled “State and Local Land Use Laws and Practices and the Application of the Fair Housing Act.”⁶¹ The joint DOJ-FHEO guidance includes a question and answer about how *Olmstead* applies to the Fair Housing Act and discusses the different protections of the two laws and how housing policies can be implemented to comply with both.⁶² The guidance references both DOJ and HUD *Olmstead* resources, and updates and

expands on a HUD and DOJ “Joint Statement on Group Homes, Local Land Use, and the FHA.”⁶³

Most recently, on January 11, 2017, DOJ issued welcome guidance relating to the application of Title II, including *Olmstead*, to criminal justice systems.⁶⁴ In the context of describing Title II’s requirements, the guidance provides helpful examples of how “local law enforcement, corrections, and justice system leaders have facilitated compliance with this obligation,”⁶⁵ and includes examples of DOJ findings letters and settlement agreements addressing compliance with Title II in the criminal justice context, including *Olmstead* settlement agreements.⁶⁶

In addition to *Olmstead* guidance, over the years DOJ has developed substantial guidance

material, which is now readily accessible through the DRS-maintained website ADA.gov. In the years immediately following passage of the ADA, DOJ developed the ADA Title II and Title III Technical Assistance Manuals which provided, in a more user-friendly format, the requirements of the ADA. DRS last updated the manual in November 1993.⁶⁷ DOJ did develop a Supplement to the Title II Technical Assistance Manual⁶⁸ and the Title III Technical Assistance Manual in 1994.⁶⁹ **NCD recommends that DOJ update the ADA Title II and Title III Technical Assistance Manuals.**

Since 1994, most of DOJ's ADA Guidance documents have been topical, ranging from "Frequently Asked Questions About Service Animals and the ADA,"⁷⁰ "ADA Update: A Primer for Small Business,"⁷¹ to "Questions and Answers: The Americans with Disabilities Act and Persons with HIV/AIDS."⁷² Since *Promises to Keep*, DOJ now posts numerous ADA enforcement documents on ADA.gov, which plaintiffs, defense attorneys, and ADA compliance staff find especially useful. These enforcement documents include "letters of findings" of violations against public entities covered under Title II of the ADA, statements of interest and amicus briefs filed by DOJ in cases brought in federal court by private parties, and a number of consent decrees obtained in federal cases involving DOJ. The vast majority of the enforcement documents posted on ADA.gov, however, are settlement agreements and "letters of resolution" resolving violations by numerous entities.

From 1992 to 2005, DOJ posted over 40 ADA Title II settlement agreements on ADA.gov, and over 80 ADA Title III agreements, along with a number of other litigation documents. From 2006

to the present, DOJ has posted over 65 ADA Title II settlements and close to 300 ADA Title III settlements or letters of resolution. These enforcement documents provide examples of areas which fall within the ADA, and detailed examples of what entities subject to the ADA are required to do.

For instance, a February 5, 2014, letter of findings on the Louisiana attorney licensure system provides a detailed explanation of a lengthy 3-year DOJ investigation begun in response to a complaint on behalf of a person with a mental health disability seeking admission to the Louisiana bar.⁷³ DOJ concluded that Louisiana's practice of admitting certain people with mental health disabilities under a conditional licensing system is prohibited by the ADA, and that three questions asked about mental health by the admissions committee tended to screen out people with disabilities, subjected them to additional burdens, and were not necessary to determine whether the applicant is fit to practice law. DOJ set forth a detailed set of recommended remedial measures that Louisiana would need to take to end the ADA violation. The letter provides similar entities who administer or enforce admissions standards an example of the type of applicant questions that run afoul of the ADA, as well as providing examples of the limited questions that would be permitted.

As another example, DOJ entered into a consent decree with tax preparer H&R Block that addresses Title III web accessibility.⁷⁴ DOJ intervened in a private case which alleged that people who are blind are unable to access the information, enjoy the services, or take advantage of the benefits offered through H&R Block's website in violation of Title III.⁷⁵ H&R Block agreed under the consent decree to designate a web accessibility coordinator, develop a web

accessibility policy, train its customer service staff, mandate training for employees involved in the website development, conduct accessibility testing, develop a priority response to fix problems, and to have its websites comply with the Web Content Accessibility Guidelines 2.0 Level A and AA Success Criteria (“WCAG 2.0 AA”) as the applicable technical accessibility standard.⁷⁶ The H&R Block consent decree provides a useful example, in the absence of DOJ web accessibility regulations, of the reasonable timelines and the numerous steps necessary to make websites and mobile applications accessible to people with disabilities who use assistive technology.

DOJ settlement agreements also provide important examples when new technology is introduced. DOJ’s 2010 settlement with Arizona State University involved the then new use of a tablet reader (Kindle) for educational materials, which was not accessible to blind students.⁷⁷ DOJ has also initiated enforcement actions in cases involving disabilities that had not been clearly recognized as disabilities before the ADA. In 2012 and 2019, DOJ settled with two separate universities in which both agreed that the university dining service and meal plans needed to make reasonable modifications for students with celiac disease or food allergies.⁷⁸

While the enforcement documents available on ADA.gov are useful, it is very difficult to find specific topics. Currently, while some documents are posted specifically to certain webpages, such as *Olmstead* letters and agreements, and information on the Assistive Technology, Barrier-Free Health Care (which does

not include its accessible medical equipment settlements), Employment, HIV/AIDs, and Project Civic Access webpages, DRS simply posts the many documents under Title I, Title II or Title III, and Section 504 in no apparent order. DRS should improve the website to make it easier to find enforcement documents on specific topics as it has done with the *Olmstead* webpage. As an illustration, all service animal enforcement documents should be under one general topic with subtopics on issues involving service animals in various settings such as schools, medical facilities, hotels, and restaurants. Similarly, auxiliary aides and services and effective communications enforcement documents should be arranged first by topic,

and then by setting such as medical facilities, nursing homes, jails, and schools. **NCD recommends that DRS significantly reorganize the enforcement documents (letters of findings, letters of resolutions, settlement agreements, and consent decrees) available on ADA.gov by topic and setting type, as well as alphabetically and by date.**

DRS should improve the website to make it easier to find enforcement documents on specific topics as it has done with the Olmstead webpage.

Proactive and Reactive Strategies

Promises to Keep recommended that DOJ as a whole, and DRS specifically, create a strategic plan with a focused strategy on ADA Titles II and III enforcement.⁷⁹ DOJ operates under a general 5-year strategic plan, but the current plan has no specific strategy to enforce the ADA. The FY 2014–FY 2018 DOJ strategic plan included disability rights in regard to hate crimes, housing discrimination, and education, as well as to

protect ADA rights under the broad objective to “promote and protect American civil rights by preventing and prosecuting discriminatory practices.”⁸⁰ The FY 2007–FY 2012 strategic plan provided slightly less mention of disability, but did include under the objective to “Uphold the civil and constitutional rights of all Americans,” a continued vigorous investigation and prosecution of ADA violations, housing discrimination involving people with disabilities among other groups, and a mention of Project Civic Access which has emerged as an important tool to achieve ADA compliance by state and local governments.⁸¹

The current DOJ strategic plan for FY 2018–FY 2022 does not mention disability rights enforcement. The strategic plan “describes the priorities of [DOJ] over the next five years,” provides guidance to DOJ staff, informs DOJ’s relationship with other jurisdictions, and “sets expectations for the American public about the nature of the work [DOJ] will undertake.”⁸² It is a concern that, despite the continued inaccessibility and other challenges faced by people with disabilities, DOJ removed enforcement of disability rights from the Department’s strategic plan. **NCD recommends that DOJ maintain disability rights enforcement as a priority and amend the current Strategic Plan to include disability rights as such.**

Promises to Keep recommended that DOJ increase compliance reviews and “make creative use of accessibility surveys, testers, and other proactive techniques” to address ADA violations.⁸³ DOJ has reviewed the accessibility

of certain public facilities under Project Civic Access, and individual U.S. Attorney’s Offices (USAOs) have found unique ways to tackle violations of disability rights specific to a locality. As with other aspects of DOJ’s enforcement, however, the effort has not been consistent over time, setting up the possibility of backsliding on enforcement and the successes already achieved.

In February 2001, “The New Freedom Initiative” was launched as “a comprehensive program to promote the full participation of people with disabilities in all areas of society by increasing access to assistive and universally designed technologies, expanding educational

and employment opportunities, and promoting increased access into daily community life.”⁸⁴ To implement this initiative, Executive Order 13217 directed the Attorney General to “fully

enforce” Title II of the ADA.⁸⁵ In addition to the direct work of the DRS, USAOs are involved in ADA enforcement either through the U.S. Attorneys Program for ADA Enforcement in which the USAO leads the enforcement effort with assistance from DRS, or through a joint partnership between DRS and an individual USAO.

Around the same time as the New Freedom Initiative, in 2000 DRS began to conduct compliance reviews under Project Civic Access. Under Project Civic Access, DRS requests data from state and local government entities throughout the country and conducts physical surveys of facilities owned or leased by these

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entities. The initial reviews focused largely on architectural accessibility of smaller local government buildings and text telephone (TTY) access to PSAPs. In 2004 and 2005, DRS completed and entered into its largest number of Project Civic Access agreements which included a number of larger cities and counties. Over time, the scope of the reviews has expanded to include emergency preparedness plans; accessibility of shelters; state and local government website accessibility; polling place accessibility; and any employment practices of these entities which might discriminate against people with disabilities.

Between FY 2001 and FY 2018, DRS completed a total of 225 Project Civic Access reviews in all 50 states, the District of Columbia, and Puerto Rico. DRS conducted a project high 41 reviews in calendar year 2004

and 35 in 2005. The number of completed reviews, however, has dropped significantly in recent years, and since 2012 the number of reviews annually have typically been in the single digits. With so few Project Civic Access reviews each year, people with disabilities in cities and counties face the potential of being left without accessible government services.

NCD recommends the DRS significantly increase the number of Project Civic Access reviews to the levels conducted between 2001 and 2005 and obtain more agreements with state and local governments to ensure access to public facilities for people with disabilities.

DRS has undertaken relatively few ADA Title III compliance reviews that were not prompted by a complaint and an investigation, based on information available to NCD.

DRS has undertaken relatively few ADA Title III compliance reviews that were not prompted by a complaint and an investigation, based on information available to NCD. Some USAOs have initiated compliance reviews. The highest profile reviews were initiated by the USAO for the Southern District of New York in 2005 when it surveyed the accessibility of 60 hotels in Manhattan’s Theater District.⁸⁶ Following these reviews, most of the hotels voluntarily agreed to bring their properties into compliance with the ADA, but the USAO brought cases in federal court against five hotels that refused to comply.⁸⁷ According to DOJ, 16 out of the 93 USAOs have initiated some compliance

reviews of public accommodations in their jurisdictions.

Promises to Keep recommended DOJ take a “proactive leadership role” to implement *Olmstead*,⁸⁸

but DOJ made limited efforts in the first decade following the decision. Prior to 2010, DRS assisted in only one private *Olmstead* case through the submission of a statement of interest to a federal court.⁸⁹ SPL began to include limited *Olmstead* claims after Executive Order 13217 in cases brought under CRIPA⁹⁰ involving illegal conditions at publicly operated institutions. SPL’s *Olmstead* claims focused on the process for discharging people from the institution(s) at issue and monitoring people as they transitioned to the community.⁹¹

Beginning with the “Year of Community Living” initiative in June 2009, federal agencies were charged to take steps to increase access

to community services and integrated housing, and DOJ launched a new emphasis on community living and *Olmstead* enforcement.⁹² CRT included *Olmstead* enforcement as an area of focus,⁹³ and made staffing decisions to support this priority. CRT further identified a dedicated funding stream to support *Olmstead* enforcement from the Health Care Fraud and Abuse Control (HCFAC) Program,⁹⁴ which continues to be utilized.

Competent and Credible Investigative Process and Enforcement Action

The most serious concern regarding DOJ's enforcement of disability rights is the lack of public data by which to assess how DRS accepts, handles, and investigates disability rights complaints received from the public and other federal agencies. According to what DOJ states is "longstanding Department policy," it has not provided statistics on the number of disability rights complaints received per year; the number of complaints investigated or referred to mediation; the number of referrals from other federal agencies; the number of complaints dismissed for lack of merit or administrative reasons; or the number resolved through mediation. The lack of publicly available data significantly restricts a proper assessment of DOJ's ADA enforcement efforts. **NCD recommends that Congress requires DOJ to collect and make available comprehensive statistical information about the number of**

disability rights complaints received by DOJ and the outcome of such complaints on at least an annual basis.

CRT provided some of this information for the *Promises to Keep* report, but now states it no longer makes such information publicly available. Nearly 20 years later, even with the availability of some data for *Promises to Keep*, that report still recommended that DOJ dramatically improve its data collection and analysis of disability complaints, and provide statistics on complaint processing similar to the EEOC.⁹⁵ With even less data available today, there is a significant setback in the transparency of the overall ADA enforcement efforts by DOJ.

CRT did provide statistical information

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on the resolution of enforcement matters undertaken either by CRT directly and through USAOs between FY 2008 and FY 2018. The resolutions are classified

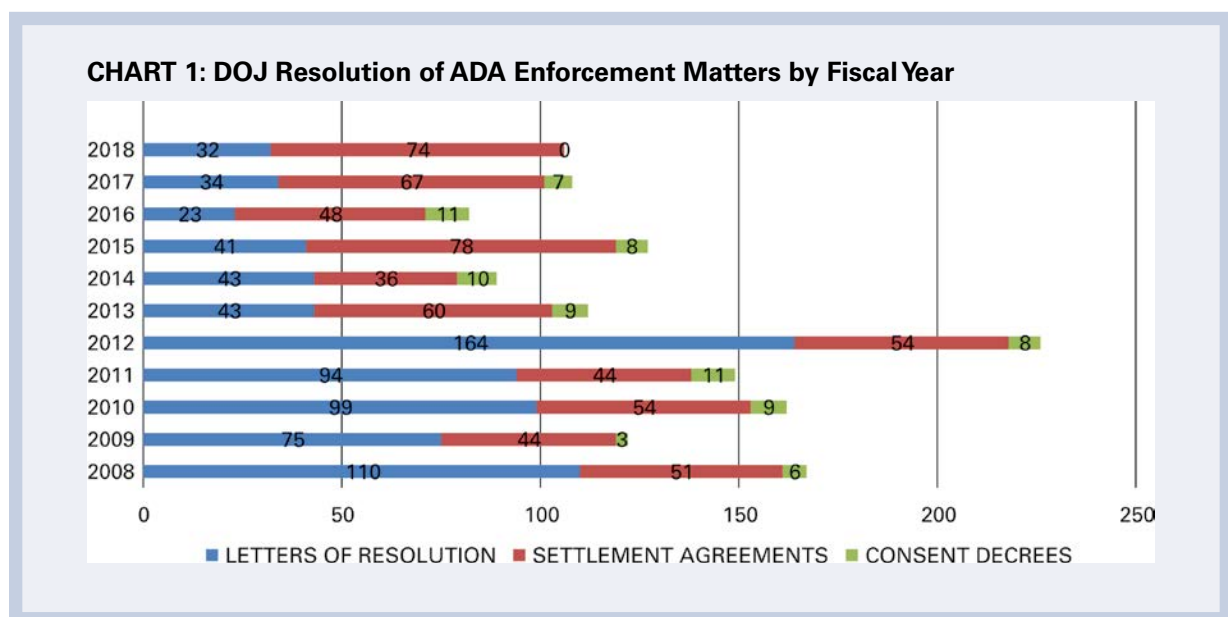
as resulting in letters of resolution, settlement agreements, or consent decrees. A small handful of cases were settled after being filed by DOJ in federal court.

Promises to Keep recommended a strong mediation program, and CRT does refer disability rights complaints to mediation. CRT reported that more than 80 percent of disability complaints referred to mediation are resolved, but it does not release the actual number of complaints referred to or resolved through mediation. With no information on how many disability rights complaints are actually handled through mediation, it is impossible to assess the effectiveness of mediation within the overall CRT disability

rights enforcement mechanism. In addition, mediation agreements are confidential, and DRS assigns responsibility for ensuring that mediation agreements comply with the ADA to the contract mediator, Key Bridge Foundation. DRS trains Key Bridge Foundation mediators on the ADA, including the 2010 accessibility standards, and provides the contractor with information and clarification upon request. DOJ does not, however, conduct audits to ensure mediation agreements comply with the ADA. **NCD recommends that Congress require DOJ to establish strong oversight of the ADA mediation program to include audits of the work of the contract mediator on a regular basis.** The absence of publicly available statistical data on disability rights complaints, investigations, mediation, and resolutions by DOJ, leaves data DOJ provided to NCD about resolution of actual enforcement matters as the only statistical way to assess the Department. This limited analysis offers a very incomplete picture of DOJ's enforcement of disability rights laws.

As indicated in Chart 1, wide variation exists in the resolution of ADA enforcement matters by DOJ between FY 2008 and FY 2018. DOJ resolved a very large number of cases through letters of resolution in FY 2012, a year in which DOJ also resolved a total of 226 disability enforcement matters, the most in the 11-year period considered. Following this peak year, DOJ successfully resolved on average 106 disability rights matters per year from FY 2013 to FY 2018, which represents 59 fewer resolved matters per year than during the FY 2008 to FY 2012 period.

While the level of DOJ's effort in the enforcement of disability rights, as measured by the numbers of cases resolved and filings in court is inconsistent over time, the overall sophistication and comprehensiveness of DOJ settlement agreements have significantly improved. This is particularly true with cases on issues such as the reasonable accommodation obligations of day care facilities, camps, schools, and universities.



DOJ has also improved settlement agreements in the context of correctional facilities. For example, in February 2001, DOJ entered into a settlement agreement with the Fairfax County, Virginia Sheriff's Office for not providing a Deaf detainee with an American Sign Language (ASL) interpreter after his arrest, not enabling him to make a telephone call, and not attempting to communicate with him through written notes.⁹⁶ The settlement agreement was only 951 words long and required just a handful of changes in jail policies and staff training. In comparison, DOJ settled a case in 2016 which involved a Deaf detainee held in the Arlington County, Virginia, jail for over a month without auxiliary aids and services to communicate, and who underwent a medical exam without his consent. The settlement agreement with the Arlington County Sheriff's Office is 10,160 words long with 66 detailed paragraphs.

The agreement contains requirements for evaluating a detainee's need for auxiliary aids and services from booking to housing, for medical assessments, for classification and eligibility for legal representation, and for discussions about making bond for release, along with other details. The settlement also provided for significant compensatory monetary damages to the individual.⁹⁷

DOJ has also learned to adapt its settlement agreements as technology changes. After the introduction of Video Remote Interpreting (VRI) services in the early 2000s, in 2006 DOJ

intervened in a private case against a hospital involving effective communications. DOJ negotiated a consent decree which approved the hospital to use VRI services as an auxiliary aid, noting that such services "can provide immediate, effective access to interpreting services seven days per week, twenty-four hours a day in a variety of situations including emergencies and unplanned incidents."⁹⁸ In a 2007 settlement with another health care provider, DOJ added language that VRI services "can also be used as a stop-gap measure until a qualified interpreter is available."⁹⁹ DOJ set

some conditions in the agreement on when video interpreting could be used which were later included in DOJ's 2010 regulations on VRI.

In the years since, DOJ has learned that hospitals have sought to rely exclusively on VRI and not use in-person interpreters, thus requiring an adjustment

in DOJ's strategy. In DOJ's most recent 2018 settlement agreements involving effective communications, it states that "VRI shall not be used when it is not effective due, for example, to a patient's limited ability to move his or her head, hands or arms; vision or cognitive issues; significant pain; or due to space limitations in the room. If, based on the circumstances, VRI is not providing effective communication . . . VRI shall not be used as a substitute for an on-site interpreter. . . ."¹⁰⁰

DOJ settlement agreements have further moved from addressing flagrant violations to

While the level of DOJ's effort in the enforcement of disability rights, as measured by the numbers of cases resolved and filings in court is inconsistent over time, the overall sophistication and comprehensiveness of DOJ settlement agreements have significantly improved.

addressing the contours of specific rights. Early DOJ settlements involving child care, camps, and schools dealt with the outright exclusion of children with certain disabilities.¹⁰¹ More recent cases, however, have focused on specific discrimination involving the refusal of these types of entities to modify policies and practices for children with specific disabilities. As illustration, recent DOJ settlement agreements have remedied the refusal of universities, child care centers, and camps to allow nonmedical personnel to administer medications to children or to adjust meal plans to

accommodate children with certain disabilities.¹⁰² In one settlement, a day camp agreed to train staff on the use of a new emergency medication to treat seizures designed for administration by nonmedical personnel as a reasonable modification of camp policies.¹⁰³

DOJ has focused enforcement efforts on patterns and practices of disability discrimination as seen through settlement agreements with national chains of schools and day care providers,¹⁰⁴ and through both DOJ direct lawsuits and support of private litigants in cases involving the refusal of testing centers to provide reasonable accommodations. DOJ successfully defended its 2010 ADA regulations which required testing and licensing entities to provide accommodations that “best ensure” that the test measures knowledge or skill, and not disability.¹⁰⁵ DOJ also intervened in private litigation challenging the Law School

Admissions Council’s (LSAC) alleged failure to provide testing accommodations when needed so that the Law School Admissions Test meets the ADA standard,¹⁰⁶ which resulted in a consent decree.¹⁰⁷

Other notable pattern and practice discrimination cases included a comprehensive settlement agreement with Wells Fargo in 2011.¹⁰⁸ DRS investigated a complaint alleging that Wells Fargo refused to conduct business over the phone with people with hearing and speech disabilities, and further uncovered that the bank

failed to provide financial documents in alternate formats, did not provide appropriate auxiliary aids and services for in-person meetings, and did not remove barriers for people with mobility disabilities.

DRS’s enforcement activities have been limited in the area of web accessibility of public accommodations, although it has focused

attention on enforcing the ADA regarding accessible technology for people with visual and reading disabilities. Of the 26 matters listed on the ADA Access-Technology/Enforcement webpage, only two are affirmative DOJ web accessibility federal cases, and in both cases DOJ intervened after the cases had initially been filed by private plaintiffs.¹⁰⁹ One of the two web accessibility cases in which DRS intervened, a 2015 case against Miami University of Ohio, involved web-based and other digital technology that was not accessible to students with visual

Of the 26 matters listed on the ADA Access-Technology/Enforcement webpage, only two are affirmative DOJ web accessibility federal cases, and in both cases DOJ intervened after the cases had initially been filed by private plaintiffs. Early DOJ settlements involving child care, camps, and schools dealt with the outright exclusion of children with certain disabilities.

disabilities.¹¹⁰ Miami University eventually agreed to make significant improvements to ensure that technologies across all its campuses are accessible, to reform its technology procurement practices, and to compensate students with disabilities for the violations.¹¹¹ DRS has filed statements of interest in a significant number of matters in the areas of web accessibility and accessible technology that have resulted in significant accessibility improvements by both private and public entities. DRS filed a statement of interest in 2012 in support of plaintiffs in a case against Netflix for the lack of captioning on the “watch instantly” streaming service.¹¹² The parties eventually settled, with Netflix agreeing to ensure 100 percent closed captioning within 2 years.

In terms of *Olmstead* enforcement, CRT conducts extensive investigations before making a determination that a public entity has violated *Olmstead*. Investigations typically involve review of documents and data provided by the public entity in response to requests for information; visits to the facility or facilities at issue by CRT staff with experts to evaluate policies, interview staff, and observe people; visits by CRT staff along with experts to evaluate community services; and meetings with impacted people, including people with disabilities and their families, providers, and state and local disability advocacy organizations.¹¹³

If CRT finds a violation of federal law pursuant to CRIPA, it sends a letter notifying the public entity of the conclusions of the investigation, the facts supporting these findings, and the steps necessary to remedy

the violations.¹¹⁴ Similarly, if CRT finds a violation of the ADA, it issues a findings letter following ADA enforcement procedures.¹¹⁵ Since FY 2008, CRT issued a total of 22 letters of finding involving a CRIPA disability rights matter, with most issued between FY 2008 to FY 2011. No letters of finding have been issued under CRIPA involving disability in FYs 2015, 2017, and 2018.

NCD recommends that the Disability Rights and Special Litigation Sections increase their investigations and enforcement activities around *Olmstead* violations in facilities covered under the ADA and CRIPA.

The volume of CRT’s *Olmstead* enforcement work has decreased since the end of 2016. From FY 2009 to FY 2016, CRT issued 16

Olmstead letters of finding and entered into 11 settlement agreements. Since 2016, CRT issued investigative conclusions in only one new *Olmstead* case,

involving people with psychiatric disabilities in nursing facilities in Louisiana.¹¹⁶ At the end of 2016, a number of letters of finding had been issued and CRT was in negotiations with the public entities. Out of these, two have settled, the Louisiana nursing facilities case mentioned above¹¹⁷ and an out-of-court settlement in May 2019 involving youth with psychiatric disabilities in residential treatment centers in West Virginia.¹¹⁸ CRT is pursuing resolution of its investigation of South Dakota involving people with a range of disabilities in nursing facilities. CRT continues to monitor, and when necessary, enforce the terms of existing *Olmstead* agreements, such as in North Carolina¹¹⁹ and New York.¹²⁰ CRT continues to litigate *Olmstead*

cases that were filed up to the end of 2016, including cases about people with intellectual disabilities in nursing facilities in Texas,¹²¹ students with disabilities in a segregated educational program in Georgia,¹²² adults with serious mental disabilities in Mississippi,¹²³ and children with disabilities in nursing facilities in Florida.¹²⁴

The structure of CRT's *Olmstead* settlement agreements has also varied. Prior to 2009, CRT structured some agreements between CRT and the public entity related to people with disabilities in institutions as a settlement agreement or a Memorandum of Understanding (MOU). In those matters, federal courts did not typically retain jurisdiction to enforce the settlement agreement or MOU. If problems with adherence to the agreement arose, CRT would need to enforce under contract law or by refiling the lawsuit. Also prior to 2009, CRT used a mix of external independent monitors and compliance monitoring by DOJ and its retained experts. The MOU sometimes would further typically end on a set date regardless of whether the public entity had complied with all of its obligations.¹²⁵

Beginning in 2009, CRT *Olmstead* settlement agreements were often filed in federal court, with a request that the court retain jurisdiction for enforcement. The agreements included an external court monitor or independent reviewer to evaluate and report on the status of compliance. Settlement agreements would only terminate upon a court finding that the public entity was in substantial compliance with the terms of the agreement as opposed to expiring on a predetermined date regardless of the status of compliance.¹²⁶ DOJ has now changed these policies.

Changes to DOJ's use of consent decrees

On November 7, 2018, the Attorney General issued a memorandum with strict new limitations on DOJ's use of consent decrees and settlement agreements involving state and local governments, the use of external court monitors or independent reviewers, and the duration of such agreements.¹²⁷ The memo reverses a previous practice that many settlements were court-enforceable, and describes the limited circumstances in which DOJ will consider a consent decree that requires approval by the political leadership of the DOJ litigating division.¹²⁸ The memo also addresses the need to keep the duration of settlements limited and provides a presumptive limit of no more than 3 years.¹²⁹ Finally, the memo states that DOJ should monitor compliance itself absent unique circumstances, and that DOJ's political leadership must approve any use of court monitors or independent reviewers, and whose work is to be significantly limited if used.¹³⁰

The November 2018 memorandum is a particular concern for *Olmstead* enforcement since settlements in such cases often run longer than 3 years and involve court monitors. Settlements with sufficient compliance time is usually necessary in *Olmstead* cases because of the need to develop new community infrastructure and recruit and train new providers before people with disabilities can move into the community with appropriate supports. Person-centered planning and informed choice also necessitate longer compliance periods

as people being discharged may need to visit and try multiple community settings prior to successful placement. Lastly, *Olmstead* settlements usually demand data collection and long-range monitoring of people who move to the community in order to adjust for new services over time and prevent readmissions that diminish community participation and the exercise of choice. **NCD recommends that DOJ consider the implications of the November 2018 memorandum, which places restrictions on agreements involving state and local governments and excludes application of the memorandum in settlements to address any *Olmstead* violations.**

The CRT Housing and Civil Enforcement Section (HCES), along with HUD, plays a role in the enforcement of the FHA, and the ADA in regard to public accommodations in housing complexes. HCES also enforces the ADA in relation to group homes for people with disabilities, including the misuse of zoning ordinances in an attempt to prevent group homes from being placed in communities. In zoning or land use matters, HUD's Office of Fair Housing and Equal Opportunity (FHEO) will refer the matter to HCES. When FHEO finds a violation in cases not involving zoning or land use matters, and either party "elects" to pursue the case in federal court, HCES represents the federal government in such cases. As discussed in Chapter 2, very few FHA cases investigated through HUD reach a federal court. Several recent cases brought by HCES, however, have dealt with service and emotional support animal issues in housing and this appears to be an ongoing issue as discussed in more detail in Chapter 2.

Person-centered planning and informed choice also necessitate longer compliance periods as people being discharged may need to visit and try multiple community settings prior to successful placement.

The Criminal Section of CRT now enforces two criminal statutes that impact people with disabilities. In 2000, Congress passed the Trafficking Victims Protection Act (TVPA) which enhanced the criminal penalties for forced labor and commercial sex trafficking, added provisions to protect victims, and expanded federal efforts to combat human trafficking.¹³¹ Since passage of the TVPA, the Human Trafficking Prosecution Unit of the CRT Criminal Section, in partnership with the USAOs, has prosecuted a number of perpetrators for both labor and sex trafficking who targeted people with disabilities.¹³² These cases have involved horrible exploitation and violence against people with developmental and mental health disabilities.¹³³

In 2009, Congress passed the Hate Crimes Prevention Act, which created a federal crime if a perpetrator injures, or attempts to injure with a deadly weapon, any

person because of a disability, as well as people with other characteristics.¹³⁴ The Criminal Section has prosecuted five cases since 2009 involving people with disabilities who were targeted for human trafficking, hate crimes, or both. One case, *U.S. v. Weston et al.*, involved crimes under both the TVPA and the Hate Crimes Prevention Act for the targeting of six people with disabilities who received Social Security benefits.¹³⁵ The perpetrators locked the victims up in horrific conditions, and became the victims' Social Security representative payee in order to steal their benefits. Two victims died of malnutrition, and two victims were forced into commercial sex trafficking.¹³⁶ **NCD recommends that DOJ**

continue to work closely with disability advocates to address ways to prevent and react to hate crimes and the trafficking of people with disabilities.

NCD recommends that Congress commission a study on the problem of human trafficking of people with disabilities to better understand the scope of the problem, methods to prevent such trafficking, and ways to best support trafficking victims with disabilities.

The CRT Voting Section and DRS share the enforcement of voting rights laws which protect people with disabilities. Relevant to voters with disabilities, the Voting Section enforces the Voting Rights Act of 1965, the Voting Accessibility for the Elderly and Handicapped Act of 1984, Section 7 of the National Voter Registration Act of 1993 and Section 301 of the Help America Vote Act of 2002 which applies to federal elections. DRS enforces the ADA to ensure that people with disabilities have a full and equal opportunity to vote in all elections conducted by state and local government entities.

DRS has conducted compliance reviews of local governments through Project Civic Access focused on architectural accessibility and entered into settlement agreements with localities on access to polling places and other local government voting programs. DRS has also conducted compliance reviews focused on polling place accessibility and accessible voting technology and obtained settlement agreements

where violations existed. An agreement with the Board of Elections of Chicago was particularly ambitious because its goal was to ensure every Chicago polling place was accessible for the 2018 election.¹³⁷ DRS recently entered into a settlement agreement to ensure that blind voters have access to accessible voting equipment in a city election in Concord, New Hampshire.¹³⁸ DRS has also filed suit against several government entities that failed to voluntarily agree to provide accessible polling places after DRS issued a letter of findings.¹³⁹

The Voting Section receives general training on ADA polling place accessibility requirements.

The perpetrators locked the victims up in horrific conditions, and became the victims' Social Security representative payee in order to steal their benefits. Two victims died of malnutrition, and two victims were forced into commercial sex trafficking.

The section monitors local polling places during elections, and may gather information about physical accessibility, including curbside voting during monitoring if related to a statute the Voting Section enforces. The shared responsibility

between the DRS and the Voting Section regarding the accessibility of polling places and voting equipment could result in inefficiency in voting rights enforcement for people with disabilities. Despite the inefficiency, providing Voting Section monitors with more than just basic information about physical accessibility to voting places under the ADA would at least expand the potential for locating violations that prevent people with disabilities from voting. **NCD recommends that DOJ provide expansive training to all personnel employed within the Voting Section on ADA requirements at polling locations and the authority to remedy such violations.**

Timely Resolution of Complaints

CRT stated in response to requests for data on the timely resolution of complaints that it no longer releases information about the timeliness of processing disability complaints. The lack of such data prohibits a comparison between the average length of time to resolve ADA complaints discussed in *Promises to Keep* and today,¹⁴⁰ and further prevents a full assessment of the disability rights enforcement efforts of DOJ. **NCD recommends that Congress require DOJ to track and publish data on the timeliness of resolving disability rights complaints on an annual basis.**

DOJ's *Olmstead* enforcement activities can come from individual complaints, although there is no specific data for which to evaluate the timeliness of DOJ to resolve *Olmstead* concerns. *Olmstead* cases can also result from an evaluation of information and data, media reports, and/or engagement with interested constituents and advocates in the state or local jurisdiction of interest. Negotiating a complex, statewide settlement agreement takes numerous meetings involving a range of state officials and takes a significant amount of time, often 6 months to 1 year. One *Olmstead* findings letter issued by CRT in 2016 has yet to be resolved, resulting in people with disabilities remaining unnecessarily institutionalized.¹⁴¹

Communication with Complainants and the Community

DOJ has improved communications with the disability community through more information on ADA.gov as recommended in *Promises to Keep*.¹⁴² While the organization of the website could certainly be improved, it does provide

more transparency on the outcomes of CRT enforcement activities, especially related to *Olmstead*. The website communicates the real-world impact of community integration in "Faces of Olmstead," which highlights the stories of people who have been impacted by DOJ's *Olmstead* enforcement.¹⁴³ Critically, the website includes information on how to file a disability rights complaint with DOJ.

In addition to ADA.gov, CRT maintains a separate website with information on each CRT section. A person can file a complaint about disability or other rights violations online through the CRT website, the CRT complaint phone line, the DOJ ADA information line, or through mail or in some cases email. The CRT website includes prominent icons about how to contact CRT and how to file a complaint, contains information in 10 common languages, provides phone numbers for how to contact CRT for interpreter assistance, and directs people to an online complaint process on ADA.gov. The website includes information about how to request an accommodation as part of the complaint process with the DRS, but the accessibility information is not prominent and is only on the DRS webpage. While the online complaint process is adequate, the website scores between a high school and college grade reading level—too high for a person with certain intellectual or cognitive disabilities.¹⁴⁴

NCD recommends that DOJ simplify the language on its website to enable people with intellectual and other cognitive disabilities to effectively use the website and file a complaint.

NCD recommends that all DOJ websites that explain the filing of complaints prominently indicate how to request a

reasonable accommodation as part of the description.

The CRT complaint line contains useful information for people with disabilities such as how to request materials in alternative formats, how to request interpreter assistance, how to identify the appropriate CRT section in which to file a complaint, and other assistance in communicating with CRT. The complaint line, however, contains mostly prerecorded information, and it is difficult to access a live person to request assistance. Furthermore, based on tests of the system, when a caller selects the option for interpreter services or with a complaint-related inquiry, the caller is subject to waits of over an hour, is not informed of the wait time, and is frequently disconnected after long waits and before a CRT agent answers the line. The complaint line states the caller may need to leave a voicemail, but based on tests, the system does not provide an option for how to leave a message. In contrast, the ADA information phone line had much shorter wait times, with about 20 minutes based on tests to reach a live agent. **NCD recommends that CRT improve the complaint phone line by reducing wait times, informing callers about the wait time, and allowing for easier access to an agent.**

CRT has always had some level of communications and engagement with people who have an interest in *Olmstead* enforcement activities, which includes presentations at

conferences with states, people with disabilities, and disability advocates. Transparency and sharing information about its work, however, could not be described as a priority during the first decade after the *Olmstead* decision.¹⁴⁵ In a number of early *Olmstead* cases, people with an interest in the case were surprised by, and in some cases even objected to, the settlement agreements reached after an investigation.¹⁴⁶ Beginning in 2010, CRT increased engagement with interested constituents and the broader community in all stages of enforcement. In a 2012 memo, CRT described the importance of such engagement in its litigation, the framing of settlement agreements, and the creation of remedies to ensure the sustainability of systemic changes.¹⁴⁷

. . . when a caller selects the option for interpreter services or with a complaint-related inquiry, the caller is subject to waits of over an hour, is not informed of the wait time, and is frequently disconnected after long waits and before a CRT agent answers the line.

Strategic Litigation

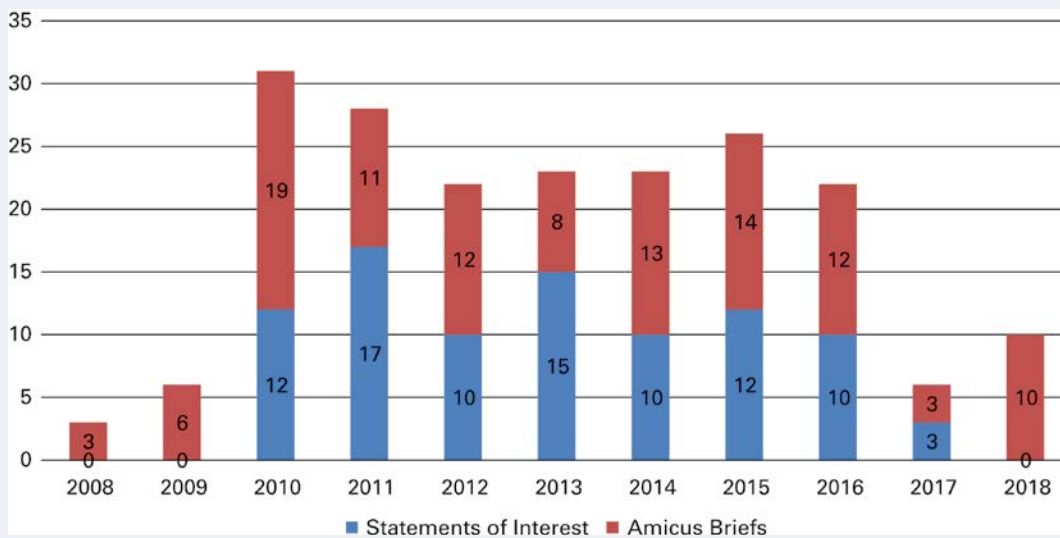
DOJ's litigation efforts involve filing cases directly in federal court, submitting a statement of interest or an amicus

brief in a case filed by private parties, or seeking to intervene in cases filed by private parties.

Promises to Keep recommended DOJ pursue a more aggressive litigation program; however, DOJ's litigation efforts involving disability rights has been inconsistent, and the rollercoaster of such enforcement can result in a relapse of gains achieved or a failure to appropriately react to emerging areas of discrimination.

As shown in Chart 2, in FY 2008, DOJ filed a total of 3 statements of interest and amicus briefs in support of ADA private litigants, and a total of 6 in FY 2009.¹⁴⁸ DOJ's activity increased

CHART 2: DOJ Statements of Interest and Amicus Briefs Filed in Disability Rights Cases by Fiscal Year



significantly to 31 statements of interest and amicus briefs in FY 2010. The numbers then declined in FY 2012 but remained stable for several years as DOJ filed around 20 to 25 such documents in support of private litigants each year. This effort slid back to FY 2009 levels with only 6 filings in FY 2017 and just 10 in FY 2018.

Between FY 2008 and FY 2018, as shown in Graph 1, DOJ only occasionally sought to join in ADA and Rehabilitation Act private cases in federal court,¹⁴⁹ but as with other enforcement techniques, over time DOJ has been inconsistent in this practice. DOJ intervention peaked in FY 2010 and FY 2011 with requests to join in 10 and 9 cases respectively. Since that time, the number has steadily dropped to no more than 2 or 3 requests a year.

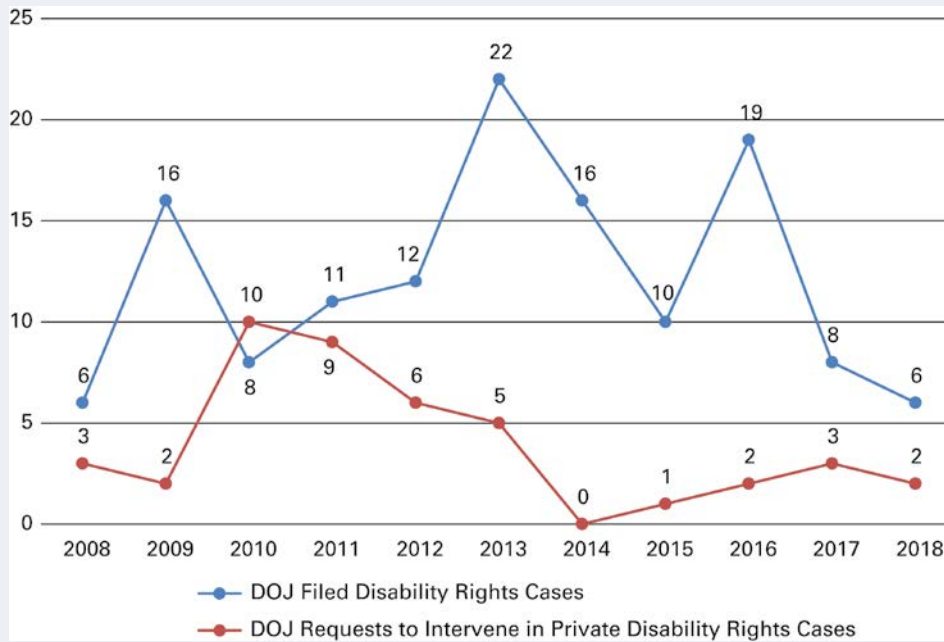
Similarly, DOJ's own disability rights litigation in federal court has been inconsistent over time.

Between FY 2009 and FY 2018, DOJ filed on average 12 disability rights cases in federal court per year. DOJ cases filed under the ADA, the Rehabilitation Act, and CRIPA involving disability peaked at 22 cases in FY 2013 and 19 cases in FY 2016, and then declined to 8 cases filed in FY 2017 and 5 in FY 2018. One new CRIPA litigation involving disability has been filed since FY 2013. CRT indicated that since 2010, SPL has focused on systemic ADA violations, rather than conditions in specific facilities covered by CRIPA, which accounts for the drop in CRIPA disabilities cases. Nevertheless, the current trend is toward less DOJ involvement in disability rights litigation.

NCD recommends that DOJ increase and maintain greater consistency in its litigation efforts involving disability rights.

In terms of the substance of DOJ litigation, DRS has relied heavily on strategic *Olmstead* litigation for systemic change and to develop

GRAPH 1: DOJ Litigation Activity in Disability Rights Cases by Fiscal Year



federal court interpretations of the integration mandate.¹⁵⁰ Of the 100 statements of interest or amicus briefs filed between 2009 and 2016, 43 involved *Olmstead* cases based on a count by NCD researchers of the number of such documents posted to ADA.gov that involve *Olmstead* compliance. These filings covered a wide range of issues, including the legal standard to prove that a person is “at risk” of institutionalization, the application of Title II’s fundamental alteration defense, the requirements for *Olmstead* planning, and the ability of a private person to enforce *Olmstead*.¹⁵¹

In terms of the substance of DOJ litigation, DRS has relied heavily on strategic Olmstead litigation for systemic change and to develop federal court interpretations of the integration mandate.

CRT has filed no *Olmstead* statements of interest since the end of FY 2016. **NCD recommends that DOJ file statements of interest, where appropriate, in support of private *Olmstead* cases in federal court.**

Starting in FY 2009, CRT began to shift its existing investigations and litigation to move away from a focus on improving institutional conditions and toward directly enforcing the

right to community living. CRT made this shift in *United States v. Georgia*, when it began a CRIPA investigation in 2007 focused on the conditions in Georgia’s state hospitals for people with

psychiatric or intellectual disabilities.¹⁵² The parties negotiated a settlement agreement in January 2009 focused primarily on improving conditions at the state hospitals¹⁵³ which was opposed by disability advocates and other interested people.¹⁵⁴ On October 19, 2010, CRT and Georgia reached a new agreement primarily focused on expanding community services.¹⁵⁵ The settlement required expansion of specific community services statewide within certain timeframes, including a range of crisis services, assertive community treatment (ACT) teams, supported housing, and community-based waivers slots for people with intellectual disabilities. It also contained obligations to prevent the admission of people to state hospitals (and the eventual prohibition of admission of any children or people with intellectual disabilities) and for helping transition people currently in state hospitals back to the community.

CRT also broadened CRIPA investigations of public institutions to focus on *Olmstead* compliance. For example, in 2010 CRT expanded CRIPA investigations of conditions at state facilities to include an evaluation of the community service system for people with intellectual and developmental disabilities in Virginia, and with mental health disabilities in Delaware, and each state's compliance with *Olmstead*.¹⁵⁶ These two investigations eventually led to *Olmstead*-focused letters of finding which sought not only improvement in treatment and discharge planning at the institutions at issue, but also statewide expansion of critical community-based services necessary to help people transition out of institutions and to prevent their admissions to the institution in the first place.¹⁵⁷ These cases eventually led to some of CRT's first comprehensive *Olmstead*

settlement agreements.¹⁵⁸ The Delaware agreement has been fully implemented.¹⁵⁹

CRT has also sought out opportunities to intervene in private *Olmstead* cases. CRT intervened in 2009 in a private *Olmstead* challenge to New York's segregation of people with mental health disabilities in institutional adult homes.¹⁶⁰ CRT, the private plaintiffs, and the State eventually reached a systemic settlement to expand integrated housing and community supports for people residing in adult homes.¹⁶¹ Similarly, in 2011–2012, CRT intervened in private *Olmstead* litigation in New Hampshire regarding people with mental health disabilities in, or at risk of, entering the state's public nursing facility and psychiatric hospital,¹⁶² and in private *Olmstead* litigation in Texas regarding people with intellectual and developmental disabilities in or at risk of entering nursing facilities.¹⁶³ The New Hampshire case resulted in a settlement agreement,¹⁶⁴ and the Texas case went to trial in November 2018 after an interim agreement¹⁶⁵ ended without a final agreement.¹⁶⁶

CRT has strategically used litigation to address the wide range of setting and circumstances in which people with disabilities are segregated. Prior to 2010, most *Olmstead* cases focused on people segregated in state-operated institutions, but since that time CRT has used its cases to expand the reach of *Olmstead*. CRT has brought *Olmstead* litigation to challenge the segregation of people in publicly funded, privately operated institutions like nursing facilities and board and care homes,¹⁶⁷ and litigated or filed a statement of interest on behalf of people who are at serious risk of segregation, including due to long waitlists or service cuts.¹⁶⁸ CRT has challenged the segregation of people not only in where they live, but in how they spend their days, including

segregation in sheltered workshops and day habilitation programs.¹⁶⁹ CRT has expanded the reach of *Olmstead* to cover the segregation of students with disabilities in separate educational programs.¹⁷⁰ Finally, CRT has included *Olmstead* in some of its criminal justice work, such as in the segregation of prisoners with disabilities in solitary confinement¹⁷¹ and policing practices that lead to the unnecessary confinement of people with disabilities (particularly people experiencing mental health crises) in prisons and jails.¹⁷²

CRT's *Olmstead* settlement agreements overall have succeeded in making significant, systemic changes to states' disability service systems to the benefit of tens of thousands of people with disabilities.

Most of CRT's settlement agreements contemplate implementation over a significant period of time—most between 5 and 10 years—to make and sustain the system-wide changes required by the agreements.¹⁷³ The vast majority of CRT's *Olmstead* settlement agreements are in the middle of implementation, with the state meeting interim benchmarks to, for example, increase the capacity of community services, transition people into the community, or divert people from institutional placements.¹⁷⁴ In these cases, there is ongoing monitoring and, in most cases, regular status reports to the court from external monitors or independent reviewers. In contrast to the fully implemented Delaware agreement,¹⁷⁵ in several *Olmstead* settlements, states have not met significant interim requirements of the agreements. CRT has taken enforcement action to extend or amend the terms of some of those

CRT has challenged the segregation of people not only in where they live, but in how they spend their days, including segregation in sheltered workshops and day habilitation programs.

agreements.¹⁷⁶ **NCD recommends that DOJ continue to emphasize community integration and community service delivery requirements under *Olmstead* in any investigation of the conditions for people with disabilities within a state mental health, nursing, or intellectual or developmental disabilities facility.**

Interagency Collaboration and Coordination

CRT has improved its interagency collaboration and coordination since 2000. In 2005, the CRT entered into an MOU with the U.S. Department of Transportation's (DOT) Federal Transit Administration to coordinate enforcement of

Section 504 and the ADA to ensure accessible public transportation for people with disabilities.¹⁷⁷ Also, under a change in the 2010 regulations, CRT has the discretion to respond directly to complaints it receives

rather than referring to DOT. This permits CRT to enforce cases and obtain compensatory relief for aggrieved parties as well as civil penalties for egregious ADA violations.

The ADA requirements that fleets of bus companies Over-the-Road Buses (OTRBs)—buses with the passenger compartment over a baggage or luggage area—be wheelchair accessible increased over the years, first to 50 percent of large company fleets by 2006, and then to 100 percent by 2012. Additionally, by 2012, small bus companies were required to provide equivalent accessible service with advance notice from a passenger. The DOT's Federal Motor Carrier Administration undertook compliance reviews of

bus companies and the CRT took enforcement action against a number of bus companies that did not comply with the ADA requirements. CRT has actively enforced the requirements for OTRB companies, both large and small.¹⁷⁸ CRT entered into a nationwide consent decree in 2016 with Greyhound Lines, Inc., regarding a pattern and practice of ADA violations.¹⁷⁹

Both CRT and HHS's Office of Civil Rights (OCR) have jurisdiction over *Olmstead* enforcement, although only CRT can bring litigation. Implementation of *Olmstead* involves, among other things, access to Medicaid-funded home and community-based services (overseen by HHS's Centers for Medicare & Medicaid Services [CMS]), affordable integrated housing (federal programs overseen by HUD), opportunities for competitive integrated employment (federal policies overseen by DOL and the Department of Education [ED]), and integrated educational opportunities (federal policies overseen by ED).

Beginning with the early *Olmstead* cases brought under CRIPA, DOJ has coordinated with HHS. For example, CRT worked with CMS, which oversees institutional licensing and compliance with federal regulations, when investigating and implementing violations around standards of treatment and discharge planning at particular facilities.¹⁸⁰ Starting with the Year of Community Living initiative and the creation of a new Administration on Community Living (ACL) within HHS in 2012, the interagency collaboration between CRT and HHS deepened. CRT has coordinated with ACL, CMS, and HHS OCR during its *Olmstead* investigations, during negotiations and implementation of settlement agreements, and around litigation filings. CRT has also worked closely with HHS on policy and guidance related to community living.

One of HHS's major policy initiatives around community living was the creation of the Home and Community-Based Services Settings Rule (HCBS Rule) finalized in January 2014.¹⁸¹ The HCBS Rule provides clear standards for all settings for entities receiving HCBS funding, including that such entities provide people access to the broader community, allow people to make decisions about their daily lives, and have opportunities for competitive integrated employment.¹⁸² A stated purpose of the HCBS Rule is to help states comply with their obligations under *Olmstead*, although CMS has made clear that compliance with the HCBS Settings Rule does not necessarily mean the state is in compliance with *Olmstead*.¹⁸³ CRT coordinates with CMS on implementation of the HCBS Rule by 2022. In addition, CRT has worked closely with CMS and other agencies within HHS related to health and safety in community placements, including providing technical assistance related to an HHS report on the topics.¹⁸⁴

Access to affordable housing is key to *Olmstead* implementation. As a result of the Year of Community Living initiative, HUD increased its focus on *Olmstead* and its collaboration with DOJ. Working together with CRT, HUD issued a number of guidance documents around opportunities for states to use federal affordable housing programs to meet their *Olmstead* obligations.¹⁸⁵ HUD has also assisted CRT in its *Olmstead* enforcement work, including helping identify federal housing resources that could be included as part of *Olmstead* settlement agreements.¹⁸⁶

When CRT began to expand its *Olmstead* enforcement to address segregation in employment settings, including sheltered workshops, CRT worked closely with the DOL Wage and Hour Division (WHD), which oversees

the subminimum wage provision under Section 14(c) of the Fair Labor Standards Act. A CRT *Olmstead* enforcement action against Rhode Island was “brought to light by an investigation by [WHD], regarding improper subminimum wages being paid to people with disabilities working at a large sheltered workshop provider.”¹⁸⁷ When CRT announced an interim settlement, WHD revoked the ability of the workshop to pay subminimum wages.¹⁸⁸ CRT also collaborated with WHD in 2015 around implementation of regulations relating to the wages of home care workers.¹⁸⁹ CRT and HHS OCR worked in close consultation with WHD to develop the previously discussed guidance to states about *Olmstead* obligations in light of the WHD regulations.¹⁹⁰

Finally, as CRT has expanded its *Olmstead* enforcement to look at educational segregation, it has worked with the Department of Education (ED), including its Office of Civil Rights and Office of Special Education and Rehabilitation Services (OSERS). For example, CRT worked with both OCR and OSERS during its investigation and attempt to resolve its investigation of Georgia’s segregated educational system for students with behavioral disabilities.¹⁹¹ CRT has also consulted with ED on policy issues and guidance that impact inclusion of students with disabilities, including its August 2016 guidance on in-school behavioral supports,¹⁹² which was subsequently rescinded in December 2018.¹⁹³ **NCD recommends that DOJ continue to include unnecessary educational segregation as part of its *Olmstead* enforcement work.**

Training and Technical Assistance

CRT conducts presentations across the country on the requirements of the ADA and the Rehabilitation Act, as well as on other issues such as human trafficking and hate crimes involving people with disabilities. DRS operates the ADA information line, which provides technical assistance on federal disability rights laws.

The number of public trainings conducted by DRS varied each year between FY 2008 and FY 2018 with no discernable pattern to suggest that DRS significantly increased or decreased the level of focus on such trainings over that period of time. Since FY 2008, DRS public trainings on disability rights have been as few as 31 in FY

2014 to as many as 68 trainings in FY 2011.

Training and technical assistance on the applicable housing accessible standards appears to require more resources and effort. HCES believes that

residential building developers and professionals seem to misunderstand that the FHA accessibility requirements apply to multifamily construction and not the ADA. Similarly, HUD reports that property owners typically refer to the ADA, not the FHA, when assessing whether or not to provide a reasonable accommodation. According to HUD, this is especially the case concerning the applicable standards for emotional support and service animals. The number of recent cases filed by HCES regarding emotional support and service animals suggests a need for greater training on the standard applicable under the FHA and the differences with the ADA. **NCD recommends that HCES work closely with**

The number of recent cases filed by HCES regarding emotional support and service animals suggests a need for greater training on the standard applicable under the FHA and the differences with the ADA.

HUD to create comprehensive training and technical assistance guidance outlining the applicability of the FHA and ADA to multifamily housing developers, property designers, property owners, and managers, and to develop methods for effective distribution of such assistance.

DRS maintains the ADA information and technical assistance line which provides good prerecorded information about the ADA. Callers can reach a live ADA specialist with little reported difficulty and also file a complaint. Though the ADA information line is displayed in the center of ada.gov, it is not as prominently displayed on the separate DRS webpage. The number of calls to the ADA information line has steadily declined from FY 2012, in which DRS received 60,000 calls, to 48,500 calls in FY 2014 and 42,741 in FY 2018. There is no public reason offered for the drop, which is a concern if fewer people are learning about disability rights under federal law. DRS recently updated the operating system of the information line which will allow a more detailed assessment of the use of the line. **NCD recommends that DRS conduct a study to better understand the steady decline in calls to the ADA information line.**

Declining ADA information line calls

The number of calls to the ADA information line has steadily declined from FY 2012, in which DRS received 60,000 calls, to 48,500 calls in FY 2014 and 42,741 in FY 2018.

NCD recommends that DRS prominently display information about the ADA information line to increase awareness of its benefits to the public.

Adequacy of Agency Resources

An analysis of the staffing and budget of the DRS, SPL, and other sections of the Civil Rights Division is not possible as CRT does not release such information at the individual section level. Looking solely at the entire CRT budget since FY 2008, in constant dollars the Division's budget has averaged around \$105 million a year (\$140 million on average in real dollars).¹⁹⁴ Congress enacted a 16 percent increase in the CRT budget in FY 2010, but the budget level has gradually dropped since that time with a large 7 percent drop in FY 2013 (see Table A, Appendix A). The CRT FY 2018 budget was \$102 million in constant dollars (\$148 million in real dollars). Overall, for most of the period of this study, the CRT budget remained within a fairly consistent window.

CRT staffing levels were more volatile than the budget between FY 2008 and FY 2018 based on the number of direct full-time equivalent (FTE) positions reported for the Division (see Table B, Appendix A). Overall, FTEs at CRT declined significantly by 24 percent over this 11-year period. While FTEs reported for CRT jumped from 715 in FY 2009 to 766 in FY 2010 and then to 817 in FY 2011, CRT lost 169 FTEs in FY 2012 alone, and this decline continued with 540 FTEs reported in FY 2018. In only one year between FY 2012 and FY 2018 did the FTEs at the CRT increase from the prior fiscal year.

Since CRT does not release staffing data by section, the direct impact of the rapid staff loss in FY 2012 on disability enforcement cannot be assessed. CRT reports that the sudden increase

in resolution of disability rights cases in FY 2012 (see Chart 1) may have been in part a result of the staffing increases the prior 2 years, with the resulting significant decrease in resolutions starting in FY 2013 a potential result of the staffing decline. Nevertheless, the overall CRT staffing decline of 175 FTEs since FY 2008, accelerated

since FY 2012, can only have a negative impact on the ability of CRT to enforce federal disability rights laws. **NCD recommends that Congress ensure that DOJ has the resources necessary to maintain stable staffing levels within the Civil Rights Division to ensure consistent disability rights enforcement efforts.**

Chapter 2: U.S. Department of Housing and Urban Development

Based on the analysis contained in this chapter, NCD recommends that HUD:

- Develop regulations for the application of Section 504 of the Rehabilitation Act to homeownership projects with more than five units.
- Retain, without change, the 2013 regulations on disparate impact litigation.
- Make greater use of Secretary Initiated complaints and investigations in disability discrimination cases.
- Maintain the current “affirmatively furthering fair housing” (AFFH) regulations and deadlines, and create a collection of data about housing accessibility, segregation or integration of people with disabilities, and any disparities to community services for people with disabilities.
- Develop an in-depth training curriculum on disability rights for Fair Housing Assistance Program (FHAP) investigators.
- Train a certain percentage of Fair Housing Equal Opportunity (FHEO) investigators on specific disability issues and require the same of the FHAP agencies.
- Ensure that conciliation policies do not result in people with disabilities being pressured into an agreement that significantly dilutes their rights under the Fair Housing Act.
- Prioritize conducting reviews for compliance with Section 504 of the Rehabilitation Act.
- Make efforts to resolve disability housing rights complaints within the statutory 100-day time period.
- Simplify language on the FHEO website about how to file a complaint and provide lengthier time or an automatic saving function to accommodate people with disabilities who need more time to complete the online form.

NCD recommends that Congress:

- Budget the needed funds to adequately staff FHEO to ensure adequate and timely disability discrimination investigations and Section 504 reviews.

Overview

The Department of Housing and Urban Development (HUD) is responsible for the enforcement of Title VIII of the Civil Rights Act of 1968, more commonly known as the Fair Housing Act (FHA). HUD also enforces compliance with the ADA and Section 504 of the Rehabilitation Act as applicable to housing. Much of HUD's work, such as supporting the development of affordable housing and community development, directly impacts the ability of people with disabilities to secure suitable, safe, and accessible housing within the community. This chapter, however, focuses on HUD's efforts to enforce the FHA and to achieve compliance with the ADA and Section 504.

HUD program offices are located in Washington, D.C., and within 10 HUD regions. HUD's responsibilities range from administering community development programs, housing mortgage finance, public housing support, and enforcement of federal housing and civil rights laws.¹⁹⁵ The Office of Fair Housing and Equal Opportunity (FHEO) is charged with FHA enforcement. The FHA prohibits discrimination in the sale, rental, and financing of dwellings, other housing-related transactions, or practices which otherwise restrict housing availability on the basis of race, color, religion, sex, national origin,¹⁹⁶ and since 1988, disability and familial status.¹⁹⁷ FHEO investigates fair housing

complaints, conducts reviews for compliance with Section 504 for entities that receive federal financial assistance through HUD, and enforces Title II of the ADA as it applies to housing-related problems.

Regulatory, Sub-Regulatory and Policy Guidance

HUD develops regulations and guidance documents for programs such as Public and Indian Housing, the Housing Choice Voucher Program, and the Section 811 Program that affect housing choices for people with disabilities. HUD promulgates regulations implementing Section 504 for recipients of HUD financial assistance and for HUD's own programs, and for the FHA, and has issued interpretative guidance about these laws, some in conjunction with DOJ.

The Department issued final Fair Housing Act Amendments Act regulations related to disability within one year of those 1988 amendments to the FHA. The regulations included the prohibition on disability discrimination, and the obligation to make reasonable modifications and accommodations, and to establish requirements for accessibility and usability in new multifamily housing.¹⁹⁸

Since the FHA disability regulations were first issued, HUD has revised the regulations to provide additional protections for people with disabilities. In 2013, HUD issued final regulations establishing FHA liability for practices with a discriminatory

effect, known as disparate impact, even if the housing practice was not motivated by an intent to discriminate against a person with a disability.¹⁹⁹ Under these rules, a housing provider’s policies and practices, or a local government’s zoning laws or land use policies, that may have been created to be neutral as to disability, yet have a discriminatory impact on housing opportunities for people with disabilities, are prohibited. In the 2015 case *Texas Department of Housing and Community Affairs v. Inclusive Communities*, the U.S. Supreme Court agreed that a housing provider may violate the FHA for disparate impact, without the need to prove an intent to discriminate.²⁰⁰ While the Supreme Court did not disturb the 2013 HUD regulations on disparate impact, in August 2019 HUD published

proposed regulations to significantly change the disparate impact standard to place virtually all the burden on members of protected classes, including people with

disabilities. The regulations, if adopted as proposed, would make it much more difficult, if not impossible, for persons with disabilities to overcome discriminatory effects in housing.²⁰¹

NCD recommends that HUD retain the 2013 regulations on disparate-impact discrimination.

In 2016, HUD issued a regulation to clarify the requirements under the FHA that housing providers “affirmatively further fair housing” (AFFH) by reducing barriers to achieve fair housing and equal opportunity.²⁰² Under the AFFH duty, housing entities must take meaningful actions “to overcome the legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing.”²⁰³ As part

of the AFFH regulations, HUD must collect and make publicly available data on patterns of integration and segregation, concentrations of poverty, disproportionate housing needs, and disparities in access to housing opportunities.²⁰⁴ In turn, state and local recipients of HUD funding must use this data to take significant actions to overcome historic patterns of segregation, achieve truly balanced and integrated living patterns, promote fair housing choice, and foster inclusive communities that are free from discrimination. As many people with disabilities are also people of color with low income, and have faced segregation and difficulties locating housing, the AFFH rule could reduce barriers and expand housing options for people with disabilities.

Under the AFFH duty, housing entities must take meaningful actions “to overcome the legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing.”

Under the AFFH regulations, entities which receive federal housing funds were required to complete an Assessment of Fair Housing in staggered

phases depending on the entities’ funding cycle, with the first assessments originally due in 2016. HUD has extended the deadlines to comply with the AFFH regulation several times since, with the latest extension moved until after October 31, 2020.²⁰⁵ Shortly after a federal court dismissed a challenge to the delay, in August 2018,²⁰⁶ HUD indicated it might further revise the AFFH process asserting, among several reasons, the need to minimize the regulatory burden while “more effectively aiding program participants to plan for fulfilling their obligation[s,]” focus on positive results “rather than on performing analysis of community characteristics,” and “provide greater local control and innovation.”²⁰⁷

NCD recommends that HUD maintain the current requirements of the AFFH regulations and reporting deadline, and issue new Assessments of Fair Housing Templates which would require HUD program participants to gather data about housing accessibility, segregation or integration of people with disabilities, and any disparities in access to health care, transportation, education, employment, individualized services, and other social opportunities for people with disabilities.

In a positive move, in 2016 HUD revised regulations concerning harassment to better explain how harassment of a resident or housing applicant may violate the FHA terms and conditions of housing. HUD specifically added a prohibition on “quid pro quo and hostile environment harassment,”²⁰⁸ that applies to harassment based on all FHA protected classes. People with disabilities are thus protected from unwelcome requests or conduct which is sufficiently severe or pervasive enough to interfere with the availability of housing. For example, a housing manager’s persistent and abusive comments, using objectionable language about the hardships of providing a reasonable accommodation, might violate the harassment regulation.

For people with disabilities “housing is the single biggest barrier to community integration and to *Olmstead* implementation” and NCD has recommended that HUD “work to simplify other aspects of federal housing programs, and support focused advocacy and service brokerage for people with disabilities to access federally supported housing programs.”²⁰⁹ In June 2009, HUD issued a letter to Fair Housing Organizations (FHOs) detailing the new Money

Follows the Person Demonstration Program from HHS and urging FHOs to adopt a local preference for people transitioning from institutions to the community.²¹⁰ HUD issued further guidance on August 11, 2011 to provide strategies FHOs can use in their compliance and monitoring reviews to ensure public housing programs operate in a manner that supports the community integration mandate.²¹¹

On June 29, 2012, HUD sent a letter to Public Housing Authorities titled, “Assisted Housing for Persons with Disabilities under *Olmstead* Implementation Efforts to Provide Community-Based Options Rather than Institutional Settings” which discussed how to use a housing voucher program for people with disabilities who are not seniors to transition from institutions. The letter also discussed ways to leverage Section 811 funding to develop and subsidize supportive community housing for people with disabilities, and to conduct outreach to people in institutions to inform them of vacancies on public housing waiting lists.²¹² The Section 811 program is one of the largest housing programs for people with disabilities who are not seniors.

In 2013, HUD issued a “statement on the Role of Housing in Accomplishing the Goals of *Olmstead* and Questions and Answers on *Olmstead*, Section 504 and the ADA Integration Mandate.”²¹³ HUD clarified the obligations of programs that receive HUD funding assistance to comply with *Olmstead*, and pledged to explore how to fund additional scattered site integrated housing units and administer existing housing units in a manner that provides for more opportunities for autonomy, independence, and self-determination. The HUD *Olmstead* statement and questions and answers document were a necessary first step to address how

existing HUD programs can be used to provide housing in more integrated settings.

HUD guidance documents, however, do not offer any new options for accessible, affordable housing, and HUD has not sought to change existing regulations in a manner designed to stimulate new housing. As a result of some increased funding from Congress, HUD announced new funding for Section 811 Project Rental Assistance vouchers which may address some of the housing shortage for people with disabilities.²¹⁴

NCD recommends that HUD continue to find ways to use various existing federal housing programs to increase the availability of community housing for people with disabilities.

While HUD regulations may not have been revised to stimulate new housing, HUD has revised some program regulations to better accommodate people with disabilities in existing HUD-funded programs.

HUD now specifically allows the Section 8 Housing Choice Voucher Program to be used to rent in housing settings often used by people with disabilities such as single room occupancy (SRO),²¹⁵ congregate facilities,²¹⁶ group homes,²¹⁷ and shared housing.²¹⁸ Gaps, however, still exist in HUD's regulations. There is no requirement that multifamily homeownership units which receive HUD assistance meet accessibility standards to comply with Section 504. In the fall of 2002, HUD began the process to develop such regulations,²¹⁹ but withdrew the proposed regulations in March 2005.²²⁰ No further regulatory action has occurred, leaving missing details of how multifamily homeownership units assisted

through HUD need to be accessible to comply with the Rehabilitation Act. **NCD recommends that HUD develop and finalize regulations for Section 504 of the Rehabilitation Act that apply to homeownership projects with more than five units.**

Proactive and Reactive Strategies

The FHA authorizes the HUD Secretary to initiate an investigation and file a complaint without the need for a person alleging discrimination to first contact HUD.²²¹ "Secretary-initiated" complaints based on disability are not common. HUD filed several complaints in 2011, two of which involved multifamily housing that was not

fully accessible to people with disabilities.²²²

In 2018, HUD filed a charge against Epcon Communities based on a Secretary-initiated complaint filed in 2012.

In the case against Epcon, HUD asserted that

the housing developer and its franchisees constructed inaccessible multifamily residential communities based on the developer's inaccessible designs.²²³ The charge alleged that Epcon had constructed 11 inaccessible multifamily residential communities in Ohio, and had mandated the use of its inaccessible designs by its franchisees, which in turn constructed another 21 inaccessible residential communities. Among a wide range of design and construction violations, the housing communities lacked accessible pedestrian routes to common facilities and areas like mailboxes, parking lots, and gazebos. Many of the communities contained steps for entry into individual housing units; were designed with an inaccessible kitchen and

The HUD Olmstead statement and questions and answers document were a necessary first step to address how existing HUD programs can be used to provide housing in more integrated settings.

bathroom; and were built with inaccessible light switches, electric outlets, and environmental controls.

Design and construction violations continue to be ripe for Secretary-initiated complaints since people with disabilities may be less aware of the FHA's requirements in this regard, nor have the ability to access design and construction plans without commencing litigation. HUD has continued to send design and construction cases to DOJ which has initiated or resolved over 10 design and construction cases in the past 2 years.²²⁴ **NCD recommends that HUD make greater use of Secretary-initiated complaints and investigations, especially in areas of possible FHA violations of design and construction requirements, along with other disability discrimination cases.**

Competent and Credible Investigative Process and Enforcement Action

FHEO is responsible for investigating complaints of housing discrimination based on disability and other protected classes covered under the FHA. Once a person with a disability files a complaint alleging housing discrimination, the complaint is handled by either FHEO or what is known as a Fair Housing Assistance Program (FHAP) agency. The FHA mandates that FHEO refer complaints to certified FHAP state and local government fair housing enforcement agencies if the agency enforces and operates under a law substantially similar to the FHA. The FHAP investigates the complaint, and if a violation is uncovered, initiates enforcement activity.

FHEO has specific regulations concerning the initial and continued certification of FHAP agencies.²²⁵ Currently, FHEO works with 84 FHAP agencies, of which 35 are statewide agencies and the remaining 47 cover a specific locality. Under cooperative agreements with each FHAP agency, FHEO pays the FHAP agency following completion of an investigation provided the agency follows all investigative procedures and other applicable requirements. FHEO may also make additional payments to the FHAP agency should the case require enforcement efforts after the investigation.

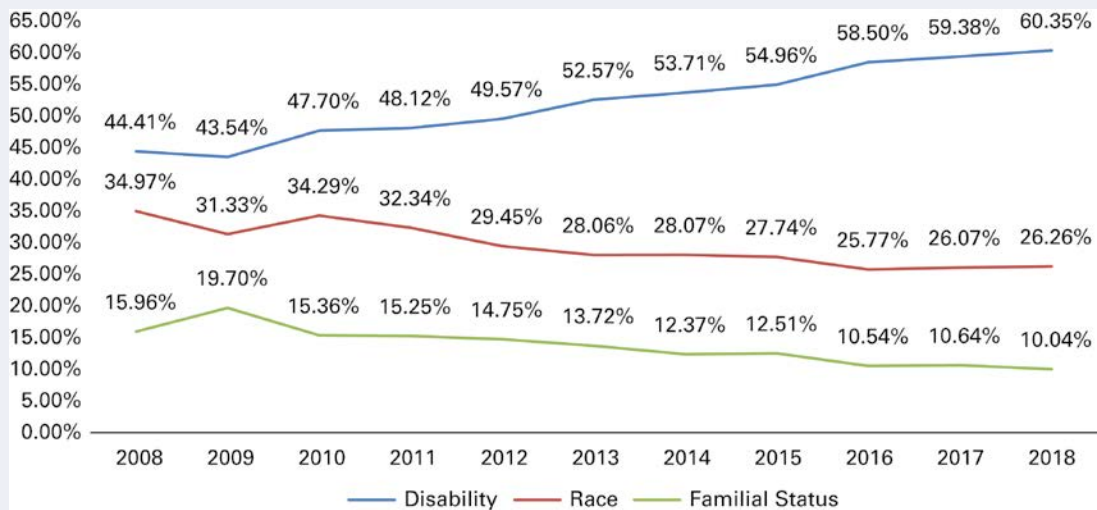
In locations where no certified FHAP agency exists, FHEO conducts its own investigation.

Complaints about potential housing discrimination based on disability accounted for 44 percent of all complaints filed with

HUD has continued to send design and construction cases to DOJ which has initiated or resolved over 10 design and construction cases in the past 2 years.

FHEO and the FHAP agencies in FY 2008, and that number has increased significantly since that time. As indicated in Graph 2, the percentage of disability complaints compared to other bases of complaints increased to 52.6 percent in FY 2013 and climbed to 60.3 percent in FY 2018.²²⁶ As shown in Graph 3, the total number of disability complaints fluctuated between FY 2008 and FY 2018, ranging from a low of 4,371 in FY 2012, to a high of 4,949 in FY 2016. FHEO staff were unsure of the reason for the continued upward trend in disability complaints, but reported that within the disability complaints, allegations that a housing provider failed to make a reasonable accommodation represented the most common issue. Within these reasonable accommodation complaints, FHEO staff identified the failure

GRAPH 2: Top Three FHA Complaints by Basis as Percentage of Total Complaints Filed with HUD & FHAP Agencies by Fiscal Year



to accommodate a service animal as the most frequent sub-issue.

Graph 3 also reflects the number of “inquiries” made to FHEO or FHAP agencies alleging a potential disability housing claim. Some, but not all, inquiries result in a formal complaint of housing discrimination. On average, about 65 percent

of inquiries of housing discrimination based on disability were converted to a complaint filed for investigation. By way of a loose comparison, about half of all contacts with the EEOC to discuss employment discrimination result in an actual investigation.²²⁷

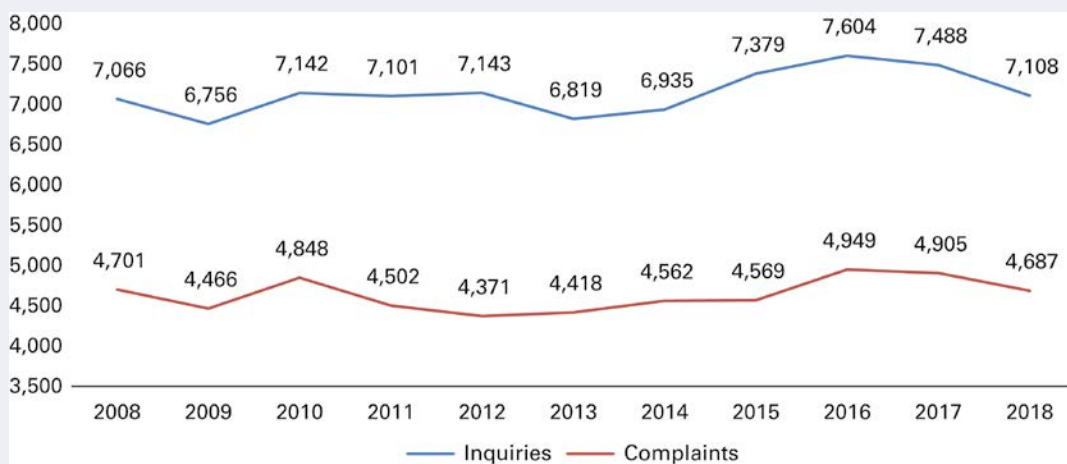
About 78 percent of the total disability housing discrimination cases closed between FY 2008 and FY 2018 were FHAP agency cases. The 2018 NCD Progress Report discussed how EEOC investigators are cross-trained on all laws enforced by the Commission and individual investigators have no specialization in disability issues.²²⁸ The same issue also exists with both FHEO and FHAP agency investigators who cover all seven of the potential bases of discrimination under the FHA.

The lack of any specialization in disability regulations by FHAP agency investigators is likely even more problematic than what may exist at

FHEO and FHAP housing discrimination complaints

- FY2008 - 44% of all complaints were disability discrimination
- FY2013 - 52.6% of all complaints were disability discrimination
- FY2018 - 60.3% of all complaints were disability discrimination

GRAPH 3: FHA Inquires and Complaints Based on Disability Filed with HUD & FHAP Agencies by Fiscal Year



the EEOC. Many FHAP agencies are general civil rights enforcement entities responsible for fair housing laws, equal employment laws, and in many cases other state civil rights law. Of the 35 current statewide FHAP agencies, 27 are also Fair Employment Practice Agencies responsible for investigations of employment discrimination complaints as well as those involving housing discrimination. These agencies, in essence, simultaneously serve as the state's equivalent of the FHEO and the EEOC, resulting in even more generalization in civil rights enforcement. People with disabilities who seek reasonable accommodations in housing have unique needs depending on the disability and manifestations.

These agencies, in essence, simultaneously serve as the state's equivalent of the FHEO and the EEOC, resulting in even more generalization in civil rights enforcement. People with disabilities who seek reasonable accommodations in housing have unique needs depending on the disability and manifestations.

Fair housing rights investigators with a general knowledge of disability issues, for example, may miss the complexities and nuances necessary to understand the need for reasonable

accommodations, made worse when investigators cover a multitude of civil rights statutes. **NCD recommends that FHEO develop an in-depth training curriculum with routine training on disability rights issues in housing for FHAP agency investigators.**

NCD recommends that FHEO train a certain percentage of FHEO investigators in disability-specific issues, especially around reasonable accommodations and various disabilities, and require the same of certified FHAP agencies.

CHART 3: Outcome of FHEO and FHAP Cases as Percentage of Total Closed by Basis Fiscal Year 2008–2018 Combined

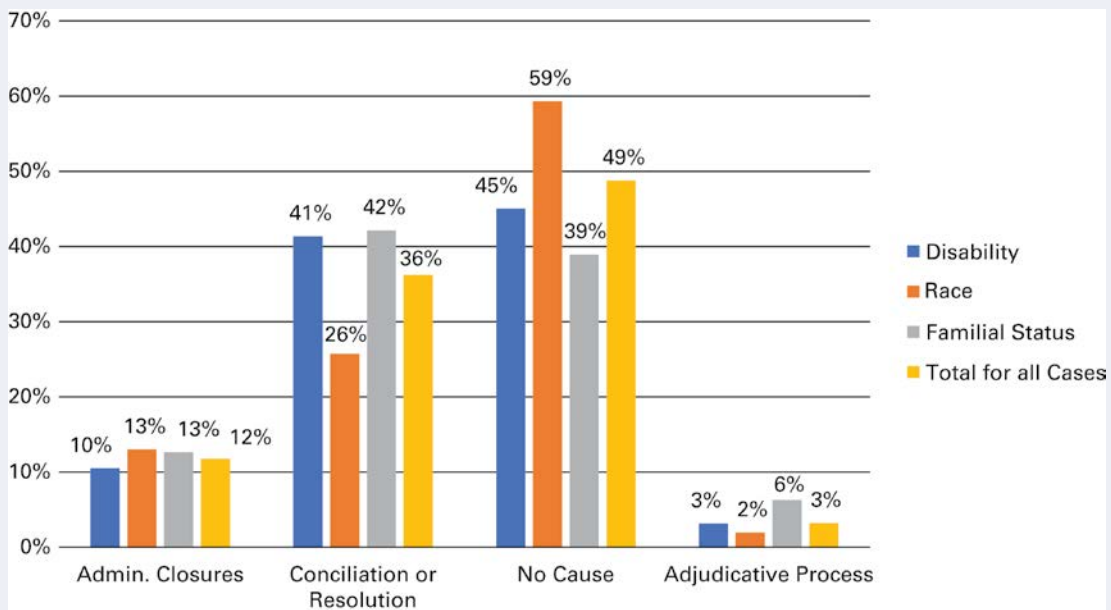


Chart 3 provides the outcomes of investigations between FY 2008 and FY 2018 for cases alleging housing discrimination based on disability, race, and family status which represent the largest number of complaints received by FHEO and the FHAP agencies. The outcomes of all cases are also represented in Chart 2. Over the past 11 years, most housing discrimination investigations, 49 percent, resulted in a determination that no violation occurred, known as a “no cause” finding. Slightly fewer disability cases, 45 percent, resulted in a no cause finding, which represents the largest outcome for disability complaints.

More disability complaints, 41 percent, are resolved through conciliation or other settlements than those based on race, 26 percent, and all types of housing complaints combined, 36 percent. Only 3 percent of

disability complaints went to an administrative adjudicative process or to court, with 10 percent closed for various administrative reasons. In terms of administrative hearings, FHAP agencies were involved in 94 hearings in disability cases between FY 2008 and FY 2018, with 62 percent, or 59 hearings, resulting in a finding of discrimination. Over the same time period

FHAP disability cases, FY08-FY18

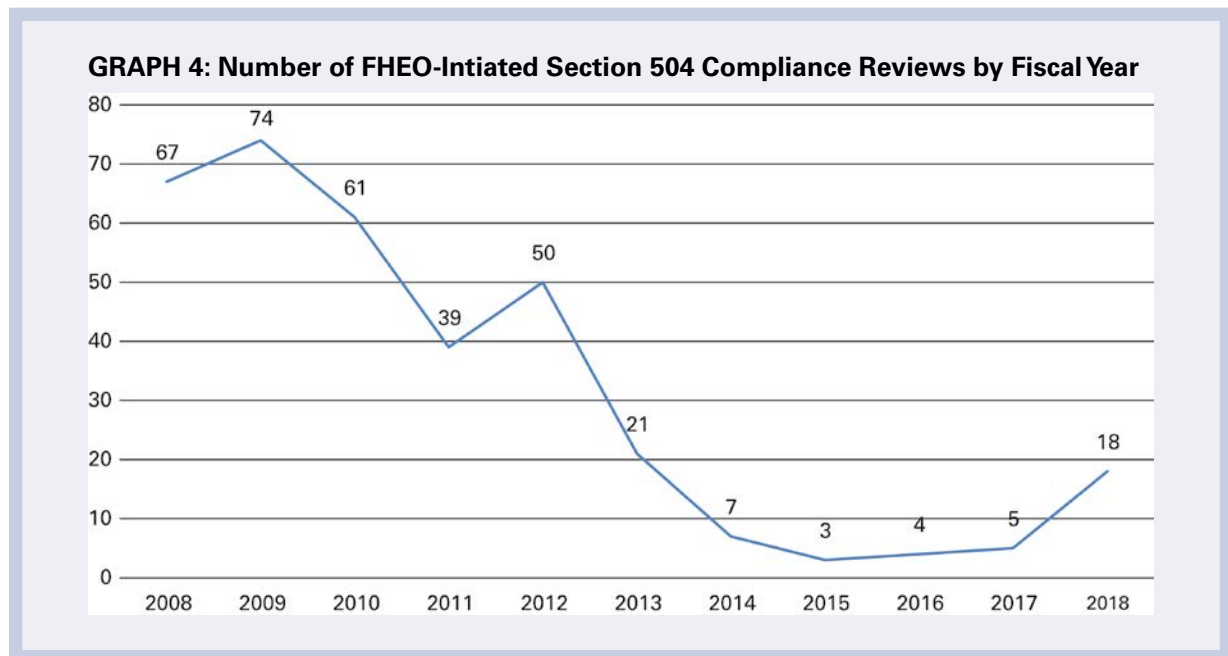
- 94 hearings in disability cases
- 62% (59 hearings) found discrimination
- 39 HUD ALJ proceedings in disability cases with consent order resolution in all cases

39 HUD Administrative Law Judge (ALJ) proceedings occurred in disability cases, all of which resulted in a consent order resolving the case.

The FHA requires that FHEO seek to conciliate an agreement between the parties throughout the complaint investigation process. In 2005 the Government Accountability Office (GAO) reported concerns about the HUD intake and investigations process, including that in some cases complainants felt pressured into accepting a conciliation agreement.²²⁹ For complainants with disabilities in critical need of accommodations to obtain housing, the risk of accepting less than what FHA requires is of concern, especially with the high percentage of disability cases resolved through conciliation. **NCD recommends that FHEO review policies related to the conciliation process to ensure people with disabilities are not pressured into accepting an agreement that significantly dilutes their rights under the FHA.**

FHEO also administers the Fair Housing Initiative Program (FHIP), a hybrid program which provides funding for private enforcement of the FHA and education and outreach. In terms of enforcement, FHIP provides grants through a competitive process under the Private Enforcement Initiative to nonprofit organizations to enforce the FHA through the use of tester and other private mechanisms including investigations, mediation, and litigation. FHEO oversees the entities participating in FHIP through grant management practices and does not approve investigations as with the FHAP agencies.

FHEO conducts reviews of housing providers' compliance with Section 504. As shown in Graph 4, the number of Section 504 reviews initiated by FHEO has dropped significantly since FY 2008. FHEO reports that prioritizing a large backlog of FHA cases, and prioritizing other compliance reviews, accounts for the decline. A reduction in FHEO staff may also account



for the decline in the number of reviews. **NCD recommends that FHEO prioritize Section 504 compliance reviews.**

Timely Resolution of Complaints

The FHA provides that both FHEO and FHAP agencies complete investigations within 100 days, “unless it is impracticable to do so.”²³⁰ Based on the average time required to complete a case overall, the 100-day requirement seems more the exception than the rule. Between FY 2008 and FY 2018, FHEO took an average of 283 days to complete a case.²³¹ FHAP agencies did better in attempting to meet the 100-day mark, on average taking 150 days to complete a case. FHEO does not break down the case completion time by basis, and therefore it is not possible to determine if disability cases take more or less time to complete than the overall average time. In 2005, FHEO informed the GAO that tensions exist between the 100-day requirement and “the need to conduct a thorough investigation, . . . at times one goal cannot be achieved without some cost to the other.”²³² A continued decline in FHEO staffing also likely accounts for difficulties in meeting the statutory 100-day benchmark.

For people with disabilities needing a reasonable accommodation in housing, delays in investigations can result in significant difficulties.²³³ A property owner refusing to allow a reasonable modification to a housing unit which requires a lengthy investigation can result in

the person with a disability taking more time to find alternative housing, experiencing a delay in discharge from an institution, or encountering a barrier to full enjoyment of life in the community.

NCD recommends that HUD and the FHAP agencies make efforts to reach a resolution in cases within the 100-day time period.

Communication with Complainants and the Community

FHEO provides a number of options for filing a housing discrimination complaint, including by phone, email, and mail.²³⁴ The online information

on how to file a complaint is accessible and generally easy to understand. Information on how to file a complaint with FHEO is a single level down on the FHEO homepage and labels lead to various information about filing a complaint intuitive. The information on how to file a complaint is written in a simple, short format and rated

at an eighth-grade reading level, still high for certain people with intellectual and cognitive disabilities, but very good in comparison with other government websites. The website also contains examples of the types of discrimination FHEO investigates.

The online complaint form questions are not complicated, and it is easy to locate information in different languages. The complaint website clearly indicates where a person with a disability can call if an interpreter or disability-related services or accommodations are needed. The online complaint

A property owner refusing to allow a reasonable modification to a housing unit which requires a lengthy investigation can result in the person with a disability taking more time to find alternative housing, experiencing a delay in discharge from an institution, or encountering a barrier to full enjoyment of life in the community.

form, however, needs to be completed in 45 minutes, which creates difficulties for people with certain physical, cognitive, or intellectual disabilities who may require more than 45 minutes to complete the form. Unlike the complaint website, the online form does not clearly indicate how to request an accommodation in completing the form.

NCD recommends that FHEO further simplify the language on the website for how to file a complaint to accommodate people with intellectual and other cognitive disabilities.

NCD recommends that FHEO lengthen the time for filling out the online complaint form to accommodate people with disabilities who need more time to complete the form and include a statement that “persons who have difficulty completing the form for any reason may contact a HUD representative for assistance.”

Training and Technical Assistance

FHEO funds several training and educational programs through FHIP, the Education and Outreach Initiative (EOI), the Fair Housing and Organizations Initiative (FHOI), and most relevant for people with disabilities, developers, architects, and builders of new multifamily housing, the Fair Housing and Accessibility FIRST program. The acronym FIRST describes the services offered by the program: Fair Housing Information, Resources, Support, and Technical Guidance.

The FIRST program website offers resource materials and operates a Design and

Construction Resource Center with technical staff available to answer questions.²³⁵ FIRST also conducts both online remote and in-person full day trainings in venues throughout the country focused on complying with the FHA design and construction requirements. The FIRST trainings include modules more applicable to housing managers and disability advocates and people with disabilities on the issues of reasonable accommodations and modifications.²³⁶ Though available online as well as in person, the FIRST trainings reach only a very small percentage of the developer, architect, and builder community. Multifamily housing continues to be constructed

Multifamily housing continues to be constructed that does not comply with the modest FHA accessibility requirements for design and construction requirements over 30 years after they were established . . .

that does not comply with the modest FHA accessibility requirements for design and construction requirements over 30 years after they were established,²³⁷ resulting in fewer housing units available to people with disabilities and the need

to seek enforcement action. **NCD recommends that HUD increase resources to FIRST focused on reaching housing developers, architects, and builders.**

The EOI component of FHIP provides funds on a competitive basis to various organizations to develop education and outreach materials to inform the public about rights under the FHA. Most notable for this program, FHEO provides funds to develop and run a national media and Internet campaign on all FHA rights.²³⁸ The National Fair Housing Alliance has been the grantee for a number of years to run the national campaign. FHEO uses FHOI funds

to assist in developing the capacity of new private fair housing enforcement organizations, especially in areas currently underserved by such organizations.²³⁹

Interagency Collaboration and Coordination

The DOJ Housing and Civil Enforcement section is required to handle FHA cases in which either the complainant or the defending housing provider elects to take the case to federal court instead of utilizing the HUD ALJ process. Coordination between HUD and DOJ is thus built directly into the FHA, and HUD and DOJ's HCES staff meet monthly and have entered into an MOU.

Over the years, HUD has collaborated with DOJ to develop more user-friendly documents in the form of questions and answers on different aspects of fair housing. These documents explain both the rights of people with disabilities, and the obligations of housing providers and state and local governments to provide people with disabilities equal access to housing. In 2004, HUD and DOJ collaborated to issue a "Joint Statement on Reasonable Accommodations" under the FHA.²⁴⁰ Among other topics, it noted that housing providers might need to incur some costs to provide reasonable accommodations, and that surcharges were impermissible. The Joint Statement further discussed the interactive process for providing a reasonable accommodation and the direct threat defense against providing an accommodation. In

2008, HUD and DOJ issued a Joint Statement on Reasonable Modifications under the FHA,²⁴¹ explaining the differences between accommodations and modifications, and providing examples of modifications that would or would not need to be restored to original condition when a tenant with a disability vacates a housing unit. These two joint statements are widely relied on by disability advocates and housing providers because they are written in a useable question and answer format and address some of the most common issues of concern by both sides.

HUD and DOJ again collaborated in 2013 to issue the "Joint Statement on

These two joint statements are widely relied on by disability advocates and housing providers because they are written in a useable question and answer format and address some of the most common issues of concern by both sides.

Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings Under the FHA."²⁴² The statement has a number of questions and answers regarding different kinds of dwellings covered by the design and

construction requirements which include condos, timeshares, assisted living facilities, single room occupancy units, shelters designed as a residence for the homeless, and extended stay or residential hotels, and more. It also clarifies the exemptions for multistory townhouses without elevators and about alterations or conversions of buildings constructed prior to the effective date of the 1988 FHA amendments. Most recently, on November 10, 2016, HUD and DOJ issued a statement on "State and Local Laws and Practices and the Application of the Fair Housing Act" as discussed in Chapter 1. This guidance piece provides helpful information

about zoning protections for housing people with disabilities.

In 2010, DOJ's DRS issued new ADA regulations which generally narrowed the definition of service animals to dogs and excluded emotional support animals from the definition. In response to the DOJ service animal regulations, on April 25, 2013, HUD issued a statement on "Service Animals and Assistance Animals in Housing" and in HUD-funded programs under Section 504 and the FHA.²⁴³

HUD clarified that the ADA definitions, which are applicable to public accommodations, do not limit housing providers' obligations to make reasonable

accommodations for assistance animals under the FHA or Section 504 in housing. The guidance states, and according to FHEO staff, that housing providers often confuse the FHA with the ADA, and simply use the DOJ ADA service animal

definition. This results in housing providers wrongfully denying accommodations to people with disabilities who use assistance animals not included in the DOJ regulations. People with disabilities may also not understand the differences between the two laws.

FHEO and HUD Office of General Council staff expressed concern over the manner in which DOJ developed the ADA regulations around service animals, which HUD refers to as assistance animals. According to HUD staff, differences required between public and private settings, along with confusion among housing providers between the FHA and ADA,

have created numerous difficulties involving the requirements for assistance animals. For example, HUD staff stated that important differences exist in the need of a person with a disability for an assistance animal at home than when out in public. HUD staff expressed that DRS was too focused on developing a consistent definition for a service animal at the expense of important contextual differences.²⁴⁴

NCD recommends that HUD and DOJ provide additional guidance to covered entities and the general public to clarify the difference between service animals and emotional support animals in housing versus public accommodations.

Recent natural disasters due to hurricanes, wildfires, and widespread flooding in California, North Carolina, Texas, Puerto Rico, the Virgin Islands, and across the Midwest point to greater need for interagency collaboration

and coordination between HUD, DOJ, the Federal Emergency Management Agency (FEMA), and the Centers for Medicare and Medicaid Services (CMS) to better address the housing needs of people with disabilities. Specifically, these agencies need to collaborate to plan for natural and man-made national disasters that result in widespread evacuation and relocation of people receiving Medicaid and living in community settings.

During recent emergencies people with disabilities were relocated from community-based living arrangements to segregated long-term care facilities. Such long-term care facilities

According to HUD staff, differences required between public and private settings, along with confusion among housing providers between the FHA and ADA, have created numerous difficulties involving the requirements for assistance animals.

are often easier to locate, space is usually available, and Medicaid reimbursement is largely assured.²⁴⁵ Nonetheless, this common practice is inconsistent with the *Olmstead* integration mandate and other federal laws which favor the provision of Medicaid and governmental emergency services in the most integrated settings appropriate. **NCD recommends that DOJ and HUD monitor and enforce compliance with obligations for emergency sheltering in a disaster consistent with emergency sheltering requirements under the FHA, emphasizing the fact that compliance is required in both transient and long-term disaster shelters.**

Adequacy of Agency Resources

Congressional funding for FHEO operations and for FHAP has declined slightly in both real and constant dollars between FY 2008 and FY 2018 (see Table D, Appendix A). In the FY 2009 and FY 2010 period both the FHEO operations and FHAP funds increased, but the FY 2018 funding remains below those peak years. The FHEO operations budget is down just shy of \$700,000 over the same period.

In terms of staffing issues, FHEO staff cited a lack of resources, and the increasing rate of retirement of knowledgeable enforcement staff as the biggest challenge to fair housing enforcement efforts. Since the FHAP and the FHEO are

the HUD programs most directly tied to FHA enforcement, budget and staffing cuts directly impact enforcement of laws which protect people with disabilities from housing discrimination. The GAO reported that approved staff levels fell quickly from 744 Full-Time Equivalent (FTEs) in FY 2003 to 640 in FY 2004, and that the agency had challenges meeting the approved ceiling.²⁴⁶ Between FY 2008 and FY 2018, FHEO staff levels based on FTEs fell even further, from 582 to 479 FTEs, a significant 17.7 percent reduction (see Table E, Appendix A). **NCD recommends**

Specifically, these agencies need to collaborate to plan for natural and man-made national disasters that result in widespread evacuation and relocation of people receiving Medicaid and living in community settings.

that Congress budget the needed funds to adequately staff FHEO to ensure adequate and timely disability discrimination investigations and Section 504 reviews.

Funding for FHIP, in contrast, was 4.5 percent higher in FY 2018 than in FY 2008 in constant dollars. In FY 2009 Congress raised FHIP funding by 15 percent over FY 2008 and increased the FHIP budget again by 50 percent in FY 2009 (both in constant dollars). While the FHIP program budget has declined in more recent years, the program remains about \$9 million higher than in FY 2008 funding based on constant dollars. As noted previously, while the Private Enforcement Initiative under FHIP does fund some housing rights enforcement mechanisms, the overall FHIP program is funded higher than FHAP.

Chapter 3: Federal Communications Commission

Based on the analysis in this chapter, NCD recommends that the FCC:

- Ensure that the AccessInfo announcements about important regulation and proposed regulations impacting people with disabilities are accompanied with an ASL version.
- Develop regulations to ensure telecommunications devices have multimodal alert methods to notify a person with a sensory disability of incoming audio and video calls.
- Ensure relay services are available for web conferencing, resolve interoperability for video conferencing, and make accessible virtual and augmented reality technologies.
- Move quickly to develop standards to allow for the accessibility and interconnection across videoconference systems and services for people with disabilities.
- Address concerns and develop regulations to ensure ease of use of accessibility features on telecommunication devices.
- Work with FEMA to ensure all EAS and WEA alerts are accessible to people with disabilities and all deficiencies are addressed within 12 months.
- Work closely with DOJ to complete consistent Next Generation 9-1-1 standards for PSAPs, with the FCC addressing the text standards for wireless carriers and DOJ addressing the technical requirements of the PSAPs to accept and communicate through text to 9-1-1.
- Ensure reliable and interoperable access to Next Generation 9-1-1 services by people with disabilities, specifically media communication line services to allow a direct connection to 9-1-1 through video.

(continued)

**Based on the analysis in this chapter,
NCD recommends that the FCC: *continued***

- Explore solutions to ensure timely, accurate, and reliable descriptions of images and video displayed as part of emergency information over both existing legacy and developing broadcasting systems.
- Ensure reliable and interoperable access to Next Generation 9-1-1 services by people with disabilities, specifically media communication line services to allow a direct connection to 9-1-1 through video, text, and voice calls.
- Explore solutions to ensure timely, accurate, and reliable descriptions of images and video displayed as part of emergency information over both existing legacy and developing broadcasting systems.
- Establish measurable quality metrics for captioning with the consumer experience in mind and refuse to allow any technology which fails to meet these quality metrics.
- Require that “set-top box” and other video device providers include auditory commands as a mandatory universal design function for all such equipment.
- Develop regulations to ensure that people who are blind and visually impaired are able to obtain set-top boxes with easily accessible controls without incurring a surcharge through the purchase of more expensive equipment.
- Consider the expansion of new regulations to increase access to audio-described programming at a level greater than 1 hour per day on each covered network and revise the strategic plan performance goal accordingly.
- Evaluate the minimum standards for broadband in the Lifeline program and determine whether it meets the accessibility needs of Deaf and Hard of Hearing low-income customers.
- Revert back to its Open Internet policies.
- Ensure the IP Relay and VRS provider rate is sufficient to ensure quick response answer times, an adequate number of providers, and quality services.
- Reconsider the pay rate for the trials for skills-based routing and certified Deaf interpreters and apply the emergent rate to any VRS providers that participate in the skills-based routing trial and renew the trial period.
- Take concrete steps to develop and implement performance measures and service quality metrics for VRS and IP CTS.

(continued)

**Based on the analysis in this chapter,
NCD recommends that the FCC: *continued***

- Work with Congress to develop a mechanism to allow for the reporting of resolution of RDAs to increase the transparency of the RDA program.
- Increase its accountability and transparency on how it spends the amount set aside for outreach and education.
- NCD echoes its recommendation from the 2000 report and recommends that the FCC establish a TRS Technical Assistance Clearinghouse to provide information to consumers and relay providers.

Overview

The Federal Communications Commission (FCC) is an independent federal agency created by the Communications Act of 1934.²⁴⁷ The FCC's role and duties changed through the Telecommunications Act of 1996,²⁴⁸ and is now responsible to "make available so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, rapid, efficient, nationwide, and world-wide wire and radio communication services with adequate facilities at reasonable charges."²⁴⁹ The FCC adopts and enforces the rules on telecommunications relay services for people with hearing and speech disabilities under Title IV of the ADA,²⁵⁰ access to telecommunications services and equipment, and video programming under the Telecommunications Act of 1996,²⁵¹ and access

to the Internet, emergency services, and video programming and other communications for people with disabilities under the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA).²⁵² The FCC is responsible for regulations for radio, television, wire, wireless, satellite, cable, and the Internet.

By 2016, at least 79 percent of homes owned a computer and approximately 75 percent had an Internet subscription.²⁵⁴ Social media and applications on smartphones have emerged as accessible ways for people with disabilities to connect with the world.

Substantial changes in telecommunications technology since *Promises to Keep* has added many responsibilities for the FCC to oversee in regard to access for people with disabilities. Voice recognition software was still new in 2000, and only about half of

American homes had a computer and an Internet subscription at that time.²⁵³ By 2016, at least 79 percent of homes owned a computer and approximately 75 percent had an Internet subscription.²⁵⁴ Social media and applications on smartphones have emerged as accessible ways

for people with disabilities to connect with the world. Telecommunications and technology are changing so rapidly, and it has proven difficult for the FCC to make certain there is access for people with disabilities.

The FCC has five commissioners, all appointed by the President and confirmed by the Senate for 5-year terms, except when one is appointed to fill an unexpired term. The President appoints the Chair. No more than three commissioners may be from the same political party. The FCC has a headquarters office in Washington, DC, a satellite office in Pennsylvania, three regional offices, and 12 field offices around the country. The FCC has seven operating bureaus.²⁵⁵

The Consumer and Governmental Affairs Bureau (CGB) develops and oversees the FCC consumer policies. The CGB also handles outreach, education, and consumer complaints. The Disability Rights Office (DRO) is a part of the CGB, and is responsible for advising and implementing policies with respect to disability access issues including: (1) access to telecommunications services and equipment; (2) hearing aid compatibility; (3) access to advanced communications services and equipment; (4) access to Internet built into mobile phones; (5) telecommunications relay services; (6) access to emergency communications; (7) the National Deaf-Blind Equipment Distribution Program; and (8) accessible video programming and video programming devices.²⁵⁶ The Enforcement Bureau is responsible for enforcement of the Communications Act and the FCC's regulations. Due to the FCC's important regulatory

responsibilities, this chapter focuses on current FCC regulations and policies, new and future regulatory issues, and the role of the DRO.²⁵⁷

Enactment of the CVAA was the most important legislative development to impact the FCC on disability rights since *Promises to Keep*. The CVAA updated the Communications Act²⁵⁸ to make modern communications more accessible for people with disabilities.²⁵⁹ The FCC is required under Section 255 of the Communications Act, as amended, to make available to the extent possible and in the most efficient matter, telecommunications services that enable Deaf or Hard of Hearing users, Deaf-Blind persons, and users with speech disabilities to communicate in a manner that is functionally equivalent to that of

Enactment of the CVAA was the most important legislative development to impact the FCC on disability rights since Promises to Keep.

other telephone system users.²⁶⁰ The law requires telecommunication service providers and manufacturers of telecommunications technology to ensure that

people with disabilities can use their services and devices, if readily achievable.²⁶¹ "Readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense."²⁶² The FCC decides what is "readily achievable" on a case-by-case basis.

Section 717 of the Communications Act, as amended, requires advanced communications services (ACS) providers and equipment manufacturers to ensure that their services and equipment can be used by people with disabilities, unless doing so is not achievable.²⁶³ ACS includes interconnected Voiceover Internet Protocol (VoIP) service, noninterconnected VoIP service, electronic messaging service, and

interoperable video conferencing service.²⁶⁴ Section 718 of the Communications Act now requires that Internet browsers built into mobile phones must be accessible to and usable by people who are blind or visually impaired, unless doing so is not achievable.²⁶⁵ These rules apply to Internet browsers built into mobile phones that have been introduced into the mobile phone market since October 8, 2013.²⁶⁶

Since 2010, the FCC has worked on several technical and service issues that affect how people with disabilities can access broadcasts and telecommunications. These issues include accessibility and hearing aid compatibility (HAC) of devices used with advanced communications services, such as VoIP services; closed captioning, including the captioning quality; video description services; Telecommunications Relay Services (TRS); and a number of other issues.

Much of the FCC's work involves the development of specific regulatory standards to ensure accessibility, oversight of the TRS funds, and resolution of complaints filed about accessibility issues; thus, not all of the 11 assessment elements from *Promises to Keep* are equally applicable to the FCC today. Most of this chapter focuses on the FCC's interaction with the disability community and the creation of regulatory standards since, as discussed, almost every complaint filed with the FCC is resolved through an alternative dispute process which has thus far eliminated the need for enforcement action.

Communications with the Community

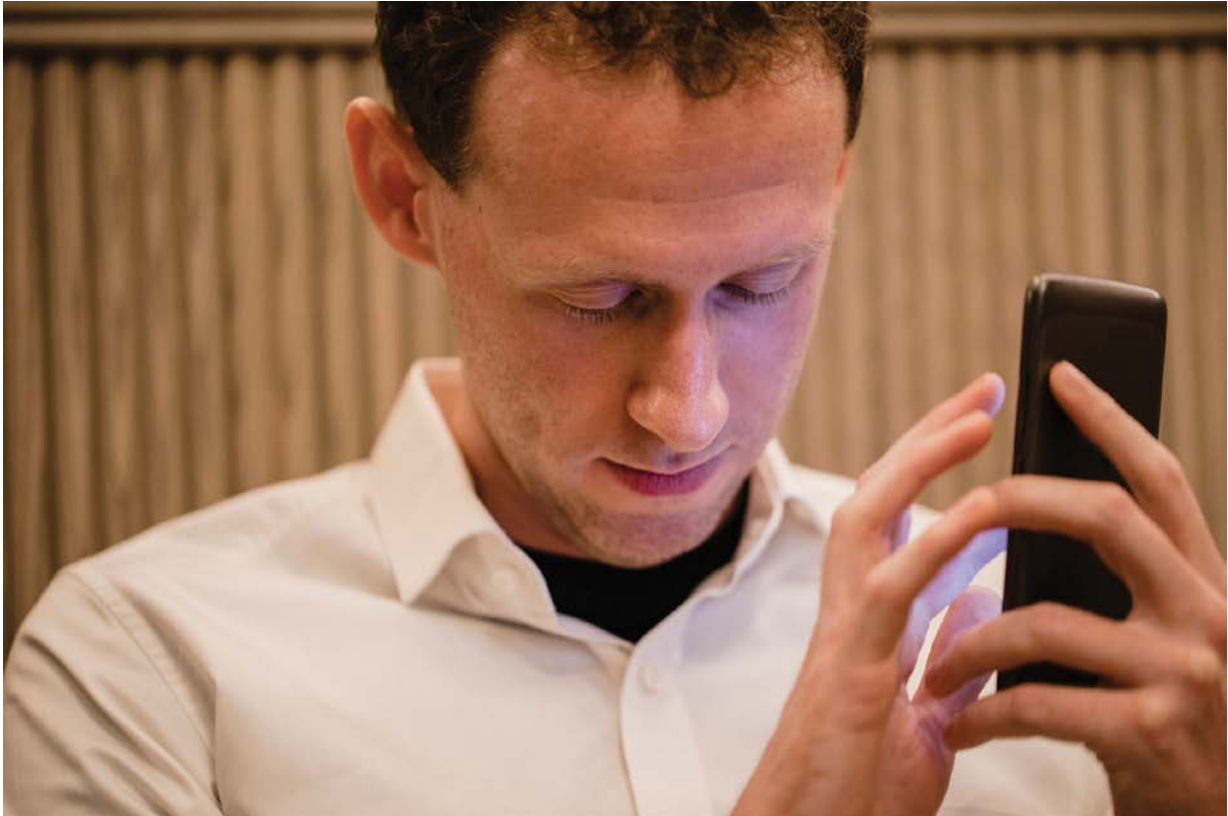
In *Promises to Keep*, the NCD recommended that the FCC establish an advisory committee on disability issues. The FCC first established a Disability Advisory Committee (DAC) in 2014.²⁶⁷ Since then, the DRO has convened two DACs for 2-year terms, and has recently appointed a third DAC which has been active since February 2019.²⁶⁸ Membership to the DAC is through appointment by the Chair of the FCC "in consultation with appropriate Commission staff," with a membership expected to be 35 to 40 members, and include "a wide variety of entities with interests in disability access issues that

are within the purview" of the FCC.²⁶⁹ The DAC provides advice and recommendations to the Commission on several disability issues.

The DAC provides input to the FCC on

disability issues, while the FCC also seeks input directly from the disability community, and other organizations and industry representatives with an interest in accessibility issues. The FCC, however, has not always been responsive to recommendations from either the disability community or the DAC. For example, on October 28, 2015, the FCC held a summit on the communications needs of people with cognitive disabilities to learn more about how this group uses information and communication technology (ICT).²⁷⁰ Following this summit, the DAC found ways to improve the use of, and access to, ICT products and services.²⁷¹ While the FCC issued a white paper and included

Since 2010, the FCC has worked on several technical and service issues that affect how people with disabilities can access broadcasts and telecommunications.



people with cognitive disabilities in an annual reminder about access to televised emergency information, to date the FCC has not announced how it will proceed to use the recommended best practices.

The FCC communicates and shares announcements about disability-related regulations through an email listserv called AccessInfo.²⁷² The FCC has an American Sign Language (ASL) video library²⁷³ about some topics, but the AccessInfo announcements about regulations that affect people with disabilities do not have ASL version videos. **NCD recommends that the FCC ensure that the AccessInfo announcements about important regulation and proposed regulations impacting people with disabilities are accompanied with an ASL version.**

Proactive and Reactive Strategies

The CVAA requires that ACS and ACS products be accessible to, and usable by, people with disabilities.²⁷⁴ The FCC is required to submit a report to Congress on the CVAA every other year,²⁷⁵ and the Commission's most recent report discusses successes in "1) the emerging availability of enterprise interconnected VoIP telephones with built-in accessibility features for people who are blind or visually impaired; 2) improved access to the telecommunications and ACS features of smartphones and other devices for people with a wide range of disabilities; and 3) an increased percentage of . . . [HAC] wireless handsets."²⁷⁶ The FCC determined that "a variety of smartphones are available to deliver accessible telecommunications and ACS features

to a wide range of [people] with disabilities, including people who are blind or visually impaired, Deaf-Blind, Deaf or Hard of Hearing, or have physical, mobility or dexterity limitations, or cognitive disabilities.”²⁷⁷

The FCC states in the recent report that areas still exist where technology is not accessible.²⁷⁸ Specifically, the FCC found that accessibility gaps continue to exist with respect to (1) mobile phones other than smartphones, (2) accessible alerts on video calls, and (3) accessible devices for people who are Deaf-Blind.²⁷⁹ The FCC has found that over the past 2 years little has improved in the availability of accessible mobile phones other than smartphones, particularly for people who are blind or visually impaired.²⁸⁰

According to a consumer group, many people who are Deaf-Blind “have no knowledge of Braille and communicate exclusively through tactile [ASL], and are unable to independently make and receive calls on any communications device.”²⁸¹

Several Deaf and Hard of Hearing consumer advocacy organizations, commonly called “consumer groups,” noted that the FCC report fails to mention accessible alerting for video calls. Video conferencing services, especially on smartphones, often fail to include vibration or flashing lights that can notify people who are Deaf and Hard of Hearing of incoming calls.²⁸² Consumer groups also commented that non interconnected VoIP services provided in video games are still inaccessible to people who are Deaf or Hard of Hearing.²⁸³ **NCD recommends that the FCC develop regulations to ensure telecommunications devices have multimodal**

alert methods to notify a person with a sensory disability of incoming audio and video calls.

The CVAA requires the FCC to evaluate and report on the accessibility barriers that still exist with new communications technologies.²⁸⁴ In its report, the FCC stated that new communications technologies can improve life for many consumers with disabilities, but that many consumers complain that such technologies are still not accessible.²⁸⁵ According to the report, commenters generally agree that communications will be more accessible with “continued development in, and the rollout of, technologies such as 5G, real-time-text (RTT), text-to-911, high definition (HD) voice, and Bluetooth.”²⁸⁶

NCD recommends that the FCC ensure relay services are available for web conferencing, resolve interoperability for video conferencing, and make accessible virtual and augmented reality technologies.

The CVAA requires accessible videoconferencing systems, but the various video services do not interact with each other. Unlike telephone users who call each other even if their telephone service providers are different (e.g., AT&T, Sprint, T-Mobile, Verizon, etc.), videoconferencing services—which are growing ever more popular—lack such interconnection. For example, FaceTime users can videoconference only with other FaceTime users and cannot videoconference with Skype users. The FCC is considering how to ensure videoconferencing programs can connect to each other and also be accessible for people with disabilities. A new working group has been set up to address this problem.²⁸⁷ **NCD recommends**

In its report, the FCC stated that new communications technologies can improve life for many consumers with disabilities, but that many consumers complain that such technologies are still not accessible.

the FCC move quickly to develop standards to allow for the accessibility and interconnection across videoconference systems and services for people with disabilities.

Virtually all landline telephones used in the United States, including VoIP telephones, must meet HAC standards after February 28, 2020.²⁸⁸ The FCC also requires wireless service providers and wireless phone manufacturers to offer wireless phones that are compatible with hearing aids and cochlear implants.²⁸⁹ Those wireless phones must reduce unwanted noise and interference with hearing aids and cochlear implants.²⁹⁰ HAC phones must provide volume control that limits loudness levels.²⁹¹

In 2016, the FCC changed the HAC regulations to require modified standards for the provision of HAC phones by wireless phone manufacturers and service providers.²⁹² The revised HAC regulations asked manufacturers and service providers to participate in a task force with Hard of Hearing persons to determine if all wireless phones can be made hearing aid compatible. This task force continues to meet to address the issue.²⁹³

In October 2017, the FCC changed the volume control standards for landline phones so such phones provide a better measurement of volume.²⁹⁴ The FCC also applied standards to landline telephones used with advanced communications services (such as phones used with VoIP services) beginning after February 28, 2020.²⁹⁵ By March 2021, all wireless phones that are marked as hearing aid compatible must include volume control for consumers with hearing loss.²⁹⁶

While the FCC regulation on volume control is an improvement, research suggests that consumers may have difficulties trying to find

information about a phone's accessibility features necessary to compare models.²⁹⁷ According to these researchers, people with disabilities are not always able to turn on a phone's accessibility features without assistance from others.²⁹⁸ A Deaf-Blind advocacy organization has said that “[u]ser guides and other documentation continue to be inaccessible to those who are Deaf-Blind[,]” and such customers often have difficulties trying to communicate their needs for mobile technology in person at retail stores.²⁹⁹ **NCD recommends that the FCC address concerns and develop regulations to ensure ease of use of accessibility features on telecommunication devices.**

Emergency alert and communications systems are critical for the safety of all people and must be fully accessible to allow people with disabilities to have full and equal access to these systems. While new technology offers the ability to improve accessibility, problems remain.

The FCC has partial responsibility for the Emergency Alert System (EAS),³⁰⁰ and when used to make weather and other alerts by state and local agencies, the FCC “requires broadcasters, cable operators and satellite TV providers to make local emergency information accessible” both through sound and vision.³⁰¹ While EAS alerts are usually sent via radio and television, government agencies can use the Wireless Emergency Alert (WEA) system to send Presidential, Imminent Threat, and AMBER Alerts to WEA-capable mobile devices based on where users are located.³⁰² In June 2015, the DAC endorsed a 2014 report from a subgroup of the Communications Security, Reliability, and Interoperability Council (CSRIC) which the DAC amplified in June 2016.³⁰³ The recommendations supported increasing the WEA character limit to 360 characters; adding websites

into WEA messages (such as links to ASL videos); improving how WEA messages are sent to people in certain areas; adopting state and local WEA testing and training for emergency managers; and increasing consumer awareness.³⁰⁴ The DAC supported “consideration of new rules to further enable people with disabilities to have better access to information.”³⁰⁵

The FCC adopted in 2015 accessibility requirements for televised Presidential EAS alerts and EAS test alerts.³⁰⁶ In 2016, the FCC sought public comment about accessibility issues for the EAS and WEA systems. The FCC specifically requested comments on whether access to public service announcements regarding EAS could be enhanced by transmitting such announcements via the Internet or other methods besides television, and by making the announcements available in ASL.³⁰⁷ The FCC also asked people to comment on the potential to use new technologies to make EAS alerts more accessible, including whether the use of certain cellphone-based services could make such alerts more accessible to people with sensory disabilities.³⁰⁸ Other than the request for comments, the FCC has taken no action in regard to increasing the accessibility of the EAS and WEA systems.

In September 2016, the FCC increased the maximum length of WEA messages from 90 to 360 characters and required wireless providers to support the inclusion of Internet links and phone number in all WEA alerts.³⁰⁹ The FCC considered this change “an important first step” in the

use of multimedia WEA, and requested public comment on whether alert messages could be made available through ASL.³¹⁰ In January 2018, the FCC required improvements in WEA to enable more accurate targeting of alerts to specific areas of the country,³¹¹ and to ensure that WEA-capable mobile devices keep the alerts for at least 24 hours in an accessible format for people with disabilities.³¹² These changes are important to provide people with disabilities more time to access and understand the emergency information.³¹³

An FCC performance goal is to assist with making EAS and WEA alerts effective and reliable, especially with new technologies.³¹⁴ In

The EAS alerts had poor color contrast, poor caption placement, delayed alerts, and lack of full visible texts to match the information that was shared by sound.

October 2018, FEMA and the FCC conducted a nationwide test of EAS and the WEA system.³¹⁵ This nationwide test showed accessibility problems. The EAS alerts had poor color contrast,

poor caption placement, delayed alerts, and lack of full visible texts to match the information that was shared by sound. Such deficiencies represent a serious shortcoming for Deaf and Hard of Hearing and people who are blind or have visual impairments. **NCD recommends the FCC work with FEMA to ensure all EAS and WEA alerts are accessible to people with disabilities and all deficiencies addressed within 12 months.**

Under the CVAA, the FCC must make sure people with disabilities have access to Next Generation 9-1-1 services where achievable and technically feasible.³¹⁶ In 2014, the FCC established regulations to require all wireless

carriers and other providers of text messaging applications to deliver emergency texts to PSAPs.³¹⁷ A PSAP is a call center which receives 9-1-1 emergency calls for police, fire, and ambulance services. The FCC requires that covered text messaging providers allow text messages to be sent to 9-1-1, and for PSAPs to receive such 9-1-1 texts if the PSAP has upgraded to text to 9-1-1 service, and otherwise provide a “bounce-back” message.³¹⁸ The FCC maintains a master registry of PSAPs that accept text to 9-1-1.³¹⁹ Within 6 months of a PSAP informing a wireless carrier that it can receive text to 9-1-1, covered text messaging providers must be able to send such texts to the PSAP. The FCC can encourage PSAPs to upgrade their technology

to text to 9-1-1 services, but the FCC lacks the authority to require PSAPs to upgrade their services. As mentioned in Chapter 1, DOJ is

responsible for the development of accessibility standards for PSAPs. In October 2017, the DAC recommended that the FCC take a number of steps to encourage PSAP operators to upgrade to accept real-time text—an improved form of text to 9-1-1.³²⁰ Processing of real-time text is critical for people with disabilities to obtain equal access to emergency services. **NCD recommends that the FCC work closely with DOJ to complete consistent Next Generation 9-1-1 standards for PSAPs, with the FCC addressing the text standards for wireless carriers and DOJ addressing the technical requirements of the PSAPs to accept and communicate through text to 9-1-1.**

The FCC’s captioning regulations require that all television programs be captioned unless the programming falls within an exemption.

NCD recommends that the FCC ensure reliable and interoperable access to Next Generation 9-1-1 services by people with disabilities, specifically media communication line services to allow a direct connection to 9-1-1 through video, text, and voice calls.

Concerns also exist about the availability of audio descriptions of visual emergency information shown on TV, such as weather radar maps, emergency exit routes, and other graphic displays. The FCC has concluded that “no solutions” exist to include audio description of such visual information during emergency announcements on television.³²¹ In February 2018, the DAC recommended that the FCC call on industry and consumer groups to find workable solutions for such audio descriptions.³²²

NCD recommends the FCC explore solutions to ensure timely, accurate, and reliable descriptions of images and video displayed as part of emergency information

over both existing legacy and developing broadcasting systems.

Regulatory, Policy, and Sub-Regulatory Guidance

The FCC regulates closed captioning and audio descriptions for television programming. Congress amended the Communications Act through the Telecommunications Act of 1996 to require that video programming be closed captioned for Deaf and Hard of Hearing people.³²³ In 1997 the FCC created the first regulations for closed captioning on television.³²⁴

The FCC’s captioning regulations require that all television programs be captioned unless the programming falls within an exemption.³²⁵

“Economically burdensome” exemptions may be granted by the FCC for television programs upon an application to the FCC which proves the cost of captioning is more than they can afford.

“Self-implementing exemptions,” in contrast, do not require the FCC’s affirmative permission. Self-implementing exemptions include, among other things, (1) public service or promotional announcements shorter than 10 minutes; (2) television programs shown between 2 a.m. and 6 a.m.; (3) any television program that displays mostly texts;³²⁶ and (4) locally produced non-news programming that is only for a local station and will not be repeated.³²⁷

FCC regulations generally require that captioned TV programs must also be captioned when shown over the Internet.³²⁸ In 2014, the FCC also stated that a TV program must be captioned when shown on the internet, and certain video clips must also be captioned when available online.³²⁹ Also in 2014, 10 years after a request from the Deaf and Hard of Hearing community, the FCC established four quality standards for closed captioning.³³⁰ These quality standards apply to video programs that are shown on TV, and when captioning is shown on the Internet.³³¹ There are concerns, however, that these regulations fail to explain how to achieve those quality standards of captioning. For instance, in fall 2018 several stations stopped using real-time captioning and began using Automated Speech Recognition (ASR) to provide captioning.³³² ASR captioning technology is totally automated without human intervention to correct errors and ensure accuracy, and ASR often fails to

provide entirely accurate and complete captioning. For example, in March 2019, ASR technology used during a local newscast produced the caption “God hates Muslims,” a totally incorrect interpretation of what was stated.³³³

NCD recommends that the FCC establish measurable quality metrics for captioning with the consumer experience in mind and refuse to allow any technology that fails to meet these quality metrics.

The FCC also allows television stations to use the Electronic Newsroom Technique (ENT), a less than ideal captioning quality, particularly for live news broadcasts in areas outside of the top 25 largest city markets. ENT enables a television station to use the teleprompter script used by the

newscaster to capture the captioning during a news broadcast. During a live news program, however, anchors and reporters do not always follow the teleprompter script, such as for

breaking news, weather alerts, sports updates, or ad lib comments.³³⁴ As a result, ENT does not caption all of the verbal information conveyed during a live news program. In 2014, the FCC said it was “concerned about the ability of ENT . . . to provide full and equal access to news programming for all Americans,”³³⁵ but allowed the continued use of ENT at the request of the National Association of Broadcasters. The FCC stated that ENT is a way for live news programs in areas outside the 25 largest cities to be able to afford captioning. The FCC developed stronger rules for use of ENT,³³⁶ and stated it would check on the quality of captioning on live TV news programs under the new ENT rules within

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1 year.³³⁷ The FCC hosted an Enhanced ENT Forum on May 10, 2019, but as of early July 2019 no updates have been made publicly available.

The CVAA requires that any equipment which can show videos must be able to display closed captioning on devices with screens smaller than 13 inches (such as portable televisions, tablets, laptops, and smartphones).³³⁸ These devices must also be able to show video descriptions and emergency information that can be understood by people who are blind or visually impaired if the technology makes it possible and achievable.³³⁹

The CVAA also requires that devices which can record TV programs must be able to display closed captions,

video description, and emergency information, and users must be able to turn such accessibility features on or off.³⁴⁰

FCC regulations also require that “set-top boxes” and other video devices which provide on-screen text

menus and guides must provide an auditory way for people who are blind or visually impaired to choose the menu options, if achievable.³⁴¹

The FCC allows providers of set-top boxes and other video devices to create separate boxes and devices that have such auditory options.

According to the DRO, blind and visually impaired consumers “may have to specifically request an accessible box because not all the boxes have to be accessible for the visually impaired, as long as the provider can give an accessible box upon request.”³⁴² Such an additional step required only of people with disabilities fails to provide equal access. **NCD recommends that the FCC**

require “set-top box” and other video device providers include auditory commands as a mandatory universal design function for all such equipment.

Producers of video devices that have the ability to display closed captioning must include a method such as a button, key, or icon to turn the closed captioning on and off.³⁴³ Disability advocates expressed concerns to the FCC that the option to turn captioning on and off on both TV and Internet are more difficult than necessary.³⁴⁴ If a Deaf or Hard of Hearing person or person with a disability cannot easily find and use controls to change the font, size, color,

background, and location of closed captioning text, then closed captioning is not readily accessible. People who are unable to find and use closed captioning controls may give up trying to use the captioning or even stop using the TV or watching videos on

the Internet.³⁴⁵ Furthermore, customers with disabilities sometimes pay more for a set-top box with features that they do not need, because the more expensive boxes have better controls that they can use, in effect creating a surcharge for people with disabilities.³⁴⁶ A customer with a disability should not be required to pay a surcharge on an item solely for accessibility purposes. The FCC has yet to address creating regulations to improve the ease of accessing captioning controls on TV and video device menus.³⁴⁷ **NCD recommends that FCC develop regulations to ensure people who are blind and visually impaired are able to obtain**

Furthermore, customers with disabilities sometimes pay more for a set-top box with features that they do not need, because the more expensive boxes have better controls that they can use, in effect creating a surcharge for people with disabilities.

set-top boxes with easily accessible controls without incurring a surcharge through the purchase of more expensive equipment.

In July 2017, the FCC established new regulations to make it easier for people who are blind or visually impaired to access audio-described programming—which allows a user to hear a description of on-screen activity in between the dialogue. Starting in July 2018, broadcasters and pay-tv providers carrying one of the top networks must have 87.5 hours of described programming every 3 months. Before 2018, these providers were required to have 50 hours of audio description every 3 months. Eighty-seven and a half hours of described programming over 3 months equates to approximately 1 hour per day of video description on each covered network. The FCC’s FY 2018–2022 Strategic Plan includes a performance goal to implement action to ensure that people with disabilities can access video programming.

NCD recommends the FCC consider the expansion of new regulations to increase access to audio-described programming at a level greater than 1 hour per day on each covered network and revise the strategic plan performance goal accordingly.

Video Relay Service (VRS) allows Deaf or Hard of Hearing people to make calls over the Internet using ASL and a videophone or other communications device with a communication assistant interpreting the call between the videophone user and the voice telephone user.³⁴⁸ In 2017, the FCC answered calls for VRS reforms. These reforms included allowing trials for skills-based routing which would route VRS calls to interpreters specifically trained to handle certain types of calls such as medical or legal calls. Other reforms included a trial to use Deaf interpreters

to work with hearing interpreters to make sure callers understand what is being said, a pilot program allowing VRS interpreters to work from home as long as they follow confidentiality rules and other requirements, and allowing hearing persons who know ASL to make videophone calls with other ASL users.³⁴⁹

Consumers have also shared concerns about the quality of VRS with the FCC. The FCC sought comment on performance measures and service quality metrics for VRS.³⁵⁰ The DAC also discussed this issue but did not make a recommendation to the FCC. Several groups of Deaf-Blind consumers shared their concerns about the lack of access to telecommunications involving VRS. The DAC recommended that the FCC require that VRS providers add video mail-to-text services for calls that are made to Deaf-Blind consumers.³⁵¹ The FCC has not responded yet to this recommendation.

In 2018, the FCC found that telecommunications services, ACS, and devices have improved and become more accessible over the prior 2 years because smartphones and other devices helped give people with disabilities a way to use telecommunications services.³⁵² While changes in telecommunications equipment and services may improve accessibility, these better services are more expensive, putting them out of reach of many people with disabilities. In addition, Deaf and Hard of Hearing users use more data than other users because they require more data usage for communications, such as for VRS. The cost of smartphone plans is a concern for Deaf and Hard of Hearing people as they need higher data limits or unlimited data plans in order to participate in basic communications.³⁵³ Deaf and Hard of Hearing users are forced to choose between more expensive smartphone plans

with unlimited data, or less expensive, affordable smartphone plans with limited data that may not be enough for their communications needs.³⁵⁴ The FCC does operate a Lifeline program³⁵⁵ and expanded the program to include Internet services in 2016.³⁵⁶ Disability advocates informed the FCC that the minimum standards for Internet as part of Lifeline were not equal to the unlimited voice minutes provided under Lifeline. It noted that “Lifeline’s Internet services would only give a Deaf or Hard of Hearing consumer about an hour’s worth of videophone and VRS use.”³⁵⁷

NCD recommends the FCC evaluate the minimum standards for broadband in the Lifeline program and determine whether it meets the accessibility

needs of Deaf and Hard of Hearing low-income customers.

On December 15, 2016, the FCC updated its regulations to allow wireless carriers providing service over Internet-protocol (IP) to provide support for real-time text (RTT) instead of continuing support for TTY, which is quickly declining.³⁵⁸ RTT allows users to see letters, characters, and words as they are being typed in real time. In October 2015 and February 2016, the DAC sent the FCC two recommendations concerning RTT. The first asked the FCC to begin making a regulation to accept RTT as a text replacement in an IP environment.³⁵⁹ The second requested that the FCC require that RTT include a minimum level of technology and features.³⁶⁰ The DAC also asked that the FCC study best practices for RTT and host a meeting with people who are developing RTT and Deaf-Blind people to make sure RTT can work with

refreshable Braille displays and similar assistive technologies. The FCC held a meeting on April 9, 2018, with Deaf-Blind people, who explained their challenges to RTT service providers. Participants discussed possible solutions during the meeting,³⁶¹ which further helped the DAC develop a set of best practices for RTT.³⁶²

All telecommunications technologies that use Internet will only be as good as the availability of and quality of the Internet services. In 2005, the FCC set up four factors for better Internet service: “choice of content, choice of applications and services, and choice of devices, and competition among providers.”³⁶³ In December 2010, the FCC changed these four factors and adopted the

FCC updated its regulations to allow wireless carriers providing service over Internet-protocol (IP) to provide support for real-time text (RTT) instead of continuing support for TTY, which is quickly declining.

Open Internet Order which has three rules for Internet services: transparency, no blocking, and no unreasonable discrimination.³⁶⁴ On February 26, 2015, the FCC decided that broadband Internet access

is a telecommunications service, so that Title II of the ADA would control,³⁶⁵ but then reversed this decision by a 3-2 vote on December 14, 2017, which became effective on June 11, 2018.³⁶⁶ At the same time, the FCC shared a Notice of Inquiry under Section 706 of the Telecommunications Act to open a discussion about whether all Americans have access to Internet services in a reasonable and timely way.³⁶⁷ **NCD recommends the FCC revert to its Open Internet policies.**

Adequacy of Resources

Title IV of the ADA requires interstate telecommunications relay services to make it possible for Deaf, Hard of Hearing, and people

with speech disabilities to make and receive telephone calls. Title IV also added Section 225 to the Communications Act, which requires the FCC to establish regulations to make it possible for interstate telecommunications relay services. The FCC must ensure that telecommunications relay services (TRS) “are available to the extent possible and in the most efficient manner” to the Deaf, Hard of Hearing, and people with a speech disability.³⁶⁸

The Telecommunications Act amended the Communications Act to make sure that everyone in the country has access to telecommunication service.³⁶⁹ To create this system, the FCC requires telecommunications service providers to contribute to the Universal Service Fund (USF) and the FCC decides how the fund is spent.³⁷⁰ The USF includes the interstate Telecommunications Relay Services (TRS) Fund, established under Section 225.³⁷¹ The TRS Fund is operated by an administrator, currently Rolka Loube, LLC under the direction of the FCC. The administrator is advised by the TRS Fund Advisory Council,³⁷² made up of TRS users, state relay administrators, interstate service providers, and contributors.³⁷³

The TRS Fund pays TRS providers for the reasonable costs of providing interstate and Internet-based telephone services that enable a Deaf and Hard of Hearing person, deaf-blind person, or a person with a speech disability to communicate with others.³⁷⁴ The costs of providing interstate TRS are funded by interstate telecommunications carriers and VoIP service providers.³⁷⁵ The TRS fund administrator estimated there will be a 7.5 percent reduction in the contribution base, a reduction of \$53,467,000 for the program year beginning July 1, 2018.³⁷⁶ At the same time, it estimated that the fund will need \$1.622 billion for the 2018–2019 fiscal

year,³⁷⁷ creating a significant shortfall for the iTRS Fund.

In 2015, the DAC advised the FCC that a requirement of “80 percent of [VRS] calls answered in 45 seconds,” proposed by VRS providers does not make telephone services equivalent for Deaf and Hard of Hearing callers.³⁷⁸ The DAC requested that the FCC and VRS providers “work together to make changes to the VRS [compensation] rate methodology so that the speed of answer for VRS can continue to improve.”³⁷⁹ In 2017, the FCC set up a 4-year plan for paying VRS providers.³⁸⁰ The iTRS Fund Advisory Council asked the FCC to adopt this plan to make sure the quality of VRS services does not decline with lower rates.³⁸¹ The iTRS Fund Advisory Council wanted to avoid problems that occurred with IP Relay services.

When the FCC set the current rate for IP Relay services in 2016,³⁸² there were seven IP Relay service providers.³⁸³ The FCC investigated several IP Relay providers and took appropriate enforcement action, and the providers then ceased providing the service. Further, after the FCC cut the payment rate, only one provider, Sprint, still offers IP Relay services.³⁸⁴ The rate has been so low that Sprint petitioned the FCC to adopt “a new approach to setting the rates for IP Relay services,”³⁸⁵ stating it “can only commit to providing [the] service through June 30, 2019”³⁸⁶ unless the FCC changes how much it pays for IP Relay services. Deaf and Hard of Hearing advocates have told the FCC they are concerned that since the low pay rates for IP Relay services resulted in six out of seven providers leaving the market, that if the FCC fails to set an adequate rate for VRS service, the result will also be a lack of VRS providers. In 2015, the U.S. Government Accountability Office (GAO) found that the FCC should do a better job

of managing the TRS program.³⁸⁷ Many Deaf and Hard of Hearing groups argued that if the rate is not increased, Deaf and Hard of Hearing people will have limited and poor options when placing calls.³⁸⁸ **NCD recommends that the FCC ensure the IP Relay and VRS provider rate is sufficient to ensure quick response answer times, an adequate number of providers, and quality services.**

In November 2009, DOJ indicted 26 people for fraud for allegedly perpetrating and billing the iTRS fund for fake VRS calls. Most of the 26 perpetrators of the scheme pled guilty or were convicted.³⁸⁹ Since the discovery of the fraud³⁹⁰ the FCC has been concerned about the problem. The FY 2018–2022 FCC Strategic Plan calls on the Commission to reduce the potential for “fraud, waste, and abuse in the USF programs,”³⁹¹ and to “improve the quality of telecommunications relay services” so that Deaf and Hard of Hearing people can make calls in the same way as hearing people.³⁹²

As part of the new VRS rates, a tier was established for emergent providers to encourage competition. As of September 2017, however, no providers participated in the trials for skills-based routing and certified Deaf interpreters mentioned earlier because of the cost. The iTRS Fund Advisory Council asked the FCC to increase the rates paid to any VRS providers that participated in the skills-based routing trial and to extend the trial period.³⁹³ The FCC has not yet responded to this request. **NCD recommends the FCC reconsider the pay rate for the trials for skills-based routing and certified Deaf interpreters, apply the emergent rate to any VRS providers that participate in the skills-based routing trial, and renew the trial period.**

Internet Protocol Captioned Telephone Service (IP CTS) is another form of TRS, which allows Hard of Hearing persons with sufficient residual hearing who want to use their own voice to speak directly to the called party and listen while at the same time reading captions of what the other person is saying.³⁹⁴ When placing a call, the IP CTS user turns on the captioning option on a caption telephone, which alerts a Communications Assistant to join the call.³⁹⁵ Hard of Hearing users of IP CTS also have the same problems with choice, competition, and quality as other TRS users.³⁹⁶ In December 2018, the iTRS Fund Advisory Council found that the FCC's plan to reduce the rate by \$1.58 per minute³⁹⁷ does not cover all providers' costs and may result in providers dropping IP CTS services.³⁹⁸ IP CTS is also one of only two disability-related issues on which the FCC's actions have been reversed in litigation.³⁹⁹ On June 20, 2014, the United States Court of Appeals for the District of Columbia Circuit halted⁴⁰⁰ FCC interim rules on IP CTS. The interim rule required, among other things, that new IP CTS users pay a minimum of \$75 per equipment.⁴⁰¹

On June 7, 2018, the FCC issued a rule to allow the use of, and compensation for, full ASR to make captions for IP CTS calls.⁴⁰² There is, however, no quality measure to ensure users of IP CTS can understand telephone calls in the same way as others when the IP CTS uses only ASR without human assistance.⁴⁰³ One FCC Commissioner and a group of disability advocates have told the FCC it should not allow ASR for IP CTS without first setting quality standards and setting a proper payment rate.⁴⁰⁴ In September 2016, the DAC recommended that the FCC “establish rules and standards for IP CTS quality of service,”⁴⁰⁵ and followed up in October 2018, asking that there be a measurement of IP CTS

captioning quality to set the minimum quality level before allowing ASR to be used.⁴⁰⁶ To date, the FCC has not developed minimum quality level measurements.⁴⁰⁷ **NCD recommends the FCC take concrete steps to develop and implement performance measures and service quality metrics for VRS and IP CTS.**

Competent and Credible Investigative Process and Enforcement Action

The FCC is mandated to report on complaints about CVAA violations involving Section 255 which covers accessibility of telecommunications services and equipment, Section 716 which deals with accessibility of advanced communications services and equipment, and Section 718 which concerns the accessibility of Internet browsers on mobile phones.⁴⁰⁸ FCC regulations for complaints related to these CVAA provisions require that a consumer must submit a Request for Dispute Assistance (RDA) to the DRO.⁴⁰⁹ The RDA process seeks to resolve a complaint by bringing together the person making the complaint, the business covered under the Communications Act about which the person has complained, and the FCC to find a solution.⁴¹⁰ If the parties do not agree on how to resolve the complaint within 30 days after the filing of the RDA, the parties may agree to ask for a 30-day extension. The parties to the dispute may continue to request additional 30-day extensions until there is a resolution or the complainant decides to move to the next step of the enforcement process and file an informal complaint. The informal complaint is handled by the FCC Enforcement Bureau.⁴¹¹

When an informal complaint is filed, the FCC must send the complaint to the business covered under the Act for which the consumer

complains.⁴¹² That business must respond to the complaint and any FCC questions within 20 days.⁴¹³ Within these 20 days, the business must also provide a summary of an answer to the complainant and the FCC.⁴¹⁴ Within 180 days after receipt of the complaint, the FCC must finish an investigation and a written order stating whether or not a violation has occurred.⁴¹⁵ The FCC can order the business to fix the problem of the complaint and take other appropriate action.⁴¹⁶ The FCC states that the RDA process resolved virtually all complaints about accessibility without the need to file an informal complaint and without further FCC action.⁴¹⁷ The FCC also believes “this process has encouraged service providers and equipment manufacturers to comply with the accessibility rules.”⁴¹⁸

From January 1, 2016, to December 31, 2017, consumers filed 24 RDAs for violations of the CVAA.⁴¹⁹ Of these 24 RDAs, 9 (37 percent)

Summary of FCC Requests for Dispute Assistance, 1/1/16 - 12/31/17

- 24 RDAs for violations of CVAA
- 9 of 24 RDAs that business equipment not accessible or usable
- 15 of 24 RDAs that business services not accessible or usable
- 22 of 24 RDAs that business didn't follow Sec. 255
- 2 of 24 RDAs that business didn't follow Sec. 716
- 1 of 24 RDAs that company didn't follow both Secs. 255 and 718

complained that the business's equipment was not accessible or usable and 15 (63 percent) complained that the business's services were not accessible or usable.⁴²⁰ Twenty-two (92 percent) of the 24 RDAs complained that businesses did not follow Section 255, and 2 (8 percent) complained companies did not follow Section 716.⁴²¹ One RDA complained that a company did not follow both Sections 255 and 718.⁴²² Several RDAs complained about the accessibility of communication services.⁴²³ For example, the CVAA requires access to web browsers on mobile devices for people who are blind or visually impaired,⁴²⁴ but some complained that certain services were not accessible to them.⁴²⁵ Additional complaints were about handsets that had (1) poor sound quality and (2) hard to read or use video screens, keyboards, or dial pads.⁴²⁶

In other RDAs, consumers complained that service providers did not give them a way to apply for service, purchase a phone, learn how to use their phones or services, report service or equipment problems, get general customer service, pay their bills, cancel service, or obtain directory assistance.⁴²⁷ Some consumers with sight, dexterity, or cognitive disabilities complained that they did not have accessible ways to apply for service. Some consumers with speech, hearing, or cognitive disabilities complained that customer service was not accessible because the only way to get it was through direct voice calls or voice interactive menus.⁴²⁸ For example, a consumer with a cognitive disability required more time to get through a voice menu but got disconnected. Some people with hearing and speech limitations complained that they could not use relay services to get through voice-

activated menus at all and requested the ability to contact customer service through chat or email.⁴²⁹

The DRO helped resolve 23 of the 24 RDAs filed during this time.⁴³⁰ DRO noted that no consumer asked to change his or her RDA to an informal complaint for investigation by the Enforcement Bureau. Also, no consumer filed a formal complaint against a company for not providing accessible services or products. The FCC did not impose a fine on any company for accessibility-related violations.⁴³¹ While the FCC can report on the general nature of RDAs, it cannot reveal the resolution of the complaint because of confidentiality provisions. Without transparency in the resolution of complaints, there is no clear understanding about the true nature of the problem, the number of people with disabilities who might be impacted by the practice of a business, and the ability of the FCC to achieve systemic solutions.

NCD recommends that the FCC work with Congress to develop a mechanism to allow for the reporting of resolution of RDAs to increase the transparency of the RDA program.

The FCC has a compliance ladder for closed captioning quality complaints which provides industry an opportunity to correct the problem prior to enforcement action by the Commission. Once a pattern of noncompliance is identified, the entity in question will have 30 days to take corrective action. If the issue is not remedied after 30 days, the FCC will ask the entity for a written action plan for how they will achieve compliance. Over 180 days, the entity will need to update the FCC on the results of the action plan. If a pattern of noncompliance is still present, the FCC will take appropriate enforcement action. The goal of the compliance ladder is to increase pressure on companies against whom there are

more consumers complaining of repeated failures to provide access.⁴³² The FCC noted that they would like to see more complaints.⁴³³

Training and Technical Assistance

Promises to Keep recommended that the FCC

change the required minimum standards to increase its public information sharing and outreach to the disability community. The iTRS Advisory Group has questioned the reporting details about how the \$2 million set aside for

outreach and education is spent.⁴³⁴ Only a small percentage of the estimated 48 million people who are Deaf and Hard of Hearing know about TRS services, and much more can be done to educate people about TRS and the FCC.

NCD recommends that the FCC increase its

accountability and transparency on how it spends the set aside amount for outreach and education.

Promises to Keep also recommended that Congress should fund a TRS technical assistance clearinghouse to provide information

to consumers and relay providers, but there has been no funding for such a program. The FCC maintains an Accessibility Clearinghouse⁴³⁵ which only provides information on accessible devices, closed captioning contacts, and HAC

reports. No information is provided regarding TRS. **NCD echoes its recommendation from the 2000 report and recommends that the FCC establish a TRS Technical Assistance Clearinghouse to provide information to consumers and relay providers.**

The goal of the compliance ladder is to increase pressure on companies against whom there are more consumers complaining of repeated failures to provide access.⁴³² The FCC noted that they would like to see more complaints.

Conclusion: Has the Promise Been Kept?

This report asked the question, has the promise of federal disability rights laws been kept? As with other civil rights laws, the attempt to achieve the promise is a difficult and ongoing process. As this report demonstrates, DOJ, HUD, and the FCC have a long and critical list of responsibilities to uphold the rights of people with disabilities to access the community on an equal basis with all other citizens. It is therefore fitting that these agencies are considered on the 20th anniversary of the most important U.S. Supreme Court decision to advance the integration of people with disabilities in the community, *Olmstead v. L.C.*

Since the release of *Promises to Keep* in 2000, DOJ, HUD, and the FCC have expanded the scope, and in some cases the sophistication, of their regulations and guidance in response to many technological and social changes of the past two decades. DOJ enforcement work has advanced beyond simply addressing the type of entities covered by the ADA, toward outlining the specific details of the rights contained within the ADA. DOJ has further improved the availability of enforcement documents. The CVAA provides greater

authority to the FCC to advance accessibility requirements in the vastly expanded world of telecommunications, while HUD has created useful guidance on disability rights under the FHA and established additional protections through its regulations. FHEO within HUD has further faced a steady and significant increase in disability rights complaints in the past decade.

Despite some positive developments in regulations and guidance, the efforts of these

Since the release of Promises to Keep in 2000, DOJ, HUD, and the FCC have expanded the scope, and in some cases the sophistication, of their regulations and guidance in response to many technological and social changes of the past two decades.

agencies to enforce federal laws has been inconsistent. The number of Section 504 compliance reviews conducted by HUD has dropped precipitously since FY 2009 as the agency faces a decline in staff and a backlog of

housing investigations. DOJ's litigation efforts have swung up and down using various data measures over the past decade, while the successful Project Civic Action reviews have declined. Resource issues and significantly declining staff levels at both CRT and FHEO since FY 2008 likely account for some of the downturn in enforcement efforts. Agency decisions on enforcement priorities must also be factored into some of the trends. **NCD recommends that Congress**

and the President increase resources to allow sufficient staffing for DOJ, HUD, and the FCC to maintain a consistent level of enforcement and compliance activities.

NCD recommends Congress, the President, and the leadership of DOJ, HUD, and the FCC make policy choices that maintain consistent enforcement of federal disability rights.

The availability of data by which to assess the enforcement of federal disability rights laws is further inconsistent across the federal agencies. The EEOC and DOL's Office of Federal Contract Compliance Programs (OFCCP), considered last year in *Has the Promise Been Keep?* (Part 1), and the HUD's FHEO in this report, all provided comprehensive data on their enforcement outcomes, from initial receipt to closure of the discrimination case. The FCC, however, appears hamstrung by the results of their Disability Rights Office's Request for Dispute Assistance program. While this dispute resolution program may more quickly resolve telecommunications complaints, and perhaps result in resolutions that impact the broader disability community, the confidential nature of the resolutions achieved from the program precludes any independent assessment of its effectiveness and impact, harming transparency of the FCC's enforcement effort. Of greater concern in terms of transparency, however, is the lack of comprehensive statistical data available from DOJ by which to assess its overall disability rights enforcement efforts. DOJ released less data

on receipt and handling of disability complaints for this report than it did for *Promises to Keep*—an unfortunate step backwards.

Swings in regulatory development and enforcement policies are also a threat to efforts to achieve consistent protection of federal disability rights laws. Recent decisions by DOJ to withdraw guidance documents on *Olmstead*, the delays and reversals on development of web accessibility standards, and changes in DOJ settlement policies put at risk the ultimate goal of equality for persons with disabilities. HUD's continued delays in affirmatively furthering fair housing data collection,

Recent decisions by DOJ to withdraw guidance documents on Olmstead, the delays and reversals on development of web accessibility standards, and changes in DOJ settlement policies put at risk the ultimate goal of equality for persons with disabilities.

and the need for the FCC to address accessibility compliance issues concerning emergency alerts directly impact the realization of the promises of equal access for people with disabilities.

The first report in this series concluded that “the nation cannot be content for full integration

and equal rights for all people with disabilities to remain simply aspirational,” but requires “constant vigilance and diligent enforcement by the Federal Government.”⁴³⁶ The nation has taken important steps since *Promises to Keep* to address legal gaps, changes in society, and other challenges to the dignity and equality for people with disabilities, but without a fully supported, consistent, and transparent federal enforcement system, the promise will always remain aspirational. As a nation we must commit to surge past aspirations to meet the promise and the right of equality for people with disabilities.

Appendix A: Agency Budget and Staffing Charts

Table A: DOJ Civil Rights Division Budget 2008–2018⁴³⁷

Fiscal Year	CRT Enacted	CRT Constant 2000 Dollars	Yearly % Change (Constant \$)
2008	\$114,450,000	\$92,069,038	
2009	\$123,151,000	\$99,422,259	7.99%
2010	\$145,449,000	\$115,528,886	16.20%
2011	\$144,495,000	\$111,259,204	-3.70%
2012	\$144,500,000	\$109,007,204	-2.02%
2013	\$136,341,000	\$101,367,468	-7.01%
2014	\$144,173,000	\$105,479,368	4.06%
2015	\$147,239,000	\$107,594,792	2.01%
2016	\$148,239,000	\$106,976,025	-0.58%
2017	\$148,239,000	\$104,744,594	-2.09%
2018	\$148,239,000	\$102,247,228	-2.38%
Annual Average	\$140,410,455	\$105,063,279	1.13%
% Change since 2008			11.05%

Table B: DOJ Civil Rights Division Staffing 2008–2018

Fiscal Year	FTE End of Year*	Yearly FTE Change	Yearly % Change
2008	715		
2009	715	0	0.00%
2010	766	51	7.13%
2011	817	51	6.66%
2012	648	-169	-20.69%
2013	607	-41	-6.33%
2014	605	-2	-0.33%
2015	607	2	0.33%
2016	618	11	1.81%
2017	699	81	13.11%
2018	686	-13	-1.86%
Annual Average	680		-0.02%
% Change since 2008		-35	-4.06%

*Full-time equivalent as reported in the U.S. Department of Justice, *Annual Performance Budget for CRT*.⁴³⁸ NCD used the most recent FTE reported. For example, in the 2014 Fiscal Year *Annual Performance Budget Report*, DOJ reported an enacted FTE number for FY 2012 as 648.

Table C: HUD Fair Housing Assistance Program (FHAP) and Fair Housing Initiative Program (FHIP) Budgets 2008 to FY 2018

Fiscal Year	Fair Housing Assistance Program (FHAP)		
	FHAP Enacted	FHAP Constant 2000 Dollars	Yearly % Change Constant \$
2008	\$25,620,000	\$20,609,950	
2009	\$25,500,000	\$20,586,659	-0.11%
2010	\$28,710,000	\$22,804,105	10.77%
2011	\$28,652,580	\$22,062,101	-3.25%
2012	\$28,047,000	\$21,157,959	-4.10%
2013	\$26,579,974	\$19,761,808	-6.60%
2014	\$25,600,000	\$18,729,386	-5.22%
2015	\$23,300,000	\$17,026,458	-9.09%
2016	\$24,300,000	\$17,535,989	2.99%
2017	\$24,300,000	\$17,170,202	-2.09%
2018	\$23,900,000	\$16,484,925	-3.99%
Annual Average	\$23,691,778	\$19,448,140	
% Change since 2008			-20.01%

Table C: HUD Fair Housing Assistance Program (FHAP) and Fair Housing Initiative Program (FHIP) Budgets 2008 to FY 2018, *continued*

Fiscal Year	Fair Housing Initiative Program (FHIP)		
	FHIP Enacted	FHIP Constant 2000 Dollars	Yearly % Change Constant \$
2008*	\$24,000,000	\$19,306,744	
2009*	\$27,500,000	\$22,201,299	14.99%
2010*	\$42,075,000	\$33,419,810	50.53%
2011	\$41,990,850	\$32,332,389	-3.25%
2012	\$43,020,000	\$32,453,217	0.37%
2013	\$40,276,995	\$29,945,336	-7.73%
2014	\$40,100,000	\$29,337,828	-2.03%
2015	\$40,100,000	\$29,303,046	-0.12%
2016	\$39,200,000	\$28,288,508	-3.46%
2017	\$39,200,000	\$27,698,433	-2.09%
2018	\$39,600,000	\$27,313,934	-1.39%
Annual Average	\$34,314,804	\$28,327,322	
% Change since 2008			41.47%

*The FHIP Technical Assistance (FIRST) program was a separate line item between FY 2008 and FY 2010. It has been combined with the FHIP amount in this chart for consistency. As broken down by HUD for those fiscal years: FY 2008: FHIP \$23,200,000 FHIP TA FIRST \$800,000; FY 2009: FHIP \$26,700,000 FHIP TA FIRST \$800,000; FY 2010: FHIP \$41,555,000; FHIP TA FIRST \$520,000.

Table D: HUD Office of Fair Housing and Equal Opportunity Budget 2008–2018

Fiscal Year	Office Salary and Expenses		
	Enacted	Constant 2000 Dollars	Yearly % Change (Constant \$)
2008	\$66,734,000	\$53,684,012	
2009	\$70,323,000	\$56,773,161	5.75%
2010	\$71,800,000	\$57,030,121	0.45%
2011	\$71,800,000	\$55,285,033	-3.06%
2012	\$72,600,000	\$54,767,633	-0.94%
2013	\$73,044,000	\$54,307,107	-0.84%
2014	\$69,000,000	\$50,481,549	-7.04%
2015	\$68,000,000	\$49,690,950	-1.57%
2016	\$72,000,000	\$51,958,485	4.56%
2017	\$72,000,000	\$50,874,674	-2.09%
2018	\$69,808,000	\$48,149,775	-5.36%
Annual Average	\$70,646,273	\$53,000,227	
% Change since 2008			-10.31%

Table E: HUD Office of Fair Housing and Equal Opportunity Staffing 2008–2018

Fiscal Year	Staffing		
	Reported FTE	Yearly FTE Change	Yearly % Change
2008	582		
2009	596	14	2.41%
2010	576	-20	-3.36%
2011	572	-4	-0.69%
2012	583	11	1.92%
2013	543	-40	-6.86%
2014	527	-16	-2.95%
2015	490	-37	-7.02%
2016	484	-6	-1.22%
2017	496	12	2.48%
2018	479	-17	-3.43%
Annual Average	539		-1.87%
% Change since 2008		-103	-17.70%

Appendix B: Federal Disability Civil Rights Laws Considered

Americans with Disabilities Act of 1990, as Amended

The Americans with Disabilities Act (ADA)⁴³⁹ of 1990 is heralded as the nation's first comprehensive civil rights law addressing the needs of people with disabilities, prohibiting discrimination in employment, public services, public accommodations, and telecommunications. Modeled on the Civil Rights Act of 1964, the ADA gives recognition that discrimination based on disability is a violation of civil rights. The ADA affords protections to people with disabilities similar to those provided to people on the basis of race, color, sex, national origin, age, and religion, guaranteeing nondiscrimination on the basis of disability and equal opportunity in employment, state and local government services, transportation, public accommodations, and telecommunications.

Title I of the ADA prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. The EEOC is charged with enforcement of Title I of the ADA.

Title II of the ADA protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by state and local government entities. Title II extends the prohibition on discrimination established by Section 504 of the Rehabilitation Act of 1973, as amended⁴⁴⁰ to all activities of state and local governments regardless of whether these entities receive federal financial assistance. Except for matters involving public transportation services, DOJ is responsible for enforcement activities related to Title II, generally through DOJ's Civil Rights Division, Disability Rights Section. Compliance and enforcement of Title II provisions covering public transportation services, such as city buses and public rail transit (e.g., subways, and commuter rail) are directed to the Federal Transit Administration, Department of Transportation, Office of Civil Rights.

Title III of the ADA prohibits discrimination on the basis of disability in the activities of places of public accommodations, defined as businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices. Public accommodations must comply with basic nondiscrimination requirements that prohibit exclusion, segregation, and unequal treatment. Places of public accommodation also must comply with specific requirements related to architectural standards for new and altered buildings; reasonable modifications to policies, practices, and procedures; effective communication with people with hearing, vision, or speech disabilities; and other access requirements. Additionally, public accommodations must remove barriers in existing buildings where it is easy to do so without much difficulty or expense, given the public accommodation's resources. The Department of Justice is charged with enforcement of Title III.

Title VI of the ADA—Section 225—requires the FCC to issue regulations to ensure interstate communications carriers provide telecommunications relay services “to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals.”

The ADA Amendments Act of 2008⁴⁴¹ (ADAAA), removed a number of unintended barriers and roadblocks to coverage under the original ADA and nullified judicial misinterpretations of Congressional intent. As described by the EEOC, the ADAAA:

emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis. The Act makes important changes to the definition of the term “disability” by rejecting the holdings in several U.S. Supreme Court decisions and portions of EEOC’s ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.⁴⁴²

Civil Rights of Institutionalized Persons Act

The Civil Rights of Institutionalized Persons Act (CRIPA)⁴⁴³ was passed in 1980 to allow the Department of Justice to review “conditions and practices within institutions run by, or for, state and local government.”⁴⁴⁴ The Act covers public institutions such as prisons and correctional facilities, juvenile detention facilities, nursing homes, and intermediate or long-term care or residential facilities.⁴⁴⁵ CRIPA only allows DOJ to address systemic patterns or practices which result in “egregious or flagrant conditions” which deprive persons a right, privilege, or immunity protected under the Constitution of federal law and causes grievous harm.⁴⁴⁶

The Act allows, but does not require, DOJ to bring a lawsuit against the public facility if the pattern and practice is not resolved through agreement. The Act also allows DOJ to intervene in federal court cases brought by other parties to address the issues covered in CRIPA.⁴⁴⁷ In either case, before DOJ can bring suit or seek to intervene in another suit, the Act lays out a number of specific prerequisites.⁴⁴⁸

Fair Housing Act of 1968, as Amended

The Fair Housing Act (FHA) was enacted as Title VIII of the Civil Rights Act of 1968 to prohibit discrimination on the basis of race, religion, sex, color, or national origin in housing.⁴⁴⁹ The Act was amended in 1988 to include disability and family status as additional prohibited bases for discrimination.⁴⁵⁰

The current Act prohibits discrimination in the sale or rental of a dwelling, in the advertisement for a dwelling, and in any terms, conditions, or privileges of service or facilities connected to the dwelling, or otherwise making unavailable or denying use of the dwelling. Both a renter or a purchaser with a disability, and person with a disability residing or intending to reside in the dwelling, plus a person associated with the person renting or purchasing are covered by the Act. The refusal to allow a person with a disability to pay for reasonable modifications to a dwelling if necessary to live in such dwelling is included as prohibited discrimination. Also prohibited is the refusal of an entity

covered under the Act to make reasonable modifications to rules, policies, practices, or services for a person with a disability.

As part of the 1988 FHA amendments, new multifamily housing construction to be ready for occupancy on or after March 13, 1991 is required to meet certain standards for accessibility. The FHA further prohibits discrimination in providing residential property real estate transactions and brokerage services.

Rehabilitation Act of 1973, as Amended

The Rehabilitation Act of 1973,⁴⁵¹ was one of the first federal laws with wide applicability to prohibit discrimination on the basis of disability. Title V of the Act prohibits discrimination based on disability by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. Several important sections of the Act include the following.

Section 501 prohibits federal agencies from discriminating in the hiring and employment of people with disabilities and requires the agencies to take affirmative action to hire, place and advance employees with disabilities.⁴⁵²

Section 503 prohibits federal contractors and subcontractors from discriminating in employment against people with disabilities and requires these employers to take affirmative action to recruit, hire, promote, and retain employees with disabilities.

Section 504 mandates that no qualified individual with a disability shall be “excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” receiving federal financial assistance or conducted by a federal agency. Each federal agency establishes its own 504 regulations that apply to its programs and each federal agency is responsible for enforcing its own regulations. Requirements common to these regulations include reasonable accommodation for employees with disabilities; program accessibility; effective communication with people who have hearing or vision disabilities; and accessible new construction and alterations.

Section 508 establishes requirements for electronic and information technology developed, maintained, procured, or used by the Federal Government. Section 508 requires federal electronic and information technology to be accessible to people with disabilities, including employees and members of the public.

Section 508 was enacted to eliminate barriers in information technology, to make available new opportunities for people with disabilities and to encourage development of technologies that will help achieve these goals. Section 508 requires that when federal agencies develop, procure, maintain, or use electronic and information technology, federal employees with disabilities have access to and use of information and data that is comparable to the access and use by federal employees who are not individuals with disabilities, unless an undue burden would be imposed on the agency. Section 508 also requires that individuals with disabilities, who are members of the public seeking information or services from a federal agency, have access to and use of information and data that is comparable to that provided to the public who are not individuals with disabilities, unless an undue burden would be imposed on the agency.⁴⁵³

Similar to Section 504, each federal agency is charged with establishing and enforcing its 508 criteria.

Twenty-First Century Communications and Video Accessibility Act

The Communications and Video Accessibility Act (CVAA) of 2010 was passed “to increase the access of persons with disabilities to modern communications.”⁴⁵⁴ Title I of the CVAA requires that advanced communications services, such as Internet voice services, electronic messaging, and video communications, including mobile devices that work with such services, for example smartphones, be fully accessible to people with disabilities.⁴⁵⁵ Title II further updated the definition of telecommunications relay services, and applies hearing aid compatibility mandates to telephone-like equipment.⁴⁵⁶

Title II of the CVAA requires that the captioning of video programming shows on television be captioned over the Internet, that on-screen text menus and guides shown through a TV set-top box be accessible to people who are blind and visually impaired, and contains other provisions to ensure easier access to closed captioning.

Appendix C: Overview of *Promises to Keep* and Methodology Used for the 2019 Progress Report

Overview of Promises to Keep

Promises to Keep took an in-depth look at the EEOC, DOJ, DOT, FCC, and to a degree the Access Board, all of which have a role in the enforcement or implementation of the ADA. For that report, NCD developed and used the following 11 elements to assess the ADA enforcement by those agencies.⁴⁵⁷

Element 1: Proactive and reactive strategies. Proactive measures address compliance through efforts to educate, monitor, and prevent civil rights violations, and reactive measures aim to resolve and remedy complaints of civil rights violations after the fact.

Element 2: Communication with consumers and complainants. Communication must ensure that persons protected by the statute know where and how to file complaints of discrimination, how the enforcement agency operates, what to expect as possible outcomes, and the aims and limits of the enforcement mandate. Complainants should hear promptly from the agency following the initial filing and be regularly updated on the status of the complaint.

Element 3: Policy and sub-regulatory guidance. Enforcement is advanced where agencies issue policy and sub-regulatory guidance on issues of confusion or controversy as a means of providing advice to covered entities about actions for compliance and to assist the courts in the interpretation of the statute.

Element 4: Enforcement actions. Where violations of the statute are present, effective enforcement involves measures to obtain corrective action or mediated settlement, followed by more punitive measures such as fines or litigation where violations are not easily or promptly resolved.

Element 5: Strategic litigation. Agency-initiated strategic litigation or amicus participation in litigation to implement enforcement is used where other measures have failed or to develop case law.

Element 6: Timely resolution of complaints. Effective resolution of complaints involves their timely processing. There should be expeditious internal processing where complaints must be referred to other agencies for investigation.

Element 7: Competent and credible investigative processes. Effective enforcement includes investigative processes and outcomes that are thorough, well-documented, and competent and thus credible to complainants and covered entities alike.

Element 8: Technical assistance for protected persons and covered entities. Technical assistance, offered in a variety of modes and formats, assists covered entities and informs those protected by the statute of their rights.

Element 9: Adequate agency resources. Resources include agency staff (investigators, attorneys, and others) adequate in number to the size of the compliance and complaint caseload; ongoing staff training provided on a regular basis; and data management systems and other support systems to enable efficient implementation of enforcement activities.

Element 10: Interagency collaboration and coordination. Appropriate collaboration and coordination affects enforcement where responsibilities are spread across different agencies or organizations, or where there are related activities or areas of jurisdiction.

Element 11: Outreach and consultation with the community. Regular outreach and consultation with the communities of persons protected by the statutes provide information about the key issues and problem areas of enforcement, how effectiveness is judged by consumers, and potential methods for improvement.

Promises to Keep concluded that “the federal agencies charged with enforcement and policy development under the ADA, to varying degrees, have been overly cautious, reactive, and lacking any coherent and unifying national strategy,”⁴⁵⁸ and that there existed “variation in the degree to which the federal agencies [had] shown leadership, engaged in policy development, and sought to clarify ‘frontier issues.’”⁴⁵⁹ *Promises to Keep* went on to state that in some cases differences in agency leadership “appear to be related to the culture of the agency itself and how it has traditionally framed its mission and defined its constituency. In other cases, resource and administrative constraints, turf conflicts, and other forces within the agency appear to suppress or mute the rigor of civil rights enforcement.”⁴⁶⁰

Promises to Keep included 20 recommendations related to DOJ,⁴⁶¹ and 5 recommendations related to the FCC.⁴⁶²

Methodology Used for the 2019 Progress Report

NCD looked back at the methods and recommendations contained in *Promises to Keep*, while broadening the scope of the analysis to include disability rights enforcement beyond the ADA. The primary question considered for the 2019 Progress Report was how effective have the efforts of DOJ, HUD, and the FCC been in the enforcement and implementation of federal disability rights laws within each agency’s responsibility? To focus the analysis, the 11 assessment elements developed in *Promises to Keep* were rephrased into 11 questions to guide the research.

NCD reviewed agency reports, strategic plans, regulations, and sub-regulatory guidance; evaluated agency budget and staffing data; analyzed enforcement statistics when available and relevant; examined agency involvement in federal litigation, as relevant; and considered reports from other entities such as the Government Accountability Office. Though data and information were considered back to 2000, the analysis considered mainly the period of 2008 to 2018.

The budgets of CRT within DOJ, and FHEO within HUD were analyzed to determine changes and the potential impact on the enforcement of disability rights and programs. Data on full-time equivalent (FTE) staff was also provided by CRT and assessed for significant changes. Since the FCC has not taken

enforcement action because of the outcomes of Request for Dispute Assistance program discussed within the report, budget and staffing of the FCC Disability Rights Office or Enforcement Bureau was not considered.

FHEO provided comprehensive data on HUD housing complaints, investigations, compliance reviews, and other enforcement information which NCD analyzed and included as part of the report. CRT provided NCD with data on the outcome of DOJ disability rights cases which resulted in a letter of finding, settlement agreement, or consent decree; involvement in federal litigation, either directly, or through submission of a statement of interest or amicus curie brief; the number of reviews conducted under Project Civic Action; and the number of ADA information calls and DRS public trainings. As discussed in the report, CRT did not provide other disability rights complaint information requested by NCD.

Specific questions for each agency, covering a range of issues, were developed based on the broad 11 research questions. NCD submitted questions to CRT for which the relevant CRT sections provided a written response. NCD conducted an in-person interview of a staff member each from CRT and DRS, and submitted follow-up questions for which CRT replied in writing. A number of the interview questions for DOJ related to the recommendations contained in *Promises to Keep*. NCD interviewed in-person staff from HUD's FHEO and Office of General Counsel. FHEO also responded in writing to follow-up questions. NCD conducted two separate interviews with staff at the FCC Disability Rights Office.

In addition to an analysis of important regulations and sub-regulatory guidance on disability rights from each agency, NCD analyzed a sample of federal court cases which involved DOJ, and analyzed a sample of letters of finding, settlement agreements, and consent decrees made available by DOJ on ada.gov. Since DOJ handles housing rights in federal court, no analysis was required of HUD in this regard.

To guide the research, a project advisory group of 16 experts in disability rights, disability research, and disability and self-advocacy was established which provided advice on specific research questions, research methods, ideas for recommendations, and the accuracy of the analysis in the report. Several members of the advisory group were also interviewed individually about DOJ or HUD enforcement efforts.

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