IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

FRANK G. McALEESE, Plaintiff, v. PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. Defendants,	))))))))))	No. CA99-381 Erie

THE UNITED STATES' SUPPLEMENTAL OPPOSITION TO DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

Defendants have moved for summary judgment on four issues. Defendants argue: (1) plaintiff's claim under the Americans with Disabilities Act, 42 U.S.C. 12111 et seq ["ADA"] is barred by the Eleventh Amendment; (2) the individual defendants should be dismissed from this action because there is no individual liability under title II of the ADA or section 504 of the Rehabilitation Act, 29 U.S.C. 704; (3) plaintiff is not entitled to punitive damages under the ADA or Rehabilitation Act; and (4) plaintiff's claim for compensatory damages is barred by the Prison Litigation Reform Act.

In response to the Court's request for briefs on the issue of whether Congress properly abrogated the states' Eleventh Amendment immunity when it enacted title II of the ADA, the United States files this supplemental opposition to defendants' second motion for summary judgment.

BACKGROUND

1. Statutory Framework: The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 et seq., established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). As a result, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7).

Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the Disabilities Act. 42 U.S.C. 12101(b)(4). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case involves a suit filed under Title II. That Title provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). The term "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"; "a record of such an impairment"; or "being regarded as having such an impairment." 42 U.S.C. 12102(2). A "qualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2); 28 C.F.R. 35.140.[1]

The discrimination prohibited by Title II of the Disabilities Act includes, among other

[1] Congress instructed the Attorney General to issue regulations to implement Title II, based on prior regulations promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See 42 U.S.C. 12134.

things, denying a government benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii), (vii). In addition, a public entity must make reasonable modifications in policies, practices, or procedures if the accommodation is necessary to avoid the exclusion of individuals with disabilities and can be accomplished without imposing an undue financial or administrative burden on the government, or fundamentally altering the nature of the service. See 28 C.F.R. 35.130(b)(7). The Disabilities Act does not normally require a public entity to make its existing physical facilities accessible. Public entities need only ensure that "each service, program or activity, * * * when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," unless to do so would fundamentally alter the program or impose an undue financial or administrative burden. 28 C.F.R. 35.150(a). However, facilities altered or constructed after the effective date of the Act must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151.

Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

ARGUMENT

BECAUSE IT COMBATS AN ENDURING PROBLEM OF UNCONSTITUTIONAL MISTREATMENT AND DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES, TITLE II OF THE AMERICANS WITH DISABILITIES ACT IS VALID SECTION 5 LEGISLATION

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power to

Congress, see Kimel v. Florida Bd. of Regents, 528 U.S. 62, 80 (2000), that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." Board of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress" when enforcing the Fourteenth Amendment.) (citation & emphasis omitted). Section 5 thus grants Congress broad power indeed, including the power to abrogate a State's Eleventh Amendment immunity, Garrett, 531 U.S. at 364. Although Section 5 empowers Congress to enact prophylactic and remedial legislation to enforce Fourteenth Amendment rights, it also requires a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne v. Flores, 521 U.S. 507, 520 (1997). Title II of the Disabilities Act is appropriate Section 5 legislation because it responds to a history of pervasive discrimination and deprivation of constitutional rights by States, which has spawned continuing discrimination and the denial of rights in the daily decisions of officials, and because the legislation is reasonably designed to prevent and remedy those constitutional violations.

A. Title II Of The Disabilities Act Is Valid Section 5 Legislation Because It Targets Distinctly Governmental Activities That Often Burden Fundamental Rights

In Garrett, supra, the Supreme Court held that Title I of the Disabilities Act, 42 U.S.C. 12111 to 12117, which prohibits public and private employers from discriminating in

employment on the basis of disability, was not valid Section 5 legislation. The arguments of defendants largely assume that the invalidity of Title II's abrogation follows ineluctably from Garrett. See Def.Br. at 3-8. But, if Titles I and II were constitutionally indistinguishable, the Supreme Court would have had no reason to limit its holding in Garrett, 531 U.S. at 360 n.1. Moreover, defendant's argument overlooks three critical distinctions between the two Titles.

First, in enacting Title I, Congress simply included States as employers within a general ban on employment discrimination by private employers, without considering sufficiently whether there was a distinctive problem of unconstitutional employment discrimination by the States. Garrett, 531 U.S. at 369-371.[2] Title II, by contrast, is a law that Congress enacted specifically and deliberately to regulate the conduct of state and local governments qua governments. Congress thus was singularly focused on the historic and enduring problem of official discrimination and unconstitutional treatment on the basis of disability by "any State or local government," 42 U.S.C. 12131(1)(A) and (B).

For that reason, as Garrett acknowledged, Title II is predicated on a more substantial legislative record pertaining to "discrimination by the States in the provision of public services." 531 U.S. at 371 n.7; see also Section B(2)(b), infra. That legislative record, in turn, led Congress to make specific findings about the historic and enduring problem of discrimination by States and their subdivisions. Contrast Garrett, 531 U.S. at 371 (no findings about state employment discrimination). In particular, Congress found that "discrimination against

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[2] In other recent federalism cases, Congress likewise sought to "place States on the same footing as private parties." Kimel, 528 U.S. at 82 (citation omitted); see Alden v. Maine, 527 U.S. 706, (1999) (Fair Labor Standards Act of 1968); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 631-632 (1999) (patent infringement); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (Lanham Act liability).

individuals with disabilities persists in such critical areas as * * * education, transportation, * * * institutionalization, * * * voting, and access to public services." 42 U.S.C. 12101(a)(3). Those are areas for which States and their subdivisions are either exclusively or predominantly responsible. And the same Committee Reports that the Supreme Court in Garrett found lacking with regard to public employment, 531 U.S. at 371-372, are directly on point here, declaring that "there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the area[] of * * * public services." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 28 (1990); see also S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989) ("Discrimination still persists in such critical areas as * * * public services.").

Congress thus specifically concluded, on the basis of a weighty legislative record, that States were contributors to the "history of purposeful unequal treatment" and participants in "the continuing existence of unfair and unnecessary discrimination and prejudice" against individuals with disabilities, 42 U.S.C. 12101(a)(7) and (9). When Congress focuses in that manner on the problem of unconstitutional conduct by States and their subdivisions and determines that "legislation is needed to secure the guarantees of the Fourteenth Amendment," Congress's "conclusions are entitled to much deference." Kimel, 528 U.S. at 81 (citation omitted).

Second, because Title I pertains only to employment, decisions made by state employers concerning individuals with disabilities implicate only the Equal Protection Clause's guarantee against irrational employment decisions. Garrett, 531 U.S. at 366-368. Like Flores, 521 U.S. at 512-514, and Kimel, 528 U.S. at 83, Title I thus addressed state conduct in an area where the States, as sovereigns, are given an extraordinarily wide berth and constitutional violations are infrequently found.

Title II, by contrast, enforces not only the Equal Protection Clause, but also a wide array of fundamental constitutional rights -- the right to petition the government, the right of access to the courts, the right to vote, Fourth and Eighth Amendment protections, and procedural due process. Indeed, Title I dealt only with the States' denial of an opportunity -- state employment -- to individuals who equally could pursue employment in the private sector. Title II, by contrast, regulates state and local governments when they intervene in and regulate the activities of private citizens, or deprive them of their liberty, property, or parental rights. Title II also regulates a State's ability to deny a class of citizens access to government services upon which all citizens must rely for basic opportunities (and sometimes the necessities) of modern life. The private sector cannot provide medical licenses, or the ability to cast a ballot, file a lawsuit, secure the protection of the police, or seek the enactment of legislation. Title II thus legislates in an area where the States' conduct often is subject to heightened scrutiny, and where its ability to infringe those rights generally, let alone to deny them disparately to one particular segment of the population based on stereotypes, fears, economics, or administrative convenience, is constitutionally curtailed.

Third, unlike Kimel and Garrett, this case potentially implicates concerns beyond abrogation and the ability of individuals to sue the States for money damages. Because both Kimel and Garrett targeted employment discrimination, those decisions only invalidated the statutes' abrogation provisions; the substantive prohibitions of those laws remain applicable to the States under Congress's Commerce Clause power and can be enforced against state officials under Ex parte Young, 209 U.S. 123 (1908). See Garrett, 531 U.S. at 374 n.9; EEOC v. Wyoming, 460 U.S. 226, 235-243 (1983).

For all of those reasons, and especially because this case may implicate the constitutional authority for enactment of Title II's substantive prohibitions as applied to all levels of government, this Court is not constrained, as the Supreme Court was in Garrett, to consider only the legislative evidence of unconstitutional conduct by the States. When Congress specifically focuses the substantive provisions of Section 5 legislation jointly on the operations of state and local governments qua governments, its enforcement powers under Section 5, like the substantive protections of Section 1, can charge the States with some responsibility for the unconstitutional conduct of the subdivisions of government that the States themselves create and empower to act.[3] That is, in part, because the line between state and local government is much harder to discern in the context of public services than it is in employment. While state and local employment decisions can be made independently, the operations of state and local governments in the provision of government services, such as voting, education, welfare benefits, zoning, licensing, and the administration of justice are often inextricably intertwined. In education, for example, the State plays a substantial role in directing, supervising and limiting the discretion of local agencies, either by administrative supervision or by statutory direction. The complexity of the relationship between state and local governments in the administration of public services often raises difficult, state-by-state questions regarding whether a particular entity is operating as an "arm of the state." In some cases, the local government officials act at the direct behest of the State government pursuant to State mandates. And in all cases, the local government is able to discriminate only because it exercises power delegated to it by the State.

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[3] See Atkin v. Kansas, 191 U.S. 207, 220-221 (1903); see also Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 270-271 (1985) (Rehnquist, J., dissenting).

The record of historic and pervasive discrimination and unconstitutional treatment by all levels of government further blurs the line between state and local governmental action, because the conduct of local officials is traceable, at least in part, to the rules of state-mandated discrimination and segregation under which they operated for years.

Indeed, under similar circumstances, the Supreme Court has recognized the relevance of local governmental conduct in assessing the validity of Section 5 legislation as applied to the States. In Garrett, the Court cited the substantive provisions of the Voting Rights Act of 1965, which were upheld in South Carolina, supra, as "appropriate" Section 5 legislation regulating the States because it was predicated upon a documented "problem of racial discrimination in voting." Garrett, 531 U.S. at 373 (citing 383 U.S. at 312-313). Much of the evidence of unconstitutional conduct described in South Carolina, 383 U.S. at 312-314, however, involved the conduct of county and city officials.[4] Indeed, almost all of the evidence of specific instances of discrimination underlying the Voting Rights Act of 1965 concerned local officials rather than state officials; the rest of the evidence was either statistical evidence or lists of state laws.[5] See also Flores, 521 U.S. at 530-531 (in analyzing Section 5 as a source of power for

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[4] See 383 U.S. at 312 n.12 (discussing discrimination by Montgomery County Registrar); id. at 312 n.13 (discussing discrimination by Panola County registrar and Forrest County registrar); id. at 313 n.14 (citing a case that documents discrimination by the Dallas County Board of Registrars); id. at 313 n.15 (citing a case that documents discrimination by the Walker County registrar); id. at 314 ("certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls"); id. at 314-315 (discussing discrimination in Selma, Alabama and Dallas County).

[5] See, e.g., Voting Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 5-8 (1965) (extensive voting discrimination by local officials in Selma, Alabama, and Dallas County); id. at 8 (local sheriff and deputy sheriff in Mississippi, beat three black men when they attempted to register to vote); id. at 36 (21 of 22 voting discrimination lawsuits filed by the Department of Justice in Mississippi were against counties); Voting Rights:

substantive provisions of a law, the Court did not distinguish between evidence of state and local governmental conduct). In sum, while Congress compiled ample evidence of unconstitutional conduct by the States themselves in enacting Title II, the constitutional question presented here, unlike Garrett, compels consideration of the evidence of local government discrimination as well.

B. After An Exhaustive Investigation, Congress Found Ample Evidence Of A Long History And A Continuing Problem Of Unconstitutional Treatment Of Individuals With Disabilities

Defendants argue that "nowhere in the findings does Congress state that the States have engaged in any unconstitutional discrimination against the disabled." Def. Br. 7. That argument is profoundly mistaken.

1. Congress Exhaustively Investigated Governmental Discrimination On The Basis of Disability

Congress's "special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." Fullilove v. Klutznick, 448 U.S. 448, 503 (1980) (Powell, J., concurring). "One appropriate source" of evidence for Congress to consider in combating disability discrimination

> is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Hearings Before the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 12 (1965) (discrimination in Clarke County, Mississippi, and Wilcox County, Alabama); H.R. Rep. No. 439, 89th Cong., 1st Sess. 16 (1965) (resistance of parish registrars to registration of black citizens); S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 7-9 (1965) (discrimination and litigation in Dallas County, Alabama); id. at 12 (counties' discriminatory use of "good moral character" test); id. at 33 (county officials' discriminatory use of poll tax).

Fullilove, 448 U.S. at 503 (Powell, J., concurring); see also South Carolina, 383 U.S. at 330 ("In identifying past evils, Congress obviously may avail itself of information from any probative source.").

The Congress that enacted Title II of the Disabilities Act brought to that legislative process more than forty years of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination. See Garrett, 531 U.S. at 390-391 (Breyer, J., dissenting) (listing prior legislation). Building on that expertise, Congress commissioned two reports from the National Council on the Handicapped, an independent federal agency, to report on the adequacy of existing federal laws and programs addressing discrimination against persons with disabilities.[6] That study revealed that "the most pervasive and recurrent problem faced by disabled persons appeared to be unfair and unnecessary discrimination." National Council on the Handicapped, On the Threshold of Independence 2 (1988) (Threshold); see National Council on the Handicapped, Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities (1986). Persons with disabilities reported "denials of educational opportunities, lack of access to public buildings and public bathrooms, [and] the absence of accessible transportation." Threshold 20-21, 41. Congress also learned of an "alarming rate of poverty," a dramatic educational gap, a "Great Divide" in employment, and a life of social "isolat[ion]" for persons with disabilities. Id. at 14.[7]

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[6] See Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Title V, § 502(b), 100 Stat. 1829.

[7] Twenty percent of persons with disabilities -- more than twice the percentage for the general population -- live below the poverty line, and 15% of disabled persons had incomes of $15,000 or

Congress itself engaged in extensive study and fact-finding concerning the problem of discrimination against persons with disabilities, holding 13 hearings devoted specifically to consideration of the Disabilities Act. See Garrett, 531 U.S. at 389-390 (Breyer, J., dissenting) (listing hearings). In addition, a congressionally designated Task Force held 63 public forums across the country that were attended by more than 30,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment 16 (1990) (Task Force Report). The Task Force also presented to Congress evidence submitted by nearly 5,000 individuals documenting the problems with discrimination persons with disabilities face daily -- often at the hands of state and local governments. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act 1040 (Comm. Print 1990) (Leg. Hist.).[8] Congress also considered several

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less. Threshold 13-14. Forty percent of persons with disabilities -- triple the rate for the general population -- did not finish high school. Only 29% of persons with disabilities had some college education, compared with 48% for the general population. Id. at 14. Two-thirds of all working-age persons with disabilities were unemployed; only one in four worked full-time. Ibid. Two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances; persons with disabilities were three times more likely not to eat in restaurants; and 13% of persons with disabilities never go to grocery stores. Id. at 16-17.

8 See also Task Force Report 16. The Task Force submitted those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" to Congress, 2 Leg. Hist. 1324-1325, as part of the official legislative history of the Disabilities Act. See id. at 1336, 1389. Those documents – mostly handwritten letters and commentaries collected during the Task Force's forums – were part of the official legislative history of the ADA. *See id.* at 1336, 1389. Both the majority and dissent in Garrett relied on these documents, *see* 531 U.S. at 369-370, with dissent citing to them by State and Bates stamp number, id. at 389-424 (Breyer, J., Dissenting), a practice we follow.

reports and surveys. See S. Rep. No. 116, supra, at 6; H.R. Rep. No. 485, supra, Pt. 2, at 28; Task Force Report 16.[9]

2. Congress Amassed Voluminous Evidence Of Historic And Enduring Discrimination And Deprivation Of Fundamental Rights By States

a. Historic Discrimination: The "propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 640 (1999) (quoting Flores, 521 U.S. at 525). While defendants ignore it, Congress and two Justices of the Supreme Court have also acknowledged the Nation's "history of unfair and often grotesque mistreatment'" of persons with disabilities. Cleburne, 473 U.S. at 454 (Stevens, J., concurring); see also Olmstead v. L.C., 527 U.S. 581, 608 (1999) (Kennedy, J., concurring) ("[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."); Alexander v. Choate, 469 U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist").

From the 1920s to the 1960s, the eugenics movement labeled persons with mental and physical disabilities as "sub-human creatures" and "waste products" responsible for poverty and crime. Id. at 20. Every single State, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy, and excluded them from public schools and other state

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[9] Those included the United States Civil Rights Comm'n, Accommodating the Spectrum of Individual Abilities (1983); two polls conducted by Louis Harris & Assoc., The ICD Survey Of Disabled Americans: Bringing Disabled Americans into the Mainstream (1986), and Louis Harris & Assocs., The ICD Survey II: Employing Disabled Americans (1987); a report by the Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988); and eleven interim reports submitted by the Task Force.

services and privileges of citizenship.[10] States also fueled the fear and isolation of persons with disabilities by requiring public officials and parents, sometimes at risk of criminal prosecution, to report and segregate into institutions the "feebleminded."[11]

Almost every State accompanied forced isolation with compulsory sterilization and prohibitions of marriage. See Buck v. Bell, 274 U.S. 200, 207 (1927) ("It is better for all the world, if * * * society can prevent those who are manifestly unfit from continuing their kind. * * * Three generations of imbeciles are enough."); 3 Leg. Hist. 2242 (James Ellis); M. Burgdorf & R. Burgdorf, A History of Unequal Treatment (Unequal Treatment), 15 Santa Clara Lawyer 855, 887-888 (1975). Children with mental disabilities "were excluded completely from any form of public education." Board of Educ. v. Rowley, 458 U.S. 176, 191 (1982). Numerous States also restricted the rights of physically disabled people to enter into contracts, Spectrum 40, while a number of large cities enacted "ugly laws," which prohibited the physically disabled from appearing in public. Chicago's law provided:

> No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.

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[10] See also Cleburne, 473 U.S. at 463 (Marshall, J) (state laws deemed persons with mental disorders "unfit for citizenship"); see also Note, Mental Disability and the Right to Vote, 88 Yale L.J. 1644 (1979).

[11] Spectrum 20, 33-34.

Unequal Treatment 863 (quoting ordinance). Such laws were enforced as recently as 1974. Id. at 864.[12]

b. Enduring Discrimination and Deprivation of Fundamental Rights: "

Congress specifically found that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 116, supra, at 8-9.[13]

That is because the process of changing discriminatory laws, policies, practices, and stereotypical conceptions and prejudices did not even begin until the 1970s and 1980s. Even then, "out-dated statutes [were] still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation" of those with disabilities "continue to stymie recognition of the[ir] dignity and individuality." Cleburne, 473 U.S. at 467 (Marshall, J., concurring) (emphasis added). The involuntary sterilization of the disabled is not distant history; it continued into the 1970s, and occasionally even into the 1980s -- well within the

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[12] See also State v. Board of Educ., 172 N.W. 153, 153 (Wis. 1919) (approving exclusion of a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children") (noted at 2 Leg. Hist. 2243); see generally T. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 399-407 (1991).

[13] See also 3 Leg. Hist. 2020 (Att'y Gen. Thornburgh) ("But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society -- notions that have, in large measure, been created by ignorance and maintained by fear."); 2 Leg. Hist. 1606 (Arlene Mayerson) ("Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history.").

lifetime of many current governmental decision makers. P. Reilly, The Surgical Solution 2, 148 (1991); National Public Radio, "Look Back at Oregon's History of Sterilizing Residents of State Institutions" (Dec. 2, 2002). As recently as 1983, fifteen States continued to have compulsory sterilization laws on the books. Spectrum 37; see also Stump v. Sparkman, 435 U.S. 349, 351 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15 year old girl); Reilly, supra, at 148-160.

Until the late 1970s, "peonage was a common practice in [Oregon] institutions." Gov. J. Kitzhaber, "Proclamation of Human Rights Day, and Apology for Oregon's Forced Sterilization" (Dec. 2, 2002). As of 1979, "most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." Cleburne, 473 U.S. at 464 (Marshall, J., concurring). New Mexico recently reaffirmed its unqualified exclusion of "idiots [and] insane persons" from voting. New Mexico, Official 2002 General Election Results by Office (Dec. 2002).

Based on the evidence it amassed, Congress found, as a matter of present reality and historical fact, that persons with disabilities have been and are subjected to "widespread and persisting deprivation of [their] constitutional rights." Florida Prepaid, 527 U.S. at 645 (citation omitted); see also 42 U.S.C. 12101(a)(2) and (a)(3). In particular, Congress discerned a substantial risk that persons with disabilities will be unconstitutionally denied an equal opportunity to obtain vital services and to exercise fundamental rights, and will be subjected to unconstitutional treatment in the form of arbitrary or irrational distinctions and exclusions, and disparity in treatment as compared to other similarly situated groups, Garrett, 531 U.S. at 366 n.4.

(i) Education: "[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Brown v. Board of Educ., 347 U.S. 483, 493 (1954). Accordingly, where the State provides a public education, that right "must be made available to all on equal terms." Ibid. But Congress heard that irrational prejudices, fears, ignorance, and animus still operate to deny persons with disabilities an equal opportunity for public education. As recently as 1975, approximately 1 million disabled students were "excluded entirely from the public school system." 42 U.S.C. 1400(c)(2)(C). A quadriplegic woman with cerebral palsy and a high intellect, who scored well in school, was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material." VT 1635. Other school districts also simply labeled as mentally retarded a blind child and a child with cerebral palsy. NB. 1031; AK 38 (child with cerebral palsy subsequently obtained a Masters Degree). "When I was 5," another witness testified, "my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, supra, at 7.[14]

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[14] See also 136 Cong. Rec. H2480 (daily ed. May 17, 1990) (Rep. McDermott) (school board excluded Ryan White, who had AIDS, not because the board "thought Ryan would infect the others" but because "some parents were afraid he would"); UT 1556 (disabled student refused admission to first grade because teacher refused to teach student with a disability); NY 1123 (three elementary schools had practice of locking mentally disabled children in a 3'x 3'x 7' box for punishment); Spectrum 28, 29 ("a great many handicapped children" are "excluded from the public schools" or denied "recreational, athletic, and extracurricular activities provided for non-handicapped students"); Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare, 93d Cong., 1st Sess. 793 (1973) (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions); id. at 400 (Mrs. R. Walbridge) (student with spina bifida barred from

State institutions of higher education acted on the same stereotypes and prejudices. Indeed, the "higher one goes on the education scale, the lower the proportion of handicapped people one finds." Spectrum 28; see also note 10, supra. A person with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 Leg. Hist. 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." Id. at 1617 (Arlene Mayerson). Another witness explained that, "when I was first injured, my college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." WA 1733. Similarly, an Education student was denied a student teaching assignment because administrators thought the students would react badly to her appearance. OR 1384.[15]

For both good and ill, "the law can be a teacher." Garrett, 531 U.S. at 375 (Kennedy, J., concurring). As with race discrimination, few governmental messages more profoundly affect individuals and their communities than the message that individuals with disabilities should be

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the school library for two years "because her braces and crutches made too much noise"). For additional examples, see id. at 384 (Peter Hickey); 2 Leg. Hist. 989 (Mary Ella Linden); PA 1432; NM 1090; OR 1375; AL 32; SD 1481; MO 1014; NC 1144; Garrett, 531 U.S. at 391-424 (Breyer, J., dissenting).

[15] See also 2 Leg. Hist. 1224 (Denise Karuth) (state university professor asked a blind student enrolled in his music class "'What are you doing in this program if you can't see'"; student was forced to drop class); id. at 1225 (state commission refuses to sponsor legally blind student for masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients'"); J. Shapiro, No Pity 45 (1993) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work"). For additional examples, see SD 1476; LA 999; MO 1010; WIS 1757; CO 283; Garrett, 531 U.S. at 391-424 (Breyer, J., dissenting); Cal. Report 138; Appendix A, infra.

segregated in education:

> Segregation in education impacts on segregation throughout the community. Generations of citizens attend school with no opportunity to be a friend with persons with disabilities, to grow together, to develop an awareness of capabilities -- all in the name of benevolence! Awareness deficits in our young people who become our community leaders and employers perpetuate the discrimination fostered in the segregated educational system.

MO 1007 (Pat Jones).

(ii) Voting: Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 561-562 (1964). But Congress found that persons with disabilities have been "relegated to a position of political powerlessness," 42 U.S.C. 12101(a)(7), and continue to be subjected to discrimination in voting, 42 U.S.C. 12101(a)(3). Congress made that finding after hearing that "people with disabilities have been turned away from the polling places after they have been registered to vote because they did not look competent." 2 Leg. Hist. 1220 (Nancy Husted-Jensen) (emphasis added). When one witness turned in the registration card of a voter who has cerebral palsy and is blind, the "clerk of the board of canvassers looked aghast * * * and said to me, 'Is that person competent? Look at that signature," and then invented a reason to reject the registration. Id. at 1219. A deaf voter was told that "you still have to be able to use your voice" to vote. Equal Access to Voting for Elderly and Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin., 98th Cong., 1st Sess. 94 (1984) (Equal Voting Hearings).[16] The legislative record also documented that many persons

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[16] One voter with a disability was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available"; on another occasion that

with disabilities "cannot exercise one of your most basic rights as an American" because polling places or voting machines are inaccessible. S. Rep. No. 116, supra, at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." Ibid.; see also May 1989 Hearings 76 (Ill. Att'y Gen. Hartigan) (same). Voting by absentee ballot also "deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day." 2 Leg. Hist. 1745 (Nanette Bowling).[17] "How can disabled people have clout with our elected officials when they are aware that many of us are prevented from voting?" ARK 155.

(iii) Access to the courts: The Fourteenth Amendment protects the rights of civil litigants, criminal defendants, and members of the public to have access to the courts. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). Yet, Congress learned that "[t]he courthouse door is still closed to Americans with disabilities" -- literally. 2 Leg. Hist. 936 (Sen. Harkin).

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voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an explanation for my decisions." Equal Voting Hearings 45. "A blind woman, a new resident of Alabama, went to vote and was refused instructions on the operation of the voting machine." AL 16; see also Garrett, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples); Help America Vote Act of 2001: Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 13 (Dec. 5, 2001) (James Dickson) ("I am blind, and I have never cast a secret ballot."); id. at 15 ("Twice in Massachusetts and once in California, while relying on a poll worker to cast my ballot, the poll worker attempted to change my mind about whom I was voting for. * * * [T]o this day I really do not know if they cast my ballot according to my wishes.").

[17] See also Equal Voting Hearings 17, 461 (criticizing States' imposition of special absentee voting requirements on persons with disabilities). For examples of inaccessible polling places, see 2 Leg. Hist. 1767 (Rick Edwards); WIS 1756; MT 1024, 1026-1027; MI 922; ND 1185; DE 307; WIS 1756; AL 16; Garrett, 531 U.S. at 395-424 (Breyer, J., dissenting); FEC, Polling Place Accessibility in the 1988 General Election 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986 elections).

> I went to the courtroom one day and * * * I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who * * * told me there was an entrance at the back door for the handicapped people. * * * I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door and maybe let me in.* * * This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. * * * And when [the judge] finally saw me in the courtroom, he could not look at me because of my wheelchair. * * * The employees of the courtroom came back to me and told me, "You are not the norm. You are not the normal person we see every day."

Id. at 1071 (Emeka Nwojke). Such differential treatment affects not only the ability to get into the courthouse, but also the ability to be heard and participate effectively and meaningfully in judicial proceedings.[18]

(iv) Access to government officials and proceedings: "The very idea of a government, republican in form, implies a right on the part of its citizens to * * * petition for a redress of grievances," United States v. Cruikshank, 92 U.S. 542, 552-554 (1875), and that right cannot be denied to an entire class of citizens without compelling justification, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). State governments must "act as neutral entities, ready to take instruction and to enact laws when their citizens so demand." Garrett, 531 U.S. at 375 (Kennedy, J., concurring). But government cannot take instruction from those whom it cannot

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[18] See ID 506 (adult victims of abuse with developmental disabilities denied equal rights to testify in court); Consol. Gov't C.A. Br. at 3, Lane v. Tennessee, No. 98-6730 (6th Cir.) (Lane arrested for two misdemeanors and ordered to report for hearing at inaccessible courthouse; the first day he crawled up the stairs to the courtroom; the second day he was arrested for failure to appear when he refused to crawl or be carried up the stairs; hearing later held with defendant forced to remain outside while counsel shuttled between him and the courtroom). For additional examples of inaccessible courthouses and court proceedings, see AL 15; WV1745; MA 812; CA 254; CO 273; ID 528; PA 1394; LA 998; WA 1690; MS 990; SD 1475; NC 1161-1164; L 15; DE 345; GA 374; HI 455; Garrett, 531 U.S. at 391-424 (Breyer, J., dissenting).

see or hear. The Illinois Attorney General testified that he "had innumerable complaints regarding lack of access to public services -- people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building," and that "individuals who are deaf or hearing impaired call[] our office for assistance because the arm of government they need to reach is not accessible to them." May 1989 Hearings 488, 491. Another individual, "who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of Statehouse stairs, the only route to the small hearing room." IN 626. Access to other important government buildings and officials depended upon the individual's willingness to crawl or be carried.[19]

(v) Law Enforcement: Persons with disabilities have also been victimized in their dealings with law enforcement, in violation of their Fourteenth Amendment right to due process and protection from unreasonable searches and seizures. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 Leg. Hist. 1005 (Belinda Mason). Police refused to accept a rape complaint from a blind woman because she could not make a visual identification. NM

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[19] See Spectrum 39 (76% of State-owned buildings offering services and programs for the general public are inaccessible and unusable for persons with disabilities); May 1989 Hearings 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the 'Court Room.' In this room all public business is conducted by the county government whether on taxes, zoning, schools or any type of public business."); AK 73 ("We have major problems in Seward, regarding accessibility to City and State buildings for the handicapped and disabled."; City Manager responded that "[H]e runs this town * * * and no one is going to tell him what to do."). For additional examples of inaccessible government officials and offices, see H.R. Rep. No. 485, supra, Pt. 2, at 40; May 1989 Hearings 76; IN 651; WIS 1758; NY 1119; Cal. Report 70; Garrett, 531 U.S. at 391-424 (Breyer, J., dissenting).

1081. A person in a wheelchair was given a ticket and six-months' probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. VA 1684. Task Force Chairman Justin Dart testified, moreover, that persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 Leg. Hist. 1331. A parole agent "sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though * * * he could not make the appointments because he was unable to get accessible transportation." Cal. Report 103.[20]

(vi) Child Custody: The Supreme Court has long recognized that the Constitution protects and respects the sanctity of the parent-child relationship. See, e.g., Troxel v. Granville, 530 U.S. 57 (2000); Stanley v. Illinois, 405 U.S. 645 (1972). In addition, the Due Process Clause requires States to afford individuals with disabilities fair child custody proceedings, including the opportunity to be heard "at a meaningful time and in a meaningful manner." Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (citation and quotation marks omitted). But the Task Force Chairman testified that "clients whose children have been taken away from them

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[20] See also 2 Leg. Hist. 1115 (Paul Zapun) (sheriff threatens persons with disabilities who stop in town due to car trouble); id. at 1197 (police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight"); Task Force Report 21 (six wheelchair users arrested for failing to leave restaurant after manager complained that "they took up too much space"); TX 1541 (police refused to take an assault complaint from a person with a disability); LA 748 (police called to Burger King because staff believed disabled customer was acting strangely, and made the customer leave town); AL 6, DE 345, KS 673, WV 1746, IL 572 (all: lack of interpreter for deaf arrestee). For additional examples of harassment and inappropriate treatment, see 2 Leg. Hist. 1196 (Cindy Miller); IL 569-570, 583; Cal. Report 101-104; Garrett, 531 U.S. at 391-424 (Breyer, J., dissenting). In addition, persons with disabilities, like epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, supra, Pt. 3, at 50.

a[re] told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?" 2 Leg. Hist. 1331 (Justin Dart). Another government agency refused to authorize a couple's adoption of a child solely because the woman had muscular dystrophy. MA 829.[21]

(vii) Institutionalization: The Constitution protects individuals with disabilities from unjustified institutionalization and from unduly severe treatment while institutionalized. Youngberg v. Romeo, 457 U.S. 307, 315, 322 (1982). Yet unconstitutional denials of appropriate treatment and unreasonable institutionalization of persons in state mental hospitals were commonplace. See 2 Leg. Hist. 1203 (Lelia Batten) (state law ineffective; state hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone. Seclusion rooms and restraints are used to punish clients."); id. at 1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); Spectrum 34-35.[22]

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[21] See also H.R. Rep. No. 485, supra, Pt. 3, at 25 ("These discriminatory polices and practices affect people with disabilities in every aspect of their lives * * * [including] securing custody of their children."); id., Pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk -- it has meant being * * * deemed an 'unfit parent'" in custody proceedings.); 2 Leg. Hist. 1611 n.10 (Arlene Mayerson) ("Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent."); Spectrum 40; Garrett, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples); No Pity, supra, at 26 (woman with cerebral palsy denied custody of her two sons; children placed in foster care instead); In re Marriage of Carney, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped"); Appendix A, infra.

[22] See also Gov. Kitzhaber, supra (admitting the use of "inhumane devices to restrain and control patients" until "the mid 1980's"); Cal. Report 114; 132 Cong. Rec. S5914-01 (daily ed. 1986) (Sen. Kerry) (findings of investigation of State-run mental health facilities "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief."); Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Sen. Comm. on the Judiciary, 95th Cong., 1st Sess. 127 (1977) (Michael D. McGuire, M.D.) ("it became quite clear * * * that the

Indeed, in the years immediately preceding enactment of the Disabilities Act, the Department of Justice found unconstitutional treatment of individuals with disabilities in state institutions for the mentally retarded or mentally ill in more than half of the States. One facility forced mentally retarded residents to inhale ammonia fumes as a form of punishment. See Notice of Findings Regarding Los Lunas Hosp. & Training Sch. 2. Residents in other facilities lacked adequate food, clothing and sanitation. Many state facilities failed to provide basic safety to individuals with mental illness or mental retardation, resulting in serious physical injuries, sexual assaults, and deaths. See Appendix B, infra.

(viii) Zoning: Congress knew that Cleburne, where the Supreme Court found unconstitutional discrimination in a zoning decision based on irrational fears and stereotypes, was not an isolated incident. In Wyoming, a zoning board declined to authorize a group home because of "local residents' unfounded fears that the residents would be a danger to the children in a nearby school." WY 1781. In New Jersey, a group home for those who had suffered head injuries was barred because the public perceived such persons as "totally incompetent, sexual deviants, and that they needed 'room to roam.' * * * Officially, the application was turned

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personnel regarded patients as animals, * * * and that group kicking and beatings were part of the program"); id. at 191-192 (Dr. Philip Roos); Civil Rights for Instit. Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 239 (1977) (Stanley C. Van Ness) (describing "pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, unsanitary, and anti-therapeutic living conditions" in New Jersey state institutions); Civil Rights of Instit. Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 34 (1979) (Paul Friedman) ("[A] number of the residents were literally kept in cages. A number of those residents * * * had lost the ability to walk, had become incontinent, and had regressed because of these shockingly inhumane conditions of confinement."); Garrett, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples).

down due to lack of parking spaces, even though it was early established that the residents would not have automobiles." NJ 1068.[23]

(ix) Licensing: The legislative record likewise includes evidence of discriminatory treatment in licensing. The House Report discussed a woman who was denied a teaching credential, not because of her substantive teaching skills, but because of her paralysis. H.R. Rep. No. 485, supra, Pt. 2, at 29. See also 2 Leg Hist. 1611 n.9 (Arlene Mayerson) (teaching license denied "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching"); WY 1786 (individual unable to get a marriage license because the county courthouse was not wheelchair accessible).[24]

(x) Public Transportation: Individuals reported discriminatory treatment on public transportation that lacked any rational basis and that "made no sense in light of how the [government] treated other groups similarly situated in relevant respects." Garrett, 531 U.S. at 366 n.4. One student testified:

> Some of the drivers are very rude and get mad if I want to take the bus. Can you believe that? I work and part of my taxes pay for public buses and then they get mad just because I am using a wheelchair.* * * It is hard for people to feel good about themselves if they have to crawl up the stairs of a bus, or if the driver passes by without stopping.

2 Leg. Hist. 993 (Jade Calegory); MA 831 ("Blacks wanted to ride in the front of the bus.

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[23] For additional examples, see 2 Leg. Hist. 1230 (Larry Urban); AL 2,31; CO 283; Garrett, 531 U.S. at 391-424 (Breyer, J., dissenting); Appendix A.

[24] See also CA 261 (discrimination in licensing teachers); HI 479 (discrimination in licensing); TX 1549 (state licensing requirements for teaching deaf students require the ability to hear); TX 1528 & 1542 (interpreters and readers not allowed for licensing exams); TX 1543 (blind applicant not allowed to take state chiropractor's exam because she could not read x-ray without assistance); Garrett, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples).

Disabled people just want[] on."). A high-level Connecticut transportation official responded to requests for accessibility by asking "Why can't all the handicapped people live in one place and work in one place? It would make it easier for us." 2 Leg. Hist. 1085 (Edith Harris).[25]

(xi) Prison conditions: The Eighth Amendment protects inmates with disabilities against treatment that is deliberately indifferent to their serious medical needs and safety or imposes wanton suffering. Farmer v. Brennan, 511 U.S. 825 (1994); Rhodes v. Chapman, 452 U.S. 337, 347 (1981). But Congress heard that "their jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2 Leg. Hist. 1190 (Cindy Miller). Another prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead." Parrish v. Johnson, 800 F.2d 600, 603, 605 (6th Cir. 1986).[26]

(xii) Other Public Services: The scope of the testimony offered to Congress regarding unconstitutional treatment swept so broadly, touching virtually every aspect of individuals' encounters with their government, as to defy isolating the problem into select categories of state

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[25] For additional examples, see 2 Leg. Hist. 1097 (Bill Dorfer); id. at 1190 (Cindy Miller); WA 1716; Garrett, 531 U.S. at 391-424 (Breyer, J., dissenting).

[26] See also Spectrum 168 (discrimination in treatment and rehabilitation programs available to inmates with disabilities; inaccessible jail cells and toilet facilities); NM 1091 (prisoners with developmental disabilities subjected to longer terms of imprisonment); Appendices A & B, infra. The Attorney General's enforcement activities revealed that individuals awaiting placement in State mental institutions in Mississippi were held in a county jail and routinely left for days shackled in a "drunk tank" without any mental health treatment or supervision. Notice of Findings Regarding Hinds County Detention Ctr. 3 (1986).

action. Services and programs as varied as the operation of public libraries,[27] public swimming pools and park programs,[28] homeless shelters,[29] and benefit programs[30] exposed the discriminatory attitudes of officials.

3. Other Evidence Confirms the Problem

In Garrett, Justice Kennedy suggested that, if a widespread problem of disability discrimination existed, "one would have expected to find * * * extensive litigation and discussion of the constitutional violations." 531 U.S. at 968. Appendix A to this brief provides a non-exhaustive list of cases in which courts have found discrimination and the deprivation of

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[27] See 2 Leg. Hist. 1100 (Shelley Teed-Wargo) (town library refused to let person with mental retardation check out a video "because he lives in a group home," unless he was accompanied by a staff person or had a written permission slip); PA 1391 (same rule for library cards for "those having physical as well as mental disabilities").

[28] A paraplegic Vietnam veteran was forbidden to use a public pool; the park commissioner explained that "[i]t's not my fault you went to Vietnam and got crippled." 3 Leg. Hist. 1872 (Peter Addesso); see also id. at 1995 (Rev. Scott Allen) (woman with AIDS and her children denied entry to a public swimming pool); WIS 1752 (deaf child denied swimming lessons); NC 1156 (mentally retarded child not allowed in pool because of "liability risk"); CA 166 (inaccessible public recreation site); MISS 855 (same); May 1989 Hearings 76 (Ill. Att'y Gen. Hartigan) (visually impaired children with guide dogs "cannot participate in park district programs when the park has a 'no dogs' rule"); NC 1155 (blind people told not to participate in regular parks and recreation programs).

[29] CA 216 (wheelchair users not allowed in homeless shelter); CA 223 (same); DE 322 (same for mentally ill).

[30] See 2 Leg. Hist. 1078 (Ellen Telker) ("State and local municipalities do not make many materials available to a person who is unable to read print."); id. at 1116 (Virginia Domini) (persons with disabilities "must fight to function in a society where * * * State human resources [sic] yell 'I can't understand you,' to justify leaving a man without food or access to food over the weekend."); IA 664 (person with mild mental retardation denied access to literacy program); KS 713 (discrimination in state job training program); IL 533 (female disability workshop participants advised to get sterilized); AK 72 (no interpreter for deaf at state motor vehicles department). For examples of inaccessible social service agencies, see AK 145; OH 1218; AZ 116; AZ 127; HI 456; ID 541; see generally Spectrum App. A (identifying 20 broad categories of state-provided or supported services and programs in which discrimination against persons with disabilities arises).

fundamental rights on the basis of disability. Many of the cases specifically found constitutional violations. In others, the facts support that conclusion, but the existence of statutory relief allowed the court to avoid the constitutional question. Federal efforts to enforce the rights of individuals with disabilities offer still more evidence. See South Carolina, 383 U.S. at 312 (considering evidence collected in Department of Justice investigations). In public reports, the Department of Justice has either litigated or settled dozens of cases to ensure access to the courts and other government buildings, reasonable treatment by law enforcement officials, and protection against other forms of discrimination that implicate important constitutional rights.[31] In addition, the Department of Justice has found unconstitutional treatment of individuals with disabilities in institutions or prisons in more than 30 States. See Appendix B.

4. Special Significance of Discrimination in Government Services.

The foregoing record of extensive state and local discrimination in the provision of government services provides a solid predicate for exercise of Congress's Section 5 enforcement power, for three reasons. First, in Garrett, the Supreme Court held that evidence of "hardheaded[] -- and perhaps hardhearted[]" -- employment discrimination based on disability

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[31] Many of these reports, "Enforcing the ADA: A Status Report from the Department of Justice," are available at www.usdoj.gov/crt/ada. See, e.g., Oct.-Dec. 2001 Report 9 (candidate for city council who uses a wheelchair unable to access a city council platform to address constituents); Apr.-June 1998 Report 8-10 (absence of communication assistance results in longer pre-trial detention for detainees with disabilities and denial of medical treatment and communication with family members); July-Sept. 1997 Report 7-9 (State general assembly inaccessible for lobbyists with mobility impairments; lack of effective participation in court proceedings); Apr.-June 1997 Report 5-7 (blind voters; inaccessible courts; unreasonable treatment during traffic stop of deaf motorist); Oct.-Dec. 1994 Report 4-6 (access to town hall; effective participation in court proceedings; inaccessible polling places); "Enforcing the ADA: Looking Back on a Decade of Progress" 4-8 (July 2000) (access to public meetings and public offices, to courts and court proceedings; fair treatment by law enforcement).

did not violate the Constitution if it could be justified by "any reasonably conceivable state of facts that could provide a rational basis for the classification." 531 U.S. at 367-368. The constitutional balance under Title II, however, is quite different. Much of the identified state conduct interferes with or threatens the fundamental rights of individuals with disabilities, or occurs where the right to equal protection intersects with other constitutional rights, see Employment Div. v. Smith, 494 U.S. 872, 881 (1990). Such violations are subject to more intense scrutiny and cannot be justified by any conceivable rationale. A particular class of individuals cannot be excluded from voting, participating in court proceedings, accessing public meetings and services, or raising their children based on nothing more than administrative convenience. Rather, such infringements are unconstitutional "unless shown to be necessary to promote a compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634 (1969); see also Troxel, 530 U.S. at 65; Clark v. Jeter, 486 U.S. 456, 461 (1988).

Second, much of the identified conduct fails rational basis scrutiny. Even that low constitutional threshold cannot justify beating a deaf student for failure to follow spoken instructions, refusing to let individuals with disabilities on buses, excluding a paralyzed veteran from a public swimming pool, or denying a disabled student a college education either because "it would be 'disgusting' to [her] roommates to have to live with a woman with a disability," or because of groundless stereotypes that blind people cannot teach, provide competent rehabilitation counseling, or succeed in a music course. The Supreme Court reaffirmed in Garrett that "'mere negative attitudes, or fear,'" alone cannot justify disparate treatment of those with disabilities. 531 U.S. at 367.

Moreover, a purported rational basis for treatment of the disabled will fail if the State does not accord the same treatment to other groups similarly situated. Garrett, 531 U.S. at 366 n.4; Cleburne, 473 U.S. at 447-450; U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528, 534, 93 S.Ct. 2821, 2825-26, 37 L.Ed.2d 782 (1973). It accordingly is not enough that the State can offer a rational basis -- such as finances -- for failing to offer benefit information or services in handicap-accessible formats if the State is already accommodating the special communication needs of other constituents by offering such information in, for example, Spanish. Police may not refuse to take complaints from blind individuals, while taking them from victims who were blindfolded or unconscious. Moreover, many of the instances of discriminatory treatment reported to Congress arose in contexts, like education and zoning, where state actors already make accommodations for other groups, but are selectively resistant to doing so for those with disabilities.

Third, based on the record before it, Congress could reasonably conclude that the aggregate effect of consistently excluding individuals with disabilities from a broad range of important government services caused a constitutional problem that is greater than the sum of its parts. The consistent distribution of benefits and services in a way that maintains a permanent subclass of citizens is inimical to the core purposes of the Equal Protection Clause. See Hooper v. Bernalillo County Assessor, 472 U.S. 612, 623 (1985); Plyler v. Doe, 457 U.S. 202, 213 (1982). States cannot balance their budgets or allocate their resources in a manner that "divide[s] citizens into * * * permanent classes" and apportions "rights, benefits and services according to" their class. Zobel v. Williams, 457 U.S. 55, 64 (1982).

5. State Laws Provided Insufficient Protection

Defendants point out that prior to the enactment of the ADA, some states had enacted laws addressing disability discrimination at the state level. (Br. 6) Although defendants do not explain their point, perhaps they mean that the existence of state legislation suggests that discrimination at the state level has been addressed. If so, the legislative record belies this argument. Evidence before Congress during the hearings on the ADA demonstrated that state laws were "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 116, supra, at 18; see also ibid. (section of report entitled "CURRENT FEDERAL AND STATE LAWS ARE INADEQUATE"); H.R. Rep. No. 485, supra, Pt. 2, at 47 (same).[32]

State officials themselves broadly agreed with that assessment. The 50 State Governors' Committees "report[ed] that existing State laws do not adequately counter * * * discrimination." S. Rep. No. 116, supra, at 18; H.R. Rep. No. 485, supra, Pt. 2, at 47. California itself noted that "gaps" and "contradictions" in state law justified enactment of the Disabilities Act. Cal. Report 22-23. The Illinois Attorney General testified that "[p]eople with disabilities should not have to win these rights on a State-by-State basis," and that "[i]t is long past time * * * [for] a national

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[32] See also 136 Cong. Rec. H2627 (May 22, 1990) (Rep. Wolpe), id. at H2633 (Rep. Levine); 134 Cong. Rec. S5116 (Apr. 28, 1988) (Sen. Simon); 2 Leg. Hist. 963 (Sandra Parrino); id. at 967 (Adm. James Watkins) ("Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action."); id. at 1642-1643 (Arlene Mayerson) (noting variations and gaps in coverage of state statutes); 3 Leg. Hist. 2245 (Robert Burgdorf); AL 24 (failure to enforce laws protecting persons with disabilities) AK 52 (same).

policy that puts persons with disabilities on equal footing with other Americans." May 1989 Hearings 77.[33]

In addition, defendants exaggerate the coverage of state laws. See generally J. Flaccus, Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of any Help?, 40 Ark. L. Rev. 261 (1986) (detailing gaps in coverage of state laws). Prior to 1990, nearly half of the States did not protect persons with mental illness and/or mental disabilities. See Flaccus, supra, at 278-280. New Hampshire excluded disabilities caused by illness, N.H. Rev. Stat. Ann. § 354-A:3(XIII) (1984), while Arizona excluded disabilities which were first manifested after the age of 18, Ariz. Rev. Stat. § 36-551(11)(b) (1986). Flaccus, supra, at 285. Few States protected against discrimination based on either a perceived disability or a history of illness such as cancer. See B. Hoffman, Employment Discrimination Based on Cancer History, 1986 Temple L. Q. 1 (1986). Many States failed to provide for private rights of action and compensatory damages, effectively leaving victims of

[33] Other state and local officials echoed those sentiments. See Dep't of Health & Human Servs., Visions of: Independence, Productivity, Integration for People with Developmental Disabilities 29 (1990) (19 States strongly recommended passage of the Disabilities Act); 2 Leg. Hist. 1050 (Elmer Bartels, Mass. Rehab. Comm'n); id. at 1455-1456 (Nikki Van Hightower, Treas., Harris Co., Tex.); id. at 1473-1474 (Robert Lanier, Chair, Metro. Transit Auth. of Harris Co., Tex.); id. at 1506 (Texas State Sen. Chet Brooks) ("We cannot effectively piece these protections together state by state."); id. at 1508; May 1989 Hearings 778 (Ohio Governor). Indeed, state officials themselves had "pointed to negative attitudes and misconceptions as potent impediments to [their own] barrier removal policies." Advisory Comm'n on Intergovernmental Relations, Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal 87 (Apr. 1989).

discrimination without enforceable remedies. Id. at App. B; Flaccus, supra, at 300-310, 317-321.[34]

Furthermore, defendants' assertions concerning the effectiveness of those laws cannot supplant Congress's findings based on the first-hand testimony of witness after witness about the instances of discrimination they faced and the ineffectiveness of state laws. Although there may be specific contexts, such as Section 5 legislation designed to remedy violations of the Takings Clause or the privilege against self-incrimination, in which the lack of a state remedy may be relevant to the existence of a constitutional violation, cf. Florida Prepaid, 527 U.S. at 642-643, the possibility of a state remedy for discrimination does not make the underlying conduct constitutional. Just as state laws against race discrimination have neither eradicated the problem nor undermined the basis for subjecting state employers to federal prohibitions,[35] Congress was equally justified in concluding that state laws against disability discrimination had generally been ineffective in combating the lingering effects of prior official discrimination and exclusionary laws and policies and, more importantly, in changing the behavior of individual state actors.

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[34] See also May 1989 Hearings 386-394 (lengthy analysis of state laws); 3 Leg. Hist. 2245 (James Ellis) ("state laws have not provided substantial protection to people with disabilities"); Employment Discrim. Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opp. of the House Comm. on Educ. & Labor, 99th Cong., 1st Sess. 62 (1985) (Rep. Moakley) ("[O]ne-fourth of the states have no protection for the handicapped. Additionally, even those states with laws differ greatly in their regulations.") (attaching ten-state survey showing gaps in coverage of laws).

[35] See, e.g., S. Rep. No. 415, 92d Cong., 1st Sess. 19 (1971) (37 States had equal employment laws at the time Title VII was extended to the States).

C. The Americans With Disabilities Act Is Reasonably Tailored To Remedying And Preventing Unconstitutional Discrimination Against Persons With Disabilities

While Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified, Florida Prepaid, 527 U.S. at 639, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies," Flores, 521 U.S. at 519-520. Thus, the relevant inquiry is not whether Title II "prohibit[s] a somewhat broader swath of conduct," Garrett, 531 U.S. at 365, than would the courts. "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." Garrett, 531 U.S. at 365. Rather, the question is whether, in light of the scope of the problem identified by Congress, the enactment "is so out of proportion to the supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Kimel, 528 U.S. at 86 (quoting Flores, 521 U.S. at 532). Title II is not.

1. Title II's Terms are Tailored to the Constitutional Problems it Remedies

Because much of Title II targets only discrimination that threatens fundamental rights it therefore mostly targets conduct outlawed by the Constitution itself. As applied to discrimination in voting, child custody proceedings, criminal cases, institutionalization, conditions of confinement, interactions with law enforcement, judicial proceedings, access to public officials and offices, and other areas implicating fundamental rights, Title II tracks the Fourteenth Amendment when it prevents the disparate deprivation of those rights for invidious reasons.

Furthermore, Title II targets some additional discrimination, and, in so doing, ensures that the government's articulated rationale for differential treatment does not mask impermissible animus and does not result in the unlawful differential treatment of similarly situated groups. The States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all. The Disabilities Act does not require preferences and permits the denial of benefits or services if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service, 42 U.S.C. 12131(2). But once an individual proves that he can meet all the essential eligibility requirements of a program or service, especially those programs and services that implicate fundamental rights, the government's interest in excluding that individual solely "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally circumscribed. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in selecting and structuring governmental activities. The Disabilities Act thus balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." Rice v. Cayetano, 528 U.S. 495, 496 (2000).

As defendants note (Br.8), the Disabilities Act requires "reasonable modifications" in public services, 42 U.S.C. 12131(2). That requirement, however, is precisely tailored to the unique features of disability discrimination in two ways. First, given the history of separation and isolation and the resulting entrenched stereotypes, fear, prejudices, and ignorance about persons with disabilities, Congress reasonably determined that a simple ban on overt discrimination would be insufficient. Therefore, the Disabilities Act both prevents difficult-to-

prove discrimination and affirmatively promotes the integration of individuals with disabilities in order to remedy past unconstitutional conduct and to prevent future discrimination.

Congress further concluded that the demonstrated refusal of state and local governments to undertake reasonable efforts to accommodate and integrate persons with disabilities within their programs, services, and operations would freeze in place the effects of those governments' prior official exclusion and isolation of individuals with disabilities, creating a self-perpetuating spiral of isolated, stigma, ill treatment, neglect, and degradation. See Gaston County, supra (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination). Congress also concluded that, by reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. Cf. Olmstead, 527 U.S. at 600 (isolation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"). Moreover, given the record of discrimination and unconstitutional treatment of the disabled, Congress reasonably concluded that the failure to make reasonable accommodations to the rigid enforcement of seemingly neutral criteria can often mask invidious, but difficult to prove, discrimination. Congress' Section 5 power includes the ability to ensure that constitutional violations are not left unremedied because of difficulties of proof. See, e.g., South Carolina, 383 U.S. at 314-315.

Second, the Constitution itself already requires individualized consideration and modification of practices or programs, when necessary to avoid infringing on fundamental rights.[36] Beyond that, States may not justify infringement on fundamental rights by pointing to

[36] See, e.g., M.L.B. v. S.L.J., 519 U.S. 102, 121-122 (1996) (transcript fee modified in appeal of parental termination, where it was "not likely to impose an undue burden on the State"); Stanley, 405 U.S. at 651-658 (State must provide individualized determination of father's fitness to raise his

the administrative convenience or cost savings achieved by maintaining barriers to the enjoyment of those rights.[37]

The statute, moreover, requires modifications only where "reasonable," 42 U.S.C. 12131(2). Governments need not make modifications that "impose an undue hardship" or require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or cost, agency resources, and the operational practices and structure of the program. 42 U.S.C. 12111(10), 12112(b)(5)(A); 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; Olmstead, 527 U.S. at 606 n.16. Furthermore, based on the consistent testimony of witnesses and expert studies, Congress determined that the vast majority of modifications entail little or no cost. One local government official stressed that "[t]his bill will not impose great hardships on our county governments" because "the majority of accommodations for employees with disabilities are less than $50" and "[t]he cost of making new or renovated structures accessible is less than 1 percent of the total cost of construction." 2 Leg. Hist. 1443 (Nikki Van Hightower, Treasurer, Harris Co., Tex.).[38]

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children).

[37] See, e.g., Little v. Streater, 452 U.S. 1, 13-17 (1981) (State must pay for blood test for indigent defendant in paternity suit); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974); Carrington v. Rash, 380 U.S. 89, 95 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.").

[38] See also S. Rep. No. 116, supra, at 10-12, 89, 92; H.R. Rep. No. 485, supra, Pt. 2, at 34; 2 Leg. Hist. 1552 (EEOC Comm'r Evan Kemp); id. at 1077 (John Nelson); id. at 1388-1389 (Justin Dart); id. at 1456-1457; id. at 1560 (Jay Rochlin); 3 Leg. Hist. 2190-2191 (Robert Burgdorf); Task Force Report 27; Spectrum 2, 30, 70; GAO, Briefing Report on Costs of Accommodations, Americans with Disabilities Act: Hearing Before the House Comm. on Small Business, 101st Cong., 2d Sess. 190 (1990).

Title II, then, goes further than the Constitution itself only to the extent that some disability discrimination may have no impact on fundamental rights and may be rational for constitutional purposes, but still be unlawful under the requirements of the Disabilities Act. That margin of statutory protection does not exceed Congress' authority for two reasons. First, like Title VII on which it was modeled, that statutory protection is necessary to enforce the Supreme Court's constitutional standard by reaching unconstitutional conduct that would otherwise escape detection in court and to deter future constitutional violations.

Second, "[a] proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." United States v. Virginia, 518 U.S. 515, 547 (1996). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; subject to proportionality and congruence, it can require States to tear down the walls they erected during decades of discrimination and exclusion. See id. at 550 n.19 (Equal Protection Clause itself can require modification of facilities and program to ensure equal access). Title II's accommodation requirements eliminate the effects of past discrimination by ensuring that persons previously invisible to program and building designers are now considered part of the government's service constituency. "Just as it is unthinkable to design a building with a bathroom only for use by men, it ought to be just as unacceptable to design a building that can only be used by able-bodied persons. It is exclusive designs, and not any inevitable consequence of a disability that

results in the isolation and segregation of persons with disabilities in our society." 3 Leg. Hist. 1987 n.4 (Laura Cooper).[39]

2. Title II Is As Broad As Necessary

Defendants suggest that Title II is too broad. (Br. 9-10). The operative question, however, is not whether Title II is broad, but whether it is broader than necessary. It is not. Congress found that the history of unconstitutional treatment and the risk of future discrimination found by Congress pertain to all aspects of governmental operations. It determined that only a comprehensive effort to integrate persons with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Integration in education alone, for example, would not suffice if there were not going to be jobs and professional licenses for those who received the education. Integration in employment and licensing would not suffice if persons with disabilities lacked transportation. Integration in transportation is insufficient unless persons with disabilities can get into the facilities to which they are traveling. Ending unnecessary institutionalization is of little gain if neither government services nor the social activities of public life (libraries, museums, parks, and recreational services) are accessible to bring persons with disabilities into the life of the community. And none of those efforts would suffice if persons with disabilities continued to lack equivalent access to government officials, courthouses, and polling places. In short, Congress chose a comprehensive remedy because it confronted an all-encompassing, inter-connected problem. To

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[39] Likewise, child-size and adult-size water fountains routinely appear in buildings; requiring accessible fountains just expands that routine design process. 2 Leg. Hist. 993-994 (Jade Calegory) ("Black people had to use separate drinking fountains and those of us using wheelchairs cannot even reach some drinking fountains. We get thirsty, too.").

do less would be as ineffectual as "throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway," S. Rep. No. 116, supra, at 13.

CONCLUSION

For the foregoing reasons, and based upon the entire record herein, the United States respectfully submits that this Court should deny defendants' second motion for summary judgment with regard to whether the Eleventh Amendment bars plaintiff's claims under Title II of the ADA.

Respectfully submitted,

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APPENDIX A

Cases Evidencing Unconstitutional Treatment of Individuals with Disabilities:

Foucha v. Louisiana, 504 U.S. 71 (1992) (Louisiana statute allowing continued confinement of the mentally ill, who were acquitted of crimes by reason of insanity, resulted in unconstitutional confinement, in violation of the Due Process Clause, where the hospital review committee had reported no evidence of mental illness and recommended conditional discharge); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (unconstitutional zoning discrimination); Youngberg v. Romeo, 457 U.S. 307, 315, 322 (1982) (institutionalized persons have due process "right to adequate food, shelter, clothing, and medical care," "safe conditions," and freedom from unreasonable physical restraint, as well as to "such training as may be reasonable in light of [the resident's] liberty interests in safety and freedom from unreasonable restraints"); O'Connor v. Donaldson, 422 U.S. 563 (1975) (unconstitutional confinement); Delano-Pyle v. Victoria County, 302 F.3d 567, 575-576 (5th Cir. 2002) (affirming a jury verdict that included evidence of a police officer giving a sobriety test and Miranda warnings to a deaf plaintiff who could not understand him, and then arresting the plaintiff); Kiman v. New Hampshire Dep't of Corrs., 301 F.3d 13, 15-16 (disabled inmate stated Eighth Amendment claims for denial of accommodations needed to protect his health and safety due to his degenerative nerve disease), reh'g en banc granted, 310 F.3d 785 (1st Cir. 2002); Popovich v. Cuyahoga County Ct. of Common Pleas, 276 F.3d 808 (6th Cir.) (en banc) (deaf parent denied communication assistance in child custody proceeding), cert. denied, 123 S. Ct. 72 (2002); Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001) (failure to conduct parole and parole revocation proceedings in a manner that disabled inmates can understand and in which they can participate), cert. denied, 123 S. Ct

72 (2002); Baird v. Rose, 192 F.3d 462 (4th Cir. 1999) (seventh-grader suffering from clinical depression prohibited from singing in school choir); Key v. Grayson, 179 F.3d 996 (6th Cir. 1999) (deaf inmate denied access to sex offender program required as precondition for parole), cert. denied, 528 U.S. 1120 (2000); Bradley v. Puckett, 157 F.3d 1022, 1025-1026 (5th Cir. 1998) (failure for several months to provide means for amputee to bathe lead to infection); Innovative Health Sys., Inc., v. City of White Plains, 117 F.3d 37, 49 (2d Cir. 1997) (building permit denied for drug and alcohol treatment center "based on stereotypes and unsupported fears"); Koehl v. Dalsheim, 85 F.3d 86 (2d Cir. 1996) (Eighth Amendment violated when inmate with serious vision problem denied glasses and treatment); Weeks v. Chaboudy, 984 F.2d 185, 187 (6th Cir. 1993) ("squalor in which [prisoner] was forced to live as a result of being denied a wheelchair" violated the Eighth Amendment); Thomas S. v. Flaherty, 902 F.2d 250 (4th Cir.) (unconstitutional confinement when appropriate community placement available), cert. denied, 498 U.S. 951 (1990); Chalk v. United States Dist. Ct. Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988) (certified teacher barred from teaching after diagnosis of AIDS); LaFaut v. Smith, 834 F.2d 389 (4th Cir. 1987) (Powell, J.) (failure to provide paraplegic inmate with an accessible toilet is cruel and unusual punishment); Parrish v. Johnson, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead"); Clark v. Cohen, 794 F.2d 79 (3d Cir.) (unconstitutional confinement), cert. denied, 479 U.S. 962 (1986); Miranda v. Munoz, 770 F.2d 255, 259 (1st Cir. 1985) (failure to provide medications for epilepsy, which caused prisoner's death, violated Eighth Amendment); Lynch v. Baxley, 744 F.2d 1452 (11th Cir. 1984) (State subjected individuals awaiting civil

commitment proceedings to unconstitutional conditions of confinement in county jails); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981) (doctor with multiple sclerosis unconstitutionally denied residency out of concern about patients' reactions); Ferrell v. Estelle, 568 F.2d 1128, 1133 (5th Cir.) (deaf habeas petitioner's "rights were reduced below the constitutional minimum" because he could not understand his trial), withdrawn due to death of petitioner, 573 F.2d 867 (1978); Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977) (holding unconstitutional an irrebuttable presumption that blind teacher cannot instruct sighted students); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (unconstitutional conditions of confinement for the mentally ill); McCray v. City of Dothan, 169 F. Supp.2d 1260, 1279-1280 (M.D. Ala. 2001) (police officer had "not articulated any specific facts upon which suspicion reasonably could be founded" other than "the communication gap between a deaf man and herself"); M.H. v. Bristol Bd. of Educ., 169 F. Supp. 2d 21, 24-25 (D. Conn. 2001) (possible substantive due process violation where school employees spat water in disabled student's face and restrained him so forcibly as to result in bruising); Doe v. Rowe, 156 F. Supp. 2d 35 (D. Me. 2001) (unconstitutional restriction on voting by those with mental disabilities); Project Life, Inc. v. Glendening, 139 F. Supp. 2d 703, 705 (D. Md. 2001) (unlawful rejection of permit for drug treatment facility based on "community prejudices"), aff'd, No. 01-1754, 2002 WL 2012545 (4th Cir. 2002); Pathways Psychosocial v. Town of Leonardtown, 133 F. Supp. 2d 772, 791-792 (D. Md. 2001) (denying summary judgment on claim that town officials violated Equal Protection Clause under City of Cleburne by zoning decisions that excluded a home for individuals with mental retardation) & Pathways Psychosocial v. Town of Leonardtown, 223 F. Supp. 2d 699, 704-705 (D. Md. 2002) (noting jury verdict against town and denying motion for

new trial); Salcido ex rel. Gilliland v. Woodbury County 119 F. Supp. 2d 900, 931 (N.D. Iowa 2000) (granting summary judgment for mentally ill plaintiff on claim that he was denied due process by State's denial of an appropriate institutional placement without notice or hearing); New York v. County of Schoharie, 82 F. Supp. 2d 19 (N.D.N.Y. 2000) (inaccessible polling places); Schmidt v. Odell, 64 F. Supp. 2d 1014 (D. Kan. 1999) (amputee forced to crawl around jail, resulting in injury and infection, in violation of Eighth Amendment); Matthews v. Jefferson, 29 F. Supp. 2d 525 (W.D. Ark. 1998) (paraplegic litigant had to be carried up stairs to court room for all-day hearing at which he could not leave to get food or use the restroom to empty catheter, resulting in infection; eventually had to crawl down steps to get out after everyone else left the courthouse without him); Lewis v. Truitt, 960 F. Supp. 175 (S.D. Ind. 1997) (Fourth Amendment prohibits use of force against an individual, whom officers know to be deaf, for not complying with officers' spoken commands); Carty v. Farrelly, 957 F. Supp. 727, 739 (D.V.I. 1997) ("The abominable treatment of the mentally ill inmates shows overwhelmingly that defendants subject inmates to dehumanizing conditions punishable under the Eighth Amendment."); Kaufman v. Carter, 952 F. Supp. 520 (W.D. Mich. 1996) (amputee hospitalized after fall in inaccessible jail shower); Harrelson v. Elmore County, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around his cell); T.E.P. v. Leavitt, 840 F. Supp. 110 (D. Utah 1993) (statute prohibiting and voiding marriages between individuals with AIDS); Galloway v. Superior Court, 816 F. Supp. 12 (D.D.C. 1993) (blind individuals categorically excluded from jury service); Nolley v. County of Erie, 776 F. Supp. 715 (W.D.N.Y. 1991) (Constitution violated where inmate with HIV was housed in the part of a prison reserved for inmates who are mentally disturbed,

suicidal, or a danger to themselves, and was denied access to prison library and religious services); Bonner v. Arizona Dep't of Corrs., 714 F. Supp. 420 (D. Az. 1989) (deaf, mute, and vision-impaired inmate denied communication assistance, including in disciplinary proceedings, counseling sessions, and medical treatment); DeLong v. Brumbaugh, 703 F. Supp. 399, 405 (W.D. Pa. 1989) (decision to exclude deaf individual from jury was "unreasonable, discriminatory and violative of Section 504 of the Rehabilitation Act"); Doe v. Dolton Elem. Sch. Dist., 694 F. Supp. 440 (N.D. Ill. 1988) (elementary student with AIDS excluded from attending regular classes or extracurricular activities); Robertson v. Granite City Comm. Unit Sch. Dist., 684 F. Supp. 1002) (S.D. Ill. 1988) (seven-year old student with AIDS confined to a modular classroom where he was the only student); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1986) (kindergarten student with AIDS excluded from class and forced to take home tutoring); Garrity v. Gallen, 522 F. Supp. 171, 214 (D.N.H. 1981) ("blanket discrimination against the handicapped * * * is unfortunately firmly rooted in the history of our country"); New York State Ass'n for Retarded Children, Inc. v. Carey, 466 F. Supp. 487 (E.D.N.Y. 1979) (mentally retarded students excluded from public school system); Hairston v. Drosnick, 423 F. Supp. 180 (S.D. W. Va. 1976) (school refused to admit child with spina bifida without the daily presence of her mother, even though student was of normal mental competence and capable of performing easily in a classroom situation); Smith v. Fletcher, 393 F. Supp. 1366, 1368 (S.D. Tex. 1975) (government assigned paraplegic, who had a Master's degree in physiology, to menial clerical tasks based on "arbitrary and unfounded decision as to her physical capabilities"), aff'd as modified, 559 F.2d 1014 (5th Cir. 1977); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) (mentally retarded students excluded from public school

system); Pennsylvania Ass'n for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) (mentally retarded students excluded from public school system); State v. Barber, 617 So. 2d 974, 976 (La. Ct. App. 1993) ("[T]he Constitution requires that a defendant sufficiently understand the proceedings against him to be able to assist in his own defense. Clearly, a defendant who has a severe hearing impairment, without an interpreter, cannot understand the testimony of witnesses against him so as to be able to assist in his own defense."); State v. Schaim, 600 N.E.2d 661, 671-672 (Ohio 1992) (under the Confrontation Clause "a severely hearing-impaired defendant cannot be tried without adopting reasonable measures to accommodate his or her disability"); Peeler v. State, 750 S.W.2d 687, 690-691 (Mo. Ct. App. 1988) (constitutionally ineffective assistance of counsel in failure to request an interpreter, where the hearing-impaired defendant was "probably unable to understand what was being said at trial"); District 27 Comm. Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986) (two school boards sought to prevent attendance of any student with AIDS in any school in the city, unless all of the students at that school had AIDS); People v. Rivera, 480 N.Y.S.2d 426, 434 (N.Y. Sup. Ct. 1984) (a conviction was unconstitutionally obtained because the deaf defendant had no interpreter and did not understand his trial); State v. Staples, 437 A.2d 266, 268 (N.H. 1981) (ineffective assistance of counsel in failing to secure assistance for hearing-impaired defendant whose disability made him "unable to assist effectively in the preparation of his defense"); In re Marriage of Carney, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped"); Connecticut Inst. for the Blind v. Connecticut Comm'n on Human Rights & Opps., 405 A.2d 618, 621 (Conn. 1978) (blanket exclusion from state jobs of persons with

visual impairments), modified, 355 N.Y.S.2d 185 (App. Div. 1974); Bevan v. New York State Teachers' Retirement Sys., 345 N.Y.S.2d 921 (Sup. Ct. 1973) (statute allowing forced retirement of teacher who became blind); In re Adoption of Richardson, 251 Cal. App.2d 222, 239 (Cal. 1967) (trial court "stated, in effect, he will systematically strike any and all deaf-mute petitioners from any list of prospective adopting parents"); State v. Board of Educ., 172 N.W. 153, 153 (Wis. 1919) (excluding a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children").

Appendix B

Findings of Investigations Under the Civil Rights Of Institutionalized Persons Act 42 U.S.C. 1997 et seq.

Between 1980 and the enactment of Title II of the Americans with Disabilities Act in 1990, Department of Justice investigations under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 et seq., found unconstitutional treatment of individuals with disabilities in institutions in more than twenty-five States. From 1980 until the present, unconstitutional conditions have been found in more than 200 institutions in more than thirty States throughout the country. The tables below describe some of the findings issued by the Department of Justice pursuant to 42 U.S.C. 1997b(a)(1).

I. Investigations Prior to Enactment of the Americans with Disabilities Act

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Rosewood Center	MD	1982	Failure to provide reasonable supervision and safety	Many residents sustain injuries during "low staffing periods" (p. 4). One resident left the facility unobserved and died of exposure. Another profoundly retarded resident drowned when staff left him unattended in a bathtub. Another died after being pushed down a flight of stairs (pp. 4-5). On another occasion, "six severely handicapped female

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				residents * * * were allegedly raped by an outside intruder. There was only one staff person on duty to supervise the 32 residents * * * and only one security officer on duty to cover the entire Rosewood facility. While the inability of the residents to communicate apparently prevented state officials from confirming the rapes * * * several of the residents had positive tests for gonorrhea of the throat right after the incident" (p. 4). Several male patients "show[ed] the presence of venereal disease" and "nonconsensual sexual contact occurred between one resident and at least one and possibly three residents" (p. 4).
			Abuse of residents	An employee sexually abused a resident (p. 4).
			Unsanitary conditions	Facilities are deteriorating; the "stench of urine is prevalent in a number of buildings." Plumbing problems left overflowing toilets unrepaired for days; heating problems subjected patients to "sub-freezing temperature in the buildings themselves" at times (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate training	"Over 900 of the 1125 residents receive less than 50% of the services called for in their program plans" (p. 2).
East Louisiana State Hospital	LA	1982	Inadequate medical and mental health care	pp. 2-4
Enid & Paul's Valley State Schools	OK	1983	Inadequate medical and mental health care	"Insufficient licensed physician coverage has resulted in serious harms to residents," contributing to patient deaths (p. 2-3).
			Inadequate training	Lack of training "contributes to and manifests itself in residents' aggressive and stereotypic behaviors * * * [such as] incessant disordered physical movements, headbanging, biting, hyperactivity, and assaultive behavior" (p. 5).
			Failure to provide reasonable supervision and safety	"For example, a group of 21 naked residents were observed being led to a shower area, where two staff sprayed the residents down with a large garden type hose" (p. 5).
			Unreasonable use of physical and chemical restraints	p. 5
			Abuse of residents	Staff found "slapping, kicking, hitting, or spanking residents" while records also "reflect many instances of unexplained resident injuries" (p. 6).
			Unsanitary conditions	Lack of sanitation practices

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				contributed to parasitic and bacterial infections requiring quarantine of entire living areas (p. 6).
Wheat Ridge Regional Center	CO	1984	Failure to provide reasonable supervision and safety	"Due to lack of staff, residents suffer neglect and numerous accidents and injuries. * * * [N]umerous residents have sustained injuries where the cause remains unknown. Resident on resident assaults are common; residents engaging in self-abusive behaviors are frequently unsupervised and unattended. Residents have been found with unexplained broken bones and burns to the body. For example, one resident was found with a femur segment protruding through the skin" (p. 2). During tour, staff came upon "approximately 20 adult women being cared for by one person amid great disorder and confusion. Many of these women were partially undressed, one was urinating on the floor of the living area and several were engaging in self-abusive behavior" (p. 2).
			Inadequate medical and mental health care	"A large number of Wheat Ridge residents suffer from severe contractures of their limbs and other body deformities due to the absence of necessary physical and

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				occupational therapy" (p. 3). "One troublesome secondary effect of these immobilizing contractures due to lack of physical therapy is the dysfunctioning of the digestive system," which has apparently caused an "abnormally high percentage of Wheat Ridge residents to require pureed diets or gastroatomies for tube feeding" (p. 4).
Logansport State Hospital	IN	1984	Inadequate medical and mental health care	pp. 1-2
			Failure to provide reasonable supervision and safety	"Patients are not being adequately monitored and supervised to prevent suicidal behavior or patient-on-patient violence, to notice and correctly diagnose symptoms of serious, physical or psychiatric dysfunctions, to monitor treatment responses and drug reactions, or to determine appropriate and reasonably safe modes of treatment for each patient" (pp. 2-3).
Manteno and Eglin Mental Health Centers	IL	1984	Inadequate medical and mental health care; Inadequate training; Unreasonable use of physical restraints	Lack of professional staff lead to "inappropriate uses of drugs and serious treatment errors which have resulted in physical danger to, or unnecessary physical or chemical restraint of, the involved patients" (p. 3). Patients are further "endangered by inadequate medical care relating to serious and sometimes debilitating or

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				life-threatening drug side-effects" (p. 4).
			Failure to provide reasonable supervision and safety	"Units in the facilities are overcrowded to a point that makes it virtually impossible for staff to maintain control without regular and extensive use of physical and chemical restraints" (p. 4).
			Unsanitary conditions	"Sanitation and maintenance in portions of the facilities are so inadequate as to present serious risks to patients of poisoning, infection, or disease" (pp. 4-5).
Northville Regional Psychiatric Hospital	MI	1984	Failure to provide reasonable supervision and safety; Abuse of residents	Large number of patient deaths under unusual circumstances, some associated with restraint practices (p. 3). A patient died after "a stranglehold was applied to him while he was being subdued. He reportedly lay on the seclusion room floor from 15-20 minutes before efforts were made to resuscitate him" (pp. 2-3). "Another patient also died due to strangulation, and his body showed signs of a beating" (p. 3). "A third patient allegedly died from injuries suffered in a beating. Still another patient, who had expressed her fear for her safety to her psychologist on a Friday, died over the

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				weekend. Her body allegedly was bruised and battered" (p. 3). Police found that another patient who had died in a seclusion cell "had contusions on his face and the back of his head" (p. 3). There have also been "numerous incidents of rape, assault and threat of assault, broken bones and bruises" (p. 3). A staff member was found to have had "sexual relations with three different patients in one night." Other patients were beaten by staff, "including one who was stripped, placed in seclusion and severely beaten by several attendants" (p. 3).
			Inadequate medical and mental health care	Inadequate medical care contributed to several deaths and preventable suicides (pp. 3-4).
Fairview Training Center	OR	1985	Inadequate training	Training "is virtually non-existent" and "results in a serious level of self-injurious and aggressive behaviors" (p. 3).
			Unreasonable use of physical and chemical restraints	"[R]estraints are used at Fairview in lieu of training and for the convenience of staff," and were employed more than 2,000 times per month (p. 4).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Failure to provide reasonable supervision and safety	Records showed "an alarmingly high number of injuries," such as 197 incidents of injuries in one month resulting from self-abuse or aggression. In one two-month period, there were 27 incidents of sexual abuse (p. 3 n.1). "[W]e observed numerous residents with open wounds, gashes, abrasions, contusions, and fresh bite marks. Many other residents had deep scars and scabs from a long history of self-abuse or victimization" (p. 3). Due to inadequate supervision of residents with pica behavior (ingesting inedible objects), "[r]esidents have had to undergo surgery, sometimes on a repeated basis, to remove foreign objects or to relieve bowel and other obstructions caused by pica. Physicians at Fairview have indicated that some residents have had surgery so frequently that any more operations resulting from pica would jeopardize their lives" (p. 8).
			Inadequate medical and mental health care	Dangerous psychotropic medication practices (p. 7-8). "Seventy percent of residents institution-wide have gum

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				disease" (p. 8).
			Unsanitary conditions	"Many of the cottages we toured smelled of urine and waste. Sewage backup in cottage basements, up to three feet high on the walls, is permitted to remain for days. * * * [A]n August 1983 random sample of Fairview residents revealed that 35% had pinworm infection, a parasite which is spread by fecal and oral routes in unclean environments" (p. 9).
Fort Stanton Hospital & Training School	NM	1985	Inadequate medical and mental health care	Facilities' sole physician wrote institution-wide prescriptions for prescription medications and powerful psychotropic medications, authorizing their use when nursing staff believes it necessary, in contravention of professional standards and creating substantial risk to patients (p. 2).
			Unreasonable use of chemical restraints	Psychotropic drugs being used to restrain patients without any physician assessment for the need for such measures (p. 2.)
			Inadequate mental health care	"Many residents are subjected to potentially dangerous" prescriptions of multiple psychotropic drugs "without any medical justification" (p. 2)
Southbury Training School	CT	1985	Failure to provide reasonable supervision and safety	Low staffing levels lead to inadequate supervision, which permitted one resident to leave

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				the facility and die of exposure; another was able to remove and hide a large knife (p. 10). In one cottage, staff compensate for low staffing level by placing "at least one resident in restraints for up to 12 hours a day due to the staff's inability to monitor his activities" (p. 10).
			Inadequate medical and mental health care	Investigation found "dangerous medication interactions and errors, and found that acute medical problems, such as fractures and infections, frequently do not receive critically necessary follow-up treatment" (p. 3). Use of psychotropic medications substantially departed from professional standards, creating substantial health risks for patients (pp. 3-6).
			Inadequate training; Unreasonable use of physical and chemical restraints	Facility's failure to provide adequate training program resulted in "a dangerous reliance on the use of both physical and chemical restraint" (p. 6).
Hinds County Detention Center	MS	1986	Inadequate medical and mental health care	County Jail was being used to house mentally ill persons awaiting civil commitment hearings or placement in a mental hospital for up to eleven days. At time of investigation, jail held 42 mentally-ill

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				detainees (pp. 1-2). No mental health treatment was provided during period of confinement (p. 3). “Male mentally-ill detainees were confined * * * in a small cell designed to serve as the ‘drunk tank.’ Some of the detainees were placed in hand and leg irons” (p. 3).
Westboro State Hospital	MA	1986	Unsanitary conditions	“The smell and sight of urine and feces pervade not only the toilet areas, but ward floors and walls as well” (p. 3). “Bathrooms and showers were filthy. Living areas are infested with vermin. There are consistent shortages of clean bed sheets, face cloths, towels and underwear. Open commodes with human waste in them were often found in rooms to which many patients in unclean geri-chairs are confined all day, including meal times” (p. 3). “[N]on-sterile techniques are used when changing patients’ dressings and feeding tubes” (p. 3).
			Inadequate medical and mental health care	Patients’ physical illnesses are often misdiagnosed as psychological problems, resulting in “increased dosages of potentially dangerous

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				antipsychotic drugs" (p. 5). "Acutely life threatening illnesses * * * are also not detected appropriately or on a timely basis.* * * [I]nappropriate and inadequate medical care preceded many of the[] deaths" reviewed during the investigation (p. 5). "Patients also frequently do not receive prescribed medications because the ward or pharmacy lacks adequate supplies" (p. 4).
			Unreasonable use of physical and chemical restraints	Facility used sedating drugs on elderly patients for no medically justifiable reason, but instead to control residents' behavior "subjecting vulnerable geriatric patients to the dangerous effects of inappropriate drug usage and overmedication" (p. 7).
			Failure to provide reasonable supervision and safety; Inadequate training	pp. 7-8
Kalamazoo Regional Psychiatric Hospital	MI	1986	Inadequate training; Unreasonable use of physical restraints	Inadequate staffing prevents the facility from providing treatment that could "reduce or eliminate unreasonable risks to [patients'] personal safety and the undue use of bodily restraint" (p. 2).
			Inadequate medical and mental health care	Facility fails to adequately monitor efficacy and side

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				effects of potentially dangerous drugs, creating unjustifiable risk of "deleterious side effects, tardive dyskinesia, involuntary, abnormal muscle movements, akathisia, and parkinsonism" (p. 3).
Napa State Hospital	CA	1986	Failure to provide reasonable supervision and safety; Unreasonable use of physical and chemical restraints	Severe staffing shortages "result in patient management, in lieu of treatment, through the inappropriate use of seclusion, chemical restraint, and physical restraint" (p. 2). Restraint practices "pose significant hazards to the personal safety of NSH patients" (p. 4).
			Inadequate medical and mental health care; Inadequate training	Certain medication practices at facility "violated all known standards of medical practice" resulting in great danger to patient safety (p. 2). There was no monitoring of drug side effects and several patients exhibited an "antipsychotic drug-induced side effect, potentially irreversible, that may result in permanent physiological damage" (p. 3). Facility failed to provide training programs adequate to protect patient safety and avoid need for restraint and seclusion (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Broadview, Cleveland & Warrensville Developmental Centers	OH	1987	Inadequate training; Unreasonable use of chemical restraints	In the absence of adequate training programs, "staff overuse psychotropic medication to control the behavior of residents" (p. 1).
			Inadequate mental health care	p. 2
Metropolitan Developmental Center	LA	1986	Inadequate medical and mental health care	"MDC employs antipsychotic medication primarily as a means of controlling behavior without proper [medical] justification." As a result, "[n]umerous residents demonstrated serious neurological side effects from sustained exposure to high doses of antipsychotic drugs" (p. 2). Facility had no program for monitoring for serious, potentially irreversible side effects of these medications (pp. 2-3). Other residents "have been exposed to an extreme risk of drug-induced toxic poisoning by the absence of preliminary and periodic drug-level testing" (p. 3).
Belle Chasse State School	LA	1986	Inadequate medical and mental health care	Administration of psychotropic drugs substantially departed from professional standards. There was no program to detect "Tardive Dyskinesia" which is

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				"an antipsychotic drug induced side effect, potentially irreversible, that may result in permanent physiological damage" (p. 2).
Montgomery Developmental Center	OH	1987	Inadequate medical and mental health care; Failure to provide reasonable supervision and safety	pp. 2-3
Los Lunas Hospital and Training School	NM	1988	Inadequate training; Unreasonable use of chemical restraints	"[S]traightjackets and ammonia inhalants are used as a consequence for antisocial behavior. Restrained individuals are in some cases isolated in a room with a closed door out of sight of staff. This practice, absent adequate surveillance, places severely handicapped residents at great risk of injury and is not professionally justifiable" (p. 2). "Los Lunas staff are using physical restraints, isolation and punishment * * * to control the behavior of residents in lieu of necessary training programs" (p. 2).
			Failure to provide reasonable supervision and safety	Due to lack of supervision, a woman was raped, developed peritonitis, and died (p. 3).
			Inadequate medical and mental health care	Facility provides almost no physical therapy to the large number of patients with body deformities who need therapy "to prevent muscular or

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				skeletal breakdown" (p. 3).
W.A. Howe Developmental Center	IL	1989	Inadequate training; Unreasonable use of physical and chemical restraints	"To control resident behavior, in lieu of professionally designed training programs, staff resort to chemical and physical restraints" (p. 3).
			Inadequate medical and mental health care	"Due to the lack of adequate medical supervision of patients, early signs of illness and disease go undetected and/or untreated" (p. 5).
			Failure to provide reasonable supervision and safety	Patient was dead on the floor of her room for some time before staff discovered her, after staff failed to perform scheduled room checks. Another patient strangled to death while left unsupervised in improperly-applied restraints. Another resident left unsupervised ran out of the front door and into traffic, where she was killed (pp. 6-7).
Great Oaks Center	MD	1990	Failure to provide reasonable supervision and safety; Inadequate training	Investigation found that inadequate supervision contributed to "an alarmingly high frequency of resident injuries" (p. 5). Inadequate training program "fails to reduce self-abusive, aggressive, and other

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				maladaptive and inappropriate behaviors." "As a result of these problems, rocking, pacing, and aimlessly wandering residents were seen throughout the institution. Instances of self-abuse were not an uncommon sight; observed attempts to intervene appropriately were rare. Many residents were observed to have cuts, bruises and scrapes. Clearly, many of the injuries may have been preventable with more effective programming and if more trained staff were available" (p. 3).
			Unreasonable use of physical and chemical restraints	"Staff resort to chemical and physical restraints to control residents' behavior, in lieu of professionally designed training programs" (p. 3).
			Inadequate mental health care	p. 4
			Abuse of residents	A number of staff had been disciplined or criminally charged for abusing patients (p. 5 n.1).
Hawaii State Hospital	HI	1990	Inadequate food, clothing and shelter	Staff at facility confirmed that there was often insufficient food; "Staff reported that patients are often wrapped in blankets and sheets due to the absence of adequate clothing"; inadequate items for basic personal hygiene (p. 2).

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			Unsanitary conditions	"[S]anitation is grossly inadequate. During a tour of [one unit] our consultants had to walk around numerous puddles of urine. * * * * Kitchen facilities exhibited signs of serious cockroach infestation and other unsanitary practices" (p. 3).
			Inadequate medical and mental health care	"[D]rug practices at HSH are seriously deficient and represent significant departures from generally accepted medical standards" (p. 3).
			Unreasonable use of physical and chemical restraints; Inadequate training	"In view of serious, chronic and facility-wide staffing shortages, HSH staff employ bodily restraints – physical restraints, seclusion, and chemical restraints – at an unjustifiably high level solely for their own convenience or in lieu of professionally designed treatment programs" (p. 5).

II. Investigations Subsequent To Enactment of the Americans with Disabilities Act

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Arlington Developmental Center	VA	1991	Failure to provide reasonable supervision and safety; unsanitary conditions	"In many units, there was a pervasive smell of urine. Residents in diapers were wet; often their clothes were soaked

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				through with urine" (p. 3).
			Inadequate medical care	"[W]e observed young children, some as young as two, whose limbs were severely contracted" from lack of physical therapy. "Many residents were left unattended in cribs, with no efforts being made to move their limbs, position them, or to provide any real physical therapy services" (p. 3). "The penis of another resident, a paraplegic with an in-dwelling Foley catheter, was eroded throughout its entire length due to inadequate care and monitoring" (p. 3). Inadequate medical care contributed to deaths of five residents in past six months (p. 4).
			Abuse of residents	pp. 3-4
			Inadequate training	pp. 8-9
Northern Virginia Training Center	VA	1991	Inadequate training; Unreasonable use of physical and chemical restraints	In part because of inadequate training programs, use of restraints was pervasive: "restraint is used so frequently that it appears to be the treatment of choice rather than a technique of last resort" (p. 4).

			Inadequate medical and mental health care	"Serious medical conditions and marked functional deterioration are not comprehensively evaluated or effectively treated" due to inadequate medical system (p. 5).
Boswell Retardation Center	MS	1991	Inadequate training; Unreasonable use of physical and chemical restraints	"Boswell's staff are using restraints, isolation and punishment to control the behavior of residents in lieu of necessary training programs" (p. 2).
			Inadequate mental health care	pp. 3-4
			Unsanitary conditions	p. 5
Embreeville Center	PA	1991	Inadequate medical and mental health care	Delays in emergency medical care contributed to patient death (p. 2).
			Abuse of residents	Undercover agent observed repeated instances of abuse over nine-week period (p. 3).
			Inadequate training programs	p. 2
Agnews Developmental Center	CA	1991	Unsanitary conditions	"Clients and residents smelled of urine and feces" (p. 2).
			Unreasonable use of physical and chemical restraints	Bodily restraint and medication used in lieu of training programs or adequate staff supervision (pp. 4-5).
			Inadequate medical care	Investigation found "resident after resident whose legs had lost all muscle tone and whose hip, knee and ankle joints had become permanently fixed or

				cemented in place in a deformed frog-leg or windswept position due to months and even years of inactivity" (p. 2). "[I]nordinate delays in diagnosing and responding to serious resident illness" placed large population of medically fragile patients at substantial risk (pp. 5-6)
			Abuse of residents	Administrators "confirmed to us that staff abuse of residents is a serious problem" (p. 2).
Memphis Mental Health Institute	TN	1992	Inadequate medical and mental health care	Deficiencies in the facility's medical care system contributed to two recent deaths (pp. 5-6). Lack of psychiatrists leads to serious errors in diagnosis and medication prescription (pp. 7-8).
			Unreasonable use of physical and chemical restraints	"Patients at MMHI are subjected to both an undue amount of bodily restraint and dangerous restraint practices" (p. 9). "[S]taff members are placing patients inappropriately in physical restraints simply because they are confused or disoriented." Patients are also restrained while sedated, "a substantial departure from accepted standards of psychiatric care" (pp. 9-10).
Arizona State Hospital	AZ	1993	Unreasonable use of physical and chemical	Patients "are routinely put into five-point restraints (a practice

			restraints	where a patient is restrained on a bed and bound by the ankles, by the wrists with the arms to the side, and by a strap across the abdomen) *and* placed into a locked seclusion room" for convenience of staff. Leaving a restrained patient unsupervised creates "great risk of harm from choking and asphyxiation" (p. 2).
Jones County Jail	MS	1993	Inadequate medical and mental health care	Mentally ill inmates, and mentally ill persons detained pending civil commitment proceedings, housed in five-by-six foot steel cage, sometimes for months (p. 4).
Chicago-Read Mental Health Center	IL	1993	Inadequate mental health care; Inadequate training	pp. 1-2
			Unreasonable use of physical restraints	pp. 2-3
Sonoma Developmental Center	CA	1994	Failure to provide reasonable supervision and safety	"As a result of inadequate supervision, residents have been subjected to numerous, serious, unnecessary injuries" (p. 2). In one incident, a resident drowned in a bathtub while unattended (p. 2). In another, one resident was attacked by another with a knife (p. 2).
			Inadequate training	Training programs are inadequate and lead to harm from unaddressed behaviors and to the unnecessary and

				unreasonable use of physical and chemical restraints (pp. 4-6).
			Inadequate medical care	Improper feeding practices for severely disabled residents "subject them to severe risk of choking, aspiration and aspiration pneumonia" (p. 3). "The lack of physical therapists and physical therapy services has led to the development of undue contractures, muscle atrophy, inappropriate body growth, and physical degeneration" (p. 3). "The failure of staff to properly maintain [tracheostomy] tubes subjects residents to the risk of death from suffocation and presents other significant health risks, including infection" (p. 3).
Southern & Central Wisconsin Developmental Centers	WI	1994	Failure to provide reasonable supervision and safety	Inadequate supervision has led to serious resident injuries. For example, one elderly resident with condition that creates great risk of falling was taken to hospital for injury caused by a fall, where hospital staff noted that she had fallen 62 times that day (p. 10).
			Inadequate medical and mental health care	While facility has over 300 residents with seizure disorders, management practices are dangerously deficient; some patients kept on medications with strong and dangerous side effects for years after they are no longer

				necessary; some are kept on potentially dangerous drugs even though they are not helping. For example, one patient who had been seizure free for six years, was kept on medication even though lab results showed that dosage was too low to be having any effect and even though patient appeared to be suffering from dementia as a side effect of the drug (p. 3-4). Facility's use of psychotropic medications substantially departs from professional standards, exposing patients to unnecessary risks of dangerous side effects (pp.7-9).
			Inadequate training; Unreasonable use of physical restraints	pp. 10-13
Eastern State Hospital and Hancock Geriatric Center	VA	1994	Inadequate mental health care; Inadequate training; Unreasonable use of physical and chemical restraints	pp. 1-6
Clover Bottom Developmental Center	TN	1995	Failure to provide reasonable supervision and safety	Many injuries linked to lack of supervision; "in one seven month period, a resident received injuries on twenty-six occasions," half of which required stitches (pp. 3-4).
			Inadequate training programs	pp. 5-8
			Inadequate medical and mental health care	"Residents languish in carts and ill-fitting wheelchairs, which exacerbate or allow

				physical deformities to progress – in some cases to a point that the deformity may preclude a person from sitting upright in a wheelchair" (p.12).
Fircrest Residential Habilitation Center	WA	1992	Failure to provide reasonable supervision and safety	"[R]esidents suffer needless serious injuries" due to lack of supervision, including an average of "410 incidents per month for some 440 residents" (p. 1). "Numerous residents were seen with fresh wounds and lacerations, including shaved spots on heads revealing stitches and healing injuries; red marks and significant bruises; multiple scabs and scars, and large bandages or casts" (pp. 1-2). "Our consultants observed residents engaged in self-injurious behavior, having seizures, masturbating in open view – all without staff intervention of any kind" (p. 2). "[O]ne resident was found dead in the day room of a living unit; the resident had been dead for up to three hours before her body was discovered by staff" (p. 2). Dangerous positioning and feeding practices risk the lives of many residents (p. 2).
			Inadequate training	"Due to a lack of human interaction and care, residents

				have developed significant stereotypic, maladaptive or anti-social behaviors" including "headbanging, eating foreign objects and pulling hair, to waving arms, flicking fingers and other self-stimulatory activities" (p. 1). "Much of the anti-social, maladaptive behavior, injuries and use of restraints is attributable, in significant part, to the lack of * * * training programs" (p. 5).
			Unreasonable use of physical and chemical restraints	Physical restraints, including "staff incapacitating residents by holding them down involuntarily on the floor or elsewhere for a period of 'enforced relaxation'" were pervasively "used as punishment, for the convenience of staff and in lieu of training programs" (p. 4-5).
Forrest County Jail	MS	1993	Inadequate mental health care	"There are no mental health services available at the jail and the holding cells into which disturbed or mentally-ill * * * prisoners are placed pose a direct threat to their health and safety" (p. 2). "During the course of our tour of the jail, our consultants observed a severely mentally ill inmate, clad only in an undershirt, housed in the general population" where he had been waiting for several weeks for a transfer to a mental health facility. "He had

				allegedly eaten some glass and was prone to defecate on the floor of the cell" (pp. 2-3).
Nat T. Winston Developmental Center	TN	1995	Inadequate training; Unreasonable use of physical and chemical restraints	"NTWDC, because of the ineffectiveness of its behavioral programs, relies on physical and chemical restraints to control residents' behavior" (p. 3). Lack of training programs and supervision contribute to high incidence of injuries, including "multiple bites, lacerations, broken bones, bruises and abrasions. One individual was injured 25 times * * * in an eight-month period. * * * Several residents were found attempting to cut themselves with knives or razorblades" (p. 4).
			Inadequate medical and mental health care	pp. 4-5
			Unsanitary conditions	"Sanitary conditions were very poor at the food facility"; "Mold and mildew were prevalent throughout the refrigerators and coolers" because of plumbing leaks (pp. 5-6).
Greene Valley Developmental Center	TN	1995	Inadequate medical and mental health care	"Due to an inadequate medical care delivery system * * * residents are subjected to needless fractures, recurrent aspiration, preventable weight loss, recurring seizures, avoidable injuries, and other direct threats to their health" (p. 2).

				Psychiatrists prescribing dangerous combinations of drugs "absent any rational justification in violation of medical standards" (p. 3).
			Failure to provide reasonable supervision and safety	Due to lack of supervision, residents "are repeatedly 'found with blood' on them from injuries that occur outside of staff supervision. On other occasions, residents' severe injuries are discovered only during bathing or at bedtime" (p. 5). "[O]ne eleven year old boy apparently lost the sight in one eye from repeated headslapping which resulted in a detached retina. Other residents were noted with swollen, disfigured features resulting from years of self-injury. Still others had permanent scars from continual self-mutilation of their faces and arms" (p. 6).
			Inadequate training	Many residents' "destructive behaviors remain unaddressed" by training programs. "For example, one resident had large scratches on her face that had been self-inflicted; our consultant psychologist was informed that there was no program to modify or eliminate this unsafe behavior." The same was true of another patient who repeatedly reopened a wound on his face and one who had a history of

				pica for almost 20 years (p. 7).
Northern Virginia Mental Health Institute	VA	1995	Inadequate medical and mental health care	"[P]sychiatric care is grossly inadequate" and "poses direct threats to the health and safety of patients" (p. 3). "A county hospital is located only a few hundred yards [away], yet there have been a number of well-publicized deaths which are linked to substantial delays in providing adequate medical care" (p. 4). "[O]ne patient died partly because of a toxic buildup of antidepressants in her body. Another patient died from meningitis after a psychiatrist requested that she be seen by an internist who failed to appear to assess her life-threatening condition" (p. 4).
			Unreasonable use of physical and chemical restraints	"Due to inadequate staffing, NVMHI is unable to provide one-on-one monitoring for many residents who are suicidal or are in restraints or seclusion and require such close supervision. Patients have been injured while being restrained and are then left unattended by medical personnel" (p. 5).
			Failure to provide reasonable supervision and safety	"[T]he lack of supervision and care is so grave that patients have been subjected to severe harm, including death" (p. 5).
Northern Virginia Mental Health	VA	1996	Failure to provide reasonable supervision	Problems with supervision persist: in the past year, there

Institute			and safety	were 70 incidents of patients escaping from the facility, and an average of 27 incidents of patient self-injury and another 17 incidents of patient-on-patient violence each month (p. 7). Patients repeatedly injured themselves even when "supposedly under careful supervision." "One patient committed approximately 12 such acts of self-injury while on 'special observation' status." "One patient somehow managed to obtain a knife while in the seclusion room" (p. 7).
			Inadequate training	In some cases, "staff have resorted to calling the police and having patients arrested rather than addressing the underlying psychological issues" (p. 8).
Central State Hospital	VA	1997	Failure to provide reasonable supervision and safety	Lack of staffing and failure to supervise patients leads to repeated incidents of preventable injury and suicide attempts (pp. 3-5). One patient supposedly under 24-hour surveillance was found with 42 bruises over his body from unwitnessed incidents (p. 4).
			Inadequate medical and mental health care	pp. 5-7, 9-11

			Unreasonable use of physical and chemical restraints	Facility's use of restraints substantially departs from professional standards (pp. 7-9). Patient died after being left in five-point restraint on bed as punishment; her psychiatrist had warned facility staff not to restrain her because of seizure risk. Nonetheless, the "patient had spent over 300 hours of the last two months of her life in restraints" (p. 8).
Landmark Learning Center	FL	1996	Failure to provide reasonable supervision and safety	pp. 3-4
			Inadequate training and mental health care	pp. 4-10
Harold Jordan Rehab. Center	TN	1996	Inadequate training and mental health care	pp. 3-4
Los Angeles County Jail	CA	1997	Inadequate mental health care	Jail system housing approximately 1,700 mentally ill inmates provides virtually no treatment to most inmates other than medication (p. 8). Jail exacerbates many inmates' illness by placing them in solitary confinement for 23 hours or more per day (p. 12).
			Failure to provide reasonable supervision and safety	Jail places many mentally ill inmates in general population, but requires them to wear uniforms that designate them as mentally ill. As a result, many inmates suffered from beatings and sexual assaults (pp. 14, 17).

Centro de Reeducation para Adultos	PR	1997	Unsanitary conditions/ inadequate shelter	"Many of the buildings are dilapidated, decaying, and lack adequate plumbing and lighting." At one facility, "the showers do not work, the faucets do not work, and the toilets do not flush properly. In order to bathe the clients, staff dump water from water tanks into large movable garbage cans from which the staff manually extract water using smaller buckets to pour it on the residents." Lack of water means that staff cannot wash hands after changing some patients' diapers (p. 3).
			Inadequate training and mental health care; Failure to provide reasonable supervision and safety	Investigators found patient "sitting on the floor * * * moaning to himself. We noticed a stream of blood trickling down his helmet. * * * * When the nurse removed his helmet, we discovered that [the patient's] head had been severely damaged due to years of self-abuse and head banging. [He] had butted and rammed his head into walls and post corners so often that he had pushed back completely his hair and skin on the front half of his head." Nonetheless, "the Commonwealth has failed to provide [the patient] with professional psychological or behavioral services." Investigation found many other such individuals not receiving adequate care (p. 6).

				p. 4
			Unreasonable use of physical and chemical restraints	"Restraints are prevalent at many of the institutions * * * and are related lack of behavioral programming, training, and professional mental health intervention. * * * * [S]taff use a bed sheet to tie [a client's] waist and torso to a bench and to one of the iron bars at the facility to keep her from walking around the building and engaging in aggressive, maladaptive behaviors such as biting and hitting other clients. Staff tie [another client] up in four-point restraints to her bed for the entire time she is menstruating" (p. 7)
Center for Integral Services	PR	1997	Failure to provide reasonable supervision and safety	"On our tour of CIS, we generally found a dangerous environment for the clients. We noticed many CIS residents with fresh injuries, including lacerations and bruises, as well as historical remnants of past injuries suffered at CIS, such as disfiguring scars. Many clients had suffered facial injuries or severe injuries on the back of their heads with resulting deep scars and hair loss" (p. 3). Parents of clients showed pictures of "son with a very swollen, bulbous, purple and black eye. The father told us that his son has suffered a host of other injuries at CIS

				including a broken nose, a severe knee injury * * * and various head injuries, some requiring sutures." Another picture showed a client with a black eye, "a bloody left eye socket, bloody swollen lips, and a face marked with fresh lacerations. The mother reported that her son has also suffered a fractured arm, numerous lacerations, bites, broken teeth" and "is now limited in the use of his hands to one index finger and thumb on each hand" (p. 4).
			Inadequate food, shelter and sanitation	"[T]he facility runs out of food monthly" and "is in a state of disrepair." "Residents have to sleep on beds with old, worn mattresses that are dirty and often wet." Toilets do not flush. As a result, "virtually all of the toilets on the men's side had urine and/or feces in them, producing a health hazard and an unpleasant, malodorous environment" (pp. 5-6). "Staff admitted to us that they routinely bathe the male clients by lining them up naked and hosing them down in groups * * * with a garden hose" (pp. 6-7).
			Abuse of residents	Facility administrator acknowledged problems with protecting clients from staff abuse and stated that "one CIS staff member had recently been convicted for sodomizing a

				client" (p. 3).
			Unreasonable use of physical and chemical restraints	"CIS frequently uses restraints as a substitute for meaningful activity during the day or for appropriate programs to address maladaptive behaviors * * * to control residents they routinely use mechanical restraints, such as leather cuff belts (which are tied to the heavy metal beds around the limbs of the clients), restraint vests and straight jackets, and restraint nets" (p. 8).
			Inadequate medical and mental health care	Facility "routinely runs out of certain critical drugs" such as anti-convulsant medications for epileptic patients, who suffered repeated untreated seizures as a result (pp. 5, 10). "Most of the residents are put on psychotropic medication simply to control their behaviors without appropriate psychiatric assessments, diagnoses, treatment and monitoring" (p. 9).
			Inadequate training programs	pp. 7-9
Hammond Developmental Center and Pinecrest Developmental Center	LA	1997	Failure to provide reasonable supervision and safety	Client went for weeks with an undetected fractured shoulder, even though obviously in pain and bruised (p. 6).
			Abuse of residents	Four staff members recently indicted for abusing residents,

				many other incidents of abuse documented by facility (pp. 4-5, 15-16).
			Unreasonable use of physical and chemical restraints	"A staff member left a client in full mechanical restraints unattended for hours in a room with a known aggressor" while staff watched television (p. 5). Failure to provide adequate training programs leads to some patients being in restraints virtually non-stop (p. 12). Failure to monitor clients in restraints led to injuries (p. 12-13).
			Inadequate training	As a result of insufficient training programs, "residents' aberrant behaviors continue unabated, often get worse, and lead frequently to other destructive behaviors" (p. 10). Staff in one unit withheld food from clients if they misbehaved (p. 10).
			Inadequate medical and mental health care	pp. 13-15
Holly Center	MD	1998	Failure to provide reasonable supervision and safety; Inadequate medical care	Improper feeding techniques for severely disabled residents contributed to a constant rate of hospitalization and several deaths from choking and severe respiratory problems (pp. 3-5). Systemic inadequacies in medical care contributed to the recent death of a severely

				handicapped and retarded resident (pp. 7-8).
			Inadequate training	pp. 8-13
Davies County Detention Center	KY	1998	Inadequate mental health care	Jail provides no mental health services. "During our tour, we observed several acutely mentally ill individuals at the main jail, obviously in need of psychiatric evaluation and treatment, being left for days at a time in 'observation' – i.e., in a cell by themselves. One inmate was observed singing for hours on end, and eating his own feces" (p. 11). As a result of inadequate mental health and suicide prevention system, a 15-year-old boy killed himself (p. 12).
New Castle Developmental Center	IN	1998	Failure to provide reasonable supervision and safety; Inadequate training	"Injuries are pervasive throughout the campus. With a census of 164 individuals, New Castle averaged over 1,000 resident injuries/incidents on a monthly basis"; over a four-month period, "88 percent of New Castle residents sustained injuries; 82 percent of the residents were injured more than one time during this period" (pp. 2-3). In a single month, one resident was assaulted 20 times and another was assaulted 19 times (p. 3). "Other injuries are unwitnessed by staff, including bone fractures, bloodied noses and

				body bruises" (p. 3). "[W]e witnessed instances in which residents engaged in aggressive and self-injurious behaviors (including head slapping, hand biting, eye gouging and table banging) without appropriate and timely staff intervention (p. 4).
			Inadequate medical and mental health care	While half of residents have epilepsy, facility's seizure management practices dangerously depart from accepted medical practices, increasing risk of liver and permanent brain damage (pp. 5-6). Insufficient levels of nursing staff lead to failures to identify and treat serious medical problems (pp. 6-7).
Georgia Juvenile Facilities	GA	1998	Inadequate mental health care	Inadequate mental health care provided throughout State's juvenile detention facilities and training schools (pp. 9-11, 19-22). Many mentally ill youth "end up locked in security units where they spend large portions of their days isolated in small rooms with few activities. In these units, and elsewhere, they are often restrained, hit, shackled, put in restraint chairs for hours, and sprayed with [pepper spray] by staff who lack the training and resources to respond appropriately to the manifestations of mental

				illness" (p. 20).
Western State Hospital	VA	1999	Inadequate medical and mental health care	Facility fails to identify and address mental health needs, leading to inadequate treatment and risk of harm. In one case, patient identified as suicidal was given no treatment to address suicidal urges and subsequently hanged himself in his room (pp. 3-4). Physicians are not permitted to prescribe some medically-indicated drugs for budget reasons (pp. 5-6). Inadequate medical care contributed to several recent deaths (p. 8).
			Unreasonable use of physical and chemical restraints	Facility uses excessive and dangerous restraint techniques (p. 7).
			Failure to provide reasonable supervision and safety; Inadequate training	Combination of inadequate staffing and training for patients results in high level of violence and injuries. Within one 90-day period, the facility of 370 patients "recorded 169 altercations, 81 instances of self-injurious behavior, and 128 falls" as well as 8 suicide attempts and 13 escapes. In the recent past, one patient committed suicide and was dead for an hour before being discovered (p. 9).
Rainier School & Frances Haddon Morgan Center	WA	1999	Unreasonable use of physical and chemical restraints	"In 1998, Rainier logged many thousands of hours of restraint use, without demonstrating that less restrictive interventions

				were tried or that underlying behavioral support plans and services were adequate." For example, the facility's response to patients attempting to eat inedible objects (pica) or digging at their eyes or rectums was to place patients in nearly constant restraints: one patient with pica behavior spent 2,000 hours in a restraint suit over a six-month period; another averaged 600 hours per month for pica and rectal digging; another averaged 22 hours per day in the suit for rectal digging (pp. 2-3).
			Failure to provide reasonable supervision and safety; Inadequate training; Inadequate medical and mental health care	"Without the necessary specialized treatment, * * * residents have suffered serious harm. Residents * * * have blinded themselves from chronic behaviors, such as eye poking and head banging, that the facilities have not addressed in accordance with accepted professional standards" (p. 7). Numerous incidents of unaddressed, dangerous behaviors, such as pica, head-banging, and eye-poking (pp. 7-8). In one facility, "approximately 20 percent of all Morgan residents were admitted to the emergency room or hospital, some on more than one occasion, for treatment of injuries" in a one-year period;

				during same year residents in another facility "suffered approximately 77 lacerations requiring sutures (32 involving the head), 37 bone fractures, 8 dislocated shoulders, and 2 incidents of finger amputation" (p. 10).
Clark County Detention Center	NV	1999	Inadequate mental health care	Jail failed to identify adequately mentally ill inmates and provide appropriate treatment, resulting in serious harm and suicides (pp. 5-6).