IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

BUDDY CASON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 84-313-1-MAC
	)	
JIM SECKINGER, et al.,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' MEMORANDUM OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' POSITION THAT SECTION 504 AND THE ADA ARE APPLICABLE TO THE GEORGIA DEPARTMENT OF CORRECTIONS AND ITS INSTITUTIONS

INTRODUCTION

Cason v. Seckinger is a class action suit filed in 1984 against various Georgia state correctional officials challenging general prison conditions under § 1983 of the Civil Rights Act. The certified plaintiff class comprises all past, current, and future inmates housed at the Middle Georgia Correctional Complex, which consists of five separate facilities that primarily house male inmates, and a subclass that includes all sentenced females housed by the Georgia Department of Corrections. On March 15, 1995, Plaintiffs filed a motion to amend their complaint to add claims under title II of the Americans with Disabilities Act of 1990 ("title II" or the "ADA"), 42 U.S.C. §§ 12131-34, and section 504 of the Rehabilitation Act of 1973 ("section 504" or the "Rehabilitation Act"), 29 U.S.C. § 794, in order to address

what they allege are widespread problems with care and access for inmates with disabilities.

Plaintiffs allege that Defendants have violated the ADA and the Rehabilitation Act by routinely excluding Plaintiffs with disabilities from a wide range of correctional programs on the basis of Plaintiffs' disabilities, by failing to make reasonable modifications in the programs and activities that Defendants provide to prison inmates in order to allow Plaintiffs to participate in such programs and activities, by failing to provide appropriate auxiliary aids and services to Plaintiffs where necessary for effective communication, and by building and/or renovating prison facilities in a manner that does not comply with federal accessibility standards.

Defendants have opposed adding these claims to the suit, raising questions regarding the applicability of the Rehabilitation Act and the ADA to state correctional facilities. On April 2, 1996, Magistrate Judge Hicks issued an Order requiring the parties to brief the coverage issues and holding Plaintiffs' motion to amend in abeyance pending resolution of the issues. In their Brief, Defendants argue that the protections of the ADA and Rehabilitation Act do not extend to inmates in state correctional facilities.[1] The United States as amicus curiae

[1] Defendants, while acknowledging that the issue is not now before this Court, have also questioned the provisions of the ADA that abrogate the states' Eleventh Amendment immunity, suggesting that the scope of that abrogation is open to question because

urges this Court to reject that argument. As we demonstrate below, the protections of title II of the ADA and section 504 of the Rehabilitation Act do apply to inmates in state prisons because the statutes apply to all public entities and all recipients of federal financial assistance, respectively. And, as we further demonstrate, case law strongly supports the coverage of inmates in state correctional facilities under section 504 and the ADA.

BACKGROUND

The Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, is Congress' most extensive civil rights legislation since the Civil Rights Act of 1964. Its purpose is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA's coverage is

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Congress did not specify which of the ADA's provisions were enacted pursuant to the Commerce Clause as opposed to the Fourteenth Amendment. Def.'s Brief at 8 (citing Seminole Tribe of Fl. v. Florida, 116 S. Ct. 1114 (1996). We agree that that question is not presented here, but disagree that Seminole raises any question as to the scope of the ADA's abrogation of state immunity. In enacting the ADA Congress broadly invoked "the sweep of Congressional authority, including the power to enforce the fourteenth amendment ***." 42 U.S.C. § 12101(b)(4). The Fourteenth Amendment, rather than the Commerce Clause, is the traditional constitutional authority for legislation proscribing state conduct. See EEOC v. County of Calumet, 686 F.2d 1249, 1253 (7th Cir. 1982). Moreover, after Seminole at least one court that has considered the issue of whether Congress had the constitutional authority to abrogate Eleventh Amendment immunity under the ADA (as well as under the Rehabilitation Act) has found that it had such authority. See Armstrong v. Wilson, No. C 94-2307 CW, slip op. at 21, 25 (N.D. Cal. Sept. 20, 1996) (copy attached).

accordingly broad -- prohibiting discrimination on the basis of disability in employment, state and local government programs and services, transportation systems, telecommunications, commercial facilities, and the provision of goods and services offered to the public by private businesses. This action involves title II of the ADA, which prohibits disability-based discrimination by state and local governmental entities.

Title II of the ADA was enacted to broaden the coverage of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination in any program or activity that receives federal financial assistance, including the federally assisted programs and activities of state and local governments. Title II extends these protections to all state and local governmental entities regardless of whether they receive federal funds.

The substantive provisions of the statutes are similar. Section 504 provides in pertinent part:

> No otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

29 U.S.C. § 794(a).

Title II of the ADA provides in pertinent part:

> [n]o 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.

ARGUMENT

THE ADA AND THE REHABILITATION ACT APPLY TO STATE CORRECTIONAL FACILITIES

A. The Plain Language of Both Statutes Applies to the Operations of State Correctional Facilities

The starting point in statutory construction is the language of the statute. Bailey v. United States, 116 S. Ct. 501, 506 (1995). An examination of the plain language of title II and section 504 establishes that both statutes apply to state prison facilities. See Bonner v. Lewis, 857 F.2d 559, 562 (9th Cir. 1988); Gates v. Rowland, 39 F.3d 1439, 1446-1447 (9th Cir. 1994); Inmates of The Allegheny County Jail v. Wecht, 1996 WL 474106 (3rd Cir. Aug. 22, 1996), vacated, reh'g granted, Sept. 20, 1996; see also Lue v. Moore, 43 F.3d 1203, 1205 (8th Cir. 1994) (applying section 504 to prisoners); Harris v. Thigpen, 941 F.2d 1495, 1522 (11th Cir. 1991) (same).

Section 504 prohibits disability-based discrimination by "any program or activity receiving federal financial assistance." 29 U.S.C. § 794(a) (emphasis added). Similarly, title II prohibits any "public entity," i.e., "any State or local government" and "any department, agency, special purpose district, or other instrumentality of State or States or local government" 42 U.S.C. §§ 12131(1)(A)&(B) (emphasis added), from discriminating against qualified individuals with disabilities in

any services, programs, or activities of that public entity. 42 U.S.C. § 12132. State correctional facilities clearly fall within both definitions: they receive federal financial assistance,[2] and Departments of Corrections are "departments" of the state.

Moreover, Congress has emphasized that the term "program or activity" means "all of the operations of * * * a department, agency, * * * or other instrumentality of a State or of a local government," and has directed that the terms "be given the broadest interpretation." 20 U.S.C. § 1687 (emphasis added); 29 U.S.C. § 794(b)(1)(A) (emphasis added); S. Rep. No. 64, 100th Cong., 2d Sess. at 5, reprinted in 1988 U.S.C.C.A.N. at 7.[3] Thus it is clear that section 504 covers "all of the operations" of state correctional departments, including the treatment of the inmates incarcerated in state correctional facilities, if the state department of corrections receives federal funding. There is absolutely no indication in the statutory language or

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[2] To support a finding that section 504 is applicable, Plaintiffs must establish that the Georgia Department of Corrections receives federal financial assistance. We assume, for purposes of discussion, that the Department receives such assistance.

[3] In 1988, Congress enacted the Civil Rights Restoration Act, to "overrule" the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984), and to ensure that the terms "program and activity," appearing in various civil rights statutes including section 504 of the Rehabilitation Act, are properly defined. S. Rep. No. 64, 100th Cong., 2d Sess. 1, 2, 4, 5, 6-7 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 4, 6, 7, 8-9.

legislative history that Congress intended to carve out certain state departments or portions of such departments.

Title II also covers all the operations of state correctional departments. In enacting title II, Congress not only employed the same terminology contained in section 504; it specifically directed that title II be interpreted in a manner consistent with section 504. See 42 U.S.C. §§ 12134(b) and 12201(a). Therefore, the terms "programs" and "activities" in title II must be given the same meaning as in section 504.[4] Accordingly, title II, like section 504, covers "all of the operations of" state correctional departments.

Even if Congress had not enacted the Restoration Act and specified that a "program or activity" encompasses "all the operations of" a federally assisted department, title II and section 504 would nonetheless cover the operations of state correctional facilities. It is well-established that words in a statute are to be given their common, ordinary meaning. See FDIC v. Meyer, 114 S. Ct. 996, 1000 (1994); Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2251, 2255 (1994). See MCI

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[4] When construing a statute, "`[i]t is not uncommon to refer to other, related legislative enactments when interpreting specialized statutory terms,' since Congress is presumed to have `legislated with reference to' those terms." Reno v. Koray, 115 S. Ct. 2021, 2025 (1995), quoting Gozlon-Peretz v. United States, 498 U.S. 395, 407-408 (1991). Moreover, when Congress borrows language from one statute and incorporates it into another, it is well settled that the language of the two acts should be interpreted the same way. See Morales v. Trans World Airlines, 504 U.S. 374, 383-384 (1992); Ingersoll-Rand v. McClendon, 498 U.S. 133, 144-145 (1990); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).

Telecommunications Corp v. AT&T Co., 114 S. Ct. 2223, 2236 (1994) (Stevens, J. dissenting), citing Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) (Hand, J.) (noting the usefulness of dictionaries in statutory interpretation), aff'd, 326 U.S. 404 (1945).

As the court in Innovative Health Systems, Inc. v. City of White Plains, 931 F. Supp. 222, 232 (S.D.N.Y. 1996), explained:

> "Activity" is defined by Webster's Third New International Dictionary (1993) as a "natural or normal function or operation." Because zoning is a normal function or operation of a governmental entity, the plain meaning of "activity" clearly encompasses zoning. (footnote omitted.)

Thus section 504 and title II cover the natural or normal functions or operations (i.e., the "activities") of state correctional departments and the facilities they administer. Further, correctional departments and prisons operate many "programs" as that term is commonly understood. For example, prisons may operate rehabilitative programs, including work release, vocational, and reward systems for good behavior, and programs for the treatment of mental illness and substance abuse. See also, Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 WL 735802 *3 (M.D. Ala. Apr. 27, 1993) (copy attached) ("under common usage and understanding of the terms [service, program, or activity,] the jail and all of its facilities, including the shower, constitute a service, program or activity of the City *** to which the ADA applies").

Finally, the prohibitions of title II are not limited to the discriminatory exclusion of or denial of benefits to individuals from services, programs, or activities. Title II also prohibits

public entities from subjecting individuals with disabilities to discrimination by providing that "no qualified individual * * * shall * * * be subjected to discrimination by any such entity." 42 U.S.C. § 12132. This final phrase must be construed to protect prison inmates from discriminatory conduct regardless of whether prison operations are considered to involve services, programs, or activities. To conclude otherwise impermissibly makes the final phrase of § 12132 mere "surplusage" and "altogether redundant" with the guarantee that a qualified individual not be "excluded * * * or denied the benefits of the services, programs, or activities of a public entity." Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2413 (1995); Gustafson v. Alloyd Co., 115 S. Ct. 1061, 1069 (1995). The court in Innovative Health Systems also followed this analytical approach and found:

> no suggestion in the statute that zoning or any other type of public action is to be excluded from this broad mandate. Moreover, the last phrase of Title II's prohibition is even more expansive, stating simply that no individual with a disability may be `subjected to discrimination' by a public entity.

931 F. Supp. at 232, (emphasis added). See also Crowder v. Kitagawa, 81 F.3d 1480, 1484 (9th Cir. 1996) ("neither stairs nor the spoken word is a `service[], program[], or activit[y]'" of a public entity, yet each can constitute a violation of Title II); Oak Ridge Care Ctr. v. Racine County, Wis., 896 F. Supp. 867, 872-873 (E.D. Wis. 1995) (even if zoning is not a service, program, or activity within the meaning of title II, "the

statute's catch-all phrase protects [plaintiffs] from being `subjected to discrimination by any such entity'").

B. Deference to Department of Justice Regulations Requires the Conclusion that the Rehabilitation Act and Title II Apply to State Correctional Facilities

The implementing regulations for section 504 and title II further demonstrate that state correctional institutions are covered by these statutes. Congress explicitly delegated to the Department of Justice the authority to promulgate regulations under both section 504 and title II. 29 U.S.C. § 794(a); 42 U.S.C. § 12134(a). Accordingly, the Department's regulations and its interpretation thereof are entitled substantial deference. Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2386 (1994); Martin v. Occupational Safety & Health Review Comm'n., 499 U.S. 144, 150 (1991), citing Lyng v. Payne, 476 U.S. 926, 939 (1986); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (where Congress expressly delegates authority to an agency to issue legislative regulations, the regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"); United States v. Morton, 467 U.S. 822, 834 (1983). The same is true of the preamble or commentary accompanying a regulation since both are part of a department's official interpretation of legislation. Stinson v. United States, 508 U.S. 36, 45 (1993), quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). See United States v. Larionoff, 431 U.S. 864, 872-873

(1977); Udall v. Tallman, 380 U.S. 1, 16-17 (1965). Indeed, "[a]s the author of the [ADA] regulation, the Department of Justice is also the principal arbiter as to its meaning." Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35, 39 (D.D.C. 1994), citing Thomas Jefferson Univ., 114 S. Ct. at 2386.[5] As set forth in the regulations and other administrative materials cited below, the Department of Justice interprets both section 504 and title II of the ADA to apply to correctional facilities.

The regulations promulgated by the Department of Justice to enforce section 504 define the kinds of programs and benefits that should be afforded to individuals with disabilities on a nondiscriminatory basis. These definitions encompass prison administration. The regulations define "program" to mean "the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, e.g., a police department or department of corrections."

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[5] See also Helen L. v. DiDario, 46 F.3d 325, 331-32 (3d Cir. 1995) (relying extensively on DOJ title II regulations and its interpretation thereof), cert. denied sub nom. Pennsylvania Sec'y of Pub. Welfare v. Idell S., 116 S. Ct. 64 (1995); Kinney v. Yerusalim, 9 F.3d 1067, 1071-1073 (3d Cir. 1993) (same), cert. denied sub nom. Hoskins v. Kinney, 114 S. Ct. 1545 (1994); Innovative Health Systems, 931 F. Supp. 222, 232-233, nn. 3 & 4 (same); Bullock v. Gomez, 929 F. Supp. 1299, 1302 (C.D.Ca. 1996) (same); Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 846 F. Supp. 986, 989 n.9 (S.D.Fla. 1994) (same); Tugg v. Towey, 864 F. Supp. 1201, 1205 n.6 (S.D. Fla. 1994) (same); Bechtel v. East Penn. School Dist. of Lehigh County, No. Civ. A. 93-4898, 1994 WL 3396, *2-*3 (E.D. Pa. 1994) (same); Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993) (same); Noland v. Wheatley, 835 F. Supp. 476, 483 (N.D. Ind. 1993) (same).

28 C.F.R. 42.540(h) (emphasis added). The term "benefit" includes "provisions of services, financial aid or disposition (i.e., treatment, handling, decision, sentencing, confinement, or other prescription of conduct)." 28 C.F.R. § 42.540(j) (emphasis added). The appendix to the regulations, attached to the Final Rule (45 Fed. Reg. 37620, 37630 (June 30, 1980)), makes clear that services and programs provided by detention and correctional agencies and facilities are covered by section 504. This coverage is broad, and includes "jails, prisons, reformatories and training schools, work camps, reception and diagnostic centers, pre-release and work release facilities, and community based facilities." Ibid. The appendix further states that:

> [f]acilities available to all inmates or detainees, such as classrooms, infirmary, laundry, dining areas, recreation areas, work areas, and chapels, must be readily accessible to any handicapped person who is confined to that facility. Beyond insuring the physical accessibility of facilities, detention and correctional agencies must insure [sic] that their programs and activities are accessible to handicapped persons. * * * In making housing and program assignments, such [correctional] officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates. The existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy safety, security and other needs of the handicapped inmate.

Ibid. (emphasis added).

Department of Justice regulations also make it clear that institutions administered by the federal Bureau of Prisons are subject to section 504. See 28 C.F.R. 39.170(d)(1)(ii) (section 504 complaint procedure for inmates of federal penal institutions); id. at 28 C.F.R. Pt. 39, Editorial Note, p. 667

(1995) (final rule published in 1984) (section 504 regulations requiring nondiscrimination in programs or activities of the Department of Justice apply to the Bureau of Prisons); id. at 669 (federally conducted program is "anything a Federal agency does").

The regulations promulgated under title II of the ADA afford similar protections to persons with disabilities who are incarcerated in prisons or otherwise institutionalized by the state, regardless of the public institution's receipt of federal financial assistance. The regulations state that the statute's coverage extends to "all services, programs, and activities provided or made available by public entities." 28 C.F.R. § 35.102. This broad language is intended to "appl[y] to anything a public entity does." 28 C.F.R. Pt. 35, App. A, Subpart A at 449. As part of its enforcement obligations under title II, the Department of Justice is designated as the agency responsible for coordinating the compliance activities of public entities that administer "[a]ll programs, services, and regulatory activities related to law enforcement, public safety, and the administration of justice, including courts and correctional institutions * * * ." 28 C.F.R. § 35.190(b)(6) (emphasis added). The Preamble to the Department's title II regulations makes express reference to the statute's application to prisons, stating that an entity is required to provide "assistance in toileting, eating, or dressing to individuals with

disabilities * * * where the individual is an inmate of a custodial or correctional institution." 28 C.F.R. pt. 35, App. A at 461 (emphasis added).

Finally, the Department's Title II Technical Assistance Manual specifically lists "jails and prisons" as types of facilities that, if constructed or altered after the effective date of the ADA (January 26, 1992), must be designed and constructed so that they are readily accessible to and usable by individuals with disabilities. Title II Technical Assistance Manual at II-6.0000, II-6.3300(6). DOJ Technical Assistance Manuals are also entitled deference. See Innovative Health Systems, 931 F. Supp. 222, 233 n.4; Fiedler, 871 F. Supp. 35, 37 n.4; Bechtel, 1994 WL 3396, *2-*3; Petersen, 818 F. Supp. 1276, 1279; Chatoff v. City of New York, No. 92 Civ. 0604 (RWS), 1992 WL 202441 *2 (S.D.N.Y. June 30, 1992).[6]

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[6] The design standards applicable to facilities covered by section 504 and title II also include specific provisions relating to correctional facilities. The Department of Justice section 504 regulations for federally assisted facilities adopt the Uniform Federal Accessibility Standards (UFAS), as the standards for all entities receiving federal financial assistance from the Department. See 28 C.F.R. § 42.522 (b). UFAS lists "jails, prisons, reformatories" and "[o]ther detention or correctional facilities" as institutions to which the accessibility standards apply. 41 C.F.R. subpart 101-19.6, Appendix A, p. 149. Under Title II, covered entities building new or altering existing facilities can choose to follow either UFAS or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG). 28 C.F.R. 151(c); see 28 C.F.R. part 36, Appendix A. Amendments to ADAAG, adopted as an Interim Final Rule, effective December 20, 1994, by the Architectural and Transportation Barriers Compliance Board, include specific accessibility guidelines for "detention and correctional facilities." 59 Fed. Reg. 31676, 31770-31772 (June 20, 1994). The Department of Justice has proposed adoption of the interim final rule. Id. at 31808.

C. Case Law Strongly Supports the Coverage of State Correctional Facilities Under the Rehabilitation Act and ADA

Numerous Courts have applied the Rehabilitation Act and/or the ADA in the context of correctional facilities.[7] In Bonner v. Lewis, the Ninth Circuit held that section 504 applies to inmates with disabilities in state correctional facilities. 857 F.2d 559, 562 (9th Cir. 1988). Based on the plain language of both the Rehabilitation Act and the Justice Department's implementing regulation, and on the congruence between the Act's goals and those of prison officials, the court held that the

[7] See, e.g., Lue v. Moore, 43 F.3d 1203 (8th Cir. 1994) (Rehabilitation Act); Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991) (Rehabilitation Act); Armstrong v. Wilson, No. C 94-2307 CW, slip op. (N.D. Cal. Sept. 20, 1996) (copy attached) (title II and Rehabilitation Act); Bullock v. Gomez, 929 F. Supp. 1299 (title II and Rehabilitation Act); Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996) (title II); Austin v. Pennsylvania Dep't of Corrections, 876 F. Supp. 1437 (E.D. Pa. 1995) (title II and Rehabilitation Act); Love v. McBride, 896 F. Supp. 808 (N.D.Ind. 1995) (title II); Rewolinski v. Morgan, 896 F. Supp. 879 (E.D. Wis. 1995) (title II); Smith v. Indiana, 904 F. Supp. 877 (N.D. Ind. 1995) (title II); Clarkson v. Coughlin, 898 F. Supp. 1019 (S.D.N.Y. 1995) (Rehabilitation Act and title II); Timmons v. New York State Dep't of Correctional Servs., 887 F. Supp. 576 (S.D.N.Y. 1995) (Rehabilitation Act); Harrelson v. Elmore County, Alabama, 859 F. Supp. 1465 (M.D. Ala. 1994) (title II); Outlaw, 1993 WL 735802 (title II and Rehabilitation Act); Noland, 835 F. Supp. 476 (title II); Donnell v. Illinois Bd. of Educ., 829 F. Supp. 1016 (N.D. Ill. 1993) (Rehabilitation Act); Casey v. Lewis, 834 F. Supp. 1569 (D. Ariz. 1993) (Rehabilitation Act); Sites v. McKenzie, 423 F. Supp. 1190 (N.D. W. Va. 1976) (Rehabilitation Act).

protections of the Act extended to inmates of correctional facilities.[8]

Following Bonner, this Circuit has also applied section 504 to prisoners in state correctional facilities. Harris v. Thigpen, 941 F.2d 1495, 1522 n. 41. In Harris, the court was not required to actually decide the coverage issue because the Alabama Department of Corrections conceded that section 504 applied to prisoners. The court did, however, explicitly note that it agreed with both the result reached by the Bonner court, and the Bonner court's underlying analysis of the issue.[9]

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[8] This conclusion was reaffirmed in Gates, 39 F.3d 1439, 1446-47. Defendants assert that Gates suggests that the Ninth Circuit has "noticeably retreated" from its decision in Bonner that state prisons are subject to the Rehabilitation Act. Def.'s Brief at 21. To the contrary, in Gates, the Court articulated the standard of review for determining how the Rehabilitation Act is to be applied in a prison setting, not whether the statute should be applied at all. See Gates, 39 F.3d at 1446-47. See also Armstrong, slip op. at 8 ("Gates is a reaffirmation of Bonner, not a retreat from it.")

[9] Two district court decisions within the Eleventh Circuit have also held that title II of the ADA applies to correctional facilities. In Outlaw v. City of Dothan, Alabama, 1993 WL 735802 *4 (M.D. Ala. Apr. 27, 1993), the court held that the ADA required the City of Dothan to make the shower in its jail accessible to an individual with a disability. Although the City did not dispute that it was a "public entity" covered by the ADA, it denied that the shower was a "service, program, or activity" of a public entity. The court held that "under common usage and understanding of the terms the jail and all of its facilities, including the shower, constitute a service, program or activity of the City of Dothan to which the ADA applies." In Harrelson v. Ellmore County, Alabama, 859 F.Supp 1465, 1468 (M.D. Ala. 1994), the court stated, without discussion, that a claim by a paraplegic alleging injury because of inaccessible jail facilities clearly stated a claim under title II of the ADA.

Defendants mistakenly rely on the Fourth Circuit's qualified immunity ruling in Torcasio v. Murray, 57 F 3d. 1340 (4th Cir. 1995), to assert that section 504 and title II do not apply to state correctional facilities. The plaintiff in Torcasio, who alleged that he was morbidly obese, brought an action against state prison officials for injunctive relief and damages, asserting claims under section 504 and title II of the ADA. 57 F.3d at 1342. The Torcasio court held that the individual defendants were entitled to qualified immunity because it was not clearly established "at the time" that either statute applied to state prisons. Id. at 1343; see id. at 1344-1352.[10] Although the Torcasio court expressed doubt that either statute applies to prisons, its discussion of that question was dicta. More importantly, the reasoning underlying its limited reading of both statutes is flawed and should be rejected.

Defendants, following the reasoning of the Torcasio court, assert that prison management is an "core state function" into which federal courts should not interfere without the unmistakably clear direction of Congress. Def.'s Brief at 4. Although the Torcasio court recognized that the broad language prohibiting discrimination on the basis of disability in both statutes "appears all-encompassing," 57 F.3d at 1344, it

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10 The Court also held that it was not clearly established that either statute provided protections to a morbidly obese prisoner, 57 F.3d at 1353-1355, and that the individual defendants could reasonably have believed that their actions were lawful. Id. at 1355-1356.

expressed its reluctance to find either applicable to prisons, "absent a far clearer expression of congressional intent." Ibid. The court cited a rule of statutory construction set forth in Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989), that "if Congress intends to alter the `usual constitutional balance between the States and the Federal Government,' it must make its intention to do so `unmistakably clear in the language of the statute.' Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); see also Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984)." 57 F.3d at 1344. Because it found the operation of prisons to be a "core state function," 57 F.3d at 1345, and further that neither section 504 nor the ADA included a clear statement of their application to correctional facilities, the Torcasio court refused to hold that Congress had "clearly" intended either statute to apply to state prisons, id. at 1346.

This extension of the clear statement rule was unwarranted. Will, Atascadero, and Pennhurst all involved instances in which there had been no express waiver or abrogation of the states' traditional immunity from suit, either by the state itself (Pennhurst), or by Congress (Will, Atascadero). Here, in contrast, both section 504 and title II of the ADA contain an "unequivocal expression of Congressional intent to overturn the constitutionally guaranteed immunity of the several states." Pennhurst, 465 U.S. 89, 99. See 42 U.S.C. § 2000d-7(a)(1) ("A

State shall not be immune under the Eleventh Amendment * * * from suit in Federal court for a violation of section 504 of the Rehabilitation Act"); 42 U.S.C. § 12202 ("A state shall not be immune under the eleventh amendment * * * from an action in Federal or State court of competent jurisdiction for a violation of [the ADA]"). And, both statutes speak unequivocally of their application to state governments and to "any" or "all" of their operations. In light of the clear and all-encompassing language of both statutes, there is simply no basis for requiring Congress to have detailed which of the many important components of state and local governments were included in the terms "any" and "all."[11]

While other federal courts have acknowledged that deference is due to the decisions of state officials, they have also recognized that they cannot abdicate their duty to enforce important civil rights protections. Indeed, in a recent decision under title II of the ADA, the Ninth Circuit reversed a district court that had refused to examine the lawfulness of a state legislative action. See Crowder, 81 F.3d 1480. The Court of Appeals directed that the lower courts must apply federal law:

> We are mindful of the general principle that courts will not second-guess the public health and safety decisions

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11 There are, of course, many areas of state and local governance that could be considered core state functions. Such areas may include police services, fire protection, the selection of judicial nominees, the qualification of applicants to a state bar, and the management of state court systems. Nevertheless, these state or local functions are commonly understood to be covered by the Rehabilitation Act and the ADA.

> of state legislatures acting within their traditional police powers. However, when Congress has passed antidiscrimination laws such as the ADA * * * , it is incumbent upon the courts to insure that the mandate of federal law is achieved.

Id. at 1485 (citation omitted). See also Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985) (states are not immune from federal regulation of their "integral state functions").[12]

In an effort to find a textual basis for its narrow reading of section 504 and title II, Torcasio opined that, despite their broad language, certain provisions of the statutes cast doubt on their applicability to prisons. 57 F.3d at 1346-1347. The court stated its belief that prisons "generally do not provide `services,' `programs,' or `activities' as those terms are ordinarily understood" and that "the definition of `qualified

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[12] Not surprisingly, a number of federal courts have applied various federal anti-discrimination statutes to correctional facilities. See Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994) (Title IX of the 1964 Civil Rights Act); Baker v. McNeil Island Corrections Ctr., 859 F.2d 124 (9th Cir. 1988) (racial discrimination) (Title VII of the 1964 Civil Rights Act). See also Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia, 877 F. Supp. 634, 672 (D.D.C. 1994) (Title IX), vacated in part on other grounds, 899 F. Supp. 659 (D.D.C. 1995); Klinger v. Nebraska Dep't of Correctional Servs., 824 F. Supp. 1374, 1431 (D. Neb. 1993) (same), rev'd on other grounds, 31 F.3d 727 (8th Cir. 1994), cert. denied, 115 S.Ct. 1177 (1995); Donnell v. Illinois Bd. of Educ., 829 F. Supp. 1016 (N.D. Ill. 1993) (Individuals with Disabilities Education Act); Canterino v. Wilson, 546 F. Supp. 174, 209 (W.D. Ky. 1982) (Title IX), aff'd, 875 F.2d 862 (6th Cir. 1989), cert. denied, 493 U.S. 991 (1989); Green v. Johnson, 513 F. Supp. 965, 976 (D. Mass. 1981) (Individuals with Disabilities Education Act); Cruz v. Collazo, 450 F. Supp. 235 (D. P.R. 1979)(same); Beehler v. Jeffes, 664 F. Supp. 931, 940 (M.D. Pa. 1986) (Title IX).

individual with a disability' is not naturally read as encompassing inmates in state prisons." 57 F.3d at 1347.

As explained above, however (pp. 5-8, supra), the operations of state or local correctional facilities fall quite naturally within the terms "programs" and "activities." Similarly, the fact that inmates are in prison involuntarily does not negate the fact that prison officials provide them with benefits and services in the form of food, shelter, medical care, recreation, education, and rehabilitation.

Nor are prisoners excluded from coverage because section 504 and title II protect only qualified individuals with a disability. That term is defined in title II to mean:

> an individual with a disability who, with or without reasonable modifications * * * meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2). This definition, drawn from the Rehabilitation Act regulations, is not intended to circumscribe the entities covered by the Act. Rather, it sets forth the common sense proposition that entities that are covered by the Act need not jettison the essential eligibility requirements of their programs or activities in order to avoid liability. See Southeastern Community College v. Davis, 442 U.S. 397 (1979); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt.4, at 39 (1990), reprinted in 1990 U.S.C.C.A.N. 512, 528.

Moreover, the terms "eligible" and "participate" do not, as Torcasio stated, "imply voluntariness" or mandate that an

individual seek out or request a service to be covered. 57 F.3d at 1347. To the contrary, the term "eligible" applies to those who are automatically included, without regard to choice or application, as in "only native-born citizens are eligible to the office of president." See Webster's Third New International Dictionary (1986). Further, Torcasio's narrow reading would exempt other entities that are clearly covered under the Acts, such as mental institutions, in which individuals are "held against their will" and would allow an entity to escape liability for discrimination under the statutes by making participation in a function mandatory.

Therefore, both the Torcasio court's application of the clear statement doctrine to statutes that unambiguously apply to the states and its artificially narrow reading of the regulatory language must be rejected.[13] However, even if the clear statement doctrine is applied, both section 504 of the Rehabilitation Act and title II of the ADA clearly and unambiguously apply to all the operations of state correctional departments including the treatment of inmates with disabilities.

Finally, Defendant's repeat Torcasio's concern that the application of section 504 or the ADA to state correctional facilities will lead to absurd results. However, the issue

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[13] The Torcasio court also failed to locate the specific regulatory sections that discuss the application of section 504 and the ADA to correctional facilities. See Armstrong, slip op. at 15-16. The Torcasio court itself noted that Torcasio might have prevailed "if he were able to point to regulations that make

before this court is whether the ADA and section 504 protect inmates in state correctional facilities. The question of how these statutes apply is a separate issue. Contrary to the Defendants' contention, applying section 504 and the ADA to prisons, as many other courts have done, does not lead to "absurd" results. Neither the ADA nor section 504 require a fundamental alteration in the way prisons operate; indeed, the unique features of any state program, including prisons, must be taken into account in determining what the statutes require in a particular situation.[14] Put simply, neither statute calls for an abrogation of common sense.[15]

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that applicability clear." Torcasio, 57 F.3d at 1347.

[14] For example, prisons must make only "reasonable" modifications to their policies, practices, and procedures, when those modifications are necessary to avoid discrimination. 28 C.F.R. § 35.130(b)(7). And covered entities such as prisons are never required to take any action that would result in a "fundamental alteration" in the nature of the programs they provide or that would pose "undue financial and administrative burdens." 28 C.F.R. § 35.150(a)(3).

[15] Nor do the statutes mandate that prisons create particular programs or activities for prisoners or provide "special treatment" for inmates with disabilities. They simply require the state to provide inmates with disabilities with as equal an opportunity as that provided to inmates without disabilities to participate in, and benefit from, the programs, activities, and services of the state prison system -- whatever they happen to be.

CONCLUSION

For the reasons set forth above, this Court should conclude that the protections of section 504 of the Rehabilitation Act of 1973 and title II of the Americans with Disabilities Act of 1990 extend to prisoners incarcerated in state correctional institutions including institutions operated by the State of Georgia and the Georgia Department of Corrections.

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CERTIFICATE OF SERVICE

I, Vicki Crowell, hereby certify that a copy of the foregoing United States Memorandum of Law as Amicus Curiae in Support of Plaintiffs' Position that Section 504 and the ADA are Applicable to the Georgia Department of Corrections and Its Institutions was served upon the following persons at the addresses listed below by first class mail this 30th day of September, 1996:

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