IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

TRACY ANTHONY MILLER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION FILE
	:	NO. 6:98-CV-109-JEG
HUGH SMITH, et al.,	:	
	:	
Defendants.	:	

UNITED STATES' MEMORANDUM OF LAW AS AMICUS CURIAE ON ISSUES UNDER THE AMERICANS WITH DISABILITIES ACT AND REHABILITATION ACT THAT ARE LIKELY TO ARISE ON SUMMARY JUDGMENT OR AT TRIAL

INTRODUCTION

This lawsuit, originally filed pro se by Plaintiff Tracy Miller ("Miller") in 1998, seeks declaratory and injunctive relief and damages for conditions at Georgia State Prison ("GSP") and Augusta State Medical Prison ("ASMP"), two correctional facilities under the control of the Georgia Department of Corrections ("GDOC"). Miller alleges, *inter alia*, violations of Title II of the Americans with Disabilities Act of 1990 ("Title II" or "ADA"), 42 U.S.C. §§ 12131-12134, and section 504 of the Rehabilitation Act of 1973 ("Section 504" or "Rehabilitation Act"), 29 U.S.C. § 794, as well as certain constitutional violations. Specifically, Miller alleges that GDOC[1] has violated the ADA and Rehabilitation Act by routinely excluding him from, or denying him the benefits of, the programs, services, and activities provided to other GSP and ASMP inmates and otherwise discriminating against him because of his disability. Miller also alleges that GDOC has violated Title II and Section 504 by failing to make its programs,

[1] Defendants, who are various officials, entities, and subdivisions of GDOC, will be referred to as GDOC.

services, and activities readily accessible to and usable by him and other inmates with disabilities by either making necessary physical modifications at GSP and ASMP or using legally permitted alternative means of affording access.

The United States has participated informally in this case during settlement discussions by conducting an on-site compliance review of GSP and ASMP under Title II and Section 504 and providing the Court and parties with technical assistance regarding architectural and programmatic modifications necessary to achieve compliance with the ADA and Section 504. The United States has also participated formally as an intervenor in this litigation on questions of the constitutionality of the ADA under the Eleventh Amendment to the U.S. Constitution, an issue subsequently decided in the Goodman v. Georgia litigation.[2] The United States has otherwise not been a party to this litigation. As the federal agency that enforces, regulates, implements, coordinates, and provides technical assistance for the ADA and Section 504,[3] the United States respectfully submits the instant memorandum as *amicus curiae* on questions of law under the ADA and Section 504 that will undoubtedly be addressed on summary judgment or at trial.

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[2] See Brief for the United States as Petitioner, United States and Goodman v. Georgia, 546 U.S. 151 (2006) (Nos. 04-1203 and 04-1236).

[3] See 42 U.S.C. §§ 12134(a), (c) (requiring Department of Justice to issue regulations implementing ADA requirements, including architectural standards, applicable to state and local governments); 28 C.F.R. §§ 35.190 (authorizing the Department to issue policy guidance to ensure consistent interpretation of Title II and designating it as the agency responsible for Title II enforcement for state and local government programs and facilities, including correctional institutions; Exec. Order 12,250 (assigning leadership role to Department in the coordination and enforcement of federal civil rights laws applicable to federally assisted programs, including Section 504); 28 C.F.R. pt. 41 (implementing Exec. Order. 12,250 and Department of Justice's role in coordination of federal disability rights laws involving federal assistance); 28 C.F.R. pt. 42 subpt. G (Nov. 2, 1980) (establishing Section 504 requirements for recipients of Department of Justice financial assistance).

BACKGROUND

The Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.*, as amended, is a comprehensive civil rights law enacted to provide "a clear and comprehensive national mandate for the elimination of discrimination" against individuals with disabilities. 42 U.S.C. § 12101(b)(1). Its coverage is 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.

Title II of the ADA was enacted to broaden the coverage of Section 504, which prohibits discrimination in any program or activity that receives federal financial assistance, including programs and activities of state and local governments. Title II extends these protections to all state and local government entities, including those receiving no federal funds. [4]

[4] Title II was modeled closely on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination on the basis of disability in federally conducted programs and in all of the operations of public entities that receive federal financial assistance. Title II provides that "[t]he remedies, procedures, and rights" set forth under Section 504 shall be available to any person alleging discrimination in violation of title II. 42 U.S.C. § 12133; see also 42 U.S.C. § 12201(a) (ADA must not be construed more narrowly than Rehabilitation Act). The ADA directs the Attorney General to promulgate regulations to implement title II, and requires those regulations to be consistent with preexisting federal regulations that coordinated federal agencies' application of Section 504 to recipients of federal financial assistance, and interpreted certain aspects of Section 504 as applied to the federal government itself. 42 U.S.C. § 12134(a)-(b). Title II thus extended Section 504's pre-existing prohibition against disability-based discrimination in programs and activities (including state and local programs and activities) receiving federal financial assistance or conducted by the federal government itself to all operations of state and local governments, whether or not they receive federal assistance. The ADA and the Rehabilitation Act are generally construed to impose the same requirements. See Allmond v. Akal Sec., Inc., 558 F.3d 1312 (11th Cir. 2009); Cash v. Smith, 231 F.3d 1301, 1305(11th Cir, 2000). This principle follows from the similar language employed in the two acts. It also derives from the Congressional directive that implementation and interpretation of the two acts "be coordinated to prevent[ ] imposition of inconsistent or conflicting standards for the same requirements under the two statutes." Baird ex rel. Baird v. Rose, 192 F.3d 462, 468 (4th Cir, 1999) (citing 42 U.S.C. § 12117(b)) (alteration in original). See also Yeskey v. Com. of Pa.

The substantive provisions of Title II and Section 504 are very similar. Title II provides:

> [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. Section 504 provides:

> 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.

28 U.S.C. § 794(a).[5]

Congress explicitly delegated to the Department of Justice the authority to promulgate regulations under both statutes. See 42 U.S.C. § 12134(a); 28 C.F.R. pt. 35 (Title II); 29 U.S.C. § 794(a); 28 C.F.R. pt. 41 (Section 504 coordination regulation); 28 C.F.R. pt. 42, subpt. G (Section 504 regulation governing correctional institution grantees). Accordingly, the Department's regulations and interpretation thereof are entitled to substantial deference. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); Olmstead v. L.C.,

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Dep't of Corr., 118 F.3d 168, 170 (3d Cir. 1997) ("[A]ll the leading cases take up the statutes together, as we will."), aff'd, 524 U.S. 206 (1998).

[5] Under Title II, the term "[q]ualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 28 C.F.R. § 35.104. See also 28 C.F.R. § 42.540(l)(2) (definition of qualified individual for purposes of Section 504). Title II prohibits a public entity from using eligibility criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities "from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(8). See also 28 C.F.R. § 42.503(b)(3) (Section 504 prohibition against use of discriminatory criteria). The essential eligibility criteria for programs, services, and activities in prisons are generally quite minimal – *e.g.*, any prison inmate is generally eligible to participate in a prison's transportation, classification, housing, showers, nutrition, medical, library, visitation, religious,

527 U.S. 581, 597-98 (1999); cf. Bragdon v. Abbott, 524 U.S. 624, 646 (1998) (citing same for Title III of the ADA); see also Auer v. Robbins, 519 U.S. 452, 461 (1977) (agency's interpretation of its regulations "controlling unless plainly erroneous or inconsistent with the regulation"). Because this case involves the application and interpretation of the Department's regulations and other guidance implementing Title II and Section 504, the United States has a direct interest in this case.

APPLICATION OF TITLE II AND SECTION 504 TO CORRECTIONAL INSTITUTIONS GENERALLY

In its investigation of the necessity for the ADA, Congress found that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, . . . education, transportation, communication, recreation, institutionalization, health services, . . . and access to public services." 42 U.S.C. § 12101(a)(3). Congress also found that

> [I]ndividuals 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).

It is with this backdrop that the Supreme Court held in 1998 that "[s]tate prisons fall squarely within the statutory definition of 'public entity,'" Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 290-10 (1998) (quoting 42 U.S.C. § 12131(1)(B)) and that Title II of the ADA, therefore, "unmistakably includes State prisons and prisoners within its coverage." Yeskey, 524 U.S. at 209 (Scalia, J.) (unanimous). The Court made clear that the various programs, services, and activities offered in correctional institutions are covered by the ADA and, therefore, are required

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and recreation programs, services, and activities simply by virtue of incarceration.

to be accessible to individuals with disabilities even though participation in most of those programs is not voluntary. Yeskey, 524 U.S. at 211; Bircoll v. Miami-Dade County, 480 F.3d 1072, 1081 (11th Cir. 2007). "Modern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in')." Yeskey, 524 U.S. at 210 (citing Block v. Rutherford, 468 U.S. 576, 580 (1984) (referring to 'contact visitation program'); Hudson v. Palmer, 468 U.S. 517, 552 (1984) (discussing 'rehabilitative programs and services'); and Olim v. Wakinekona, 461 U.S. 238, 246 (1983) (referring to 'appropriate correctional programs for all offenders')); see also Phipps v. Sheriff of Cook County, 2009 WL 4146391, at **13-14, No. 07 C 3889 (N.D. Ill. Nov. 25, 2009) (finding showers, toilets, and sinks to constitute programs or services); Schmidt v. Odell, 64 F. Supp. 2d 1014, 1032-1033 (D. Kan. 1999) (describing 'basic services' of the jail to include the use of the toilet, shower, recreational areas, and obtaining meals). The specific issue resolved in Yeskey was Title II's application to a 'motivational boot camp.' An inmate drug treatment program was another example of a program, service, and activity required to be accessible to inmates with disabilities under the ADA. 524 U.S. at 210, 211.

THE NONDISCRIMINATION REQUIREMENTS OF TITLE II AND SECTION 504

Title II and Section 504 contain broad prohibitions of discrimination against individuals with disabilities. 42 U.S.C. § 12132; 29 C.F.R. § 794. The implementing regulation provides a general prohibition that mirrors the language of Section 202 of the ADA, and which is very similar in substance to Section 504. It provides: "No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the

services, programs, or activities of a public entity, or be subject to discrimination by any public entity." 28 C.F.R. § 35.130(a).

The regulation then provides specific prohibitions. In the correctional setting, these include, but are not limited to, the following:

- The outright denial of the benefits of a prison's programs, services, and activities, 28 C.F.R. § 35.130(b)(1), such as excluding an inmate who uses a wheelchair from recreation privileges because there is no accessible recreation area, excluding an inmate from bathing because a prison does not have accessible shower facilities or will not provide necessary bathing assistance, or excluding an inmate with diabetes from a commissary program because the commissary does not sell any items the inmate can eat.

- Providing an unequal, different, or separate opportunity to participate in programs, services, and activities, 28 C.F.R. § 35.130(b), such as placing an inmate with a low security classification in a maximum security setting because the inmate uses a wheelchair and requires an accessible cell, which the facility does not have available at the appropriate security classification, or providing an inmate who uses a wheelchair with only indoor recreational activities because the outdoor recreation area – or the route to it – is not accessible.

- Engaging in contractual, licensing, or other arrangements that deny participation; provide unequal aids, benefits, or services; perpetuate discrimination; or otherwise limit enjoyment of any right, privilege, advantage, or opportunity, 28 C.F.R. §§ 35.130(b)(1), (3), such as transporting an inmate who uses a wheelchair unsafely in an inaccessible vehicle because the facility's transportation contractor does not have accessible vehicles or denying the benefits of medical care to inmates with disabilities because the medical contractor does not provide appropriate medication to an inmate with HIV or a psychiatric disability.

- Using eligibility criteria that screen out or tend to screen out people with disabilities, 28 C.F.R. § 35.130(b)(8), such as requiring inmates participating in anger management courses to be able to hear or requiring inmates who participate in a jobs or trustee program to be able to see, hear, or walk.

- Failing to integrate inmates with disabilities, 28 C.F.R. § 35.130(d), such as segregating all inmates with a particular disability to one dorm, one class, or one meal time;

- Failing to make reasonable modifications (sometimes referred to as reasonable accommodations) in rules, policies, practices, or procedures, 28 C.F.R. § 35.130(b)(7), such as not making an exception to a drug treatment program's rule requiring inmates to be medication free in order to permit participation by an inmate who requires medication for a psychiatric disability.

- Failing to provide auxiliary aids and services necessary to achieve effective communication with individuals with disabilities, 28 C.F.R. §§ 35.160-164, such as refusing to provide written materials in large print for an inmate with low vision to participate in a GED program or failing to procure a sign language interpreter for a deaf inmate to participate in a "scared straight" program. See Garcia v. McNeil, 2009 U.S. Dist. LEXIS 70511 at **21-33, No. 4:07cv474-SPM/WCS (N.D. Fla. June 22, 2009) (denying defendant's motion for summary judgment on claim of appropriate auxiliary aids and services to achieve effective communication).

Ultimately, these provisions work together to prohibit all disability discrimination in all of the programs, services, and activities of public entities. In the correctional context, where the public entity has custody of an individual with a disability, such prohibitions also include failing to provide critical healthcare and personal services (e.g., access to mammograms and pap smears), necessary consumable medical supplies (e.g., sterile catheters, colostomy bags, and diapers), durable medical equipment and other disability-related equipment (*e.g.*, wheelchairs, walkers, crutches, and canes), and personal assistance services (e.g., assistance in eating, dressing, bathing, bowel and bladder management, transferring to and from a wheelchair, and maintenance of a cell). See 28 C.F.R. § 35.130(a); see also 28 C.F.R. §§ 42.503, 42.511, 42.520-522 (similar obligations under Section 504).

Additionally, as the Supreme Court has explained, Title II not only

> [S]eeks to enforce th[e] prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review. [citations omitted] These rights include some . . . that are protected by the Due Process Clause of the Fourteenth Amendment.

Tennessee v. Lane, 541 U.S. 509, 523-24 (2004) (noting First Amendment right to access court proceedings in case where court refused to move proceeding to first floor of existing courthouse without elevator).

In the correctional context, Title II's nondiscrimination mandate buttresses constitutional guarantees, such as the Eighth Amendment's protection against deliberate indifference to a

serious medical need. See United States v. Georgia, 546 U.S. 151, 157-58 (2006); Taylor v. Adams, 221 F.3d 1254, 1257 (11th Cir. 2000). Other cognizable violations of the Eighth Amendment may exist where harm "poses an unreasonable risk with respect to an inmate's safety." Rhodan v. Schofield, 2007 U.S. Dist. LEXIS 44593 at *31, No. 1:04-CV-2159-TWT (N.D. Ga. June 18, 2007) (denying summary judgment for defendant on deliberate indifference to inmate's claim for wheelchair). The Eighth Amendment requires that inmates "be furnished with the basic human needs, one of which is reasonable safety." Helling v. McKinney, 509 U.S. 25, 35 (1993). See also LaFaut v. Smith, 834 F.2d 389, 394 (4th Cir. 1987) (paraplegic inmate's inability to access toilet facilities was violation of Eighth Amendment's prohibition of cruel and unusual punishment); Schmidt v. Odell, 64 F. Supp. 2d 1014 (D. Kan. 1999) (forcing inmate who was double amputee to crawl around jail floor to access jail facilities was sufficient to proceed to jury on Eighth Amendment claim); Key v. Grayson, 179 F.3d 996 (6th Cir. 1999) (denying deaf inmate access to sex offender therapy program required for parole was constitutional violation).

Similarly, failing to provide auxiliary aids or services necessary for effective communication undermines First Amendment rights to free speech and petition the government. See Brown v. Ga. Dep't of Corr., 2008 U.S. Dist. LEXIS 27127 at *5, No. 5:07-CV-79 (CAR) (M.D. Ga. Mar. 4, 2008). The panoply of Fourteenth Amendment procedural and substantive due process rights afforded inmates also can be violated or undermined where Title II and Section 504 nondiscrimination mandates are not met.

In the context of physical accessibility, a key component of Title II and Section 504 is the affirmative obligation of program accessibility – *i.e.*, the requirement that all of a public entity's programs, services, and activities be "readily accessible to and usable by individuals with disabilities." See 28 C.F.R. §§ 35.149-151; see also 28 C.F.R. §§ 42.520-522. In the

correctional setting, this requirement has, *inter alia*, policy, transportation, housing, bathing, dining, medical, employment, education, visitation, and architectural components involving all aspects of prison operations that affect inmates, visitors, staff, and volunteers, ranging from executive level administration to the daily interactions that correctional officers have with inmates. The regulation defining the program accessibility obligations of prisons and other public entities under Title II have been in place since the early 1990s. The regulation setting out program accessibility obligations under Section 504 for recipients of federal financial assistance were issued long before that time.[6]

The program accessibility requirements of Title II are set out in Subpart D to the Title II regulation, which includes three sections: a broad nondiscrimination requirement applicable to all of a public entity's programs, services, and activities (§ 35.149); the architectural nondiscrimination requirement for newly constructed facilities and alterations to facilities (§ 35.151); and requirements, permitted methods, time period, and procedures for complying with the program accessibility requirements in existing facilities (§ 35.150). To understand how Title II's program accessibility requirements apply to a public entity's programs, services, and activities, it is necessary to read §§35.149, 35.150, and 35.151 together.

§ 35.149.[7] This section requires all of a public entity's programs, services, and activities to be readily accessible to and usable by individuals with disabilities. It prohibits disability-

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6 'Federal financial assistance' is, in essence, anything of value received from the federal government. See 28 C.F.R. § 42.540(f).

7 Section 35.149 provides:

> Except as otherwise provided in Sec. 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied

based exclusion from participation, denial of benefits, and discrimination of other kinds, *inter alia*, "because a public entity's facilities are inaccessible to or unusable by individuals with disabilities." 28 C.F.R. § 35.149. See also 28 C.F.R. § 42.520 (comparable regulation under Section 504).

§ 35.151.[8] This section applies to the construction of facilities, and alterations to facilities, occurring after January 26, 1992. Under this section, a public entity's newly

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the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

[8] The relevant provisions of § 35.151 state:

> (a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.
> (b) Alteration. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.
> (c) Accessibility standards. Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR part 101 - 19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided. [The omitted provisions of this section are subsections (d), relating to alterations to historic properties, and (e), relating to the requirement to install curb ramps to provide access on newly constructed and altered streets and sidewalks).]

constructed facilities, and newly constructed portions of facilities, must be "readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.151(a). Alterations to a public entity's facilities must be "readily accessible to and usable by individuals with disabilities" to the maximum extent feasible. Id. This section also identifies two architectural standards – *i.e.*, (1) the standards at 28 C.F.R. pt. 36, app. A excluding any elevator exception (hereafter, "ADA Standards" but known colloquially as "ADAAG") or (2) the standards at http://www.access-board.gov/ufas/ufas-html/ufas.htm (hereafter, Uniform Federal Accessibility Standards or "UFAS").[9] 28 C.F.R. § 35.151(c). See also 28 C.F.R. § 42.522 (comparable Section 504 regulation). Compliance with one of these two architectural standards is deemed to comply with the architectural accessibility requirements of Title II.

§ 35.150. This section contains four subsections, (a)-(d), relating to a public entity's obligations in existing facilities. Subsection (a) addresses the nature and extent of the program accessibility obligation in existing facilities, subsection (b) sets out methods for compliance, subsection (c) establishes a deadline, and subsection (d) sets out certain administrative requirements.

§ 35.150(a)[10] – nature and extent of the program accessibility obligation in existing facilities. This subsection requires a public entity to operate each program, service, and activity

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[9] Notably, when a public entity sets out to employ UFAS in a building, it cannot then choose to employ the ADA Standards for another floor or in an alteration project, and vice-versa. Title II TA Manual § 6.2100 at 26.

[10] 28 C.F.R. § 35.150(a) states:

> (a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not --

located in existing facilities so that each of them, "when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). Although § 35.150(a) may require a public entity to modify its existing facilities to be accessible to individuals with disabilities, it "does not necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities" (emphasis added). 28 C.F.R. § 35.150(a)(1). Under this subsection, a public entity is not required to take an action that it "can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.150(a)(3). However, a public entity "shall take any other actions" to "ensure that individuals with disabilities receive the benefits or services provided by the public entity." 28 C.F.R. § 35.150(a)(3). As the regulatory language makes clear, the burden of proving that an action would result in a fundamental alteration or undue burdens rests with the public entity. Id.

> (1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;
> (2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or
> (3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with Sec. 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

Moreover, any decision not to take an action on such grounds must be made "after considering all resources available for use in the funding and operation of the service, program, or activity" and must be accompanied by a written statement of the reasons setting out the basis for the determination. Id. Notwithstanding the fundamental alterations and undue burden defenses available to public entities, "the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases." Preamble to Title II Regulation, 56 Fed. Reg. 35708 (emphasis added). See also Olmstead, 138 F.3d 893, 902 (11th Cir. 1998), aff'd, 527 U.S. 581 (1999) ("[T]he plain language of the ADA's Title II regulations, as well as the ADA's legislative history, make clear that Congress wanted to permit a cost defense in only the most limited of circumstances" and "[t]he fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services.") (quoting H.R. Rep. No. 101-485, pt. 3 at 50, reprinted in 1990 U.S.C.C.A.N. at 473).

§ 35.150(b)[11] – methods for providing program accessibility in existing facilities.

This subsection sets out alternative ways of making programs, services, and activities in existing

[11] Relevant provisions of 28 C.F.R. § 35.150(b) state:

> (b) Methods -- (1) General. A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of Sec.35.151. In choosing among available methods for meeting the

facilities readily accessible to and usable by individuals with disabilities. One acceptable method is to make alterations to the existing facility, or construct a new facility, in compliance with the ADA Standards or UFAS, consistent with § 35.151. Other acceptable methods – such as reassigning services to accessible buildings, delivering services at alternate accessible sites, and the assignment of aides to provide assistance – can also be used so long as two requirements are met. First, the public entity "shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate." 28 C.F.R. § 35.150(b); see also 28 C.F.R. § 35.130(g); Olmstead, 527 U.S. at 592 (discussing integration mandate). As the Department explained in 1991 in the Preamble to the Title II regulation:

> Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status. For example, it would be a violation of this provision to require persons with disabilities to eat in the back room of a government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.

56 Fed. Reg. 35703.[12]

In addition to giving priority to integration, the selected method for achieving program accessibility must result in making the services, programs, or activities "readily accessible to and

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> requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate. [Provisions relating to historic preservation programs are omitted.]

[12] Preambles and commentaries accompanying regulations, like the regulations themselves, are entitled substantial deference as both are part of a department's official interpretation of legislation. Stinson v. United States, 508 U.S. 36, 45 (1993).

usable by individuals with disabilities."[13] 28 C.F.R. § 35.150(b). If non-architectural methods are ineffective, a public entity must make structural changes in existing facilities.[14] Structural changes "include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alteration to a load-bearing structural member." 56 Fed. Reg. 35709. All physical changes must be made in accordance with the ADA Standards or UFAS. 28 C.F.R. § 35.150(b). Neither the ADA Standards nor UFAS is stricter.[15] Notably, 5% of the cells in facilities of federally funded correctional entities, such as those at issue here, are required to be accessible. See 28 C.F.R. § 42.522(b); UFAS § 4.1.4(9)(c), at http://www.access-board.gov/ufas/ufas-html/ufas.htm#4.1.4 (requiring at least 5% of cells to be accessible and requiring accessibility in, *inter alia*, all common use and visitor areas).

Although the ADA (UFAS) and Section 504 establish the minimum number of accessible cells and other residential units that must be provided in the design and construction of

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13 The preamble to the Title II regulation makes clear that carrying an individual with a disability is almost never an acceptable method of providing access. 56 Fed.Reg. 35709.

14 The regulation specifies the circumstances in which public entities must make structural modifications to facilities in the following way. It expressly permits a public entity to comply through "the alteration of existing facilities and construction of new facilities . . . and other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(b). It then exempts a public entity from making structural changes to the extent that nonarchitectural means provide the required level of accessibility for individuals with disabilities: "[A] public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section." Id. Accordingly, where nonarchitectural means are not effective in making a program, service, or activity readily accessible to or usable by individuals with disabilities, the exemption from making structural changes is not applicable. As made clear in the preamble to the Title II regulation, "[s]tructural changes in existing facilities are required only when there is no other feasible way to make the public entity's program accessible." 56 Fed. Reg. 35709.

15 The Title II Technical Assistance Manual provides a list of differences between the ADA Standards and UFAS. See Title II TA Manual §§ 6.3100-300, at 27-35.

correctional facilities, neither statute specifies the maximum number of accessible cells that a correctional facility may be required to provide in order to accommodate inmates with mobility disabilities consistent with the requirements of 28 C.F.R. §§ 35.149-150 (ADA) and 28 C.F.R. §§ 42.520-21 (Section 504). Regulations issued under both statutes require a correctional facility's housing program to be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. 28 C.F.R. §§ 35.149-151; 28 C.F.R. § 42.520-522. An inmate housing program is not readily accessible to and usable by individuals with disabilities unless, for example, its inmates with mobility disabilities, including those who use a wheelchair, are housed in cells or dormitories equipped with all of the requisite accessible features. Id. This requirement applies regardless of whether the inmate is housed in a newly constructed prison or an existing one. Where a prison is an existing facility, Title II and Section 504 may permit the public entity to house an inmate with a mobility disability in another facility with an available accessible cell provided certain conditions are met: (1) this option must make the prison's housing program, when viewed in its entirety, readily accessible to and usable by the inmate; (2) it cannot exclude the inmate from participation in, or deny him the benefits of, the prison's programs, services or activities or otherwise subject him to discrimination; and (3) it must give priority to the provision of services in the most integrated setting appropriate. 28 C.F.R. §§ 35.150 (Title II), 42.521 (Section 504). For example, where a public entity has two pre-ADA prisons, both with the same programs, services, activities, and security classification, and only one has architecturally accessible cells, the Title II and Section 504 program access requirements would permit an inmate who uses a wheelchair to be housed in the prison with the accessible cells, in lieu of requiring architectural modifications at the other facility. 28 C.F.R. §§ 35.150 (Title II), 42.521 (Section 504). However, if the prison without accessible cells has a

drug treatment program and the prison with accessible cells does not, it would be a violation of Title II and Section 504 to deny an inmate with a disability participation in the drug treatment program, whether or not participation in the program is a condition of the inmate's sentence or parole, because he was housed in an accessible cell at a facility where the program was not offered. 28 C.F.R. §§ 35.149-150 and 42.520-521 (individual with disability cannot be denied participation in or benefits of program because facility is inaccessible).

Similarly, if an inmate with a disability requires a specific accessible feature of physical accessibility in order to use a prison program, those features of physical accessibility must be provided pursuant to 28 C.F.R. §§ 35.149-35.150, even if they are not one of the requirements for facilities specified in the ADA Standards or UFAS. For example, an inmate with a mobility disability may require a trapeze or grab bars in order to transfer between a wheelchair and a bed, which is necessary for the accessibility of the prison's housing program. To ensure the safe transportation of an inmate who uses a wheelchair, a prison's transportation program must use an accessible vehicle – *i.e.*, a van or bus equipped with a ramp or wheelchair lift and appropriate wheelchair securement equipment.

To aid correctional officials in complying with Title II's and Section 504's requirement to provide accessible inmate housing, the Department published a technical assistance document describing and illustrating the requirements for accessible cells required pursuant to UFAS and the ADA Standards. See U.S. Dep't of Justice, ADA/Section 504 Design Guide: Accessible Cells in Correctional Facilities (Feb. 2005) ("Accessible Cells Design Guide"), at http://www.ada.gov/publicat.htm#Anchor-ADA-23240, and appended hereto as Exhibit A. The Accessible Cells Design Guide notes the basic elements of accessibility required under both UFAS and the ADA Standards. These include:

1. Doors with 32 inches of clear opening width (when a sliding door is fully opened or a hinged door is open 90 degrees), and clear floor space in front of the door.

2. Where desks are provided, knee and toe space and clear floor space for front approach.

3. Bed with clear floor space for a side approach next to the bed for transferring. Bed height should be between 17 and 19 inches.

4. A toilet with a seat height between 17 and 19 inches, its centerline 18 inches from the side wall, with side and rear grab bars 33 to 36 inches from the finished floor. The side grab bar must be at least 40 inches long and the rear grab bar must be at least 36 inches long.

5. Adequate clear floor space to approach the toilet from a variety of transfer positions (front, diagonal, or side), as different people with disabilities transfer in different manners. Flush controls must be within reach and be operable without tight grasping, twisting, or pinching. Generally, the toilet needs to be placed within a 60-inch-wide by 59-inch deep clear area of the floor. (The various clear floor spaces identified here may overlap.)

6. Lavatories must provide burn protection from contact with pipes, faucets must be usable with one loosely closed fist, such as by levers, push-type mechanisms, and U-shaped handles. Lavatories must also have appropriate clearance.

See Exhibit A, Accessible Cells Design Guide at 1-5 (incorporating UFAS and ADA Standards and providing illustrations).

In addition to accessible cells, other elements of correctional facilities must also comply with accessibility standards in order to provide access to a correctional facility's programs, services, and activities for inmates and visitors with disabilities. These accessibility elements include parking, loading zones, entrances, routes throughout the facility, ramps, curb ramps, stairs, lifts and elevators, doors, drinking fountains, toilet rooms, toilets, sinks, handrails, showers, bathing elements, alarms, telephones, fixed or built-in seating and tables, assembly areas, and controls and operating mechanisms, such as vending machines and dispensers in visitation areas. See generally UFAS; ADA Standards. Particular areas requiring accessibility include those that inmates or visitors use, such as visitation areas, classrooms, workplaces,

private industries, recreation areas, libraries (law and regular), dining areas, and medical care areas. See generally UFAS; ADA Standards.

§ 35.150(c)[16] – time period for achieving compliance. Recognizing that a public entity might require a significant period of time to make structural changes in existing facilities, the Title II regulation gave public entities up to three years to complete those changes. Public entities were required to make all structural changes necessary for program accessibility in existing facilities "as expeditiously as possible" but no later than January 26, 1995. 28 C.F.R. § 35.150(c); Title II Technical Assistance Manual at 46.

§ 35.150(d) and Title II's administrative requirements. Recognizing that large entities – *i.e.*, those with 50 or more employees – would likely need to plan for structural changes in existing facilities necessary to comply with program accessibility requirements, the Title II regulation established an administrative requirement intended to ensure that such planning occurred. 28 C.F.R. § 35.130(d). By July 26, 1992, large public entities were required to develop a transition plan showing the steps they would be taking to achieve compliance. 28 C.F.R. § 35.150(d)(1). The transition plan was required: (a) to identify the physical obstacles in a public entity's facilities that limited the accessibility of its programs, services or activities (*i.e.*, steps, steep slopes, narrow doorways, inaccessible toilet rooms and showers, and other features that did not comply with the ADA Standards (excluding the elevator exception) or UFAS); (b)

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[16] 28 C.F.R. § 35.150(c) provides:

> (c) Time period for compliance. Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

More than a decade earlier, the Section 504 regulation, 28 C.F.R. § 42.521(d), provided a similar time period for making structural modifications.

describe in detail the methods that would be used to make the facilities accessible; and (c) specify a schedule for completion of the steps necessary to achieve compliance. Id. See also Title II TA Manual at 46-47. For Title II entities that also received federal funds and had already complied with transition plan requirements under Section 504, the transition plan was required only to address obstacles to access that were not remedied under a prior Section 504 transition plan. Id.

The Title II regulation (28 C.F.R. § 35.105) also required all public entities to evaluate their own services, policies, and practices to identify those that did not comply with Title II requirements. This self-evaluation was to be completed within one year, by January 26, 1992.

ENSURING COMPLIANCE WITH TITLE II AND SECTION 504 AT GSP AND ASMP

Relief to ensure compliance with Title II, Section 504, and the regulations implementing these statutes, including the ADA Standards or UFAS, requires an evaluation of each of the prisons' programs, services, and activities, as well as the physical and operational issues addressed herein. Such an evaluation must include a thorough review of the facilities' rules, policies, practices, and services. Furthermore, any equitable relief must also include compliance with the regulations with respect to any other inmate with a disability who requires, *inter alia*, an accessible cell, seeks equal access to another program (*e.g.*, drug treatment or education), seeks auxiliary aids and services (*e.g.*, sign language interpreter, reader, materials in accessible formats such as large print or Braille) because of a disability affecting hearing, vision, or speech; or seeks disability-related healthcare and personal assistance services, supplies, or equipment.

SUMMARY

Title II and Section 504 mandate that no qualified individual be subjected to discrimination by a state department of corrections or prison or be excluded from or denied the

benefits of their programs, services, and activities. 42 U.S.C. § 12132; 29 U.S.C. § 794. In addition, all of the programs, services, and activities of public entities, including departments of corrections and prisons, must be "readily accessible to and usable by" inmates with disabilities. 28 C.F.R. §§ 35.149-150(a); 28 C.F.R. § 42.520-521; Yeskey, 524 U.S. at 209. These nondiscrimination mandates – which include obligations established by constitutional guarantee, Lane, 541 U.S. at 523-24 – have existed since the early 1990s for Title II, and the early 1970s for Section 504. Regulations issued under these two statutes, including the architectural standards in the ADA Standards and UFAS, establish the standards for compliance and define what physical accessibility means. Anything short of the benchmarks established by the regulations and applicable standards should be deemed a violation of Title II and Section 504 subject to appropriate remedies.

CONCLUSION

For the reasons stated herein, the United States respectfully requests consideration of this Memorandum of Law in rendering any decisions on summary judgment and at trial.

Respectfully submitted, this 21st day of June 2010.

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EXHIBIT A

U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, ADA/Section 504 Design Guide: Accessible Cells in Correctional Facilities, at http://www.ada.gov/accessiblecells.htm.

CERTIFICATE OF SERVICE

I, William F. Lynch, on behalf of the United States of America as Amicus Curiae hereby certify that I served the following parties in the above-captioned action by electronically filing the foregoing with the Court's case management/electronic case filing system:

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