(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 39.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 39.152–39.159 [Reserved]

§ 39.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 39.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Attorney General or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 39.161–39.169 [Reserved]

§ 39.170 Compliance procedures.

(a) *Applicability.* Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) *Employment complaints.* The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501

of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) *Responsible Official.* The Responsible Official shall coordinate implementation of this section.

(d) *Filing a complaint*—(1) *Who may file.* (i) Any person who believes that he or she has been subjected to discrimination prohibited by this part may by him or herself or by his or her authorized representative file a complaint with the Official. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a complaint with the Official.

(ii) Before filing a complaint under this section, an inmate of a Federal penal institution must exhaust the Bureau of Prisons Administrative Remedy Procedure as set forth in 28 CFR part 542.

(2) *Confidentiality.* The Official shall hold in confidence the identity of any person submitting a complaint, unless the person submits written authorization otherwise, and except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or proceeding under this part.

(3) *When to file.* Complaints shall be filed within 180 days of the alleged act of discrimination, except that complaints by inmates of Federal penal institutions shall be filed within 180 days of the final administrative decision of the Bureau of Prisons under 28 CFR part 542. The Official may extend this time limit for good cause shown. For purposes of determining when a complaint is timely filed under this subparagraph, a complaint mailed to the agency shall be deemed filed on the date it is postmarked. Any other complaint shall be deemed filed on the date it is received by the agency.

(4) *How to file.* Complaints may be delivered or mailed to the Attorney General, the Responsible Official, or agency officials. Complaints should be sent to the Director for Equal Employment Opportunity, U.S. Department of Justice, 10th and Pennsylvania Avenue, NW., Room 1232, Washington, DC 20530. If any agency official other than the Official receives a complaint, he or she shall forward the complaint to the Official immediately.

(e) *Notification to the Architectural and Transportation Barriers Compliance Board.* The agency shall promptly send to the Architectural and Transportation Barriers Compliance Board a copy of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons. The agency shall delete the identity of the complainant from the copy of the complaint.

(f) *Acceptance of complaint.* (1) The Official shall accept a complete complaint that is filed in accordance with paragraph (d) of this section and over which the agency has jurisdiction. The Official shall notify the complainant and the respondent of receipt and acceptance of the complaint.

(2) If the Official receives a complaint that is not complete, he or she shall notify the complainant, within 30 days of receipt of the incomplete complaint, that additional information is needed. If the complainant fails to complete the complaint within 30 days of receipt of this notice, the Official shall dismiss the complaint without prejudice.

(3) If the Official receives a complaint over which the agency does not have jurisdiction, the Official shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(g) *Investigation/conciliation.* (1) Within 180 days of the receipt of a complete complaint, the Official shall complete the investigation of the complaint, attempt informal resolution, and, if no informal resolution is achieved, issue a letter of findings.

(2) The Official may require agency employees to cooperate in the investigation and attempted resolution of complaints. Employees who are required by the Official to participate in any investigation under this section shall do so as part of their official duties and during the course of regular duty hours.

(3) The Official shall furnish the complainant and the respondent a copy of the investigative report promptly after receiving it from the investigator and provide the complainant and respondent with an opportunity for informal resolution of the complaint.

(4) If a complaint is resolved informally, the terms of the agreement shall be reduced to writing and made part of the complaint file, with a copy of the agreement provided to the complainant and respondent. The written agreement may include a finding on the issue of discrimination and shall describe any corrective action to which the complainant and respondent have agreed.

(h) *Letter of findings.* If an informal resolution of the complaint is not reached, the Official shall, within 180 days of receipt of the complete complaint, notify the complainant and the respondent of the results of the investigation in a letter sent by certified mail, return receipt requested, containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found;

(3) A notice of the right of the complainant and respondent to appeal to the Complaint Adjudication Officer; and

(4) A notice of the right of the complainant and respondent to request a hearing.

(i) *Filing an appeal.* (1) Notice of appeal to the Complaint Adjudication Officer, with or without a request for hearing, shall be filed by the complainant or the respondent with the Responsible Official within 30 days of receipt from the Official of the letter required by paragraph (h) of this section.

(2) If a timely appeal without a request for hearing is filed by a party, any other party may file a written request for hearing within the time limit specified in paragraph (i)(1) of this section or within 10 days of the date on which the first timely appeal without a request for hearing was filed, whichever is later.

(3) If no party requests a hearing, the Responsible Official shall promptly transmit the notice of appeal and investigative record to the Complaint Adjudication Officer.

(4) If neither party files an appeal within the time prescribed in paragraph (i)(1) of this section, the Responsible Official shall certify that the letter of findings is the final agency decision on the complaint at the expiration of that time.

(j) *Acceptance of appeal.* The Responsible Official shall accept and process any timely appeal. A party may appeal to the Complaint Adjudication Officer from a decision of the Official that an appeal is untimely. This appeal shall be filed within 15 days of receipt of the decision from the Official.

(k) *Hearing.* (1) Upon a timely request for a hearing, the Responsible Official shall appoint an administrative law judge to conduct the hearing. The administrative law judge shall issue a notice to all parties specifying the date, time, and place of the scheduled hearing. The hearing shall be commenced no earlier than 15 days after the notice is issued and no later than 60 days after the request for a hearing is filed, unless all parties agree to a different date.

(2) The complainant and respondent shall be parties to the hearing. Any interested person or organization may petition to become a party or amicus curiae. The administrative law judge may, in his or her discretion, grant such a petition if, in his or her opinion, the petitioner has a legitimate interest in the proceedings and the participation will not unduly delay the outcome and may contribute materially to the proper disposition of the proceedings.

(3) The hearing, decision, and any administrative review thereof shall be conducted in conformity with 5 U.S.C. 554–557 (sections 5–8 of the Administrative Procedure Act). The administrative law judge shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He or she shall have all powers necessary to these ends, including (but not limited to) the power to—

(i) Arrange and change the date, time, and place of hearings and prehearing conferences and issue notice thereof;

(ii) Hold conferences to settle, simplify, or determine the issues in a hearing, or to consider other matters that

may aid in the expeditious disposition of the hearing;

(iii) Require parties to state their position in writing with respect to the various issues in the hearing and to exchange such statements with all other parties;

(iv) Examine witnesses and direct witnesses to testify;

(v) Receive, rule on, exclude, or limit evidence;

(vi) Rule on procedural items pending before him or her; and

(vii) Take any action permitted to the administrative law judge as authorized by this part or by the provisions of the Administrative Procedure Act (5 U.S.C. 551–559).

(4) Technical rules of evidence shall not apply to hearings conducted pursuant to this paragraph, but rules or principles designed to assure production of credible evidence and to subject testimony to cross-examination shall be applied by the administrative law judge whenever reasonably necessary. The administrative law judge may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties, and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record.

(5) The costs and expenses for the conduct of a hearing shall be allocated as follows:

(i) Persons employed by the agency, shall, upon request to the agency by the administrative law judge, be made available to participate in the hearing and shall be on official duty status for this purpose. They shall not receive witness fees.

(ii) Employees of other Federal agencies called to testify at a hearing shall, at the request of the administrative law judge and with the approval of the employing agency, be on official duty status during any period of absence from normal duties caused by their testimony, and shall not receive witness fees.

(iii) The fees and expenses of other persons called to testify at a hearing shall be paid by the party requesting their appearance.

(iv) The administrative law judge may require the agency to pay travel expenses necessary for the complainant to attend the hearing.

(v) The respondent shall pay the required expenses and charges for the administrative law judge and court reporter.

(vi) All other expenses shall be paid by the party, the intervening party, or amicus curiae incurring them.

(6) The administrative law judge shall submit in writing recommended findings of fact, conclusions of law, and remedies to all parties and the Complaint Adjudication Officer within 30 days after receipt of the hearing transcripts, or within 30 days after the conclusion of the hearing if no transcript is made. This time limit may be extended with the permission of the Complaint Adjudication Officer.

(7) Within 15 days after receipt of the recommended decision of the administrative law judge, any party may file exceptions to the decision with the Complaint Adjudication Officer. Thereafter, each party will have ten days to file reply exceptions with the Officer.

(l) *Decision.* (1) The Complaint Adjudication Officer shall make the decision of the agency based on information in the investigative record and, if a hearing is held, on the hearing record. The decision shall be made within 60 days of receipt of the transmittal of the notice of appeal and investigative record pursuant to § 39.170(i)(3) or after the period for filing exceptions ends, whichever is applicable. If the Complaint Adjudication Officer determines that he or she needs additional information from any party, he or she shall request the information and provide the other party or parties an opportunity to respond to that information. The Complaint Adjudication Officer shall have 60 days from receipt of the additional information to render the decision on the appeal. The Complaint Adjudication Officer shall transmit his or her decision by letter to the parties. The decision shall set forth the findings, remedial action required, and reasons for the decision. If

the decision is based on a hearing record, the Complaint Adjudication Officer shall consider the recommended decision of the administrative law judge and render a final decision based on the entire record. The Complaint Adjudication Officer may also remand the hearing record to the administrative law judge for a fuller development of the record.

(2) Any respondent required to take action under the terms of the decision of the agency shall do so promptly. The Official may require periodic compliance reports specifying—

(i) The manner in which compliance with the provisions of the decision has been achieved;

(ii) The reasons any action required by the final decision has not yet been taken; and

(iii) The steps being taken to ensure full compliance.

The Complaint Adjudication Officer may retain responsibility for resolving disagreements that arise between the parties over interpretation of the final agency decision, or for specific adjudicatory decisions arising out of implementation.

EDITORIAL NOTE: For the convenience of the user, the ''Supplementary Information'' portion of the document published at 49 FR 35724, Sept. 11, 1984, is set forth below:

SUPPLEMENTARY INFORMATION: On December 16, 1983, the Department of Justice published a Notice of Proposed Rulemaking (NPRM) for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs and activities conducted by the Department of Justice. 48 FR 55996. Shortly after the NPRM was published, the Department received a number of preliminary comments from handicapped individuals and from organizations representing handicapped individuals. The tone and nature of these comments indicated to the Department that some of the regulatory provisions of the NPRM were being misunderstood. As a result, the Department, on March 1, 1984, published a Supplementary Notice further explaining the NPRM and requesting comments on possible revisions to the original NPRM. 49 FR 7792.

By April 16, 1984, close of the comment period, the Department received 1,194 comments. Two hundred and six of these comments also addressed the supplemental notice. Over 90% of the comments that the Department received came from individuals (908), most frequently handicapped persons, and from organizations representing the interests of handicapped persons (180). The Department received comments from all fifty states, the District of Columbia, Puerto Rico, Canada, and Denmark. Most of the comments that the Department received were general in nature. The Department received 721 comments based on a form letter. This form letter, written before issuance of the Supplemental Notice, expressed dismay at the inclusion of the regulation's ''undue financial and administrative burdens'' language, asserted that the Department was imposing a lesser requirement on the Federal government than on recipients of Federal assistance, and requested that the regulation be withdrawn. This form letter did not contain any substantive or detailed analysis. In fact, only 55 of the 1,194 comments contained specific, detailed analysis of the Department's proposal.

The Department read and analyzed each comment. Each comment was then subdivided according to one or more of over 90 issue categories. Because comments often addressed, even in general terms, more than one issue, the 1,194 comments were translated into 4,256 issue-specific comments. The decisions that the Department made in response to these comments, however, were not made on the basis of the number of commenters addressing any one point but on a thorough consideration of the merits of the points of view expressed in the comments. Copies of the written comments will remain available for public inspection in Room 854 of the HOLC Building, 320 First Street, NW., Washington, DC from 9:00 a.m. to 5:30 p.m., Monday through Friday, except for legal holidays, until November 13, 1984.

Section 504 requires that regulations that apply to the programs and activities of Federal executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been so submitted. The Department has today submitted this regulation to the Senate Committee on Labor and Human Resources and its Subcommittee on the Handicapped and the House Committee on Education and Labor and its Subcommittee on Select Education pursuant to the terms of section 504. The regulation will become effective on October 11, 1984.

This rule applies to all programs and activities conducted by the Department of Justice. Thus, this rule regulates the activities of over 30 separate subunits in the Department, including, for example, the Federal Bureau of Investigation, the Drug Enforcement Administration, the Immigration and Naturalization Service, the Bureau of Prisons, Federal Prison Industries, and the United States Attorneys.

BACKGROUND

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to programs and activities conducted by the Department of Justice (DOJ). As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Sec. 119, Pub. L. 95–602, 92 Stat. 2982), section 504 of the Rehabilitation Act of 1973 states that:

No otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.*

(29 U.S.C. 794) (amendment italicized).

The substantive nondiscrimination obligations of the agency, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. *See* 28 CFR part 41 (section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1984) *id.*, 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); *id.* at 38,552 (remarks of Rep. Sarasin).

Nine hundred and two comments that the Department received agreed that the obligations of section 504 for federally conducted programs should be identical to those developed by the Federal agencies over the past seven years for federally assisted programs. These commenters, however, objected to any language differences between the Department's proposed rule for federally conducted programs and the Department's section 504 coordination regulation for federally assisted programs (28 CFR part 41). The commenters asserted that a number of language differences that the Department had proposed created less stringent standards for the Federal government than those applied to recipients of Federal assistance under section 504. They wrote that such a result could not be justified by Executive Order 12250, by the wording of the statute itself, nor by the legislative history of the 1978 amendments.

The commenters appear to have misunderstood the basis for inclusion of the new language in the DOJ regulation. The changes in this regulation are based on the Supreme Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting *Davis* and section 504. *See Dopico* v. *Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association* v. *Lewis*, 655 F.2d 1272 (D.C. Cir. 1981) (*APTA*); *see also Rhode Island Handicapped Action Committee* v. *Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983).

Some commenters questioned the use of *Davis* as justification for the inclusion of the new provisions in the federally conducted regulation. They noted that the Department had not included these changes when, subsequent to the *Davis* decision, it issued a regulation implementing section 504 in programs receiving Federal financial assistance from this Department. The Department's section 504 federally assisted regulation, however, was issued prior to the D.C. circuit's decision in *APTA*. In *APTA*, the Department had argued a position similar to that advocated by the commenters. Judge Abner Mikva's decision in *APTA* clearly rejected the Department's position in that case. Other circuit court decisions followed the *APTA* interpretation of *Davis*. Since these decisions, the Department has interpreted its section 504 regulation for federally assisted programs in a manner consistent with the language of this final rule. The Department believes that judicial interpretation of section 504 compels it to incorporate the new language in the federally conducted regulation.

Incorporation of these changes, therefore, makes this section 504 federally conducted regulation consistent with the Federal government's section 504 federally assisted regulations. Because many of these federally assisted regulations were issued prior to the judicial interpretations of *Davis* and its progeny, their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence the Department believes that there are no significant differences between this final rule for federally conducted programs and the Federal government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared. This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601–612).

SECTION-BY-SECTION ANALYSIS AND RESPONSE TO COMMENTS

Section 39.101 Purpose

Section 39.101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

The Department received no comments on this section and it remains unchanged from the Department's proposed rule.

Section 39.102 Application

The regulation applies to all programs or activities conducted by the Department of Justice. Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: those involving general public contact as part of ongoing agency operations and those directly administered by the Department for program beneficiaries and participants. Activities in the first part include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the Department's facilities (cafeteria, library). Activities in the second category include programs that provide Federal services or benefits (immigration activities, operation of the Federal prison system). No comments were received on this section.

Section 39.103 Definitions

The Department received 469 comments on the definitions section. Most of the comment, however, concentrated on the definition of ''qualified handicapped person.''

''Agency'' is defined as the Department of Justice.

''Assistant Attorney General.'' ''Assistant Attorney General'' refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

''Auxiliary aids.'' ''Auxiliary aids'' means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Auxiliary aids are addressed in §39.160(a)(1). Comments on the definition of ''auxiliary aids'' are discussed in connection with that section.

''Complete complaint.'' ''Complete complaint'' is defined to include all the information necessary to enable the agency to investigate the complaint. The definition is necessary, because the 180 day period for the agency's investigation (*see* §39.170(g)) begins when it receives a complete complaint.

''Facility.'' The definition of ''facility'' is similar to that in the section 504 coordination regulation for federally assisted programs, 28 CFR 41.3(f), except that the term ''rolling stock or other conveyances'' has been added and the phrase ''or interest in such property'' has been deleted.

Twenty commenters on the NPRM objected to the omission of the phrase ''or interest in such property'' from the definition of ''facility.'' As explained in the Supplemental Notice, the term ''facility,'' as used in this regulation, refers to structures, and does not include intangible property rights. The definition, therefore, has no effect on the scope of coverage of programs, including those conducted in facilities not included in the definition. The phrase has been omitted because the requirement that facilities be accessible would be a logical absurdity if applied to a lease, life estate, mortgage, or other intangible property interest. The regulation applies to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. Sixty commenters supported the clarification of this issue in the Supplemental Notice.

''Handicapped person.'' The definition of ''handicapped person'' has been revised to make it identical to the definition appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). In its NPRM, the Department omitted the list of physical or mental impairments included in the definition of ''handicapped persons.'' The Department received 19 negative comments on this omission, and, in the Supplemental Notice, requested comments on whether it should be re-inserted. On the basis of the comments received, we have included the list in the final rule.

''Qualified handicapped person'' The definition of ''qualified handicapped person'' is a revised version of the definition appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Subparagraph (1) of the definition states that a ''qualified handicapped person'' with regard to any program under which a person is required to perform services or to achieve a level of accomplishment is a handicapped person who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature. This definition is based on the Supreme Court's *Davis* decision.

In *Davis,* the Court ruled that a hearing-impaired applicant to a nursing school was not a ''qualified handicapped person'' because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), ''she would not receive even a rough equivalent of the training a nursing program normally gives.'' 442 U.S. at 410. It also found that ''the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways,'' *id.* at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in ''a fundamental alteration in the nature of the program.'' *Id.* at 410.

The Department incorporated the Court's language in the definition of ''qualified handicapped person'' in order to make clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable a handicapped applicant to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered; not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some handicapped people from some programs, it requires that a handicapped person who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

Two hundred and forty-four commenters objected to this revised definition for a variety of reasons. Several commenters stated that the Department incorrectly used *Davis* as the justification for explaining the differences between the federally assisted and the federally conducted regulations because the Supreme Court upheld the validity of the existing regulations in *Consolidated Rail Corp.* v. *Darrone,* 104 S. Ct. 1248 (1984). This view misunderstands the Court's actions in *Darrone.* In that case the Court ruled on a series of issues, the most important of which was under what circumstances section 504 applied to employment discrimination by recipients. The Court did not concern itself either directly or indirectly with the definition of ''qualified handicapped person'' or whether section 504 included limitations based on ''undue financial and administrative burdens.''

Many commenters stated that the proposal would change the definition of qualified handicapped person for employment. ''Qualified handicapped person'' is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by §39.140. Nothing in this part changes existing regulations applicable to employment.

Many commenters assumed that the definition would have the effect of placing on the handicapped person the burden of proving that he or she is qualified. The definition has been revised to make it clear that the agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in §§39.150(a)(2) and 39.160(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the agency head or his or her designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable the handicapped person to achieve the purpose of the program but would not result in such an alteration.

Some commenters said that the definition of ''qualified handicapped person'' places handicapped persons in a ''Catch-22'' situation: because only qualified handicapped persons are protected by the statute, a determination that a person is not qualified would make enforcement remedies unavailable to that person. This concern is misplaced. If the Department determined that a handicapped person was not ''qualified,'' the person could use the procedures established by §39.170 to challenge that determination, just as he or she could challenge any other decision by the agency that he or she believed to be discriminatory.

Many commenters argued that the definition of ''qualified handicapped person'' confused what should be two separate inquiries: whether a person meets essential eligibility

requirements and, if so, whether accommodation is required. They argued that the reference to ''fundamental alteration'' in the definition focuses attention on accommodations rather than on a handicapped person's abilities. As another commenter noted, however, the Supreme Court in *Davis* developed the ''fundamental alteration'' language in a decision that was determining the nature and scope of what constitutes a qualified handicapped person. The Department continues to believe that the concept of ''qualified handicapped person'' properly encompasses both the notion of ''essential eligibility requirements'' and the notion of program modifications that might fundamentally alter a program.

Some commenters argued that our analysis of *Davis* was inappropriate because *Davis* was decided on the basis of individual facts unique to that case or because *Davis* involved federally assisted and not federally conducted programs. While cases are decided on the basis of specific factual situations, courts, especially the Supreme Court, develop general principles of law for use in analyzing facts. The *Davis* decision was the Supreme Court's first comprehensive view of section 504, a major new civil rights statute. The *Davis* holding, that a person who cannot achieve the purpose of a program without fundamental changes in its nature is not a ''qualified handicapped person,'' is a general principle, a statement by the Court on how it views section 504. It is therefore necessary to reflect it in the Department's regulation.

Subparagraph (2) of the definition adopts the existing definition in the coordination regulation of ''qualified handicapped person'' with respect to services for programs receiving Federal financial assistance (28 CFR 41.32(b)). Under this part of the definition, a qualified handicapped person is a handicapped person who meets the essential eligibility requirements for participation in the program or activity.

''Section 504.'' This definition makes clear that, as used in this regulation, ''section 504'' applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section 39.110 Self-evaluation

This section requires that the agency conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with handicapped persons that promotes both effective and efficient implementation of section 504.

In response to preliminary comments that the proposed rule had no specific criteria for conducting a self-evaluation, we requested comment on a proposed alternative in our Supplemental Notice (49 FR 7792). We received 64 comments, 57 of which were positive. The comments generally favored adoption of the alternative section, instead of the proposed section. We agree.

With respect to the applicability of the Federal Advisory Committee Act (5 U.S.C. App. 1 et seq.) (FACA), several comments were received. They argued that the FACA is not intended to apply to meetings with a self-evaluation group comprised of private individuals because they are rather unstructured, ad hoc meetings.

Authority for interpreting FACA was delegated to the General Services Administration (GSA) by Executive Order 12024 in 1977. Regulations issued by GSA place specific limitations on the scope of the Act by delineating examples of meetings or groups *not* covered. 41 CFR part 101–6. GSA identified a major issue in the promulgation of the regulations to be the extent of applicability of the Act

Some commenters believe, as a matter of general policy, that advisory groups which are not formally structured, which do not have a continuing existence, which meet to deal with specific issues, and whose meetings do not constitute an established pattern of conduct should not be covered under the Act. * * * This rule reflects our judgment that the exclusion of certain non-recurring meetings from the Act's coverage is fully consistent with the statute, its legislative history, and judicial interpretation. * * * The interim rule provides guidance for those meetings between Federal officials and non-Federal individuals which do not fall within the scope of the Act, and for which a charter and consultation with GSA is not required.

48 FR 19324 (Preamble to interim rules).

The regulations define ''advisory committee'' in pertinent part as:

Any committee, board, commission, council, conference, panel, task force or other similar group * * * established by * * * or *utilized by* * * * any agency official *for the purpose of obtaining advice or recommendations on issues or policy* which are within the scope of his or her responsibilities.

41 CFR 101–6. 1003 (emphasis added).

In turn, ''utilized'' is defined in pertinent part as a

group * * * which * * * agency official(s) *adopts,* such as through institutional arrangements, *as a preferred source from which*

to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities *in the same manner* as that *individual would obtain advice or recommendations from an established advisory committee.*

41 CFR 101–6.1003 (emphasis added).

The GSA regulation further provides that the Act does not apply to

(g) Any meeting initiated by the President or one or more Federal official [sic] for the purpose of obtaining advice or recommendations from one individual;

(h) Except with respect to established advisory committees:

(1) Any meeting with a group initiated by the President or one or more Federal official(s) for the purpose of exchanging facts or information; or

(2) Any meeting initiated by a group with the President or one or more Federal official(s) for the purpose of expressing the group's view, provided that the President or Federal official(s) does not use the group as a preferred source of advice or recommendations;

* * * * *

(j) Any meeting initiated by a Federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations.

41 CFR 101–6.1004 (g), (h), and (j).

This final rule provides that the agency shall provide an opportunity for interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process and development of transition plans by submitting comments (both oral and written).

Section 39.111 Notice

The Department received negative comments on its omission of a paragraph routinely used in section 504 regulations for federally assisted programs requiring recipients to inform interested persons of their rights under section 504. In the Department's Supplemental Notice, we requested comments on inclusion of specific regulatory language. Fifty-four positive comments were received. As a result, the Department has incorporated that new provision on notice into the final rule. It appears as §39.111.

Section 39.111 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 of this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Section 39.111 is, in fact, a broader and more detailed version of the proposed rule's requirement (at §39.160(d)) that the agency provide handicapped persons with information concerning their rights. Because §39.111 encompasses the requirements of proposed §39.160(d), that latter paragraph has been deleted as duplicative.

Section 39.130 General prohibitions against discrimination

Section 39.130 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51). This regulatory provision attracted relatively few public comments and has not been changed from the proposed rule.

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in §39.130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the agency violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found in §39.130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of handicapped persons. The agency may not refuse to provide a handicapped person with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (*e.g.*, epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligiblity requirements for participation in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be permissible to disqualify automatically all those who are blind in just one eye.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Subparagraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to a handicapped person be as effective as that afforded to others. The later sections on program accessibility (§§ 39.149–39.151) and communications (§ 39.160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons, subparagraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide handicapped persons with an equal opportunity to participate in or benefit from the agency's programs or activities. Subparagraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, subparagraph (b)(2) provides that a qualified handicapped person still has the right to choose to participate in the program that is not designed to accommodate handicapped persons.

Subparagraph (b)(1)(v) prohibits the agency from denying a qualified handicapped person the opportunity to participate as a member of a planning or advisory board.

Subparagraph (b)(1)(vi) prohibits the agency from limiting a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Subparagraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny handicapped persons access to the agency's programs or activities. The phrase ''criteria or methods of administration'' refers to official written agency policies and to the actual practices of the agency. This subparagraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny handicapped persons an effective opportunity to participate.

Subparagraph (b)(4) specifically applies the prohibition enunciated in § 39.130(b)(3) to the process of selecting sites for construction of new facilities or existing facilities to be used by the agency. Subparagraph (b)(4) does not apply to construction of additional buildings at an existing site.

Subparagraph (b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

Subparagraph (b)(6) prohibits the agency from discriminating against qualified handicapped persons on the basis of handicap in the granting of licenses or certification. A person is a ''qualified handicapped person'' with respect to licensing or certification, if he or she can meet the essential eligibility requirements for receiving the license or certification (*see* § 39.103).

In addition, the agency may not establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. For example, the agency must comply with this requirement when establishing safety standards for the operations of licensees. In that case the agency must ensure that standards that it promulgates do not discriminate in an impermissible manner against the employment of qualified handicapped persons.

Subparagraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program or activity of the licensee or certified entity, and thereby indirectly affect limited aspects of its operations.

Twenty-three commenters argued that the regulation should extend to the activities of licensees or certified entities, citing *Community Television of Southern California* v. *Gottfried,* 103 S. Ct. 885 (1983). In that case, the Court held that section 504 as applied to federally assisted programs did not require the Federal Communications Commission to prohibit discrimination on the basis of handicap by licensed broadcasters, but that ''the policies underlying the Communications Act'' might authorize the Commission to issue a regulation governing such discrimination. The Court did not, however, indicate that section 504 itself could serve as the source of such regulatory authority.

The Court has held that ''the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather the words take meaning from the purposes of the regulatory legislation.'' *National Association for the Advancement of Colored People* v. *Federal Power Commission,* 425 U.S. 662, 669 (1976). In our view, section 504 does not of itself extend an agency's regulatory authority to the activities of licensees or certified entities.

Where an agency has existing regulatory authority that is broad enough to enable it to establish a nondiscrimination requirement for its licensees or certified entities, section 504 may support the exercise of that authority. Because the Department of Justice has no such underlying authority, it cannot prohibit discrimination by licensees.

Twenty-two commenters objected to the omission of a paragraph from the regulations for federally assisted programs that prohibits a recipient from providing significant assistance to an organization that discriminates. To the extent that assistance from the agency would provide significant support to an organization, it would constitute Federal financial assistance and the organization, as a recipient of such assistance, would be covered by the agency's section 504 regulation for federally assisted programs. The regulatory ''significant assistance'' provision, however, would be inappropriate in a regulation applying only to federally conducted programs or activities.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only handicapped persons or a given class of handicapped persons may be limited to those handicapped persons.

Paragraph (d), discussed above, provides that the agency must administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

Section 39.140 Employment

Section 39.140 prohibits discrimination on the basis of handicap in employment by the agency. Comments on proposed §39.140 identified two types of problems. First, several commenters felt that the rule's treatment of employment was not sufficiently comprehensive. They pointed out that the rule does not enumerate the employment practices covered (*e.g.*, hiring, promotion, assignment); it does not say what must be done to avoid or correct possible discrimination (*e.g.*, reasonable accommodation, review of preemployment tests, limitations on preemployment inquiries and the use of medical examinations); nor does it define a ''qualified handicapped person'' with respect to employment.

Second, one commenter objected to the rule's adoption of ''the definitions, requirements and procedures of section 501 of the Rehabilitation Act'' as established in rules of the Equal Employment Opportunity Commission (EEOC) at 29 CFR part 1613. This commenter argued that EEOC's rules on physical examinations were too restrictive and claimed that the proposed rule did not limit employment coverage to the program conducted by the Federal government in a manner similar to the ''program or activity'' limitation on coverage of programs receiving Federal financial assistance. Finally, the commenter asserted that reliance on section 501 was misplaced because that section of the Rehabilitation Act requires affirmative action whereas section 504, which the rule implements, contains only a nondiscrimination requirement.

The original notice of proposed rulemaking explained that the regulation is in accord with *Prewitt* v. *United States Postal Service,* 662 F.2d 292 (5th Cir. 1981), which held that Congress intended section 504 to cover the employment practices of Executive agencies. In *Prewitt,* the court also held that, in order to give effect to sections 501 and 504, both of which cover Federal employment, the administrative procedures of section 501 must be followed. Accordingly, the proposed rule adopted the definitions, requirements and procedures of section 501 as established in EEOC's rules.

The final rule has not been changed. The Department intends to avoid duplicative, competing or conflicting standards under the Rehabilitation Act with respect to Federal employment. While the rule could define terms with respect to employment and enumerate what practices are covered and what requirements apply, reference to the Government-wide rules of the Equal Employment Opportunity Commission is sufficient and avoids duplication. The class of Federal employees and applicants for employment covered by section 504 is identical to or subsumed within that covered by section 501. To apply different or lesser standards to persons alleging violations of section 504 could lead unnecessarily to confusion in the enforcement of the Rehabilitation Act with respect to Federal employment.

Section 39.149 Program accessibility: Discrimination prohibited

The proposed regulation did not contain a general statement of the program accessibility requirement similar to that appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.56). The decision not to include this language in the proposed regulation created the misperception that a change in substance was intended. In order to remedy this misunderstanding, the Supplemental Notice requested comments on explicitly including it. Sixty-two commenters favored inclusion of the specific regulatory language that was published in the Supplemental Notice. Consequently, the final rule has been revised to include the language of the Supplemental Notice. The language appears at §39.149.

Section 39.150 Program accessibility: Existing facilities

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Thus, §39.150 requires that the agency's program or activity, when viewed in its entirety, be readily accessible to and usable by handicapped persons. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (§39.150(a)(1)). However, §39.150, unlike 28 CFR 41.56–41.57, places explicit limits on the agency's obligation to ensure program accessibility (§39.150(a)(2)). This provision provoked 959 comments, the largest number received on any single issue. Most commenters sought the deletion of the ''undue financial and administrative burdens'' language from the regulation. On the basis of preliminary comments on this paragraph, the Department published clarifying language in its Supplemental Notice. The final version includes that clarification.

The ''undue financial and administrative burdens'' language (found at §§39.150(a)(2) and 39.160(d)) is based on the Supreme Court's *Davis* holding that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in ''undue financial and administrative burdens.'' 442 U.S. at 412. Since *Davis*, circuit courts have applied this limitation on a showing that only one of the two ''undue burdens'' would be created as a result of the modification sought to be imposed under section 504. *See, e.g., Dopico* v. *Goldschmidt, supra; American Public Transit Association* v. *Lewis, supra* (*APTA*). In *APTA* the United States Court of Appeals for the District of Columbia Circuit applied the *Davis* language and invalidated the section 504 regulations of the Department of Transportation (DOT). The court in *APTA* noted ''that at some point a transit system's refusal to take modest, affirmative steps to accommodate handicapped persons might well violate section 504. But DOT's rules do not mandate only modest expenditures. The regulations require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities.'' 655 F.2d at 1278.

The inclusion of subparagraph (a)(2) is an effort to conform the agency's regulation implementing section 504 to the Supreme Court's interpretation of the statute in *Davis* as well as to the decisions of lower courts following the *Davis* opinion. This subparagraph acknowledges, in light of recent case law, that, in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. The failure to include such a provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

Many commenters argued that the Supreme Court's decision in *Davis* did not require inclusion of an undue burdens defense in this regulation. These commenters asserted that the holding in *Davis* was that the plaintiff was not a qualified handicapped person and that the subsequent reference to ''undue financial and administrative burdens'' was mere *dicta*. These commenters overlook the interpretations of *Davis* provided by the Federal circuit court cases mentioned above. The *APTA* and *Dopico* decisions make it clear that financial burdens can limit the obligation to comply with section 504. *See also New Mexico Association for Retarded Citizens* v. *New Mexico*, 678 F.2d 847 (10th Cir. 1982).

Many commenters argued that inclusion of the undue burdens defense was inconsistent with the position taken by Vice President Bush in his letter of March 21, 1983, in which he announced the Administration's decision not to revise the coordination regulation for federally assisted programs. The decision to include the undue burdens defense represents no contradiction with the position taken by Vice President Bush on the guidelines for federally assisted programs. In his letter the Vice President stated that ''extensive change of the existing 504 coordination regulations was not required, and that with respect to those few areas where clarification might be desirable, the courts are currently providing useful guidance and can be expected to continue to do so in the future.'' One element of that ''useful guidance'' obviously comes from interpretations of the *Davis* decision by the lower Federal courts.

The Department has carefully considered the comments on the process that the Department should follow in determining whether a program modification would result in undue financial and administrative burdens. The Department intends to be guided by six principles in its application of the ''fundamental alteration'' and ''undue financial and administrative burdens'' language.

First, because of the extensive resources and capabilities that could properly be drawn upon for section 504 purposes by a large Federal agency like the Department of Justice, the Department explicitly acknowledges that, in most cases, making a Department program accessible will likely not result in undue burdens. Second, the burden of proving that the accommodation request will result in a fundamental alteration or undue burdens has been placed squarely on the Department of Justice, not on the handicapped

person. Third, in determining whether financial and administrative burdens are undue, the Department is to consider all Department resources available for use in the funding and operation of the conducted program. Fourth, the ''fundamental alteration''/''undue burdens'' decision is to be made by the Attorney General or his designee and must be accompanied by a written statement of reasons for reaching such a conclusion. Fifth, if a disabled person disagrees with the Attorney General's finding, he or she can file a complaint under the complaint procedures established by the final regulation. A significant feature of this complaint adjudication procedure is the availability of a hearing before an independent administrative law judge under the due process protections of the Administrative Procedure Act. Sixth and finally, even if there is a determination that making a program accessible will fundamentally alter the nature of the program, or will result in undue financial and administrative burdens, the Department must still take action, short of that outer limit, that will open participation in the Department's program to disabled persons to the fullest extent possible.

One hundred and eighty-one commenters on the Supplemental Notice objected to the provision that the ''undue burdens'' decision would be based on consideration of ''all agency resources available for use in the funding and operation of the conducted program,'' arguing that it should be based on the resources of the agency as a whole. Some argued that this formulation was required because all agency resources come from taxpayer monies and should not be used to support discrimination.

The Department's entire budget is an inappropriate touchstone for making determinations as to undue financial and administrative burdens. Many parts of the Department's budget are earmarked for specific purposes and are simply not available for use in making the Department's programs accessible to disabled persons. For example, funds for the operation of the Bureau of Prisons are unavailable for defraying the cost of a sign language interpreter at a deportation hearing conducted by the Immigration and Naturalization Service. There are extensive resources available to the Department and it is expected that the Department will, only on very rare occasions, be faced with ''undue burdens'' in meeting the program accessibility or communications sections of the regulation.

One commenter said that the term ''undue hardship'' used in regulations for federally assisted programs is more specific and less discriminatory than the term ''undue burdens.'' The term ''undue hardship'' is a term of art used in connection with employment. The term ''undue burdens'' is taken from the Supreme Court's opinion in *Davis* and is appropriately included in this regulation.

Some commenters argued that section 504 creates an absolute right to access, and that cost cannot limit this right, although it may be a factor in determining timeframes for compliance. Section 504 does not create an absolute right to access. The Supreme Court stated in *Davis* that recipients need not undertake modifications to their programs to meet the requirements of section 504 that would result in ''undue financial and administrative burdens.'' This understanding of section 504 and its implementing regulations for federally assisted programs is shared by the lower Federal courts, which have routinely applied the ''undue burdens'' limitation to accessibility issues. Congress suggested no different interpretation of section 504 when applying it to federally conducted programs. Spreading the cost of compliance over a period of time is, however, one way of avoiding undue financial and administrative burdens, and the Department will consider that as an option whenever it considers asserting that defense.

Paragraph (b) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of handicapped persons. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 39.151 Program accessibility: New construction and alterations

Overlapping coverage exists with respect to new construction under section 504, section 502 of the Rehabilitation Act of 1973, as

amended (29 U.S.C 792), and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). Section 39.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by handicapped persons in accordance with 41 CFR 101–19.600 to 101–19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). It is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required to meet the new construction standard. They are subject, however, to the requirements of §39.150.

A commenter has recommended that the regulation should require that buildings leased after the effective date of the regulation should meet the new construction standards of §39.151, rather than the program accessibility standard for existing facilities in §39.150. Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the Department believes the same program accessibility standard should apply to both owned and leased existing buildings.

Section 39.160 Communications

Section 39.160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps include procedures for determining when auxiliary aids are necessary under §39.160(a)(1) to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They also include an opportunity for handicapped persons to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (§39.160(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under §39.160(d). That paragraph limits the obligation of the agency to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it (*see supra* preamble §39.150(a)(2)). Unless not required by §39.160(d), the agency shall provide auxiliary aids at no cost to the handicapped person.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (*e.g.*, a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. In these cases, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to inform the public of (1) the communications services it offers to afford handicapped persons an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids when several different modes are effective.

The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the agency, *e.g.*, INS deportation proceedings. Auxiliary aids in these proceedings must be afforded where they are necessary to ensure effective communication at the proceedings. When sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (§39.160(a)(1)(ii)). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

Some commenters suggested that the Department's language in §39.160(a)(1)(ii) that states that the agency need not provide individually prescribed devices or readers for personal use or study be modified to state that such devices are not required for ''non-program material.'' This suggestion has not been adopted because it is less clear than the existing formulation, which is intended to distinguish between communications that are necessary to obtain the benefits of the federal programs and those that are not and which parallels the requirements of the Federal government's section 504 regulations for federally assisted programs. For example, a

federally operated library would have to ensure effective communication between its librarian and a patron, but not between the patron and a friend who had accompanied him or her to the library.

Several comments suggested that the definition of auxiliary aids should include attendant services that may be needed to aid disabled persons to travel to meetings. Other comments recommended that in some cases attendant services may be an appropriate auxiliary aid to achieve program accessiblity.

The Department has not adopted the approach recommended by these comments. To the extent that the services of an attendant are not directly related to a federally conducted program or activity, it would be inappropriate to require them at Federal expense. For example, the services of a sign language interpreter make a workshop as available to any deaf participant as it is to other participants. The need for services of interpreters arises directly out of the presentation of information in a form that can be understood by hearing persons. However, the Department views the services of an attendant for a disabled person as generally personal in nature and not directly related to the federally conducted program.

A different conclusion, however, might be reached for Federal employees or other persons traveling for the agency. Where a disabled person who is unable to travel without an attendant is required to perform official travel, the travel expenses of an attendant, including per diem and transportation expenses, may be paid by the Department. See 5 U.S.C. 3102(d) (1982).

Paragraph (b) requires the agency to provide information to handicapped persons concerning accessible services, activities, and facilities. Paragraph (c) requires the agency to provide signage at inaccessible facilities that directs users to locations with information about accessible facilities.

Section 39.170 Compliance procedures

Section 39.170 establishes a detailed complaint processing and review procedure for resolving allegations of discrimination in violation of section 504 in the Department of Justice's programs and activities. The 1978 amendments to section 504 failed to provide a specific statutory remedy for violations of section 504 in federally conducted programs. The amendment's legislative history suggesting parallelism between section 504 for federally conducted and federally assisted programs is unhelpful in this area because the fund termination mechanism used in section 504 federally assisted regulations depends on the legal relationship between a Federal funding agency and the recipients to which the Federal funding is extended. The Department has decided that the most effective and appropriate manner in which to enforce section 504 in the federally conducted area is through an equitable complaint resolution process. Section 39.170 establishes this process.

The complaint process in the final rule is substantially the same as the one that the Department proposed. The Department received 57 comments on this section. These comments did not question the use of a complaint-responsive enforcement scheme as appropriate for section 504 for federally conducted programs. The Department continues to view its specific proposal as satisfactory.

Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

Paragraph (c) vests in the Responsible Official the responsibility for the overall management of the 504 compliance program. ''Responsible Official'' or ''Official,'' as defined in §39.103, refers to the Director of Equal Employment Opportunity, who is designated as the official responsible for coordinating implementation of compliance procedures set forth in §39.170. The definition of ''Official'' includes other Department Officials to whom authority has been delegated by the Official. The Assistant Attorney General for Administration has been designated as the Director of Equal Employment Opportunity for the Department. *See* 28 CFR 42.2(a).

Although one person has responsibility both for administering the Equal Employment Opportunity Program for the Department and for coordinating implementation of the compliance procedures under this part, the procedures for carrying out these two responsibilities are different. The Official would follow the procedures for enforcing equal employment opportunity, as set forth in 29 CFR part 1613, only for complaints alleging employment discrimination (see §39.170(b)). Other complaints would be processed under the procedures in §39.170. Authority for processing complaints of employment discrimination has been delegated to Equal Employment Opportunity Officers in some Department components, and it is expected that authority for enforcing this part will be similarly delegated.

Subparagraphs (d) (1) and (3) provide that any person who believes that he or she has been discriminated against may file a complaint within 180 days from the date of the alleged discrimination. The Official may extend the time limit when the complainant shows good cause. Good cause could be found

if, for example, (1) the complainant mistakenly filed with the wrong agency and was not informed of the mistake within the 180 days; or (2) the complainant could not reasonably be expected to know of the act or event said to be discriminatory.

Several commenters argued that the proposed rule unnecessarily restricted the right to file a complaint by not allowing an individual victim of discrimination to authorize a representative to file on his or her behalf. The final rule permits filing by the authorized representative of an individual victim, or, in the case of class discrimination, of a member of the class, as well as by an individual victim or class member. The final rule has been revised to make it clear that complaints alleging that a specific class of persons has been discriminated against may only be filed by a member of that specific class or by a representative authorized to file the complaint by a member of that class (§39.170(d)(1)).

The Federal Bureau of Prisons has established an Administrative Remedy Procedure for handling grievances of inmates of Federal penal institutions (28 CFR part 542). This procedure allows an inmate to file a formal written complaint with the Warden of the Institution or with the Regional Director. While these remedies are not a substitute for the right to an independent investigation by a civil rights office and appeal to the Complaint Adjudication Officer, the final rule requires inmates to exhaust these procedural remedies before filing a complaint with the Official. The time period for filing a complaint with the Official would be extended by the time spent exhausting these remedies. This requirement applies only to inmates and does not extend to visitors and employees.

The Department received several comments on how prisoners' complaints should be handled. Some of them suggested that both the discrimination procedure and the prison grievance procedures should be invoked simultaneously. The Department believes that this proposal would require the unnecessary duplication of efforts without materially enhancing results. The Bureau of Prisons reported that thousands of inmate complaints were filed in 1983 alone and that several court decisions have held that the inmate administrative remedy procedure must be exhausted before suit can be filed. Although the volume of complaints by prison inmates might be burdensome, it is not possible now to forecast the number that will be filed. The Department believes, however, that handicapped prisoners must be afforded the right to have their complaints investigated by an office that specializes in discrimination complaints, including section 504 complaints, as well as the right to appeal to the Complaint Adjudication Officer. It is expected that the requirement that inmates first exhaust prison administrative remedies will be effective in resolving most meritorious complaints. It may be necessary, of course, for the Department to provide additional resources to handle complaints filed under the new regulation.

Subparagraph (d)(2) requires that the name and identity of a complainant be held in confidence unless he or she waives that right in writing and except to the extent necessary for compliance purposes.

Complaints may be mailed or delivered to the Attorney General, the Responsible Official, or other agency officials. Complaints received by any agency official other than the Responsible Official must be forwarded immediately to the Responsible Official (subparagraph (d)(4)).

Paragraph (e) requires the agency to send to the Architectural and Transportation Barriers Compliance Board a copy of any complaint alleging that a building or facility subject to the Architectural Barriers Act or section 502 was designed, constructed, or altered in a manner that does not provide ready access to and use by handicapped persons.

The Official is required to accept all complete complaints over which the agency has jurisdiction (§39.170(f)(1)). If the Official determines that the agency does not have jurisdiction over a complaint, the Official shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal government (§39.170(f)(3)).

If a complaint is not complete when it is filed, the Official must notify the complainant within 30 days that additional information is needed. The complainant must furnish the necessary information within 30 days of receipt of the notice, or the complaint will be dismissed without prejudice. Filing an incomplete complaint within 180 days from the date of the alleged discrimination satisfies the requirement of subparagraph (d)(3), but the timeframes governing the Official's other obligations to process the complaint (*see, e.g.*, §39.170(g)(1), §39.170(h)) do not begin to operate until the Official receives a complete complaint.

Within 180 days of receipt of the complete complaint, the Official is to investigate the complaint, attempt an informal resolution, and, if informal resolution is not achieved, issue a letter of findings (§39.170(h)). Within the time limit, the Official should make every effort to achieve informal resolution whenever possible.

In response to a suggestion from a commenter, the Department no longer refers to the letter of findings as ''preliminary.'' The

word ''preliminary'' has been deleted because, if there is no appeal, the determination made in the letter of findings will constitute the final agency decision.

Paragraph (h) requires that the Official's letter be sent to the complainant and respondent, and that it contain findings of fact and conclusions of law, the relief granted if discrimination is found, and notice of the right to appeal. The regulation provides that a party may appeal the Official's letter or findings to the Complaint Adjudication Officer (CAO). If neither party files an appeal from the letter of findings within 30 days after receipt of the letter, the letter will constitute the final decision of the agency (§39.170(i)(4)).

The Department's final rule provides an opportunity for a hearing before an administrative law judge (ALJ). The ALJ would make a recommended decision to the CAO, who would make the final agency decision. The purpose of the hearing is to provide a forum in which the complainant or respondent can have an opportunity to be heard, confront witnesses, and present evidence so that an administrative law judge can issue a recommended decision that is well-reasoned and justified on the basis of the evidence presented.

The opportunity for a hearing before an ALJ assures more impartiality and the appearance of more impartiality than a decision made by one agency official concerning other officials of the same agency. The Department expects that agency decisions based on a hearing record would more likely survive later judicial review.

Under the regulation, another person or organization would be allowed to participate as a third party or amicus curiae if the ALJ determines that the petitioner has a legitimate interest in the proceedings, that participation will not duly delay the outcome, and that petitioner's participation may contribute materially to the disposition of the proceedings.

The Department received comments on the proposed opportunity for a hearing before an administrative law judge. Some commenters were primarily concerned that by invoking a hearing before the ALJ with the procedural safeguards adopted from the Administrative Procedure Act (APA) (5 U.S.C. 554–557), the complainant would lose the right to a *de novo* review of the agency's final decision, because the APA allows a Federal court only to determine if the agency's final decisions are ''arbitrary and capricious'' (5 U.S.C. 706(2)(A)). It is beyond our jurisdiction to specify that a *de novo* review is available to complaints seeking judicial review of final agency decisions. This issue is for the courts to decide. That is also true for the issue of the availability of a private right of action, either without invoking our compliance procedures or after the issuance of letters of findings.

Given the inherent conflicts of interest in situations where complaints allege discrimination on the part of the Department, it is critically important to ensure that a complaint be reviewed in a fair, independent process. The availability of a hearing before an independent ALJ would provide the appearance as well as the actuality of an impartial compliance mechanism. The Department has therefore included the provision for a hearing in the final regulation.

One comment requested the addition of a provision whereby the Department would award attorneys fees to complainants. Another comment suggested that the Equal Access to Justice Act (5 U.S.C. 504) might provide for the award of fees. Nothing contained in title V of the Rehabilitation Act provides for the agency award of attorneys fees in administrative proceedings other than those involving Federal employment. Nor does the EAJA and the Department's implementing regulations at 28 CFR part 24 provide for such awards in hearings conducted under §39.170(k). We have therefore included no attorneys fee provision in the current regulations.

Under paragraph (l), the CAO renders a final agency decision after appeal without a hearing or after a hearing. The CAO directs appropriate remedial action if discrimination is found. The CAO's decision will involve reviewing the entire file, including the investigation report, letter of findings, and, if a hearing was held, the hearing record and recommended decision of the administrative law judge. The decision shall be made within 60 days of receipt of the complaint file or the hearing record.

One commenter objected to the requirement in subparagraph (l)(1) that the CAO explain specifically a decision to reject or modify the ALJ's proposed findings, arguing that it would inappropriately limit the CAO's consideration of the issues. We have adopted the suggestion and eliminated the requirement.

In response to recommendations from the Department's CAO and the Drug Enforcement Administration's ALJ, some changes have been made in the compliance procedures. Among the changes are a new requirement that the ALJ provide findings to all parties, not just the CAO, an added provision for filing exceptions to an ALJ's recommended decision, a delineation of the authorities of the ALJ, and a clarification of the responsibility for supervising compliance with the final agency decision between the Responsible Official and the CAO.

The Department also received some comments on the appropriateness of providing for an appeal by either the complainant or

respondent. Some commenters objected to allowing a respondent to obtain an administrative appeal because it could delay remedying discrimination. On the other hand, an impartial adjudicatory mechanism would require that opportunity is provided for both sides to appeal. For this reason, the Department finds it necessary and appropriate for both complainant and respondent to have the right to an administrative appeal.

PART 40—STANDARDS FOR INMATE GRIEVANCE PROCEDURES

Subpart A—Minimum Standards for Inmate Grievance Procedures

Subpart B—Procedures for Obtaining Certification of a Grievance Procedure

AUTHORITY: 42 U.S.C. 1997e.

SOURCE: Order No. 957–81, 46 FR 48186, Oct. 1, 1981, unless otherwise noted.

Subpart A—Minimum Standards for Inmate Grievance Procedures

§ 40.1 Definitions.

For the purposes of this part—

(a) *Act* means the Civil Rights of Institutionalized Persons Act, Public Law 96–247, 94 Stat. 349 (42 U.S.C. 1997).

(b) *Applicant* means a state or political subdivision of a state that submits to the Attorney General a request for certification of a grievance procedure.

(c) *Attorney General* means the Attorney General of the United States or the Attorney General's designees.

(d) *Grievance* means a written complaint by an inmate on the inmate's own behalf regarding a policy applicable within an institution, a condition in an institution, an action involving an inmate of an institution, or an incident occurring within an institution. The term ''grievance'' does not include a complaint relating to a parole decision.

(e) *Inmate* means an individual confined in an institution for adults, who has been convicted of a crime.

(f) *Institution* means a jail, prison, or other correctional facility, or pretrial detention facility that houses adult inmates and is owned, operated, or managed by or provides services on behalf of a State or political subdivision of a State.

(g) *State* means a State of the United States, the District of Columbia, the commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

(h) *Substantial compliance* means that there is no omission of any essential part from compliance, that any omission consists only of an unimportant defect or omission, and that there has been a firm effort to comply fully with the standards.

§ 40.2 Adoption of procedures.

Each applicant seeking certification of its grievance procedure for purposes of the Act shall adopt a written grievance procedure. Inmates and employees shall be afforded an advisory role in the formulation and implementation of a grievance procedure adopted after the effective date of these regulations, and shall be afforded an advisory role in reviewing the compliance with the standards set forth herein of a grievance procedure adopted prior to the effective date of these regulations.

§ 40.3 Communication of procedures.

The written grievance procedure shall be readily available to all employees and inmates of the institution. Additionally, each inmate and employee shall, upon arrival at the institution, receive written notification and an oral explanation of the procedure,