

MAINE STATE LEGISLATURE

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DEPARTMENT OF THE ATTORNEY GENERAL
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July 12, 1977

Honorable Judy Kany
House of Representatives
State House
Augusta, Maine

Dear Representative Kany:

I am writing in response to your request concerning the State's responsibilities pursuant to the Federal Rehabilitation Act of 1973 and regulations recently promulgated thereunder by the Federal Department of Health, Education and Welfare (HEW), 45 C.F.R. Part 84.

These responsibilities are extensive and detailed. I have attempted to provide an overview of the regulations for your use. Inasmuch as I am not precisely aware of the extent to which the State and/or its various agencies receive HEW funds, I cannot assess the actual impact of the regulations on the State as a whole or on specific programs. Accordingly, I have provided only an outline of the regulations for your consideration and would, of course, be willing to answer any specific questions you may have.

BACKGROUND

The Rehabilitation Act itself provides in pertinent part that:

"No otherwise qualified handicapped individual in the United States, as defined in section 706(b) of this title, 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," 29 U.S.C. § 794.

On April 28, 1977, acting pursuant to these provisions, HEW promulgated regulations to ensure that programs or activities receiving Federal financial assistance from HEW do not discriminate on the basis of handicap.* These regulations are effective as of June 3, 1977.

The State's responsibilities pursuant to the HEW regulations are incurred by virtue of the receipt of Federal monies or other assistance from HEW.** The regulations are intended to assure that there is no discrimination against the handicapped in any program or activity, so funded.

GENERAL OBLIGATIONS

General Prohibitions. Any recipient of Federal assistance is subject to the general prohibitions against discrimination on the basis of handicap as well as certain affirmative obligations. Prohibited discrimination generally includes the denying to a qualified handicapped person the opportunity to participate in a program, or affording to such persons an opportunity which is not equal to or as effective as opportunities afforded to others, see § 84.3(k) defining qualified, and generally § 84.4(a) and § 84.4(b) (1).

Definition of "Handicapped Person." To understand the scope of these prohibitions, it is necessary to be cognizant of the HEW definition of "handicapped." "Handicapped person" is defined as:

* Each Federal agency will presumably issue its own regulations. However, pursuant to Executive Order #11914, HEW will issue general standards to be followed by other departments. HEW has already indicated its intention to incorporate in these general standards its definition of handicapped person as well as the relevant sections of Subparts A, B and C of its own regulations.

** For further information as to applicability, please refer to § 84.2 defining the scope of the regulations; § 84.3(f) defining "recipient;" and § 84.3(h) defining "Federal financial assistance." These regulations were published in the Federal Register on May 4, 1977, at 42 F.R. 22676 as Part 84 of Title 45 of the Code of Federal Regulations. All further section references unless otherwise indicated are to 45 C.F.R. Attached for your information is a copy of the HEW news release which accompanied the issuance of these regulations.

"(1) 'Handicapped persons' means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

"(2) As used in paragraph (j) (1) of this section, the phrase:

"(i) 'Physical or mental impairment' means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

"(ii) 'Major life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

"(iii) 'Has a record of such an impairment' means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

"(iv) 'Is regarded as having an impairment' means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; (C) has none of the impairments defined in paragraph (j) (2) (i) of this section but is treated by a recipient as having such an impairment." § 84.3(j).

HEW considers this regulation to include drug addicts and alcoholics. 42 Fed. Reg. 86, May 4, 1977, p. 22686.

In short, any person who is now physically or mentally impaired or who has been so impaired or who is perceived to be so limited is protected by these regulations. The obligation not to discriminate against handicapped persons is, however, limited by the definition of "qualified handicapped person", as it pertains to certain categories of activities See § 84.3(k) and discussion of employment, education and services herein).

Assurances and Self-Evaluation. Applicants for Federal financial assistance are required to submit written assurances as to compliance with the HEW regulations, see § 84.5. Recipients are further obligated to engage in a program of self-evaluation, with the assistance of handicapped persons, to ascertain whether their programs meet the regulations, see § 84.6. In addition, recipients that employ over 15 people* must designate a responsible employee to coordinate efforts to comply with the regulations, must adopt a grievance procedure, and take appropriate initial and continuing steps to notify participants, applicants, and employees that the recipient does not discriminate, see § 84.7(a), (b) and § 84.8.

Specific Areas for Nondiscrimination. In addition to the general responsibilities discussed above, recipients of HEW assistance must comply with regulations in the following specified categories: Employment Practices; Program Accessibility; Preschool, Elementary and Secondary Education; Postsecondary Education; and Health, Welfare and Social Services (Subparts B, C, D, E and F respectively).

OBLIGATION AS EMPLOYER

Preemployment Inquiries. Recipient employers generally may not conduct a preemployment medical exam or inquire as to whether the applicant is handicapped or as to the severity of the handicap. An employer "may, however, make preemployment inquiry into an applicant's ability to perform job-related functions," § 84.14(a).

The main exemption to this prohibition provides that an employer may condition an offer of employment upon the results of a medical examination to be conducted prior to commencement of work provided that:

"(1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part," § 84.14(c).

Medical information so obtained must, with minor exceptions, be kept confidential, § 84.14(d).

Employers are further prohibited from using employment tests or other criteria which tend to screen out handicapped persons unless the employer can show the test to be job-related and that alternative tests which do not tend to screen out such persons are not available, see § 84.13.

* The regulations differentiate in several aspects between recipients with less than 15 employees and those with more, see, e.g., § 84.9 for administrative requirements for small recipients.

Terms and Conditions of Employment. A recipient is obligated not to discriminate against a qualified handicapped person in any of the terms and conditions of employment, including hiring, pay, fringe benefits, etc., see §§ 84.11, 84.13 and 84.14. Furthermore, a recipient is required to make a "reasonable accommodation" to the known physical or mental limitations of an otherwise qualified handicapped person unless the recipient can prove that such accommodation would be an "undue hardship," see § 84.13. For purposes of the regulations dealing with employment, the term "qualified" means:

"(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;" § 84.3(k)(1).

"Reasonable accommodation" may include:

"(1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." § 84.12(b).

In determining whether such accommodations are an "undue hardship," factors to be considered include the size and type of the program, the nature and cost of the accommodation and the structure of the workforce, see § 84.12(c).

OBLIGATION TO PROVIDE
ACCESSIBILITY TO PROGRAMS

Existing Facilities. As to accessibility, no handicapped person may be denied benefits of a program or activity subject to the HEW regulations because the recipient's facilities are inaccessible or unusable, see § 84.21. The regulations contemplate accessibility to the program as a whole and do not mandate that every existing facility or part thereof be accessible, see § 84.22(a). The recipient may use various methods to provide accessibility, and must bring its programs into compliance by August, 1977, see § 84.22(b) and (d).

Where no method other than structural alteration is possible, such changes are to be made as expeditiously as possible consistent with a transition plan developed by December 3, 1977. Changes are to be complete by June 3, 1980, see § 84.22(e) and (f).

New Facilities. All facilities or parts thereof newly constructed or altered by recipients must be constructed in such a manner as to provide accessibility to the handicapped, see § 84.23.

EDUCATION: PRESCHOOL, ELEMENTARY,
SECONDARY AND ADULT EDUCATION

Definition of Qualified. In this area of regulation, qualified handicapped person means:

"(2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under § 612 of the Education of the Handicapped Act; and. . ." § 84.3(k)(2).

Identification and Location of Handicapped. A recipient or beneficiary of HEW financial assistance for preschool elementary, secondary and adult education is required to identify and locate qualified handicapped persons within its jurisdiction who are not receiving public education, and to notify all handicapped persons and their parents of the recipient's obligations pursuant to the HEW regulations, § 84.32.

Provision of Free Appropriate Public Education. Recipients must provide free appropriate public education to each qualified handicapped person in the recipient's jurisdiction "regardless of the nature or severity of the persons' handicap," § 84.33(a). "Appropriate education" and "free" are specifically defined by § 84.33(b) and (c) respectively. A recipient is now prohibited from excluding any qualified handicapped person from a public elementary or secondary education and must come into compliance with other regulations no later than September 1, 1978, § 84.33(d).

Integrated Education. Education of qualified handicapped persons must be integrated with the education of nonhandicapped persons to the maximum extent appropriate to serve the needs of the handicapped person, § 84.34.

Evaluation. Recipients must evaluate as specified any person who, because of handicap, needs or is believed to need special education prior to initial placement of that individual or to subsequent changes in placement, § 84.35. The recipient must also provide for certain procedural safeguards throughout the process of identification, evaluation or placement of handicapped persons, § 84.36.

Equal Opportunity in Nonacademic Areas. In addition to its obligations to provide nondiscriminatory academic education, a recipient must provide an equal opportunity for handicapped persons to participate in nonacademic and extracurricular activities, including counselling services, clubs, etc., § 84.37. Recipients must also take into account the needs of handicapped persons in preschool, day care and adult education programs.

POSTSECONDARY EDUCATION

Definition of Qualified. In this area qualified handicapped person is defined as:

"(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;" § 84.3(k)(3).

General Obligations. Recipients of HEW financial assistance for postsecondary programs and activities are obligated not to discriminate against qualified handicapped persons in admission and recruitment, §§ 84.41, 84.42. Specifically recipients may not limit numbers of handicapped persons, and may not use tests or criteria for admission, which have an adverse impact on handicapped persons other than where such tests have been validated, see § 84.42(b)(c)(d).

Equal Integrated Educational Opportunities. Recipients are to provide equal opportunities for participation of handicapped persons in the most integrated setting possible in programs involving courses of study, academic research, occupation training, housing, health, insurance, counselling, financial aid, physical education, athletics, transportation, extracurricular activities, etc., §§ 84.43, 84.45, 84.46 and 84.47. Where necessary, recipient institutions are required to modify requirements to ensure that the requirements do not discriminate against the handicapped except where such requirements are essential to the program of study, § 84.44.

HEALTH, WELFARE AND SOCIAL SERVICES

General Prohibitions. Recipients who operate or who receive benefits from the operation of health, welfare and social service programs are subject to nondiscrimination requirements similar to the general provisions previously discussed. HEW views the definition of recipient as including Medicaid providers, see § 84.3(f), 42 F.R. 22685. That is, they may not deny a handicapped person benefits or services; they may not afford a handicapped person benefits or services that are not equal to or as effective as those afforded other persons; they may not provide services in a manner that limits the participation of the handicapped; and they may not provide different or separate benefits except where necessary to provide qualified handicapped persons with services as effective as those provided others, § 84.52(a). In this regard, qualified handicapped person is one "who meets the essential eligibility requirements for receipt of such services," § 84.3(k)(4).


Auxiliary Aids. A recipient with 15 or more employees is required to provide necessary auxiliary aids to persons with impaired sensory, manual or speaking skills. Recipients must specifically ensure that notices which it provides are usable by handicapped persons, including those with impaired sensory or speaking skills, § 84.52(b).

Hospitals. Recipient hospitals must establish a procedure for effective communication with the hearing impaired for purposes of providing emergency health care and are further specifically prohibited from discrimination in treatment or admission against drug and alcohol addicts, §§ 84.52(c), 84.53.

In summary, the State as a recipient of HEW funds is subject to extensive prohibitions against discrimination on the basis of handicap. It is also subject to certain specific affirmative obligations to provide free appropriate public education to the handicapped and to make its programs accessible to such persons.

If I can be of further assistance, please call.

Very truly yours,


JOSEPH E. BRENNAN
Attorney General

JEB/ec