

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Department of Health and	)	DATE: August 5, 1994
Human Services,	)	
- v. -	)	Docket No. 93-504-2
Cerebral Palsy Center of	)	Decision No. CR325
the Bay Area,	)	
Respondent.	)	

DECISION ON REMAND

In a Notice of Opportunity for Hearing (Notice) dated February 1, 1993, the United States Department of Health and Human Services (Department) charged Respondent, Cerebral Palsy Center of the Bay Area (Respondent or CPCBA), with violating section 504 of the Rehabilitation Act of 1973 (Act), as amended, 29 U.S.C. § 794, and its implementing regulation at 45 C.F.R. Part 84. The Department charged specifically that Respondent subjected an allegedly qualified handicapped person (the Complainant) to discrimination in employment, and further denied him an employment opportunity based on the need to make reasonable accommodation, thereby violating section 504 of the Act and 45 C.F.R. Part 84. The Department charged also that Respondent's employment application form was discriminatory.<sup>1</sup> The Department sought as a

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<sup>1</sup> In my Decision of December 10, 1993, I concluded that Respondent had engaged in unlawful discrimination in violation of the Act by making an impermissible pre-employment inquiry in its employment application. However, even though I found that Respondent had engaged in this unlawful discrimination, I concluded that termination of all federal financial assistance to Respondent was an inappropriate remedy. My conclusion  
(continued...)

remedy termination of all Departmental federal financial assistance to Respondent until Respondent came into compliance with section 504 by providing appropriate relief for the Complainant (which relief must include reinstatement, back pay, and any other monetary loss to the Complainant resulting from Respondent's discriminatory practices) and by revising its employment application.

Respondent requested a hearing. On December 10, 1993, I issued a Decision in which I concluded that I was without authority to adjudicate the issue of whether Respondent discriminated against the Complainant by subjecting him to discrimination in employment and denying him an employment opportunity based on the need to make reasonable accommodation. Specifically, I found that although Respondent received federal financial assistance during the period of the Complainant's employment, based on my interpretation of the Supreme Court's decision in United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986), Respondent was not a "recipient" of federal financial assistance within the meaning of section 504. I found that, to be a "recipient" of federal financial assistance, an entity must know it is receiving federal funds and be in a position to accept or reject the obligations of section 504 as part of the decision whether or not to receive those funds. I concluded that the Department had not proved that Respondent was aware that it was in receipt of federal funds from the Medicaid waiver program and that, therefore, Respondent was not in a position to make

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<sup>1</sup> (...continued)

was based on my finding that the Department had not proved that Respondent was unwilling to comply voluntarily with the obligations of section 504 with regard to its employment application. Department of Health and Human Services v. Cerebral Palsy Center of the Bay Area, DAB CR295 (1993). Following my December 10, 1993 Decision, the parties settled the issue of whether Respondent's employment application form was discriminatory. Department of Health and Human Services v. Cerebral Palsy Center of the Bay Area, DAB 1468, at 1 - 2 (1994). Thus, I need not consider the issue of Respondent's employment application here. Accordingly, I have deleted all my former Findings of Fact and Conclusions of Law (Finding(s)) (specifically, Findings 18, and 65 - 81 of my December 10, 1993 Decision) relating to that issue.

a knowledgeable decision to accept or reject the section 504 obligations attendant upon receipt of those funds.

Following issuance of my December 10, 1993 Decision, the Department filed exceptions with the Civil Rights Reviewing Authority (CRRA) regarding four of the Findings of Fact and Conclusions of Law (Finding(s)) I made in that Decision, which Findings bore on my conclusions that 1) Respondent was not a "recipient" of federal financial assistance, and 2) that I lacked jurisdiction to hear the Department's charges of employment discrimination. Respondent also excepted to several of my Findings which were favorable to the Department on related jurisdictional issues. In its March 22, 1994 Decision (CRRA Decision at (page)), the CRRA agreed with my conclusion that Respondent was receiving federal financial assistance under the Medicaid waiver program. However, the CRRA determined that Respondent also was a "recipient" of federal financial assistance within the meaning of section 504 and Departmental regulations. In light of the CRRA's determination that Respondent was a "recipient" of federal financial assistance within the meaning of section 504 and Departmental regulations, the CRRA remanded the case to me to consider the Department's charges of employment discrimination on their merits. The CRRA further directed me to: 1) clarify my jurisdictional findings consistent with the CRRA's analysis; and 2) reexamine the accuracy of Findings 24, 28, and 57 in light of Respondent's exceptions. CRRA Decision at 20. As directed, I have revised such findings consistent with the CRRA's decision.<sup>2</sup>

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<sup>2</sup> As a result of the CRRA's March 22, 1994 Decision, I have changed my Findings 10, 11, 62, and 63 from my December 10, 1993 Decision, and substituted my new Findings 10, 11, 62, 63, and 64, to support a finding of jurisdiction. Further, at the direction of the CRRA, I have clarified Findings 24, 28, and 57 from my December 10, 1993 Decision, by substituting my new Findings 23, 25, 28, 57, and 58. Finding 23 has been amended to clarify that Respondent raised the issue of jurisdiction on the first day of the hearing and withdrew its admission regarding its receipt of federal financial assistance on the second day of the hearing. Finding 28 has been amended to reflect that the Medicaid waiver program reimbursed 50 percent of Respondent's State funding under that program. The actual amounts funded are set forth in DHHS Ex. 24 at 10 (as cited in Finding 28). Lastly, Finding 58 has been modified to reflect that, since Respondent received federal financial

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With regard to the Department's charge that Respondent subjected the Complainant to discrimination in employment and further denied him an employment opportunity based on the need to make reasonable accommodation, I have carefully considered the applicable law, the evidence developed at the hearing, the posthearing briefs, the proposed findings and conclusions submitted by the parties, and the CRRA's March 22, 1994 Decision. I conclude that the Department has proved within the meaning of section 504 of the Act and its implementing regulations that: 1) Respondent is a recipient of federal financial assistance; 2) the Complainant is a qualified handicapped person; 3) Respondent failed to provide the Complainant with reasonable accommodation for his handicap so that he could perform the essential functions of his position; 4) Respondent failed to prove such accommodation would impose an undue hardship on its operations; 5) Respondent unlawfully terminated the Complainant; 6) Respondent's compliance cannot be secured through voluntary means; and 7) the Department is authorized to terminate or refuse to grant or continue all Departmental federal financial assistance to Respondent until Respondent comes into compliance with section 504 and its implementing regulations.

#### ISSUES

The issues remaining in this case are whether:

1. Respondent discriminated against the Complainant by subjecting him to discrimination in employment and denying him an employment opportunity, based on the need to make reasonable accommodation;
2. Respondent is in noncompliance with section 504;
3. Respondent's compliance with section 504 can be secured through voluntary means; and
4. There exists a basis upon which to terminate Respondent's federal financial assistance.

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<sup>2</sup> (...continued)

assistance in the form of Medicaid waiver program funds, such funds did not consist of proceeds of a procurement contract with RCEB. These clarifications are essentially procedural and do not affect the outcome of my Decision regarding the issue of Respondent's alleged discrimination.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The following Findings are from my Decision of December 10, 1993, and, as set out here, have either been affirmed by the CRRA or modified or clarified by me at the direction of the CRRA.<sup>3</sup>

1. Respondent is a California non-profit corporation, which provides programs and services to individuals with developmental disabilities, primarily cerebral palsy, in order to assist these individuals in activities of daily living, such as obtaining and maintaining employment. DHHS Ex. 12; Tr. 112, 525, 526; R. Br. 1.<sup>4</sup>
2. During the spring or summer of 1989, the Department's Office for Civil Rights (OCR) received a complaint against Respondent concerning the Complainant's employment with Respondent, which employment began in April 1988 and terminated in March 1989. Tr. 90, 216; DHHS Ex. 1 at 1, 20 at 1; R. Ex. 6 at 1.
3. The Complainant alleged that Respondent had discriminated against him on the basis of his disability, athetoid cerebral palsy, by failing to provide him with reasonable accommodation to enable him to perform the essential functions of his position as supervisor of Respondent's Adult Development Program and that this failure resulted in Respondent terminating his employment. DHHS Ex. 1 at 19; 5 at 1 - 3; 20 at 1; Tr. 139, 216.
4. OCR alleged that the Department had jurisdiction to investigate and sanction Respondent under section 504 of

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<sup>3</sup> The headings included in my Findings are intended as an aid to the reader. These headings are not Findings of Fact or Conclusions of Law, and they do not change the meaning of any of my Findings.

<sup>4</sup> I refer to the Department's exhibits as "DHHS Ex. (number at page)." I refer to Respondent's exhibits as "R. Ex. (number at page)." I refer to the transcript as "Tr. (page)." I refer to the parties' briefs as "DHHS." or "R." Brief "Br. (page)," Response Brief "R. Br. (page)," Reply Brief "Rep. Br. (page)," and Supplemental Brief "Supp. Br. (page)." I cite the Department's Notice Of Opportunity for Hearing as "Notice (page)" and the Respondent's Request For Hearing and Answer as "Answer (page)." I refer to the Department's Proposed Findings as "DHHS Findings at (page)." I refer to Respondent's Proposed Findings as "R. Findings at (page)."

the Act because Respondent was a sub-recipient of Departmental funds through the California Department of Developmental Services (DDS). DHHS Ex. 20 at 1; Tr. 90.

5. Section 504 prohibits discrimination against handicapped persons in any program or activity receiving federal financial assistance. Act, section 504.

6. Under the regulations, "federal financial assistance" is defined as any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of, among other things, funds. 45 C.F.R. § 84.3(h).

7. The regulations state that service providers whose only source of federal financial assistance is Medicaid should be regarded as recipients under the statute and regulation and should be held individually responsible for administering services in a non-discriminatory fashion. 45 C.F.R. Part 84, appendix A, sub-part A, definition 1.

8. Under the regulations, a "recipient" of federal financial assistance is defined as any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. 45 C.F.R. § 84.3(f).

9. Under the regulations, "Department" is defined as the Department of Health and Human Services. 45 C.F.R. § 84.3(d).

10. To be a recipient of federal financial assistance, an entity need not be in a position to accept or reject the obligations of section 504 as part of the decision whether or not to receive federal funds. Department of Health and Human Services v. Cerebral Palsy Center of the Bay Area, DAB 1468 (1994).

11. An entity can be a "recipient" of "federal financial assistance" whether or not the entity knows it is receiving federal funds. Finding 10.

12. An entity's receipt of Medicare or Medicaid payments constitutes federal financial assistance for the purposes

of section 504, as the purpose behind these programs is to subsidize payments to providers of medical services for the care of the beneficiaries of those programs. Furthermore, Congress intended these programs to constitute federal financial assistance for the purposes of coverage under section 504. United States v. Baylor University Medical Center, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); Frazier v. Board of Trustees of Northwest Mississippi Medical Center, 765 F.2d 1278 (5th Cir. 1985), cert. denied, 476 U.S. 1142 (1986); Jacobson v. Delta Airlines, Inc., 742 F.2d 1202 (9th Cir. 1984), cert. dismissed, 471 U.S. 1062 (1985); 45 C.F.R. Part 80, appendix A, paragraph 121; 45 C.F.R. Part 84, appendix A, sub-part A, definition 1.

13. Respondent did not object to the Department's jurisdiction during OCR's investigation. Tr. 904.

14. An OCR investigational office record made by Michael Aguirre (MA), then an OCR investigator, noted that on August 8, 1989, MA allegedly had a phone contact with Respondent's Executive Director, James Gallagher (JG). The note reflects that JG allegedly confirmed that Respondent received federal funds from two California State agencies, DDS and the Department of Rehabilitation (DR). Also, MA noted that Respondent received \$422,000 in funding from the Department's Office of Human Development Services (OHDS) through DDS. DHHS Ex. 28.

15. Respondent, through the declaration and testimony of its Executive Director, JG, has denied that JG advised OCR in August 1989 that Respondent had received federal funds during 1988 and 1989 or that it ever applied for any federal program development grant funds during this period. R. Ex. 15; Tr. 904 - 908.

16. There is no evidence of record showing that, during the investigation, OCR made any effort to verify the factual basis supporting its alleged jurisdiction over Respondent through documentary evidence, or sought a written admission by Respondent.

17. OCR investigated the complaint and found that Respondent had discriminated against the Complainant by failing to provide him with reasonable accommodation and by terminating his employment. DHHS Ex. 20 at 1; Tr. 90, 91.

18. OCR was unable to negotiate a voluntary settlement with Respondent. Notice 6 - 8; Answer 4, 5; Tr. 91.

19. On February 1, 1993, the Department initiated enforcement proceedings against Respondent by issuing the Notice.

20. The Notice alleged that Respondent received federal financial assistance from the Department via DDS, and that DDS received these funds from the Department's OHDS. The Department specifically alleged that, in 1989, the period during which the Department alleged the discrimination occurred, Respondent received \$422,000 in Departmental funds. Notice 4.

21. The jurisdictional allegation in the Notice contains the identical factual basis that was developed during OCR's investigation of Respondent. Findings 14, 20.

22. In its Answer, Respondent admitted that it had received the federal financial assistance alleged in the Notice. Answer 2.

23. Based on subsequent investigation regarding the basis of the Department's jurisdiction, on the first day of the hearing Respondent raised a jurisdictional issue concerning its receipt of federal financial assistance, and on the second day of the hearing it moved to withdraw its admission regarding its receipt of federal financial assistance. Tr. 223 - 224, 226, 230 - 231.

24. Lack of subject matter jurisdiction:

- a. May be raised at any time during a proceeding, even on appeal and even by the party who invoked the federal jurisdiction in the first place;
- b. Cannot be cured;
- c. Requires dismissal of the action.

Fed. R. Civ. P. 12(h)(3); American Fire & Casualty Co. v. Finn, 341 U.S. 6, 16 - 18 (1951); May Dept. Store v. Graphic Process Co., 637 F.2d 1211, 1216 (9th Cir. 1980); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

25. Respondent's admission regarding its receipt of federal financial assistance (the basis of the Department's subject matter jurisdiction) could be withdrawn at any time during this proceeding. Findings 22, 24.

26. During the May 6, 1993 hearing, it was alleged by a former DR employee that Respondent received Departmental

funds when DR reimbursed Respondent under the Career Opportunity Development (COD) program for part of the Complainant's training at CPCBA. The employee alleged that the COD program received federal matching funds. Tr. 730, 731, 747 - 750; DHHS Ex. 1 at 29.

27. During the June 2, 1993 hearing, the Department admitted that the federal matching funds under the COD program came from the Department of Education (ED), not from the Department. The Department further conceded that, based upon review of the federal financial assistance received by Respondent during the period of the alleged discrimination, the jurisdictional amount set forth in the Notice was incorrect. Tr. 840 - 842, 844.

28. During the June 2, 1993 hearing, the Department amended the jurisdictional allegation in the Notice by offering evidence to support its contention that other federal financial assistance was provided to Respondent. Specifically, the Department alleged that, during the time the Complainant was employed, Respondent was a recipient of certain State funding, 50 percent of which funding was reimbursed for eligible individuals under the Medicaid waiver program. Tr. 840 - 841, 844; DHHS Ex. 24 at 10.

29. A Medicaid waiver is an optional benefit for which a State may apply in order to obtain federal funds. Tr. 868; Social Security Act, section 1915(c).

30. Section 1915(c) of the Social Security Act authorizes the Secretary to waive certain Medicaid statutory limitations in order to enable states to provide a broad array of approved home and community-based services (except for room and board) to individuals who, without these services, would require the level of care provided in a hospital or a nursing or intermediate care facility. Social Security Act, section 1915(c); DHHS Ex. 24 at 4.

31. On November 1, 1982, California's request to provide home and community-based services to individuals with developmental disabilities was approved by the Department, effective retroactive to July 1, 1982. DHHS Ex. 24 at 4.

32. Respondent receives 66 to 70 percent of its funding as fee-for-services from DDS and DR, primarily via the Regional Center of the East Bay (RCEB), a non-profit corporation set up under the Lanterman Act. R. Br. 1; Tr. 437, 438.

33. The Lanterman Act embodies California's statutory scheme for the provision of services to developmentally disabled persons. Its purpose is to provide a single point of coordination for services to California residents with developmental disabilities. Tr. 864; R. Rep. Br. 1.; Cal. Welf. & Inst. Code, §§ 4500 et seq. and 4600 et seq.

34. The Lanterman Act requires that California establish regional centers to carry out its responsibilities to the developmentally disabled and that it contract with private, nonprofit community agencies to provide these services. Cal. Welf. & Inst. Code, § 4620.

35. DDS is the State agency charged with carrying out this legislative mandate. DDS contracts annually with 21 regional centers (which are private, non-profit corporations, not State agencies) throughout California, which regional centers include the RCEB. Tr. 862 - 865; R. Rep. Br. 2.

36. The regional centers submit monthly invoices to DDS so that the centers can pay both their own overhead and the vendors with whom they contract to provide services to handicapped individuals. Tr. 863, 865, 874.

37. The regional centers perform an in-depth assessment of each client to determine the client's needs. During this assessment, the regional center makes a determination as to whether a client is eligible for the Medicaid waiver program. DHHS Ex. 24 at 2, 8.

38. The regional centers must provide individual program plans for each of their clients. The regional centers may contract with other agencies to provide program coordination, and may also contract with other agencies to provide other client services. Cal. Welf. & Inst. Code, §§ 4646, 4648.

39. DDS keeps a master eligibility file of those individuals whom the regional centers have found to be eligible for the Medicaid waiver program. Tr. 871.

40. When DDS receives an invoice from a regional center, it extracts the cost of the Medicaid waiver services associated with those identified individuals and creates an invoice to California's Department of Health Services (DHS), the State agency responsible for administering the Medicaid program in California. Tr. 871, 872; DHHS Ex. 24 at 8.

41. DHS checks the individual clients against its master eligibility file. DHS then puts this information into a claims schedule which goes to the California State Controller for payment. The Controller issues a check to DDS. Tr. 872; DHHS Ex. 24 at 8.

42. The check issued to DDS is a draw-down from the DHS health care deposit fund and constitutes federal reimbursement under the Medicaid waiver program for 50 percent of a regional center's invoice for eligible individuals. Tr. 873 - 875.

43. The other 50 percent of DDS' reimbursement on a regional center's invoice comes from the State general fund. Tr. 874.

44. DDS pays the regional centers. Tr. 873, 874.

45. From 1987 through 1989, DDS could submit claims under the Medicaid waiver program for 3,360 individuals only. During these years, the regional centers identified a greater number of otherwise eligible individuals, but DDS could not accommodate all of them. Tr. 875, 876.

46. RCEB contracts with vendors to provide services to its clients, who are developmentally disabled individuals. Tr. 865, 866; Findings 33 - 36, 38.

47. DDS does not contract with the vendors who provide services to RCEB's clients. Tr. 867.

48. Since January 1, 1976, Respondent has been an RCEB vendor providing services to RCEB's handicapped clients. DHHS Ex. 25.

49. The California State fiscal year covers the period of July 1 through June 30. During the State fiscal years 1987 through 1989, Respondent received \$117,573.57 from RCEB under the Medicaid waiver program. Half of this amount, \$58,786.79, was reimbursed by the Department. DHHS Ex. 24 at 3, 10.

50. During the term of the Complainant's employment by Respondent, RCEB billed DDS for the Medicaid waiver program eligible clients to whom Respondent provided services. Tr. 877; DHHS Ex. 24 at 10.

51. DDS reimbursed RCEB for these services. Half of the reimbursement for the Medicaid waiver program eligible clients came from the federal Medicaid funds DDS received. Tr. 880 - 886; DHHS Ex. 24 at 2, 3, 10 - 26.

52. During the term of the Complainant's employment by Respondent, if DDS did not receive the federal matching funds under the Medicaid waiver program, it would not have to pay RCEB the entire amount of RCEB's invoice for the services it purchased for its Medicaid waiver program eligible clients. Tr. 887 - 888.

53. During the term of the Complainant's employment by Respondent, the contracts between RCEB and vendors providing services to RCEB's handicapped clients did not refer to Medicaid eligibility or to possible federal reimbursement. Tr. 919, 920; R. Ex. 16.

54. Prior to 1992, vendors providing services to RCEB did not have to sign a Medi-Cal (the California Medicaid program) provider agreement claims certification. Respondent did not sign such a certification agreement until July 31, 1992. Tr. 886; DHHS Ex. 26, 27.

55. In the claims certification, the provider acknowledges, among other things, that payment will be from "federal and/or state funds", "services are offered and provided without discrimination based on race, religion, color, national or ethnic origin, sex, age, or physical or mental disability" and it will be an "enrolled Medi-Cal provider of home and community based waived services." DHHS Ex. 26, 27.

56. Since all Medicaid waiver program eligibility determinations and billings are handled through the regional centers, until the time that service providers were required to sign the certification agreement in 1992, service providers such as Respondent were not necessarily aware that their clients were in the Medicaid waiver program or that federal funds were providing one-half of the reimbursement for the cost of their services. Tr. 893 - 895, 919 - 921; DHHS Ex. 24 at 2; R. Ex. 16 at 2.

57. The Medicaid waiver program was intended by Congress to be federal financial assistance and thus subject to section 504 of the Act. Findings 6, 12, 29, 30.

58. Since Respondent received federal financial assistance in the form of Medicaid waiver program funds, such funds do not constitute the proceeds of a procurement contract with RCEB. Finding 57.

59. The Department has not proven that Respondent knew that, prior to July 1992, it was in receipt of any federal funds. Respondent reasonably could have assumed that its reimbursement for services from RCEB and DDS

consisted solely of funds from California. Tr. 904 - 908; R. Ex. 15; Findings 53 - 56.

60. Respondent is a recipient of Medicaid waiver program funds as defined in 45 C.F.R. Part 84, appendix A, subpart A. Findings 7, 8, 50, 51.

61. The Department did not prove Respondent knew that: 1) it was to be paid for its services with federal Medicaid waiver program funds; and 2) it was therefore in a position to accept or reject the obligations of section 504 as part of its decision whether or not to receive federal funds.

62. Proof that Respondent knew that it was in receipt of federal financial assistance is not required to establish that Respondent is a "recipient" of federal financial assistance. Findings 1 - 61.

63. Respondent is a "recipient" of federal financial assistance. Findings 1 - 62.

64. As Respondent is a "recipient" of federal financial assistance, I have jurisdiction to adjudicate the Department's allegation of discrimination.

65. After July 31, 1992, Respondent knew it was in receipt of Departmental funds and was in a position to accept or reject the obligations of section 504 as part of the decision whether or not to receive federal funds. Findings 54, 55.

II. The following Findings relate to the legal standard that must be met to prove discrimination under section 504.

66. This case is governed by section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and by regulations contained in 45 C.F.R. Parts 81 and 84.

67. It is unlawful under section 504 of the Act for a program or activity receiving federal financial assistance to discriminate against an otherwise qualified individual with a handicap, solely on the basis of his or her handicap. 29 U.S.C. § 794(a).

68. There are four elements which an employee must show in order to establish a prima facie case of discrimination under section 504 of the Act. The employee must show: 1) that he or she is a handicapped person; 2) that he or she is otherwise qualified for the job; 3) that he or she has been discriminated against on

the basis of handicap; and 4) that the discrimination took place in a program or activity which receives federal financial assistance. 29 U.S.C. § 794(a); 45 C.F.R. Part 84; See Southeastern Community College v. Davis, 442 U.S. 397 (1979); Alexander v. Choate, 469 U.S. 287 (1985); School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987).

69. Departmental regulations implementing section 504 provide that no qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity which receives federal financial assistance from the Department of Health and Human Services or receives benefits from such assistance. 45 C.F.R. §§ 84.4, 84.11(a)(1).

70. Section 84.11(b) of Title 45 of the Code of Federal Regulations describes the specific practices prohibited under section 84.11(a), which include termination of employment as set forth in 45 C.F.R. § 84.11(b)(2).

71. The regulations define a handicapped person as any person who: 1) has a physical or mental impairment which substantially limits one or more major life activities; 2) has a record of such an impairment; or 3) is regarded as having such an impairment. 45 C.F.R. § 84.3(j)(1).

72. The regulations define a qualified handicapped person with respect to employment to be a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question. 45 C.F.R. § 84.3(k)(1).

73. The regulations state that a recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. 45 C.F.R. § 84.12(a).

74. Examples of reasonable accommodation are set forth in 45 C.F.R. § 84.12(b) and 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.

75. The regulations list factors to be considered in determining whether reasonable accommodation(s) would impose an undue hardship on a recipient's operation of

its program pursuant to section 84.12(a). These factors include: 1) the overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget; 2) the type of the recipient's operation, including the composition and structure of the recipient's workforce; and 3) the nature and cost of the accommodation needed. 45 C.F.R. § 84.12(c).

76. The regulations provide that a recipient of federal financial assistance cannot deny an employment opportunity to a qualified handicapped employee, if the basis for the denial is the need to make reasonable accommodation to the employee's physical limitations. 45 C.F.R. § 84.12(d).

77. Once it has been determined that a disabled employee can perform the essential functions of his position with reasonable accommodation, the burden of proof is on the employer to demonstrate that such accommodation will constitute an undue hardship to the employer. See Southeastern Community College v. Davis, 442 U.S. 397 (1979); Pushkin v. Regents of University of Colorado, 658 F.2d 1372 (10th Cir. 1981); School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987).

III. The following Findings relate to the factual circumstances surrounding the Complainant's employment, which circumstances led to the Department's charging Respondent with discriminating against the Complainant by subjecting him to discrimination in employment, and by denying him an employment opportunity based on the need to make reasonable accommodation.

78. Respondent operates day programs for approximately 75 to 85 developmentally disabled clients (most of whom have cerebral palsy). These programs consist of a sheltered workshop (where individuals can participate in paid work) and an Adult Development Program (where Respondent provides varied programming to meet a broad range of its clients' physical and mental capabilities). Tr. 112, 445; DHHS Ex. 1 at 62.

79. During the term of the Complainant's employment, Respondent did not maintain a written policy on reasonable accommodation for its employees. Tr. 206, 525, 621 - 622.

80. The Complainant's athetoid cerebral palsy affects his ability to walk, speak, and perform manual tasks. Notice 4; Answer 2; DHHS Ex. 5 at 1 - 2, 6 at 1 - 2; Tr. 139 - 140.

81. Respondent admits that the Complainant is a handicapped person as defined by 45 C.F.R. § 84.3(j). Answer 2.
82. The Complainant applied for the job of Supervisor of Respondent's Adult Development Program on January 28, 1988. DHHS Ex. 1 at 4.
83. The Complainant was a DR client when he applied for the job of Supervisor of the Adult Development Program. Tr. 160, 166.
84. DR was not involved in finding the job opening of Supervisor of Respondent's Adult Development Program for the Complainant. Tr. at 114 - 116, 122 - 123, 160 - 161.
85. The Complainant learned that the position of Supervisor of the Adult Development Program was open through the individual who was then Respondent's Program Counselor. Tr. 111, 115 - 116, 151 - 152.
86. The "job specifications" for the position of the Supervisor of the Adult Development Program stated that, under the general supervision of the Assistant Executive Director, the Supervisor was to plan, organize, coordinate, and implement an Adult Development Program for cerebral palsied and other developmentally disabled adults, and perform related work as required. DHHS Ex. 1 at 62; Tr. 260.
87. Specifically, the job specifications reflect that the Supervisor of the Adult Development Program was responsible for the detailed planning and implementation of the Program. The Supervisor was to direct the activities of the Program's instructors, associates, assistants, interns, and volunteers by, for example: 1) evaluating and selecting varied developmental activities suitable for an adult group with a broad range of cognitive abilities; 2) scheduling a program of adult development and arranging for, and assisting in, the set-up of appropriate instructional areas; 3) administering a tracking system to monitor individual client progress and providing for accurate and timely reporting on selected client objectives each month; 4) participating in the admissions process, proposing an individual service plan for a new client, and representing the department at annual individual program plan meetings; 5) evaluating class effectiveness and proposing adjustments accordingly; 6) scheduling and chairing regular Adult Development Program staff meetings, coordinating efforts with other professional staff, and arranging for in-service training; 7) supervising all Adult Development

Program staff, including interns and volunteers; and 8) overseeing client advocacy training and implementation, including appropriate special activities away from the CPCBA building for program participants. DHHS Ex. 1 at 62; Tr. 161.

88. The position of Supervisor of the Adult Development Program did not require an applicant to meet any physical standards.

89. The position of Supervisor of the Adult Development Program required the preparation of reports, evaluations of staff and clients, curriculum development plans, and other paperwork. Tr. 261 - 271.

90. Evaluating and selecting varied developmental activities suitable for an adult group with a broad range of cognitive abilities required paperwork to be done. Tr. 261.

91. Scheduling a program of adult development and arranging for and assisting in the set-up of appropriate instructional areas required the production of paperwork, such as a calendar of events. Tr. 263.

92. Administering a tracking system to monitor individual client progress and providing for accurate and timely reporting on selected client objectives each month required paperwork. Tr. 263 - 264.

93. Participating in the admissions process and proposing an individual service plan for a new client required some paperwork. Representing the department at annual individual program plan meetings did not require paperwork, it required oral reports. Tr. 264 - 267.

94. Evaluating class effectiveness and proposing adjustments required only minimal paperwork, as it principally involved direct observation. Tr. 267.

95. Scheduling and chairing regular Adult Development Program staff meetings, coordinating efforts with other professional staff, and arranging for in-service training required only minimal paperwork, as such work was generally done over the phone and involved scheduling. Tr. 267 - 268.

96. Supervising all Adult Development Program staff, including interns and volunteers, required paperwork in the form of annual evaluation reports. Tr. 268.

97. Overseeing client advocacy training and implementation, including appropriate special activities away from the CPCBA building for program participants, required only minimal paperwork, consisting of correspondence with recreational or educational institutions providing special activities. Tr. 269.

98. While the job specifications for Supervisor of the Adult Development Program did indicate the need for the generation of certain types of reports or evaluations, they did not contain any reference to the need for typing or dictation skills or proficiency in the use of computers. DHHS Ex. 1 at 62 - 63.

99. The educational requirements for the position of Supervisor of the Adult Development Program included graduation from college with a major in developmental psychology, special education (a credential is required), or experience in a closely allied field. DHHS Ex. 1 at 63.

100. The Complainant has a bachelor's degree in elementary education and a master's degree in guidance and counseling. DHHS Ex. 1 at 9.

101. The work experience required for the position of Supervisor of the Adult Development Program includes at least three years working with adults with cerebral palsy or other developmentally disabled adults, and at least two years direct supervision of staff working with developmentally disabled adults, or similar experience.

102. At the time he applied for the job of Supervisor of Respondent's Adult Development Program, the Complainant had worked in a variety of jobs involving the developmentally disabled for over 10 years and was a developmentally disabled adult himself. DHHS Ex. 1 at 8, DHHS Ex. 7.

103. Respondent never argued that the Complainant's educational background and work experience did not qualify him for the position of Supervisor of the Adult Development Program.

104. The Adult Development Program provided services for approximately 60 to 70 clients. There was a turnover of approximately 10 clients per year. For each new client, the Supervisor of the Adult Development Program was required to prepare a written assessment, a program schedule, and an individual service plan. DHHS Ex. 1 at 62; Tr. 443 - 450.

105. JG estimates paperwork constitutes 50 percent of the job duties of the Supervisor of the Adult Development Program, although, other than confidential reports (which he believed the Complainant would do on his computer), JG did not expect the Complainant to type his own reports. Tr. 354, 443, 447 - 450, 490.

106. The Supervisor of the Adult Development Program is accountable on paper to the State agencies which partially fund the Program. Tr. 444.

107. The essential functions of the job of Supervisor of the Adult Development Program are principally professional. They are to plan, organize, coordinate, and implement an adult development program. The paperwork involved in carrying out these functions, while essential to getting the job done, is a clerical function (the physical action of memorializing the thoughts of the Supervisor in a written or typed form) which is subordinate to the professional functions (the creation of the substance of the written or typed document) of the position. Findings 86 - 106.

108. Respondent provides clerical support for its professional staff, including clerical support for the position of Supervisor of the Adult Development Program. Tr. 191 - 192, 354, 404 - 406; DHHS Ex. 23 at 23.

109. During the term of the Complainant's employment, Respondent maintained three clerical positions. There was a program records clerk (Ernestine Britt (EB)) who handled all the paperwork and case files for clients; a general clerk (Marge Thompson (MT)) who handled CPCBA's correspondence, filing, reports and billings; and a supervising clerk (first Elaine Van Buren (EVB) and then Mary Nordseth (MN)), who supervised the program records clerk and the general clerk. All three clerical positions were responsible for answering the telephone. Tr. 189 - 190, 404, 689.

110. The clerical staff served the clerical needs of eight people and were very busy. 191 - 192.

111. In September or October 1988, the supervisor of the clerical staff, EVB, (who gave assignments to the other two clericals) became ill, and Respondent had only two full-time clerical staff to serve all of CPCBA's clerical needs. Tr. 190 - 191, 495.

112. From approximately September 1988 to January 1989, Respondent had no supervising clerk, and only two full-

time clerical employees were available to assist the professional staff at CPCBA. Tr. 189 - 191, 494 - 495.

113. A new supervising clerk, MN, was hired and worked from January 16, 1989 until February 23, 1989. Between February 23, 1989 and Respondent's termination on March 16, 1989, there was no supervising clerk at CPCBA, and only two full-time clerical employees were available to assist the professional staff. Tr. 404, 495.

114. The Complainant's first interview for the position of Supervisor of Respondent's Adult Development Program occurred on February 17, 1988. JG interviewed him. DHHS Ex. 1 at 10; Tr. 155.

115. The Complainant was interviewed next on March 4, 1988, by both JG and Marilyn Russell (MR), Respondent's Executive Director. DHHS Ex. 1 at 10, 11; Tr. 155.

116. JG was aware that the Complainant had a disability prior to recommending that he be hired. Specifically, JG knew the Complainant was a wheelchair user, had limited manual dexterity, and a speech impairment. JG knew the Complainant's writing abilities were limited. DHHS Ex. 1 at 10, 12; Tr. 156 - 157, 351, 353.

117. During the interview process, JG discussed the duties of the position of Supervisor of the Adult Development Program with the Complainant and also provided the Complainant with a copy of the position description. Tr. 351; DHHS Ex. 1 at 62 - 63.

118. During the interview process, JG and MR discussed with the Complainant what accommodation for his disability would be necessary for him to perform the job of Supervisor of the Adult Development Program. DHHS Ex. 1 at 10; Tr. 157, 159 - 160, 355 - 356, 779, 786 - 789.

119. During the interview process, the Complainant discussed with JG and MR the volume of paperwork required for him to perform the job of Supervisor of the Adult Development Program. DHHS Ex. 1 at 10; Tr. 157, 159, 163, 366.

120. During the interview process, the Complainant indicated to JG and MR that he could do the paperwork required, with the aid of a computer. The possibility of using a dictaphone and existing clerical staff for transcription was discussed. The subject of an employment aide was not discussed during the interview process. DHHS Ex. 1 at 10, 23 - 28, 33 - 35; Tr. 157, 159, 163, 354 - 355, 360, 366, 779, 787.

121. In a memo of March 18, 1988, from JG to MR, JG specifically mentioned the need to discuss with the Complainant his expectations of "reasonable accommodation." DHHS Ex. 1 at 16.
122. Respondent acknowledges that the Complainant was not precluded from asking for an employment aide simply because the issue was not raised during the interview process. Tr. 364 - 366, 788 - 789.
123. Respondent was aware from the beginning of the Complainant's employment that he would need some form of "reasonable accommodation." Findings 116, 118 - 121.
124. The accommodation JG considered the Complainant needed to do the job included the physical set-up at CPCBA, i.e., suitably configured bathroom facilities, a speakerphone, and a computer provided by DR to do paperwork. Tr. 355 - 356.
125. On JG's recommendation, MR authorized hiring the Complainant for the position of Supervisor of the Adult Development Program. Tr. 350 - 351, 791.
126. Effective April 4, 1988, Respondent employed the Complainant as Supervisor of its Adult Development Program. DHHS Ex. 1 at 17, 22.
127. The Complainant's letter of employment confirmation indicated that the Complainant would be on probation for one year. The Complainant read the letter and an employee handbook explaining the probationary status of Respondent's new employees. The Complainant understood that he would be serving at the discretion of Respondent's Board of Directors. DHHS Ex. 1 at 17; Tr. 250 - 252.
128. As Supervisor of the Adult Development Program, the Complainant supervised three staff employees, whom he was required to evaluate annually (twice a year for new employees). Tr. 499, 777, 786.
129. The Complainant requested that DR provide him with an employment aide to assist him at CPCBA. Tr. 160, 166, 734.
130. Under a Career Opportunities Development Program grant, DR reimbursed Respondent for the first three months of the Complainant's salary and benefits. With general funds, DR provided the Complainant with an employment aide 15 hours a week for four months, a specially equipped van, insurance, upkeep for the van,

and rehabilitation engineering services, which services included a computer, specific software, computer training, and a revamped telephone. DHHS Ex. 1 at 29 - 33; Tr. 160, 167, 169 - 171, 360 - 361, 731, 733 - 734.

131. DR informed the Complainant that the employment aide was a temporary measure to help the Complainant adjust to his new job. The computer equipment and training were intended to permit the Complainant to do his job independently. Tr. 736 - 737.

132. Respondent made it clear to DR that they could not afford to hire a second person to help the Complainant do his job. Tr. 735 - 736.

133. The DR computer was not delivered to the Complainant until either November 1988 or January 1989, and was not fully programmed prior to the Complainant's termination. The Complainant was not fully trained on the computer prior to his termination. DHHS Ex. 1 at 46, 56; Tr. 184 - 186, 316 - 317.

134. The Complainant typed on the computer with a head wand, utilizing a "peck and poke" system. Tr. 184 - 185.

135. Respondent would not have entered into an agreement in which DR would reimburse Respondent for the Complainant's first three months of salary if Respondent knew ultimately it would be obligated to provide the Complainant with an employment aide -- thereby requiring Respondent to hire two people for one job. Tr. 735 - 736, 744 - 746.

136. At the time he was hired, the Complainant was to be paid \$1538 per month. DHHS Ex. 1 at 17.

137. JG was the Complainant's direct supervisor. Tr. 343.

138. Jim Shubert (JS) was the Complainant's first employment aide. The Complainant chose JS as his employment aide. DR paid JS. JS worked 15 hours a week from 9:00 a.m. to noon, Monday through Friday, and was paid approximately \$7 an hour. Tr. 167.

139. JS worked as the Complainant's employment aide for three weeks, then left due to a personal injury. Tr. 169.

140. Melanie Hoffman (MH) was the Complainant's second employment aide. The Complainant chose MH as his

employment aide, and DR paid MH. MH worked 15 hours a week and was paid approximately \$7 to \$7.50 per hour. DHHS Ex. 6; Tr. 169 - 170.

141. MH began working as Respondent's employment aide in May 1988 and worked as the Complainant's employment aide until July 21, 1988. DHHS Ex. 6 at 1; Tr. 170.

142. MH had to leave because the contract with DR expired and DR would no longer pay MH's salary. Tr. 171.

143. Respondent hired MH for two days in December 1988, to assist the Complainant in organizing Respondent's Christmas party. DHHS Ex. 6 at 3.

144. MH worked as the Complainant's employment aide only as a favor to the Complainant. MH did not want to perform this job. Tr. 338.

145. The Complainant's employment aides' duties were filing, making copies, filling out forms under the Complainant's direction, taking handwritten dictation, assisting the Complainant on the telephone, setting up tables and chairs, keeping the Complainant's appointment book, creating visual aids under the Complainant's direction, and keeping the Complainant's office neat and organized. DHHS Ex. 6; Tr. 167 - 168, 170.

146. Beginning in May 1988, the Complainant requested that Respondent provide him with an employment aide. DHHS Ex. 1 at 23 - 24, 26; Tr. 178 - 180, 203 - 204, 416, 737, 772.

147. Respondent denied the Complainant's request, claiming CPCBA had no existing policy under which to hire an employment aide and that when the Complainant was hired he was not promised a clerical assistant. DHHS Ex. 1 at 26 - 28, 34; Tr. 178 - 179, 204 - 205, 364 - 365, 367 - 368, 370 - 371, 374.

148. On June 30, 1988, JG informed DR that the Complainant had assumed the position of Supervisor of the Adult Development Program with an attitude of responsibility, and had been open to learning procedures. The only difficulty noted by JG was a misunderstanding regarding the employment aide. JG rated (on an "A" to "F" scale) the Complainant's curriculum development, program evaluation, and client evaluation skills an "A" and his personnel administration skills a "B." JG further answered "yes" to a question concerning whether the Complainant had the talent, personality, education, and other qualifications necessary to succeed. JG had no

recommendations for improving the Complainant's performance and did not believe the Complainant needed more time to complete his training. DHHS Ex. 1 at 33.

149. On July 15, 1988, the Complainant wrote a memo to JG stating that he understood that Respondent would not provide him with an employment aide. DHHS Ex. 1 at 35.

150. Respondent resisted the Complainant's attempts to get CPCBA to provide him with the assistance of an employment aide. The perception that a strain was occurring in the relationship between himself and JG, due to his attempts to secure an employment aide, caused the Complainant to write his July 15, 1988 memo. DHHS Ex. 4; Tr. 180 - 182.

151. From approximately the beginning of September 1988, until the beginning of December 1988, the Complainant was able to utilize the services of Alma Schawver (AS). Initially, AS was a CPCBA volunteer, whom MR later hired and Respondent paid to fill in temporarily for a clerical employee who was ill. AS assisted the Complainant 15 hours per week. Tr. 174 - 175, 398 - 399.

152. AS's duties were the same as those of the Complainant's two employment aides. Finding 145; Tr. 175.

153. The Complainant found it difficult to work with AS, because AS had a significant hearing loss. It took twice as long to get the Complainant's work done, because the problem with AS's hearing was compounded by the Complainant's unusual speech. Tr. 175, 399 - 400.

154. AS worked with the Complainant in his office. Tr. 400.

155. AS was not designated to work on confidential client information. Tr. 414.

156. When AS left, the Complainant was expected to use his computer and existing clerical staff, when available, to produce paperwork. Tr. 400 - 401.

157. Respondent refused to hire a permanent part-time employment aide for the Complainant. Findings 146 - 147, 150, 156.

158. The Complainant's position required him to produce confidential evaluations of clients and staff. Tr. 411.

159. The Complainant had difficulty completing paperwork without an employment aide. DHHS Ex. 1 at 41 - 42; Tr. 205 - 206.

160. The program records clerk, EB, was the CPCBA clerical employee authorized to handle confidential client information, as opposed to staff evaluations. Tr. 201 - 203, 414.

161. Only the supervising clerk could handle confidential staff evaluations, as opposed to client evaluations. After EVB left and before MN was hired and after she left, there was no supervising clerk to assist the Complainant with staff evaluations. Tr. 497 - 498; DHHS Ex. 1 at 54.

162. JG and MR testified that they directed the clerical staff to provide as much assistance as they could to the Complainant. MR testified that she requested that EB assist the Complainant after 3:00 or 4:00 p.m. each day. Tr. 398, 691, 773 - 774. MR did not specify how long the work day was, or how long EB actually helped the Complainant each day.

163. The Complainant specifically requested that JG ask the clerical staff to assist the Complainant, as their time permitted, to accomplish "all [the] performance duties and objectives dictated by [his] employment contract." DHHS Ex. 1 at 35; Tr. 192.

164. The Complainant does not recall that JG ever assigned anyone to help him specifically. The Complainant was left confused about who on the clerical staff he should ask for clerical assistance, as JG never informed the Complainant which clerical staff person to ask for assistance. Tr. 189, 192.

165. JG never intervened effectively on the Complainant's behalf with the clerical staff. JG's view was that it was up to the Complainant to request assistance from the clerical staff. Tr. 401.

166. Respondent otherwise provided the Complainant with access to the same clerical resources available to other professional staff at CPCBA. Tr. 405 - 406; DHHS Ex. 23 at 23.

167. The Complainant asked the clerical staff for assistance in dictation, filing, interpreting initial phone calls (until a caller became familiar with the Complainant's speech), and retrieving documents from files. Tr. 194.

168. The clerical staff had to remain in their office to answer phone calls. The Complainant had to go to the clerical staff's office to orally dictate confidential information. The office was above the parking lot and noisy. Tr. 195, 197 - 199, 272.

169. To get to the office where the clerical staff was located, the Complainant had to leave his office, pass through double doors, and travel through the lobby. The location of the clerical staff's office was not convenient to the Complainant's office. Tr. 121, 196 - 197.

170. Due to the noise, distance from the Complainant's office, distractions from phone calls, and lack of confidentiality, the clerical staff's office did not provide a professional environment for taking dictation, especially any containing confidential information. Findings 168 - 169; Tr. 198 - 200, 208 - 209, 413.

171. EB preferred to take direct dictation and not to use a dictaphone. EB transcribed most of the Complainant's dictation, as his dictation was of a confidential nature. Tr. 195.

172. The Complainant attempted to arrange for specific times for the clerical staff to assist him. The Complainant was somewhat successful in getting EB to help him, but it was not under ideal conditions. Tr. 192, 195; Findings 170 - 171.

173. After December 1988, when AS left, Respondent did not effectively direct or assign any clerical staff person to assist the Complainant exclusively on a regular basis. Tr. at 129, 188 - 189, 192 - 196, 316, 402 - 403.

174. Professional staff of the Adult Development Program were asked, either by the Complainant, JG, or MR, but at MR's direction, to assist the Complainant by giving up 30 minutes to one hour of their own office time to help the Complainant with clerical functions. Tr. 192 - 194, 662, 677.

175. The Complainant did not believe it was professional to ask his Adult Development Program staff to assist him with paperwork. Tr. 193 - 194.

176. At least one member of the Complainant's Adult Development Program staff felt it was unfair to be asked to assist the Complainant, as it would not leave enough office time to complete that staff member's own paperwork. Tr. 670 - 671.

177. The Adult Development Program staff provided assistance to the Complainant for approximately the first four months of his employment. Tr. 664, 668, 677.

178. As a probationary employee, the Complainant was evaluated by JG for the period April 1988 to September 1988, Respondent's first six months of employment. DHHS Ex. 1 at 37 - 39.

179. In a Report of Performance written by JG and signed by JG, MR, and the Complainant on October 28, 1988, the Complainant received a "very good" performance rating (a score of "7" on a scale from "1" to "9" where "1" is unsatisfactory and "9" is excellent). DHHS Ex. 1 at 37.

180. The Complainant received a "very good" performance rating on the following rating elements: Attitude, Knowledge of Job, Dependability, and Employee and Public Contacts. He received a "good" performance rating on rating elements pertaining to Work Habits and Quality of Work. DHHS Ex. 1 at 37.

181. In rating the Complainant's "Attitude," JG stated that the Complainant had: 1) accepted the many facets of his position with a strong sense of responsibility and enthusiasm; 2) adapted to changing circumstances such as special events, the unique needs of individual clients, and the heavy load of paperwork generated by his department; and 3) shown a strong desire to lead his department. DHHS Ex. 1 at 38.

182. In rating the Complainant's "Knowledge of [his] Job," JG stated that the Complainant had adapted his previous training and experience to the clients and staff at CPCBA, and had "brought . . . his own convictions about the quality of life for the clients and how they can advocate for themselves." JG questioned only the Complainant's ability to perform tasks requiring manual dexterity and his occasional time away from the office. DHHS Ex. 1 at 38.

183. In rating the Complainant's "Work Habits," JG stated: 1) that the Complainant had demonstrated his willingness and ability to accept a project, plan a strategy, then implement and evaluate the results; 2) that the Complainant continued to deal with the constant flow of paperwork across his desk and that CPCBA would continue to dialogue with him about clerical support (emphasis added); 3) that the Complainant conducted himself in a professional manner, observed CPCBA's policies and procedures, and maintained good communication with his staff and other CPCBA employees;

and 4) that the Complainant had a commendable awareness of the importance of staff development. DHHS Ex. 1 at 38.

184. In rating the Complainant's "Quality of Work," JG noted that the Complainant wanted more promptness and precision in his work, but that circumstances beyond the Complainant's control may have prevented that. Further, JG noted the problems with regard to clerical support for the Complainant. Although JG noted his hope that the new computer would facilitate a resolution of the clerical support problem, JG stated that an objective for the next few months of the Complainant's employment should include a job analysis which will document any tasks the Complainant observes as needing "accommodation" (emphasis added). DHHS Ex. 1 at 39.

185. In rating the Complainant's "Dependability," JG noted that the Complainant had demonstrated a consistent follow-through when asked to do something. JG further noted that the Complainant was able to handle the stresses and demands of his job, although the demands might, on a particular day, deplete his energy. Finally, JG noted that the Complainant was sensitive to staff relations in his department and throughout CPCBA. DHHS Ex. 1 at 39.

186. In rating the Complainant's "Employee and Public Contacts," JG noted that the Complainant understood CPCBA's linkage with the larger community and fostered contacts to benefit clients and staff. To that end, JG stated that the Complainant should utilize his role as an employee representative to get a sense of all the departments and staff members at CPCBA. DHHS Ex. 1 at 39.

187. The Complainant received an increase in pay as of October 15, 1988. DHHS Ex. 1 at 36.

188. In January 1989, JG assured DR that the Complainant was performing his job satisfactorily. Based on this assurance, DR closed the Complainant's file. Tr. 712 - 713.

189. For the first six months of his employment, the Complainant was successfully performing the essential functions of his position. Tr. 394; Findings 178 - 188.

190. During the second six months of the Complainant's employment, the Complainant had a heavier workload. Tr. 473 - 474.

191. During most of the first six months of the Complainant's employment, while the Complainant was performing in a manner Respondent termed "very good," the Complainant had a part-time employment aide, access to a pool of three clericals, and the occasional help of his Adult Development Program staff, to assist him with the clerical functions of his job. Findings 108 - 113, 130, 138 - 145, 151 - 152, 162, 166 - 167, 172, 174, 177.

192. From September 1988 until January 1989, there was no clerical employee on staff to assist the Complainant with confidential staff evaluations. Tr. 498 - 499.

193. From September 1988 until either November 1988 or January 1989, the Complainant had no computer at CPCBA on which to produce confidential staff evaluations. Further, as of his termination, the Complainant was not fully trained on this computer. Finding 133; Tr. 498 - 499;

194. By early February 1989, three of the Complainant's confidential staff evaluations had become overdue. Tr. 416; DHHS Ex. 1 at 54.

195. After MN left CPCBA in February 1989, there was no CPCBA clerical employee to assist the Complainant with confidential staff evaluations. Finding 113; DHHS Ex. 1 at 54.

196. In March 1989, the Complainant told JG that he was unable to complete the overdue paperwork using only the computer. Tr. 488.

197. The cabinetry in the Complainant's office made it difficult for him to maneuver and prevented him from meeting in his office with more than one student at a time. Tr. at 186 - 187.

198. The Complainant requested that Respondent enlarge his office. Tr. at 187, 417 - 418, 542 - 543; DHHS Ex. 1 at 59.

199. Respondent refused to remove the cabinetry in the Complainant's office, based on evidence that the Complainant had seen his office prior to his employment and did not object to it. DHHS Ex. 1 at 59; Tr. 418, 542 - 543.

200. JG was required to submit an evaluation of the Complainant no later than two weeks prior to the expiration of the Complainant's one-year period of probation. DHHS Ex. 1 at 43.

201. In a March 2, 1989 memo to MR, JG stated that he would submit the Complainant's performance evaluation to the Complainant by March 21, 1989. DHHS Ex. 1 at 43.

202. Prior to the Complainant's termination, JG did not submit a formal performance evaluation (as he did in October 1988 (see Findings 178 - 179)) covering the period October 1988 through March 1989. DHHS Ex. 1 at 54; Tr. 797 - 802.

203. On March 1, 1989, JG prepared an informal assessment, in which JG advised the Complainant of deficiencies in his performance. DHHS Ex. 1 at 41 - 42.

204. In this March 1, 1989 memo, JG stated his concern with the Complainant's work habits and quality of work. JG referenced meetings in February, at which he requested that the Complainant turn in reports and staff evaluations. JG indicated that he and the Complainant discussed the DR computer's limitations with regard to generating reports and evaluations. JG indicated the Complainant agreed to explore dictation to complete these reports and evaluations. DHHS Ex. 1 at 41.

205. The Complainant had been told by EB that she preferred direct dictation to use of a dictaphone. Tr. 195; Finding 171.

206. In this March 1, 1989 memo, JG indicated that, on February 8, 1989, he discussed the Complainant's overdue paperwork with the Complainant. JG then indicated that, by six or seven days after February 8, 1989, the Complainant had completed three client assessments and scheduled a fourth for delivery. However, JG stated that the Complainant then informed him that three staff evaluations would not be ready by the deadline, February 28, 1989. JG agreed to reschedule those for March 3, 1989. DHHS Ex. 1 at 41.

207. In this March 1, 1989 memo, JG indicated that on February 28, 1989, the Complainant stayed home to complete another overdue report. JG indicated that he understood it was easier for the Complainant to get help at home, but he did not understand why the Complainant later came to the CPCBA building when other paperwork needed attention. JG did not recall the Complainant's informing him that he was to ride the bus that day in support of an effort to use more public transportation. JG indicated it was unacceptable for the Complainant to come in at noon and, further, two of the Complainant's staff did not know about the delay. DHHS Ex. 1 at 41 - 42.

208. In this March 1, 1989 memo, JG stated that he never authorized the Complainant to work at home during regular hours, or to choose his time of arrival without prior notice. DHHS Ex. 1 at 42.

209. In this March 1, 1989 memo, JG informed the Complainant that, based on his concern about the reports and about the Complainant's absence from work without sufficient explanation, JG concluded that he could not rate the Complainant's job performance as satisfactory. DHHS Ex. 1 at 42.

210. In this March 1, 1989 memo, JG told the Complainant that, at the end of his probation (April 4, 1989), JG was required to prepare a performance evaluation determining the Complainant's status as an employee. JG indicated he would need to see demonstrable signs of improvement to rate the Complainant's work differently. Specifically, JG wanted all personnel and client evaluations completed by March 10. Further, the Complainant would be expected to monitor his staff's compliance with procedures for tracking client progress. Finally, the Complainant was to prepare a report on the effectiveness of current classes and his plan for class changes. DHHS Ex. 1 at 42, 47.

211. In this March 1, 1989 memo, JG did not offer to direct specific clerical help to assist the Complainant. Nor did he acknowledge that there was no clerical staff person who could assist the Complainant with confidential staff evaluations, forcing the Complainant to rely solely on his personal computer and help at home.

212. The Complainant responded to JG's memo with a request for a hearing, addressed to CPCBA's Personnel Services Committee, and with a request for the assistance of the Employee Relations committee. In this memo, the Complainant requested "reasonable accommodation" with regard to the paperwork involved in his job. DHHS Ex. 4.

213. Respondent's Personnel Committee is a subcommittee of Respondent's Board of Directors. The Personnel Committee recommends suggested personnel practices, policies, and procedures to the Board of Directors and, if approved by the Board of Directors, the Personnel Committee sees to their implementation. Tr. 611.

214. Generally, the Personnel Committee becomes involved in the termination of an employee only if that employee (once the employee is a regular, not a probationary employee) has a complaint about the policy under which the employee was terminated. Tr. 611.

215. By March 14, 1989, JG acknowledged that the Complainant had completed the staff and client performance evaluations, met with his staff regarding their inefficiency and weaknesses in monitoring, was to submit a report to JG on the classes, and had dictated a report on tape to JG. DHHS Ex. 1 at 47, 54.

216. JG did not respond to the Complainant in written form. Instead, JG proposed to MR, and to William J. Stephens (WS) the Chair of Respondent's Personnel Committee, to extend the Complainant's one-year probation and to provide him with a clerical aide two hours a day. JG testified he wanted to evaluate whether, with an aide, the Complainant could perform the essential functions of his job. DHHS Ex. 1 at 43 - 45, 54; Tr. 423.

217. JG indicated that the Complainant's problem with paperwork was his failure to find the right combination of his own resources and additional clerical support to do the job. JG noted that "clerical support" for the Complainant meant assistance with "dictation, filing and computer entry." JG acknowledged that such requests were legitimate in light of the Complainant's handicap. DHHS Ex. 1 at 44.

218. On March 14, 1989, JG prepared a memorandum to Respondent's Executive Committee, passing along the Complainant's request for an employment aide 12 hours a week at \$7 an hour. If the Executive Committee agreed to this request, JG indicated that the Chairman of the Personnel Committee, WS, suggested the Complainant's employment be extended for five more months and then be re-evaluated. DHHS Ex. 1 at 46 - 48.

219. JG estimated that each week the Complainant's employment aide would do two hours of computer entry, four hours of dictation, five hours of administrative requests dealing with client related written material and sorting of mail, and one hour of phone interpretation for initial telephone contacts. DHHS Ex. 1 at 48.

220. MR signed the memorandum JG prepared, because JG wanted her to. MR did not want to give the Complainant an employment aide. MR believed that the Complainant only wanted Respondent to give a job to MH, his second employment aide, whom the Complainant later married. Tr. 788 - 789, 803 - 806.

221. MR did not think providing an employment aide for the Complainant was a reasonable request, since she believed the Complainant had not utilized the assistance Respondent offered. Tr. 785, 789.

222. The Personnel Committee recommended against extending the Complainant's probation. Tr. 612.

223. MR, but not JG (who, in effect, was advocating for the Complainant and willing to explore avenues of reasonable accommodation), attended the meeting of the Personnel Committee. Tr. 802, 808.

224. The basis for the Personnel Committee's decision not to extend the Complainant's probation was that extending the Complainant's probation would set a bad precedent and show special favor toward one employee. Tr. 612.

225. The Personnel Committee determined that extension of the Complainant's probation would constitute an undue hardship, as it would violate Respondent's rules and regulations and set up specific rules for individuals rather than for the organization as a whole. Tr. at 613 - 614.

226. The Personnel Committee did not consider Respondent's finances in turning down JG's request for an extension of the Complainant's probation. Tr. 613, 616.

227. JG did not believe that it would be a hardship for Respondent to have extended the Complainant's probation. Tr. 436.

228. During a March 15, 1989 meeting, Respondent's Board of Directors, based on the joint recommendation of Respondent's Personnel and Executive Committees (which had met to discuss the extension of the Complainant's employment), rejected the extension of the Complainant's probationary period. The Board of Directors was told that the Committees had decided that, since the regular probationary period for staff is one year, that should be sufficient time to determine an employee's performance. The Board noted that this is stated in the Employee Handbook, of which the Complainant had a copy. The Board accepted the Committees' recommendation not to extend the probationary period and concurred with their determination to terminate the Complainant, as his employment had been less than satisfactory. DHHS Ex. 1 at 49.

229. Respondent terminated the Complainant from his position on March 17, 1989. DHHS Ex. 1 at 50.

230. On April 12, 1989, the Complainant requested a hearing concerning his termination. DHHS Ex. 1 at 51.

231. Respondent's Board of Directors, stating that it wanted to be fair to the Complainant, granted the Complainant a hearing before a special committee of three board members, Joseph Ratto (JR), WS, and Joseph White (JW). The grievance procedure under which the Complainant's hearing was granted generally does not apply to probationary employees. DHHS Ex. 1 at 52, 57; Tr. 210.

232. Respondent's Board of Directors is not involved in its day to day activities. The Board's primary purpose is general management through policy making regarding Respondent's procedures and practices. Tr. 609.

233. JG summarized the Complainant's employment for the special committee meeting. In this memo, JG noted the Complainant's fine qualities and the contributions he made to CPCBA. JG noted the value of the Complainant's sharing his life experience with CPCBA's clients and staff. JG noted that the Complainant advocated for clients striving to better their quality of life, and worked hard to include all Adult Development Program staff members in the promotion of the clients' needs. Further, JG noted that the Complainant took seriously the revision of the curriculum. DHHS Ex. 1 at 53 - 54.

234. JG did note that he had a concern about the Complainant's work habits (which he indicates was unrelated to the issue of clerical help). JG stated that the Complainant did not organize his work and time well. JG questioned whether the Complainant's work habits and quality of work were up to the task of fulfilling the administrative duties of a supervisor. DHHS Ex. 1 at 55.

235. Prior to participating in the termination hearing, JW was not familiar with the facts of the Complainant's termination. Tr. 603.

236. At this hearing, the Complainant changed his request for an employment aide from 12 to 20 hours a week. Tr. 211, 313 - 314, 530 - 531.

237. The Complainant changed his request to 20 hours per week because he wanted to make sure he had sufficient assistance. The Complainant intended to diminish the assistance at specific times according to his needs. Tr. 211, 313 - 314.

238. The special committee determined that without the assistance of an employment aide, the Complainant was unable to perform all the functions of his position as Supervisor of the Adult Development Program. The

committee found further that this failure principally involved the Complainant's inability to perform clerical functions within a parameter of reasonable accommodation. DHHS Ex. 1 at 57.

239. The major reason the special committee found the Complainant's termination proper was because they found that the expense of hiring an employment aide for the Complainant was not reasonable. DHHS Ex. 1 at 57 - 59; Tr. 603.

240. The special committee concluded that to provide the Complainant with an employment aide for 20 hours a week would cost not less than \$630 a month and that such an expenditure was beyond the range of reasonable accommodation. DHHS Ex. 1 at 58.

241. The special committee made its determination that providing the Complainant with an employment aide was beyond the range of reasonable accommodation because it viewed hiring an employment aide as putting two people in one job. Tr. 536 - 537, 632 - 633.

242. Also, the special committee rejected the Complainant's request that the physical layout of his office was inadequate and needed to be enlarged, based upon evidence that the Complainant had seen his office and did not raise objections prior to his employment. DHHS Ex. 1 at 59.

243. The special committee was unable to agree that there may have been other grounds (personal work habits) which would support the termination of the Complainant since they were "too closely entwined with the inability to perform the necessary clerical functions required by the job description." DHHS Ex. 1 at 59.

244. Respondent would not have terminated the Complainant if an entity other than Respondent had paid for an employment aide for the Complainant. R. Ex. 8 at 1; Tr. 542.

245. In 1989, providing an aide for the Complainant would have cost between \$602 and \$630 per month, plus Social Security. Tr. 432 - 434; DHHS Ex. 1 at 58.

246. DR reimbursed Respondent for the first three months of the Complainant's employment with Respondent. DHHS Ex. 1 at 29; Finding 130.

247. Had the Complainant received a directive from his superiors at CPCBA with regard to obtaining sufficient

clerical staff on a fixed schedule and directives on how to utilize that staff, the Complainant could have adjusted his working habits and schedule to work with that person. The Complainant never got that directive. Tr. 313 - 322.

248. Respondent's fiscal year runs from July 1 to June 30. DHHS Ex. 8.

249. In fiscal year 1989, Respondent had an excess of public support (grants from the Mary Valle Foundation for the Cerebral Palsied (Mary Valle Foundation), contributions, and the proceeds of special events) and revenue (membership dues, program receipts (including production income, rehabilitation service fees, and donated services), interest earned, worker's compensation dividend and miscellaneous)) over expenses (program services for rehabilitation (adult development and work activity center), production, and support services (management and general)), in the amount of \$48,074. DHHS Ex. 8 at 5; Tr. 435 - 436.

250. The Mary Valle Foundation is a nonprofit corporation located in Oakland, California. DHHS Ex. 13.

251. The Mary Valle Foundation was earlier known as the Cerebral Palsy Foundation of Alameda County, Inc. DHHS Ex. 13.

252. The primary purpose of the Mary Valle Foundation is to own buildings for the care, training, education, and entertainment of persons afflicted with cerebral palsy and other multiple handicaps; to furnish these buildings with adequate equipment and other tangible articles of a personal nature; and to establish and maintain an endowment fund for the purpose of funding charitable programs for individuals with cerebral palsy or multiple handicaps residing in the Oakland/San Francisco Bay area. DHHS Ex. 13 at 5, 21.

253. The Mary Valle Foundation provides grants to Respondent. DHHS Ex. 14 at 5, 15 at 5; Tr. 559.

254. Historically, the Mary Valle Foundation has provided grants only to Respondent. Tr. 560; DHHS Ex. 14 at 9, 15 at 9.

255. In 1988 - 1989, all the members of the Mary Valle Foundation's Board of Directors also were members of Respondent's Board of Directors. Tr. 548 - 554; R. Ex. 10 at 17.

256. The Mary Valle Foundation owns the building where Respondent is located. Tr. 441, 547 - 548.

257. Respondent pays rent to the Mary Valle Foundation. DHHS Ex. 8 at 8; Tr. 441, 547 - 548.

258. Respondent pays this rent to the Mary Valle Foundation to establish the real cost of operating its program in order that the State payment to Respondent reflect that cost. Tr. 555 - 556.

259. Respondent makes an annual request to the Mary Valle Foundation for funding. Tr. 442, 561.

260. The Mary Valle Foundation's fiscal year runs from May 1 to April 30. DHHS Ex. 13 at 1.

261. For the fiscal year ending April 30, 1988, the Mary Valle Foundation made a grant to Respondent in the amount of \$158,529. DHHS Ex. 14 at 5.

262. For the fiscal year ending April 30, 1989, the Mary Valle Foundation made a grant to Respondent in the amount of \$220,007. DHHS Ex. 15 at 5.

263. The Mary Valle Foundation can make individual grants, provided that the grants assist individuals with cerebral palsy or multiple handicaps in the Oakland/San Francisco Bay area. Finding 252; Tr. 558.

264. Respondent did not make a request to the Mary Valle Foundation asking that it provide funding for an employment aide for the Complainant. Tr. 573.

265. Respondent did not suggest to the Complainant that he ask the Mary Valle Foundation to provide funds for an employment aide.

266. The income from dividends, interest, contributions, and direct and indirect public support to the Mary Valle Foundation is available for distribution at the direction of the Foundation. Tr. 564, 594; DHHS Exs. 14, 15.

267. The Board of Directors of the Mary Valle Foundation could direct funds not needed in the operation of the Foundation into its endowment fund. The income, but not the capital, from the endowment fund is available for distribution. Tr. 595 - 597.

268. Any income to the Mary Valle Foundation not directed into its endowment fund is available for distribution. Tr. at 595.

269. For the fiscal year ending April 30, 1988, the Mary Valle Foundation had dividends and interest from securities in the amount of \$292,324; contributions, direct public support, and indirect public support in the amount of \$135,154; an excess of support and revenue over expenses of \$340,328; and a fund balance or net worth of \$5,207,735. DHHS Ex. 14 at 4.

270. For the fiscal year ending April 30, 1989, the Mary Valle Foundation had dividends and interest from securities in the amount of \$358,080, contributions, direct public support, and indirect public support in the amount of \$47,191, an excess of support and revenue over expenses of \$664,142, and a fund balance or net worth of \$5,871,877. DHHS Ex. 15 at 4.

271. Respondent has not proved that employing additional clerical personnel would put its State funding in jeopardy. R. R. Br. 23; R. Findings at 10.

272. The Complainant could perform the essential functions of his job with any of the following types of reasonable accommodation: 1) the assignment to the Complainant of existing CPCBA clerical personnel for prescribed periods according to a specified schedule, at a location conducive to private dictation; 2) the aid of a computer and the more limited assistance of existing CPCBA clerical personnel for prescribed periods according to a specified schedule; 3) the aid of a computer and the assistance of an employment aide less than 20 hours a week; 4) an employment aide between 10 to 20 hours a week, depending on the Complainant's needs at the time; or 5) an employment aide 20 hours a week. Findings 1, 66 - 271.

273. Respondent has not met its burden of proving that any of the accommodations identified (Finding 272) will impose an undue hardship on its operation. Findings 73 - 77.

274. Giving the Complainant the reasonable accommodation of assigning existing clerical personnel to him would not constitute an undue hardship on Respondent's operation, as it would not involve excess cost to Respondent. Finding 247.

275. Giving the Complainant the reasonable accommodation of a computer and either existing clerical personnel for prescribed periods according to a specified schedule or an employment aide would not constitute an undue hardship on Respondent's operation, as Respondent was in a

position to bear the cost of providing this aid.  
Findings 248 - 263, 266 - 271.

276. Giving the Complainant the reasonable accommodation of an employment aide 10 to 20 hours per week would not constitute an undue hardship on Respondent's operation, as Respondent was in a position to bear the cost of employing that aide. Findings 248 - 263, 266 - 271.

277. Giving the Complainant the reasonable accommodation of an employment aide 20 hours per week would not constitute an undue hardship on Respondent's operation, as Respondent was in a position to bear the cost of that aide at the time of the Complainant's termination.  
Findings 248 - 263, 266 - 271.

IV. The following Findings concern my conclusion that Respondent's conduct constituted discrimination under section 504 and its implementing regulations.

278. Respondent is a recipient of federal financial assistance. Findings 60, 63.

279. The Complainant is a handicapped person within the meaning of section 504 and its implementing regulations.  
Findings 71, 80 - 81.

280. The Complainant is a qualified handicapped person within the meaning of section 504 and its implementing regulations because, with reasonable accommodation, the Complainant can perform the essential functions of his position as Supervisor of Respondent's Adult Development Program. Finding 272.

281. Providing reasonable accommodation to the Complainant would not impose an undue hardship on Respondent's operation. Findings 273 - 277.

282. Respondent failed to provide the Complainant with reasonable accommodation for his handicap in violation of section 504 and its implementing regulations. Findings 66 - 277.

283. Respondent terminated the Complainant in violation of section 504 and its implementing regulations, thus discriminating against him on the basis of his handicap.  
Findings 66 - 282.

284. Respondent discriminated against the Complainant by subjecting him to discrimination in employment and denying him an employment opportunity. Findings 1 - 283.

285. Respondent has so far been unwilling to comply with section 504 and Departmental regulations.

286. Respondent's compliance with section 504 cannot be secured through voluntary means. 45 C.F.R. § 80.8(c).

287. The Department is authorized to terminate or refuse to grant or continue all federal financial assistance to Respondent until such time as Respondent satisfies responsible Departmental officials that it is in compliance with section 504 and its implementing regulations. Findings 1 - 286; 45 C.F.R. § 80.8(a).

### DISCUSSION

The purpose of section 504 of the Act is to ensure that no federal funds be used to support discrimination. Here, the Department's principal allegation is that Respondent (a recipient of federal financial assistance under the Medicaid waiver program), an organization whose mission is to assist developmentally disabled individuals, primarily those with cerebral palsy, in their lives and in their employment, has discriminated against a developmentally disabled employee with cerebral palsy (the Complainant), by denying him the reasonable accommodation necessary to maintain his employment.

This is a serious allegation, raising significant legal and factual issues. The allegation is particularly egregious, however, because it has been leveled against an organization whose very reason for existence is to help individuals such as the Complainant live more independently and maintain their employment. For years, Respondent has been in the business of dealing with people disabled by cerebral palsy. One would think that such an organization would be in the forefront of providing accommodation to support such employment, advocating for such accommodation for their clients, or, at the least, recognizing the absolute necessity of their own responsibility to provide such support for their disabled staff members. More than any employer, Respondent should have known precisely the forms of accommodation the Complainant would need to do his job and the cost of providing such accommodation. Respondent, if any organization, should have known better.

Respondent appears to have hired the Complainant precisely because of his perspective as a disabled person, combined with his relevant education and work experience. JG, in an outline of his initial interview

with the Complainant, noted that the Complainant "has lived and is living a life which demonstrates the ideas often heard about in the world of rehabilitation or habilitation. He has pursued a professional career, is a parent and travels independently though a wheelchair-user. His presence models a 'can-do' spirit." DHHS Ex. 1 at 10. Another CPCBA interviewer noted that the Complainant's "perspective as a disabled person, combined with his background in education, could greatly enrich the Adult Development Program." DHHS Ex. 1 at 13. What is shocking here is that, once having hired the Complainant, instead of supporting the Complainant and helping to ensure his success in his position, Respondent appears to have acted almost with callous disregard for the Complainant, essentially expecting him to make his own accommodations for the clerical, manipulative, and paperwork aspects of his position. Respondent did not even give its own clerical staff (to whom, it appears, any professional staff at CPCBA had the same access as the Complainant) effective orders about how to help him.

Rather than providing the necessary assistance, Respondent relied on the simplistic argument that to do so would mean it would have to hire two people to do the job of one person. This argument is the principal basis used by Respondent to support the Complainant's termination. The additional person Respondent claims it would need to hire only has to possess the clerical abilities that the Complainant lacks due to his disability. Only the Complainant possesses the life experience, education, training and knowledge regarding cerebral palsy, those unique qualities Respondent recognized when it hired him. Moreover, hiring a clerical person to assist the Complainant does not equate to hiring a second person to perform the job for which the Complainant was hired. Rather, supplying some type of accommodation to the Complainant to gain his insight and skills is a small but necessary price for Respondent to pay. Moreover, absent a showing of undue financial hardship, such accommodation is required by law.

Respondent's disregard for the Complainant is reflected in its response to the Complainant's request for more effective clerical assistance to handle the increasing backlog of paperwork piling up due to the absence of such effective assistance. Respondent asserts that the Complainant knew during his interviews for the position of Supervisor of Respondent's Adult Development Program that Respondent would not provide him with an employment aide. Respondent asserts that both Respondent and the Complainant assumed that the Complainant could do the job with the assistance of a computer and Respondent's

existing clerical staff. In essence, Respondent is arguing that its responsibility to provide reasonable accommodation under section 504 is somehow determined by what resources the handicapped employee sought when he or she was hired, and that if the Complainant needed some other accommodation (such as an employment aide) it was up to the Complainant to provide such assistance for himself. See Tr. 633. Respondent asserts further that the Complainant's belief at the time he was being terminated (that he needed the accommodation of an employment aide for 20 hours per week to make up for the deficiencies cited by his Supervisor) supports Respondent's argument that such accommodation is the only accommodation that will allow the Complainant to perform the essential functions of his position and precludes my consideration of other accommodation which might allow the Complainant to perform the essential functions of his job.

The record demonstrates, however, that Respondent's arguments are not supportable. There are forms of reasonable accommodation other than a 20-hour-a-week employment aide that will permit the Complainant to perform the essential functions of his position. Moreover, Respondent has failed to prove that any of the forms of reasonable accommodation described in the Findings, including the provision of a 20-hour-a-week employment aide, will result in an undue hardship to Respondent's operation.

As a result of Respondent's alleged discrimination, the Department has requested that all Respondent's Departmental federal financial assistance be terminated until such time as Respondent comes into compliance with section 504 and Departmental regulations. To justify such termination, the Department must establish a prima facie case pursuant to section 504, proving that: 1) the Complainant is a handicapped person; 2) the Complainant is otherwise qualified for the job; 3) Respondent discriminated against the Complainant on the basis of handicap; and 4) the discrimination took place in a program or activity receiving federal financial assistance. Finding 68. Respondent concedes that the Complainant is, in fact, a handicapped person. Finding 81. Further, it has been established that Respondent is a "recipient" of federal financial assistance under the Medicaid waiver program. Finding 278.

My discussion below will focus principally on my Findings that the Complainant was otherwise qualified for his position as Supervisor of the Adult Development Program and that Respondent discriminated against him on the

basis of his handicap, cerebral palsy. My discussion below will focus also on my determination that Respondent has failed to comply with section 504 and its implementing regulations, because of my Findings that Respondent discriminated against the Complainant by subjecting him to discrimination in employment and by denying him an employment opportunity in violation of section 504 and its implementing regulations.

I. Set forth below is the legal predicate to my Findings that Respondent discriminated against the Complainant in this case.

A. Section 504 and its implementing regulations

Section 504 prohibits discrimination, on the basis of disability, by a recipient of federal financial assistance. The Act provides specifically that

No otherwise qualified individual with handicaps ... shall, solely by reason of her or 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(a) (1988).

The Departmental regulations prohibiting discrimination in employment practices similarly provide that

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

45 C.F.R. § 84.11(a).

The specific practices prohibited by Departmental regulations include the discriminatory termination of employment. 45 C.F.R. § 84.11(b)(2).

Departmental regulations define the terms "handicapped person," and "qualified handicapped person." A "handicapped person" is

[A]ny 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.

45 C.F.R. § 84.3(j)(1). With respect to employment, a "qualified handicapped person" is

[A] handicapped person who, with reasonable accommodation,<sup>5</sup> can perform the essential functions of the job in question.

45 C.F.R. § 84.3(k)(1).

The scope of the "reasonable accommodation" necessary to enable a handicapped individual to perform the essential functions of a job is described at 45 C.F.R. § 84.12. Specifically, section 84.12(a) states that

A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

Examples of reasonable accommodation are set forth at section 84.12(b) and 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.

Factors to be considered in determining whether a form of reasonable accommodation would impose an undue hardship on the operation of a recipient's program are set forth at section 84.12(c) and include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) The

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<sup>5</sup> The Department has suggested that I refer to the EEOC Technical Assistance Manual on Title I of the ADA, Fair Employment Practices Manual (BNA) No. 690 (1992) with regard to the scope of reasonable accommodation. As this manual was not published until 1992 (and the Americans with Disabilities Act itself was not enacted until 1990), I am not considering this publication, as the discrimination at issue was committed prior to 1990.

nature and cost of the accommodation needed.

B. Prima Facie Case and the Burden of Proof

As stated above, in order for an employee to prevail under section 504, the employee must establish a prima facie case showing that he or she is a handicapped person, is otherwise qualified for the job, has been discriminated against on the basis of handicap, and that the discrimination took place in a program or activity receiving federal financial assistance. Here, my inquiry is limited to deciding whether the Complainant is otherwise qualified for his position and has been discriminated against on the basis of his handicap.

Whether the Complainant is a "qualified handicapped person" encompasses several elements of proof. As explained more fully below, the Department first must show that with "reasonable accommodation" the Complainant can perform the "essential functions of his position." To do this, the essential functions of the Complainant's position must be defined. Second, the Department must identify the type of reasonable accommodation needed to allow the Complainant to perform satisfactorily the essential functions of his position. The Respondent has the burden of showing that the proposed reasonable accommodation will impose an "undue hardship" on its operations. If Respondent meets this burden, then the burden shifts to the Department to demonstrate that such accommodation is not burdensome. Thus, absent a showing of undue hardship, failure by Respondent to provide the Complainant with reasonable accommodation to allow him to perform the essential functions of his position will be the basis for a finding of discrimination under section 504.

However, the Department has argued that, similar to other civil rights statutes, section 504 involves a shifting of the burden of proof. Specifically, the Department alleges that, once a recipient denies that an employee's termination resulted from its failure to reasonably accommodate the employee's handicap, a prima facie case may be established based on facts that give rise to an inference that the employee was terminated based on discrimination. The Department cites as support for this proposition the case of Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990), cert. denied, 111 S.Ct. 2825 (1991). DHHS Br. at 28 - 29. I disagree with the Department's analysis, finding the Smith case to be distinguishable from the case here.

In Smith, the management positions of two blind employees of the Idaho Commission for the Blind (Commission) were consolidated during a reorganization of their department. Although these employees applied for the consolidated position, neither was selected. Instead, these two employees were retained in staff positions. The employees then alleged that the reorganization eliminating their old positions and their non-selection for the new position violated both section 504 of the Act and 42 U.S.C. § 1893.<sup>6</sup>

The court, in discussing the elements of proof in a section 504 case, noted that the only contested issue was whether the employees were excluded from selection for the new position based solely on their handicap. Whether the employees were "otherwise qualified" for their positions or whether the Commission failed to provide "reasonable accommodation" (the issues in the instant case) were not issues in dispute. The Smith court noted that

[t]he method of analysis and allocation of burdens of proof and production differ depending on what type of discrimination is at issue, and on whether the employer denies or acknowledges reliance on the plaintiff's handicap as a basis for its employment decision.

Smith at 1339. The court concluded that, where plaintiffs seek no special accommodation and, instead, allege discrimination based on discriminatory intent, and where defendants disavow any reliance on the plaintiffs' handicap, the analytic framework employed in Title VII civil rights cases should apply. The court, relying on Doe v. New York University, 666 F.2d 761 (2d Cir. 1981), held that in those circumstances, a prima facie case could be established by proving that a plaintiff applied for a position for which he was qualified and was rejected under circumstances indicating discrimination was the basis for the non-selection. Under such circumstances, the burden shifts to the defendant to rebut the presumption of discrimination by coming forward with evidence that the plaintiff was rejected for a legitimate, nondiscriminatory reason. If the defendant

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<sup>6</sup> Both employees were active members of the National Federation for the Blind. They contended that the reorganization/constructive discharge violated their First and Fourteenth Amendment rights of free association, due process, and equal protection. These constitutional claims were brought under section 1893.

makes such a showing, the burden then shifts to the plaintiff to demonstrate that the proffered reason was not the true reason or that it encompassed unjustified consideration of the handicap itself.

The Department argues that such burden shifting analysis applies here because Respondent denies that the Complainant's termination resulted from its failure to reasonably accommodate his handicap. The Department's reliance on Smith, however, is misplaced. The special circumstances cited in Smith for using the shifting burden analysis utilized in section 1893 civil rights cases are not present here. Unlike in Smith, the issues here are: 1) whether the Complainant was "otherwise qualified" for his position; and 2) whether Respondent discriminated on the basis of the Complainant's handicap by its failure to provide "reasonable accommodation." Thus, the factual circumstances underpinning this case do not support application of the burden shifting analysis. Instead, the Act and its implementing regulations establish the parties' relative burdens of proof.

In Pushkin v. Regents of University of Colorado, 658 F.2d 1372 (10th Cir. 1981), the court, relying on the Supreme Court's opinion in Southeastern Community College v. Davis, 442 U.S. 397 (1979), indicated that the appropriate standard of proof for a prima facie case under section 504 is: 1) a showing that the plaintiff was an otherwise qualified handicapped person apart from his handicap, and was rejected under circumstances which gave rise to the inference that his rejection was based solely on his handicap; and 2) once the plaintiff establishes the prima facie case, the defendant has the burden of going forward and proving that the plaintiff was not an otherwise qualified handicapped person, or that the rejection was based on reasons other than the handicap. Pushkin, 658 F.2d at 1387. Accord, Lucero v. Papp, 915 F.2d 1367, 1371 (9th Cir. 1990).

Here, Respondent admits that the Complainant was a handicapped person, but contends that: 1) even with reasonable accommodation he could not meet the essential functions of his position; 2) he was provided reasonable accommodation through allocation of existing staff personnel, but did not utilize those resources; and 3) any other accommodation, such as hiring a personal employment aide, would impose an undue hardship on Respondent's operations. The Department has the burden of establishing that the Complainant is a qualified handicapped person (i.e., that the Complainant can perform the essential functions of his position with reasonable accommodation). If the Department establishes

that the Complainant can perform the essential functions of his position with reasonable accommodation, and Respondent is unable to prove the contrary, then the burden falls on Respondent to show that such accommodation would impose an undue hardship on its operations. If Respondent cannot prove such undue hardship, a finding of discrimination will follow.

C. Affirmative obligations and reasonable accommodation

Departmental regulations define a qualified handicapped person as one who, with reasonable accommodation, can perform the essential functions of the job in question. 45 C.F.R. § 84.3(k). Respondent cites Davis for the proposition that the Court, in defining the term "otherwise qualified person" under section 504 of the Act, did not impose an affirmative action requirement on an employer to alter its program in order to employ handicapped persons. R. Br. 28. In essence, Respondent references Davis to argue that employing a part-time aide as a reasonable accommodation to allow the Complainant to perform his job would amount to affirmative action of the type rejected by the Court in Davis. I find, however, that Davis does not support Respondent's position. To the contrary, when considered in terms of the Departmental definitions of "qualified handicapped person" and "reasonable accommodation," Davis supports the imposition of accommodations that will allow disabled individuals to perform the essential functions of a job if such accommodations do not substantially compromise the integrity of an employer's operations. Further, the Court concluded that the Secretary's regulations implementing section 504 provide the proper framework for determining whether Respondent's treatment of the Complainant amounts to discrimination prohibited by the Act. Such regulations, when consistent with the purposes of the Act, are entitled to judicial deference. Davis, 442 U.S. 397 at 411.

Davis was the Court's first opportunity to interpret the obligations on recipients of federal funds imposed by section 504 of the Act. Davis was not an employment practices case (pertaining to Subpart B of Departmental regulations) but a case involving access to postsecondary education (Subpart E of Departmental regulations).<sup>7</sup> Ms.

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<sup>7</sup> Section 84.42(a) of Subpart E makes it unlawful to deny admission to qualified handicapped persons to postsecondary school education. Section 84.44(a)

Davis, a licensed practical nurse, sought admission to a training program for registered nurses offered by Southeastern Community College (Southeastern). Ms. Davis had bilateral, sensori-neural hearing loss which was not subject to correction by use of hearing aids. As a result, she could not discriminate among sounds and had to rely on lip reading for effective communication. Southeastern rejected her from its training program because: 1) her existing hearing loss made it unsafe for her to participate in the normal clinical training program for registered nurses; 2) her hearing loss would make it unsafe for her to care for patients; and 3) any modification of the training program to allow her to participate would deny her the full benefits of the program. The district court upheld her rejection, but the Court of Appeals for the Fourth Circuit reversed on the grounds that "otherwise qualified" under section 504 meant that Ms. Davis had to be considered for the training program without consideration of her handicap, and that only her academic and technical qualifications should be considered. The Fourth Circuit further opined that section 504 required affirmative conduct by Southeastern to modify its program to accommodate Ms. Davis' disabilities, even if it was expensive to do so.

On review, the Court held that an "otherwise qualified individual" protected by section 504 still had to be able to meet the legitimate physical requirements of an educational program.<sup>8</sup> Moreover, the Court concluded

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<sup>7</sup> (...continued)

requires adjustments to academic requirements to ensure that such requirements do not result in discrimination. However, academic requirements that are essential to the program of instruction or to any directly related licensing requirement will not be regarded as discriminatory. Section 84.44(d)(2) provides that handicapped students be given access to auxiliary aids, such as sign interpreters, but attendants for personal services need not be provided.

<sup>8</sup> Relying on the definition of "qualified handicapped person" at 45 C.F.R. § 84.3(k), the Court noted that the word "otherwise" was dropped because the Department recognized that the intent of section 504 was not to completely disregard a person's handicap in determining whether such person could perform the requirements of the position or program. The Court held that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." 442 U.S. at 406.

that, in order to complete successfully the clinical training portion of the program, the applicant needed the ability to understand speech without reliance on lipreading. This ability was considered indispensable to many of the functions a registered nurse had to perform. Further, the Court rejected Ms. Davis' argument that Southeastern had to take affirmative action to alter its training program so that effective oral communication was not a necessary requirement.<sup>9</sup> The Court based its reasoning on 45 C.F.R. § 84.44(d)(2), the regulation implementing section 504 with regard to discrimination in postsecondary schools. The Court noted that this section of the regulations excluded "devices or services of a personal nature" from the types of aids that a school had to provide handicapped students. The trial record indicated that Ms. Davis would need close, individual attention by a nursing instructor to ensure patient safety when she participated in clinical training -- the type of action proscribed by the Department's own regulations interpreting section 504. Similarly, the Court concluded that section 84.44(a) does not require the kinds of curricular "modifications," such as the elimination of clinical courses, that would be necessary to accommodate Ms. Davis in the nursing program. Moreover, the Court opined that:

[i]f these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute. The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps.

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<sup>9</sup> Ms. Davis argued that Southeastern had to provide individual supervision by faculty members when she was involved in direct patient contact and eliminate certain courses from the training program. The latter accommodation was based on her belief that section 504 required modifications of educational programs for handicapped persons, such as eliminating clinical training. It was acknowledged that Ms. Davis could not perform all the duties of a registered nurse, such as in an operating room where surgical masks are used and she could not rely on lipreading for communication.

442 U.S. at 410.

To support further its view that affirmative action was not required by section 504, the Court examined other provisions of the Act (specifically sections 501(b) and 503(a) which govern, respectively, the federal government and federal contractors, and contain affirmative action requirements) and contrasted them to section 501(c) of the Act, which pertains to State agencies, such as Southeastern, which have no "affirmative action" requirement in employment. The Court concluded that the absence of the term "affirmative action" in section 504 demonstrated a congressional intent to impose a lesser standard. The Court did observe that section 504 was amended in 1978 to permit grants to State educational entities for the purpose of providing information and technical assistance, including interpreters for the deaf, to enable such entities to comply with the requirements of section 504. Despite this amendment, the Court, while recognizing that the elimination of discrimination might involve costs, was not persuaded that Southeastern's failure to make substantial changes to its nursing program itself constituted discrimination prohibited by section 504. Consequently, the Court held, "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." Davis, 442 U.S. at 411.

The Court recognized that the line between a refusal to extend affirmative action and illegal discrimination against handicapped persons is cloudy. However, based on the record, it held that Southeastern's "unwillingness to make major adjustments in its nursing program" did not constitute discrimination. Id. at 413. In order to permit Ms. Davis to participate in its nursing program, Southeastern would have had to lower or modify its educational standards substantially. The Court concluded that section 504 does not impose such a requirement.

There are a number of factual differences between Respondent's actions with regard to the Complainant's employment and the circumstances in Davis. First, the regulations pertaining to employment practices are different from those implementing the prohibition of discrimination in admission to postsecondary school education. "Reasonable accommodation" is required by section 84.12(a) to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless it would impose an undue hardship on the employer's operations. Conversely, "adjustments" or "modifications" of academic requirements

by postsecondary educational institutions are required by section 84.44(a) to prevent discrimination against handicapped applicants or students. Section 84.44(a) specifically indicates that certain types of requirements in academic programs -- those essential to the program of instruction or to licensing requirements -- need not be modified. Section 84.44(d)(2) excludes from auxiliary aids that should be provided the use of personal attendants. The Court relied, in part, on these provisions in concluding that section 504 did not require affirmative action.

While section 84.12(b) specifies certain types of accommodation that may be provided, such as modifying physical facilities to make them accessible to and usable by handicapped persons, job restructuring, acquisition or modifications of equipment, and the provision of readers or interpreters, there are no specific types of reasonable accommodation precluded by section 84.12(c) other than those which are shown to impose an undue hardship on an employer. Once a form of accommodation is identified that will allow an employee to perform the essential functions of the position, then the burden is on the employer to demonstrate that such accommodation is unduly burdensome. Such regulations impose an affirmative obligation on employers to accommodate the needs of handicapped employees or applicants as long as they do not impose an undue hardship on their business operations.<sup>10</sup> This regulatory scheme is quite different from that imposed on postsecondary educational institutions.

More importantly, it is evident that, in Davis, the Court was persuaded that a severely hearing-impaired person who could not be helped with amplification aids could not perform successfully as a registered nurse and that the modifications sought in the academic requirements were so substantial as to render the training substandard. Consequently, such person was not "otherwise qualified" within the meaning of section 504 of the Act. Respondent has not shown that the accommodation needed for the Complainant would result in his inability to meet the

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<sup>10</sup> Unlike the limitations imposed by section 84.44(d)(2) on the use of personal attendants in postsecondary school settings, there is no such limitation imposed in employment practices. In fact, the provision of readers or interpreters, and other similar actions arguably personal in nature, are permissible under 45 C.F.R. § 84.12 unless they impose an undue hardship on the employer's operations.

essential functions of his position of Supervisor of the Adult Development program and that he, thus, would not be "otherwise qualified." Moreover, I agree with the Department that Respondent's interpretation of Davis regarding the prohibition of affirmative action would eliminate the concept of "reasonable accommodation" in section 504 cases. Rather than eliminate "reasonable accommodation," the Court placed limits on the breadth of section 504 where proposed "accommodations" or "adjustments" would render the federally funded program meaningless. Thus, under section 504, the line between prohibited discrimination and actions that would render a handicapped person not "otherwise qualified" (and, therefore, non-discriminatory) must be discerned against the facts of each case.

The Court subsequently revisited its interpretation of section 504 in the case of Alexander v. Choate, 469 U.S. 287 (1985). Choate involved an action taken by the State of Tennessee to lower the durational limit on the number of reimbursed hospital days per year from 20 to 14 for Medicaid patients, as a means to reduce its overall Medicaid cost. Medicaid recipients brought a class action seeking declaratory and injunctive relief, contending that such action imposed a disparate impact on disabled persons resulting in a prima facie violation of section 504 of the Act. The Court held that such action did not violate section 504. The Court noted that

[t]he balance struck in Davis requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.

Choate, 469 U.S. at 301.<sup>11</sup>

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<sup>11</sup> The Court recognized the interconnection between the need of the handicapped person to be "otherwise qualified" under section 504 and a finding of discrimination. The Court noted that, "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under the section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable  
(continued...)

The Court recognized that the ultimate question in all cases under section 504 is the "extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped. 469 U.S. at 299 n.19. The Court observed further that its statement in Davis, that section 504 does not "impose an affirmative action obligation on all recipients of federal funds" (442 U.S. at 411), had been criticized for failing to appreciate the difference between affirmative action and reasonable accommodation. 469 U.S. at 300 n.20. The Court went on to clarify Davis, indicating that the term "affirmative action" referred to those "changes," "adjustments," or "modifications" to existing programs that would be "substantial," or that would constitute "fundamental alteration[s] in the nature of a program . . .," rather than to those changes that would be reasonable accommodations. Id.

The Court had the opportunity to interpret section 504 in an employment context in School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987). In Arline, a teacher, who was terminated from her job because she was afflicted with a susceptibility to tuberculosis, brought an action under section 504, alleging that her dismissal was discriminatory. The Court affirmed a finding that she was a "handicapped person" under the Act. The Court remanded her case to the district court to determine whether, considering her condition, she was "otherwise qualified" under the Act and, if so, whether any "reasonable accommodation" could be made. In providing guidance in determining whether a handicapped person is "otherwise qualified" in an employment context, the Court stated that an "otherwise qualified" handicapped person is an individual who can perform the essential functions of the job with the employer providing "reasonable accommodation," if necessary, to allow the individual to do the essential functions of the job.<sup>12</sup> However, such accommodation would not be considered "reasonable" where

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<sup>11</sup> (...continued)  
modifications in its programs for the needs of the handicapped." Choate, 469 U.S. at 299 n.19.

<sup>12</sup> In light of the prohibition of "affirmative action" cited in Davis, it is interesting that in Arline the Court acknowledged that, "[e]mployers have an affirmative obligation to make a reasonable accommodation for a handicapped employee." (emphasis added). Arline at 289 n.19.

it imposed "undue financial and administrative burdens," or required "a fundamental alteration in the nature of [the] program." 480 U.S. at 287 n.17. The Court referred also to the factors listed at 45 C.F.R. § 84.12(c) for determining undue hardship. In sum, the Court advised:

[W]here reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

480 U.S. at 287 n.17.

The Court's analysis in the cases cited above supports the existence of an affirmative duty on employers to provide reasonable accommodation where it is necessary to allow handicapped persons to perform the essential functions of their positions. Such cases demonstrate also that Respondent's attempt to use the affirmative action requirement placed on the federal government and federal contractors under sections 501 and 503 of the Act did not indicate a congressional intent to eliminate imposition of a similar requirement on employers under section 504. The "affirmative action" analysis proffered by Respondent is inapposite, because the focus of inquiry under section 504 is to determine whether a handicapped person is "otherwise qualified," utilizing the "reasonable accommodation" necessary to permit that person to perform the essential functions of his or her position. In determining whether an identified type of accommodation is reasonable, the focus of the examination is not on whether it is affirmative action, but on whether such accommodation will permit the person to perform the essential functions of the job, and, if it will, whether such accommodation will constitute an undue hardship on the employer's operation. This determination is a fact-specific inquiry.

As the Court of Appeals stated in Arline v. School Board of Nassau County:

[t]he court is obligated to scrutinize the evidence before determining whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice.

772 F.2d 759, 764 - 765 (11th Cir. 1985); see also, Hall v. United States Postal Service, 857 F.2d 1073, 1079 (6th Cir. 1988).

II. Respondent's actions meet the legal predicate to my finding that Respondent discriminated against the Complainant in this case.

A. Otherwise qualified handicapped person

An otherwise qualified handicapped person is one who, with reasonable accommodation, can perform the essential functions of a job. As I stated above, to determine whether the Complainant can perform the essential functions of his job, those essential functions must first be defined. It is only after the essential functions of his job have been defined that I will be able to determine whether some reasonable accommodation to be provided by the Respondent will allow the Complainant to perform those essential functions. If such reasonable accommodation is identified, it is then up to Respondent to show that such accommodation will impose an "undue hardship" on its operations. Absent such a showing, failure by Respondent to provide the Complainant with reasonable accommodation to allow him to perform the essential functions of his job will be the basis for a finding of discrimination under section 504. Accordingly, my inquiry first must focus on identifying the essential functions of the Complainant's position.

1. Essential functions of the position of Supervisor of Respondent's Adult Development Program

In the case of Nelson v. Thornburgh, 567 F. Supp. 369 (E. D. Pa. 1983), aff'd, 732 F.2d 146 (3rd Cir. 1984), cert. denied, 469 U.S. 1188 (1985), the court examined the question whether blind income maintenance workers for the State of Pennsylvania, who, with the assistance of readers, met the requirements of their position as well as their sighted colleagues, were otherwise qualified handicapped individuals under the Act, such that the State was required to provide and absorb the expense of reasonable accommodation for their disability absent a showing of undue hardship. There, as here, the court first had to examine what the essential functions of the plaintiffs' position were. The court determined that the position of income maintenance worker was a professional-level position with significant responsibilities. The court acknowledged that the capacity to read without aid is helpful in carrying out the duties of the job, as were the abilities to hear or move without help. However, the

essential qualifications for the career were dedication to the work, sufficient judgment and life-experience to enable the worker to assess accurately the legitimate needs of clients, and the ability to work effectively under the pressure of competing demands from clients and supervisors. Nelson 567 F. Supp at 372. Thus, in Nelson, the physical aspects of carrying out the professional-level job were not essential.

Applying a similar analysis here, an examination of the job specifications for the position of Supervisor of Respondent's Adult Development Program leads me to conclude that the essential functions of this position are primarily professional, not clerical. The definition of the job is for a Supervisor to plan, organize, coordinate, and implement an adult development program for cerebral palsied and other developmentally disabled adults, and to perform related work as required. There are no clerical functions included in the job specifications. The educational requirements for the job include graduation from college with a major in developmental psychology, special education, or experience in an allied field. The Supervisor must have worked with adults with cerebral palsy or developmental disabilities for at least three years, and must have at least two years of related supervisory experience. Examples of work performed by the Supervisor include evaluating and selecting developmental activities, scheduling a program of adult development, administering a tracking system to monitor client progress, participating in the admissions process, evaluating class effectiveness, scheduling and chairing staff meetings, supervising staff, and overseeing client advocacy training. DHHS Ex. 1 at 62 - 63; Findings 86 - 88, 98 - 99, 101.

Respondent has not contested that the Complainant's professional credentials (i.e., his educational background and related work experience) qualify him for the position of Supervisor of the Adult Development Program. Instead, Respondent is contending that the Complainant cannot perform the paperwork function attendant to his position. It is contended that such paperwork is a component of "related work as required."

The performance of the professional function of the Complainant's position as Supervisor of the Adult Development Program requires him to generate paperwork. Findings 89 - 98, 104 - 107. Respondent has argued that this paperwork function is an essential function of the job of Supervisor of its Adult Development Program, that it constitutes 50 percent of the Supervisor's workload,

and that, without an employment aide 20 hours a week (which Respondent argues it cannot afford), the Complainant is unable to perform the essential paperwork functions of the job.<sup>13</sup> Thus, as the Complainant was unable (or unable timely) to complete his paperwork, he was terminated in a non-discriminatory manner. R. Br. 28 - 29.

I agree with Respondent that the generation of paperwork arises from the performance of the essential functions of the Complainant's position as Supervisor of the Adult Development Program. Finding 107. However, it is not in itself an essential function of the Complainant's position. It is the Supervisor of the Adult Development Program's responsibility to see that the paperwork (i.e., the reports, evaluations of staff and clients, curriculum development plans, and other associated documentation) attendant to carrying out the Supervisor's job description of planning, organizing, coordinating, and implementing the Adult Development Program is carried out. The physical preparation of this paperwork is not, however, an essential function of the position.<sup>14</sup> It is

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<sup>13</sup> Respondent's position is not credible. Respondent argues that the Complainant cannot perform the essential functions of his position without the use of a part-time employment aide for 20 hours per week. The request for a 20-hour-per-week employment aide was made by the Complainant at a time when he was fighting to retain his job, after having been notified of his termination for failing to perform the paperwork component of that job adequately. Further, the request was made at a time when the Complainant's computer assistance was marginal, when the provision of clerical help to him was provided on an irregular and unscheduled basis, and when the clerical services themselves were offered in an environment which complicated, rather than lessened, the limitations caused by the Complainant's disability.

<sup>14</sup> As with most professional positions, the product of the analyses, thought processes, and evaluations performed by the incumbent in such positions requires some form of retention of the work product, whether it be in written form on paper or electronically maintained on a computer medium. Professionals are not hired for their skills in generating the medium by which their work product is maintained, but for the work product itself. The obvious difference is that a professional is engaged in an intellectual exercise creating the substance of the  
(continued...)

a manual task, which can be delegated to others - as are the secretarial chores of any professional who might be unable to type. The essential function of the Complainant's position in this regard is his ability to communicate his thought processes, for example, in the area of work output, to others who have responsibility to record such output. The former is a professional task, the latter clerical. Due to the Complainant's handicap, he lacks the manual dexterity and speech clarity to transmit his work output readily to others. Moreover, efforts by DR to assist him in this regard by providing him with a computer programmed to correlate with his manual limitations were unsuccessful during the time the Complainant was employed by Respondent. Finding 133. Consequently, it is with these functions of his position that the Complainant requires "reasonable accommodation" from Respondent. The inquiry now focuses on whether: 1) there are types of "reasonable accommodation" that will permit the Complainant to communicate his work product effectively to clerical staff to generate the paperwork that is required in the performance of the essential functions of his position; and 2) such accommodation would impose an undue hardship on Respondent's operations. The Department has the burden of proof regarding item 1 and Respondent has the burden of proof as to item 2.

## 2. Reasonable accommodation for the essential functions of the job

Respondent has argued that this case essentially presents only one issue, that where a handicapped person is unable to perform the essential functions of a job with the help of existing staff, it is not reasonable to require an employer to accommodate him by hiring a half-time employment aide whose only function is to compensate for that person's disability. R. Br. at 32 - 33. This is a

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<sup>14</sup> (...continued)

work product, while attendant clerical staff reduce the professional's output to final work product. As we progress further into the age of computerization, many professionals possess and utilize computer skills in the creation of their work product. Here, however, the Complainant, due to his disability, is limited in his ability to use computers. A computer programmed especially for him by DR did not arrive until late in his employment with Respondent, and he was terminated before he had the opportunity to be fully trained in its use. Therefore, the Complainant had to rely solely on the clerical personnel made available to him by Respondent.

very narrow view of the reasonable accommodation that would allow the Complainant to do his job and one that I do not believe fits the facts of this case. I find that there is more than one possible accommodation which would allow the Complainant to perform the essential functions of his job, and that only one of those accommodations would involve hiring an employment aide specifically for the Complainant 20 hours a week.

When the Complainant was hired, it was clear to Respondent that he would be unable to perform, or at least would have difficulty in performing, many manual functions, including certain clerical functions integral to the generation of paperwork. Findings 116 - 121, 123 - 124. The Complainant's disability left him unable to do such clerical functions as filing, making copies, filling out forms by hand, taking handwritten dictation, setting up tables and chairs for meetings, keeping an appointment book, creating visual aids without a computer, or keeping his office neat and clean. Finding 145. Further, due to his unusual speech, the Complainant needed help with initial telephone contacts.

Respondent understood when the Complainant was hired that some accommodation would be necessary to allow Respondent to do his job. Finding 123. Respondent apparently believed that handicapped bathrooms, use of a personal computer provided by DR, and the clerical resources available to all of its employees, would allow the Complainant to perform the essential functions of his job. Findings 120, 124. Respondent argues that the Complainant did not fully utilize the resources available at CPCBA, and the fact that he did not take sufficient advantage of them does not render them inadequate. R. Br. 31.

In essence, Respondent is arguing that it was up to the Complainant to accommodate his handicap to the resources available at CPCBA and that, if those resources were not sufficient, the Complainant needed to find some entity other than CPCBA to provide the accommodation to allow him to do his job. Respondent apparently believes that because the Complainant, during the interview process, initially believed that he could handle paperwork with the aid of a computer, and did not request an employment aide or any special clerical help (Finding 120), Respondent somehow would be absolved of its responsibility to provide other accommodation.

Respondent argues that hiring two people for one job would defeat the Act's goal of encouraging the hiring of the handicapped because, faced with the added expense,

employers would find any pretext not to hire the handicapped. R. Br. 34. This argument is without merit. Employers are not bound by law to provide accommodation which imposes undue hardship; additional expenses to provide legally required accommodation should not discourage responsible employers from hiring the disabled. Further, Respondent argues that hiring an employment aide for the Complainant would defeat the goal of the DR program under which he was hired. R. Br. 33 - 34. I find this argument equally unpersuasive. DR's role is to assist the impaired person in preparing for employment, either through training or the provision of employment aids (such as DR's provision to the Complainant of a motorized van, a computer, and the assistance of an employment aide for a period of months). Here, Respondent advised DR in January 1989 that the Complainant was performing his job satisfactorily, which action led DR to close his case. Finding 188. Respondent subsequently changed its view of the Complainant's performance but never advised DR. It is possible that greater assistance could have been provided by DR if it had been notified of Respondent's ultimate view of the Complainant's performance. Providing additional assistance would not defeat DR's goal of increasing employment opportunities for disabled persons. The DR program is not a substitute, as Respondent apparently argues, for the reasonable accommodation required by section 504 of the Act.

Respondent's arguments reflect Respondent's apparent belief that section 504 does not require an entity to expend funds for the disabled. This view clearly does not comport with Respondent's obligations under the Act. Further, not all entities covered by section 504 share Respondent's narrow view of their obligations under the Act. Again, Respondent's unduly restrictive interpretation of section 504 appears inconsistent with its stated goal of advocating employment opportunities for developmentally disabled persons with cerebral palsy. Moreover, I am surprised that an organization whose role is to advocate for the rights of disabled individuals would argue that companies would not hire disabled employees due to the cost of reasonable accommodation.

Respondent also argues that, because Respondent had not budgeted to hire a second person and was concerned about staffing ratios, it was not required under its own employment policies and section 504 to take affirmative action to change those policies to accommodate the Complainant. R. Br. 23. I disagree. As will be shown below, the evidence of record does not support Respondent's arguments.

It is Respondent's responsibility to provide any accommodation that will allow the Complainant to perform the essential functions of his job, so long as it does not constitute an undue hardship to Respondent's operation. Below, I will explore in detail the Complainant's actual experience at CPCBA, the accommodation he was given (by both Respondent and DR), his performance in his job with varying levels of accommodation, and what accommodation on Respondent's part might allow him to perform the essential functions of his job.

The Complainant began his employment as the Supervisor of the Adult Development Program at CPCBA with the assistance of an employment aide 15 hours a week (provided by DR), a pool of three clericals to draw from (provided by Respondent), and the occasional help of his Adult Development Program staff to assist him with the clerical and manipulative functions of his job. Finding 191. This assistance essentially provided the Complainant with the hands he couldn't utilize to file documents, make copies, fill out forms, set up tables and chairs for meetings, keep his appointment book, create visual aids, keep his office neat and organized, and reduce his thought processes to written form. Also, it provided the Complainant with a clear voice, assisting him with initial telephone contacts. With this assistance, even Respondent admits the Complainant performed the essential functions of his job. Findings 179, 189.

Evidence that the Complainant was performing the essential functions of his job includes: 1) JG's assurance to DR in June 1988 that the Complainant was working out so well JG had no recommendations to improve the Complainant's performance and did not believe the Complainant needed more time to complete his training (Finding 148); 2) JG's October 28, 1988 performance evaluation which gave the Complainant a "very good" performance rating (Finding 179); 3) the Complainant's receipt of an increase in pay as of October 15, 1988 (Finding 187); and 4) JG's assurance to DR in January 1989 (upon which assurance DR closed its file on the Complainant) that the Complainant was performing satisfactorily (Finding 188).

However, the Complainant did not continue to receive this level of assistance. In July 1988, Respondent lost his employment aide. Findings 141 - 142. There is testimony Respondent's Adult Development Program staff gave their time to him only for a few months and even that assistance was given somewhat begrudgingly.

Findings 174 - 177. In the early fall of 1988, Respondent's supervising clerk, EVB, became ill, leaving Respondent with a clerical staff of only two full-time persons.<sup>15</sup> Finding 111. In September 1988, Respondent hired AS on a temporary basis to assist the clerical staff and the Complainant. However, AS's hearing disability made it difficult for her to work with the Complainant. Findings 151 - 153. AS left CPCBA in December 1988. Finding 151. While the Complainant's computer was delivered in either November 1988 or January 1989, the Complainant was not trained on it at the time he was terminated. Finding 133. In January 1989, Respondent hired a new supervising clerk, MN. However, MN left in February. Finding 113. Respondent asserts it specifically tried to make EB available to the Complainant in the afternoons. Finding 162. EB, however, had telephone duty, and needed to take dictation in a noisy office where the other clerical staff worked, which office was not convenient to the Complainant's. Findings 167 - 172. Thus, as the Complainant moved into his second six months of employment, his clerical assistance dwindled away.

Just as the Complainant's clerical assistance declined, the quantity of his work, especially his paperwork, increased. Finding 190. JG first began to pressure the Complainant to turn in reports, evaluations, and other documentation in February of 1989. Finding 204. At this time, the Complainant had no employment aide, the clerical staff was down to two, as MN had left, the Complainant was not trained to use his computer, and the clerical support tendered by Respondent apparently consisted of EB in the afternoon in an office not conducive to dictation, and MT on the same basis as other CPCBA employees utilized her. Moreover, no clerical staff were available to assist the Complainant in the

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<sup>15</sup> There is testimony that Respondent may have hired Jackie Robles (JR), the aide to a visually impaired employee, to assist the clerical staff during some of the time Respondent was without a supervising clerk. MR testified that she asked JR to assist the Complainant. However, there is no evidence in the record reflecting that JR ever assisted the Complainant. Tr. 495 - 497, 775 - 776.

preparation of three confidential staff evaluations.<sup>16</sup>  
Finding 211.

This is the point at which, on March 1, 1989, JG wrote his informal assessment of the Complainant's work, stating his concern with the Complainant's work habits and quality of work, and informing the Complainant that he could not rate his job performance as satisfactory. Findings 203 - 204, 206 - 211. In this memo, JG asked the Complainant to turn in certain evaluations and reports by March 10, 1989. JG did not offer to direct specific clerical help to assist the Complainant to accomplish this (and even acknowledged that it was easier for the Complainant to get help at home with his paperwork). Finding 211. However, in a memo of March 14, 1989 to Respondent's Executive Committee, JG indicated that the Complainant had completed these tasks. Finding 215; DHHS Ex. 1 at 47. Apparently, the Complainant completed this work either at home or with the limited resources available to him at CPCBA.

Evaluating this evidence, I find that, with sufficient assistance to overcome his problems with manual dexterity (and some help with initial phone contacts), which assistance the Complainant received during his initial tenure at CPCBA, the Complainant was performing the essential functions of his job. In addition, during his initial months of employment, the Complainant had sufficient clerical assistance to allow him to meet the nonessential attendant paperwork demands of his position. Thus, as he was performing the essential functions of his job, he was a qualified handicapped employee. Moreover, it was only when almost all effective clerical assistance was withdrawn that the Complainant apparently began to

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<sup>16</sup> Respondent argues that the Complainant could have asked JG or MR to assist him with confidential staff evaluations. Respondent's Objections to DHHS's Findings of Fact and Conclusions of Law at 5; Tr. 777 - 778. I do not find this argument to be convincing. Again, Respondent is placing the burden on the Complainant to seek assistance, here as an employee asking his employer to assist him with clerical tasks. Such argument is particularly unfounded if Respondent is suggesting that such executive personnel would actually be expected to do the clerical tasks for the Complainant. Moreover, as JG and MR had never effectively designated staff to assist the Complainant with his clerical tasks, there is nothing to show that they would have been more helpful to the Complainant personally.

have difficulties generating the necessary reports and evaluations required of his position.

With regard to the assistance the Complainant needs to do his job, however, I am not convinced based on the record as a whole (which includes my evaluation of the Complainant's tenure at CPCBA) that the only reasonable accommodation for the Complainant's disability is to have Respondent hire a 20-hour-a-week employment aide for the Complainant. The record supports, and the Complainant recognizes, that what he needs is regular, specific, directed assistance. The Complainant testified that, had he received a directive from his superiors at CPCBA with regard to obtaining sufficient clerical staff on a fixed schedule and directives on how to utilize that staff, he could have adjusted his work habits and schedule to accommodate that person. Finding 247. The Complainant never received that help. Thus, there might be times the Complainant needs 20 hours a week in clerical help and other times he might need less. It is possible that such assistance can be achieved without requiring Respondent to hire additional staff.<sup>17</sup>

Accordingly, I have identified several levels of assistance which might constitute reasonable accommodation for the Complainant. Such accommodation includes: 1) the assignment of existing clerical personnel to the Complainant for prescribed periods

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<sup>17</sup> An inescapable conclusion from this record is that Respondent mismanaged its clerical staff and was derelict in its responsibility to the Complainant (and possibly its entire professional staff), to ensure that he had sufficient clerical assistance to meet his clerical needs. The record does not allow me to comment more directly on the needs of other members of the professional staff for clerical assistance. However, the record does show that much of the Complainant's problem meeting the demands placed on him by JG was the sporadic and inconsistent presence of clerical staff to assist him. Respondent's mismanagement caused the Complainant's failure to meet the imposed deadlines. However, rather than admitting this, Respondent placed the blame on the Complainant. The irony is that Respondent used the Complainant's alleged failure as one of the principal bases for his termination. Further, in asking to extend the Complainant's probation, JG acknowledges that it was the failure to find the right combination of the Complainant's resources and Respondent's clerical support that caused the problems with the Complainant's employment. Finding 217.

according to a specified schedule at a location conducive to private dictation; 2) the Complainant's use of a computer (assuming that the Complainant is fully trained on it) with the more limited assistance of existing clerical personnel for prescribed periods according to a specified schedule in a location conducive to private dictation; 3) the Complainant's use of a computer (assuming the Complainant is fully trained on it) with the assistance of an employment aide, whose hours would depend on the Complainant's clerical needs at that time; 4) the hiring of an employment aide between 10 and 20 hours a week, depending on the Complainant's clerical needs at that time; or 5) hiring an employment aide for the Complainant 20 hours a week. With such accommodation, I believe that, as the Complainant demonstrated during his first six months of employment,<sup>18</sup> with sufficient clerical assistance the Complainant is capable of performing the essential functions of his job. Thus, the Complainant is a qualified handicapped employee. Given that I find the Complainant to be a qualified handicapped employee with one or a mixture of the alternative forms of reasonable accommodation described above, it is Respondent's responsibility to provide such accommodation, unless the provision of such accommodation constitutes an undue hardship to Respondent's operation.<sup>19</sup>

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<sup>18</sup> Even after the first six months of his employment, the Complainant appears to have been performing the essential functions of his job. This is evidenced by JG's assurance to DR, in January 1989, that the Complainant was performing his job satisfactorily.

<sup>19</sup> The Complainant requested also that the cabinets in his office be removed in order for him to meet with wheelchair-bound clients. Such modification would give the Complainant more room to maneuver in his office. This request was denied by Respondent, as Respondent determined that the Complainant had seen his office prior to being hired and had not requested such modification at that time. Respondent's rationalization is without merit. While the Complainant may have seen his office, he had not tried to work in it or meet with clients in it. When he discovered it was difficult to work there, it was Respondent's responsibility to make reasonable accommodations to the Complainant's workspace to accommodate his disability, absent a finding of undue hardship. Respondent has not proved that removing the cabinets would create such a hardship. Further, Respondent has not offered any evidence to challenge the legitimacy of such accommodation.

### 3. Reasonable accommodation and undue hardship

As a recipient of federal financial assistance, it is Respondent's responsibility under section 504 to provide reasonable accommodation to its employees to enable them to perform the essential functions of their jobs, absent a finding of undue hardship. Further, once it has been determined that, with reasonable accommodation, an employee is a qualified handicapped employee, it is Respondent's burden to prove that it would be an undue hardship on its operation to provide that reasonable accommodation.<sup>20</sup> Finding 77.

Respondent asserts that, due to the nature of its funding, it operates at a deficit. Specifically, in 1988 and 1989, Respondent asserts that its State payment was insufficient to cover its expenses and that it had to rely on other sources to meet those expenses. R. Br. 35 - 36. Respondent asserts further that the bulk of this shortfall was made up by grants from the Mary Valle Foundation, an independent, California non-profit corporation. R. Br. 37. Respondent estimates that the cost of hiring an employment aide for the Complainant would be at least \$9000 a year, and that such a financial burden would be an undue hardship on Respondent. R. Br. 37. Respondent contends that section 504 does not compel recipients of federal financial assistance to make substantial modifications in their operations or incur undue economic burdens and financial costs to employ the disabled. Respondent contends further that, because it operated at a deficit (absent the Mary Valle Foundation funds), the additional burden of hiring an employment aide for the Complainant is not required under section 504. R. Br. 37. Respondent argues also that hiring a second individual to assist the Complainant would alter its staffing ratios to a level such that the funds it receives from the State of California would be jeopardized. R. R. Br. 23.

Respondent admits that, if some other entity had paid for an employment aide for the Complainant, Respondent would not have terminated him. Finding 244. Respondent's primary reason for terminating the Complainant was that it asserted that it could not afford to pay for a 20-

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<sup>20</sup> Respondent presented no evidence to show that at the time of the Complainant's termination it had done a study or made any specific inquiry as to whether it could, in fact, support hiring an employment aide for the Complainant. Both JG and the Personnel Committee thought it was possible. Findings 218, 226.

hour-a-week employment aide for the Complainant and that it believed hiring such an employment aide constituted hiring two people for one job and that such action was beyond the scope of reasonable accommodation.<sup>21</sup> Findings 239 - 241. For guidance in determining whether providing the reasonable accommodation I have outlined (Finding 272) would constitute an undue hardship to Respondent's operation, I turn to the regulations.

Section 84.12(c) of Title 45 of the Code of Federal Regulations lists factors to be considered in determining whether reasonable accommodation would impose an undue hardship on a recipient's operation of its program pursuant to section 84.12(a). These factors include: 1) the overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget; 2) the type of the recipient's operation, including the composition and structure of the recipient's workforce; and 3) the nature and cost of the accommodation needed. Appendix A, subpart B, paragraph 16 to the Part 84 regulations, discusses the weight to be given to each of these factors, and suggests that the weight will vary depending on a particular factual situation. The Appendix suggests that a small day care center might not be required to spend more than a nominal sum, such as equipping a telephone for use by a hearing impaired secretary. However, a large school district might be required to make a teacher's aide available to a blind applicant for a teaching job. Further, a State welfare agency might have to provide an interpreter for a deaf employee, where such accommodation might be a hardship for a foster care provider. To determine whether the provision of reasonable accommodation would be an undue hardship to Respondent in this case, I must weigh these factors against what evidence Respondent has offered to support its position.

Specifically, to assess effectively whether the provision of reasonable accommodation for the Complainant would constitute an undue hardship on Respondent's operation (and remaining mindful that Respondent alleged that its

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<sup>21</sup> While JG also raised a concern as to whether the Complainant's work habits and quality of work were up to the task of fulfilling the administrative duties of a supervisor (Finding 234), such concern is belied by his own evaluation of the Complainant's first six months of work. Further, the special committee renewing the Complainant's termination made it clear that his termination was a result of financial considerations.

clerical staff should have been able to accommodate the Complainant had he only sought them out) pursuant to the factors identified in the regulations, and the reasonable accommodations I have identified, I would need to evaluate evidence regarding: 1) the total number of professional staff employed by Respondent requiring the services of the clerical staff and the type of assistance each staff member required; 2) the cost per year and per employee of the clerical staff; 3) the services the clerical staff provided to professional staff members other than the Complainant (filing, dictation, etc.); 4) the impact on the organization (when fully staffed) of altering the clerical staff's tasks to accommodate the Complainant; 5) the cost of hiring temporary clerical help for busy periods; 6) the impact on other of Respondent's departments if budget resources were diverted to enlarge its clerical staff through the hiring of temporary employees or an employment aide; 7) information on the availability, efficacy and cost of computer programs that would enable the Complainant to be less reliant on clerical help; 8) the relative size of Respondent as compared to other entities providing similar services to developmentally disabled persons; and 9) any specific consequences on funding from local, State, federal or private sources resulting from a determination by Respondent to expend its existing resources to provide the requisite clerical assistance to the Complainant.

Here, however, Respondent has not supported its argument that providing reasonable accommodation for the Complainant would constitute an undue hardship, based on the factors set forth in the regulations. Rather, it has relied on general cost arguments to support the alleged hardship. Such reliance is of dubious merit, since it fails to address the specific factors established by the Department for analyzing whether an accommodation would constitute an undue hardship on an organization. Respondent's failure is particularly significant, since it has the burden of proof on this issue.

Despite this failure by Respondent, I must weigh Respondent's undue hardship argument against what evidence there is in the record. In weighing this evidence, I am essentially limited to analyzing what the record reflects as to Respondent's general expenses as measured against its income. From this, I must conclude whether or not Respondent could afford the reasonable accommodations I have outlined at the time it allegedly discriminated against the Complainant. I find that what the record does reflect (other than that the Respondent provides educational and work programs for approximately

75 to 85 developmentally disabled adults (Finding 78)), is that while Respondent does not appear to be in the position of a large school district or State welfare agency in terms of size and budget, neither does its financial position reflect the position of a small day care center or foster care provider. Respondent has a large operating budget, and, in 1989, it had a budget surplus.

Specifically, in 1989 (the year the Complainant was terminated) Respondent had an operating budget of \$1,005,857 (DHHS Ex. 8 at 5) and a surplus of public support and revenue over expenses of \$48,074.<sup>22</sup> Finding 249. The nature of this support included public support in the form of grants from the Mary Valle Foundation, contributions and special events, as well as revenue in the form of membership dues, program receipts (i.e., production income, rehabilitation service fees, and donated services), interest, worker's compensation dividends, and other miscellaneous income. Finding 249. Even assuming that this \$48,074.23 surplus was due to an infusion of funds from the Mary Valle Foundation, Respondent has advanced no convincing argument as to why I should not consider Mary Valle Foundation funds (in 1989, the Mary Valle Foundation had an excess of support and revenue over expenses of \$664,142 and a fund balance, or net worth, of \$5,207,735) available to fund reasonable accommodation for the Complainant. Findings 248 - 260, 266 - 270.

The record reflects that the primary purpose behind the existence of the Mary Valle Foundation is to support programs for individuals with cerebral palsy or multiple handicaps in the Oakland/San Francisco Bay area. Finding 252. The only entity that the Mary Valle Foundation has supported to carry out its purpose is Respondent.<sup>23</sup>

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<sup>22</sup> Neither the Respondent nor the Department offered the testimony of an accountant or other financial expert to assist in analyzing the financial data in light of the regulations. Financial documents of record include balance sheets showing income and expenses and annual reports to the State attorney general representing Respondent's and Mary Valle Foundation's financial positions. DHHS Exs. 8 - 11, 14 - 18; R. Ex. 10.

<sup>23</sup> The record indicates that, following the Complainant's termination, the Mary Valle Foundation continued to contribute substantial funds to Respondent. DHHS Exs. 17, 18; Tr. 438, 440 - 442, 559, 571 - 572,

(continued...)

Finding 254. Moreover, as well as funding Respondent, the Mary Valle Foundation is empowered to make individual grants to assist individuals with multiple handicaps, such as the Complainant. Finding 263. Respondent never explored the option of asking the Mary Valle Foundation to provide funds to pay for reasonable accommodation for the Complainant, either by making the request for funding on its own or by assisting the Complainant in applying for such funds. Findings 264 - 265. This is especially ironic in light of Respondent's own commitment to help individuals with cerebral palsy maintain their employment.

I find, however, that Respondent's financial position (at least in 1989, the year of the Complainant's termination) was such that hiring a 20-hour-a-week employment aide was not beyond Respondent's means and would not constitute an undue hardship to Respondent. Further, the other accommodations I have outlined would almost certainly be cheaper than hiring a 20-hour-a-week employment aide and could provide the Complainant with the accommodation he needs to perform the essential functions of his job.

It is likely that the most expensive accommodation that would allow the Complainant to perform the essential functions of his job would be the provision of an employment aide 20 hours a week. Respondent estimates this cost to be \$9000 a year. Assuming that Respondent's cost estimate is accurate, I find that, given Respondent's financial position in 1989 (a \$48,074 surplus, and access to Mary Valle Foundation funds) at the time of the Complainant's termination, Respondent was able to bear the cost of providing a 20-hour-a-week employment aide for the Complainant. As to Respondent's argument that hiring such an employment aide would alter its staffing ratios and jeopardize its State funding, the record does not support such a finding. While Respondent asserts this possible adverse consequence, it never made any effort to inquire of the appropriate State officials whether its funding would be affected. Finding 271. Respondent's argument is pure speculation without record support.

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<sup>23</sup> (...continued)

590. Based on the overlapping directors and other indices of the nexus between the Mary Valle Foundation and Respondent, there is no support for Respondent's contention that the Mary Valle Foundation is an independent entity which cannot be considered as a funding source for any reasonable accommodation the Complainant requires.

However, as outlined above (Finding 272), other forms of reasonable accommodation may be sufficient to enable the Complainant to perform the essential functions of his job. As I stated previously, Respondent's fundamental need is for sufficient, directed, and sustained clerical help. To meet the Complainant's needs, Respondent could assign its existing clerical staff to the Complainant for prescribed periods according to a specified schedule in a location conducive to private dictation. Such accommodation would not require Respondent to expend excess funds, although some cost may be involved if such assignment took the clerical staff away from other work. However, the record contains no information on such cost or the impact on other departments of Respondent resulting from such an allocation of resources. Respondent has failed to demonstrate any adverse impact on its operations caused by the adoption of this form of accommodation.

Further, it is possible that, once the Complainant was fully trained on his computer, he would not need as much clerical help. Again, Respondent has failed to offer record evidence supporting the inapplicability of this form of accommodation. I have no information regarding the feasibility of such computer use to aid the Complainant with clerical tasks. I do know that DR provided a computer to the Complainant. However, the record does not indicate whether or not, assuming the Complainant was fully trained in its use, the computer would actually assist him in the performance of his job. I can draw an inference from the fact that DR provided it to the Complainant that at least DR thought it would be beneficial. Respondent has offered no evidence to rebut such an inference.

Thus, a combination of the computer and either fixed clerical staff for prescribed periods according to a specified schedule in a location conducive to private dictation or an employment aide for less than 20 hours a week might be sufficient to accommodate the Complainant's needs. An employment aide for 10 to 20 hours a week also might be sufficient, depending on the Complainant's workload. Such accommodation might be either at little or no cost to Respondent or could, at least, be at a cost significantly less than Respondent's \$9000 estimate of the cost to provide the Complainant with a 20-hour-a-week employment aide.

Respondent's duty is to make sure that reasonable accommodation is provided to allow the Complainant to perform the essential functions of his job. Such accommodation must be provided in a directed and

sustained manner. This is a responsibility Respondent dismally failed to execute during the Complainant's tenure at CPCBA.

4. Discrimination on the basis of handicap

I have found the Complainant to be a qualified handicapped person, as with reasonable accommodation the Complainant can perform the essential functions of his position. Respondent has not shown that providing reasonable accommodation will impose an undue hardship. As Respondent has failed to provide reasonable accommodation to the Complainant to enable him to perform the essential functions of his position, I find that, pursuant to section 504 and its implementing regulations, Respondent has discriminated against the Complainant on the basis of the Complainant's handicap. Findings 278 - 284.

III. The Department has been unable to obtain voluntary compliance with the Act from Respondent.

Departmental regulations provide that its procedures for implementing the Act are the same as the procedures for implementing Title VI of the Civil Rights Act of 1964. 45 C.F.R. § 84.61. These procedures are set forth at 45 C.F.R. §§ 80.6 through 80.10 and at 45 C.F.R. Part 81.

The regulations provide that the Department may take action against a recipient of federal funds to obtain compliance with section 504 of the Act if the Department finds that a dispute concerning the recipient's compliance cannot be resolved informally. 45 C.F.R. §§ 80.7(d), 80.8(a). Thus, the regulations require me to find, as a prerequisite to imposing a remedy in this case, that the Department has been unable to secure voluntary compliance with the Act by informal, voluntary means. Westchester County Medical Center, DAB CR191, aff'd DAB 1357 (1992).

The Department has proved that it has not been able to secure voluntary compliance from Respondent. Prior to issuing the February 1, 1993 Notice, the Department's OCR made attempts to resolve this matter informally with Respondent. While Respondent proved willing to comply with regard to revising its employment application, Respondent has steadfastly refused to provide relief for the Complainant, which relief must include reinstatement, back pay, and any other monetary loss to the Complainant resulting from Respondent's discriminatory practices. Respondent still insists that the Complainant was

terminated because he was unable to perform his job, not because of his handicap. R. Br. 38.

IV. Respondent's federal financial assistance must be terminated until Respondent comes into compliance with section 504.

Departmental regulations provide that termination of or refusal to grant or continue federal financial assistance to a recipient of federal funds is an appropriate remedy for the recipient's refusal to comply with its obligations under section 504. 45 C.F.R. § 80.8(a). "Federal financial assistance" includes grants, loans, contracts (other than procurement contracts or contracts of insurance or guaranty), or any other arrangements by which the Department makes available funds, services of federal personnel, or real and personal property or any interest in or use of such property. 45 C.F.R. § 84.3(h). Departmental regulations provide procedures which must be followed prior to termination of federal financial assistance.<sup>24</sup> Departmental regulations provide also that any action to suspend, terminate, or refuse to grant federal financial assistance to a recipient for failing to comply with the Act shall be limited to the particular program or part of a particular program in which noncompliance has been found. 45 C.F.R. § 80.8(c)(3).

Respondent is a recipient of Departmental federal financial assistance under the Medicaid waiver program. I have found that Respondent has discriminated against the Complainant by subjecting him to discrimination in employment and by denying him an employment opportunity, based on the need to make reasonable accommodation, thus violating section 504 of the Act and Departmental regulations at 45 C.F.R. Part 84. Termination of (or refusing to grant or continue) Departmental federal financial assistance is an appropriate remedy under Departmental regulations. 45 C.F.R. § 80.8(a). Thus, I

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<sup>24</sup>These procedures include an attempt to obtain compliance by voluntary means and a finding on the record, after an opportunity for a hearing, of a recipient's failure to comply. 45 C.F.R. § 80.8(c)(1), (2). Departmental regulations provide also that the termination of a recipient's federal financial assistance will not be effective until 30 days after the Secretary has filed a full, written report of the circumstances and grounds for termination with the House and Senate committees having legislative jurisdiction over the program involved.

find that the Department is authorized to terminate or to refuse to grant or continue all Departmental federal financial assistance to Respondent until Respondent comes into compliance with section 504 and Departmental regulations.<sup>25</sup> This termination of Respondent's Departmental federal financial assistance does not constitute a punishment. Respondent can avert the imposition of this remedy at any time by complying with section 504 of the Act and Departmental regulations.

#### CONCLUSION

As I have concluded that Respondent is engaging in unlawful discrimination in violation of the Act, I find that the Department has the authority to terminate or refuse to grant or continue all Departmental federal financial assistance to Respondent until Respondent satisfies responsible Departmental officials that it is in compliance with section 504 of the Act and Departmental regulations.

/s/

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Edward D. Steinman  
Administrative Law Judge

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<sup>25</sup>Respondent has requested that I stay the termination of Departmental federal financial assistance until at least 30 days after final administrative or judicial review of this case. R. R. Br. 26. I do not have the authority to grant Respondent's request.