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Legal Rights of Persons *with* Disabilities

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***Much of the material in this Fourth Edition is an update of the Second and Third Editions, Marian M. Johnston and Kathleen W. Mikkelson, Deputy Attorneys General, writers and editors.**

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INTRODUCTION

California and Federal Law

This handbook discusses both California and federal laws that protect the rights of individuals with disabilities. California and federal law should be examined together to get a complete picture of the law on a particular topic. In some areas California law provides more legal protection or is more comprehensive; in other areas, federal law is more helpful.

Statutes, Regulations, and Cases

"The law" usually consists of a combination of statutes, regulations, and cases. Statutes are laws passed by legislators either in the state Capitol or in Congress. Statutes are generally fairly short and often do not describe the details of how the law will be enforced or what specifically will constitute a violation of law.

Various government agencies are often charged with developing regulations to carry out the mandates of statutes. These regulations usually describe the "nuts and bolts" of a statute's administration.

Finally, when cases go to court, judges issue opinions which resolve disputes in interpreting statutes and regulations.

An analysis of statutes, regulations, and cases yields the current state of rights and protections, which change over time as the law changes.

What Action Can Individuals Take?

Complaints - Many agencies are authorized to allow people who believe they have experienced discrimination or have been denied other rights to file a complaint. The agency may then investigate the complaint, and if it finds that violations of law have occurred, the agency can impose various sanctions on the violator and award various remedies to the individual who filed the complaint (complainant).

Lawsuits - Individuals who experience discrimination or other violations of law can often file a lawsuit in a court. It may be necessary to go through the agency (administrative) complaint process first. Contact the responsible agency as soon as possible to find out when and if you can file a lawsuit. Although you may file a lawsuit by yourself without an attorney, you should probably talk with a legal organization or private attorney if you plan to do so.

CHAPTER 1

EMPLOYMENT

This chapter discusses state and federal statutes which promote access to employment opportunities for individuals with disabilities.

I. STATE LAW

The Fair Employment and Housing Act (FEHA) protects the right of individuals to seek, obtain, and hold employment without discrimination on the basis of physical or mental disability or medical condition. It also prohibits retaliation against a person who has opposed unlawful discriminatory practices under the FEHA or participated in an investigation into unlawful employment practices. (Gov. Code, § 12940, subd. (h).) The FEHA also prohibits harassment on the basis of a person's disability. (Gov. Code, § 12940, subd. (j).)

A. Definition of Disability and Medical Condition

1. Disability

The definition of "disability" under the FEHA includes both physical and mental disabilities.

a. Physical disability

Physical disability includes having any physiological disease, disorder, condition, cosmetic disfigurement or anatomical loss, or having a record of such impairment, or being regarding as having or having had such an impairment, that:

- affects one or more body systems (neurological, immunological, musculoskeletal, special sense organs, respiratory, speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic, lymphatic, skin and endocrine); and
- limits a major life activity without regard to mitigating measures, such as medications, assistive devices, prosthetics or reasonable accommodations; or
- any other health impairment that requires special education or related services. (Gov. Code, § 12926, subd. (k).)

b. Mental disability

Mental disability includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities that limit a major life activity, or having a history of such impairment or being regarded as having or having had such an impairment. Mental disability includes any mental or psychological disorder or condition that requires special education or related services. (Gov. Code, § 12926, subd. (i).) Mental disability does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania or current unlawful drug use.

2. Medical Condition

The FEHA also forbids discrimination in employment on the basis of medical condition. "Medical condition" refers to 1) any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer; and 2) genetic characteristics. (Gov. Code, §§ 12926, subd. (h), and 12940, subd. (a).)

B. Covered Employers

California employment discrimination law covers nearly all employers. An "employer" for purposes of the FEHA includes anyone regularly employing five or more persons, whether full or part-time; any person acting as an agent of an employer, directly or indirectly; state and local governments; employment agencies; and labor organizations. (Gov. Code, § 12926, subd. (d)). For purposes of harassment, an employer includes anyone regularly employing one or more persons. In comparison, federal law requires employment of 15 or more employees before an employer will be covered, whether the disability is physical or mental. (42 U.S.C § 12111(5)(A).)

C. Employer Defenses to Discrimination in California

An employer may refuse to hire or may discharge a person with a physical disability if the person is unable to perform the essential functions of the job even with reasonable accommodation. Also, the employer may refuse to hire or may discharge an individual with a disability who cannot perform the essential functions of the job in a manner which would not endanger his or her health, or the health and safety of others even with reasonable accommodation. These two defenses require a case by case evaluation of each person's abilities and limitations with regard to the specific job in question.

In addition, an employer may discriminate against a whole group of persons with disabilities if the absence of a particular disability is a bona fide occupational qualification (BFOQ). For example, an employer may be able to refuse to hire any person with back problems for a job which requires heavy lifting. However, employers can rely upon a BFOQ defense to exclude a group of people only if the employer can prove that all or almost all members of the excluded group cannot presently perform the job in a safe manner. (*Sterling Transit Co.* v. *Fair Employment Practice Commission* (1981) 121 Cal.App3d 791.)

D. Employers Must Make Reasonable Accommodations

Employers must make reasonable accommodations for applicants and employees with disabilities, unless the accommodation would impose an undue hardship on the employer. Examples of reasonable accommodations include making facilities accessible and restructuring jobs, which might include reassigning or transferring an employee, developing part-time or modified work schedules, acquiring or modifying equipment, minor restructuring of the work site, and providing readers or interpreters. (Cal. Code Regs., tit. 2, § 7293.9.)

E. Nondiscrimination in Recruitment and Testing

Employers must give equal consideration to individuals with disabilities in recruitment activities and are required to make reasonable accommodations during the recruitment process. For example,

during the interview process, employers may be required to provide interpreters for individuals with hearing impairments or provide rooms which are accessible to wheelchairs. Employers may not ask general questions about an applicant's physical or mental condition. Specific questions about an applicant's present physical or mental fitness, medical condition, physical condition or medical history are permissible only if they are directly related to the job in question. An employer may only make an inquiry or conduct an examination after an offer of employment has been made, provided that it is job-related and consistent with business necessity, and that all entering employees in similar positions are subjected to the same inquiry or exam. An individual who would be disqualified from employment as a result of a physical exam must be allowed to submit independent medical opinions for consideration before a final determination is made. The exam results are confidential; however, supervisors may be informed of restrictions on or accommodations with respect to an individual's duties, and first aid and safety personnel may be informed of the condition if the condition may require emergency treatment. (Gov. Code, § 12940, subds. (d), (e), and (f); Cal. Code Regs., tit. 2, § 7294.0.)

Employers may not use testing criteria which discriminate, unless the criteria are job-related and no alternative testing method is available. The employer must ensure that test results accurately reflect the applicant's job skills or aptitude for the job, rather than merely reflecting the applicant's disability. Tests of physical agility or strength cannot be used, unless those physical skills are precisely what the test is designed to measure. To accomplish this, the employer must reasonably accommodate the applicant's disability during pre-employment testing, such as by making the site physically accessible. Other forms of accommodations may include providing readers and interpreters, allowing more time for test-taking, and administering alternate tests or individualized assessments. (Cal. Code Regs., tit. 2, § 7294.1.)

F. Complaint Procedures

If you believe that you have been discriminated against, you may file a complaint with the Department of Fair Employment and Housing (DFEH) within one year of the occurrence of the alleged discriminatory act. If you did not learn of the act of discrimination until after a year had passed, the period for filing may be extended up to 90 days. After the complaint is filed, two avenues of relief are available. The DFEH may attempt to resolve the matter through conciliation and, if necessary, an administrative hearing before the Fair Employment and Housing Commission (FEHC). (Gov. Code, §§ 12963.7, subd. (a), and 12965.) Alternatively, the DFEH may issue a "right to sue letter" which allows you to file a lawsuit against the employer directly in court. (Gov. Code, § 12965.) However, you must file with the DFEH and receive a right-to-sue letter before a court will hear your case.

G. Miscellaneous California Employment Discrimination Laws

In addition to the FEHA, there are a number of other California laws that protect disabled employees. State agencies must make reasonable accommodations for an otherwise qualified individual's physical or mental limitations, unless such accommodations would impose a hardship on the agency's operations. (Gov. Code, § 19230 et seq.) Also, any program or activity funded by the state must not discriminate against persons with disabilities. (Gov. Code, § 11135 et seq.) Other anti-discrimination statutes provide that:

- No otherwise qualified person may be denied the right to receive a teaching credential, training, or to engage in practice teaching, on the grounds that the person is an individual with a disability. (Educ. Code, §§ 44337 and 44338.)
- No person may be denied state employment because of blindness or color blindness, unless normal eyesight is absolutely necessary for the job. (Gov. Code, § 19701.)

- Discrimination based on physical handicap or medical condition against potential employees on public works projects is prohibited. (Lab. Code, § 1735.) (Some specific exceptions to this policy are set forth in Gov. Code, § 12940 et seq.)

II. FEDERAL LAW

A. The Americans With Disabilities Act

The Americans With Disabilities Act (ADA) (42 U.S.C. § 12101, et seq.) is the federal law equivalent of the FEHA. Title I of the ADA prohibits discrimination on the basis of disability by employers that employ 15 or more employees with respect to hiring and all terms and conditions of employment. (42 U.S.C. § 12111(5)(A).) Title I does not apply to the federal government. (42 U.S.C. § 12111(5)(B).)

The discrimination prohibited by the ADA includes segregating, limiting or classifying any job applicant or employee because of a disability in a manner adversely affecting the individual's status or opportunities. (42 U.S.C. § 12112(a) & (b).) Discrimination can include failing to make a reasonable accommodation for an individual's physical or mental impairments, or using employment tests and standards that tend to screen out persons with disabilities, unless such tests or standards are shown to be job-related or consistent with business necessity. (42 U.S.C. §§ 12112 and 12113.)

The ADA prohibits discrimination or retaliation against anyone who has opposed acts or practices unlawful under the ADA, has asserted a claim under the ADA, or has assisted in the assertion of such a claim by acting as a witness or aiding in the investigation of ADA violations. (42 U.S.C. § 12203.)

1. Definition of Disability

The ADA protects "qualified persons" with a disability. The definition of "disability" under the ADA includes both physical and mental impairments that substantially limit one or more of the major life activities, a record of such impairments, or being regarded as having such impairments. (42 U.S.C. § 12102(2).) In determining whether an individual is substantially limited in one or more major life activities, employers may consider the effect of any mitigating measures

For purposes of the ADA's employment protections, employees or applicants currently engaged in the illegal use of drugs are specifically excluded. (42 U.S.C. § 12114.) Additionally, the definition of disability does not include homosexuality and bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual behavior disorders, compulsive gambling, kleptomania, or pyromania. (42 U.S.C. § 12211.)

2. Employers Must Reasonably Accommodate Disabilities

The ADA prohibits covered employers from failing to provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual, unless the employers can demonstrate that such accommodation would impose an undue hardship. (42 U.S.C. § 12112(b)(5)(A) and (B).)

a. Reasonable Accommodation

The determination of what constitutes a "reasonable accommodation" required by the ADA will depend on specific circumstances and might include modified work schedules, job restructuring, changes to work areas or equipment, and similar adjustments. (42 U.S.C. § 12111(9)(A) and (B).)

b. Undue Hardship

An employer may be excused from the obligation to make an accommodation where it can be demonstrated that undue hardship would result to the employer's business. Where undue hardship will result, the accommodation is not reasonable and will not be required. "Undue hardship" is defined as any action requiring significant difficulty or expense, taking into account a number of factors, including cost, complexity and impact on the work performed. (42 U.S.C. § 12111(10).)

3. Nondiscrimination in Recruitment and Testing

Under the ADA, a covered employer may not conduct pre-employment medical or psychological examinations, nor can an employer make pre-employment inquiries regarding the existence, nature or severity of an applicant's disabilities. However, the employer may make inquiries about an applicant's ability to perform job-related duties. (42 U.S.C § 12112(d)(2).)

Once an employer has made an offer of employment, the employer may require a medical examination or inquiry. Such exams or inquiries may only be required if required of all new employees, regardless of disability. Medical exams or inquiries which use criteria to screen out employees with disabilities may only use such criteria if it can be shown that the exclusionary criteria are job-related and consistent with business necessity. Any information resulting from such examinations or inquiries must be maintained in a separate confidential file, but may be shared with supervisors and managers for safety or other significant job performance reasons. (42 U.S.C. § 12112(d)(3).)

Employers may not require medical exams or make inquiries of an employee regarding the nature or severity of a disability unless it is shown to be job-related and consistent with business necessity. (42 U.S.C. § 12112(d)(4).)

Employment tests that tend to screen out individuals with disabilities are prohibited by the ADA unless shown to be job-related for the position in question and justified by business necessity. The ADA requires that employment tests be administered in a manner that ensures a fair reflection of the skills and aptitudes actually needed to perform the job. (42 U.S.C. § 12112(b)(6) & (7).)

4. Complaint Procedures

The ADA gives the federal Equal Employment Opportunity Commission (EEOC) the primary authority to enforce the ADA's prohibitions against discrimination in employment based upon disability or perceived disability. Accordingly, an individual who believes that he or she has been the victim of employment discrimination because of a disability can file a complaint with the EEOC for investigation. A complaint must be filed with EEOC before a private lawsuit can be filed. (42 U.S.C. § 12117.)

B. The Federal Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (the "Act") prohibits the federal government, federal contractors, and employers who receive federal financial assistance from discriminating against "qualified disabled individuals" in employment. (29 U.S.C. § 701 et seq.) This protection extends to all aspects of

employment, including recruitment, hiring, promotion, benefits, social or recreational programs, termination, and any other term, condition or privilege of employment.

1. Federal Agencies

The Rehabilitation Act applies to the entire federal government and to all federal agencies in their capacity as employers. Each agency of the executive branch, including the U.S. Postal Service, must have an affirmative action plan for the recruitment, hiring, placement, and advancement of individuals with disabilities. The plan must include a description of the way special needs of persons with disabilities are being met.

a. Prohibitions

Under the Rehabilitation Act, discrimination against a "qualified individual with a handicap" who is a federal employee or an applicant for a federal job is prohibited. (29 C.F.R. § 1614.101.) Federal employees who are hired under an "excepted service" program, that is, certified by a vocational rehabilitation counselor, are also protected, and must be given the same equal employment rights as other federal employees.

b. Federal Employer Responsibilities

Federal agencies must make reasonable accommodations for a known limitation of an otherwise qualified applicant or employee with a disability, unless the agency can demonstrate that the accommodations would impose an undue hardship. Reasonable accommodations include, but are not limited to, making facilities accessible, restructuring jobs, changing work schedules, acquiring equipment or devices, changing exams and providing readers and interpreters. In determining whether accommodations would impose an undue hardship on the operation of an agency, factors to be considered include the overall size of the agency's program, the number and type of facilities, the size of the budget, and the nature and the cost of the accommodations. (29 C.F.R. §§ 1614.102(a)(8) and 1614.203(b).)

An agency may not use employment tests or other ways of selecting employees which tend to screen out qualified individuals with disabilities, unless the agency can prove that the test score or selection process is related to the specific job in question and that other testing or selection methods are unavailable. The employment test must reflect an applicant's or employee's ability to perform the functions of the job, rather than focusing on an individual's disability, unless the disability is directly related to the skills being measured for the job. (29 C.F.R. § 1614.203(b).)

Agencies may not ask whether a job applicant is disabled or inquire about the nature and severity of the disability. An agency may ask whether an applicant is able to meet, with or without

reasonable accommodations, the qualifications and responsibilities of the position. A pre-employment medical exam may be required only if all new employees are required to take such an exam and the exam results are not used to discriminate unlawfully. (29 C.F.R. § 1614.203(b).)

An agency may ask an applicant to volunteer information about his or her disability if it is made clear that the information will only be used to monitor the effectiveness of the agency's affirmative action programs. It must be clear that the information is requested on a voluntary basis and that information obtained will be kept confidential. However, such information can be provided to managers and other personnel, where appropriate, to inform them that the individual is eligible for affirmative action. The information may also be provided to government officials investigating agency compliance with equal employment opportunity laws. (29 C.F.R. § 1614.203(e).)

c. Complaint Procedure for Discrimination by Federal Agencies

If you are an employee of a federal agency and you believe that you have been discriminated against in employment because of a physical or mental disability, you may file a complaint with the EEOC or you may file a lawsuit in federal court. However, you must pursue the administrative remedies available through your agency before filing a lawsuit or lodging a complaint with the EEOC. You must bring the matter to the attention of the Equal Opportunity Counselor employed by your agency within a specified time period. If the matter is not resolved to your satisfaction, you may then appeal to the EEOC. (29 C.F.R. § 1614.401.) You also have the option to file a lawsuit, which may be filed within 90 days of your agency's final action or 180 days after the filing of the complaint, if there has been no decision. (29 C.F.R. § 1614.407.) A lawsuit may also be filed if you are not satisfied with a decision of the EEOC.

2. Federal Contractors

All government contractors and subcontractors with contracts of $10,000 or more must take affirmative action in hiring and promoting otherwise qualified individuals with disabilities.[1/] The Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor has developed regulations for complying with this law, located in Section 503 of the Rehabilitation Act. (29 U.S.C. § 793; 41 C.F.R. § 60-741 et seq.)

Contractors may conduct a medical exam prior to employment, provided that the exam is given after an offer of employment is made, all entering employees in the same job class are subjected to the exam, and the results are not used to discriminate unlawfully. The results of such exams must be kept confidential, except that supervisors and managers may be informed of work restrictions based on the disability. First aid and safety personnel may be informed if the condition might require emergency treatment, and government officials investigating the contractor's compliance with the Rehabilitation Act may be informed. (41 C.F.R. § 60-741.23.)

Contractors must make reasonable accommodations for an applicant or employee with a disability, unless accommodation would impose an undue hardship on the contractor's business. (41 C.F.R. § 60-741.44(d).)

a. Complaint Procedure for Discrimination by Federal Contractors

1. But see *Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, declaring that all racial classifications in the awarding of contracts are subject to strict scrutiny.

If you believe that you have been discriminated against by a government contractor, you may file a formal complaint with the U.S. Department of Labor. The complaint must be filed with the Director of the OFCCP within 300 days of the occurrence of the alleged violation. This time limit may be extended for good cause. (41 C.F.R. § 60-741.61(b).)

3. Recipients of Federal Funds

The Rehabilitation Act is also designed to eliminate discrimination on the basis of disability in programs or activities which receive federal financial assistance. (29 U.S.C. § 794.)

a. Protections

No "otherwise qualified" individual with a disability can, solely by reason of his or her disability, be: 1) excluded from participation in, 2) be denied the benefits of, or 3) be subjected to discrimination under any program or activity receiving federal money or administered by a federal agency. An "otherwise qualified" individual with a disability is one who meets a program's requirements in spite of his or her disability. However, a program may have to justify its requirements by showing that they are valid and necessary. (29 U.S.C. § 794; 28 C.F.R. § 41.32.)

b. Responsibilities of Employers Who Receive Federal Funds

Recipients of federal financial assistance may not discriminate on the basis of disability in any area of employment, including recruitment, hiring, promotion, rate of pay, job assignment, or any terms, conditions or privileges of employment. Employers must make reasonable accommodations for employees' and job applicants' disabilities.

An employer may not conduct a pre-employment medical exam unless it is required of all applicants and the results are not used to discriminate. Except as described below, the employer may not ask whether an applicant is disabled or inquire about the nature and severity of the disability. The employer may ask whether an individual is able to perform job-related functions.

The employer may ask about disabilities not related to job performance only for affirmative action or other legitimate purposes. There must be a clear statement explaining that providing the information is voluntary, that the information will be kept confidential, and that there is no penalty for withholding information. The employer may give such information to supervisors and managers, first aid and safety personnel, and government officials investigating compliance with the Act.

A recipient of federal funds may not use criteria which tend to screen out individuals with disabilities, unless the criteria are job-related and alternative criteria or testing methods are unavailable.

c. Complaint Procedures for Discrimination by Recipients of Federal Funds

If a funding recipient violates the law, the agency which provided the funds may enforce compliance by terminating federal funding to the program or activity affected or by any other legally authorized means. If you believe that you have experienced discrimination, you generally must file a written complaint within 180 days from the date of the alleged discrimination with the agency that provides funds for the particular employer. If the agency finds that the recipient did not violate the provisions of the Act, then you may appeal to federal court. In most cases, you can also go directly to federal court and bypass the entire administrative process.

CHAPTER 2

HOUSING

I. HOUSING DISCRIMINATION

STATE LAW

Individuals with physical and mental disabilities have the right under state law to rent, lease, or buy housing accommodations free from discrimination due to a disability. (See Chapter 1 for definitions of disability; Civ. Code, §§ 51, 54, subd.(b), and 54.1; Gov. Code, §§ 12926, subds. (i) and (k), 12955 and 12955.3.)

A person renting, leasing or providing real property for compensation must use the same criteria for selection of disabled and non-disabled individuals. An "owner" includes anyone who rents or sells housing, including another renter with a lease, a real estate agent or broker, a salesperson, or a state or local government agency. (Gov. Code, § 12927, subd. (e); Civ. Code, § 54.1.) The FEHA also prohibits disability discrimination by financial institutions and persons making, printing or publishing advertisements. (Gov. Code, § 12955, subds. (c) and (e).)

It is illegal to refuse to sell, rent, or lease housing to an individual because the person has a disability, or to assert that housing is not available when it actually is available. All housing accommodations are covered under state law, except, under certain circumstances, those in which only one room is rented in a single family residence. (Civ. Code, § 54.1; Gov. Code, § 12927, subd. (c)(2)(A).)

Equal access to housing for individuals with disabilities includes the right of a person with a visual impairment to keep a guide dog, a person with a hearing impairment to keep a signal dog, or any other person with a disability to keep a service dog, even if pets are not ordinarily allowed in the residence. (Civ. Code, § 54.1, subd. (b)(6)(A).) Tenants can be held liable for damages to real and personal property caused by guide dogs, signal dogs or service dogs. (Civ. Code, §§ 54.1, subd. (b)(6)(B) and 54.2.) Any person who rents, leases or otherwise provides real property to persons with disabilities may not deny them the right to make reasonable modifications at their expense to accommodate their disabilities if they agree to restore the premises to its pre-existing conditions. (Civ. Code, § 54.1, subd. (b)(3)(A).) An owner may not discriminate against an individual with a disability who is dependent on a spouse's income if the spouse is included on the rental agreement or lease, but together a couple must meet the owner's credit and financial requirements. (Civ. Code, § 54.1, subd. (b)(7).)

A person discriminated against on the grounds of disability pursuant to Civil Code section 54.1 can ask the local district attorney, city attorney, the Department of Rehabilitation acting through the Attorney General, or the Attorney General to bring an action to enjoin the violation, or to seek other remedies, or he or she may bring a private legal action. (Civ. Code, §§ 55 and 55.1.)

A person can file a complaint with DFEH for a violation of the FEHA within one year from the date upon which the discrimination occurred or can file a suit on his or her own behalf. (Gov. Code, §§ 12980 and 12989.1.)

FEDERAL LAW

The federal Fair Housing Amendments Act of 1988 (42 U.S.C. § 3601 et seq.) requires a landlord to permit housing accommodations to be made accessible to individuals with disabilities at the expense of the renter with a disability if the renter agrees to pay reasonable costs of restoring the premises to its original condition after the renter leaves and if such modification is necessary to afford the renter full enjoyment of the premises. However, an owner may not require the renter with a disability to pay for reasonable wear and tear of the premises. Renting for purposes of this Act includes leasing, subleasing or otherwise granting for consideration the right to occupy premises not owned by the occupant. (42 U.S.C. § 3602(e).) There is an exemption in the Act for certain single-family houses and certain rooms or units in fourplexes. (42 U.S.C. § 3603.) Furthermore, the Act requires that all new rental housing, ready for occupancy 30 months after September 13, 1988, be designed and constructed so as to be accessible to individuals with disabilities. New rental housing covered by this section of the Act includes only buildings consisting of four or more units if such buildings have one or more elevators; and ground floor units in other buildings consisting of four or more units. (42 U.S.C. § 3604(f)(7)(A) and (B).)

If you believe that you have experienced discrimination in housing, you may either file a lawsuit or you may file a complaint with HUD, not later than one year after the discriminatory act has occurred and HUD may pursue legal remedies on your behalf. (42 U.S.C. §§ 3610 and 3612.)

II. HOUSING PROGRAMS

Both the federal government and the State of California recognize that there is a shortage of suitable housing and have set national and state goals to provide decent housing for all. Funds are provided to nonprofit agencies to build low income housing. Eligible individuals with disabilities and their families may apply for housing constructed through these projects. The federal and state housing programs are discussed below.

A. Federal Housing Programs

Under federal law, a "disabled household" is defined as one or more persons, at least one of whom is an adult (18 years of age) who has a disability, or the surviving member or members of any such household who were living with the deceased member at the time of death. A "person with a disability" is a person who has a physical, mental, or emotional impairment which is expected to be of long-continued and indefinite duration, substantially impedes his or her ability to live independently and is of a nature that such ability could be improved by more suitable housing conditions. A person shall also be considered to have a disability if such person has a developmental disability. (42 U.S.C. § 8013(k)(2); 24 C.F.R. § 891.305.) Note that federally financed residences must also meet access requirements. (24 C.F.R. § 891.500 et seq.) Families which qualify may receive rent supplement payments. (24 C.F.R. § 891.610.) Income levels for determining eligibility are set by HUD. (24 C.F.R. § 891.750.) Contact HUD to determine if you may qualify.

B. California Housing Programs

California has implemented several housing programs to further the goals of its housing policy. Individuals and families that qualify are eligible to rent or buy housing financed by state or federal funds. Under California law, a "handicapped family" is defined as one in which an individual or the head of a household is suffering from an orthopedic disability which impairs his or her mobility or a physical disability which affects his or her ability to obtain employment. Also included are individuals or heads of

families with developmental disabilities or mental disorders. To be eligible, an individual with a disability must also require special facilities or care in the home. (Health and Saf. Code, § 50072.) Shared housing arrangements in which at least one person is disabled or elderly are supported by housing payment assistance. (Health and Saf. Code, § 19902 et seq.)

- Elderly individuals or individuals with disabilities must be allocated not less than 20 percent nor more than 30 percent of the units constructed under the Rental Housing Construction Program. (Health and Saf. Code, § 50736, subd. (a).)

- As a part of the de-institutionalization process for individuals with disabilities, the state will provide housing assistance payments during the transition period from an institution to an independent setting. Individuals with physical or mental disabilities are qualified for assistance if they are eligible for rehabilitation, educational, or social services from a public agency. (Health and Saf. Code, § 50680 et seq.)

Funds for housing programs are provided by federal, state, and local agencies. These agencies will take into account your current income in determining your eligibility for these programs. These financing programs have been designed to meet the needs of low and moderate income individuals and families. Contact HUD, the California Department of Housing and Community Development, the California Housing and Infrastructure Finance Agency and your local housing authority for information about housing programs in your area.

CHAPTER 3

NONDISCRIMINATION IN BUSINESSES AND SERVICES

I. NONDISCRIMINATION IN PUBLIC ACCOMMODATIONS, TRANSPORTATION CARRIERS AND BUSINESS ESTABLISHMENTS

A. California Access Law

Under California law, persons with disabilities are entitled to full and equal access to places of accommodation, transportation carriers, lodging places, recreation and amusement facilities, and other business establishments where the general public is invited. This rule applies to medical facilities, including hospitals, clinics and physicians' offices. Persons with both physical and mental disabilities are protected. (Civ. Code, § 54.1.) A person with a disability or a trainer of guide, signal or service dogs has the right to be accompanied by a guide dog, signal dog, or service dog without being required to pay an extra charge or to leave a security deposit, although if with a trainer, the dog must be on a leash and tagged as a guide, signal or service dog. (Civ. Code, §§ 54.1, subd. (b)(6)(A), and 54.2; Food & Agr. Code, §§ 30850 and 30852.) However, such persons can be liable for any provable damage done to the premises or facility by the dog. (Civ. Code, §§ 54.1, subd. (c), and 54.2, subds. (a) and (b).) Under this nondiscrimination law, an establishment is not required to make structural modifications in order to facilitate access by persons with physical disabilities. (*Marsh v. Edwards Theatres Circuit, Inc.* (1976) 64 Cal.App3d 881.) However, other laws which mandate structural modification may apply to these establishments. (See Chapter 4 for an in-depth discussion of access under the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.).)

Civil Code section 54.7 authorizes zoos and wild animal parks to prohibit guide, signal or service dogs from accompanying persons with disabilities in areas where patrons of the park are not separated from zoo or park animals by physical barriers. However, any mode of transportation provided to the general public must be offered free to persons with visual-impairments who would otherwise use a guide dog or persons in wheelchairs who would otherwise use a service dog.

If you believe that your right of admittance to or enjoyment of one of these facilities has been violated, you may file a lawsuit. (Civ. Code, § 54.3) The Attorney General, a city attorney, a district attorney, or the Department of Rehabilitation acting through the Attorney General may also file suit. (Civ. Code, § 55.1.) The DFEH also has jurisdiction to handle a complaint for violation of Civil Code sections 51, 51.5, 54, 54.1 and 54.2. (Gov. Code, § 12948.)

It is a misdemeanor to interfere with the right of a person with a disability to be accompanied by a guide dog, signal dog or service dog in public conveyances or accommodations. (Pen. Code, § 365.5.) It is a misdemeanor to intentionally interfere with the use of a guide dog by harassment or obstruction. (Pen. Code, § 365.6.) It is also a misdemeanor to knowingly or fraudulently represent yourself to be the owner or trainer of a guide, signal or service dog. (Pen. Code, § 365.7.) It is an infraction for any person to permit a dog owned, harbored or controlled by him or her to cause injury or death to any guide, signal or service dog performing its duties. (Pen. Code, § 600.2.)

B. Discrimination Based on Disability

Persons with disabilities are protected from discrimination in any business establishment open to the public. The Unruh Civil Rights Act (Civ. Code, § 51) forbids all arbitrary discrimination by business establishments on the basis of disability. "Business establishment" has been broadly defined by the courts and generally includes housing, hotels and motels, theaters, shopping centers, restaurants, and all forms of transportation. Under this nondiscrimination law, an establishment is not required to make structural modifications in order to facilitate access by persons with physical disabilities.

A victim of discrimination has several legal remedies under the Unruh Act. You may file a complaint with the DFEH, which may investigate and litigate violations of the Unruh Act. You may also file a lawsuit to recover damages. (Civ. Code, § 52.) Finally, if you believe that a person or group of persons is engaged in a conduct of resistance to any of the rights guaranteed by the Unruh Act, and that conduct is intended to deny the full exercise of those rights you should contact the Attorney General, city attorney, or district attorney, who may then file suit. (Civ. Code, § 51 et seq.) A violation of the ADA is also considered to be a violation of the Unruh Act. (Civ. Code, § 51, subd. (f).)

II. NONDISCRIMINATION IN STATE-SPONSORED PROGRAMS AND ACTIVITIES AND IN PUBLIC PLACES

No person may be denied the benefits of, or be unlawfully subjected to, discrimination under any program or activity either funded directly or assisted financially by the state. (Gov. Code, § 11135.) Individuals with disabilities have the same right as the general public to the full and free use of streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics and physician's offices, public facilities and other public places. (Civ. Code, § 54.) A violation of the ADA will also be a violation of this section, and the DFEH will have jurisdiction to handle a complaint for violation of this section. (Gov. Code, § 12948.)

III. NONDISCRIMINATION IN INSURANCE COVERAGE

A. Life, Annuity, or Disability Insurance

It is illegal to discriminate against persons with disabilities in life, annuity or disability insurance. Specifically, insurers providing individual or group life, annuity, or disability insurance cannot refuse to insure, or limit the amount or kind of coverage available, or charge a different rate for the same coverage solely because a person is blind, partially blind, or has a physical or mental impairment. A physical or mental impairment is defined as any physical, sensory, or mental impairment which substantially limits one or more of a person's major life activities. An insurer may refuse to insure, limit coverage, or charge different rates only if based on sound actuarial principles or actual and reasonably anticipated experience. (Ins. Code, §§ 10144, 10145.)

Every policy of disability insurance which covers hospital, medical, or surgical expenses on a group basis must offer coverage to members of the group with physical disabilities under the same terms and conditions as are offered to other group members. The group policies are not required to cover hospital, medical, or surgical expenses which arise as a direct result of an individual's physical disability. (Ins. Code, § 10122.1.)

Life and disability income insurers are prohibited from making unfair distinctions between individuals when insuring for the risk of AIDS or AIDS-related conditions (ARC). There are mandatory

and uniform standards for HIV testing and for determining insurability. Strict confidentiality is required of personal information obtained through testing. (Ins. Code, § 799 et seq.)

B. Health Insurance

No insurance plan or nonprofit hospital service corporation providing individual or group health care service can limit the extent or kind of coverage available, refuse to cover, or charge a different rate solely because of an individual's physical or mental impairment. A plan can only refuse to insure, limit coverage, or charge different rates if based on sound actuarial principles or underwriting practices. (Health & Saf. Code, § 1367.8; Ins. Code, § 11512.19.)

A group health plan cannot discriminate against individuals with disabilities or groups with members who have disabilities, although it may reasonably exclude coverage for services related to the disabling condition. (Health & Saf. Code, § 1373, subd. (f).) Life and disability income insurers are prohibited from requiring an HIV antibody test if the results would be used to determine eligibility for hospital, medical or surgical insurance coverage or for coverage under a hospital service plan or health care service plan. (Ins. Code, § 799.09.)

An insurer may not delay more than 60 days in the payment or provision of hospital, medical or surgical benefits for AIDS or AIDS-related complex for the purpose of investigating whether the condition arose prior to commencement of coverage. However, this 60-day period does not include any time during which the insurer awaits medical information from a health care provider. (Ins. Code, § 790.03, subd. (h)(16).)

C. Automobile Insurance

Automobile insurers cannot discriminate against persons with disabilities. Insurers cannot refuse to issue automobile insurance or charge higher rates solely because of a person's disability. A “handicapped person” is defined for purposes of this law as an individual who has suffered an impairment of physical ability, hearing, or speech which has been compensated for, when necessary, by vehicle equipment adaptation or modification. The insurer may require a person with a disability to furnish proof that he or she has qualified for a new or renewed driver's license since the occurrence of the disabling condition. (Ins. Code, § 11628.5.)

No insurer may refuse to insure the owner of a motor vehicle solely because the owner is blind. However, an insurer may exclude from coverage under the policy injuries and damages incurred while the insured vehicle is operated by an unlicensed owner who is blind. An insurer cannot raise the premiums or cancel the policy of an insured person who is blind solely because the operators of the insured vehicle are changed frequently. (Ins. Code, § 11628.7.)

An insurer may cancel or fail to renew an automobile insurance policy only if a premium is not paid, there is a substantial increase in the hazard insured against, or there is fraud. The criteria by which an insurer must determine automobile insurance premiums are: the insured's driving safety record, the number of miles he or she drives annually, and the number of years of driving experience he or she has had. Good Driver Discount policies may be purchased by anyone whose driving record

permits, regardless of disability. (Ins. Code, §§ 1861.02 and 1861.03.) The insurance industry, whether life, health, or automobile, must provide full and equal services, regardless of blindness or other physical disability. (Ins. Code, § 1861.03; Civ. Code, §§ 51, 53.)

D. Insurance Appeal Procedures

If you believe that you have been discriminated against in health, disability or auto insurance, you may file a written complaint with the California Insurance Commissioner requesting that the Commissioner review the manner in which a rate, plan, system or rule has been applied by an insurer. In addition, you may file a written request for a public hearing before the Commissioner. If you do not agree with the decision of the Commissioner, then you may appeal the decision in a court of law. (Ins. Code, § 1858 et seq.)

The Unruh Act also provides legal remedies for those who have been discriminated against by the insurance industry. (Civ. Code, § 51; Ins. Code, § 1861.03.)

IV. NONDISCRIMINATION IN LICENSING AND LICENSED SERVICES

It is unlawful for a licensing board to require any examination or establish any other qualification for licensing that has an adverse impact on persons with disabilities, unless the practice can be demonstrated to be job related. (Gov. Code, § 12944, subd. (a).) Complaints of discrimination can be filed with the Department of Fair Employment and Housing. (Gov. Code, § 12960.)

The Department of Consumer Affairs licenses many professions and services. Architects, nurses, physicians, auto repair persons, beauticians, and funeral directors are all licensed professionals. People who hold licenses issued by the state are subject to disciplinary action if they discriminate against persons with disabilities. The holder of the license is not required to permit an individual to participate in, or benefit from, the licensed activity where the individual poses a direct threat to the health or safety of others. A "direct threat" is defined as a significant risk to health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids and services. (Bus. & Prof. Code, § 125.6.)

Complaints of discrimination can be made to the board or commission within the Department of Consumer Affairs, which is charged with the regulation of the particular profession. To file a complaint to any board or commission within the Department of Consumer Affairs, contact the Consumer Information Division at (916) 445-1254 or (800) 952-5210.

CHAPTER 4

ACCESS

Access is a critical issue for persons with disabilities. Lack of access to buildings and other facilities is an obstacle in obtaining employment, education, housing, entertainment, health care and other services. Lack of access to polling places and the voting process denies persons with disabilities the opportunity to participate in one of the most important rights of citizenship. Lack of access to transportation services hinders the ability of persons with disabilities to live independent lives. Lack of access to telecommunications services limits the ability of persons with disabilities to obtain information and has often posed a threat to safety.

I. ACCESS TO BUILDINGS AND FACILITIES

Both California and federal laws address the goal of increasing physical access and removing architectural barriers. California law requires that publicly funded buildings and facilities and privately funded public accommodations be accessible to persons with disabilities. (Civ. Code, § 4450 et seq., and Health & Saf, Code, § 19955 et seq.) In 1968, Congress passed the Architectural Barriers Act (ABA) (42 U.S.C. § 4151, et seq.*),* which marked the beginning of a new federal policy toward individuals with disabilities. The Americans with Disabilities Act (ADA) further expands the right to accessible public buildings and public accommodations under federal law. In the case of the ADA, there is also an affirmative obligation to make access improvements to existing facilities, even though no remodeling has occurred, where it is readily achievable to do so.

A. Federal Law

1. Federal Buildings

The ABA is based in part on earlier laws passed to ensure that individuals with disabilities were not excluded from access to federal buildings and facilities or discriminated against in services or programs. The ABA was passed to ensure that persons with disabilities would have access to buildings and structures designed, altered, or built with federal funds after August 12, 1968. Coverage extends to any portion of a building or facility, including access routes, doors, common use areas, telephones, curb ramps, drinking fountains, seating, and restroom facilities. Roads, walks, parking lots, parks, and other outdoor areas are also included. Public housing is also included, although most privately owned residences are not.

The Act is enforced by the Architectural and Transportation Barrier Compliance Board ("ATBCB"), which has developed guidelines for accessible design. You may complain to the ATBCB about noncompliance with the ABA. The Board will investigate the complaint, and if a violation is found, the Board can take action to correct the violation. If you are not satisfied with the Board's action, you may seek review of the case in court. (29 U.S.C. § 792.)

All public works projects receiving federal grants must have proper accessibility standards incorporated into their plans. The ATBCB is authorized to ensure that any construction or renovation complies with these standards. (42 U.S.C. § 6705(g).)

2. State and Local Government Buildings

The ADA provides that no qualified individual with a disability shall be excluded from participation in, or denied the benefits, services, programs, or activities of a public entity. Also, a public entity may not discriminate in any other manner against an individual due to a disability. This means that no state or local government, governmental agency, or other instrumentality of government may discriminate on the basis of a disability where the individual is otherwise qualified to receive a benefit or service or to participate in a program. (42 U.S.C. §§ 12131 and 12132.) It is considered discrimination under the ADA for a governmental organization to fail to provide physical access for individuals with disabilities to its buildings and facilities, public transportation services, and other services.

State and local governments must provide access to their facilities and services. However, a state or local government does not necessarily have to make every facility accessible. If alterations would threaten the historic nature of a facility, fundamentally alter the nature of a service or program, or present an undue financial or administrative burden, then other methods of compliance may be used. Some examples of other methods of compliance include redesigning equipment, making structural modifications, delivering services at alternate accessible sites, making home visits, assigning of aides to beneficiaries, using accessible rolling stock or other conveyances, or constructing new facilities.

If you feel that you are being discriminated against by a state or public entity, you may file a complaint with the United States Department of Justice. The United States Attorney General will either investigate the complaint or will refer your complaint to an appropriate government agency. If the complaint cannot be resolved, then the United States Attorney General may file a civil action to force the state or public agency to comply. (42 U.S.C. § 12133; 29 U.S.C. § 794(a); 28 C.F.R. § 35.170 et seq.; *Duvall* v. *County of Kitsap* (9th Cir. 2001) 260 F.3d 1124, 1138.) You may also file your own lawsuit. (*See Hason v. Medical Board of California* (2002) 279 F.3d 1167 [holding that Congress validly abrogated state sovereign immunity in enacting Title II of the ADA, thus allowing suits by private individuals in federal court against states and their agencies. However, this issue continues to be the subject of litigation nationwide. Therefore, the holding in *Hason* may be affected by future litigation.].)

3. Privately-Owned Buildings

The ADA further provides that no individual shall be discriminated against on the basis of disability by any person who owns, leases or operates a place of public accommodation. A person with a disability is entitled to full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations offered at any place of public accommodation. (42 U.S.C. § 12182.) The term "public accommodation" refers to any business or establishment open to the public.
(28 C.F.R. § 36.104.) For example, restaurants, movie theaters, hotels, shops, amusement parks, hospitals, and bowling alleys are all considered public accommodations. A place of public accommodation is required to facilitate access by modifying policies, practices, or procedures, providing auxiliary aids and services, and removing architectural barriers where such removal is "readily achievable" (easily accomplished and able to be carried out without much difficulty or expense).

Modifying policies, practices or procedures may not be required if a place of public accommodation can show that such modification would fundamentally alter the nature of the goods,

services, facilities, privileges, advantages or accommodations being offered. Additionally, the provision of auxiliary aids and services is not required if it is established that it would result in an undue burden (significant difficulty or expense). Where a public accommodation can demonstrate that barrier removal is not readily achievable, it shall make its services available through alternate methods, if those are readily achievable. Examples of alternatives are curb service or home delivery; retrieving merchandise from inaccessible shelves or racks; or relocating activities to accessible locations.
(28 C.F.R. § 36.301 et seq.)

Examples of actions that may be required to be taken to remove architectural barriers include: installing ramps and curb cuts; repositioning shelves, telephones, bathroom dispensers, vending machines, display racks or furniture; adding raised markings on elevator control buttons; installing flashing alarm lights; widening doors; installing offset hinges to widen doorways; eliminating turnstiles or providing alternative accessible paths; installing accessible door hardware and grab bars in toilet stalls; rearranging toilet partitions to increase maneuvering space; insulating lavatory pipes under sinks to prevent burns; installing raised toilet seats and full length bathroom mirrors; repositioning paper towel dispensers in bathrooms; creating designated accessible parking spaces; installing an accessible paper cup dispenser at an existing inaccessible water fountain; removing high pile, low density carpeting; and installing vehicle hand controls. (28 C.F.R. § 36.304.)

All new facilities must be designed so that they are readily accessible and usable by persons with disabilities unless structurally impracticable. If an alteration is made to a facility, then the area altered must be made accessible. Whenever a facility is altered so that an area containing a primary function is affected, the alteration must also be made in such a manner that the path to the bathrooms, telephone, and drinking fountains serving the altered area are readily accessible. However, an exception to this rule is where the alterations to the path of travel, telephones, bathrooms or drinking fountains would be disproportionate in cost and scope to the planned alteration. Also, an elevator is not required for facilities of less than three stories or which have less than 3,000 square feet per story unless the building is a shopping center or mall, professional office of a health care provider, or unless the United States Attorney General otherwise determines. (42 U.S.C. § 12183.) A public accommodation is required to maintain in operable condition the facilities and equipment required to be readily accessible to and usable by persons with disabilities, although isolated or temporary interruptions in service due to maintenance or repairs are allowed. (28 C.F.R. § 36.211.)

If you feel that you have been discriminated against by a place of public accommodation, then you may file a complaint with the United States Department of Justice or you may file your own lawsuit. (42 U.S.C. §§ 12188, 2000a-3(a); 28 C.F.R. § 36.501 et seq.)

B. California Laws and Regulations

1. State and Local Government Buildings and Facilities

California law requires that all buildings, structures, sidewalks, curbs, and related facilities, constructed with public funds and, under certain circumstances, buildings and facilities leased by state or local government, must be accessible to and usable by persons with disabilities. (Gov. Code, § 4450 et seq.) Buildings constructed before 1968 are not required to be accessible unless structural alterations or repairs are made. If a building is altered, the area of alteration as well as the path of travel to and from key facilities (such as restrooms) serving the area must be made accessible.

Complaints alleging that a public building or facility which was constructed or altered with state funds is inaccessible should be lodged with California Division of the State Architect. Complaints alleging that a public building constructed with local funds is inaccessible should be lodged with the appropriate

local government, usually through the building official or public works director, in the jurisdiction where the building or facility is located. Any unauthorized deviations from state building standards that are detected at a state or local government building or facility must be corrected within 90 days of confirmation of the violation. (Gov. Code, § 4452.)

A district attorney, city attorney, or the California Attorney General may bring an action to enforce compliance with this law. (Gov. Code, § 4458.) However, as a general rule, the Attorney General will not consider a complaint lodged against a local government unless it is established that the complaint was first lodged with the appropriate local authority, the local authority has failed to respond appropriately within a reasonable period of time, and the complaint alleges a significant pattern or practice of non-compliance with state access laws and regulations.

California law also prohibits state and local governments from holding public meetings in buildings or facilities that are inaccessible to persons with disabilities. (Gov. Code, §§ 11131 and 54961, subd. (a).) Violations of these laws should, in the first instance, be brought to the attention of the state or local agency that has conducted or intends to conduct a meeting in an inaccessible facility. In the case of a local agency, if the local agency continues to hold meetings in an inaccessible facility, a complaint may be lodged with the California Attorney General.

2. Privately Funded Public Accommodations

California law also requires that public accommodations constructed with private funds after July 1, 1970, be accessible to individuals with disabilities. Facilities constructed before July 1, 1970, must be made accessible when any alterations, structural repairs, or additions are made. Similar to the ADA, state law requires that the altered area and the path of travel and key facilities serving the area being altered be made accessible.

The building department of every city and county is required to enforce state access laws and regulations with respect to privately funded public accommodations located in their jurisdictions. (Health & Saf. Code, § 19958.) Complaints alleging that a privately funded accommodation is out of compliance with state access laws and regulations should be lodged with the local building official in the jurisdiction where the public accommodation is located. Violations that are confirmed to exist must be corrected within 90 days of such confirmation.

A district attorney, city attorney, the Department of Rehabilitation, or the Attorney General can bring an action to enforce California's laws requiring that privately funded public accommodations be accessible to individuals with disabilities. (Health & Saf. Code, § 19958.5.) However, here again, as a general rule, the Attorney General will not consider a complaint unless it is established that the complaint was first lodged with the appropriate local building department and that the local building department has failed to respond appropriately within a reasonable period of time. The Attorney General may review the decision of the local building department to determine whether it has abused its discretion in resolving a complaint. Additionally, the Attorney General may investigate complaints that allege a local building department is engaged in a pattern or practice of failing to adequately enforce state access laws and regulations against privately funded public accommodations. The Attorney

General may file a civil action if he determines that a building department is engaged in such a pattern or practice. Lastly, private parties may also enforce compliance with state access laws and regulations against privately funded public accommodations. (*Donald v. Café Royale, Inc., supra*, 218 Cal.App.3d 168, 183 (held that an individual may initiate an action to enforce compliance with the standards set forth in Health and Safety Code, section 19955, et seq.).

3. California Access Regulations

In addition to the general state access statutes discussed above, California regulations provide a comprehensive set of requirements covering almost all important areas of accessibility for persons with physical and sensory disabilities. California's regulations are found at Volume 1, Chapter 11, of the 1998 California Building Code and are designed to comply with the requirements of the ADA. A copy of the relevant portion of the California Building Code may be acquired through the Division of the State Architect or may be found in your local law library in the California Building Code. In addition, your city or county building department should have a copy available, and helpful guides may also be purchased from private publishers. Tax deductions are available for individuals who repair or remodel buildings or vehicles in order to increase access for persons with disabilities, as long as they comply with state or federal access standards. Deductions shall not exceed $15,000 for any taxable year and may also cover emergency egress/safe area refuge systems in compliance with state or federal regulations. (Rev. and Tax Code, § 24383.)

These regulations, some of which are discussed below, set specific accessibility requirements which apply to buildings and facilities covered by the access statutes. Exceptions may be granted from some of the requirements, but only if compliance would pose an unreasonable hardship. Even when unreasonable hardship is demonstrated, some form of "equivalent facilitation" must usually be provided to make the facility usable by persons with disabilities.

In addition to the regulations, California has enacted specific statutes directed at providing access to various types of facilities. For example, stadiums, public parks and gas stations are all addressed by specific laws.

a. Restrooms, Drinking Fountains and Public Telephones Must Be Accessible

Buildings open to the public must have signs posted which indicate the location of restroom facilities accessible to persons with disabilities. Signs on restroom doors must be in the shape of a circle for women's restrooms, a triangle for men's restrooms, and a triangle interposed upon a circle for unisex restrooms. (1998 California Building Code, hereafter “CBC,” § 115B.5; see also 1998 California Plumbing Code, section 1501 et seq. for additional accessibility requirements involving water closets, urinals, lavatories, showers, bathtubs, drinking fountains and sinks.)

Toilet facilities must have sufficiently wide doorways and must have grab bars. Restroom components, such as waste paper baskets and sinks, must be accessible. Where bathing facilities are provided for the public, clients, or employees, at least one such facility (and not less than one percent of all facilities) must be accessible. A certain number of lockers must also be accessible. (CBC §§ 1115B.4, 1115B.4.1, 1115B.8, 1115B.9 and 1115B.6.)

At least half but not less than one of the water fountains must be accessible and must be placed so that they do not pose a danger to persons with visual impairments. (CBC §§ 1105.4.1; 1117B.1, 2.)

On floors where public telephones are provided, at least one must be accessible. On any floor where two or more banks of multiple telephones are provided, at least one in each bank shall be accessible. A reasonable number of public telephones provided, but always at least one on each floor or bank, shall be equipped with a volume control which is hearing-aid compatible and which is signed. Text telephones must be also provided under certain circumstances. (CBC § 1117B.2.9 et seq.)

b. Entrances and Paths of Travel Must Be Accessible

All primary and exterior ground-floor exit doors to buildings and facilities shall be made accessible to individuals with disabilities. (CBC § 1120A.1.1.) Both doors of double doors designated as a public entrance must be kept unlocked during normal business hours. (Health & Saf. Code, § 13011.)

Paths of travel must be accessible. There are also accessibility requirements for handrails; ramps; striping for persons with visual impairments; level landings; wheel guides; detectable warnings; and door pressure, surfaces and hardware. (CBC §§ 1102A et seq.; 1102B; 1114B.1.2; 1127B.1 et seq.; and 1133B.2.5 et seq.; Gov. Code, § 4460.)

c. Stadiums, Grandstands, Sports Facilities, Auditoriums, Theaters, and Related Entertainment Facilities Must Be Accessible

Any entertainment facility approved for construction after January 1, 1985, must provide seating or accommodations for persons with disabilities in a variety of locations to allow for a range of admission prices, to the extent that this variety can be provided while meeting fire and public safety requirements of the State Fire Marshall. Both private and public entertainment centers are covered by this law, including theaters, concert halls, and stadiums. No lesser standard of accessibility or usability shall be applied than under the ADA. (Health & Saf. Code, § 19952.) A district attorney, city attorney, the Department of Rehabilitation acting through the Attorney General, or the California Attorney General can bring an action to correct a violation of this section. In addition, if you believe that you have been denied access required by this law, you can bring an action in court. (Health & Saf. Code, §§ 19953 and 19954.)

In stadiums and other sports facilities, spectator seating, the customer side of ticket booths, participation areas, clubrooms and locker rooms must satisfy accessibility requirements, with certain exceptions for hardships when equivalent facilitation is provided. (CBC §§ 1104B.4 and 1115B.6.4.)

In auditoriums and theaters, seating and toilet facilities for persons with disabilities must be accessible from the lobby or from a primary entrance.

Seating spaces must be available for both individuals who use wheelchairs and individuals who are semi-ambulant. All such seating must comply with fire and public safety requirements. Assistive listening systems must be installed in stadiums, theaters, auditoriums, lecture halls and similar areas when these areas have fixed seats and where audible communications are integral to the use of the space. (CBC §§ 1104B.3.2; 1104B.3.8; 1104B.4.2; and 1105B.4.8.2.)

Stages and orchestra pits must be accessible to persons with physical disabilities, and ticket booths and refreshment stands must be accessible on both the customer and employee sides. (CBC

§ 1104B.3.10-12.)

d. Curbs and Sidewalks Must Be Accessible

Any curb or sidewalk intended for public use that is constructed with public or private funds must be accessible, regardless of where it is located. (Health & Saf. Code, § 19956.5; Gov. Code, § 4450; 57 Ops.Cal.Atty.Gen. 186 (1974).) The curb or sidewalk must be easily accessible by means of ramps or other devices. To ensure that the ramp is easily accessible, no one may park within three feet of any sidewalk access ramp which is next to a crosswalk and is designated by either a sign or by red paint. (Veh. Code, § 22522.)

A major concern for individuals with disabilities who use wheelchairs is the availability of curb ramps. Alterations to the curb, sidewalk, or street require the removal of barriers or the construction of ramps or other devices to aid accessibility. If the government, or a private entity, builds a new street or sidewalk, then it must be made accessible to individuals with disabilities if it is to be used by the public. Whenever a local government resurfaces a street, the government has made an alteration and is therefore required to alter the curb to provide ramps or slopes at the intersections if they do not already exist.

e. Historical Buildings

Historical buildings may be subject to case-by-case review when alterations are planned, rather than a strict application of standard access regulations. Alternative building regulations have been developed for use when an historical building is restored or relocated. (Health & Saf. Code, § 18950 et seq.; CBC § 1135 B.)

f. Gas Stations

Gas stations must provide persons with disabilities with refueling service at the self-service price, unless only one employee is on duty or only two employees are on duty, one of whom is assigned exclusively to the preparation of food. Individuals must display a disabled plate or placard from the Department of Motor Vehicles in order to receive this benefit. In addition to other remedies available, a gas station owner or employee who disregards this law commits an infraction and may be fined. Gas stations must post signs indicating whether or not they provide fueling services for persons with disabilities. These signs shall include toll-free numbers maintained by the Department of Rehabilitation for the purpose of seeking information about enforcement of the laws. Card readers at gasoline fuel dispensing facilities are also required to be accessible. (See CBC § 1101C et seq.*)* Local law enforcement agencies are authorized to investigate violations, upon the verified complaint of an individual or public agency, and to levy the above-mentioned fines. An individual with a disability or public agency may file a complaint with the California Attorney General, a district attorney, or a city attorney, who may bring an action to correct a violation. (Bus. & Prof. Code, § 13660.)

g. Outdoor Recreation, Parks and Recreational Facilities

California's policy is to increase accessibility to the state's scenic, natural, historic, and cultural resources. The policy includes, but is not limited to, walking trails, bikeways, horseback riding trails, public roads, boat docks, picnic areas, cross-country ski trails, and heritage corridors. (Pub. Resources Code, § 5070.5.)

Access regulations require that campsites, beaches, picnic areas, boat docks and fishing piers, parking lots, highway rest areas and portions of trails and paths be usable by persons with disabilities.

Nature and educational trails must be made accessible to persons with vision impairments by the provision of rope guidelines, raised Arabic numerals or symbols, and accessible information and guide signs. Where the natural environment would be materially damaged by compliance with these regulations, such areas will be subject to the regulations only to the extent that such damage will not occur. If permanent facilities are provided, then at least one kind of permanent functional area or facility, as applicable, shall be accessible to persons with disabilities, including a sanitary facility for each sex; at least one picnic table and one table for each 20 tables, or fraction thereof provided; information and display areas; drinking fountains; at least one parking space; and curb ramps at pedestrian ways, where appropriate. Automobile access and accessible path of travel shall not be provided if compliance would create an unreasonable hardship. (CBC § 1132B.2.)

Individuals with disabilities who receive state aid may be eligible for a Golden Bear Pass allowing free day use access to most state parks for the individuals with disabilities and his or her spouse. The pass is available from the Department of Parks and Recreation. (Pub. Resources Code, § 5011.)

At least a portion of playground equipment purchased by public agencies operating playgrounds as of January 1, 1979, shall be accessible and usable to all persons, regardless of physical condition, whenever equipment is available at a comparable cost and quality to standard equipment. (Pub. Resources Code, § 5411.)

h. Signs and Identification

The International Symbol of Accessibility must be displayed at accessible building entrances and in the lobbies of buildings which have been remodeled to provide accessible sanitary facilities. (CBC §§ 1114A and 1117A.3.)

i. Clear Floor or Ground Space

Building design must allow for the clear movement and maneuvering of wheelchairs. (CBC § 1118B.) Objects protruding from walls (for example, telephones) may not obstruct the movement of wheelchairs. Building design must also take into consideration the needs of individuals with vision impairments. This helps ensure that an individual with a visual impairment will avoid hazards undetectable by standard cane technique. (CBC § 1121B.)

j. Dining, Banquet and Bar Facilities

Wheelchair access must be provided in dining, banquet and bar facilities. Access must be provided to all areas where each type of functional activity occurs. There must be a certain number of wheelchair seating spaces. Food service aisles, tableware areas, restrooms and food preparation areas must also be accessible. (CBC § 1104B.5; *People ex rel. Deukmejian v. CHE, Inc.* (1983) 150 Cal.App.3d 123.)

k. Religious Facilities

The sanctuary areas, raised platforms, choir rooms, choir lofts, performing areas, assembly areas, classrooms and offices and sanitary facilities of religious facilities must be accessible and must provide wheelchair seating spaces. Hardship exceptions can be granted where equivalent facilitation is provided. (CBC § 1104B.6.)

l. Office Buildings and Personal and Public Service Facilities

Facilities covered by these regulations include all those used by the public as customers, clients, or visitors, or facilities which may be places of employment. Included are all types of business and professional offices, including insurance, real estate and attorneys' offices, all types of sales establishments, and all personal and public service facilities, including banks, laundromats, hospitals, police stations, courtrooms, fire stations, automated teller machines, point of sale machines, and vending machines. (CBC §§ 1105B et seq.; 1109B et seq.; 1117B.7 et seq.; and 1126B*; Donald v. Sacramento Valley Bank* (1989) 209 Cal.App.3d 1183.)

In business and professional offices, areas to be made accessible include client and visitor areas, toilet facilities, conference rooms, and employee work areas. (CBC § 1105B.3 et seq.) In sales establishments, sales and display areas must be accessible, as well as employee work areas and some check-out stations. Where fitting or dressing rooms are provided, at least one must be accessible. (CBC § 1110B.1 et seq.) Finally, with certain exceptions, client and visitor areas and employee work areas must be accessible in personal and public service facilities. Factories and warehouses must also comply with broad accessibility requirements. (CBC §§ 1105.4.4. et seq. and 1107B et seq.)

m. Educational and Library Facilities

In educational facilities, laboratory rooms must provide a certain number of work stations usable by students with physical disabilities, and a certain percentage of study carrels and teaching facility cubicles must be accessible. General use areas in libraries must be accessible, and open book stacks must allow wheelchair access to the aisle. (CBC § 1106B.1 et seq.)

n. Hotels, Motels, and Publicly-Funded Living Accommodations

A certain number of guest rooms in private lodging facilities must be accessible, including sanitary facilities. Public rooms and recreational facilities in private lodging must also comply with certain accessibility requirements. Some publicly-funded living accommodations must meet accessibility requirements although arguably they must be publicly-funded and open to the general public. (CBC § 111B.1 et seq.*; Berkeley Center for Independent Living v. Coyle* (1996) 42 Cal.App.4th 874.)

o. Courtrooms

Individuals with hearing impairments are entitled to the use of assistive listening systems or computer-aided transcription equipment to assist their participation in any civil or criminal court proceeding, alternate dispute resolution or public agency administrative hearing, if they provide at least five days' notice. Each county is required to have at least one portable listening device for use by the

courts. Signs must be posted indicating how to request these systems. In any civil or criminal proceeding where an individual with a hearing impairment is a participant, the court proceeding shall not be allowed to commence until the requested listening assistance equipment has been provided. In addition, jury boxes, judges' benches, witness stands, counsel tables, public seating areas, jury rooms and other court facilities must be made accessible in all new or remodeled facilities. No lesser standard of accessibility or usability shall be applied than is applicable under the ADA. (CBC § 1105B.3.5.)

An individual who is deaf or hearing impaired and cannot participate in court, administrative or alternative dispute resolution proceedings through the use of an assistive listening system or computer-aided transcription equipment is entitled to a free qualified interpreter to interpret the proceedings in a language understood by the individual. A free intermediary interpreter will be appointed if the appointed interpreter is not familiar with the use of particular signs or sign language used by the individual. The proceeding cannot commence until the interpreter is present. Individuals with hearing impairments are also entitled to interpreters when they are interviewed in a criminal or quasi-criminal investigation or proceeding. (Evid. Code, § 754.)

p. Elevators

Elevators must be designed so as to accommodate wheelchairs. Elevators must stop within one-half inch of the building floor level, and elevator floor buttons must be within reach of a wheelchair user. Passenger elevators must be located near a major path of travel. All new elevators must have braille and raised arabic numbers next to the buttons designating each floor. Existing elevators must also satisfy this requirement, unless an unreasonable hardship would result. The number of the floor must appear both in braille and in raised arabic numbers on the outside of the elevator door. (CBC § 1105.3; Gov. Code, § 4455.5.) Lifts are only allowed in limited circumstances. (CBC § 1116B.2 et seq.)

q. Miscellaneous

- If emergency warning systems are required, they must warn persons with hearing impairments by the use of flashing lights. (CBC § 1105.4.6.)

- Public swimming pools must be accessible to persons with disabilities. (CBC § 3104B.)

- There are accessibility requirements for exterior routes of travel, pedestrian grade separations, parking spaces and structures, and passenger drop-off and loading zones. (CBC §§ 1127B et seq., 1128B, 1129B et seq., 1130B and 1131B et seq.)

II. ACCESS TO POLLING PLACES AND THE VOTING PROCESS - STATE AND FEDERAL ELECTIONS

A. State Elections

California law requires that notice of a polling site must state whether the location is accessible. Election officials must try to select accessible voting sites. If a site is not accessible, a person with a disability can vote in a nearby accessible location or by absentee ballot.

If a voter is unable to mark a ballot, he or she must be permitted to vote with the assistance of not more than two persons, excluding the voter's employer, or an officer or agent of the union of which the voter is a member. The voter must declare under oath to a member of the precinct board present at the time that he or she is unable to mark the ballot. No person assisting a voter shall divulge any information regarding the marking of the ballot. (Elec. Code, §§ 12280 and 14282.)

B. Federal Elections

Any voter requiring assistance because of blindness or disability to vote in a federal election may receive assistance from a person of the voter's choice, other than the voter's employer or an agent of the employer or an officer or agent of the voter's union. (42 U.S.C. § 1973aa-6.) State and political subdivisions must ensure that registration and polling places for federal elections are accessible to persons with disabilities and elderly persons, or that alternative means for casting ballots are provided. The chief election officer of each state shall provide timely notice of the availability of aids and assistance and the procedures for voting by absentee ballot. Registration and voting aids which are required include:

- instructions, printed in large type, conspicuously displayed at registration and polling places; and
- information by telecommunications for persons with hearing impairments. No notarization or medical certification shall be required of a voter with a disability with respect to an absentee ballot except to automatically receive an application or ballot on a continuing basis or to apply for an absentee ballot after the deadline has passed. (42 U.S.C. § 1973ee-3.)

If a state or political subdivision does not comply with this law, the United States Attorney General or anyone potentially aggrieved by the noncompliance can bring a lawsuit for declaratory or injunctive relief in the appropriate district court. (42 U.S.C. § 1973ee-4.)

III. ACCESS TO TRANSPORTATION

A. Driving and Parking

1. Driver's Licenses

The right to a driver's license is not absolute, and licensing standards vary from state to state. In California, a person with a physical or mental disability may not be refused a driver's license if the Department of Motor Vehicles (DMV) decides the disability does not affect the individual's ability to operate a vehicle. By statute, the DMV may not issue a license to a person with a disorder characterized by lapses of consciousness, or marked confusion, but the DMV must usually make license determinations on a case-by-case basis and must issue licenses to persons capable of safe driving. The DMV shall not issue or renew a driver's license of any person whose best corrected visual acuity is 20/200 or worse in that person's better eye, as verified by an optometrist or ophthalmologist. No person may use a bioptic telescope or similar lens to meet the acuity standard. (Veh. Code, §§ 12805 and 12806; *Smith* v. *DMV* (1984) 163 Cal.App.3d 321.)

The DMV may require a person to use special adaptive devices, if necessary to assure safe driving. (Veh. Code, §12813.)

2. Parking Privileges

California has enacted a number of provisions granting special parking privileges to persons with disabilities who drive upon receipt of medical certification, unless the disability is readily observable and uncontested. In order to take advantage of most of these privileges, a person's vehicle must display either a distinguishing license plate or distinguishing placard, both of which can be obtained on a permanent or temporary basis from the DMV. (Veh. Code, §§ 5007 and 22511.55 et seq.) The plates and placards cannot be loaned to others, unless that person is in the presence or reasonable proximity of the person with a disability for purposes of transporting him or her. Violations of this code section are misdemeanors punishable by a fine and/or jail time. (Veh. Code, § 4461.) A civil penalty of $1,500 can be imposed in addition to or instead of the fine. (Veh. Code, § 4461.5.) If lost or stolen, the placards can be replaced without recertification of eligibility. The placards have a fixed expiration date of June 30 every two years. The plates and placards shall be returned to the DMV not later than 60 days after the death of the person to whom it was issued. No person is eligible for more than one placard at a time, although organizations involved in the transportation of persons with disabilities may apply for a placard for each vehicle used for that purpose. (Veh. Code,
§ 22511.55.)

Upon receipt of the required applications and documents, the DMV will also issue temporary distinguishing placards for persons temporarily disabled for a period of not more than six months. This placard expires after six months, or the termination of the disability, whichever occurs first. There are also placards available for shorter periods of time for purposes of travel. (Veh. Code, § 22511.59.)

Any person using a distinguishing placard for parking in permitted areas shall present identification and evidence of the issuance of the placard to that person upon request by a person authorized to enforce parking laws, ordinances or regulations. Failure to present the identification and evidence gives rise to a rebuttable presumption that the placard is being misused, and the placard may be confiscated. (Veh. Code, § 22511.56.) The plates and placards allow disabled persons to park in certain restricted zones, and to park in metered spaces for free. (Veh. Code, § 22511.5.) California Vehicle Code section 22507.8 precludes persons without disabled placards or plates to park in stalls or spaces reserved for the disabled. Vehicles can be towed if parked in violation of this section if the posting requirements set forth in Vehicle Code section 22511.8 have been met. (Veh. Code, § 22652.) California Vehicle Code section 42001.5 requires the court to impose a fine on any person convicted of specified disabled parking violations, which can only be suspended if the person convicted possessed a placard or plate but failed to display it.

Parking spaces identified with blue curb paint are exclusively for the use of persons with disabilities. (Veh. Code, § 21458, subd. (a)(5).) Vehicle Code section 22522 prohibits parking a vehicle within three feet of a sidewalk access ramp for the disabled adjacent to a crosswalk if the area adjoining the ramp is designated with a sign or red paint. Local authorities generally decide where special parking spaces will be located. In addition to designating reserved parking spaces on streets and in public lots, local authorities may require private parking facilities which are open to the public to reserve a certain number of spaces for the vehicles of persons with disabilities. Any parking facility controlled by a state agency must reserve a certain number of spaces for persons with disabilities and

provide appropriate signage. If a state agency does not have its own parking facility, the agency must ask local authorities to reserve on-street spaces immediately adjacent to the agency property for the use of persons with disabilities. (Veh. Code, §§ 22511.7 and 22511.8; Gov. Code, § 14679.)

Drivers with disabilities must still observe parking regulations which prohibit all stopping, parking or standing, or which reserve spaces for special types of vehicles. (Veh. Code, § 22511.5, subd. (a)(3).)

B. Mass Transit and Interstate Transportation

1. State Law

a. Accessibility of Equipment and Structures

California law provides that state agencies, boards, and departments, local governmental subdivisions, districts, public and quasi-public corporations, local public agencies and public service corporations, cities, counties and municipal or county corporations in awarding contracts for operations, equipment or structures shall require that all fixed-route transit equipment and public transit structures be built so that individuals with disabilities shall have ready access to, from, and in them. (Gov. Code, § 4500; 70 Ops.Cal.Atty.Gen. 70 (1987).) This section also provides that if state standards are higher than the ADA, those state standards shall be complied with.

Section 99220 of the Public Utilities Code sets forth a legislative finding that since public transportation systems provide an essential public service, they should be designed and operated so as to encourage maximum utilization by “handicapped persons.” A "handicapped person" is defined as "any individual who by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, including, but not limited to, any individual confined to a wheelchair, is unable, without special facilities or special planning or design, to utilize public transportation facilities and services as effectively as a person who is not so affected. A temporary incapacity or disability is one which lasts more than 90 days. (Pub. Util. Code, § 99206.5.) Cities or counties are authorized pursuant to section 99260.7 of the Public Utilities Code to file a claim for state funds to provide transportation services using vehicles for the exclusive use of “handicapped persons.”

2. Federal Law

a. General Provisions

i. Public Entities, Recipients of Federal Funding, and the Federal Government

The ADA provides that public entities must make all services, programs and activities accessible to individuals with disabilities. This general provision extends to transportation services, such as buses, trains, and other conveyances provided by state and local government. It also extends to the facilities and stations which provide access to these services. (42 U.S.C. §§ 12132 and 12142-12165.) In addition, the Rehabilitation Act of 1973 ensures that all recipients of federal financial assistance and federal agencies themselves provide access to transportation services and facilities.
(29 U.S.C. §§ 794 and 794b.)

ii. Private Entities

The ADA also provides that all public accommodations operated by private entities be accessible to individuals with disabilities, although there are exceptions for certain private clubs and religious entities. (42 U.S.C. § 12187.) Private entities include all privately-owned businesses and organizations which offer services to the public. This means that public transportation provided by private entities, such as buses, trains and taxi cabs, is subject to accessibility requirements. (42 U.S.C. §§ 12181-12189.)

The ADA makes a distinction between private entities which are primarily engaged in the business of transportation and private entities which provide transportation services incidental to other types of business. Private entities which are primarily engaged in the business of transportation are held to strict accessibility requirements. They must make reasonable modifications to their vehicles and must provide auxiliary aids and services which will aid in creating accessibility. Reasonable modifications may include removing existing barriers where such modifications are readily achievable and if not, using readily achievable alternative methods. (42 U.S.C. §§ 12182 and 12184.)

iii. Exceptions

While all forms of transportation offered to the public must be accessible, this does not mean that structural alterations must necessarily be made to all transportation vehicles. Instead, transportation systems must be accessible in a manner that provides individuals with disabilities with service comparable to that offered to persons without disabilities. Accessibility regulations take into account the need to balance the cost of altering existing transportation systems with the goal of achieving full accessibility. The regulations and exceptions which apply to the various modes of transportation are set out in more detail below.

b. Buses, Rapid and Light Rail Vehicles

i. Buses, Rapid and Light Rail Vehicles Operated By Public Entities

All new buses, rapid and light rail vehicles operated by public entities must be designed so that they are readily accessible and usable by individuals with disabilities, including individuals who use wheelchairs. This applies to all new vehicles which were ordered after August 25, 1990. Used vehicles purchased or leased after that date must also be readily accessible and usable by individuals with disabilities, unless the public entity can show that it used good faith efforts to purchase or lease accessible used buses and that none were available. Vehicles which are remanufactured so that they will last at least another 5 years are also required to be readily accessible and usable by persons with disabilities, including individuals who use wheelchairs. (42 U.S.C. § 12142.)

If a remanufactured vehicle has been made to be accessible to the maximum extent possible, then such a vehicle will comply with accessibility requirements. Historic vehicles operating on fixed route systems, any segment of which is included on the National Register of Historic Places, need only be made accessible to the maximum extent feasible, if modifications would significantly alter the historic character of the vehicle. (42 U.S.C. § 12142(c)(2).) Some transit systems which are considered "demand responsive" and do not have fixed routes may continue to purchase and lease non-

accessible vehicles, but they must operate a system which, when viewed in its entirety, provides an equivalent level of service for individuals with disabilities. (42 U.S.C. § 12144; 49 C.F.R. § 37.171.) They must compensate passengers with disabilities if they fail to provide certain services. (49 C.F.R. § 37.199.)

In addition, systems which do not provide fully accessible vehicles are required to provide paratransit and other special services in order to provide a level of service which is comparable to the service provided individuals without disabilities. Paratransit must also be comparable to the extent practical with the response time provided to individuals without disabilities. However, systems providing solely commuter bus service are exempt from this requirement. (42 U.S.C. § 12143.)

The ADA also mandates that a public entity provide at least one car per train, where two or more vehicles operate as a train by a light or rapid rail system, which is readily accessible and usable by persons with disabilities, including individuals who use wheelchairs. (42 U.S.C § 12148.)

Public entities operating fixed route systems shall permit service animals to accompany individuals with disabilities in vehicles and facilities. (49 C.F.R. § 37.167(d).)

ii. Over-the-Road Buses Operated By Private Entities

Over-the-road buses operated by private entities are generally subject to the same accessibility rules as those applied to government-funded bus systems. Private entities may not purchase or lease new buses which are not readily accessible and usable by individuals with disabilities. They are to remove transportation barriers in existing buses where such removal is readily achievable; they are not required to retrofit buses or to install hydraulic lifts. (42 U.S.C. § 12186; 49 C.F.R. §§ 37.167(d); 37.181 et seq., and 38.151 et seq.; 28 C.F.R. § 36.310.)

"Over-the road buses," which are buses with baggage compartments located underneath the passenger section, are not required to provide accessible bathrooms if this would result in a loss of seating capacity. However, they are required to be accessible in all other aspects, such as by providing handrails, lighting and slip-resistant floors where wheelchairs or mobility aid users are to be accommodated. (42 U.S.C. § 12186; 49 C.F.R. § 38.151 et seq.)

Private entities which are primarily engaged in the business of transportation must make reasonable modifications to existing buses, must provide auxiliary aids and services and, under certain circumstances, must remove barriers in order to create accessibility. Where an entity uses vehicles with a carrying capacity of eight passengers or less, it is required to purchase accessible vehicles, unless the entity provides the same level of service to passengers with disabilities when the system is viewed in its entirety. The same level of service means that the frequency, response time, and destinations covered must be equivalent. (42 U.S.C. § 12184; 28 C.F.R. § 36.202; 49 C.F.R. §§ 37.103 and 37.105.)

Private entities which are not primarily engaged in the transportation business and which operate a fixed route system are required to purchase new buses which are readily accessible and usable by individuals with disabilities, including persons who use wheelchairs. However, if the vehicle has a carrying capacity of 16 passengers or less, then the vehicle is not required to be accessible, but only if the private entity operates a system which provides the same level of service to users with

disabilities when viewed in its entirety. Public entities which operate a purely demand responsive system - where there is no fixed route - are required to purchase accessible vehicles, unless they can show that the system, when viewed in its entirety, provides the same level of service to users with disabilities. (42 U.S.C. § 12182; 49 C.F.R. §§ 37.101 and 37.105.)

c. Trains, Street Cars and Other Rail Vehicles

i. Intercity and Commuter Rail Operated By Public Entities

The same general rules apply to larger trains that apply to rapid and light rail transportation. Public entities, such as Amtrak or local commuter authorities, must purchase or lease readily accessible or usable vehicles subject to the same general exceptions allowed for rapid and light rail.

On intercity trains, there must be at least one space to park and one space to store and fold a wheelchair for every passenger coach. Accessible bathrooms are required on coaches which provide wheelchair spaces. On trains which provide food service in either single or bi-level cars, auxiliary aids and services must be provided to ensure that passengers with disabilities are provided equivalent food service to that provided to other passengers. A single-level dining car providing food service must meet certain accessibility requirements if purchased after July 26, 1990. The one-accessible-car-per-train rule also applies to intercity and commuter rail service. (42 U.S.C. § 12162; 49 C.F.R. §§ 37.91 and 37.93.)

ii. Rail Operated By Private Entities

Rail operated by private entities is subject to the same accessibility rules as other businesses providing public accommodations. Private entities have an obligation to remove structural barriers and to make alterations where readily achievable. If such alterations are not readily achievable, then the public entity has the duty to use alternative methods of providing services if they are readily achievable. However, public entities are not required to retrofit cars for hydraulic lifts. (42 U.S.C. § 12182(b)(2)(A)(iv).)

Private rail is also subject to the same rules as rail provided by public entities; for example, all new passenger cars must be readily accessible to and usable by persons with disabilities, to the maximum extent feasible. This applies to used cars not already owned or leased by an entity and to cars remanufactured to extend their life ten years. (42 U.S.C. § 12184.) Historic cars are granted the same exceptions given to those operated by public entities. (*Ibid.)*

d. Stations and Terminals

i. Facilities Operated By Public Entities

Transportation facilities are subject to the same types of accessibility requirements as other buildings. New facilities must be built so that they are readily accessible and usable by persons with disabilities, and any alterations to existing buildings must be done so that they are made accessible and usable to the maximum extent feasible. Whenever an area containing a primary function is altered, the bathrooms, telephones, drinking fountains, and path of travel must also be made accessible to persons with disabilities, including persons who use wheelchairs, unless disproportionate in cost and scope to the overall alterations. (42 U.S.C. §§ 12146 and 12147, subd. (a); 49 C.F.R. §§ 37.41-37.45.)

In addition to the general rules, "key stations" serving rapid and light rail must be made accessible no later than July 26, 1993. Public entities may apply for extensions of up to 30 years where making a station accessible would involve extraordinarily expensive structural changes to or replacement of existing

facilities. By July 26, 2010, at least two-thirds of such key stations must be readily accessible to and usable by individuals with disabilities. (42 U.S.C. § 12147(b); 49 C.F.R. § 37.41 et seq.)

"Key stations" are chosen by the public entity based on various criteria including stations where passenger boarding exceeds 15% of the average, transfer stations, connections to other modes of transportation, end stations, and stations serving major activity centers. (49 C.F.R. §§ 37.47- 37.51.)

ii. Facilities Operated By Private Entities

Transportation facilities operated by private entities are subject to the same requirements as other facilities housing public accommodations. (49 C.F.R. § 37.21(a)(2); see section "i" above.) Generally, a place of public accommodation is required to facilitate access by (1) modifying policies, practices, or procedures, unless this would fundamentally alter the nature of the services; (2) providing auxiliary aids and services, unless this would fundamentally alter the nature of the services or would result in an undue burden; (3) removing architectural barriers if readily achievable and if not, using alternative methods, if those are readily achievable. (28 C.F.R. § 36.301-305.)

New facilities must be designed so that they are readily accessible to persons with disabilities and any alterations must be made so as to create accessibility. (28 C.F.R. §§ 36.402-405, with certain exceptions for measures taken to comply with barrier removal requirements; see 28 C.F.R. § 304.)

e. Taxis

While providers of taxi service are not required to purchase or lease accessible automobiles, they are subject to the general ADA provisions against discrimination. For example, taxi service providers may not discriminate against persons with disabilities by refusing to provide taxi services to individuals who can use them, refusing to assist with the stowing of mobility devices, or by charging higher fares or fees for carrying an individual with a disability and his or her equipment/or service animal.

If a provider of taxi service purchases or leases a vehicle other than an automobile, then the vehicle is required to be accessible, unless an equivalent service is provided for persons with disabilities. For example, taxi service providers who use vans in airport door to door service may only purchase non-accessible vans if they already provide an equivalent level of service for individuals with disabilities. An equivalent level of service means an equivalency in schedules, response time, fares, areas of service, hours and days of service, availability of information, reservations capability, constraints on capacity or service availability and restriction priorities based on trip service. (49 C.F.R. §§ 37.29 and 37.105.)

f. Reduced Faires

Mass transportation systems, whether trains or buses, which receive federal funds, are required to charge special rates for passengers who are disabled or elderly. During non-peak hours, rates for

passengers who are disabled or elderly may not exceed one-half of the regular peak-hour fares. (49 C.F.R. § 609.23)

g. Enforcement

If you feel that you have been discriminated against by private or public entities providing transportation services, then the following options are available. First, under the ADA, you always have the right to bring a private lawsuit against the offending party, whether it be a government agency or a private entity. If you decide to bring a lawsuit there is no requirement that you exhaust administrative remedies first and you may bring suit at any time - even if you are already involved in the administrative complaint process. You may also file a complaint with the United States Attorney General. You may also file a complaint with the Department of Transportation's Office of Civil Rights, which will investigate your complaint and take the appropriate action. If the Department of Transportation deems it appropriate, it will refer your case to the Attorney General for enforcement in court. (42 U.S.C. § 12188; 49 C.F.R. §§ 27.11 and 37.11; 28 C.F.R. § 36.501-36.508.)

C. Air Travel

1. General Law

The nondiscrimination mandate of section 504 of the Rehabilitation Act has been held by the U.S. Supreme Court not to apply to airlines which do not receive direct federal financial assistance. (*United States Dept. of Transp.* v. *Paralyzed Veterans of America* (1986) 477 U.S. 597.) Unlike mass transit, most airlines are not recipients of direct federal subsidies. The ADA does not apply to aircraft. (42 U.S.C. §§ 12141(2) and 12181(10).) Nonetheless, all air carriers and commuter carriers, regardless of whether or not they receive federal assistance, must comply with certain nondiscrimination laws and regulations. To assure that airlines do not discriminate against airline passengers, Congress enacted the Air Carriers Access Act of 1986. The Act prohibits air carriers, including foreign air carriers, from discriminating against persons with disabilities when they are otherwise qualified to use air transit. (49 U.S.C. § 41705.) Also, the ADA and the Rehabilitation Act still apply to services and accommodations provided by airlines and airports on the ground. (See section 2, *infra*.)

All airlines are prohibited from discriminating against an individual based on a disability. Disability is defined as: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) being regarded as having such an impairment. An airline has discretion as to whom it will carry, but it may not arbitrarily decide to exclude individuals based on disability, and any decision to exclude a passenger must be based upon legitimate safety considerations. (*Adamson* v. *American Airlines* (1982) 457 N.Y.S.2d 771, *cert. denied* (1983) 463 U.S. 1209.)

Service animals can accompany persons with disabilities. They may accompany the person in his or her seat unless that would block an aisle or emergency evacuation route. If that is the case, the carrier shall offer to move the passenger with the animal to another seat location. (14 C.F.R. §§ 382.37 and 382.55.)

2. Airports

Airport facilities are covered under the ADA (42 U.S.C. § 12181(7)(G)) and, if they receive federal funding, the Rehabilitation Act. (29 U.S.C. § 794.) This means that airports must provide access to individuals with disabilities under the same rules that apply to all public accommodations. Airports operated by public entities are subject to the ADA accessibility regulations for government services and programs.

New terminals must be accessible. Placement of elevators and other similar devices should minimize any extra distance persons in wheelchairs must travel. Persons with disabilities must be able to use the main ticketing, fare collection, baggage check-in and retrieval areas and inter-terminal transportation systems. Airport operators must provide adequate assistance in boarding and deplaning, with certain exceptions. (14 C.F.R. § 382.23; 49 C.F.R. § 27.1 et seq.)

Airport terminal information systems must accommodate the needs of persons with vision and hearing impairments by providing information both visually and orally. Service animals may accompany their owners. (49 C.F.R. § 37.167(d).) At least one clearly marked telephone with a volume control or sound booster device must be available for persons wearing hearing aids, and sufficient telecommunications devices (TTY) must be available to permit persons with hearing impairments to communicate with airport personnel. Clocks must be visible to persons with vision impairments.

In addition, parking areas, loading zones, waiting areas, and public services must be accessible. (49 C.F.R. § 27.71 et seq.; see the Americans with Disabilities Act Accessibility Guidelines, including section 10.4 concerning airport facilities, Appendix A to 49 C.F.R. § 37.)

3. Services and Reservations

All air carriers are prohibited from discriminating against, denying services to, or providing separate or different services to any otherwise qualified person with a disability. (14 C.F.R. §§ 382.5, 382.7 and 382.31.)

An air carrier may not require a person with a disability to be accompanied by an attendant, except under limited circumstances when a carrier determines that an attendant is essential for safety. Circumstances where a carrier may require an attendant to accompany an individual with a disability include: (1) where an individual is traveling in a stretcher or incubator; (2) where an individual with mental disabilities is unable to comprehend or to respond to safety instructions; (3) where an individual with severe mobility disabilities is unable to assist in his evacuation of the aircraft; or (4) where an individual with both severe hearing and vision impairments cannot establish some means of communication with carrier personnel adequate enough to permit transmission of safety information. (14 C.F.R. § 382.35(b).)

The need for minor assistance is not enough to require an attendant. A carrier may not refuse to transport an individual, traveling without an attendant, on the basis that the individual cannot feed himself or herself, if the individual elects not to eat during the flight. In addition, a concern by the carrier that assistance may be needed to allow an individual with a disability to use inaccessible lavatory facilities, or may otherwise need extensive special assistance for personal needs, is not a basis

to require an attendant to accompany an individual with a disability on the flight. Where an individual with a disability believes that he or she can travel independently, and is required by a carrier to bring an attendant on the flight, then the carrier must pay for the passage of the attendant. The individual with a disability may be eligible for denied boarding compensation if there is not a seat available for this attendant. (14 C.F.R. § 382.35(c).)

Carriers must allow passengers with disabilities to use personal ventilators/respirators, canes and crutches and to keep them nearby during flight, and must allow folding wheelchairs on board when they are not a threat to safety. Assistive devices shall not be counted toward limits on carry-on baggage. Airlines apply varying regulations to battery-powered chairs, and it is advisable to check with individual carriers. Carriers must provide assistance in boarding and deplaning without advance notice, unless special assistance is required (such as specialized equipment or additional personnel.) Carriers may not impose charges for providing facilities, equipment, or services which they are required to provide to passengers with disabilities. (See 14 C.F.R. §§ 382.37-382.57 for these and other regulations governing accommodation of passengers with disabilities.)

4. Enforcement

If you believe you have been discriminated against in air travel, you should contact the United States Department of Transportation or a private attorney. (49 U.S.C. § 41705.)

IV. ACCESS TO TELECOMMUNICATIONS

Both California law and the ADA require that telephone services be provided to individuals with speech or hearing impairments. In 1990, the ADA added a new section to the Communications Act of 1934, United States Code, title 47, section 151 et seq., directing the Federal Communications Commission (FCC) to establish regulations that will ensure that hearing- and speech-impaired individuals are provided with unlimited and affordable telecommunications services. (47 U.S.C. § 225(d).)

A. Telephone Systems

1. Non-Emergency Services

a. Telecommunication Devices and Relay Services

Under California law, every telephone corporation must provide an accessible telecommunications device to any telephone subscriber who is certified as deaf or hearing-impaired. This device, usually called "Telecommunications Device for the Deaf" (TDD) or a "Teletype Device" (TTY), must be provided free of charge. Organizations which represent persons with hearing impairments are also eligible for the special telecommunications device. (Pub. Util. Code, § 2881.)

A TDD or TTY is a device that resembles a typewriter with a message display used by individuals with speech and hearing impairments to communicate with other TDD users.

Common carriers must also provide telecommunications relay services to individuals with speech and hearing impairments that will allow them to communicate with those having unimpaired

hearing and speech. (47 U.S.C. § 225(b); 47 C.F.R. § 64.603.) The California Public Utilities Commission (PUC) is required to establish a "dual party relay system," which allows persons with hearing impairments to be connected, by way of intercommunication devices, with persons of normal hearing. This system is designed to make all phases of public telephone service accessible. (Cal. Pub. Util. Code, § 2881.)

"Telecommunication Relay Services" (TRS) are the technical means by which TDD/TTY users and hearing individuals are placed in communication with each other, with typed and voice messages being translated between the parties. The ADA defines relay services as telephone transmissions services that permit communication by wire or radio between hearing individuals and those with hearing or speech impairments that is functionally equivalent to the ability of a person without a hearing or speech disability to communicate through such means. (47 U.S.C. § 64.601(7).)

In addition, communication assistants, individuals who translate conversation from text to voice and vice versa, must be trained to effectively meet in the specialized communication needs of persons with hearing and speech impairments. Services must be available 24 hours per day and calls may not be limited in terms of duration or number. Provision is also made for confidentiality and emergency assistance. (47 C.F.R. § 64.604(a).)

Telephone companies may charge a certain amount to all subscribers in order to recover their costs in providing telecommunications devices for persons with hearing impairments. Federal law allows any telephone carrier to recover costs for producing specialized terminal equipment for people with impaired hearing, speech, vision, or mobility. Thus, there is no financial burden on telephone companies which produce telecommunication devices. (47 U.S.C. § 604.)

b. Enforcement

The FCC is assigned the duty to enforce the requirements imposed on telecommunications services by the ADA. If you feel that your telecommunications services have violated the ADA, you may file a complaint with the FCC. The FCC will then refer your complaint to a state agency if the complaint falls within the state's jurisdiction, or the FCC will handle the complaint itself where it involves interstate telecommunications. However, if a state agency has not resolved the complaint within 180 days, or within a shorter period, as prescribed by state regulations, the FCC will intervene to resolve the complaint. (47 U.S.C. § 225(e) and 47 C.F.R. § 64.604.)

2. Emergency Services

In California, any county which provides emergency services must provide hearing-impaired teletype equipment at a central location to relay requests for emergency services. In addition, all "911" public safety answering points must have a telecommunications device capable of servicing the needs of persons with hearing impairments. (Gov. Code, §§ 23025 and 53112.)

Under federal law, all "essential telephones" -- meaning coin-operated, emergency use, and other telephones which are frequently used by people with hearing aids -- must be compatible with hearing aids designed for telephone use. The FCC can delegate enforcement of this provision to the state under certain specified circumstances. (47 U.S.C. § 610.)

B. Television Broadcasting

1. Emergency Information

Television stations must usually transmit emergency information both aurally and visually when conducted under a national, state or local level Emergency Alert System (EAS) plan. Other emergency information may be broadcast both visually and aurally or just visually. (47 C.F.R. § 73.1250(h).)

2. Other Broadcasting

There are a number of ways of providing access to television programming for individuals with hearing impairments, none of which is wholly satisfactory from all perspectives. Providing sign language interpreters may not assist all individuals with hearing impairments. Open captioning, where written words on the screen are displayed to all viewers, provides the most access, but may be distracting to hearing viewers. Closed captioning, where written words are displayed only on those television sets that have a decoder, provides access only to people who can afford the decoder. All three methods impose some cost on the television station.

There are currently no laws or regulations which require television stations to provide any specific amount of broadcasting which is accessible to viewers with hearing impairments (except for emergency information, discussed above).

CHAPTER 5

EDUCATION

This chapter discusses the rights of persons with disabilities in primary and secondary education, pre-school education, and post-secondary education.

I. THE RIGHTS OF CHILDREN WITH DISABILITIES IN PRIMARY AND SECONDARY EDUCATION

A. All Children With Disabilities Have a Right to a "Free, Appropriate, Public Education"

Children with disabilities have a right to a free public education appropriate to their needs, regardless of the nature or severity of their disability. This right is guaranteed by both federal and state law. The phrase used to describe the education that must be provided to a child with a disability is a "free, appropriate, public education." In the following sections, the terms "free," "appropriate," and "public" are explained in detail.

The parents of a child with a disability have a right to participate in any decision about the education of their child. Specifically, a school district must:

- inform parents of any decision to evaluate their child for special education;
- obtain parents' permission before evaluating their child;
- allow parents to attend and participate in all planning conferences;
- inform parents of any proposed changes in their child's special education; and
- listen to, consider carefully, and respond respectfully to any complaints by parents.

In addition, if parents are dissatisfied with the school district's decision, they can ask the California Department of Education and the courts to review that decision. In the following sections, the scope of the school district's duties are explained in detail.

B. The Law

1. Federal Law

Before 1975, many children with disabilities were denied any education at all. In 1975, Congress passed a law, the "Education of the Handicapped Act," which confirmed the right of a child with a disability to a free, appropriate education. The Act was later amended and is now called the Individuals with Disabilities Education Act, or the IDEA. (20 U.S.C. § 1400 et seq.) Other federal statutes, such as the Rehabilitation Act and the ADA, also protect the right of a child with a disability to an education free from discrimination based on disabilities. (29 U.S.C. § 794 et seq.; 42 U.S.C. § 12131 et seq.)

Education is primarily the responsibility of states and local communities, rather than the federal government. For this reason, the federal statutes do not require the states to educate any children. The Rehabilitation Act instead prohibits discrimination against anyone on the basis of a disability in any

program supported by federal funding. Since every state accepts federal money for its general education programs, every state is forbidden to discriminate against a child with a disability in education. (29 U.S.C. § 794.)

Under the IDEA, any state that wants federal money for the education of a child with a disability must prove to the United States Department of Education that it provides a "free, appropriate, public education" to all children with disabilities between the ages of 3 and 21. (20 U.S.C. §§ 1400(c) and 1412.) The state must also show that it has procedures to insure:

- that all children with a disability within the state are identified and contacted (20 U.S.C. § 1412(a)(3)(A));
- that all children with disabilities within the state are evaluated (20 U.S.C. § 1412(a)(3)(A));
- that an "Individualized Education Program" is prepared for every child in need of special education (this will be discussed below) (20 U.S.C. §§ 1412(a)(4) and 1414(a)(1));
- that the services needed by a child are actually provided to the child (20 U.S.C. § 1412(a)(6));
- that in adopting policies, programs and procedures for IDEA that there be public hearings, adequate notice of those hearings, and an opportunity for comment from the public (20 U.S.C. §§ 1415; 1412(a)(6)); and
- that parents are permitted to get both administrative and judicial review of any school district decision concerning their child (this is discussed in more detail below.) (20 U.S.C. § 1415.)

By accepting federal money, a state assumes the duty to provide to every child with a disability within the state an appropriate primary and secondary education. (*Board of Education* v. *Rowley* (1982) 458 U.S. 176.)

2. State Law

California accepts federal money for the education of children with disabilities, and therefore must provide children with disabilities a free, appropriate education under the federal statutes discussed above. In addition, California itself has enacted statutes concerning the education of children with disabilities, and these statutes sometimes provide greater benefits than federal law. (Ed. Code, § 56000 et seq.)

C. A Free, Appropriate, Public Education

1. "Special Education" and "Related Services"

States must provide both special education and related services for children with disabilities.

a. Special Education

"Special education" means instruction specially tailored to the needs of a child with a disability. (*Abrahamson* v. *Hershman* (1st Cir. 1983) 701 F.2d 223; *Kruelle* v. *New Castle County School District* (3rd Cir. 1981) 642 F.2d 687.) Usually, instruction is in the same subjects taught to other children -- reading, spelling, arithmetic, science, American history, etc. -- in a way or at a pace that helps the child with a

disability learn. However, special education can also include instruction in basic aspects of daily life -- toilet training, personal care, etc. -- if that is the sort of instruction a child with a disability needs. Special education can also include instruction in methods of communication specially tailored to the needs of a child with a disability, such as American Sign Language and the use of Bliss symbols.

Special education also includes physical education, either offered to children with disabilities along with other children or modified to meet the unique needs of the child with a disability. (20 U.S.C. § 1401(25).)

b. Related Services

"Related services" are supportive services that enable children with disabilities to take advantage of their special education. Examples of related services are transportation to and from school, between schools, and between or within school buildings, including the use of wheelchair - accessible buses and vans, occupational and physical therapy, speech therapy, and school health services.

Related services are services other than instruction that make the instruction meaningful. Medical services provided by a doctor are not included, but school health services may administer drugs or services prescribed by a doctor. Necessary services which a nurse or lay person could perform must be provided. For example, intermittent catheterization for a child suffering from spina bifida must be provided, since the procedure can be accomplished by a trained nurse or lay person. (*Irving Independent School District* v. *Tatro* (1984) 468 U.S. 883.) Since there are so many different kinds of disabilities, it is impossible to list every kind of supportive service a child might need. If a child needs a particular service during the school day in order to attend or profit from school, then the school district generally must provide it. (20 U.S.C. § 1401(29); *cf. Nevada County Office of Education* v. *Riles* (1983) 149 Cal.App.3d 767.)

2. What Is An "Appropriate" Education?

a. The Program Must Allow Progress in Learning

A school district must provide a child with a disability with an "appropriate" education. A school district is not required to do everything possible to maximize the child's achievement or fulfillment of his or her potential. Under federal law, the school district simply must provide a child with a disability with a special education that enables the child to make progress in learning.

b. Mainstreaming Should Be the Goal

School districts are required to educate children with disabilities together with children who do not have disabilities to the maximum extent feasible, so long as the co-education of children with disabilities and children without disabilities will meet the educational needs of the child with a disability. (20 U.S.C. § 1412(a)(5)(A).) The right of children with disabilities to be educated with children who do not have disabilities includes the right to participate in non-academic and extracurricular activities. The only situations which justify educating children with disabilities apart from children who do not have disabilities are when:

- "mainstreaming" would be of no benefit to a child with a disability;
- the benefits of educating a child with a disability in isolation from children who do not have disabilities far outweigh the benefits of "mainstreaming";

- a child with a disability disrupts the education of the children who do not have disabilities; or
- the costs of educating a child with a disability in an ordinary classroom are prohibitive.

Although cost is a legitimate consideration, the school district is required to make reasonable accommodations to enable a child with a disability to attend school in a regular classroom. (See *Daniel R.R.* v. *State Board of Education* (5th Cir.1989) 874 F.2d 1036.)

c. Private or Boarding Schools Are Sometimes "Appropriate"

An appropriate education can include placement in a private school, including a boarding school, if a child with a disability needs that placement in order to make progress in learning. A placement in a private day or boarding school is appropriate, however, only when the school district cannot provide a child with a disability with an adequate education in the public schools. (*Burlington School Committee* v. *Department of Education* (1985) 471 U.S. 359.)

3. Public School Districts Are Responsible for Providing Education to Children With Disabilities

The responsibility of providing an appropriate education to children with disabilities is a public responsibility. The immediate responsibility rests with the school district. The ultimate responsibility rests with the California Department of Education. (20 U.S.C.A. § 1412(a)(11).) Small school districts can join together to meet their duties under the law. A group of small school districts acting together is called a "special education local plan agency" (SELPA). In this handbook, the local responsible agency is always called "the school district," but that includes SELPAs and the county education offices. Even if special education or related services are provided in a private school or by a private agency, the school district is responsible for planning and supervision of and payment for the private services. The school district cannot surrender its responsibility to a private agency or even to another public agency. (*Kruelle* v. *New Castle County School District* (3rd Cir. 1981) 642 F.2d 687.)

4. Education for Children With Disabilities Must Be Provided at No Cost to the Parents

Both special education and related services, must be provided at public expense, meaning at no charge to the parents. (34 C.F.R. § 300.13.) The school district must pay for experts who provide speech, physical, or occupational therapy, specially-qualified teachers, and special equipment needed by a child with a disability in order to benefit from his or her special education. If the school district

puts a child in a private school, then the school district must pay tuition and transportation. If the school district puts a child in a boarding school, then the school district must pay for the child's room and board, in addition to the costs of tuition and transportation.

There is one exception to the duty of the school district to pay for the education of a child with a disability. If the parents reject an appropriate education offered to their child by the school district (for example, because they want to send their child to a religious school), then the school district must only pay for its own decision, not the parents' decisions. (*Teague Indep. Sch. Dist.* v. *Todd L.* (5th Cir. 1993) 999 F.2d 127.)

D. Eligibility & Procedures

1. Who is Eligible for Special Education and Related Services?

a. The Child Must Have a Disability

The benefits of the IDEA are available only to those who have "disabilities," as the term is defined in the Act itself. Disability is defined broadly and includes every condition -- organic, mental, or behavioral -- that might affect a child's performance in school.

Included are orthopedic impairments (for example, spina bifida and muscular dystrophy), sensory organ impairments (for example, visual and hearing impairments), neurological impairments (for example, epilepsy and cerebral palsy), and mental disabilities (for example, Down's Syndrome). Specifically excluded from the definition of disabled are children who are disadvantaged because of environmental, cultural, or economic reasons. (Ed. Code, § 56026, subd. (e).)

Nonetheless, while disadvantages caused by environmental, cultural, or economic factors are excluded, both federal and state law include "severe emotional disturbance" within the definition of disabled. Sometimes it is difficult to tell if a child's poor school work is caused by "severe emotional disturbance" or by social factors. The courts have decided that if a child is behaving in "emotionally disturbed" ways, then it does not matter what caused the child's behavior. If a child behaves in emotionally disturbed ways that interfere with his or her learning, then the school district is responsible for providing the child with special education and related services. (20 U.S.C. § 1401(3)(A)(i); *Christopher T.* v. *San Francisco Unified School District* (N.D.Cal. 1982) 553 F.Supp. 1107.)

b. Children Usually Must Be Between Ages Five and Eighteen, But Some Older Children Are Also Eligible

All children with disabilities between the ages of five and eighteen whose disability adversely affects their performance in school are entitled to special education and related services. In addition, any person with a disability between the ages of 19 and 21 is entitled to special education and related services if the student was enrolled in or eligible for a special education program before he or she turned 19, and the student has not yet satisfied the graduation requirements applicable to him or her.

If an individual turns 22 while enrolled in a special education program, he or she may continue in that program until the end of the school year. (20 U.S.C. § 1412(a)(1); Ed. Code, § 56026.)

c. The Child Must Have a Record of Poor School Performance

Having a disability or a health problem is not enough to make a child eligible for the benefits of the Act. A child must have a disability that actually affects school performance in a negative way. For example, a child with completely controlled epilepsy who is able to participate satisfactorily in a regular classroom would not be eligible for special education. Basically, special education and related services are only available to those who need them. (34 C.F.R. §§ 300.7 and 300.26.)

2. What Procedures Must Be Followed Before a Child May Receive Special Education and Related Services?

a. The Child Must Be Evaluated

i. Request an Evaluation

A child's eligibility for special education is determined by a process called "assessment" or "evaluation." The state and school districts are required to try and find all children who might be entitled to special education. However, anyone can request the assessment of a child. Requests for an assessment must be in writing. The school district must provide assistance to anyone making an oral request for the assessment of a child.

ii. A Child Cannot Be Evaluated Without Parental Consent

No child may be evaluated without his or her parents' consent. "Parent" includes any person having legal custody of the child. The school district must explain to the parents exactly how the assessment will be done. The explanation must be in writing and in the parents' own language. If the parents' primary method of communication is American Sign Language (ASL), then the explanation must be given in ASL. If the parents' own language cannot be written, then the explanation must be given to the parents orally in their own language, as well as in written English. If the parents agree to an assessment of their child, then they must sign a consent form provided by the school district. The school district must explain to the parents that they have a right to change their minds at any time, even after they have signed the consent form. If the parents refuse to consent to an assessment of their child, the school district may request a hearing to require the assessment. (34 C.F.R. § 300.500 et seq.)

iii. Testing Requirements

The persons actually doing the assessment of a child must be trained professionals. The tests used to evaluate a child must be fair, accurate, appropriate, and free of ethnic, cultural, or sexual bias. The tests must be given so that the results are not distorted by a child's disability and must, if at all possible, be given in a child's own language or method of communication. Tests must be given in every area that might explain a child's poor school performance, including tests for hearing and vision. The persons who give the tests must make a written report on all tests given to a child. The parents are entitled to a copy of the report in their own language or method of communication. (20 U.S.C. § 1412(6)(B); 34 C.F.R. §§ 300.530 and 300.543.)

iv. Parents May Request Independent Assessments

If the parents disagree with the results of the evaluation, they may ask for an independent evaluation of their child at public expense. The school district may either agree to pay for an independent evaluation, or it can ask for a review of the results of its tests by an independent hearing officer. If the school district agrees to pay for an independent assessment, the persons who do the independent assessment must be as experienced as the persons who did the school district's assessment. The parents may get an independent assessment of their child at their own expense at any time. If the parents do get an independent assessment, then the school district must consider it when deciding how to educate the child. (34 C.F.R. § 300.502.)

b. Planning the Education of a Child With a Disability

i. The "Individualized Educational Program"

Once it has been decided that a child has a disability which makes special education and/or related services necessary, the school district must develop an individualized educational program (or IEP) for the child. An IEP is basically a plan of action for the education of a child. (20 U.S.C. § 1401(11).) It must contain all of the following:

- a statement of the child's present educational performance;
- a statement of the educational goals for the child, both for the immediate future and for the school year;
- a statement about what type of special education and which related services the child will receive;
- a statement about the beginning date and duration of the special education and related services;
- a statement listing any needed transition services;
- a statement of the standards by which the child's educational progress will be measured; and
- a statement about how much of the child's time will be spent in a regular classroom and how much of the child's time will be spent in a special classroom.

ii. Development of the IEP

The IEP is developed by a team of people, including the parents. The members of the team must include a representative of the school district and the child's teacher. The team can also include experts or other persons chosen by the school district and education experts the parents choose to include. The team may also include the child with a disability, if appropriate. The team reviews the results of the assessment, decides what the child's special education and related services needs are, decides how the child's needs can best be met, and writes the IEP. The first IEP written for a child with a disability generally must be developed within 50 days of the date on which the parents signed the form consenting to an assessment of their child. (Ed. Code, § 56344; 34 C.F.R. § 300.340 et seq.)

iii. The School District Must Facilitate Parental Involvement in Developing the IEP

The school district must make it as easy as possible for the parents of a child with a disability to participate in the planning of their child's education. The school district must give the parents notice of the meetings of the IEP team in the parent's own language or primary method of communication, and must schedule the meetings at a time convenient for the parents. The parents have the right to present information to the rest of the team and to have their opinions carefully considered. If the parents do not speak English or are hearing-impaired, the school district must provide an interpreter for them at the meetings of the IEP team. The parents are entitled to a copy of their child's IEP at no cost to them. If the parents request it, the school district must give them a copy of their child's IEP written in their own language. (20 U.S.C. §§ 1401(11), 1412(4), and 1414(c)(1); 34 C.F.R. § 300.345.)

c. Placement in Special Education and Related Services

i. General Law

Once the evaluation and planning processes are completed, and the parents have given their consent, the school district must immediately begin to provide the special education and the related services listed in the IEP.

However, if the total cost of all special education and related services provided to a child with a disability is greater than $20,000 per year, the Superintendent of Public Instruction must review the IEP to determine if the IEP team made adequate efforts to find an appropriate, but less expensive, placement for the child. At most, this can delay the child's special education and related services for two or three weeks.

ii. Parental Consent is Required in Order to Provide Special Education or Related Services

No child may be placed in any special education program or provided with related services without the written consent of the child's parents. The parents may consent to only a part of the IEP and object to the rest. For example, the parents may consent to all or part of the related services listed in the IEP and refuse to consent to the proposed special education program. If the parents consent to some part of the IEP, then the school district must immediately provide the services for which consent has been given. A parent may object to any part of the IEP, either on the ground that it is unnecessary or on the ground that it is inappropriate or inadequate. (Ed. Code, § 56346; 34 C.F.R. § 300.505.)

If the parents refuse to consent to any part of the IEP prepared for their child, then either the parents or the school district may request a hearing before an independent hearing officer provided by the California Department of Education. If the dispute is over a service demanded by the parents and denied by the school district, then the hearing officer must make an independent determination of the needs of the child. However, if the dispute is over a service offered by the school district and rejected by the parents, then the duty of the hearing officer is less clear. Because parents have a constitutional right to control and direct the education of their children, both the school district and the hearing officer may lack the authority to overrule the parents unless a child's presence is disruptive of a regular classroom or the parents are endangering the child. (However, see also *Wilson* v. *Marana Unified School District* (9th Cir. 1984) 735 F.2d 1178.)

d. Changes in Placement or Education Program of a Child With a Disability

i. There Must Be a Periodic Reassessment of the Child

Every child with a disability who receives special education or related services must be reevaluated at least once every three years. A reevaluation must also take place if the circumstances make it appropriate or if a child's parents or teachers request it. Reevaluations are conducted under the same rules that apply to initial evaluations. (34 C.F.R. § 300.536.)

ii. The IEP Must Be Reviewed at Least Annually

The IEP team must review and revise a child with a disability's IEP at least once a year, when requested to do so by a child's parents or teachers or whenever a child is not making educational progress. The parents may request a review of their child's IEP no more than twice a semester. The procedures and protections applicable to the first IEP team meeting apply to later IEP team meetings. (20 U.S.C. § 1413(d)(4)(A); 34 C.F.R. § 300.146.)

iii. A School District May Not Change a Child's Placement Without Notice

Although parental consent is required before a child may be placed in a special education program for the first time, parental consent is not required before the school district changes a child's placement. However, if the school district plans to change a child's placement, it must give the parents notice of its plans in writing and in the parents' own language or primary method of communication. If the parents object to the plan, they may request a hearing before an independent hearing officer provided by the California Department of Education. (Ed. Code, § 56500 et seq.; 34 C.F.R. § 300.504.)

Not every change that a school district makes is considered a change in placement requiring detailed advance notice. For example, a change in the location at which the special education and related services are to be provided would not generally be considered a change in placement. A change in placement is a fundamental change in the type of special education or related services provided to a child with a disability. For example, a change from a regular classroom to a special classroom would be a change in placement, and a transfer of a child from a school that offers a year-round program to a school that does not offer a year-round program would be a change in placement. (*Tilton* v. *Jefferson County Board of Education* (6th Cir. 1983) 705 F.2d 800, *cert. den.* (1984) 465 U.S. 1006; *Concerned Parents & Citizens* v. *New York Board of Education* (2d Cir. 1980) 629 F.2d 751, *cert. den.* (1981) 449 U.S. 1078.) Note that children with disabilities and their parents are entitled to a hearing before an independent hearing officer provided by the California Department of Education whenever the school district makes a decision that the parents believe denies their child a free, appropriate, public education. State hearings are discussed below.

iv. A Child With a Disability May Not Be Expelled

A short suspension of a child with a disability for misbehavior is not a change in placement necessitating detailed advance notice. Expulsion, however, is a change in placement. Therefore, a s school district cannot use the procedures used in expelling other children in expelling children with disabilities. Although a school district can change a child with a disability's placement if the child is disruptive, the school district cannot expel a child whose misbehavior is a manifestation of, or is caused by, his or her disability. Even when a child with a disability may properly be expelled, the school district cannot refuse to offer some form of education to the child. *(Cf. Honig* v. *Doe* (1988) 484 U.S. 305; *Kaelin* v. *Grubbs* (6th Cir. 1982) 682 F.2d 595.)

v. Graduation is a Change in Placement

Parents have a right to notice and an opportunity to object before a child with a disability graduates if the child has not met district graduation requirements and is under the program's age limit. Graduation is considered a change in placement because it means termination of special education and related services. An IEP team must set special graduation requirements for a child with a disability unable to meet the usual requirements. Parents participate as members of the IEP team.

E. Administrative & Judicial Review

1. Administrative Review

a. Parental Rights to Administrative Review

The parents of a child with a disability have a right to administrative review whenever they are dissatisfied with a school district decision concerning their child. (Ed. Code, § 56500 et seq.) For example, the parents of a child with a disability have a right to administrative review whenever they object to:

- the kinds of tests used by the school district to evaluate the child;
- the conclusions reached by the persons doing the evaluation of the child;
- the type of special education offered or denied the child and/or the related services offered or denied the child;
- the specific placement proposed for the child; or
- the denial of the parents' procedural rights (their rights to fair notice of all school district decisions concerning their child in their own language, their rights to participate in planning their child's education, etc.).

b. School District's Rights to Administrative Review

The school district also has the right to request administrative review. The school district can request administrative review whenever there is a disagreement between it and the parents.

c. Filing a Complaint and Holding a Mediation Conference

Administrative review begins when a complaint is filed with the Superintendent of Public Instruction. However, either party may request a voluntary mediation conference at any time. The mediation conference will be held within 15 days of the filing of a request for mediation with the superintendent. In a mediation conference, a disagreement is resolved only when both parties agree. If the parties cannot resolve all their disagreements, then the dispute must be resolved at an administrative hearing. (Ed. Code, §§ 56500.3 and 56503.)

d. Parents Have the Right to Inspect All Their Child's Records

The parents of a child with a disability have the right to inspect and make copies of any and all records maintained by the school district concerning their child. The school district must make the records available for inspection and copying within five days of the parents' request to see them. The school district must also give the parents an opportunity to inspect and copy their child's records before a meeting of the IEP team, a mediation conference, or an administrative hearing. The school district may ask the parents to pay the costs of the copying of the records, but if the parents cannot afford the costs of copying, then the school district must give them free copies. (Ed. Code, § 56504; 34 C.F.R. §§ 300.502 and 300.566.)

e. Administrative Hearing

Any party may choose to present its evidence and argument through a lawyer. The Superintendent of Public Instruction must give the parents information on any free or low-cost representation available in the area whenever the parents request the information or file a complaint. (Ed. Code, §§ 56502 and 56507; 20 U.S.C § 1415(h); and *McSomebodies* v. *Burlingame Elementary School Dist.* (9th Cir. 1989) 897 F.2d 974.)

f. The Child's Placement Remains the Same During Administrative Review

The filing of a complaint preserves things as they are. If the dispute between the parents and the school district concerns the assessment or placement of the child, the assessment or placement cannot be carried out during the administrative review. If the dispute between the parents and the school district concerns the type of special education or related services needed by the child, the child's program must remain the same until the dispute is resolved. If the child was not in school at all, he or she must be allowed to enroll in a regular public school program during the administrative review. However, the parents and the school district can negotiate a temporary agreement about special education, related services, or placement. (20 U.S.C. § 1415(j).)

Parents have the final responsibility for the protection and education of their children. Although parents must send their children to school, parents need not leave their children in a school where they are denied the education they have a right to or the services they need. If the school district refuses to provide needed special education, needed related services, or an appropriate placement, then the parents can send their child to a school that does provide the appropriate education, services, or placement. The parents will be reimbursed for the cost of sending their child to the alternative school. However, if the hearing officer or the courts ultimately decide in favor of the school district, then the parents must pay for the school they choose. (*Union School Dist.* v. *Smith* (9th Cir. 1994) 15 F.3d 1519, *cert. den.* (1994) 115 S.Ct. 428.)

2. Judicial Review

a. General

Any party dissatisfied with the hearing officer's decision can file a lawsuit. The lawsuit can be filed in either federal district court or California superior court. Generally, a parent or child must exhaust the administrative remedies available before filing a lawsuit. In other words, a parent must file a complaint with the Superintendent of Public Instruction and use the hearing process before filing a lawsuit in federal or state court. (*Smith* v. *Robinson* (1984) 468 U.S. 992.) In some cases a court will hear the suit without use of the administrative process, but this is generally only allowed where the hearing would be futile (as where a child with a similar problem was already denied relief) or where the school district has failed in its statutory duty to inform the parents of the complaint procedures. (*Doe* v. *Maher* (9th Cir. 1986) 793 F.2d 1470.)

b. The Child's Placement During Judicial Review

If the hearing officer decides in favor of the parents of a child with a disability, then the school district must immediately obey the hearing officer's order. Only a judge may permit the school district to disregard the hearing officer's decision.

Federal law gives parents the right to insist that their child remain wherever he or she was before the dispute arose, during both administrative and judicial review. This means that the school district may not change a child's status, program, services or placement over the parents' objections, even if the hearing officer decides in favor of the school district, unless a court issues an order to the contrary. (20 U.S.C. § 1415(j).)

If the hearing officer decides in favor of the school district and denies a child a type of program, service, or placement that the parents think the child needs, the parents can ask the judge for a preliminary injunction ordering the school district to provide what is needed. The parents can also arrange privately for the child to receive the educational program, services, or placement that he or she needs. If the parents ultimately prove that the hearing officer's decision was wrong, and that their child does need what the parents provided privately, the school district will be required to repay the parents their costs. (*Doe* v. *Brookline School Committee* (1st Cir. 1983) 722 F.2d 910.) Of course, if the judge ultimately decides that the hearing officer was right, then the parents must pay for the privately-arranged program, services, or placement themselves.

c. Court Proceedings

The trial judge makes an independent decision on the basis of both the hearing officer's decision and any additional evidence which is presented.

II. PRESCHOOL EDUCATION

A. Children Younger Than Five May Be Eligible For Special Education Benefits

Children who are younger than five years old and who, because of their disability, require special education may be eligible for education services. To be eligible for early education services, children must generally satisfy the same requirements as those used for older children. Physical, mental and emotional disabilities will entitle children to available services. Services may include assistance for parents in coordinating other services provided by agencies in the area, access to developmentally appropriate equipment and specialized materials, activities to aid in the child's development, and other general services. (Ed. Code, §§ 56441.3 and 56441.11.)

California also provides for services for children two years and younger under the California Early Intervention Services Act. (Gov. Code, § 95000 et seq.) The purpose of this Act is to enhance development and minimize the potential for developmental delays by providing early intervention services for infants and toddlers who have disabilities or who are at risk of becoming disabled.

Eligibility for services is reserved for infants and toddlers with specific developmental delays, or conditions with harmful developmental consequences, or for children who are at high risk of acquiring a developmental disability. Specifically, infants or toddlers who have developmental delays in one of the following areas are eligible:

(1) cognitive development;

(2) physical and motor development (including vision and hearing);

(3) communication development;

(4) social or emotional development; and

(5) adaptive development.

Infants or toddlers are also eligible where they have conditions of known etiology or conditions which have established harmful developmental consequences, or where they are at high risk of having a substantial developmental disability due to a combination of biomedical risk factors. (Gov. Code, § 95014.)

For information on the services available, contact your local regional center. If your child has visual, hearing or orthopedic impairments, contact your local educational agency.

B. Eligible Preschool Children Have the Same Rights as School Age Children

Whenever a preschool age child is eligible for special education, both the child and the parents are entitled to all of the rights of school-age children with disabilities and their parents (discussed above).

III. POST-SECONDARY EDUCATION

A. General Law - Section 504

All post-secondary programs, including vocational programs, which receive federal financial assistance, are prohibited by section 504 of the Rehabilitation Act from discriminating on the basis of disability. Section 504 provides that no qualified individual with a disability shall be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. This section focuses on the impact of section 504 on post-secondary education.

In general, it is unlawful to discriminate against an otherwise qualified individual with a disability in any academic, research, insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or any other post-secondary education program or activity which receives federal financial assistance. (29 U.S.C. § 794; 34 C.F.R. § 104 et seq.)

B. What is a "Program or Activity?"

Until 1988, court decisions limited the scope of section 504 protection to the specific program or activity which received federal money. Thus, if a college received federal assistance only in the form of student financial aid (such as Guaranteed Student Loans and federal grants to students), then only the financial aid department of the college would have had to comply with section 504, not the entire school. Legislation which broadened the scope of section 504 was enacted in 1988. (29 U.S.C. § 794(b).)

C. Nondiscrimination in Admissions, Recruitment, and Accommodation

A "qualified individual with a disability" may not be denied admission or be subjected to discrimination in admissions or recruitment solely because of his or her disability. Schools may not limit the number or proportion of students with disabilities, and may not use any admission tests which have a disproportionate, adverse effect on applicants with disabilities, unless such tests are valid predictors of success in the specific program and alternative tests or criteria are not available. Admissions tests must accurately reflect the applicant's achievement level and not merely reflect his or her disability.

Admissions officers may not ask whether an applicant is disabled, unless it is clearly stated that the information is voluntary, will be kept confidential, and is being used solely in order to monitor the school's compliance with nondiscrimination laws.

A post-secondary education program which receives federal funds must modify its academic requirements, if necessary, to ensure that a person with a disability is not discriminated against, and must provide "auxiliary aids" such as readers, interpreters, and adapted classroom equipment. However, educational programs do not need to modify requirements which are "essential" to the program. An "otherwise qualified" individual with a disability has been interpreted to mean someone who meets all of a program's requirements, despite his or her disability. Thus, a nursing school, for example, may impose valid physical qualifications for admission to a clinical program; it need not waive important academic requirements or provide an interpreter so that a person with a hearing

impairment can participate in the program, when the ability to hear is validly deemed essential to successfully participate in the clinical program. (34 C.F.R. § 104 et seq.; *Southeastern Community College* v. *Davis* (1976) 442 U.S. 397.)

D. Nondiscrimination in Housing

If a school which receives federal assistance provides housing for students who do not have disabilities, it must provide comparable, convenient, and accessible housing for students with disabilities at the same cost. In general, the number and variety of living accommodations available to students with disabilities must be comparable to that available to non-disabled students. (34 C.F.R. § 104.45.)

E. Nondiscrimination in Financial Aid

A school which receives federal assistance may not, on the basis of disability, provide less financial aid, limit eligibility for financial aid, or discriminate in any other way against applicants with disabilities and recipients of financial aid. (34 C.F.R. § 104.46.)

Special scholarships and awards which may discriminate are valid only if the overall effect of the award or scholarship is not discriminatory on the basis of disability. For example, it might not be considered discriminatory to deny a varsity football scholarship to an individual with a neurological disorder, but it would be discriminatory to deny a diving team scholarship to an individual solely because he or she has a hearing impairment. The decision must be based on comparative athletic ability, not on the absence or presence of a disability.

F. Nondiscrimination in Nonacademic Services

A recipient of federal assistance may not discriminate on the basis of disability in providing physical education courses and athletic programs, and must provide qualified students with disabilities an equal opportunity to participate. A school may only offer separate or different physical education and athletic programs if they are not discriminatory and if qualified students with disabilities have the opportunity to participate in the regular programs.

Personal, academic or vocational counseling must be provided without discrimination on the basis of disability. It is discriminatory to counsel students with disabilities to pursue more restrictive career objectives than non-disabled students with similar interests and abilities. (34 C.F.R. § 104.47.)

CHAPTER 6

PARENTAL RIGHTS

I. PARENTAL FITNESS

Persons with disabilities have the same right as anyone else to bear and raise children. A parent's or child's disability does not by itself indicate a need for intervention by child protective services. A parent's physical disability cannot be used as a basis to deny him or her child custody, unless the disability prevents the parent from exercising care and control. (Welf. & Inst. Code, §§ 300, subd. (b) and 16509.2.)

For example, one California appellate court has held that termination of the parental rights of an individual with a developmental disability required a showing by clear and convincing evidence that services designed especially for her needs had been tried without success, and that despite such services it could be shown that the child's best interests required that she be declared free for adoption. (*In re Victoria M.* (1989) 207 Cal.App.3d 1317.)

II. CHILD CUSTODY

In California, child custody decisions are made according to the best interests of the child. A person cannot be denied custody solely because he or she has a physical disability. A parent's health or physical condition may be considered in the custody decision, but cannot be presumed to affect the child negatively or to make the parent unfit to have custody. The special contributions a parent with a disability may give to the child's development must be considered. A court may deny custody to a parent with a disability only if the parent's condition will have a substantial and lasting negative effect on the child. (*In re Marriage of Carney* (1979) 24 Cal.3d 725.) A parent with a mental disability may be denied child custody only if suffering from a mental incapacity or disorder which renders him or her unable to care for and control the child adequately. (Fam. Code, § 7827.)

III. ADOPTION

Persons with disabilities can adopt children. All adoptions are based on the best interests of the child. Although the health of a prospective parent is one of many factors in an adoption decision, a parent's disability cannot be the sole reason for denial. (*Adoption of Richardson* (1967) 251 Cal.App.2d 222; Fam. Code, § 8612.)

The Adoption Assistance Program provides assistance and financial aid to prospective adoptive parents of "hard-to-place" children. A hard-to-place child includes a child with physical, mental, emotional, or medical disabilities. (Welf. & Inst. Code, § 16120; Cal. Code Regs., tit. 22, § 35325 et seq.) An adopted child with a disability who requires medical treatment may be eligible for care at no cost through the California Children's Services Program, regardless of the income of the adoptive family. (Health & Saf. Code, § 123965.) Expenses related to the adoption of a child with special needs may also be tax-deductible.

CHAPTER 7

PROGRAMS AND SERVICES

This section describes the following special services and programs for persons with disabilities: In Home Supportive Services, rehabilitation services, Independent Living Centers, regional centers, and community mental health services. These programs are funded by state and federal governments and may be available without cost. Additionally, some private organizations may provide similar services.

I. IN HOME SUPPORTIVE SERVICES (IHSS)

In Home Supportive Services (IHSS) is a state-sponsored program whose purpose is to allow persons with disabilities to live safely and independently in their homes. (Welf. & Inst. Code, § 12300 et seq.) Any person with a disability eligible to receive MediCal or SSI is eligible to receive IHSS. Applications can be made through your county Department of Social Services.

IHSS pays the cost of supportive services for persons with disabilities who are unable to perform these services themselves and who could not safely remain in their homes without this help. Supportive services include cleaning, cooking, shopping, laundry, personal care and grooming, transportation to medical appointments, paramedical services, teaching and demonstration directed at reducing need, and protective supervision. In certain circumstances, a spouse or parent may be paid to provide supportive services.

II. REHABILITATION SERVICES

Congress has established federal and state-funded vocational training programs designed to increase the employment of persons with disabilities. The Department of Rehabilitation is the state agency in California charged with the development and supervision of services necessary to achieve this goal.

A. Eligibility For Services

Vocational rehabilitation services are available to any individual with a mental or physical disability who is of employable age and who can benefit from rehabilitation services. A person with a disability is defined here as someone with a mental or physical disability which creates a barrier to employment. (Welf. & Inst. Code, § 19151.) Financial need may be taken into account when a determination of eligibility is made for these services. (Welf. & Inst. Code, § 19018; 29 U.S.C. § 701 et seq.)

B. What Vocational Rehabilitation Services Are

- evaluation of rehabilitation potential;
- counseling, guidance, and work-related placement services;
- training services, including personal and vocational adjustment, books and other training materials;

- reader services for the persons with visual impairments and interpreter services for persons with hearing impairments;

- job coaching services that may include any of the following: on-the-job skill training, observation or supervision at the work site, consultation and/or training of coworkers and supervisors, assistance in integrating into the work environment, destination training, assistance with public support agencies, family and residential provider consultation, and any other on- or off-the-job support services needed to reinforce and stabilize job placement;

- recruitment and training services to provide persons with disabilities with new employment opportunities in the fields of rehabilitation, health, welfare, public safety, law enforcement, and other appropriate service employment;

- certain corrective surgery;

- transportation related to vocational rehabilitation services;

- services to the families of individuals with disabilities which will contribute substantially to the rehabilitation of the clients; and

- other services related to rehabilitation, such as goods and services to render a person with disabilities employable. (Welf. & Inst. Code, § 19150.)

C. Application Procedures

Applications for vocational rehabilitation services can be made to the Department of Rehabilitation. A list of offices throughout the state is included in the Directory of Services.

D. The Rehabilitation Appeal Process

If you have applied for services and have been found to be ineligible, or have had services discontinued, you may appeal the action to supervisory staff within the Department. You may also have your case heard before the Rehabilitation Appeals Board. A request for review must be filed within one year of the action. (Welf. & Inst. Code, § 19704 et seq.; 29 U.S.C. § 722 et seq.)

III. INDEPENDENT LIVING CENTERS

Independent Living Centers are designed to assist persons with disabilities in living fuller and freer lives outside institutions. The purpose of Independent Living Centers is to promote and practice the independent living philosophy of: (1) consumer control of the center regarding decisionmaking, service delivery, management, and establishment of the policy and direction of the center; (2) self-help and self-advocacy; (3) development of peer relationships and peer role models; and (4) equal access of individuals with disabilities to society and to all services, programs activities, resources, and facilities, whether public or private and regardless of the funding source.

Independent Living Centers are private, non-profit organizations. (Welf. & Inst. Code, § 19801.) The staff of these centers is trained to assist persons with disabilities in achieving economic

and social independence. Services provided by Independent Living Centers include peer counseling, advocacy, attendant referral, housing assistance, and information and referral. Other services, such as transportation, job development, equipment maintenance, training in independent living skills, assistive technology assistance, and mobility and communication assistance may also be available. (Welf. & Inst. Code, § 19801.)

IV. REGIONAL CENTERS

Generally, regional centers work closely with other state agencies to advocate on behalf of developmentally disabled people, to educate and inform the public, and to ensure that legal and civil rights are enforced. Regional centers assist persons with developmental disabilities and their families in securing those services and support which maximize opportunities and choices for living, working, learning and recreating in the community. (Welf. & Inst. Code, § 4640, et seq.) Regional centers are private, non-profit community agencies. (Welf. & Inst. Code, § 4622.)

For purposes of regional center eligibility, a developmental disability is one which begins before an individual is 18 years old, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for the individual. Mental retardation, cerebral palsy, epilepsy, and autism are all considered developmental disabilities. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature. (Welf. & Inst. Code, § 4512, subd. (a).)

Individuals with developmental disabilities, persons believed to have a high risk of parenting a child with a developmental disability and infants with a high risk of becoming developmentally disabled, are all eligible for initial intake and assessment services in the regional centers. (Welf. & Inst. Code, § 4642.) Applications for services can be made at a local regional center.

A. The Regional Center Appeal Procedure

A recipient of regional center services who believes a decision or action of the center is illegal, discriminatory, or not in his or her best interest can file an appeal. The regional center is required to assist the recipient in the appeal process. The applicant or recipient must request a hearing within 30 days of notice of the regional center's decision. (Welf. & Inst. Code, § 4700 et seq.)

V. COMMUNITY MENTAL HEALTH SERVICES

Some services for individuals with mental disabilities are provided through county community mental health programs. Every county must adopt a plan for community mental health services. To receive services, an individual should contact the community mental health service in the county where he or she resides.

Community mental health services include programs for people who are institutionalized because of mental disabilities, outpatient mental health services, and preventive programs. Each community mental health program has a citizens advisory board composed of people representing the public interest in mental health, people or families of people receiving mental health services, and mental health professionals. (Welf. & Inst. Code, § 5600 et seq.)

CHAPTER 8

BENEFITS

Both federal and state governments fund a number of benefit programs which are designed to assist persons with disabilities. The following section describes some income benefits and certain tax and business benefits. The section does not address specific benefit programs for disabled veterans. If you have served in the military, you should contact the Veterans' Administration or a veterans' organization to determine if you are eligible for benefits. Health benefits are discussed in the "Health Care" chapter of this book (Chapter 9).

I. INCOME BENEFITS

A. Social Security Disability Insurance and Supplemental Security Income (SSI)

Social Security Disability Insurance and Supplemental Security Income (SSI) provide monthly income benefits for blind or persons with disabilities. Both programs are administered by the Social Security Administration (SSA). While the eligibility requirements differ for each program, the definitions, regulations, and application procedures are similar. Some of the more important aspects of these programs are described below. (42 U.S.C. § 401 et seq.; 42 U.S.C. § 1381 et seq.)

1. Eligibility for Social Security Disability Insurance

To be eligible for Social Security disability benefits, an individual must be blind or disabled, have been employed for a required length of time, and have had Social Security taxes withheld from his or her paycheck. The amount of monthly benefits is based on previous earnings and varies between individual recipients. Benefits may be granted to the individual's family as well. A five-month waiting period is required between the onset of disability and the time that disability benefits can be received. (20 C.F.R. § 404.315.)

Some older disabled widows or widowers may also be eligible for social security disability benefits without having been employed. (20 C.F.R. § 404.336.) A child who becomes disabled before the age of 22 may receive social security disability benefits if his or her parent is entitled to social security old-age or disability benefits, or if the child's parent is deceased and was fully insured under the social security system. The child must be dependent on the insured for support. (20 C.F.R. § 404.350.)

2. Eligibility for SSI

A person with a disability who has a low income or no source of income and whose other financial resources, such as savings, are limited may qualify for SSI. (20 C.F.R. §§ 416.202, and 416.1100.) A child with a disability under age 18 may receive SSI benefits if his or her parent(s)' income is within the SSI limitations. A child is entitled to SSI benefits if he or she has an impairment which results in marked and severe functional limitations, and can be expected to result in death or lasts or is expected to last more than 12 months. (42 U.S.C. § 1382c(a)(3)(C)(i); 20 C.F.R. § 416.924(a).)

It is not necessary to have worked or paid social security taxes to qualify for SSI. However, individuals must apply for any other benefits such as pensions, worker's compensation, social security

disability, or veteran's allowances to which they may be entitled before becoming eligible for SSI. There is no waiting period for SSI benefits. (20 C.F.R. § 416.210.)

3. Application Procedures

To apply for social security disability or SSI benefits, an individual or his or her representative must file an application with the local SSA office. An individual must furnish medical and other evidence of disability as part of the application process. (20 C.F.R. §§ 416.301 et seq., 416.202 et seq. and 416.601 et seq.)

4. Determining Disability

To receive either disability or SSI benefits, an individual must show that he or she is unable to work because of blindness or disability. "Blindness" is defined as visual acuity of 20/200 or less in the better eye with use of a correcting lens. "Disability" is defined in terms of an inability to engage in any "substantial gainful activity." "Substantial gainful activity" means significant and productive physical or mental duties done or intended to be done for pay. Household tasks, hobbies, therapy, school attendance, and social activities are not generally considered substantial gainful activity. A person may still have some earnings (generally under $300 a month) and not be considered engaged in substantial gainful activity. If an individual's disability is merely temporary and is not expected to last 12 months, he or she cannot receive social security disability or SSI benefits. (20 C.F.R. §§ 404.1501 et seq. and 416.971 et seq.)

Certain disabilities are considered severe enough to qualify a person for social security disability or SSI benefits automatically. Among these are kidney failure requiring dialysis, an IQ score of 59 or below, diabetes mellitus with nerve damage, mental diseases resulting in impairment of intellectual functioning and restriction of daily activities, and some types of cancer. (20 C.F.R. § 404.1520 et seq.)

Individuals will not be considered disabled merely because they are no longer able to perform their previous job. A person must be unable to do any other type of work, taking into consideration age, education, and work experience. The SSA uses standardized medical-vocational guidelines to determine what work the applicant should be able to perform if an individual's disability is "exertional" -- for example, affecting the ability to walk, stand, or lift. For "nonexertional" disabilities -- for example, difficulty with communication, understanding, or handling stress -- the determination is not standardized. The SSA does not consider whether the work which an individual could perform exists in the immediate area in which the individual lives, whether a specific job vacancy exists for the person, or whether the individual would be hired if he or she applied for work. (20 C.F.R. § 404.1520.)

5. Referral to Rehabilitation Services

Individuals receiving social security disability benefits and SSI may be referred to the state agency providing rehabilitation services. In California, the designated state agency is the Department of Rehabilitation. If a person refuses without "good cause" to accept rehabilitation services, eligibility for SSI or the amount received for social security disability will be affected. (20 C.F.R. § 416.213.)

6. The Appeal Process

If you are denied disability or SSI benefits you may appeal. To initiate the appeal process, you must file a "request for reconsideration" with the Social Security Administration within 60 days of

receiving notice of the denial of disability or SSI benefits. If you remain dissatisfied after the appeal process is exhausted, you may file a lawsuit in federal court. (20 C.F.R. § 404.900 et seq.)

7. Review and Termination of Disability Benefits

Eligibility for disability and SSI benefits is reviewed periodically. A recipient's disability or SSI benefits cannot be terminated unless there is a finding that the physical or mental impairment upon which the benefits were based has ceased, does not exist, or is not disabling. A decision to terminate benefits must be supported by substantial medical evidence. You may appeal a decision to terminate benefits, and will continue to receive disability benefits during the appeal process. (20 C.F.R. § 416.988 et seq.)

B. State Disability Insurance

California has a disability insurance program, which can be administered either by the state or by an employer, to protect against loss of wages by disabled workers. Nearly all workers are covered by this program. Benefits vary among individuals and depend on the amount of previous earnings. Benefits can be received for up to a year.

1. Eligibility for State Disability Insurance

To be eligible for state disability insurance, an individual must be unable to perform "regular or customary work" because of either an illness or injury. The illness or injury does not have to be work-related. A worker must have received $300 in wages in the year prior to the onset of the disability. (Unemp. Ins. Code, § 2652.)

2. Application Procedures

To apply for state disability insurance, you should file a claim with your local Employment Development Department. Forms should be filed promptly, and cannot be filed later than the 41st day after the disability begins. You may appeal a denial of disability insurance benefits within 20 days. (Unemp. Ins. Code, §§ 2706.1, 2707.4.)

C. Worker's Compensation

The workers' compensation program requires an employer to pay his or her employees for all injuries which occur in the course of employment. Injury includes an accident, disease, or emotional disorder arising out of the employment, including injuries to artificial limbs, hearing aids, and metal braces. However, damage to hearing aids or eyeglasses which causes no disability is not compensated.

To receive workers' compensation benefits, you must generally notify your employer of your injury within 30 days. (Lab. Code, § 5400.) A claim for compensation must be filed within one year from the date of injury. (Lab. Code, § 5405.)

D. Special Needs Allowance for Persons With Guide Dogs

People who own guide dogs and who receive SSI are entitled to a monthly special needs allowance of $50 to help with the purchase of dog food. (Welf. & Inst. Code, §§ 12553, 12554.) Applications are available by mail through your county Department of Social Services.

E. Decreased Energy Rates

Persons with disabilities who rely on life-support equipment in their homes are entitled to an increase in the amount of gas and electricity payable at lower baseline rates. Life-support equipment includes all types of respirators, iron lungs, hemodialysis machines, suction machines, electric nerve simulators, pressure pads and pumps, aerosol tents, electrostatic and ultrasonic nebulizers, compressors, and motorized wheelchairs. People who are paraplegic or quadriplegic or who have multiple sclerosis are also entitled to these lower utility rates. (Pub. Util. Code, § 739.)

II. TAX AND BUSINESS BENEFITS

A. Tax Benefits

Several income, property, and sales tax provisions may benefit persons with disabilities. Some of the tax benefits include:

- an additional exemption for persons who are blind;
- deductions for the cost of purchase and maintenance of wheelchairs, guide dogs, signal dogs, and other necessary equipment, medical treatment, and prescription drugs;
- deductions for the cost of attendance at special schools for children with mental or physical disabilities;
- a tax credit for the cost of caring for a spouse or child with a disability while the taxpayer is working;
- a tax credit for persons retired on disability;
- deductions for the cost of repairing or remodeling a building or a transportation vehicle in order to increase access by persons with disabilities;
- deductions for expenses related to the adoption of a child with a disability;
- property tax and renter's assistance;
- property tax postponement; and
- exemptions from sales tax obligations on a variety of purchases related to prescribed medications, hemodialysis products, wheelchairs and related parts, oxygen equipment, and parts used to modify a vehicle for use by persons with physical disabilities.

Tax laws are complex and change from year to year. To take advantage of these laws, you should contact a tax advisor.

B. Business Loans & Enterprises to Persons With Disabilities

The Small Business Administration may make business loans to assist persons with disabilities when no other financial assistance is available on reasonable terms.

Persons with disabilities who wish to establish, acquire, or operate a small business may be eligible for these loans. Any public or private organization operated in the interest of disabled persons and which employs disabled persons may also be eligible. Contact the Small Business Administration for more information. (15 U.S.C. § 636(h).)

Persons who are blind who are licensed to operate vending facilities have priority to operate such facilities on any property owned, leased, rented, or otherwise controlled by any state or federal agency or department. (20 U.S.C. § 107; Welf. & Inst. Code, § 19625 et seq.)

CHAPTER 9

HEALTH CARE

The following section summarizes California and federal law concerning health care benefits, the right to medical treatment, consent to medical care, and sterilization of persons with disabilities.

I. HEALTH CARE BENEFITS

A. Medicare

Medicare is a government-sponsored program of health insurance. An individual who has been receiving social security disability benefits for 24 months is entitled to Medicare. Applications for Medicare can be made at a local Social Security office.

Medicare consists of two parts. Part A provides hospital insurance benefits which pay part of the cost of hospital care, related post-hospital care, home health services, and hospice care. Part B provides medical insurance which pays for part of the cost of physician fees and outpatient medical services. Unlike Part A, Part B is a voluntary plan which must be paid for by the insured individual. Some private health insurers or group health plans may provide supplemental coverage for Part A or B or both. (42 U.S.C. §§ 426 et seq. and 1395 et seq.)

B. MediCal

MediCal is a state and federal-sponsored program to pay for medical care for low income individuals. It is the California version of the Medicaid program and is partially federally-funded. Application for MediCal can be made at your county Department of Social Services. (42 U.S.C. § 1396 et seq.; 42 C.F.R. § 430 et seq.; and Welf. & Inst. Code, § 14000 et seq.)

1. Eligibility For MediCal

A person receiving federal Supplemental Security Income (SSI) or Aid to Families with Dependent Children (AFDC) automatically receives MediCal benefits. Certain "medically needy" individuals may also be eligible for MediCal. A "medically needy" person is a person with a disability whose income is too high to qualify for public assistance but insufficient to provide for the costs of health care. A medically needy person may have to pay a monthly share of costs before receiving MediCal services. (Welf. & Inst. Code, §§ 14005.7 and 14051; Cal. Code Regs., tit. 22, § 50062.)

A person may own a house which is used as his or her principal residence and still be eligible for MediCal. However, under certain circumstances, the state may seek to recover the cost of certain medical services rendered to a recipient after he/she is deceased by filing a claim against that person's estate. (42 U.S.C. § 1396p(a); Welf. & Inst. Code, § 14009.5.)

2. What MediCal Covers

MediCal is a comprehensive program which pays for both hospitalization and outpatient medical services and treatment. It includes coverage of the cost of nursing home care, x-rays, certain

prescription medications, emergency and essential dental services, certain medical transportation, home health services, eyeglasses, hearing aids, orthopedic devices, durable medical treatment and supplies, adult day health care, pregnancy-related care, and mental health services. Also included are heart and liver transplants and bone marrow transplants for treatment of cancer. (Welf. & Inst. Code, § 14132 et seq.)

Not all physicians or health care facilities accept MediCal. Only certain hospitals can accept routine MediCal patients. However, a MediCal recipient can be treated at any hospital when there is a life-threatening emergency situation, when the MediCal patient also receives Medicare, or when the MediCal recipient lives an excessive distance from a hospital which usually accepts MediCal patients. (Welf. & Inst. Code, § 14000 et seq.)

3. The MediCal Appeal Process

A denial or termination of MediCal benefits can be appealed within 90 days.

C. Hill-Burton Hospitals

The Hill-Burton Act provides public funds for hospital construction. Each hospital which accepts Hill-Burton money is required by law to give a reasonable amount of care at no cost or low cost to persons unable to pay for hospital services. The hospital must post signs in the admissions office, emergency room, and business office identifying itself as a Hill-Burton facility. The hospital business office should assist people in applying for care at reduced rates. (42 U.S.C. § 291 et seq.; 42 C.F.R. § 53.111 et seq.)

D. California Children's Services (CCS)

The California Children's Services (CCS) program assists the parents of children with physical disabilities under the age of 21 who are unable to pay for the cost of their child's medical treatment. Eligibility for the program is determined by the family's income and by the cost of care for the child. Parents may have to pay a share of the cost of medical treatment. Services include screening of newborn infants at high risk for deafness and payment for bone marrow transplants under certain conditions. Applications can be made at the CCS office in the county where the child resides. (Health & Saf. Code, § 123800 et seq.)

E. Genetically Handicapped Person's Program

The Genetically Handicapped Person's Program provides medical and social support services to children and adults with genetically-handicapping conditions, such as cystic fibrosis, hemophilia, sickle cell disease, and Huntington's disease. The program is administered by the State Department of Health Services. Services include diagnostic evaluation, cost of blood transfusions, rehabilitation services, medical treatment, physical and speech therapy, appliances, transportation, respite care, and genetic and psychological counseling.

Eligibility for the program is based on the family's adjusted gross income. An individual will generally not receive services under the program if he or she is entitled to similar benefits under any other private, state, or federal insurance program. Persons who can no longer receive services and assistance under the California Children's Services program because they have attained the age of 21 may be eligible for this program. (Health & Saf. Code, § 125125 et seq.)

II. RIGHT TO MEDICAL TREATMENT

People with mental or developmental disabilities have a right to prompt medical care and treatment. (Welf. & Inst. Code, §§ 4502, subd. (d), and 5325.1, subd. (d).) Health care professionals, such as physicians, social workers, psychologists, physical therapists, and nurses licensed by the state, are subject to disciplinary action if they discriminate against people who are physically disabled. The State Department of Consumer Affairs regulates licensed professionals, and complaints concerning discriminatory practices should be made to the board or commission within the Department of Consumer Affairs which regulates the particular profession.

Physicians who intentionally violate any rights of involuntarily confined people with mental disabilities are engaging in unprofessional conduct and are subject to disciplinary proceedings. Complaints can be filed with the Division of Medical Quality of the Board of Medical Quality Assurance. (Bus. & Prof. Code, § 100 et seq.) (See Chapter 10 for more information on the rights of people with mental and developmental disabilities.)

A. Medical Care for Newborns With Disabilities

The Federal Child Abuse Amendments of 1984 address the withholding of medical treatment from infants with disabilities. The amendments attempt to ensure that decisions about medical treatment for handicapped infants are not made on the basis of subjective opinions concerning the future "quality of life" of a person with a disability. (42 U.S.C. § 5101 et seq.; 45 C.F.R. § 1340.15.)

The amendments set certain requirements for states which wish to receive federal money. To receive federal money, state Child Protective Service (CPS) agencies must enact a system of responding to reports of medical neglect. (State CPS agencies are already responsible for responding to reports of child abuse and neglect.) "Medical neglect" means the withholding of medically indicated treatment from infants with life-threatening disabilities. "Withholding of medically indicated treatment" means the failure to respond to the infant's life-threatening conditions by providing treatment which, in the physician's reasonable medical judgment, would be effective in helping or correcting all such conditions. (See 42 U.S.C. § 5106a; *Bowen* v. *American Hospital Assn.* (1986) 476 U.S. 610.)

Treatment may only be withheld when:

- the infant is chronically and irreversibly comatose; or
- the provision of treatment would merely prolong dying or not be effective in treating the infant's life-threatening conditions, or would be futile in saving the infant; or
- the treatment itself would be inhumane.

Even when treatment may be withheld, appropriate food, water, and medicine must be provided. (42 U.S.C. § 5101 et seq.; 45 C.F.R. § 1340.15.)

The state is required to have programs or procedures to place a medically-neglected infant within protective service. The procedures must provide for an investigation of the infant's condition and a court order for an independent medical examination, if necessary. (42 U.S.C. § 5106a; 29 U.S.C. § 701 et seq.; and 45 C.F.R. § 84.55(c).)

B. Infant Care Review Committees

Infant Care Review Committees (ICRC) are composed of hospital personnel, community members, and disability organization representatives. They provide education for health care professionals and families of infants with life-threatening disabilities, recommend guidelines and policies concerning withholding medically-indicated treatment, and offer counsel in cases involving infants with life-threatening conditions. The federal government has issued model guidelines to assist hospitals in developing ICRC. (45 C.F.R. § 84.55(a).)

III. RIGHT TO CONSENT TO MEDICAL TREATMENT

Persons with physical or mental disabilities have a right to consent or refuse to consent to any medical treatment, except in an emergency or where a conservator or court has authorized treatment. If a person is incapable of giving consent or refusing consent (such as a child or a person in a coma), and the person has no legal guardian or conservator, a family member may be able to give consent. Consent in these cases may also be obtained through court proceedings. In any court proceeding brought to authorize medical treatment, a person must be given proper notice and the opportunity to be represented by an attorney. (Prob. Code, § 3200 et seq.)

A. Right of a Conservatee to Refuse Medical Treatment

A person for whom a guardian (conservator) has been appointed may still be able to refuse medical treatment. The person (conservatee) loses the right to refuse only if the court determines that the conservatee lacks capacity. A conservator may consent to medical treatment on behalf of the conservatee in an emergency or in certain cases of severe illness or injury requiring immediate care. If the court determines that the conservatee lacks capacity to give consent, the conservator has the exclusive authority to consent to medical treatment for the conservatee. A conservator appointed under the Lanterman-Petris-Short (LPS) Act, discussed in Chapter 10, may have some additional power to authorize treatment.

No surgery can be performed on a conservatee without his or her prior consent, except where the conservatee faces loss of life or serious bodily injury, or a court order authorizes the surgery. (Prob. Code, § 2354 et seq.; Welf. & Inst. Code, § 5357 et seq.; 58 Ops.Cal.Atty.Gen. 849 (1975).)

B. Durable Power of Attorney for Health Care

In California, individuals can sign a Durable Power of Attorney for Health Care. It allows the person, called the "principal," to choose an individual, called the “attorney in fact,” who has the power to make health care decisions on behalf of the principal if the principal is unable to consent to or refuse medical treatment. Because of the broad legal powers conferred upon the attorney in fact, an individual should carefully consider and review all provisions of the durable power of attorney for health care or consult with an attorney before executing a power of attorney. (See Prob. Code, § 4650, et seq.)

C. Limited Right to Die

The United States Supreme Court ruled that competent persons have a constitutional right to refuse heroic medical treatment, although a state may require clear and convincing proof of that patient's intent before allowing life-support systems to be removed. (*Cruzon v. Director, Missouri Depart. of Health* (1990) 497 U.S. 261; see also *Thor v. Superior Court* (1993) 5 Cal.4th 725 (a competent informed adult has a fundamental right of self-determination to refuse or demand the withdrawal of medical treatment in any form, irrespective of the personal consequences.) The United States Supreme Court, however, has affirmed the right of states to prohibit assisted suicide. (See *Vacco v. Quill* (1997) 521 U.S. 793; *Washington v. Glucksberg* (1997) 521 U.S. 702.)

D. Sterilization of Persons With Disabilities

Sterilization is a medical procedure which makes a person permanently unable to have children. Both men and women can be sterilized. Voluntary sterilization is legal in California with the individual's full knowledge and consent. Persons with disabilities who are able to give consent to medical treatment may not be sterilized without their consent.

Persons with developmental disabilities who are unable to give consent may be sterilized only by court order. Before a court can order sterilization, a hearing must be held. A person with a developmental disability must be represented at this hearing by a lawyer. Sterilization will only be permitted if necessary to maximize the person's development and quality of life and if no other less drastic means of birth control are available. (*Conservatorship of Valerie N.* (1985) 40 Cal.3d 143.)

CHAPTER 10

CIVIL RIGHTS OF PERSONS WITH MENTAL AND DEVELOPMENTAL DISABILITIES

I. CIVIL RIGHTS OF PERSONS WITH DEVELOPMENTAL DISABILITIES

A. Federal and State Rights

In 1975, Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act, which provides funding for programs and expresses the federal goal of legal and human rights for people with developmental disabilities. (42 U.S.C. § 15001 et seq.)

The Act defines developmental disability as a severe, chronic disability of an individual which:

- is attributable to a mental or physical impairment or combination of mental and physical impairments;
- manifests itself before age 22;
- is likely to continue indefinitely;
- results in substantial functional limitations in three or more of the following areas of activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency; and
- reflects the person's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated; or
- an individual from birth to age 9, inclusive, who has a substantial developmental delay or specific congenital or acquired condition, may be considered to have a developmental disability without meeting three or more of the criteria described above if the individual, without services and supports, has a high probability of meeting those criteria later in life.

(42 U.S.C. § 15002(8))

It is the government's policy to encourage states to provide appropriate treatment, services and habilitation to people with developmental disabilities. ("Habilitation" means the education, treatment and care required by developmentally disabled people to achieve their maximum development.) Treatment should maximize the developmental potential of an individual and should be provided in the least restrictive setting possible. (42 U.S.C. § 15009.)

California law similarly protects the constitutional rights of people with developmental disabilities, including the right to treatment, habilitation, dignity, privacy and humane care and the right to be free from hazardous procedures, unnecessary physical restraint, isolation, excessive medication, abuse or neglect. (Welf. & Inst. Code, § 4500 et seq.)

B. Institutionalization of Persons With Developmental Disabilities

In California, the presence of a developmental disability alone cannot justify commitment to an

institution; an adult with a developmental disability has a legal right to make choices, including with whom and where he or she will live. (Welf. & Inst. Code, § 4502.) A person who has a developmental disability may be involuntarily placed in an institution only if he or she is a danger to himself or herself, or to others, and if evidence of such danger is proven in court. (Welf. & Inst. Code, § 6500.) The following persons may request the filing of a petition for commitment: (a) the parent, guardian, conservator, or other person charged with the support of the person with a developmental disability; (b) the probation officer; (c) the Youth Authority; (d) any person designated for that purpose by the judge of the court; (e) the Director of Corrections; or (f) the regional center director or his or her designee. (Welf. & Inst. Code, § 6502.)

A person may be judicially committed to an institution only after court proceedings to determine whether they constitute a danger to themselves or others. At these proceedings, a person has a right to representation by an attorney and a right to a jury trial. If a person is judicially committed, the commitment order expires after one year unless further court proceedings are started to extend the period of commitment. (Welf. & Inst. Code, § 6500.) A person must be judicially committed to the least restrictive residential setting necessary to achieve the purposes of treatment. (Welf. & Inst. Code, §§ 4502, subd. (a), and 6509.)

A person may be voluntarily placed in an institution only upon referral from a regional center. (Welf. & Inst. Code, §§ 4653 and 4803.)

In 1981, the California Supreme Court ruled that persons with developmental disabilities who are unable to provide informed consent regarding their placement in a state developmental center are entitled to a judicial review regarding the need for, and appropriateness of their placement. (*In re Hop* (1981) 29 Cal.3d 82.) An adult with a developmental disability placed in a state hospital at the request of a family member is not considered a voluntary admittee merely because the person neither protests nor knowingly agrees to the placement. (*Ibid.*) A person must give a knowing and intelligent waiver of rights or participate in a judicial hearing with representation by counsel. (*Ibid.*)

C. Rights of Persons With Developmental Disabilities in Institutions

Federal law guarantees that persons with developmental disabilities placed in institutions have a right to safety, to provision of care that is free of abuse, neglect, sexual and financial exploitation, and violations of legal and human rights, to freedom from bodily or chemical restraint, and to reasonable training necessary to protect those interests. (42 U.S.C. § 15009; *Youngberg* v. *Romeo* (1982) 457 U.S. 307.) In California, residents of state hospitals or community care facilities also have the following rights:

- to treatment and habilitation services and support in the least restrictive environment;
- to wear their own clothes, to keep and use personal possessions, and to keep and spend a reasonable sum of money for small purchases;
- to have access to individual storage space for private use;

- to see visitors each day;
- to have reasonable access to telephones to make and receive confidential calls;
- to receive and send mail, to have access to letter-writing materials and stamps, to receive unopened correspondence;
- to refuse electroconvulsive (electroshock) therapy;
- to refuse behavior modification techniques which cause pain or trauma;
- to refuse psychosurgery; and
- to make choices in areas including, but not limited to, their daily living routines, choice of companions, leisure and social activities, and program planning and implementation.

These rights must be prominently posted in a state hospital, community care facility, or health care facility both in English and Spanish and other applicable languages. A resident can only be denied these rights for good cause. (Welf. & Inst. Code, §§ 4503 and 4504; Cal. Code Regs., tit. 17, § 50500 et seq.)

D. Judicial Hearing to End Institutionalization

Any adult with a developmental disability who has been admitted or committed to a state hospital or community care facility has a right to a judicial hearing in order to obtain release from the facility. A request for release may be made to any staff member of the state hospital, community care facility, or to any employee of a regional center. This individual must notify the court of the request for release. (Welf. & Inst. Code, § 4800 et seq.)

Generally, judicial review takes place in a superior court in the county where the facility is located. A person seeking release has a right to an attorney. If a person does not have an attorney, the court will appoint one. (Welf. & Inst. Code, § 4801.)

II. CIVIL RIGHTS OF PERSONS WITH MENTAL DISABILITIES

A. The Lanterman-Petris-Short (LPS) Act

In 1967, the California Legislature passed the Lanterman-Petris-Short (LPS) Act, which was designed to define and protect the rights of people with mental disabilities, clarify commitment and conservatorship proceedings, and provide a means for enforcing these rights. (Welf. & Inst. Code, § 5000 et seq.)

B. Rights of Persons With Mental Disabilities

Individuals with mental disabilities cannot be confined involuntarily if they are not dangerous and can live safely on their own. (*O'Connor v. Donaldson* (1975) 422 U.S. 563.) The United States Supreme Court has held that a person who was confined to a state mental institution against his will and without a hearing could sue state officials in federal court under United States Code, title 42, section

1983. (*Zinermon v. Burch* (1990) 494 U.S. 113.) In California, people with mental illnesses have the same legal rights as all other people. (Welf. & Inst. Code, § 5325.1; *Foy v. Greenblott* (1983) 141 Cal.App.3d 1.) No one who has been involuntarily detained for evaluation or treatment, or who resides voluntarily in a treatment facility, can be excluded from participation in, denied the benefits of, or subjected to discrimination under any publicly-funded program or activity. Additionally, persons with mental disabilities have a right to treatment in the least restrictive setting possible which promotes the ability of the person to function independently, and a right to be free from hazardous procedures, unnecessary or excessive physical restraint or medication, abuse, or neglect. Medication cannot be used as punishment, for the convenience of staff, as a substitute for a treatment program, or in quantities that interfere with treatment. (Welf. & Inst. Code, § 5325.1; *Mills* v. *Rogers* (1982) 457 U.S. 291.)

Persons with mental disabilities residing either voluntarily or involuntarily in health care facilities also have the right to:

- wear their own clothing, keep and use their personal possessions, and keep and be allowed to spend a reasonable sum of money for small purchases;
- have access to individual storage space for private use;
- see visitors each day;
- have reasonable access to telephones, both to make and receive confidential calls or to have such calls made for them;
- have access to letter-writing materials, including stamps, and to mail, and to receive unopened correspondence;
- refuse convulsive treatment (convulsive treatments include electroshock therapy and insulin coma treatment);
- refuse psychosurgery; and
- see and receive the services of a patient advocate.

In California, a patient voluntarily admitted to a treatment facility may refuse anti-psychotic medication. (*In Re Qawi* (2001) 90 Cal.App.4th 1192, review granted and opinion superceded by 111 Cal.Rptr.2d 825.) These rights must be prominently posted in the languages predominant in the community. Each patient must, upon admission to the facility, be given a copy of a patient's rights handbook prepared by the state Department of Mental Health. (Welf. & Inst. Code, § 5325.)

C. Commitment Procedures

A police officer, member of the attending staff of an evaluation facility designated by the county, designated members of a mobile crisis team, or other professional person designated by the county may take into custody and detain upon probable cause any person who, as a result of a mental disorder, is a danger to himself or herself, or to others, or who is "gravely disabled." The person may

be detained at a mental health facility for purposes of evaluation and treatment for up to 72 hours. (Welf. & Inst. Code, § 5150.)

"Gravely disabled" refers to a person who, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter. People are not gravely disabled if they can provide for their basic needs with assistance from others, such as family or friends. (Welf. & Inst. Code, §§ 5008, subd. (h), and 5150; *Conservatorship of Early* (1983) 35 Cal.3d 244; *Conservatorship of Chambers* (1977) 71 Cal.App.3d 277.)

At the end of the 72-hour period, a detained individual must be released if, in the opinion of the professional in charge of the facility, the individual no longer requires evaluation or treatment. An individual can also be referred for further care and treatment on a voluntary basis, certified and detained for further intensive involuntary treatment, or recommended for conservatorship proceedings. (Welf. & Inst. Code, § 5150 et seq.)

D. Certification For Intensive Treatment

A person may continue to be detained for not more than 14 days beyond the initial 72-hour period once he or she is certified for intensive treatment. The certification is given if the following conditions are met:

- the person is "gravely disabled" or a danger to others, or to himself or herself;
- the facility is certified to provide treatment and will admit the person; and
- the person has been advised of the need for, but has not been willing or able to accept, voluntary treatment.

(Welf. & Inst. Code, § 5250.)

A person certified for intensive treatment has a constitutional right to an administrative or court hearing to determine if probable cause exists to hold the person for treatment. A certification review hearing must be held within four days of the date on which the person is certified for a period of intensive treatment, unless the person requests judicial review. A person is entitled to have an attorney or advocate assist in preparation for the hearing. The hearing is not adversarial and is conducted in an informal and impartial manner. (Welf. & Inst. Code, § 5254 et seq.)

If the hearing officer decides that there is no probable cause to believe that a person is "gravely disabled" or a danger to himself or herself, the individual can no longer be detained involuntarily, but may voluntarily remain at the facility. (Welf. & Inst. Code, § 5256.5; *Doe* v. *Gallinot* (9th Cir. 1981) 657 F.2d 1017.)

E. Judicial Hearing

Every person detained after certification for intensive treatment has a right to a judicial hearing to obtain release from the facility. A person must be informed of this right when a copy of the certification notice is given to him or her. A person must also be informed of his or her right to an attorney. (Welf. & Inst. Code, § 5254.1.)

The hearing must be held promptly. The person will be released if the court finds: (1) that the person is not "gravely disabled" or a danger to himself or herself, or to others; (2) that the person was not advised of the need for voluntary treatment, or had accepted voluntary treatment; or (3) that the facility cannot provide

appropriate treatment. (Welf. & Inst. Code, §§ 5254.1 and 5276.)

F. Involuntary Detention Beyond 14 Days

After the 14-day certification period expires, a person may be involuntarily held for a longer period under certain circumstances. If a person is suicidal as a result of a mental disorder, he or she may be recertified for up to an additional 14-day period. (Welf. & Inst. Code, § 5260.) If a person presents a demonstrated danger of inflicting substantial physical harm upon others, he or she may be confined for up to 180 days. A judicial hearing is required in order to extend the detention beyond 14 days. A person has a right to counsel and to a jury trial. If judged to be "gravely disabled" as a result of a mental disorder, an individual may be involuntarily detained after the certification period only if conservatorship proceedings begin. (Welf. & Inst. Code, § 5300 et seq.)

G. Conservatorship Procedures

A conservator is a person appointed by the court to undertake the responsibility of making decisions for the personal care of a "gravely disabled" person (conservatee) or his or her property. A conservator has broad powers, including determining the conservatee's place of residence or the type of treatment he or she will receive. (Welf. & Inst. Code, § 5350 et seq.) The conservatee loses the ability to make decisions on his or her own behalf and to give legally binding consent. (Welf. & Inst. Code, § 5357.)

A 30-day temporary conservatorship can be filed after the 14-day certification period if a person is gravely disabled and unwilling to accept voluntary treatment. (Welf. & Inst. Code, § 5352.1.) During the 30-day period, an investigation is made to evaluate the person's suitability for conservatorship. Conservatorship is recommended only if there are no suitable alternatives available.

A court hearing takes place before a permanent conservatorship can be established. A person is entitled to a court or jury trial to determine whether he or she is "gravely disabled." (*Waltz* v. *Zumwalt* (1985) 167 Cal.App.3d 835.) A person has a right to representation by an attorney. Grave disability must be proved beyond a reasonable doubt by a unanimous jury. (*Conservatorship of Roulet* (1979) 23 Cal.3d 219.) A court order establishing a conservatorship may be appealed, and counsel must be appointed to assist indigent clients. Conservatorships expire automatically after one year, but can be renewed. (Welf. & Inst. Code, §§ 5360, 5361.)

A conservator is obligated to place the conservatee in the least restrictive placement. If the conservatee cannot be placed with family or relatives, priority is given to a suitable placement near his or her family's or relatives' home. (Welf. & Inst. Code, § 5350 et seq.; *Conservatorship of Chambers* (1977) 71 Cal.App.3d 277.)

H. Mental Health Advocacy Programs

The state Department of Mental Health has a Patients' Rights Office, which is responsible for ensuring that mental health laws, regulations, and policies on the rights of recipients of mental health services are observed in state hospitals and community care facilities.

The Patients' Rights Office trains county patients' rights advocates. The county patients' rights advocates may conduct investigations if there is probable cause to believe that the rights of a person with a mental disability have been violated. A client may refuse the advocate's services.

DIRECTORY OF SERVICES

INTRODUCTION

This general directory lists various legal services and organizations which may be of assistance to persons with disabilities. It is by no means a complete directory of services. We have included agencies and organizations which are referred to in the text of this handbook, as well as some legal services organizations which provide primary assistance to persons with disabilities. Many organizations listed below can refer you to other groups which may be able to help you.

Many of the government agencies mentioned in this book and directory have local branch offices. The phone numbers for these offices can be found in the government listings at the beginning of your phone directory, and we have therefore not included all of them here.

Finally, always be sure to call an agency or organization ahead of time to find out about accessibility, hours of operation, and whether an appointment is necessary.

I. LEGAL SERVICES

Northern California

Disability Rights Education and Defense Fund
(510) 644-2555, (510) 644-2626 (TTY)

Disability Rights Advocates
(510) 273-8644

Family Caregiver Alliance
(415) 434-3388

Humboldt Access Project, Inc.
(707) 445-8404

Legal Aid Society of San Francisco
Employment Law Center
Disability Employment Rights Project
(415) 864-8848

Legal Center for the Elderly
(530) 621-6154

Legal Center for the Elderly and the Disabled
(916) 488-5298

Mental Health Advocacy Project
(408) 294-9730

Mental Health Advocates
(510) 835-5532

Protection and Advocacy
(510) 430-8033

People for People
(707) 468-5882

Southern California

Access Center
(619) 293-3500

Mental Health Advocacy Services, Inc.
(213) 484-1628

Western Law Center for Disability Rights
(213) 736-1031

Protection and Advocacy
(800) 776-5746, (213) 427-8747

II. EMPLOYMENT

California

Department of Fair Employment and Housing (800) 884-1684, (800) 700-2320 (TTY)

Federal

Equal Employment Opportunity Commission: (800) 669-4000, (800) 669-6820 (TDD)

Office of Federal Contract Compliance, Department of Labor: (415) 848-6969

III. HOUSING

Federal

U.S. Dept. of Housing and Urban Development: (800) 669-9777, (415) 436-6594 (TTY)

California

State Department of Housing and Community Development

State Housing Finance Agency

Local Housing Authority

Department of Fair Employment and Housing (800) 233-3212

IV. NONDISCRIMINATION IN BUSINESSES AND SERVICES

Insurance discrimination: Contact the State Commissioner of Insurance

Licensed services: Contact the State Department of Consumer Affairs in Sacramento at (916) 445-1254 and ask for the board that licenses the type of service with which your complaint is concerned.

Public Services and Accommodations: Department of Fair Employment and Housing (see Employment: (800) 884-1684)

V. ACCESS

Buildings and Facilities

General Information:

The U.S. Dept. of Justice ADA Hotline:
(202) 514-0301 (Voice) or
(202) 418-2555(TTY)

U.S. Dept. of Justice, Civil Rights Division, Disability Rights
(202) 307-1198

Disability Rights Education and Defense Fund (DREDF) ADA Hotline:
(800) 466-4ADA(Voice/TTY)

Equal Opportunity Programs Division
Telephone: (510) 238-3500

Paralyzed Veterans of America
(202) 872-1300

California:

State Department of General Services, Disabled Access Compliance
(916) 327-9698

State Department of Rehabilitation

City or county building departments

Federal:

Access Board
(202) 272-0080
(800) 072-2253
(202) 272-0082 (TTY)
(800) 993-2822 (TTY)

Transportation

Local Department of Motor Vehicles

U.S. Department of Transportation:
ADA documents and general questions: (202) 366-4018
Complaints and enforcement: (800) 446-4511

Telecommunications

Local phone company

State Public Utilities Commission (PUC): (SF) (415) 703-2782 , (415) 703-2032 (TTY)
(LA) (213) 576-7000, (800) 229-6846 (TTY)

Federal Communications Commission

VI. EDUCATION

State Department of Education
(916) 445-4613, (916) 327-3718 (TTY)

Community Alliance for Special Education
(415) 431-2285

VII. PROGRAMS AND SERVICES

IHSS: Contact your county Social Services Agency

Community Mental Health Services: Contact your county Mental Health Services office

Hearing-Impaired Services: California Department of Social Services, (916) 653-8320, (916) 653-7651 (TTY)

Visually-Impaired Services: Visually Impaired Assistance Center, (661) 255-3309

Rehabilitation Services: State Department of Rehabilitation (916) 263-8952 Centralized Services.

California Foundation for Independent Living Centers: (916) 325-1690

Organization of Developmental Disabilities Area Boards: (916) 263-5780

Regional Centers: Check your local directory for the Regional Center that serves your area.

IX. BENEFITS

Income Benefits

SSI/Social Security Disability: Contact your local Social Security Administration office

State Disability: Contact your local Employment Development Department

General Assistance, Food Stamps, Guide Dog Allowances, AFDC: Contact your county Social Service Agency

Tax And Business Benefits

Property tax/Renter's Assistance: Contact the Franchise Tax Board (main office is in Sacramento, with branch offices throughout the state)

Property Tax postponement: Contact the State Controller in Sacramento at (916) 445-3028

Business Loans: Contact the federal Small Business Administration

X. HEALTH CARE

Medicare: Contact your local Social Security Administration office

Medi-Cal: Contact your county Social Services Agency

California Children's Services: Contact your local California Children's Services office

Right to medical treatment: Contact the State Department of Consumer Affairs Medical Board in Sacramento at (800) 633-2322

Infant Care: Contact your county Children's Protective Services

Mental Disabilities: Contact the Patients' Rights Office of your County Mental Health Services.