

CHAPTER TWO: Protections and Reasonable Accommodation for Persons with Disabilities

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This chapter presents three questions and their answers as a way to focus on some of the major themes of disability protection and reasonable accommodation. It reviews important definitions and provides an orientation to some of the major provisions of Section 188 and 29CFR Part 37. The first question asks **who** is protected from discrimination as a person with a disability. The discussion leads to the second question, **what** are forms of discrimination based on disability that are prohibited. The third question probes **reasonable accommodation**, along with reasonable modification and auxiliary aids and services, all of which are crucial elements in insuring that persons with disabilities receive full and equal access to all WIA Title I aids, benefits, services, and training.

A. WHO ARE INDIVIDUALS WITH DISABILITIES WHO ARE PROTECTED UNDER SECTION 188?

WIA Section 188 protects persons with disabilities from discrimination, applying the same standards and definitions as found in Section 504 of the Rehabilitation Act of 1973. Moreover, these are the same standards and definitions found in the Americans with Disabilities Act of 1990 (ADA). WIA Section 188, Section 504, and the ADA prohibit discrimination against any "qualified individual with a disability." Determining whether a particular individual is protected by these laws begins with understanding what is considered a disability (and what is not). Then the question is asked, "Who is a **qualified** individual with a disability?"

DISABILITY -- THREE CONDITIONS

For the purposes of coverage under WIA §188, an individual with a disability is defined as an individual who meets any one (or more) of the three conditions (sometimes referred to as "prongs" of the definition) outlined in the statute. Each component (prong) of the definition is explained in part 37. This definition is identical to the ADA definition of the term.

29 CFR §37.4

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

1. A Physical or Mental Impairment

The first category of the definition covers any individual who currently has a physical or mental impairment that substantially limits one or more major life activities. The focus of this part is on the individual, to determine if he or she has a substantially limiting impairment.

What is an impairment? The phrase *physical or mental impairment* has been defined by the provision of the regulation cited above to include physiological conditions that affect body systems as well as mental or psychological disorders. The definition at §37.4 provides only representative examples of physical or mental impairments.

What is not an impairment? Simple physical characteristics such as left-handedness, disadvantages attributable to environmental, cultural, or economic factors; common personality traits such as poor judgment or a quick temper. The definition also excludes homosexuality and bisexuality as impairments

What is a substantial limitation of major life activities? Another key requirement under the first category of the definition is that an impairment must substantially limit a major life activity to constitute a disability. The phrase *major life activities* refers to functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, working, and learning.

This list of ***major life activities*** is not meant to be exhaustive. They are understood to include "those basic activities that the average person in the general population can perform with little or no difficulty." For example, in a 1998 Supreme Court decision, the court determined that reproduction is a major life activity.

In contrast, determining whether or not an impairment ***substantially limits*** a major life activity is more difficult and must be done on an individual basis, taking into consideration the following factors:

- the **extent** of the impairment, its nature and severity;
- the **duration** (or expected duration) of the impairment, how long it will last or is expected to last; and

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(1)(i) The phrase *physical or mental impairment* means--
(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine;
(B) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
(ii) The phrase *physical or mental impairment* includes, but is not limited to, such contagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific

29 CFR §37.4

(2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

- the **impact** of the impairment, its permanent or long-term impact or expected impact.

While the definition of disability does not exclude temporary impairments, temporary impairments must be assessed on a case-by-case basis to determine whether the impairment substantially limits a major life activity.

2. Persons With Records of Physical or Mental Impairments

The second category of the definition of disability protects two groups of people: those who have a history or record of an impairment that substantially limits a major life activity; and, those who have been erroneously diagnosed as having an impairment. Examples include: persons who have been misdiagnosed as mentally retarded or mentally ill.

3. Persons Regarded as Having a Disability

The third category of the definition of disability protects people who are not, in fact, substantially limited in any major life activity but are nevertheless perceived by others as having a disability, sometimes because of myth, fear, or stereotype.

The second and third categories of the definition are meant to cover situations where individuals never had or do not currently have disabilities, but are treated by others as if they did. For instance, a person with severe facial scarring might be denied a job because she or he is regarded as an individual with a disability. A person with a history of heart disease might be denied a promotion because of that "record of" a disability. These persons do not, in fact, have disabilities, but have been treated by others as if they did. In these cases, it is mistaken perception or a record of a disability that entitles a person to protection against discrimination under the law.

Use of the Second and Third Categories

The use of the second and third categories of the definition of individuals with disabilities arises often in the area of employment, but can also apply in the areas of aid, services, benefits or training. For example, someone with a history of mental illness but no current symptoms might be denied a

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(4) The phrase *is regarded as having an impairment* means--

- (i) Has a physical or mental impairment that does not substantially limit major life activities, but that is treated by the recipient as being such a limitation;
- (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (iii) has none of the impairments defined in paragraph (1) of this definition but is treated by the recipient as having such an impairment.

teaching job based solely on that record of past disability. This action would not be permissible under WIA 188.

Individuals with learning difficulties or attention deficit disorder (ADD) meet the first category of the definition of disability. That is, they actually have a mental or physical impairment that substantially limits their ability to learn.

WHAT DOES IT MEAN TO BE QUALIFIED?

Protection under WIA 188 is specifically afforded to *qualified* individuals with disabilities. Not every person with a disability (someone who falls within the three-category definition) is also qualified. The definition of a *qualified* individual with a disability takes two forms, depending on the nature of the activity involved. These include:

- aid, services, benefits or training; and
- employment.

Aid, Services, Benefits or Training

For purposes of determining whether an individual is eligible to receive the aid, services, benefits, or training offered by a recipient, a person is considered to be qualified if the individual meets the **essential eligibility requirements** needed to receive the aid, services, benefits or training. It does not matter whether the person meets these requirements with or without **reasonable accommodation or modifications** to rules, policies, or practices or with or without the removal of architectural, communication, or transportation barriers. The determination is also made without regard to whether **auxiliary aids and services** must be provided [28 CFR §35.104].

It is also important to note that persons who wish to attend One-Stop Center events or activities, who are qualified individuals with disabilities, are covered by Section 188, as well as other nondiscrimination statutes and regulations. For example, if a One-Stop Center were to host a job fair, the Center would need to assure the availability of interpreter services and materials in alternative formats.

Employment

For the purposes of employment, an individual is considered to

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Qualified individual with a disability means:

- (1) With respect to employment, an individual with a disability who, with or without reasonable accommodation, is capable of performing the essential functions of the job in question;
- (2) With respect to aid, benefits, services, or training, an individual with a disability who, with or without reasonable accommodation and/or reasonable modification, meets the essential eligibility requirements for the receipt of such aid, benefits services, or training.

be qualified if the person meets the job-related requirements for a job and is able to perform its essential functions with or without reasonable accommodations [29 CFR §37.4].

ASSOCIATIONAL DISCRIMINATION

Section 188 also extends its protections to people who do not have disabilities themselves but are discriminated against on the basis of their association with a person with a disability. The association can be with family members, friends, or any other person or entity [29 CFR 37.7(l)]. A person who experiences associational discrimination has a right to relief under the Section 188, but is not, like persons who themselves have disabilities, entitled to request reasonable accommodations in employment.

WHO IS ELIGIBLE TO FILE A SECTION 188 COMPLAINT?

The 29CFR Part 37 regulations provide a detailed process to allow individuals who believe they have been discriminated against to register complaint with the Department of Labor's Civil Rights Center. The complaint process is described in greater detail in chapter 8 of this guide.

RETALIATION OR COERCION

An entity may not retaliate against or coerce any individual because that individual took action to oppose any act or practice prohibited by WIA §188, or because that individual assisted or encouraged others in exercising their rights under WIA §188. Prohibited actions include threats, intimidation, harassment, or interference.

EXCLUSIONS FROM PROTECTION

A Direct Threat to Health or Safety

One factor to be considered in determining whether a person is a qualified individual with a disability is the health or safety of others. Under the WIA §188 and applicable disability laws, if an individual with a disability poses a *direct threat* to the health or safety of others, then that person is not a qualified individual with a disability. Such a person has not met an essential eligibility requirement for the receipt of services or participation in programs or activities of a recipient.

29 CFR 37.7(l)

A recipient must not exclude, or otherwise deny equal aid, benefits, services, training, programs or activities to, an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

29 CFR §37.70

Who may file a complaint concerning discrimination connected with WIA Title I?

Any person who believes that either he or she, or any specific class of individuals, has been or is being subjected to discrimination prohibited by WIA or this part may file a written complaint, either by him/herself or through a representative.

28 CFR §37.11

(a) A recipient must not discharge, intimidate, retaliate, threaten, coerce or discriminate against an individual because the individual has:

- (1) Filed a complaint alleging a violation of Section 188 of WIA or this part;
- (2) Opposed a practice prohibited by the nondiscrimination and equal opportunity provisions of WIA or this part;
- (3) Furnished information to, or assisted or participated in any manner in, an investigation, review, hearing, or any other activity . . .
- (4) Otherwise exercised any rights and privileges under the nondiscrimination and equal opportunity provisions of WIA . . .

(b) The sanctions and penalties contained in Section 188(b) of WIA or this part may be imposed against any recipient that engages in any such retaliation or intimidation, or fails to take appropriate steps to prevent such activity.

The determination that an individual with a disability poses a direct threat to the health or safety of the individual or of others may not be based on stereotypes. The decision must be based on an individualized assessment of the person's present condition, not on speculation about any future risk. It must also be based on reasonable judgment founded on medical evidence or on the best available objective evidence. Factors to be considered in determining whether an individual poses a direct threat to health and safety include:

- the duration, nature, and severity of the potential harm;
- the likelihood the potential injury will occur;
- the imminence of the potential harm; and
- whether a reasonable accommodation (in an employment context), or reasonable modification in policies, practices, or procedures, or the provision of auxiliary aids and services, will mitigate or eliminate the risk.

CONDITIONS NOT CONSIDERED DISABILITIES

29 CFR §37 explicitly excludes the following conditions from the term disability: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from the current illegal use of drugs [29 CFR §37.4]. Moreover, the phrase "physical or mental impairment" does not include homosexuality or bisexuality; those orientations are not considered disabilities under WIA §188, section 504 or the ADA. However, where these individuals also have physical or mental conditions that do constitute disabilities under WIA §188, section 504 or the ADA, they may not be discriminated against on the basis of the covered disability.

Current Illegal Use of Drugs Not Protected

Although an individual addicted to drugs may be an individual with a disability, persons who are **currently** engaging in the illegal use of drugs are not protected by WIA §188, section 504 or the ADA. Thus, a recipient may withhold services or benefits from a person because of his or her current illegal use of drugs. By contrast, a person with a history of drug use who has been successfully rehabilitated, or someone who is

29 CFR 37.4

(2) The term "individual with a disability" also does not include an individual who is currently engaged in the illegal use of drugs, when a recipient acts on the basis of such use. This limitation does not exclude as an individual with a disability an individual who:

- (i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;
- (ii) Is participating in a supervised rehabilitation program; or
- (iii) Is erroneously regarded as engaging in such use.

participating in a drug rehabilitation program and is **not** currently using drugs illegally, is protected.

Use of Alcohol

Alcoholism can be a disability covered by the ADA. If a person's alcoholism substantially limits a major life activity, that person has a disability under the ADA. Employers may prohibit the use of alcohol by all employees at the workplace and may hold an alcoholic employee to the same performance and conduct standards that apply to all employees [29 CFR §1630.16(b)].

Under Section 188 persons who are alcoholics, whose current use of alcohol prevents their performing the duties of their job or constitutes a direct threat to the property or safety of others, **are not** considered to be persons with a disability in the context of employment. In other words, beneficiaries who are alcoholics, are entitled to the same aid, benefits, services, or training that are due any other person with a disability. However, if seeking employment or currently employed by a recipient, these persons are not entitled to the protections of other persons with disabilities. They may not claim their alcoholism as a disability in the employment context.

Contagious Disease or Infection Not Considered Disabilities in Employment Context

Likewise, Section 188 does not consider as disabling conditions **in the context of employment** any currently contagious diseases or infections that prevent an individual from performing job duties or that constitute a direct threat to the health and safety of others. As in the previous case, beneficiaries of aid, benefits, services, or training, who have currently contagious diseases or infections, may qualify for the protections due to persons with disabilities under Section 188, but employees or employment applicants do not qualify for this protection— unless they have some other basis for being considered persons with disabilities.

U.S. Citizenship Not Required for Protection

A person does **not** have to be a United States citizen to be covered by section 504 or WIA §188. In fact, WIA §188

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(2) With regard to employment, the term “individual with a disability” does not include any individual who:

- (i) Is an alcoholic:
 - (A) Whose current use of alcohol prevents such individual from performing the duties of the job in question, or
 - (B) Whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others; . . .

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(2) With regard to employment, the term “individual with a disability” does not include any individual who:

- (ii) Has a currently contagious disease or infection, if:
 - (A) That disease or infection prevents him or her from performing the duties of the job in question, or
 - (B) His or her employment, because of that disease or infection, would constitute a direct threat to the health and safety of others.

prohibits discrimination on the ground of citizenship (see the definition of the term “discrimination on the ground of citizenship” in 29 CFR 37.4).

B. WHAT DISCRIMINATORY ACTIONS ARE PROHIBITED?

General Prohibitions Against Discrimination

Discrimination against persons with disabilities is prohibited by WIA Section 188 as part of a broader prohibition against discrimination on numerous grounds [29CFR §37.5]. In addition, it includes an entire section detailing specific prohibited discrimination based on disability [29CFR §37.7].

Applicability

A WIA Title I recipient must ensure that no qualified individual with a disability is, on the basis of disability, excluded from participation in or denied any benefit of its aid, benefits, services, or training, or subjected to any other discrimination [29CFR §37.7(a)(1-6)].

The requirement to ensure that qualified individuals with disabilities are not discriminated against in the workforce investment system is applicable to the aids, benefits, services, or training that are provided directly by the One-Stops, as well as those operated or provided by another entity on behalf of the Local Workforce Investment Area (LWIA) under contractual or other arrangements. This means that it is necessary to evaluate the aids, benefits, services, and training that are provided by all entities on behalf of the LWIA through contractual or other arrangements as well as those provided directly by the One-Stop Center.

For example, a One-Stop Center that operates its own GED-prep program may not exclude individuals with disabilities from participating in the program. If the same One-Stop Center contracted with a private provider to deliver this training program, it continues to be responsible for the assurance of nondiscrimination on the part of the contractor. Accordingly, if the contractor excluded a student from service on the basis of the student's disability, the One-Stop Center would be liable for that discrimination.

29 CFR §37.5 What forms of discrimination are prohibited by this part?

No individual in the United States may, on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in any WIA Title I--financially assisted program or activity, be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with any WIA Title I--funded program or activity.

BASIC EQUAL OPPORTUNITY REQUIREMENTS

Denial of Opportunity to Participate or Benefit Prohibited.

A recipient must ensure that no qualified individual with a disability is, on the basis of disability, excluded from participation in, or denied any benefit of, its aid, benefit, services, or training, or subjected to any other discrimination [29 CFR §37.7(a)(1)]. This means that, in providing general benefits and services, a One-Stop Center must take steps to ensure that a qualified individual with a disability is not denied the opportunity to participate in any of its programs or to benefit from any aid, benefit, service, or training that it provides.

Provision of Unequal Opportunity or Benefit Prohibited

A recipient must also ensure that, in providing general services and benefits, a qualified individual with a disability is provided an opportunity to participate in its programs that is **equal** to the opportunity that is provided to nondisabled persons to participate. A One-Stop Center must also ensure that a qualified individual with a disability is provided with an opportunity to benefit from any aid, benefit, service, or training that is provided under its programs that is equal to the opportunity that is provided to nondisabled individuals.

For example, an individual with a profound hearing disability is being evaluated for intensive services, and it is determined that, in order for them to benefit from these services, that reasonable accommodations, including a sign language interpreter or other appropriate accommodation, must be provided. The One-Stop, citing expense, refuses to pay for the sign language interpreter. The One-Stop would be in violation of Section 188.

Provision of Benefit or Service That Is Not Equally Effective Prohibited

In providing general services and benefits, a One-Stop Center must ensure that services provided to qualified individuals with disabilities are effective enough to afford equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement as

29 CFR §37.7(a)(1)

In providing any aid, benefits, services, or training under a WIA Title I-financially assisted program or activity, a recipient must not directly or through contractual, licensing, or other arrangements, on the ground of disability: (1) deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefits, services, or training.

29 CFR §37.7(a)(2)

In providing any aid, benefits, services, or training under a WIA Title I-financially assisted program or activity, a recipient must not directly or through contractual, licensing, or other arrangements, on the ground of disability afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefits, services, or training that is not equal to that afforded others

29 CFR §37.7(a)(3)

In providing any aid, benefits, services, or training under a WIA Title I-financially assisted program or activity, a recipient must not directly or through contractual, licensing, or other arrangements, on the ground of disability afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefits, services, or training that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or reach the same level of achievement as that provided to others.

nondisabled individuals.

For example, a Welfare-to-Work participant with a learning disability is evaluated, and it is determined that she can participate in a remedial education program with certain modifications, such as being permitted additional time in which to take tests. Any action inconsistent with this determination, such as an instructor's denial of additional time to take a test, would result in provision of training to this individual that was not effective enough to afford her an equal opportunity to reach the same level of achievement as nondisabled participants.

Programs

Under Section 188, a recipient may not operate separate or different programs, or provide separate or different aids, benefits, services, or training within programs, for individuals with disabilities, unless such aids, benefits, services, or training are necessary to provide assistance to persons with disabilities that are equally as effective as those provided to nondisabled persons [29 CFR §37.7(a)(4)]. Even when separate aids, benefits, services, or training are permitted under Section 188, a recipient must provide them in the most integrated setting appropriate to the needs of qualified individuals with disabilities [29 CFR §37.7(d)].

Separate programs may not be established based on stereotypes or presumptions about what a class of individuals with disabilities can or cannot do. However, even where the recipient operates a permissibly separate program or offers a permissibly separate service or benefit, it may not deny participation in the regular program or provision of the regular service or benefit to any qualified individual with a disability [29 CFR 37.7(c)].

It is also important to note that persons with disabilities have the right to decline accommodations, aids, or services, including those that might be offered to individuals with disabilities participating in regular programs [29 CFR §37.7(0)(1)]. For example, a person with a hearing impairment may choose to decline special front-row seating at a One-Stop related activity. However, if individuals decline accommodations necessary to enable them to participate in a program and are unable to meet the essential eligibility requirements of the program without the accommodations, they would not be "qualified individuals with

29 CFR §37.7(a)(4)

In providing any aid, benefits, services, or training under a WIA Title I-financially assisted program or activity, a recipient must not directly or through contractual, licensing, or other arrangements, on the ground of disability provide different, segregated, or separate aid, benefits, services, or training to individuals with disabilities, or to any class or individuals with disabilities, unless such action is necessary to provide qualified individuals with disabilities with aid, benefits, services or training that are as effective as those provided to others;

29 CFR §37.7(c)

A recipient must not deny a qualified individual with a disability the opportunity to participate in WIA Title I-financially assisted programs or activities despite the existence of permissibly separate or different programs or activities.

disabilities." Of course, individuals with disabilities have the right to provide their own accommodations, aids and services, which may enable them to be qualified to participate in a program.

Denial of Board Membership Prohibited

A local One-Stop system is overseen by the Local Workforce Investment Board (LWIB). In addition, One-Stop partners often have advisory boards and there may be planning or coordinating committees associated with the operation of a One-Stop or one of its entities. Participation on any of these boards is to be afforded to persons with disabilities. They must not be denied participation on a board on grounds of their disability.

Limitations on Enjoying Advantages, Opportunities, or Benefits Prohibited

In general, persons with disabilities are to be afforded every opportunity, advantage, privilege, and right that is available or enjoyed by persons without disabilities through the aids, benefits, services, and training provided by recipients through the One-Stop system.

Surcharges Prohibited

Section 188 prohibits placing surcharges on individuals with disabilities to cover the cost of measures necessary to provide nondiscriminatory treatment [29 CFR §37.7(k)]. This means, for example, that a One-Stop Center that provides an auxiliary aid or service to an individual with a disability in order to enable that individual to effectively participate in the program, may not charge the individual for the auxiliary aid or service. A Center may, however, charge individuals with disabilities the same fees for services, programs, and events that it charges individuals without disabilities.

Eligibility Criteria

The Workforce Investment System may not use eligibility criteria for participation in its programs or receipt of its benefits or services that directly or indirectly screen out individuals with disabilities, or that directly or indirectly cause individuals with disabilities to be denied full and equal

29 CFR §37.7(a)(5)

In providing any aid, benefits, services, or training under a WIA Title I-financially assisted program or activity, a recipient must not directly or through contractual, licensing, or other arrangements, on the ground of disability deny a qualified individual with a disability the opportunity to participate as a member of planning or organizing boards; or

29 CFR §37.7(a)(6)

In providing any aid, benefits, services, or training under a WIA Title I-financially assisted program or activity, a recipient must not directly or through contractual, licensing, or other arrangements, on the ground of disability otherwise limit a qualified individual with a disability in enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, service or training.

29 CFR §37.7(i)

A recipient must not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any aid, benefit, service, training, program, or activity, unless such criteria can be shown to be necessary for the provision of the aid, benefit, service, training, program, or activity being offered.

participation, services, or benefits, **unless** the eligibility criteria are necessary for the provision of the service, program, or activity being offered [29 CFR§37.7(i)].

A One-Stop Center may impose legitimate safety requirements necessary for the safe operation of its aids, benefits, services, or training. However, any safety requirement must be based on actual risks, and not on speculation, stereotypes, or generalizations about individuals with disabilities.

For example: A One-Stop Center sponsors training in computer repair. The application states that individuals with disabilities must submit a doctor's certificate indicating that they are able to participate in the course. The One-Stop can make no showing that this blanket requirement is essential. This type of eligibility requirement is in violation of Section 188.

Effect of Policies and Practices (Standards, Procedures, Criteria, Methods of Administration)

A recipient may not use "**standards, procedures, criteria or methods of administration**" that result in discrimination on the basis of disability [29 CFR §37.7(e)]. A recipient may not have written policies or actual operating practices that exclude qualified individuals with disabilities directly on the basis of their disability. The requirement prohibiting standards, procedures, criteria or methods of administration that have the effect of discriminating on the basis of disability means that a recipient may not use policies or practices-- even where they are not stated in terms of prohibiting participation on the basis of disability or where they are not intended to prohibit or limit participation on the basis of disability--that cause qualified individuals with disabilities to be denied an equal opportunity to participate in a program or to benefit on an equal basis under the program.

29 CFR §37.7(e)

A recipient must not directly or through contractual, licensing, or other arrangements, use standards, procedures, criteria, or administration methods:

- (1) That have the purpose or effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;
- (2) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the WIA Title I-financially assisted program or activity with respect to individuals with disabilities; or
- (3) That perpetuate the discrimination of another entity if both entities are subject to common administrative control or are agencies of the same state.

Selecting Sites and Locations

In determining the site or location of a facility, a One-Stop Center may not select a site or location that: (1) has the effect of excluding individuals with disabilities, denying them benefits, or otherwise subjecting them to discrimination; or (2) has the purpose or effect of defeating or substantially impairing the accomplishment of the disability-related objectives of the service, program, or activity with respect to individuals with

disabilities [29 CFR 37.7(f)]. Thus, the site selection procedures of a Workforce Investment Board should routinely include an assessment of whether the terrain or any other feature of a site or location under consideration would have any adverse effect on participation by qualified individuals with disabilities.

The requirements concerning the selection of sites and locations do not apply to construction of additional buildings at an existing site. However, any such facilities must be made accessible in accordance with the requirements for new construction discussed in Chapter Six.

Significant Assistance to Entities That Discriminate

Recipients must identify agencies, organizations, and persons to whom they provide "significant assistance" and determine whether, through that assistance, they may be aiding or perpetuating discrimination against qualified individuals with disabilities [29 CFR §37.7 (b)].

For example, a One-Stop Center permits a national service organization to establish a tutoring and mentoring program for "at-risk" youth. The One-Stop learns that the organization plans to ask youth who apply to the program whether they are HIV-positive and to screen applicants out of the program on that basis. The One-Stop Center provides publications, supplies, and space. The Center must inform the organization that it cannot provide "significant assistance" to an organization that discriminates on the basis of disability. If the organization does not eliminate the discriminatory criterion for participation, the One-Stop must terminate its relationship with the organization.

29 CFR §37.7(b)

(b) A recipient must not, directly or through contractual, licensing, or other arrangements, aid or perpetuate discrimination against qualified individuals with disabilities by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefits, services or training to registrants, applicants, or participants.

Procurement Contracts

A One-Stop Center may not discriminate on the basis of disability in the selection of contractors in any procurement [29 CFR §37.7(g)].

Licenses or Certification

A recipient that operates a licensing or certification program may not discriminate against qualified individuals with disabilities on the basis of disability in its licensing and

certification activities [29 CFR §37.7(h)]. A recipient may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability.

Exceeding the Section 188 Requirements

Section 188 permits a public entity to provide benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by the regulation [29 CFR §37.7(j)]. This means that One-Stop Centers may provide programs, services, and benefits that are designed only to benefit individuals with disabilities without incurring additional obligations to nondisabled persons or to other classes of individuals with disabilities.

C. WHAT ARE REASONABLE ACCOMMODATIONS?

Requirement to Provide Reasonable Accommodation and Reasonable Modification

Reasonable Accommodation and Reasonable Modification are similar terms that are used when describing procedures and remedies for ensuring the participation of persons with disabilities. Reasonable Accommodations are those things which are provided to the qualified person with a disability--ordinarily based upon their request--to enable their participation. Reasonable Modifications are those things which a recipient must make to its policies, practices, or procedures to avoid discrimination on the basis of disability.

Section 188 requires recipients to make those modifications to policies, practices, or procedures that are necessary to avoid discrimination on the basis of disability [29CFR §37.8(b)]. In addition, it requires meeting the requests of persons with disabilities for reasonable accommodations to enable their participation in the aids, benefits, services, training, or employment that the recipient provides [29CFR §37.8(a)]. Under the ADA, reasonable accommodation is required in the area of employment. Under Section 188, the requirement to provide reasonable accommodations is extended to all of the aids, benefits, services, or training that may be provided through the One-Stop system.

29 CFR §37.4

Reasonable accommodation.

(1) The term "reasonable accommodation" means:

(i) Modifications or adjustments to an application/registration process that enables a qualified applicant/registrant with a disability to be considered for the aid, benefits, services, training, or employment that the qualified applicant/registrant desires; or
(ii) Modifications or adjustments that enable a qualified individual with a disability to perform the essential functions

of a job, or to receive aid, benefits, services, or training equal to that provided to qualified individuals without disabilities. These modifications or adjustments may be made to:

(a) The requirements to qualify for aid, benefits, services, or training; or
(b) The aids, benefits, services, or training.

(c) The registration process, including the application and employment, a recipient must provide reasonable accommodation to qualified individuals with disabilities who are applicants, registrants, eligible employees, or applicants for employment, unless providing the training are given, or
(d) Modifications or adjustments that enable a qualified individual with a disability to enjoy the same benefits and privileges of the aids, benefits, services, training, or employment as are enjoyed by other similarly situated individuals without disabilities, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless making the modifications would fundamentally alter the nature of the service, program, or activity.

(e) The aids, benefits, services, or training, or employment, a recipient must also make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless making the modifications would fundamentally alter the nature of the service, program, or activity.

(f) The aids, benefits, services, or training, or employment, a recipient must also make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless making the modifications would fundamentally alter the nature of the service, program, or activity.

(g) The aids, benefits, services, or training, or employment, a recipient must also make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless making the modifications would fundamentally alter the nature of the service, program, or activity.

Reasonable Accommodation Defined

The definition of Reasonable Accommodation in 29CFR Part 37 includes a wide range of areas in which accommodation is frequently sought. Recipients are required to make reasonable accommodation for qualified applicants, registrants, and employees with disabilities who request such accommodation. Reasonable accommodation in the program environment means modification or adjustment to an application/registration process or to the customary manner in which aid, benefits, services, or training are given that enable a qualified individual with a disability to enjoy the same benefits and privileges as individuals without disabilities. Reasonable accommodation in the employment environment means modification of the job application process, the way in which a job is customarily performed, or employment policies that enable a qualified individual with a disability to be considered for the position, perform the essential functions of the job, or enjoy benefits and privileges of employment equal to those available to a similarly-situated employee without a disability [29 CFR §37.4].

Reasonable Accommodation and Accessibility

In addition to the definitions and particular regulations regarding reasonable accommodation in 29CFR Part 37, the preamble includes a discussion of the relationship between reasonable accommodation and accessibility. The distinction between these two is that the requirement to provide accessible programs and accessible buildings requires a recipient to take advance action to ensure that they are ready when persons with disabilities seek aid, benefits, services, training, or employment from the recipient. The requirement to provide reasonable accommodation for a person with a disability is one that becomes activated when a person with a disability does come and present the recipient with specific needs in order to take advantage of the aid, benefits, services, training, or employment that the recipient is offering. Accessibility requires advance preparation and readying; accommodation requires adjustment within the context of delivering specific aid, benefits, services, training, or employment to a particular individual with a disability.

29CFR §37: Supplementary Information

Under the requirements of Section 188 of WIA and this part, as well as under other Federal civil rights laws and their implementing regulations, a recipient must provide both accessible facilities (that is, both program accessibility and architectural accessibility) and reasonable accommodation for individuals with disabilities. It is important to understand the difference between these two requirements.

Providing accessible facilities requires a recipient to take advance actions, in order to be ready when persons with disabilities seek aid, benefits, services, training, or employment from that recipient at some point in the future. See the discussion of "program accessibility" and "architectural accessibility" in the discussion in this preamble about Paragraph 37.3(b).

By contrast, providing reasonable accommodation for an individual with a disability requires the recipient to make efforts to meet the specific needs of the particular individual who is currently seeking aid, benefits, services, training, or employment from the recipient. Reasonable accommodation may require making specific structural or other modifications to meet the needs of a particular individual for access.

Examples of Reasonable Accommodation

Examples of reasonable accommodations in the program environment include, along with making facilities accessible, also restructuring a service or the way in which aid, benefits, or training are provided; making appropriate adjustment or modifications to examinations, training materials, or policies; providing readers or interpreters; and other similar accommodations for individuals with disabilities.

Examples of reasonable accommodation in the work environment include adjusting work schedules, restructuring the job, reassigning the employee, acquiring or modifying equipment and devices, providing qualified readers or interpreters, or modifying the work site [29 CFR §1630.2(o)(2)].

1.) Modifying in the way in which training is provided.

Modifications of training delivery may include more frequent breaks, repetition of key points, and utilization of a variety of media in training sessions.

Luisa, the clerical skills trainer has been informed that Anne, a welfare-to-work participant who will be taking part in the training, has informed her job counselor that she has a mild form of Attention Deficit Disorder (ADD). Anne has trouble concentrating for long periods of time, and has trouble digesting/comprehending information that is spoken to her. After consulting with a local community based organization that focuses on learning disabilities, Luisa modified the training to add an additional break in the morning and afternoon, concluded each morning and afternoon session with a reiteration of the major points from the day's lesson, made key points through visual and oral presentation, and provided a number of hands-on in-class exercises. Anne is excelling in the clerical skills training program and the One-Stop Center is fulfilling its obligation to provide reasonable accommodation.

2) Adjusting work schedules. Recipients, in their employment practices, should consider modification of a regular work schedule as a reasonable accommodation unless this would cause an undue hardship. Modified work schedules may include flexibility in work hours or the work week, or part-time work, where this will not be an undue hardship.

29 CFR §37.4

(2) Reasonable accommodation includes, but is not limited to:

(i) Making existing facilities used by applicants, registrants, eligible applicants/registrants, participants, applicants for employment, and employees readily accessible to and usable by individuals with disabilities; and

(ii) Restructuring of a job or a service, or of the way in which aid, benefits, or training is/are provided; part-time or modified work or training schedules; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of readers or interpreters; and other similar accommodations for individuals with disabilities.

For example, Jean, a job counselor with a mental disability, requires two hours off, twice weekly, for sessions with a psychiatrist. She requests a reasonable accommodation. The One-Stop Center permits Jean to take longer lunch breaks and to make up the time by working later on those days. The One-Stop is fulfilling its obligation to provide reasonable accommodation.

Although employers may be required to make adjustments in leave policy as a reasonable accommodation in some instances, employers are not required to provide additional paid leave for employees with disabilities as an accommodation.

3) Restructuring the job. Job restructuring as a reasonable accommodation may involve reallocating or redistributing the marginal functions of a job. Although a recipient, as an employer, is not required to reallocate essential functions of a job as a reasonable accommodation, it may be a reasonable accommodation to modify the essential functions of a job by changing when or how they are done.

For example, Rob, who had his left arm amputated as a result of an accident, has returned to work in the facilities maintenance department using a prosthesis. He is able to perform all of the essential job functions of his former position. However, Rob is not able to perform the marginal function of operating one piece of equipment that cannot be modified and requires a two-handed, fine motor grasping motion. Since Rob always works as part of a crew, the duties among the crew are re-allocated so that other workers perform that task. The Center is fulfilling its obligation to provide reasonable accommodation.

4) Reassigning the employee to a vacant position. Under Title I of the ADA, reassignment may be an appropriate accommodation if an individual is unable to perform the essential functions of his or her current position because of a disability. If there is no other accommodation that will enable the person to perform these functions, or if the employer can prove that other accommodations would pose an undue hardship, reassignment to a vacant position should be considered if the individual is qualified for the position.

5) Acquiring or modifying equipment and devices. Purchase of equipment or devices or modifications to existing equipment may be effective accommodations for people with

many types of disabilities. There are many devices that make it possible for people to overcome existing barriers to performing functions of a job. These devices range from very simple solutions, such as an elastic band that can enable a person with cerebral palsy to hold a pencil and write, to high-tech electronic equipment that can be operated with eye or head movements by people who cannot use their hands. There are also many ways to modify standard equipment, enabling people with functional limitations to perform jobs effectively and safely.

Creative analysis of job requirements often results in effective low-cost accommodations. The following are examples of effective uses of low-cost assistive devices that would be considered reasonable accommodations:

- Wrist supports for use while typing (available for under \$30) and adjustment of the height of the desk chair may enable a clerk/typist with carpal tunnel syndrome (an inflammatory disease that affects the wrists, typically as a result of repetitive motion) to do his or her job with minimal stress on his or her wrist joints.
- A trackball may be used instead of a "mouse" to enable an individual with poor hand-eye coordination to control the movement of the cursor on a computer screen.

It is important to note that many types of equipment and devices that are effective accommodations for employees with visual, hearing or speech disabilities--such as large print displays on computer monitors, screen readers, TTY/TDDs, and telephone amplifiers--also constitute **auxiliary aids and services** that are designed to provide effective communication. Auxiliary aids and services that are used to provide effective communication are discussed in greater detail in Chapter Seven on communication.

6) Providing qualified readers and interpreters. It may be a reasonable accommodation to provide a qualified reader for a qualified individual with a visual disability or a qualified interpreter for a qualified individual with a hearing disability, if such an accommodation does not impose an undue hardship. Identifying the needs of the individual in either program or employment situations will determine whether or when a reader or interpreter is needed. Few tasks require a full-time employee for reading or interpreting. A reader or an interpreter may be a part-time employee or a full-time employee who performs other

duties. Readers and interpreters must read and interpret well enough, respectively, to enable the employee with disabilities to perform his or her job effectively or to receive aid, benefits, services, or training equal to that provided to qualified individuals without disabilities. A qualified interpreter must be able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

Qualified readers and interpreters are also examples of auxiliary aids and services that may be used to provide effective communication, as discussed more fully in Chapter Seven.

7) Modifying the work site. Employers are obligated to provide access for individual job applicants with disabilities to enable them to participate in the job application process. When an employee with a disability is hired, an employer may have to modify the work site to enable him or her to perform essential job functions. In addition, employees with disabilities must be able to readily access all facilities used by employees, whether essential to job functions or not--for example, the employee lounge or cafeteria.

For example Peter, who uses a wheelchair, is hired as an administrator. He is unable to enter the building where he is assigned, which has two steps between the lobby entrance and the elevators. He is also unable to sit comfortably at his desk because it is too low to the floor. The One-Stop Center constructs a ramp in the lobby to provide an accessible route for Peter. His desk is raised on concrete blocks to accommodate the height of his wheelchair. These worksite modifications fulfill the center's duty to provide reasonable accommodation.

Personal Devices and Services

It is important to understand that a recipient is obligated to provide only program-related job-related accommodations. The requirement to provide reasonable accommodation does not include providing personal devices or services to assist an individual in daily activities, such as wheelchairs, prescription eyeglasses or hearing aids, prostheses, readers for personal use or study, or assistance in toileting, dressing, or eating [29CFR §37.7].

Choosing the Accommodation

Title I of the ADA specifies that an employer is obligated to accommodate only known disabilities of qualified applicants or employees [29 C.F.R. §1630.9(a)]. The responsibility for providing an accommodation is triggered when an individual with a disability makes a request for an accommodation. The person making the request will often be able to suggest an appropriate accommodation.

Not all employees with disabilities require accommodations. For other employees, the need for accommodation may be obvious. If an employee with a known disability is having difficulty performing the job without an accommodation, the employer may ask the employee whether he or she is in need of an accommodation. Under Section 188, a qualified individual with a disability is not required to accept the offer of an accommodation [29CFR §37.7(o)(1)]. However, if such an offer is rejected and the person cannot then perform the essential functions of the job, the person will no longer be considered a qualified individual with a disability [29 CFR §1630.9(d)].

Once the applicant or employee has requested an accommodation, sufficient information must be gathered to determine the type of accommodation necessary to enable the individual to perform the job. In most instances, the person with a disability is in the best position to identify what is needed. Ask them! When necessary, seek additional information from qualified experts.

An employer need not provide the requested accommodation if an alternative means of accommodation that is less costly, but equally effective, is available. It is mandatory, however, to provide an accommodation that gives a qualified individual with a disability an opportunity to attain the same level of job performance as co-workers with similar skills and abilities.

The Job Accommodation Network (JAN) provides free consulting services for employers, employees, or job-seekers to help them select accommodations to enable persons with disabilities to perform critical job functions. By contacting the JAN, an employer, job-seeker, or a One-Stop recipient can access experienced persons familiar with a large number of accommodations that may be applicable to the barrier an

29 CFR §37.4 (3)

To determine the appropriate reasonable accommodation, it may be necessary for the recipient to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 CFR §37.7 (o)(1)

(o)(1) Nothing in this part requires an individual with a disability to accept an accommodation, aid, benefit, service, training, or opportunity provided under WIA Title I or this part that such individual chooses not to accept.

employee must overcome. By far, the majority of accommodations suggested are relatively inexpensive; 31% of those suggested by Network consultants have been free. JAN can be reached toll-free at 1-800-526-7234 or on the internet at <http://www.jan.wvu.edu/english/homeus.htm>.

The Counterbalance: Fundamental Alteration or Undue Burden/Hardship

There is a limit to the accommodation that must be offered by a recipient in the One-Stop delivery system. It occurs when the recipient believes that making the proposed modification or providing the proposed accommodation would result in a fundamental alteration – that is a change in the essential nature of a program or activity – and/or create such additional cost as to become an undue “undue burden or “undue hardship” [29 CFR §37.8(a)]. In the event that a recipient – either when acting as an employer or when offering aid, benefits, services, or training – believes that the requested accommodation would cause an undue burden, the recipient must follow a three step process that is specified in the regulation. Recipients that believe a proposed accommodation would create a fundamental alteration and/or cause an undue burden must:

- prove that the requested accommodation would result in such hardship; the burden of proof rests with the recipient;
- make their determination only after considering all of the factors that are required by the definition of “undue hardship” and commit their determination, along with the reasons for it, to writing—and provide a copy of the written explanation to the individual or individuals who requested the accommodation;
- take any other action that would not result in the hardship, but would ensure that individuals with disabilities receive the aid, benefits, services, training, or employment provided by the recipient to the maximum extent possible [29 CFR §37.8].

Fundamental alteration is defined as a “change in the essential nature of a program or activity, including but not limited to an aid, service, benefit, or training; . . . or a cost that would result in an undue burden” [29 CFR §37.4]. “Undue burden/hardship is defined as “significant difficulty or expense incurred by a recipient” in the provision of an accommodation [29 CFR

29 CFR §37.8(a)

(1) In those circumstances where a recipient believes that the proposed accommodation would cause undue hardship, the recipient has the burden of proving that the accommodation would result in such hardship of a program or activity as defined in this part, including but not limited to an aid, service, benefit, or training, and that a recipient can demonstrate that a recipient can demonstrate “undue burden or undue hardship” in Sec. 37.8(a). A decision must be accompanied by a written statement of the recipient’s reasons for each conclusion. The recipient may also provide information on the individual or individuals who requested the accommodation, including the individual or individuals who requested the accommodation, the expense incurred by a recipient when providing the accommodation, and the factors that the recipient considered in making the determination that would not result in such hardship, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the aid, benefits, services, training, or employment provided by the recipient.

§37.4]. Factors that must be weighed in determining whether a requested accommodation poses an undue hardship include:

- the nature and net cost of the accommodation, taking into consideration the availability of tax credits and deductions and/or outside funding for the accommodation;
- the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons aided, benefitted, served, trained by, or employed at, such facility; and the effect on expenses and resources;
- the overall financial resources of the recipient; the overall size of the recipient; the number of persons aided, benefitted, served, trained, or employed; and the number, type, and location of its facilities;
- the type of operation or operations of the recipient; including the composition, structure, and functions of the recipient's work force; the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the recipient; and
- the impact of the accommodation upon the operation of the facility; including the impact on the ability of other participants to receive aid, benefits, services, or training, or of other employees to perform their duties; and the impact on the facility's ability to conduct business [29 CFR §37.4].

Under Section 188, the resources that are available to the recipient's specific work site must be considered, in addition to consideration of the resources of the recipient as a whole. The Section 188 regulation also stresses that net cost (taking into consideration the availability of tax credits, tax deductions, and/or outside funding) is a relevant factor.

The determination whether a requested accommodation is reasonable must be made on a case-by-case basis. If providing a particular accommodation would be an undue hardship, the recipient must attempt to identify an alternative accommodation that would not. Title I of the ADA adds the additional option, in cases in which the accommodation would pose an undue hardship for the recipient, the individual with the disability should be given the option of paying for the portion of the cost that constitutes an undue hardship or of providing the accommodation [Appendix to 29 CFR §1630, at 414 (1994)]. It must be clearly understood, however, that this option is to be offered as a last resort and only in cases in which providing the

requested accommodation would clearly constitute an undue hardship; it is not to be considered a routine cost-saving strategy.

For example a job counselor with a disability that affects blood circulation requests that the thermostat in her office suite be raised to a certain level to accommodate her disability. However, the temperature she requires for her own comfort is uncomfortably hot for her office mates. The center does not have to provide this accommodation if it would constitute an undue hardship. However, if there is an alternative accommodation that would not be an undue hardship--such as providing a space heater--the recipient must provide that accommodation.

If employees are governed by a collective bargaining agreement, the terms of that agreement may have an impact on whether or not a requested accommodation creates an undue hardship [Appendix to 29 CFR §1630, at 414 (1994)].

EEOC Guidance to Reasonable Accommodation

The EEOC has developed guidance on reasonable accommodation and undue hardship. The entire EEOC guidance is included as Appendix **XXX** of this document; it is also available through the EEOC website at www.eeoc.gov/docs/accommodation.html.

Qualification Standards and Selection Criteria Permitted

In the area of employment, the ADA makes clear that employers are not prohibited from establishing physical and mental job-related qualification standards--including education, skills, and work experience--necessary for job performance, health and safety [29 CFR §1630.10]. Recipients are entitled to hire the most qualified person able to perform a job.

ADA requirements are designed to ensure that people with disabilities are not excluded from jobs that they can perform. However, qualification standards or selection criteria that screen out or tend to screen out an individual with a disability on the basis of disability are not automatically disallowed if they are demonstrably job-related and consistent with business necessity [29 CFR §1630.10]. **"Job-related"** means

29 CFR §1630.10 Qualification standards, tests, and other selection criteria.

It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

that a selection criterion must be a legitimate measure or qualification for the specific job for which it is being used. **"Business necessity"** means that a selection criterion may not exclude an individual with a disability because of the disability unless the criterion relates to the essential functions of the job.

CHAPTER TWO: Protections and Reasonable Accommodation for Persons with Disabilities

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