Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Department of Health and Human Services,	DATE: December 10, 1993
- v.-	Docket No. 93-504-2 Decision No. CR295
Cerebral Palsy Center of the Bay Area,	
Respondent.	

DECISION

In a Notice of Opportunity for Hearing (Notice) dated February 1, 1993, the United States Department of Health and Human Services (Department) charged Respondent, Cerebral Palsy Center of the Bay Area (Respondent or CPCBA), with violating section 504 of the Rehabilitation Act of 1973 (Act), as amended, 29 U.S.C. § 794, and its implementing regulation at 45 C.F.R. Part 84. The Department seeks as a remedy termination of all federal financial assistance to Respondent.

Respondent requested a hearing. I held a hearing in San Francisco, California, from May 3 through May 6, 1993. During this hearing, Respondent contested the Department's jurisdiction to bring this case. On June 2, 1993, I heard testimony limited solely to this jurisdictional issue. The parties filed posthearing briefs in accordance with the schedule I established.

I have carefully considered the applicable law, the evidence adduced at the hearing, the posthearing briefs, and the proposed findings and conclusions submitted by the parties. I conclude that the Department has failed to prove that it has jurisdiction to bring, or I have the jurisdiction to hear, that part of the case which relates to Respondent's alleged discrimination against the complainant, an allegedly qualified handicapped person as

defined by 45 C.F.R. § 84.3(k), by subjecting him to discrimination in employment, and by denying him an employment opportunity based on the need to make reasonable accommodation, allegedly violating section 504 of the Act and 45 C.F.R. §§ 84.11(a), 84.12(a), and 84.12(b). However, I find I do have the jurisdiction to hear the Department's allegation that Respondent's employment application discriminates by making an impermissible pre-employment inquiry of an applicant regarding the existence of a handicap or the nature or severity of such handicap, allegedly in violation of 45 C.F.R. § 84.14(a). Furthermore, I find that Respondent's employment application discriminates against applicants in the manner alleged. However, I find that the Department has not proved that Respondent's compliance with section 504 regarding its employment application cannot be secured through voluntary means. Thus, pursuant to 45 C.F.R. § 80.8(c), I find that there exists no basis upon which to terminate Respondent's federal financial assistance.

ISSUES

The issues in this case are whether:

1. I have the jurisdiction to decide if Respondent is engaging in unlawful conduct in violation of section 504 by:

    a. Discriminating against the complainant by subjecting him to discrimination in employment and denying him an employment opportunity, based on the need to make reasonable accommodation;

    b. Discriminating by making an impermissible pre-employment inquiry of an applicant regarding the existence of a handicap or the nature or severity of such handicap;

2. Respondent is in noncompliance with section 504;

3. Respondent's compliance with section 504 can be secured through voluntary means; and

4. There exists a basis upon which to terminate Respondent's federal financial assistance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a California non-profit corporation, which provides programs and services to individuals with developmental disabilities, primarily cerebral palsy, in order to assist these individuals in activities of daily living, such as obtaining and maintaining employment.[1] DHHS Ex. 12; Tr. 112, 525, 526; R. Br. 1.

2. During the spring or summer of 1989, the Department's Office for Civil Rights (OCR) received a complaint against Respondent concerning the complainant's employment with Respondent, which employment began in April 1988 and terminated in March 1989. Tr. 90, 216; DHHS Ex. 1 at 1, 20 at 1; R. Ex. 6 at 1.

3. The complainant alleged that Respondent had discriminated against him on the basis of his disability, athetoid cerebral palsy, by failing to provide him with reasonable accommodation to enable him to perform the essential functions of his position as supervisor of Respondent's Adult Development Program and that this failure resulted in Respondent terminating his employment. DHHS Ex. 1 at 19; 5 at 1 - 3; 20 at 1; Tr. 139, 216.

4. OCR alleged that the Department had jurisdiction to investigate and sanction Respondent under section 504 of the Act because Respondent was a sub-recipient of Departmental funds through the California Department of Developmental Services (DDS). DHHS Ex. 20 at 1; Tr. 90.

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

6. Under the regulations, "federal financial assistance" is defined as any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which

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

the Department provides or otherwise makes available assistance in the form of, among other things, funds. 45 C.F.R. § 84.3(h).

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

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

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

10. To be a recipient of federal financial assistance, an entity must be in a position to accept or reject the obligations of section 504 as part of the decision whether or not to receive federal funds. Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986).

11. Unless an entity knows it is receiving federal funds, an entity cannot be a "recipient" of "federal financial assistance," because it is not in a position to accept or reject those federal funds. Finding 10.

12. An entity's knowing receipt of Medicare or Medicaid payments constitutes federal financial assistance for the purposes of section 504, as the purpose behind these programs is to subsidize payments to providers of medical services for the care of the beneficiaries of those programs. Furthermore, Congress intended these programs to constitute federal financial assistance for the purposes of coverage under section 504. United States v. Baylor University Medical Center, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); Frazier v. Board of Trustees of Northwest Mississippi Medical Center, 765 F.2d 1278 (5th Cir. 1985), cert. denied, 476 U.S. 1142 (1986); Jacobson v. Delta Airlines, Inc., 742

F.2d 1202 (9th Cir. 1984), cert. dismissed, 471 U.S. 1062 (1985); 45 C.F.R. Part 80, appendix A, paragraph 121; 45 C.F.R. Part 84, appendix A, sub-part A, definition 1.

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

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

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

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

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

18. OCR found also that Respondent's employment application included a prohibited pre-employment inquiry. DHHS Ex. 20 at 1; Tr. 90, 91.

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

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

21. The Notice alleged that Respondent received federal financial assistance from the Department via DDS, and that DDS received these funds from the Department's OHDS. The Department specifically alleged that, in 1989, the

period during which the Department alleged the discrimination occurred, Respondent received $422,000 in Departmental funds. Notice 4.

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

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

24. During the hearing, Respondent asked that its admission regarding its receipt of federal financial assistance be withdrawn, because its own investigation had revealed that it did not receive federal financial assistance from the Department or from any other federal agency. Tr. 223, 224, 226, 230, 231.

25. Lack of subject matter jurisdiction:

a. May be raised at any time during a proceeding, even on appeal and even by the party who invoked the federal jurisdiction in the first place;

b. Cannot be cured;

c. Requires dismissal of the action.

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

26. During the May 6, 1993 hearing, it was alleged by a former DR employee that Respondent received Departmental funds when DR reimbursed Respondent under the Career Opportunity Development (COD) program for part of the complainant's training at CPCBA. The employee alleged that the COD program received federal matching funds. Tr. 730, 731, 747 - 750; DHHS Ex. 1 at 29.

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

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

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

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

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

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

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

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

35. DDS is the State agency charged with carrying out this legislative mandate. DDS contracts annually with 21

regional centers (which are private, non-profit corporations, not State agencies) throughout California, which regional centers include the RCEB. Tr. 862 - 865; R. Rep. Br. 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

54. Prior to 1992, vendors providing services to RCEB did not have to sign a Medi-Cal (the California Medicaid program) provider agreement claims certification.

Respondent did not sign such a certification agreement until July 31, 1992. Tr. 886; DHHS Ex. 26, 27.

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

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

57. Respondent offered no evidence to show that it had a procurement contract with RCEB or that it was reimbursed in an amount equal to the fair market value of its services.

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

59. The Department has not proven that Respondent knew that, prior to July 1992, it was in receipt of any federal funds. Respondent reasonably could have assumed that its reimbursement for services from RCEB and DDS consisted solely of funds from California. Tr. 904 - 908; R. Ex. 15; Finding 53 - 56.

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

61. The Department did not prove that Petitioner knew a) it was to be paid for its services with federal Medicaid waiver program funds and b) it was therefore in a position to accept or reject the obligations of section 504 as part of its decision whether or not to receive federal funds. Findings 1 - 60.

62. Respondent is not a "recipient" of federal financial assistance. Findings 1 - 61.

63. As Respondent is not a "recipient" of federal financial assistance with regard to the Department's allegation of discrimination against the complainant, I am without jurisdiction to adjudicate this allegation.

64. After July 31, 1992, Respondent knew it was in receipt of Departmental funds and was in a position to accept or reject the obligations of section 504 as part of the decision whether or not to receive federal funds. Findings 10, 54, 55.

65. With regard to Respondent's employment application and the Department's allegation that Respondent makes an impermissible pre-employment inquiry of an applicant regarding the existence of a handicap or the nature or severity of such handicap in violation of 45 C.F.R. § 84.14(a), Respondent utilized an impermissible employment application after signing the certification agreement in 1992. R. Ex. 1.

66. I have jurisdiction to hear and decide the Department's allegation against Respondent with regard to Respondent's employment application. Findings 8, 10, 64, 65.

67. The section 504 regulations apply to pre-employment inquiries. 45 C.F.R. § 84.14(a).

68. The regulations provide that a recipient of federal financial assistance may not conduct a pre-employment medical examination or make a pre-employment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. 45 C.F.R. § 84.14(a).

69. The regulations allow a recipient of federal financial assistance to make a pre-employment inquiry into an applicant's ability to perform job-related functions. 45 C.F.R. § 84.14(a).

70. The employment application submitted by the complainant asked the complainant, "Do You Have A Disability, A Handicap or A Medical Condition That Limits Your Job Performance?" The application required the complainant to check yes or no. DHHS Ex. 1 at 7.

71. The Department determined that this pre-employment inquiry violated section 504. The Department asserts that only inquiries regarding an applicant's ability to perform specific job tasks are acceptable under section 504. 45 C.F.R. § 84.14(a); 45 C.F.R. Part 84, appendix A, sub-part B, paragraph 18; Tr. 93, 94; Notice 6.

72. Since 1989, Respondent's employment application has asked an applicant, "Are you physically or otherwise unable to perform the duties of the job for which you are applying?" The application requires an applicant to check yes or no in response. R. Ex. 1 at 4; DHHS Ex. 3 at 4.

73. The Department determined that this revised application did not meet the Department's requirements, as it was overly broad and too general. Specifically, it does not offer an applicant sufficient information to allow the applicant to answer whether the applicant could perform the essential functions of the job. Tr. 92, 93, 95.

74. The Department, through the testimony of OCR employee Virginia Apodaca indicated that Respondent's 1989 employment application form would comply with section 504 if a description of the job's duties was either attached to the application form or handed to an applicant during the application process. Tr. 96, 105, 106.

75. Respondent attempted to submit a new application with its response brief, which application purported to correct the deficiencies of the 1989 employment application as outlined by the Department. R. R. Br. appendix 3.

76. In this attempt to correct its employment application, Respondent added the notation "(See attached job specifications)" after the question "Are you physically or otherwise unable to perform the duties of the job for which you are applying." Respondent supported this revised application with the declaration of James E. Gallagher. R. R. Br. appendix 3.

77. As Respondent submitted the revised employment application and the declaration of James E. Gallagher supporting that revised application after the evidentiary record in this case closed, I am not admitting this evidence. Findings 75, 76.

78. Respondent's current employment application discriminates against applicants in the manner alleged. Findings 72, 73.

79. Respondent is willing to change its employment application in order to comply with section 504. Answer 4; Tr. 108, 109; R. Br. 13; R. R. Br. 1, 2, 23.

80. The Department has not proved that Respondent's compliance with section 504 cannot be secured through voluntary means. Finding 79; 45 C.F.R. § 80.8(c).

81. Until the Department proves that Respondent's compliance with regard to the employment application cannot be secured through voluntary means, there exists no basis upon which to terminate Respondent's federal financial assistance. Finding 80; 45 C.F.R. § 80.8(c).

DISCUSSION

The purpose of section 504 of the Act is to ensure that no federal funds be used to support discrimination. Thus, the Department's enforcement authority under the Act is limited to programs or activities that receive federal financial assistance. Here, the Department alleges that Respondent is a recipient of federal financial assistance and is subject to its enforcement authority under section 504. The Department alleges further that Respondent, an organization whose mission is to assist developmentally disabled individuals, primarily those with cerebral palsy, in their lives and in their employment, has discriminated against a developmentally disabled employee with cerebral palsy (the complainant), by denying him the reasonable accommodation necessary to maintain his employment. The Department alleges also that the employment application Respondent uses makes an impermissible pre-employment inquiry.

These are serious allegations, especially as they are made against an organization whose very reason for existence is to help individuals such as the complainant live more independently and maintain employment. Both the Department and the Respondent have expended much effort establishing their respective positions regarding the underlying allegations of discrimination in this case. However, for me to adjudicate all of the Department's allegations against Respondent, I must find that I have the jurisdiction to hear those allegations. Here, for the reasons discussed below, I have found that my jurisdiction is limited and that the only allegation I can consider is whether or not Respondent's employment application contains an impermissible pre-employment inquiry.

My inability to consider the allegation of Respondent's discriminatory treatment of the complainant, however, does not mean that I have found that Respondent did not discriminate against the complainant. If I had the authority to adjudicate this issue and to consider all of

the evidence in the record, I might have found that Respondent did discriminate against the complainant. However, although I lack the authority to decide this issue, the parties have had the opportunity to fully litigate the legal and factual matters involved. A full record of this proceeding is available for the use of another entity who may have authority to adjudicate the issue.

Moreover, to the extent that I am prevented from making factual findings and legal conclusions on all the allegations of discrimination (due to the absence of subject matter jurisdiction), I believe that the issues are of such significance that the Department should undertake further efforts to ascertain whether the Department or some other regulatory agency has the authority to resolve all of the legal and factual issues regarding the Respondent's alleged discriminatory treatment of the complainant under section 504.

I. SUBJECT MATTER JURISDICTION MAY BE RAISED AT ANY TIME IN A PROCEEDING.

Respondent asserts that I do not have subject matter jurisdiction to decide whether Respondent discriminated against the complainant or in its employment application, because Respondent is not a program or activity receiving federal financial assistance. Respondent asserts further that, even though it admitted in its Answer to the Department's Notice that it received federal funds from the Department (Finding 23), it should not be precluded from raising the issue of lack of subject matter jurisdiction in this forum. R. Br. 14, 15. I agree. Moreover, the Department does not appear to dispute Respondent's assertion. DHHS Br. 19.

Pursuant to both case precedent and the Federal Rules of Civil Procedure, subject matter jurisdiction may be raised at any time during a proceeding, even on appeal and even by the party who invoked the federal jurisdiction in the first place. Further, the parties cannot confer subject matter jurisdiction by stipulation or waiver. Thus, neither Petitioner's acquiescence in OCR's investigation, nor its initial Answer admitting its receipt of federal financial assistance, precludes my consideration of the issue here. Moreover, if I find that I lack jurisdiction of the subject matter in any aspect of this case, then that part of the case must be dismissed. Finding 25.

II. I AM WITHOUT AUTHORITY TO DECIDE WHETHER RESPONDENT DISCRIMINATED AGAINST THE COMPLAINANT.

A. Factual Background

The regulations applicable to section 504 incorporate the procedural provisions of Title VI of the Civil Rights Act of 1964 for the filing and processing of complaints of discrimination. 45 C.F.R. § 84.61. The Title VI regulations provide that any person who believes that he or she has been subjected to discrimination may, personally or by a representative, file a written complaint with the Department. 45 C.F.R. § 80.7(b). Pursuant to this regulation, the complainant timely filed a complaint. The complainant alleged that Respondent had discriminated against him on the basis of his handicap, athetoid cerebral palsy, by failing to provide him with reasonable accommodation to enable him to perform the essential functions of his position as supervisor of Respondent's Adult Development Program and that this failure resulted in Respondent's termination of his employment. Finding 3. OCR, basing its authority on Respondent's alleged receipt of federal financial assistance, investigated this complaint and found that Respondent had denied the complainant reasonable accommodation and that Respondent's denial had resulted in the complainant's termination. Findings 17, 21. OCR found also that Respondent's employment application included a prohibited pre-employment inquiry. Finding 18. OCR attempted to negotiate a voluntary settlement with Respondent, but was unable to do so. Finding 19. The Department then initiated enforcement proceedings against Respondent. The case was assigned to me for hearing and decision. I scheduled a hearing to begin on May 3, 1993 in San Francisco, California.

During OCR's investigation of the complainant's allegations, Respondent never objected to OCR's jurisdiction to investigate the complaint. Finding 13. Furthermore, after the Department notified Respondent that it had initiated enforcement proceedings, Respondent admitted that it had received the federal financial assistance described in the Department's Notice. Finding 23. However, on the first day of the hearing, Respondent raised a question as to whether it had, in fact, been a recipient of federal financial assistance. Respondent asked permission to withdraw its admission regarding its receipt of federal financial assistance, because its investigation revealed that it did not receive federal financial assistance from the Department or from any other federal agency. Finding 24. On June 2, 1993, I heard testimony limited to this issue only.

The Department initially based its jurisdiction in this case on an investigational office record (DHHS Ex. 28) which purports to represent an August 8, 1989 telephone interview between an OCR investigator, Michael Aguirre, and James Gallagher, Respondent's Executive Director. Tr. 342. (During the term of the complainant's employment, Mr. Gallagher was Respondent's Assistant Director. Tr. 343.). Mr. Aguirre's note alleged that Mr. Gallagher had confirmed that Respondent received "federal monies" through DDS and DR. Mr. Aguirre's note alleged specifically that Respondent received $422,000 from the Department's Office of Human Development Services via DDS. Finding 14. Apparently based on this alleged admission by Respondent, OCR never made any further effort to establish the existence of subject matter jurisdiction through documentary evidence, including a written admission by Respondent. In fact, the allegation of subject matter jurisdiction contained in the Notice was based solely on Mr. Aguirre's investigative report. Findings 16, 21, 22.

At the June 2, 1993 hearing, Mr. Gallagher testified that he did not recall participating in a telephone interview with Mr. Aguirre. The investigational office record (DHHS Ex. 28) did not refresh Mr. Gallagher's recollection of such an interview. Finding 15; Tr. 907, 908. Although the Department asserted that it was offering DHHS Ex. 28 both to refresh Mr. Gallagher's recollection and for the truth of its contents, the Department offered no evidence to substantiate the truth of the assertions in DHHS Ex. 28. In response to my inquiry as to whether Mr. Aguirre was available to respond to Mr. Gallagher's claim that he did not make the statements attributed to him in DHHS Ex. 28, the Department indicated that Mr. Aguirre was no longer employed by the Department and was "unavailable." Tr. 906. The Department could authenticate only that DHHS Ex. 28 was prepared in connection with the Department's investigation of Respondent. Tr. 924 - 929. As to the accuracy of the contents of DHHS Ex. 28, the Department admitted that it could not substantiate Respondent's receipt of $422,000 in federal financial assistance. Finding 27. Despite this, the Department requested that I consider DHHS Ex. 28 at least as evidence that Respondent knew it was in receipt of federal funds, even if Respondent did not know the amount or particular source of those funds. Tr. 921, 922.[2]

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[2] Although both Mr. Gallagher and Mr. White (a member of Respondent's Board of Directors) testified that (continued...)

During the June 2, 1993 hearing, the Department asserted for the first time that Respondent was a recipient of federal financial assistance under the Medicaid waiver program.[3] The Department asserted further that Respondent received this federal financial assistance through RCEB, an entity established under California's Lanterman Act. Tr. 840, 841, 844; DHHS Ex. 24. Finding 28.

B. Medicare, Medicaid, and the Lanterman Act

Congress enacted the Medicare and Medicaid programs as a means to assure that the aged, disabled and poor could secure necessary medical services. Baylor, 736 F.2d at 1044; Social Security Act, Titles XVIII, XIX. Under the Medicare program, the federal government pays for medical treatment for the aged and disabled. Under the Medicaid program, the federal government provides funds to States which, under federally approved State plans, use those funds to subsidize medical services for their poor and disadvantaged citizens. Section 1915(c) of the Social Security Act authorizes the Secretary to waive certain Medicaid requirements in order to enable a State to offer home and community-based care to eligible individuals in lieu of institutional placement. Findings 29, 30.

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[2] (...continued)
they were aware of the requirements of section 504 prior to the complainant's employment (Tr. 345 - 346, 522 - 526), neither individual testified that he knew that Respondent itself was in receipt of federal funds. As individuals who worked with the developmentally disabled, it is to be expected that they would be aware of the requirements of section 504. However, the awareness that section 504 existed does not constitute proof that Respondent knew it was in receipt of federal financial assistance.

[3] During the hearing on May 6, 1993, a former DR employee alleged that Respondent received Departmental funds when it reimbursed Respondent for part of the complainant's training. During the June 2, 1993 hearing, however, the Department asserted that these federal funds came from ED, not from the Department. The Department submitted no evidence to support this assertion. Furthermore, the Department did not allege specifically that Respondent knew that the funds it received from DR included federal funds. Findings 26, 27.

California's process for identifying developmentally disabled individuals who are eligible to receive funding under the Medicaid waiver program is governed by the Lanterman Act, which provides for the coordination of services to California residents with developmental disabilities. The Lanterman Act requires California to establish regional centers to carry out this responsibility. The Lanterman Act requires further that California (through DDS, a State agency charged with carrying out this legislative mandate) contract with private, non-profit community agencies to provide these services, as the California legislature had found that the service to be provided individuals and their families by the regional centers was of such a special and unique nature that it could not be provided by State agencies. Findings 33 - 35.

DDS has contracted with 21 regional centers, including RCEB. These regional centers are required to perform in-depth assessments of each of their clients to determine each client's needs. The regional centers determine also whether a client is eligible to receive Medicaid waiver program funds. The regional centers are required further to set up individual program plans for each of their clients. The regional centers can subcontract with other entities to provide program coordination or other services to their clients. To receive payment under the Medicaid waiver program for its eligible clients, a regional center will invoice DDS. If the regional center has been billed by a subcontractor, such as Respondent, for services to clients deemed eligible for Medicaid waiver program services, the regional center will base its claim for that client on the subcontractor's bill. Findings 35 - 38.

When DDS receives an invoice from a regional center, it extracts the cost of the Medicaid waiver program services and creates an invoice to DHS. DHS checks the individual clients RCEB invoiced against its master eligibility list and sends the claim to California's Controller for payment. The Controller pays DDS with a check which is a draw-down from the DHS health care deposit fund, which check constitutes federal reimbursement for 50 percent of a regional center's invoice for its eligible clients. The other 50 percent of the invoiced amount comes from the State general fund. DDS reimburses the regional center for its costs for these individuals and the

regional center pays service providers such as Respondent.[4] Findings 36, 40 - 44, 46.

C. Federal Financial Assistance

Before deciding whether or not Respondent received federal financial assistance in the form of Medicaid waiver program funds, I must first determine whether such funds constitute federal financial assistance. Although Respondent's principal arguments concern its assertion that it was not a recipient of federal financial assistance under the Medicaid waiver program, Respondent appears to argue also that Medicaid waiver program funds do not constitute federal financial assistance. R. Br. 23, 25, 26; R. R. Br. 13, 14. While I have not found any case precedent specific to the Medicaid waiver program itself, there is case precedent regarding Medicare and Medicaid generally which holds that Medicare and Medicaid payments constitute federal financial assistance subjecting the recipient of those funds to section 504 of the Act. Baylor, 736 F.2d 1039. Finding 12. Since the Medicaid waiver program is a part of the larger Medicaid program as set out in Title XIX of the Social Security Act, and because Medicaid has been construed as federal financial assistance, it follows logically that an entity's receipt of Medicaid waiver program payments also constitutes federal financial assistance.

In finding that Medicaid waiver program payments constitute federal financial assistance, I am guided by the Fifth Circuit's decision in Baylor. In Baylor, the Department received a complaint that the Baylor

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[4] During the hearing, there was a difference in the testimony of Walter Kealy (Chief of the Operations Section of the Federal Programs Branch of DDS's Program Services Division) and W. Steve Harper (RCEB's comptroller). Under the Medicaid waiver program, DDS reimburses half of RCEB's invoice for eligible clients with federal Medicaid funds. Mr. Kealy testified he understood that if these funds are unavailable, DDS does not have to reimburse RCEB for the entire amount invoiced. Tr. 887, 888. However, Mr. Harper testified he understood that, even if federal funding failed, DDS was obligated to reimburse RCEB for the entire amount. Tr. 918, 919. I find Mr. Kealy's testimony to be more credible. As DDS is the entity actually reimbursing all 21 of the regional centers, I believe that it is more likely that DDS knew whether it would be able to reimburse the regional centers if federal Medicaid funds were unavailable.

University Medical Center (hospital) refused to allow a deaf patient to bring an interpreter into the hospital so that she could understand her pre and post-operative discussions with the medical staff. The Department further informed the hospital that, as a recipient of federal financial assistance, it was obliged to comply with section 504 of the Act. After investigation, the Department found that the complaint merited an on-site review. The hospital responded that it was not a recipient of federal financial assistance for the purposes of section 504. The hospital stipulated that it received Medicare and Medicaid funds, but argued that these funds did not constitute federal financial assistance. The Baylor court found that an entity's receipt of such payments constituted federal financial assistance. The court based its determination (that Medicare and Medicaid payments constitute federal financial assistance for the purposes of section 504) on the legislative history of the statutes prohibiting discrimination in federally funded programs, judicial interpretations of those statutes, and the regulations adopted pursuant to those statutes and decisions. Specifically, the court found that the language and legislative history of the Act made clear that Congress intended that Medicare and Medicaid constitute federal financial assistance for the purposes of section 504. The court quoted from a House Committee report, which stated:

> [I]t has always been clear the Medicare and Medicaid funds constitute Federal financial assistance. The Committee wishes to reaffirm that health care facilities and other providers that receive Medicare and Medicaid funds are required, under existing statutes and long-standing Department of Health and Human Services regulations and interpretations, to provide services without discrimination not just to Medicare and Medicaid beneficiaries, but to all patients.

Baylor, 736 F.2d at 1045-46, citing H.R. Rep. No. 442, 98th Cong., 1st Sess. 77 (1983).

The Baylor court stated also that five of six courts which had considered the issue previously, including a district court case which was affirmed on appeal, held that Medicare and Medicaid invoked the protection of the federal discrimination statutes. Moreover, the court accorded "great weight" to the regulatory interpretation of the statute.

Departmental regulations define "federal financial assistance" as any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of funds. Finding 6. The Department included among those receiving federal financial assistance service providers whose only source of federal financial assistance is Medicaid. The Department states further that, under the Act and the regulations, providers receiving Medicaid funds should be held individually responsible for administering services in a non-discriminatory fashion. 45 C.F.R. Part 84, appendix A, sub-part A, definition 1. Thus, under the Department's regulations, the receipt of Medicaid funds does not constitute a procurement contract or a contract of insurance or guaranty potentially absolving an entity's receipt of federal funds from the obligations of section 504. Rather, under the Department's regulations, the receipt of funds under the Medicaid program binds an entity to the obligations of section 504.

The Baylor court's interpretation that an entity's receipt of Medicare and Medicaid payments constitutes federal financial assistance was followed in the case of Frazier v. Board of Trustees of Northwest Mississippi Medical Center, 765 F.2d 1278 (5th Cir. 1985), cert. denied, 476 U.S. 1142 (1986), which held that, as a hospital receiving Medicare and Medicaid payments, Northwest was prohibited from discriminating against otherwise qualified individuals based on their handicap. Frazier, 765 F.2d at 1289.

Respondent argues that Baylor and Frazier are not controlling here (R. R. Br. 13) and that payments under the Medicaid waiver program do not constitute federal financial assistance subjecting a recipient to the obligations of section 504. R. Br. 23. Respondent distinguishes Baylor and Frazier by relying on the decision of the Ninth Circuit in Jacobson v. Delta Airlines, Inc., 742 F.2d 1202 (1984), cert. dismissed, 471 U.S. 1062 (1965).[5]

Jacobson did not directly address whether the receipt of Medicare or Medicaid funds constitutes federal financial assistance. It did involve, in part, an analysis of whether funds provided to Delta through various

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[5] Respondent argues further that any dispute between the courts of appeal should be resolved by relying on the Ninth Circuit, where Respondent resides.

governmental programs were a subsidy or payment for services at fair market value. Respondent argues that, under Jacobson, Congress intended federal financial assistance to include grants and subsidies but not to include compensation for the fair market value of services provided. Respondent cites several cases in support of this proposition. See, DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 911 F.2d 1377 (1990); Mass v. Martin Marietta Corp., 805 F. Supp. 1530 (D. Colo 1992); Tanberg v. Weld, 787 F. Supp 970 (D. Colo 1992). Respondent argues further that Medicaid waiver program funds constitute compensation payments for services and do not constitute a subsidy. R. Br. 24, 25. Respondent's briefs do not specify whether Respondent is arguing that such payments would or would not constitute a subsidy to the State. Taking the more inclusive view, I am thus assuming that Respondent's argument encompasses the argument that the federal funds the State received under the Medicaid waiver program are compensation for services provided and that they do not constitute a subsidy.

Specifically, in Jacobson, a handicapped individual brought suit challenging Delta's policy requiring that handicapped individuals sign medical release forms acknowledging that they might be removed from a flight for specified reasons. The court found that for the purposes of section 504, Delta was not a recipient of federal financial assistance under a program or activity receiving the federal financial assistance.[6] In analyzing whether Delta's receipt of federal funds for the carriage of mail caused section 504 obligations to apply to Delta, the court concluded that any funds Delta received were at fair market value or below, and thus merely constituted compensation for services rendered. Therefore, Delta did not receive federal financial assistance. The court indicated also that "payments that include a subsidy constitute 'federal financial assistance'." In deciding that "purely compensatory payments do not constitute federal financial assistance", the court relied on old Departmental regulations which excepted from federal financial assistance those procurement contracts with the government in which the

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[6] Even though the court applied the nondiscrimination provision of section 504 to Delta through incorporation into section 404(b) of the Federal Aviation Act, the plaintiff in Jacobson was seeking attorney's fees, which were available only under the Act. For this reason, the court analyzed the application of section 504 to Delta.

goods and services are sold at "fair market value." But, more importantly, the court indicated that determining application of section 504 on economic issues such as fair market value would result in "[h]ighly divergent holdings on which programs are subject to the civil rights laws...." Rather than focusing on fair market value as the determining factor in deciding which programs are subject to civil rights laws, the court indicated that the focus should be on "the intention of the government." The court further stated

> [I]n short, the question of which programs are subject to the civil rights laws is a question of law, to be answered in most cases by reference to the statutory authority for the particular disbursements at issue or, if the authority to provide assistance has been delegated, to the relevant administrative documents.

In examining the various sources of federal funds provided to Delta to determine whether those federal funds constituted federal financial assistance, the court relied on either Civil Aeronautics Board (CAB) or congressional interpretations as to whether the funds were a subsidy subjecting Delta to the Act.

Respondent misapplies the lessons of Jacobson. The court indicated specifically that it did not want to make an economic evaluation of the contractual terms of the relationship between Delta and the federal government to determine whether any funds received were a subsidy or a procurement contract for services at fair market value. Instead, it examined the intent of Congress and the CAB for each program or activity for which Delta received federal funds to determine whether such funds constituted federal financial assistance. In this case, the appropriate examination applying Jacobson is whether Congress intended that Medicaid funding be deemed a subsidy to providers for the purposes of coverage under section 504 of the Act. Baylor answers that question in the affirmative.

Respondent concedes that Jacobson does not involve Medicare or Medicaid funding. R. R. Br. 18. Since the Ninth Circuit has not addressed the specific issue of whether an entity's receipt of Medicaid funding can trigger section 504 coverage, and the court in Jacobson rejected an economic analysis of contractual terms to determine the existence of federal financial assistance for purposes of applying section 504, Respondent's reliance on Jacobson to refute Baylor is unpersuasive. Moreover, even assuming such an economic analysis of

contractual terms was mandated by Jacobson, I could not conclude that the funds RCEB paid to Respondent were at fair market value. Respondent has offered no evidence on the specific contractual relationship between itself and RCEB to permit me to make a determination as to whether the terms of compensation were at fair market value. Accordingly, I find that it is reasonable for me to look to other decisions regarding the nature of the Medicare and Medicaid programs to determine whether Congress intended these programs to constitute a subsidy.

My analysis of the Baylor decision convinces me that Congress intended that the Medicare and Medicaid programs subsidize the providers of medical care. Specifically, the Medicare and Medicaid programs were enacted to ensure that the aged, disabled, and poor receive necessary medical services. The very nature of the program is to subsidize the cost of providing services to such individuals to ensure that they receive these services. Baylor makes clear that it was the intent of Congress that Medicare, Medicaid, and, by extension, Medicaid waiver program funds constitute federal financial assistance to an entity receiving those payments.

E. Receipt of Federal Financial Assistance

Although I have found that Medicaid waiver program funding constitutes federal financial assistance, the question remains whether Respondent is a recipient of that federal financial assistance. The Department asserts that Respondent is a recipient of federal financial assistance and insists that, by virtue of Respondent's receipt of that federal financial assistance, I have jurisdiction to hear this case. Respondent disagrees, arguing generally that: 1) it is not a "recipient" of federal financial assistance under the Medicaid waiver program because, under this program, it is the State which is the recipient of any funds; 2) Congress did not intend section 504 to apply to all businesses and individuals which benefit from federal financial assistance; and 3) Respondent did not "receive" federal financial assistance, because it did not agree to be subject to section 504 as a condition of receiving federal funds. R. Br. 14 - 23. For the reasons set out below, I find that an entity's receipt of federal financial assistance in the form of Medicaid waiver program payments would trigger the application of section 504 when that entity knew such funds included federal financial assistance and was in a position to accept or reject such funds and the consequential obligations of section 504. I find further that Respondent received Medicaid waiver program funds. However, I find also that

because there is no evidence of record that Respondent was aware that funds received from RCEB included funds under the Medicaid waiver program, Respondent was not in a position to accept or reject the obligations of section 504. Therefore, Respondent was not a recipient of federal financial assistance during the period at issue.

Respondent asserts that this case is governed by the Supreme Court's decision in Paralyzed Veterans. R. Br. 16. In that case, the Paralyzed Veterans of America, an organization representing the disabled, sued the Department of Transportation for failing to impose the obligations of section 504 on commercial airlines. The organization argued that the federal government provided federal financial assistance to airport operators through grants from a trust fund operated by the Airport and Airway Development Act of 1970 and by virtue of the operation of the air traffic control system. The Court held that the starting point of any inquiry into the application of a statute is the language of the statute itself. In Paralyzed Veterans, the Court held that, under the relevant statute, the recipient for the purposes of section 504 was the operator of the airport, not its users, the commercial airlines. The Court held further that the scope of section 504 was limited to those who receive the federal funding, because Congress' intent was to impose section 504 coverage as the contractual cost of a recipient's agreement to accept federal funds.

Thus, under Paralyzed Veterans, in order to subject a recipient to section 504 obligations, Congress enters into an arrangement in the nature of a contract with the recipient of federal funds. It is the recipient's acceptance of those funds as federal funds which triggers the section 504 coverage. The Court stated that, by limiting coverage to recipients, Congress imposed the obligations of section 504 only upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to receive federal funds. The Court stated that the key to deciding whether an entity is bound by the obligations of section 504 is to determine whether an entity is a recipient of the assistance. Moreover, the Court held that the section 504 obligations do not follow the federal funds past the intended recipient to those who merely indirectly benefit from such federal financial assistance. The Court stated further that any interpretation of section 504 must respond to two countervailing considerations: the need to give effect to the Act's objectives and the desire to keep the Act within manageable bounds. The Court rejected as too broad and contrary to the intent of

Congress the court of appeals' holding that an entity was part of a federally-assisted program or activity, not because it had received federal financial assistance, but because it was inextricably intertwined with an institution that had received such funds. If that interpretation of the Act were accepted, the Court concluded, it would subject to the coverage of section 504 every entity which benefitted from a federal program or activity, even though it did not receive any federal funds.

Respondent asserts that if Medicaid waiver program funding constitutes federal financial assistance, it is the State, not Respondent or RCEB, which is the recipient of that federal financial assistance, and only the State which is subject to section 504. Respondent asserts further that Paralyzed Veterans supports Respondent's proposition that a State submitting a State plan is the only recipient of federal financial assistance under the Medicaid waiver program. R. Br. 16 - 18. Respondent asserts that the Department's regulations support Respondent's interpretation of the scope of section 504 because federal financial assistance provided under Medicaid lists "grants to states" as the recipient of federal funds. Further, Respondent asserts that, under the Medicaid waiver program, every requirement for obtaining assurances and obtaining State Plan approval is on the State. Social Security Act, Title XIX. Respondent argues that nothing in the Act requires or permits participation in the State plan by a service provider or requires a service provider to be aware of the existence of the State plan. Thus, Respondent argues that, under Paralyzed Veterans, Congress has made it clear that the federal financial assistance is to go to States and the recipient is the State, not the service providers. R. Br. 16 - 18; R. R. Br. 14. I do not agree.

Respondent argues that Congress did not intend that section 504 apply to all businesses and individuals which might benefit from federal financial assistance. In Paralyzed Veterans, the plaintiffs urged that the airlines were "indirect recipients" of federal aid to airports and were thus subject to section 504. Respondent argues that it benefitted only indirectly from the Medicaid waiver program funds. It was the State which was required to apply for this program and Respondent denies that it knew the program existed. R. Br. 20, 21. I do not agree that Respondent is an indirect beneficiary of Medicaid waiver funds. Such an analysis would exclude all Medicaid providers from coverage under section 504 merely because Medicaid funds

are paid initially to States prior to distribution to providers, such as Respondent, who deliver medical services to the intended beneficiaries of the Medicaid funds.

To determine who actually receives federal financial assistance, the Court in Paralyzed Veterans directs the trier of fact to examine the purpose and intent of Congress in establishing the program from which the federal financial assistance flowed, in order to find out the scope and breadth of coverage of the program with respect to responsibility under section 504. As I found above, the purpose of the Medicare and Medicaid programs is to ensure that the aged, poor, and disabled have access to medical services. With regard to the Medicaid waiver program, Congress wanted to ensure that those with developmental disabilities have access to home and community based care in lieu of institutional care. Therefore, the purpose of the Medicaid waiver program is to subsidize payments to entities who provide care to the intended beneficiaries of the program -- developmentally disabled individuals. Findings 12, 29, 30.

The State of California is certainly one recipient of this federal financial assistance under the Medicaid waiver program, as it is directly receiving federal funds. It is not, however, the only recipient. Instead, I find that, pursuant to the Lanterman Act, California acts as a conduit, funneling Medicaid waiver program payments to a chain of entities providing services to Medicaid waiver program eligible individuals. While RCEB and Respondent may be independent, non-profit corporations, they are inextricably intertwined by the Lanterman Act in the provision of services to individuals whom Congress intended to benefit under the Medicaid waiver program. The Lanterman Act set up the regional centers to ensure that services would be provided to enable individuals with developmental disabilities to approximate the pattern of everyday living available to non-disabled people of the same age. Cal. Welf. & Inst. Code §§ 4501, 4620. Respondent has set up programs to assist individuals with developmental disabilities. Finding 1. The Lanterman Act contemplates that regional centers will use vendors, such as Respondent, to implement its goals. RCEB and Respondent participate as a team in providing services to developmentally disabled individuals, RCEB determining an individual's need for services and funneling that individual to Respondent for the provision of those services. Findings 37, 38, 46, 48. It is Respondent or RCEB, depending on who is actually providing services to a Medicaid waiver program eligible beneficiary, which is the recipient of those

federal funds. Congress' purpose was to compensate the entity who actually provides services to the intended beneficiaries of the Medicaid waiver program (disabled individuals), not the entities channeling that payment to the entity providing services. However, in such circumstances those entities would be recipients under section 504.

Respondent argues, however, that under the Court's finding in Paralyzed Veterans, it could not have received federal financial assistance because it did not agree to be subject to section 504 as a condition of receiving federal funds. I agree. In Paralyzed Veterans, the Court concluded that Congress limited the obligations of section 504 to recipients because it intended to impose coverage of the Act only "as a form of contractual cost of the recipient's agreement to accept the federal funds." By limiting coverage to recipients, Congress imposes section 504 obligations only as part of an entity's decision whether or not to "receive" federal funds. The Departmental definition of recipient makes no reference to knowledge of the receipt of federal financial assistance (Finding 8) as a condition of coverage under section 504. However, while an entity such as Respondent may meet the regulatory definition of a recipient (which definition includes specifically the receipt of federal financial assistance by a private agency), this is not sufficient to impose section 504 obligations. The Court imposed an additional requirement, that an entity be in a position to accept or reject the federal funds, since such funds come with an obligation to be bound by section 504. The Court, concerned with the Act's breadth of coverage, indicates that this quasi-contractual analysis is appropriate as a means to confine the bounds of section 504 in a reasonable manner.

With regard to the receipt of federal financial assistance and the breadth of coverage of section 504, here the chain leading to the receipt of federal financial assistance ends with Respondent. Congress did not intend to obligate Respondent's vendors under section 504. Vendors are too remote from the provision of care to the intended beneficiaries of the Medicaid waiver program. It is Respondent who provides these medical services.

Respondent cites Eivins v. Adventist Health System/Eastern, Etc., 651 F. Supp. 340 (D. Kan. 1987) and Glanz v. Vernick, 756 F. Supp 632 (D. Mass. 1991) for the proposition that indirect beneficiaries of federal financial assistance are not bound by the obligations of

section 504. The Department cites these cases for the proposition that an entity's receipt of Medicaid funds qualifies it as a recipient of federal financial assistance. I find that the holdings in these cases are consistent with the position of the Court in Paralyzed Veterans regarding whether an entity's receipt of federal funds constitutes federal financial assistance.

In Eivins, the complainant was an employee of the data processing department of a holding company for hospitals which received federal financial assistance. The court referred to the holding company as having a "symbiotic relationship" with the entity receiving the federal financial assistance and held that the holding company was not a direct recipient of federal financial assistance. The court stated that, before finding such a direct relationship, the court had to be satisfied that the relationship between the holding company and the entity receiving assistance was of a sufficient quality to extend coverage of the Act. In Eivins, the holding company benefitted from such funds. However, even if the rationale of Paralyzed Veterans is not applied (i.e., determining who the intended recipient of the federal funds is), the Medicaid program was not intended to benefit such peripheral entities. In Paralyzed Veterans, the court rejected application of section 504 to those entities who merely receive indirect economic benefits. The Eivins court indicated further that even if the financial and structural relationship had established that the holding company was a recipient of federal funds, an additional inquiry would be needed to determine whether the federal funds had a "nexus" to the program or activity in which the handicapped individual was participating. In contrast to Respondent's case, in which the Medicaid waiver program was intended to subsidize the exact services Respondent was providing to Medicaid beneficiaries, the activities of the holding company were found by the court not to be related to the hospital's receipt of federal financial assistance.

In the Glanz case, the court differentiated between a physician's participation in Medicaid as a direct provider and as a hospital employee. The court found that the physician would be liable under section 504 for activities he committed while directly compensated as a Medicaid provider, but not as a hospital employee. The court found also that the hospital could be liable under section 504 for its employees' actions on the theory of respondeat superior. The court agreed that under Baylor the receipt of Medicare or Medicaid payments for the hospital's services qualified as the receipt of federal financial assistance. Further, the court found that the

discrimination occurred in a program or activity -- the provision of medical services -- in which Medicare or Medicaid payments were received. However, the physician's employment by the hospital was not sufficient to extend coverage of section 504 to the physician. As an employee, the court concluded that the physician would not be in a position to accept or reject federal financial assistance. Respondent, like the hospital in Glanz, is the intended recipient of the Medicaid funds. Also, as an independent entity, Respondent, like the hospital, but unlike the physician as an employee, is in a position to accept or reject federal financial assistance.

The Department urges me to find that Respondent's claim that it had no knowledge of its receipt of federal funding is not credible. The Department argues that, although Respondent may not have known the specific sources of the funds constituting its receipt of federal financial assistance, it had the general understanding that these sources included some federal funding and thus made Respondent subject to the obligations of section 504. Further, the Department urges that I find that Paralyzed Veterans does not hold that notice is required to subject an entity to section 504 obligations. DHHS Br. 32. I cannot make such a finding. The Court in Paralyzed Veterans was concerned with the breadth of section 504's coverage. It held that the Act purposely imposed a notice requirement so that an entity could make a decision whether or not to accept section 504 obligations. The Department has failed to demonstrate that Respondent possessed the requisite knowledge as set out in Paralyzed Veterans. In the absence of proof of that knowledge, I cannot find that Respondent is bound by the obligations of section 504.

Through Respondent's May 28, 1993 brief, the Department was put on notice that Respondent intended to rely on Paralyzed Veterans as an avenue by which (whether or not it had committed the discrimination alleged) it could avoid the obligations of section 504. During the hearing on June 2, 1993, I put the Department on notice that I was concerned especially with the issue of whether Respondent had knowledge that it was in receipt of federal financial assistance. Tr. 949. Thus, the Department was aware that it needed to prove such knowledge with specificity.

Respondent is in the business of providing care to developmentally disabled individuals. Respondent knew it was funded by State agencies, knew about the Lanterman Act, and knew about section 504 and the obligations

imposed upon those in receipt of federal financial assistance. Perhaps documentation exists proving that Respondent knew also that it received federal funds. Moreover, for those individuals eligible for the Medicaid waiver program to whom Respondent provided services, it would seem plausible (considering that the Medicaid waiver program had been in effect since 1982 (Finding 31)) that RCEB would discuss its status with Respondent and that such discussion might be evidenced in correspondence between RCEB and Respondent. To prove it had jurisdiction to bring this case, the Department knew it must prove that Respondent was in receipt of federal financial assistance. The Department knew further that without this proof of jurisdiction its case would fail. The Department's initial position regarding jurisdiction certainly was impacted by its belief that Respondent, through its executive director (as referenced in DHHS Ex. 28), allegedly admitted that it knew it received federal financial assistance. The Department relied on this exhibit in stating the jurisdictional basis for the case in the Notice. Respondent admitted the Department's jurisdiction over the case in its Answer. However, when the Department was notified on May 4, 1993 that Respondent sought to withdraw its admission concerning the Department's jurisdiction, the Department made no attempt to develop evidence other than DHHS Ex. 28 to prove Respondent knew it was in receipt of federal financial assistance (even after I brought the importance of the issue to the Department's attention on June 2, 1993).[7] Respondent has denied the truth of DHHS Ex. 28 and the Department has been unable to prove the truth of that exhibit's contents.[8] Findings 14 - 16. The

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[7] Rather than seeking additional time to develop evidence regarding whether Respondent knew it was in receipt of federal financial assistance as required under Paralyzed Veterans (a request I likely would have granted considering Respondent's change of position on jurisdiction), the Department chose instead to rely on Baylor to support its argument that Respondent was the recipient of federal financial assistance in the form of Medicaid waiver program funds and argued that Paralyzed Veterans was inapplicable to this case.

[8] In the Notice, the Department relied solely on DHHS Ex. 28 in establishing jurisdiction. Subsequently, the Department conceded that the jurisdictional amount set forth in both DHHS Ex. 28 and the Notice was

(continued...)

testimony of DDS employee Walter Kealy supports Respondent's denial. Mr. Kealy testified that a service provider such as Respondent might not be aware that a client was in the Medicaid waiver program and that federal funds provided half of the reimbursement for that client's service. DHHS Ex. 24 at 2; Tr. at 893 - 895. Also supporting Respondent's denial, RCEB employee W. Steve Harper testified that the contracts between RCEB and its providers do not refer to federal reimbursements. Tr. 919 - 921.

Thus, for the period prior to July 1992 (at which time Respondent signed the provider certification agreement), the Department failed to prove by a preponderance of the evidence that it had knowledge as to how its costs were reimbursed or that it received federal financial assistance.[9] Finding 59. Therefore, I find that Respondent did not have the opportunity to choose to accept or reject the obligations of section 504.[10] Finding 61.

F. Dismissal of the Case Regarding the Complainant's Allegations

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[8] (...continued)
incorrect and later modified the amount. Findings 27, 28.

[9] This contrasts with the case of Hawthorne v. Kenbridge Recreation Association, Inc., 341 F. Supp. 1382 (E.D. Va. 1972), cited by the Department. In Hawthorne, the Association knew it was receiving federal financial assistance and accepted that federal financial assistance under a mistaken belief that by so doing it would not subject itself to Title VI obligations. The key difference between Hawthorne and Respondent's case is that the Association had knowledge that it was receiving federal financial assistance and Respondent did not have that knowledge.

[10] Although the Department did not rely on it, the complainant testified that Respondent was a recipient of federal funds. Tr. 206, 216. The complainant did not specify what the alleged federal funds consisted of or where the alleged federal funds came from. The Department did not offer any evidence to support the complainant's assertion. Thus, in the absence of any proof supporting the complainant's assertion, I have not relied on this testimony in making my decision.

Since I have found that Respondent did not have knowledge of its receipt of Medicaid waiver program funds, I find under Paralyzed Veterans that, for the period at issue, Respondent was not a recipient of federal financial assistance. Therefore, I dismiss that part of the Department's case. However, had the Department proved that Respondent had such knowledge, I would have found that it did receive federal financial assistance. This is because I find that Medicare and Medicaid funds constitute federal financial assistance and that Respondent would have been a direct recipient of those funds as the provider of services to the Medicaid waiver program's intended beneficiaries.

G. Authority to Make Findings Regarding the Complainant's Allegations

On September 27, 1993, I gave the parties an opportunity to brief the issue of whether or not I still had the authority to make findings regarding Respondent's allegedly discriminatory treatment of the complainant, assuming I found that the Department had no jurisdiction to proceed against Respondent. Both parties submitted supplemental briefs on this issue.

Respondent argued that I do not have such authority. R. Supp. Br. 2. The Department argued that I do have such authority. DHHS Supp. Br. 2. I agree with Respondent. For the reasons discussed below, I find that, once I have dismissed that part of the Department's case dealing with the Respondent's allegedly discriminatory treatment of the complainant, I am without authority to make findings with regard to that issue.

The Department argues that section 504 does not distinguish between recipients of federal financial assistance based on the federal agency from which the federal financial assistance is received and thus I have the authority to reach the merits of the complainant's allegation based on federal financial assistance to Respondent from any source. DHHS Supp. Br. 2, 3. The Department argues further that here the Department could have joined ED as a co-petitioner to prove that Respondent was a recipient of federal financial assistance, as authorized by section 1-207 of Executive

Order 12250, 3 C.F.R. § 298 (1980).[11] DHHS Supp. Br. 3, 4. I do not agree.

While section 504 does not distinguish between the recipients of federal financial assistance based on the federal agency from which the federal financial assistance is received, Departmental regulations governing this case define the agency providing federal financial assistance as the Department only. Finding 9. The regulations thus limit my jurisdiction to those entities receiving federal financial assistance from the Department. Therefore, absent some joint prosecution with another agency where jurisdiction based on an entity's receipt of federal financial assistance could be proved (which joint prosecution does not exist in this case), I would not have jurisdiction to reach the merits. Furthermore, although the Department alleges that Respondent received ED funds (Findings 26, 27), it has not proved that Respondent received ED funds or that Respondent knew that it was in receipt of ED funds. Moreover, even if Respondent was the recipient of ED funds, in the absence of a joint inquiry or prosecution with ED, the Department alone is without jurisdiction to bring the case against Respondent.

The Department argues also that it could proceed against the State on this complaint and force the State to sanction Respondent. This may be true. However, that does not confer authority upon me to make findings. The Department stresses that my making findings of fact and conclusions of law on the evidence presented would be efficient and would preclude the necessity of having the

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[11] The Department asserts that, if Respondent had raised the jurisdictional issue earlier in the proceeding, it would have been in a better position to join ED in proving that Respondent was the recipient of federal financial assistance. DHHS Supp. Br. 3. The Department never requested that I grant it time specifically to investigate whether it could join ED in proving that Respondent was the recipient of federal financial assistance. Moreover, I have found that the lack of subject matter jurisdiction can be raised at any time. Finding 25. Respondent raised the jurisdictional issue on the first day of the hearing. I continued the hearing to give the parties a chance to present evidence on the jurisdictional issue. Moreover, the timing of Respondent's assertion on jurisdiction has no bearing on whether or not, in the absence of jurisdiction, I am authorized to make findings on Respondent's alleged discriminatory treatment of the complainant.

evidence presented again. DHHS Supp. Br. 4, 7. While this may be true, it does not confer jurisdiction upon me.

In the absence of jurisdiction, I have no case or controversy before me to decide and I must dismiss the case. The Department has not convinced me that it would be appropriate for me to make findings of fact or conclusions of law regarding the issue of the Respondent's allegedly discriminatory treatment of the complainant. However, in the interest of efficiency and economy, a full record is available for the consideration of any entity with jurisdiction to hear the case.

III. I HAVE THE AUTHORITY TO ADJUDICATE THE ISSUE OF PETITIONER'S EMPLOYMENT APPLICATION.

On July 31, 1992, Respondent signed a provider certification agreement with RCEB. Finding 54. In so signing, Respondent acknowledged that it was bound by section 504. Respondent is accused of using an employment application the Department alleges is discriminatory. Thus, because Respondent now knows it is subject to section 504, I have the authority to hear the case against Respondent as limited to the issue of the employment application.

The Department asserts that the section 504 regulations which are applicable to pre-employment inquiries, 45 C.F.R. § 84.14(a), provide that a recipient of federal financial assistance may not conduct a pre-employment medical examination or make a pre-employment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. The Department acknowledges, however, that a recipient may make a pre-employment inquiry into an applicant's ability to perform job-related functions. DHHS Br. 45. Here, the Department alleged violations of section 504 in the employment application the complainant submitted to Respondent in 1988, as well as in a revised employment application Respondent began using in 1989. Findings 70 - 73; DHHS Br. 45 - 47; DHHS Rep. Br. 2, 3.

Respondent alleged that its employment application had been revised and it is now in compliance with the Department's requirements, which requirements were outlined in testimony presented by the Department's witness, Virginia Apodaca. Finding 74. Respondent sought to prove that its employment application satisfied the regulations by submitting a revised employment

application with its response brief.[12] Findings 75, 76. However, I did not admit this proposed exhibit because it was submitted after the evidentiary record in this case had closed. Finding 77.

In its reply, the Department argues that Respondent's promise to comply with section 504 regarding its employment application does not moot the issue as to whether the application includes a prohibited pre-employment inquiry. The Department argues that the issue would be moot only if there was no reasonable expectation that the alleged violation would recur or if interim events completely and irrevocably eradicated the effects of the alleged violation. The Department asserts that until Respondent submits a revised employment application form to DHHS for a determination of compliance or enters into a consent agreement or some other legally binding assurance that it will in future use an employment application form complying with section 504, Respondent's mere promise to comply is insufficient to satisfy the Act and regulations. DHHS Rep. Br. 3. Thus, the Department seeks termination of Respondent's federal financial assistance on this issue and seeks to have this termination remain in effect until Respondent satisfies DHHS that it will comply with the applicable provisions of the regulation. DHHS Rep. Br. 5.

IV. THERE EXISTS NO BASIS UPON WHICH TO TERMINATE RESPONDENT'S FEDERAL FINANCIAL ASSISTANCE.

While I agree with the Department that the employment application Respondent began using in 1989 does not comply with Respondent's section 504 obligations, I do not agree with the Department that there exists a basis upon which to terminate Respondent's federal financial assistance. Prior to terminating an entity's federal financial assistance, the Department must prove that an entity's compliance with section 504 cannot be secured through voluntary means. 45 C.F.R. § 80.8(c). Here, the Department has not offered sufficient proof to convince me that Respondent is not ready to voluntarily conform its employment application.

Instead, the record shows that Respondent is willing, perhaps even eager, to change its employment application in order to comply with section 504. Finding 79. The

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[12] I have marked the revised employment application and the declaration of James E. Gallagher which accompanied it (R. R. Br., appendix 3) as R. Ex. 17.

Department has indicated to Respondent what it must do to comply with section 504 (Finding 74), and Respondent has indicated that it is ready to comply. Findings 75, 79. As Respondent has indicated its willingness to comply voluntarily, the Department must allow Respondent time to come into compliance. Therefore, at this time, there exists no basis upon which to terminate Respondent's federal financial assistance.[13]

CONCLUSION

I conclude, for the reasons cited above, that I am without authority to adjudicate the issue of whether Respondent discriminated against the complainant by subjecting him to discrimination in employment and denying him an employment opportunity based on the need to make reasonable accommodation. I conclude further that Respondent has engaged in unlawful discrimination in violation of the Act by making an impermissible pre-employment inquiry in its employment application. However, I conclude also that the Department has not proved that Respondent is unwilling to voluntarily comply with the obligations of section 504 with regard to this employment application. Therefore, there exists no basis upon which to terminate Respondent's federal financial assistance.

/s/

Edward D. Steinman
Administrative Law Judge

[13] As I have not admitted R. Ex. 17, I do not make findings based upon it.