BE IT RESOLVED, That the American Bar Association supports in principle federal legislation which prohibits discrimination on the basis of disabilities in a manner parallel to existing prohibitions on discrimination based on race, sex, national origin, and religion; seeks to ensure equal opportunities for individuals with disabilities in employment, public accommodations and services (including mass transportation), telecommunications, and activities of State and local governments, taking into consideration the economic benefits and costs; and provides clear standards for identifying such discrimination.
A variety of federal statutes and regulations have been enacted which prohibit discrimination on the basis of handicap. Yet these existing statutes and regulations are less extensive than those that prohibit discrimination on the basis of race, color, national origin, age, religion, and sex, and therefore fail to provide some 43,000,000 Americans with disabilities the same civil rights afforded to other minority groups and women.

The major obstacle to the achievement of equal opportunity and full participation by individuals with disabilities is the problem of discrimination. It is a daily experience for individuals who have disabilities. The severity and pervasiveness of discrimination against people with disabilities is well-documented. Americans with disabilities are much poorer than those without disabilities. Their ability to participate in social, community, and many daily living activities is severely limited. Most importantly, individuals with disabilities experience staggering levels of unemployment. Two-thirds of all Americans with disabilities between the age of 16 and 64 are not working at all, despite the fact that a large majority of these individuals want to work, and are able to perform the skills necessary for maintaining employment. The majority of those not working, and out of the labor force, must depend on insurance payments or government benefits for support.

Individuals with disabilities who say that their disability constrains their activities, social life and employability, identify several important barriers which contribute to their problems, including discriminatory hiring practices of employers, lack of access to public transportation and lack of access to public buildings and bathrooms. Further, deaf individuals and people with communication disorders are still denied an effective opportunity to use telephones, despite the availability of technology to establish relay services for these individuals.


Id.
Accessible transportation is the lynchpin for integration of people with disabilities. It is essential if a person is to seek and maintain a job. It does little good to open the doors of institutions, to provide rehabilitation and early intervention programs, if people with disabilities cannot even leave their homes and move freely in society to jobs and other essential activities.

Thus, despite advances made in technology, public attitudes, and the protections offered by federal and state law, discrimination against people with disabilities continues to exist, resulting in isolation, segregation, unequal treatment, and denial of opportunities available to individuals without disabilities.

In recognition of this lack of equal protections, and the continued serious and pervasive isolation, segregation, and exclusion of people with disabilities, federal legislation is needed to create a national policy mandating an end to discrimination on the basis of disability.

Such legislation could be patterned after Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which prohibits discrimination on the basis of handicap in federally funded programs as well as programs or activities conducted by the Federal government. Section 504 is one of four sections of Title V of the Rehabilitation Act that prohibits discrimination on the basis of handicap by federal agencies (Section 501 and 504), federal contractors (Section 503), and federal grantees (Section 504). New legislation could extend to individuals with disabilities civil rights protections as provided for by other civil rights laws, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-17, covering employment.

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4 See Civil Rights Restoration Act, Pub.L.No. 100-259, §4, 102 Stat. 29 (1988) [clarifying that Section 504 and other Civil Rights laws cover all operations of a federally assisted program or activity (with some exceptions) if any part of it receives federal financial assistance, thereby overturning the decision in Grove City College v. Bell, 465 U.S. 555 (1984), which held that receipt of grants by particular programs within an educational institution does not trigger institution-wide coverage under Title IX of the Education Amendments of 1972]. See also Consolidated Rail Corp. v. Darrone, 104 S.Ct. 1248, 1255 (1984) [Section 504 case referencing "program or activity" discussion in Grove City].

5 Section 502 of the Rehabilitation Act established the Architectural and Transportation Barriers Compliance Board (ATBCB) which enforces the Architectural Barriers Act of 1968.
activities, and Title II of the Civil Rights Act of 1964, 42 U.S.C. §§2000a to 2000a-6, concerning the provision of public accommodations.

Federal legislation could take a number of forms. One pending legislative proposal, the Americans With Disabilities Act (S. 933; H.R. 2273), incorporates features consistent with the principles in the Resolution.

The Americans With Disabilities Act, for example, defines "disability" as a physical or mental impairment that substantially limits one or more of an individual's major life activities. It includes a section on general forms of prohibited discrimination, e.g., denial of the right to participate in or benefit from opportunities, provision of opportunities that are not equal to or which are less effective than those afforded others, the provision of different or separate opportunities unless necessary to provide an individual with equally effective opportunities, or otherwise limiting the enjoyment of a right, privilege, advantage, or opportunity enjoyed by others.

The rights accorded under such legislation could be limited by incorporating several defenses to allegations of discrimination, including reasons for exclusion or discrimination unrelated to disability; failure of the individual to meet qualification standards which are shown to be necessary and substantially related to the ability of the individual to perform; and standards that require individuals who currently use or abuse alcohol or drugs, or who have a contagious disease or infection, not to pose a direct threat to the safety of others in the workplace or program.

In addition to the above requirements, such legislation would extend to individuals with disabilities those employment protections set forth in Title VII of the Civil Rights Act of 1964. The Americans With Disabilities Act recognizes the burdens on small employers by excluding from its employment provisions those employers with less than 15 employees. A qualified

6 This is the same definition used in the Rehabilitation Act and the recent amendments to the Fair Housing Act, 42 U.S.C. §§3601-3619, see Pub.L. No. 100-43, 102 Stat. 1619 (1988), which now includes persons with disabilities among those groups who are afforded protection under the Act.

7 These provisions also derive from Section 504 and its implementing regulations. See, e.g., 45 C.F.R. §84.4 (Department of Health and Human Services), which is applicable to recipients of federal financial assistance.
individual with a disability would be defined as one who, with or without reasonable accommodation, can perform the essential functions of the job in question. Reasonable accommodation, e.g., making facilities accessible, job restructuring, provision of qualified interpreters and readers, would be required unless the entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business, in which case it would be relieved of that responsibility. A remedies provision would also be included, such as in the Americans With Disabilities Act, which makes available Title VII remedies and procedures, with the Equal Employment Opportunity Commission responsible for the promulgation of regulations.

The proposed federal legislation would cover public services, thereby making activities of State and local governments subject to its nondiscrimination provisions and impose requirements with regard to accessible transportation systems. Discrimination in public accommodations and services operated by private entities, e.g., theatres, restaurants, hotels, office buildings, and recreational facilities would also be prohibited. Discrimination, as defined by the Americans With Disabilities Act, for example, would include failure to make modifications in rules or policies unless such modifications would fundamentally alter the nature of the program, in which case such modifications would not have to be made; failure to

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8 Concerns about the cost and disruptiveness of the duty to make reasonable accommodation have been dispelled by various studies conducted by the Department of Labor, the U.S. Civil Rights Commission, and private industry. See Toward Independence, Appendix, A 15-16.

9 See Alexander v. Choate, 469 U.S. 287 (1985) [recognizing duty to make reasonable accommodation pursuant to Section 504 of the Rehabilitation Act].

10 The undue hardship standard is also found in section 504 and its implementing regulations. See, e.g., 45 C.F.R. §84.53. See also Nelson v. Thornburgh, 567 F.Supp. 369 (E.D.Pa 1982), affirmed without opinion, 732 F.2d 146 (3d Cir. 1984), cert. denied, 469 U.S. 1188 (1985) [interpreting Section 504's undue hardship standard].

11 For a discussion of cost issues as they relate to transportation accessibility, see Toward Independence, Appendix E 31-36.

12 This standard is consistent with Southeastern Community College v. Davis, 442 U.S. 397, 411-413 (1979) [Section 504 case not requiring modifications to a nursing program if to do so (cont.)
provide auxiliary aids and services unless the entity can demonstrate that such services would result in an undue burden; and failure to remove architectural, communication, and transportation barriers where such removal is readily achievable.

The proposed federal legislation would also incorporate provisions related to telecommunications, requiring common carriers to provide equal services to individuals who use non-voice terminal devices, e.g., telecommunications devices for deaf persons (TDDs), because of their disabilities.

Additional provisions, as provided for in the Americans With Disabilities Act, for example, could also be incorporated into the proposed federal legislation, e.g., that the act: not be construed to reduce the scope of coverage of Section 504 or to invalidate or limit other Federal or State laws offering greater protections; include an anti-retaliation provision; direct the issuance of minimum guidelines to ensure the accessibility of buildings, facilities, and transportation systems; declare that States shall have no immunity in law or equity under the 11th Amendment for violations; and include an attorneys' fees provision for administrative and court proceedings initiated under the legislation.

CONCLUSION

Federal legislation such as that described above would provide a national mandate to end discrimination on the basis of disability. The American Bar Association has a history of opposing discrimination on the basis of race, gender, national origin, handicap, and age in such areas as employment, housing, public accommodations, credit, and education. The basis for the Association's commitment is its recognition that all groups, regardless of status, deserve to be afforded equal opportunities and to be free from discrimination. Support of federal legislation requiring nondiscrimination on the basis of disability is consistent with these historic principles of the Association.

would result in a fundamental alteration in the nature of the program.

13 Cf. Atascadero State Hospital v. Scanlon, 105 S.Ct. 3142 (1985) [Eleventh Amendment bars suits for monetary damages in federal court against States and State agencies under Section 504].
RESPECTFULLY SUBMITTED,

CLIFFORD D. STROMBERG,
Chairperson
Section of Individual Rights
and Responsibilities

CHRISTOPHER L. GRIFFIN,
Chairperson
Young Lawyers Division

August, 1989
GENERAL INFORMATION FORM

No. ________________________________

Submitting Entities: Section of Individual Rights and Responsibilities, Young Lawyers Division

Submitted By: Clifford D. Stromberg, Chairperson
Section of Individual Rights and Responsibilities

1. Summary of Recommendation

Resolves that the American Bar Association urges the enactment of federal legislation prohibiting discrimination on the basis of disability in employment, public accommodations and services (including mass transportation), telecommunications, and activities of State and local governments.

2. Approval by Submitting Entity

This recommendation was approved by the Council of the Section of Individual Rights and Responsibilities at its meeting in Washington, D.C. on May 13, 1989 and by the Assembly of the Young Lawyers Division at their meeting in Denver in February, 1989 in conjunction with the ABA midyear meeting.

3. Previous submission to the House on relevant Association position

A submission as described in the attached report has never been proposed to the House of Delegates, but the Association in its history has adopted various recommendations relating to nondiscrimination on the basis of disability, as well as on the basis of race, sex, national origin, age and religion.

4. Need for Action at this Meeting

A variety of federal statutes and regulations have been enacted which prohibit discrimination on the basis of disability. Yet these existing statutes and regulations are less extensive than those that prohibit discrimination on the basis of race, color, national origin, age, religion and sex, and therefore fail to provide some 43,000,000 Americans with disabilities the same civil rights afforded to other minority groups and women. In recognition of this lack of equal protections, and the continued serious and pervasive isolation, segregation, and exclusion of people with disabilities, federal legislation such as that described in the attached report would create a national policy mandating an end to discrimination on the basis of disability.
5. Status of Legislation

Comprehensive Federal legislation to prohibit discrimination on the basis of disability was proposed in 1988, and was a key recommendation of the National Council on the Handicapped, an independent federal agency, in its 1986 report, Toward Independence. First introduced in the 1988 session of Congress (S. 2345 and H.R. 4498), the Americans With Disabilities Act received wide bipartisan support in both the Senate and the House of Representatives. As no final action was taken on the bill in 1988, it was reintroduced in the 101st Congress in 1989 by Senator Harkin (S. 933) and Representative Coelho (H.R. 2273). This bill embraces many of the principles enumerated in the attached recommendation and report.

6. Cost to the Association

None.

7. Disclosure of Interest. (If applicable)

N/A

8. Referrals

A copy of this recommendation has been submitted to the chairs of all ABA Sections and Divisions.

9. Contact Person (Prior to meeting)

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10. Contact Person (who will present the report to the House.)

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