



April 25, 2016

Bernadette Wilson  
Executive Officer  
Executive Secretariat  
Equal Employment Opportunity Commission  
131 M Street NE  
Washington, DC 20507

**Re: Comments on Proposed Rule concerning Affirmative Action for Individuals with Disabilities in the Federal Government, RIN 3046-AA94.**

Dear Ms. Wilson:

The undersigned members of the Consortium for Citizens with Disabilities (CCD) Rights, Employment and Training, and Veterans and Military Families Task Forces submit these comments in response to the above-captioned proposed rule implementing Section 501 of the Rehabilitation Act. CCD is a coalition of national disability organizations working for national public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

We applaud the EEOC for proposing substantive rules to guide and strengthen implementation of Section 501's affirmative action and non-discrimination mandates. A substantive rule implementing Section 501 is long overdue and is critical to ensure continuing meaningful efforts to promote affirmative action in federal employment of people with disabilities. We support the proposed rule and believe that it has the potential to increase significantly the employment of people with disabilities by the federal government. The proposed rule's requirement of concrete and specific steps that must be taken as part of an affirmative action plan, its setting of goals for the employment of people with disabilities and targeted disabilities, and its requirement that agencies provide personal assistance services are necessary and important measures.

We strongly believe, however, that some aspects of the rule must be strengthened. For example, the employment goals for employment of individuals with disabilities and targeted disabilities are too low, and the need for agencies to have a centralized accommodation fund is critical. Recruitment efforts must include formal linkage agreements with disability organizations as well as state disability service systems and vocational rehabilitation agencies, and must focus on

people with targeted disabilities (including people who use supported and customized employment services) as well as people with disabilities more generally. Personal services enabling people with significant disabilities to work should include obligations not just with respect to attendant care but also with respect to supported employment services that are critical for many people with intellectual and significant psychiatric disabilities to maintain employment.

Our specific comments follow.

**1. The “Model Employer” Description Should Include an Affirmative Action Obligation (Section 1614.203(c))**

We believe that it is important to update the regulations’ description of the federal government’s obligation to be a “model employer” of people with disabilities to reflect meaningful affirmative action obligations. The current definition, which is maintained in the proposed rule, states that “[a]gencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities.” This definition only reflects non-discrimination obligations; giving less than full consideration to individuals with disabilities in hiring, placement and advancement would constitute discrimination.

To reflect the obligation to take affirmative action to promote employment of people with disabilities, as well as the need to give special attention to recruitment and retention of people with disabilities in order to effectuate affirmative action, the “model employer” description should be amended by adding the following: *“Agencies shall also take affirmative action to promote the recruitment, hiring, placement, retention, and advancement of qualified individuals with disabilities, with the goal of eliminating under-representation of individuals with disabilities in the federal workforce.”*

**2. The Affirmative Action Plan Obligations Should be Strengthened (Section 1614.203(d))**

We support the proposed subsection describing what an “affirmative action plan” must contain. We agree with the Commission that the specific steps it has proposed to require as part of an affirmative action plan (recruitment obligations, obligations concerning the application process, obligations concerning an advancement program for people with disabilities, harassment policy requirements, obligations concerning the provision of reasonable accommodations, requirements for accessible facilities and technology, requirements for the provision of personal services allowing employees to participate in the workplace, utilization analysis requirements, required goals, and recordkeeping requirements) are key measures that must be taken as part of an effective affirmative action plan. As described below, we believe it is important to require more for some of these steps.

**a. The general description of an affirmative action plan should clarify the meaning of “adequate” recruitment, hiring, placement, and advancement opportunities**

The proposed rule contains the following general description of an affirmative action plan: “a Plan that provides sufficient assurances, procedures, and commitments to provide adequate

recruitment, hiring, placement, and advancement opportunities for individuals with disabilities at all levels of federal employment.” While this language is derived from the statute, we think it is important to provide further clarification about the meaning of “adequate” recruitment, hiring, placement, and advancement opportunities—that is, to explain what such opportunities must be adequate to accomplish. *The final rule should state that such opportunities be adequate to ensure that the agency can meet the employment goals set forth in paragraph (d)(7)(i) of this section.*

## **b. Recruitment requirements**

**Require formal linkage agreements:** We support the proposed rule’s requirement that agencies establish and maintain contacts with organizations specializing in the placement of individuals with disabilities, but this provision must be stronger and clearer. The final rule should require that agencies establish and maintain *linkage agreements or other formal arrangements* with a number of the listed organizations. Merely maintaining “contacts” with such organizations suggests that it would be sufficient for an agency to call someone at an Employment Network service provider once every several years, for example. It is critical that regular, formal arrangements sufficient to ensure effective recruitment of qualified applicants with disabilities be maintained.

Such agreements should require agencies to engage in targeted outreach through such organizations to increase recruitment of people with disabilities for federal employment. Further, we suggest that the final rule expand the list of examples of organizations specializing in the placement of individuals with disabilities, to include at least: Ticket to Work employment networks, protection and advocacy organizations, supported and customized employment providers, and other disability service providers.<sup>1</sup> We note that these organizations and agencies can also help identify appropriate accommodations that may be needed by applicants with disabilities. Moreover, as stated below, we urge the EEOC to require specifically that linkage agreements be maintained with state disability services agencies and vocational rehabilitation agencies.

**Recruitment must specifically include individuals with targeted disabilities:** The final rule should specify that these linkage agreements or other formal arrangements *address the recruitment of individuals with targeted disabilities* as well as the broader group of individuals with disabilities.

**Establish linkage arrangements with disability service and vocational rehabilitation systems:** We strongly urge the EEOC to require that, at a minimum, federal agencies establish and maintain such arrangements with *state disability services authorities and vocational rehabilitation authorities*, and that these arrangements include a goal to recruit a specified

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<sup>1</sup> The final rule could also refer agencies to the Labor Department’s list of state-based disability employment resources for federal contractors at <http://www.dol.gov/ofccp/regs/compliance/Resources.htm>. We note, however, that this list varies in its comprehensiveness and accuracy across states, and accordingly suggest that the EEOC maintain and make available its own list of state-based resources.

percentage of individuals with disabilities who use supported employment services. Any meaningful effort to recruit individuals with significant disabilities must include the recruitment of individuals receiving these services, which help many individuals with the most significant disabilities secure and keep jobs.

**Replace the phrase “placement of individuals with disabilities:”** We also recommend that the EEOC *replace the phrase “placement of individuals with disabilities” with a more accurate description such as “assisting individuals with disabilities in securing and maintaining employment.”* “Placement” of individuals with disabilities in jobs is an outdated concept that connotes that where people with disabilities seek employment should be determined by agencies rather than people with disabilities themselves.

### **c. Application process requirements**

**Require an accessible application process:** *EEOC should state explicitly that the application process, including online applications, should be fully accessible to individuals with disabilities as a matter of non-discrimination.* As the EEOC notes, the non-discrimination standards for Section 501 are those standards applied under Title I of the ADA. Inaccessible application processes violate ADA Title I and Section 501, as they are a method of administration that has the effect of discriminating on the basis of disability and is not job-related and consistent with business necessity. The Justice Department has interpreted Title I to require full accessibility of employment applications and has entered into numerous settlement agreements with public employers requiring the provision of accessible employment applications. *See, e.g., United States v. City of DeKalb, Illinois* (entered Feb. 3, 2015), *United States v. City of Fallon, Nevada* (entered Feb. 3, 2015), *United States v. City of Isle Palms, South Carolina* (entered Feb. 3, 2015), *United States v. City of Vero Beach, Florida* (entered Feb. 3, 2015), *United States v. City of Parowan, Utah* (entered May 5, 2015), *United States v. Village of Ruidoso, New Mexico* (entered May 5, 2015).

While the EEOC does not have authority to enforce federal agencies’ compliance with the accessibility requirements of Section 508 of the Rehabilitation Act, we believe it does have authority to interpret Section 501’s non-discrimination obligations to require that the application process be accessible to people with disabilities, wholly apart from the requirements of Section 508. It is hard to understand how federal agencies can engage in effective affirmative action efforts if their application processes are not even accessible to applicants with disabilities. Moreover, it is entirely feasible to ensure such accessibility with current technology.

**Require that staff designated to handle disability-related issues in the application process be trained on affirmative action requirements:** Section 203(d)(ii) of the proposed rule appropriately requires agencies to ensure that they have “designated sufficient staff to handle any disability-related issues that arise during the application and placement processes, and... to provide such individuals with sufficient training, support, and other resources to carry out their responsibilities under this section.” However, the Section-by-Section Analysis states that the rule “does not require agencies to provide mandatory training to supervisors and hiring officials... because these issues are already addressed elsewhere by Commission regulations.” 81 Fed. Reg. 9126 (citing, *inter alia*, 29 CFR § 1614.102(a)(5) and (9)). But 29 CFR §

1614.102(a)(5) requires agencies only to “provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the *equal employment opportunity policy and program*” (emphasis added), not their understanding and implementation of an affirmative action plan under Section 501. Similarly, 29 CFR § 1614.102(a)(9) requires agencies only to “[p]rovide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in *equal employment opportunity*” (emphasis added), not to those demonstrating accomplishment in implementing an affirmative action plan under Section 501.

*We recommend that the final rule require federal agencies to ensure that any staff designated to handle disability-related issues in the application and placement process be trained on the affirmative action obligations of Section 501, and that such trainings also include components concerning the capabilities of individuals with disabilities, the wide range of reasonable accommodations that can be provided, and the components of the agency’s affirmative action plan.<sup>2</sup> We further recommend that the rule require agencies to provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in implementing the agency’s affirmative action plan pursuant to paragraph (d) of this section.*

#### **d. “Hiring and advancement program” requirements**

**Require additional processes to gather feedback from employees with disabilities:** We support proposed §1614.203(d)(1)(iii) regarding opportunities for advancement for current employees with disabilities, but we think this proposed section is insufficient to meet the explicit requirement under Section 501 that agencies focus on “advancement” for current employees with disabilities. In particular, while the exit interviews required by the proposed rule are an important and useful tool for identifying changes that should be made in order to improve retention of employees with disabilities, they come too late to retain a valued employee with a disability. *We urge the EEOC to require agencies also to establish a process for employees with disabilities to provide anonymous feedback concerning the agency’s handling of affirmative action, accommodation requests or other issues related to individuals’ disabilities, as well as non-anonymous forums for such feedback, such as roundtables.*

#### **e. Reasonable accommodation procedures**

**Clarify that no magic words required:** We support the proposed requirement that reasonable accommodation procedures be in writing, consistent with past Executive Orders and EEOC Management Directive 715. *See* Proposed §1614.203(d)(3), *et seq.* We also support the specific requirements for the contents of these written procedures, as well as the proposed requirements concerning accommodation requests that are denied. *However, we suggest that the final rule make clear that a request for a reasonable accommodation need not use the legal term “reasonable accommodation” or other “magic words.” See, e.g., 41 C.F.R. § Pt. 60-741, App. B at paragraph 3.*

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<sup>2</sup> The final rule could also refer agencies to existing trainings, including an updated version of the Selective Placement Program Coordinator Online Training ([http://www.hru.gov/course\\_catalog.aspx?cid=213&mgr=false](http://www.hru.gov/course_catalog.aspx?cid=213&mgr=false)) and the Roadmap to Success: Hiring Retaining and Honoring Employees with Disabilities ([http://www.hru.gov/Course\\_Catalog.aspx?cid=195](http://www.hru.gov/Course_Catalog.aspx?cid=195)) hosted on OPM’s HR University.

**Require a centralized accommodation fund:** *We believe it is critical that the final rule require agencies to establish an agency-wide centralized accommodation fund, ensuring that the specter of paying for needed reasonable accommodations out of agency division budgets does not deter decision-makers from hiring or promoting individuals with disabilities. As the National Association of the Deaf states in its comments, “cash-strapped division hiring managers are financially incentivized to deny employment to people with disabilities that require reasonable accommodations, so that they can maximize how their budgets are used to achieve their assigned tasks. Centralizing the reasonable accommodation funds takes the cost consideration for accommodating prospective employees with disabilities away from the hiring decision made by the hiring managers.”*

We strongly disagree with the concerns raised by the EEOC about requiring such a fund. While the Commission states that such a requirement would raise practical concerns about “the precise manner in which appropriated funds are to be held, requested, and disbursed within the agency,” it need not mandate the details of how the fund is administered and could afford agencies flexibility to administer a centralized fund in whichever manner works best for it, as long as the general mechanism of a centralized fund is used. While the EEOC notes that problems may remain if a centralized fund is “too small” or if “relevant decision-makers within the agency are unaware of the fund’s existence or of the means of accessing it,” we do not believe these are insurmountable barriers. The EEOC should require agencies to ensure that relevant decision-makers are aware of how to access the fund. To ensure that the fund is not too small, the EEOC could require that the fund be based on the cost of accommodation requests in prior years and adjusted for other relevant factors such as increased employment of individuals with disabilities; in the event that the fund is insufficient to cover all accommodation requests in a particular year, remaining requests could be funded by agency divisions, as occurs now in most agencies.

If the EEOC believes that legislative authority might be necessary to establish an agency-wide centralized accommodation fund in the case of certain agencies (we believe that it is not), it should specify that in those unusual circumstances the centralized accommodation fund must be established for components of the agency that are as broad as permitted by law.

**Clarify that reassignment rule applies to non-discrimination as well as affirmative action obligations:** We support the proposed provision requiring agencies to ensure that “reassignment to a position for which an employee is qualified, and not just permission to compete for such position, will be considered as a reasonable accommodation if the agency determines that no other reasonable accommodation will permit the employee with a disability to perform the essential functions of his or her current position, and notify supervisors and other relevant agency employees about how and where to conduct a search for available vacancies when reassignment is being considered.” *We urge the EEOC to clarify, however, that the requirement that reassignment be more than simply the opportunity to compete for another position applies to non-discrimination obligations as well as affirmative action obligations.* Otherwise the inclusion of this rule in the affirmative action plan requirements may be misconstrued to suggest, contrary to the Commission’s longstanding position, that non-discrimination requires something different.

#### **f. Personal services allowing employees to participate in the workplace**

**The personal services obligation is critically important:** We strongly support the EEOC's proposal to require agencies to provide personal assistance services required by employees with disabilities except when doing so would impose an undue hardship. These services are critical to enable many people with significant disabilities to work, and will open up workplace doors to many talented individuals who were previously unable to work due to the lack of assistance with personal needs. This obligation is not inappropriately burdensome, as it is limited by the undue hardship rule. Agencies are also permitted to have individuals who perform these services do other tasks as well, if time permits. This provision will make an enormous difference in the lives of many individuals with disabilities, and will enable agencies to benefit from their skills.

**Include within this category an obligation to permit receipt of supported employment services provided by outside service providers:** *We urge the EEOC to include in the personal services obligation a requirement to permit employees with disabilities to use supported employment services to assist them.* These services are typically financed through state disability service systems and/or state vocational rehabilitation agencies, and come without cost to the federal agency.<sup>3</sup> Just as attendant care is critical to enable employees with certain significant disabilities to work, supported and customized employment services are equally critical to enable employees with other types of significant disabilities (including intellectual and significant psychiatric disabilities, as well as individuals with certain physical disabilities) to work.<sup>4</sup> Yet some agencies believe that their employees cannot use supported employment services because they misunderstand the nature of these services and believe that the supported employment provider would be volunteering for the agency. As stated below, we believe that affirmative action plans should set goals for the employment of individuals who use supported employment services.

#### **g. Utilization analysis and goals**

**Set higher employment goals:** We applaud the EEOC for setting employment goals for individuals with disabilities and targeted disabilities, and for focusing those goals on both higher and lower level jobs. Such goals are one of the most important ways to ensure that affirmative action efforts bear fruit. We also appreciate that the EEOC proposes a separate goal to ensure that attention is paid to recruiting, hiring and retaining individuals with targeted—or significant—disabilities. And we agree with the EEOC that hiring and advancement goals for people with disabilities under Section 501 should be set by the EEOC, rather than by individual agencies.

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<sup>3</sup> As noted in the interpretive guidance to the EEOC's regulations implementing Title I of the ADA, some supported employment services are required to be provided by employers as a reasonable accommodation. Those services are not personal services and must be furnished by federal agencies.

<sup>4</sup> The flexibilities of the Schedule A hiring authority are particularly suited to ensure that customized employment can be done effectively in the federal government.

We believe, however, the goals set forth in the Proposed Rule are too low. In order for federal agencies to be “model employers” of people with disabilities, and to effect real improvements in the employment rate of people with disabilities, such goals must be higher than the status quo. Yet the Proposed Rule adopts goals – 12% for people with disabilities generally and 2% for people with targeted disabilities, *see* Proposed § 1614.203(d)(7) – that the EEOC concedes have already been met and exceeded in the case of the 12% goal, and very nearly met in the case of the 2% goal. OPM’s FY 2014 data indicates that people with disabilities made up 18.8% of employees at GS-10 and below, and 12.6% of employees at GS-11 and above.

Since the proposed rule would impose new requirements to ensure that affirmative action efforts are effective, would set new goals, and is designed to ensure that agencies make progress in increasing the employment of people with disabilities, it seems wholly inconsistent with the purpose of the rule to set a goal that is lower than what has already been achieved. Such a goal would not ensure progress.

The fact that some agencies may be unable to achieve a higher goal in the near future does not suggest that such a goal is inappropriate. As the EEOC notes, the fact that an agency may not be meeting set goals does not mean that the agency is violating the law. If an agency is taking all appropriate measures to try to meet those goals, the failure to meet them will not be considered non-compliance.

*The EEOC should set goals that are higher. We believe those goals should be at least 15% for people with disabilities, and 4% for people with targeted disabilities.* The EEOC should look to those agencies that have done the best job of employing people with disabilities, as well as workforce data, and use those sources to set appropriate goals that will improve employment rates rather than maintain the status quo. We note that in eight federal agencies, people with disabilities already make up more than 15% of the workforce, and at the EEOC they make up more than 23% of the workforce.<sup>5</sup>

**Set goals for individuals receiving supported and customized employment:** *We further suggest that the Final Rule require agencies to meet goals with respect to the hiring and employment of individuals receiving supported and customized employment services.* Currently, the number of federal employees who use these services is miniscule. Given the importance of these evidence-based strategies for many individuals with significant disabilities, and the tremendous success that they have had, their use is critical to improving employment rates of individuals with significant disabilities throughout the federal government and should be a particular priority for agencies.

**Require agencies to consider as a positive factor an individual’s disability or targeted disability:** We appreciate the listing of specific examples of steps designed to increase the number of employees with disabilities or targeted disabilities, including giving consideration to

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<sup>5</sup> Moreover, the proposed goals are significantly less than the availability of employees with disabilities and targeted disabilities in the workforce. The EEOC notes that approximately 24% of the eligible workforce has a disability, and that at least 10.5% – and likely more – has a targeted disability. 81 Fed. Reg. 9128-29. These figures also suggest that the employment goals for Section 501’s affirmative action obligations should be set higher than the proposed goals.

disability or targeted disability as a positive factor in employment decisions, to the extent permitted by applicable laws. We believe that this step is at the core of true affirmative action efforts and is an important means of ensuring progression toward the desired employment goals. Moreover, using disability as a positive factor does not invite heightened scrutiny under the Constitution and should generally be permissible as an affirmative action measure. *We urge the EEOC to require that agencies consider disabilities and targeted disabilities as a positive factor in employment decisions.*

**Include veterans with significant disabilities in utilization analysis:** We urge the EEOC to include in the workforce analysis that agencies must conduct under proposed Section 1614.203(d)(6) an analysis of the following: (1) how many employees hired pursuant to the hiring authority for veterans with a 30% disability rating and a service-connected disability identified themselves as having a significant disability on the SF-256 form at any time, and (2) how many employees hired pursuant to the Veterans' Recruitment Appointment authority identified themselves as having a significant disability on the SF-256 form at any time. This analysis will enable agencies and the EEOC to determine the extent to which veterans with disabilities being hired under special authorities for veterans with service-connected and non-service connected disabilities include those with significant disabilities.

#### **h. Recordkeeping and reporting requirements**

We support the proposed recordkeeping and reporting requirements, and believe they are important for purposes of analyzing the effectiveness of an agency's affirmative action efforts. Indeed, agencies should already be keeping track of much of this information, including the information concerning Schedule A hiring and probationary status; if they are not, it is important that they do so.

However, we suggest the Final Rule require one additional reporting category--namely, that each agency confirm that it has reviewed each of its job qualification standards to determine whether any physical or mental qualification standard screens out people with disabilities and, if so, whether the standard may be appropriately modified to avoid that result.

### **3. Questions Posed by the EEOC**

#### **a. Should PAS assistants be assigned to a particular individual or should they respond to requests for PAS by different individuals, as needed?**

PAS assistants assist individuals with sensitive and intimate tasks, and having a constant rotation of different individuals assisting a person with these tasks is intrusive and uncomfortable. In addition, providing effective personal assistance typically requires that an assistant learn and understand an individual's needs; having rotating assistants makes it extremely difficult to provide effective help. Accordingly, it is important that PAS assistants should be assigned to a particular individual.<sup>6</sup>

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<sup>6</sup> If an employee needs and wants more than one personal assistant, an agency should be required to provide more than one personal assistant in order to meet the employee's needs. The EEOC should also specify that a personal

Additionally, as the employee with a disability receiving PAS assistants will have the greatest knowledge of how well a PAS assistant is able to work with that particular employee, the final rule should require that the employee receiving those services be heavily involved with the selection and performance appraisal of the assistant providing for their needs.

The EEOC also asks whether an agency should be allowed to assign non-PAS tasks to assistants when no personal assistance is required. The final rule should specify that non-PAS tasks may be assigned to PAS assistants only where doing so will not interfere with an employee receiving needed personal assistance services.

**b. How should the PAS obligation be enforced?**

First, since the proposed rule assigns de facto “reasonable accommodation” status to PAS, we believe the obligation should be enforced just like any other reasonable accommodation obligation, through the EEOC’s Federal Sector Enforcement Program, 29 CFR Part 1614.

Moreover, the statute clearly authorizes private enforcement of all Section 501 obligations, including affirmative action obligations. While some of the affirmative action requirements may be difficult for an individual to enforce due to the challenges of proving that the individual was harmed by non-compliance, such standing and proof challenges are separate from the question of whether private enforcement is available.

We disagree with the EEOC’s statement that: “[a]ffirmative action obligations, such as employment goals or advancement plans, are not generally enforceable through the part 1614 process.” 81 Fed. Reg. 9130, Paragraph 3. Subject to generally-applicable standing requirements, both the statute itself and the case law interpreting it make clear that persons aggrieved by a violation of Section 501 – including its affirmative action obligation – may file a complaint with the EEOC and, ultimately, a civil action.

The Rehabilitation Act was specifically amended in 1978 to add 29 U.S.C. § 794a, which states:

*The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964... shall be available, with respect to any complaint under section 791 [Section 501] of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint.*

(Emphasis added.)

Additionally, § 794a(a)(1) anticipates that either “equitable *or* affirmative action remed[ies]” (emphasis added) will be available, further evincing congressional intent to allow a private right of action regarding the affirmative action obligation. Section 794a(b) allows a “court” to award attorneys fees to prevailing parties other than the United States, in enforcement actions, suggesting Congress anticipated that private individuals would enforce the Act through the

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assistant may be assigned to more than one employee only where the employees do not need a personal assistant on a full-time basis, and provided that each employee receives the assistance that he or she needs.

courts.<sup>7</sup> Finally, Section 501 itself states, “[t]he standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990...” 29 U.S.C. § 791(f). Nothing in the Section precludes the filing of an “affirmative action employment discrimination complaint.” Indeed the language suggests the opposite: that Congress anticipated some plaintiffs *would* file “*affirmative action* employment discrimination complaints,” and that a different (non-ADA) legal standard would apply to such claims. (The ADA does not require affirmative action, and so ADA legal standards would not be applicable to an affirmative action claim.)

The Congressional Record also supports the reading that there is a private right of action to enforce the Section 501 affirmative action obligation. 29 U.S.C. § 794a “originated in the Senate Committee on Human Resources, which stated in its report... ‘application of the title VII provisions makes specific the right to bring a private right of action with respect to section 501.’” S. Rep. 95-890, at 19 (1978).

Senator Cranston, chief Senate sponsor of the 1978 legislation amending the Act, stated regarding the amendments, “Mr. President, the rights extended to handicapped individuals under title V of the Rehabilitation Act of 1973—Federal Government employment, physical accessibility in public buildings, employment under Federal contracts, and non-discrimination under Federal grants—are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance. Private enforcement of these title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys’ fees should assist substantially in this respect.” 124 Cong. Rec. 30,346 (Sept. 20, 1978) (statement of Sen. Cranston). Senator Cranston further explained, “application of Title VII would make specific the right to bring a private right of action with respect to Section 501 [29 U.S.C. s 791], subject, of course, to the provision for exhaustion of administrative remedies and other rules and procedures set forth in Title VII.” 124 Cong. Rec. 30,347 (Sept. 20, 1978) (statement of Sen. Cranston).

Additionally, Senator Cranston described testimony supporting the decision to grant such rights to Section 501 plaintiffs:

In testimony before the Subcommittee on the Handicapped, Deborah Kaplan of the Disability Rights Center noted that she had been examining the implementation of section 501 and recommended that legislative changes be made to “make it stronger and easier to enforce and to provide the same civil rights protection to the disabled that other minorities have in employment with the Federal Government.” Ms. Kaplan’s group

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<sup>7</sup> See also Clarke v. FELEC Servs., Inc., 489 F. Supp. 165, 168 (D. Alaska 1980), describing the legislative history of the 1978 amendments to the Rehabilitation Act:

The committee believes that the rights extended to handicapped individuals under Title V, that is, Federal government employment, physical accessibility in public buildings, employment under federal contracts, and nondiscrimination under federal grants—are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance and the availability of attorney’s fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504. S. Rep. No. 95-890, at 19 (1978).

discovered that in the first 2 years after enactment of section 501 “only 12 Federal agencies have increased their rate of hiring disabled employees by more than 3 percent.”

Finally, courts have held that there is a private right of action to enforce Section 501. *See, e.g., Shirey v. Devine*, 670 F.2d 1188, 1195 (D.C. Cir. 1982) (holding that NASA's employment practices, as applied to individual plaintiff, did not “provide adequate hiring, placement, and advancement opportunities for handicapped individuals” consistent with Section 501’s requirement that it have an “affirmative action program plan”); *Allen v. Heckler*, 780 F.2d 64 (D.C. Cir. 1985) (holding that St. Elizabeth’s affirmative action plan allowed the hospital to discriminate against class of plaintiffs on the basis of their previous institutionalization, and thus violated Section 501’s affirmative action obligation because it did not provide “adequate” advancement opportunities).

As the *Shirey* court explained, “[i]n 1973 Congress mandated affirmative action for handicapped persons, not only in hiring but also in placement and advancement, throughout the federal government. And, although the original Rehabilitation Act was silent on the matter, the 1978 Congress confirmed that the federal courts as well as civil service authorities should have a role in enforcing its affirmative action guarantee.” *Shirey*, 670 F.2d at 1195. “[29 U.S.C. § 794a] contemplates that courts will stand on equal footing with administrative authorities in defining and fashioning affirmative action plans. Any other interpretation would strain the plain meaning of the final sentence of [§ 794a](a)(1), which clearly contemplates that a court has discretion to grant a wide variety of relief under Section 501, including an ‘affirmative action remedy.’” *Id.* at 1198 (internal footnote omitted). Thus, “for those claims of employment discrimination on the basis of handicap to which the 1978 Amendments apply, the federal courts should make an independent appraisal as to whether a federal employer acted unlawfully because the terms of its affirmative action program do not meet the standard of Section 501.” *Id.* At 1200.

**c. Should agencies maintain a database of individuals determined eligible for appointment under a hiring authority that takes disability into account but who have not been hired by the agency? If so, should individuals’ permission be obtained before including them in the database?**

We support the creation of such a database if agencies will also be required to make use of it to increase hiring of people with disabilities—for example, by using it to search it for eligible candidates when positions become available. Toward that end, we suggest (1) that the federal government maintain one central database that agencies report to, rather than requiring each agency to create its own database; and (2) that the database contain information about the individuals’ work experience and educational qualifications, so that agencies can use the database to search for potential candidates who may be eligible for available positions. Finally, we suggest that applications include a box to check or some other indicator through which the applicant can give permission for his or her name and information to appear in the database, as well as information about what agencies will do with the information in the database.

Thank you for taking the time to review and consider these comments.

Sincerely,

ACCSES

American Association of People with Disabilities

American Association on Health and Disability

American Council of the Blind

American Foundation for the Blind

American Network of Community Options and Resources

The Arc of the United States

Association of University Centers on Disabilities

Autism Speaks

Autistic Self Advocacy Network

Bazelon Center for Mental Health Law

Disability Rights Education and Defense Fund

Easter Seals

Epilepsy Foundation

Goodwill Industries International, Inc.

Institute for Educational Leadership

National Association of State Head Injury Administrators

National Council on Independent Living

National Disability Institute

National Disability Rights Network

National Down Syndrome Congress

National Down Syndrome Society

National Multiple Sclerosis Society

Paralyzed Veterans of America

Perkins School for the Blind

RespectAbility

SourceAmerica

United Spinal Association

Non-members of CCD joining these comments:

The Advocrat Group

Disability Power and Pride