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RE: Docket Number DOE-HQ-2025-0015 (New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities)

Docket Number DOE-HQ-2025-0024 (Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities (General Provisions))

We write on behalf of Disability Rights Education and Defense Fund (DREDF). DREDF is a national nonprofit law and policy center dedicated to advancing and protecting the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy, and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities.

This is a **significant adverse comment** opposing the direct final rules at Docket Numbers DOE-HQ-2025-0015 and DOE-HQ-2025-0024. These rules would rescind critical portions of the Department of Energy (DOE)'s regulations implementing Section 504 of the Rehabilitation Act. Number 2025-0015 would rescind 10 C.F.R. § 1040.73, which requires recipients to make new construction and alteration fully accessible to people with disabilities. Number 2025-0024 would rescind portions of DOE's program access rule for existing facilities at 10 C.F.R. § 1040.72(c) & (d), including the requirement to make a transition plan to eliminate access barriers in these existing facilities.

If adopted, the rules would upend the central framework of Section 504 as applied to the built environment: the law requires that new buildings and renovations be fully

accessible, as measured by access standards, but grants more flexibility for existing buildings.

DREDF has deep expertise in the legal history of the provisions which DOE proposed to delete. As recently recounted in the documentary Change, Not Charity: The Americans with Disabilities Act, DREDF staff played a leadership role in the enactment of the Americans with Disabilities Act, a law which built on the Section 504 rules at issue here. The proposed rules are unlawful and must be withdrawn.

INTRODUCTION

The proposed rules are unlawful. The changes cannot be adopted as "direct final rules" as they are neither routine nor noncontroversial. Nor can the changes be adopted through ordinary rulemaking. The proposed rescissions contradict the foundational principles of Section 504 of the Rehabilitation Act. As the Supreme Court has recognized, "elimination of architectural barriers was one of the central aims of the [Rehabilitation] Act." *Alexander v. Choate*, 469 U.S. 287, 297 (1985). The requirement that newly constructed and altered facilities be fully accessible as measured by applicable access standards is central to this purpose. As important is the requirement that recipients of federal funds undertake careful accessibility planning to remove barriers in existing buildings.

The provisions at issue date back to the Section 504 coordination regulations adopted by the Department of Health, Education, and Welfare (HEW) in 1978, which in turn were based on the first Final Rule published by HEW in 1977. The coordination rules regulations were intended to establish minimum standards for implementing Section 504 across the federal government.

In adopting the 1977 and 1978 rules, HEW consulted with Congress and engaged in robust and multiple rounds of notice and public comment. The final rules carefully balanced the challenge of making existing buildings accessible to people with disabilities with the opportunity for new construction and alterations to achieve greater accessibility going forward.

The compromise reached – which has been adopted by more than 80 federal agencies – was and still is to allow some flexibility with respect to existing buildings, while requiring new facilities to be fully accessible as measured by access standards. Congress has repeatedly reviewed and approved the provisions at issue, and federal courts have enforced them for decades.

Access standards are the key to making new construction accessible. Accessibility is often a matter of inches and can make the difference between inclusion and exclusion of people with disabilities. Architects and contractors need a comprehensive set of design rules to ensure that new construction and alterations are built to be fully accessible to people with disabilities. And recipients need confidence that they are

providing such access in compliance with law. Otherwise, we will never reach the fully inclusive society intended by Congress in enacting and reenacting Section 504.

DOE may not delete foundational rules for the implementation of Section 504 approved by Congress. The rescissions must be rejected.

The Proposed Recissions Are Procedurally Unlawful.

The proposed rescissions cannot be adopted as direct final rules. The direct final rule approach is designed for situations in which rule changes "are needed immediately or are routine or noncontroversial." Administrative Conference of the United States, Procedures for Noncontroversial and Expedited Rulemaking (adopted June 15, 1995); *cf*. 5 U.S.C. § 553(b)(4)(B) (describing exemptions to requirements of Administrative Procedures Act where agency finds based on good cause that "notice and public procedure … are impracticable, unnecessary, or contrary to the public interest"); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (2012) (exemptions "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.") (citation omitted).

The notices published in the Federal Register do not discuss or attempt to make any of these showings. Instead, DOE proposes to upend core legal principles that have governed the implementation of Section 504 for 48 years. This is neither routine nor noncontroversial.

The rules that DOE proposes to rescind derive from the Section 504 coordination regulations adopted by HEW in 1978 (now found at 28 C.F.R. Part 41[1]), and the first Section 504 Final Rule published by HEW in 1977 (found at 45 C.F.R. Part 84). HEW promulgated its coordination regulations to implement an Executive Order instructing that agency to "coordinate governmentwide enforcement of section 504." 43 Fed. Reg. 2132 (Jan. 13, 1978). The "procedures, standards, and guidelines were to be followed by each federal agency that provides federal financial assistance in issuing regulations implementing section 504." *Id.* Accordingly, the Department of Energy – and dozens of other agencies – drafted and promulgated regulations implementing Section 504 that largely tracked the HEW coordination regulations.

Consistent with the importance and complexity of the topics under consideration, including the accessibility rules for existing facilities and new construction, HEW's rulemaking process was robust and included multiple rounds of public comment, dozens of public meetings, and extensive consultation with Congress. HEW, Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, Final Rule, 42 Fed.Reg. 22675, 22676-77 (May 4, 1977)

[1] Department of Justice (DOJ), Redesignation and Transfer of Section 504 Guidelines, Final Rule, 46 Fed.Reg. 40686 (Aug. 11, 1981) (republishing Section 504 coordination regulations at 28 CFR Part 41).

(describing rulemaking process);[2] HEW, Coordination of Federal Agency Enforcement of Section 504 of the Rehabilitation Act of 1973, Final Rule, 43 Fed.Reg. 2131, 2132-36 (Jan. 13, 1978) (describing rulemaking process and analyzing comments received); *accord* DOE, Nondiscrimination in Federally Assisted Programs; General Provisions, Final Rule, 45 Fed.Reg. 40513, 40514-15 (June 13, 1980) (describing DOE's rulemaking process in adding 10 C.F.R. Part 1040, including publication of proposed rule on November 16, 1978, and consideration of 511 responses during comment period).

It is difficult to imagine rules that are less "routine or noncontroversial" than the rescissions proposed here. Further, Section 2 of the Administrative Procedures Act mandates that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).[3] The Department should withdraw the proposed rules as procedurally deficient.

The Proposed Recissions Are Contrary to Foundational Section 504 Regulations Reached Through Careful Rulemaking Reviewed and Approved by Congress.

Despite the "elimination of architectural barriers [being] one of the central aims of the [Rehabilitation] Act," *Choate*, 469 U.S. at 297, the proposed rules would delete 10 C.F.R. § 1040.73, the provision requiring that new construction and alterations be fully accessible as measured by access standards. The rules would also delete the planning requirements for removing barriers from existing facilities set out in 10 C.F.R. § 1040.72.

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[2] The rulemaking process included a May 17, 1976, Notice of Intent to Issue Proposed Rules, seeking public comment on fifteen critical issues, with draft proposed rules and a statement of estimated economic impact, 41 FR 20296; ten meetings conducted by HEW's Office for Civil Rights (OCR) at locations across the country; a review of three hundred written comments received in response to the Notice of Intent; a July 16,1976, Notice of Proposed Rulemaking (NPRM) analyzing comments received and setting forth a revised proposed regulation for public comment, 41 FR 29548; an extension of the initial 60-day comment period until October 14, 1976; an additional twenty-two public meetings designed to inform interested persons and organizations of the proposed regulation and to solicit their comments and recommendations; an analysis of more than 700 comments responding to the NPRM and 150 additional comments sent in response to the Notice of Intent that were received too late to be analyzed during the first comment period; analysis of transcripts of all public meetings; and publication of Final Rule at 45 C.F.R. Part 84. HEW also consulted with members of Congress and Congressional committees, *see infra*.

[3] In *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015), the Supreme Court agreed with the lower court that section 2 of the Administrative Procedures Act mandates that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance. *Id.* at 101 (citing *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009) (the APA "make[s] no distinction … between initial agency action and subsequent agency action undoing or revising that action"). The Court nevertheless reversed because, in that case, unlike here, the matter under review was an interpretive guidance rather than a rule.

The text of these rules was first developed through HEW's Section 504 rulemaking from 1976 to 1978,[4] resulting in the regulations at 45 C.F.R. Part 84 and 28 C.F.R. Part 41.[5] These regulations were reached through careful rulemaking that was reviewed and approved by Congress. The Agency cannot lawfully delete these standards.

Careful Agency Rulemaking Balancing Equities

Throughout its rulemaking process, HEW discussed and considered the complexity of drafting rules to prohibit disability discrimination, noting: "[I]t is meaningless to 'admit' a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building." 42 Fed.Reg. 22676.

To address the built environment, HEW carefully balanced the challenge of making programs accessible in the context of existing buildings with barriers to people with disabilities, together with the opportunity for new construction and alterations to achieve greater accessibility going forward. The compromise was and still is to allow flexibility with respect to existing buildings, while requiring new facilities to be constructed to be fully accessible:

> Subpart C sets forth the central requirement of the regulation—program accessibility. All new facilities are required to be constructed so as to be readily accessible to and usable by handicapped persons. Every existing facility need not be made physically accessible, but all recipients must ensure that programs conducted in those facilities are made accessible. While flexibility is allowed in choosing methods that in fact make programs in existing facilities accessible, structural changes in such facilities must be undertaken if no other means of assuring program accessibility is available.

42 Fed.Reg. 22676 (May 4, 1977); *accord* 43 Fed. Reg. 2135 (Jan. 13, 1978) ("Although new facilities are to be designed and constructed so as to be physically accessible to handicapped persons, structural modifications of existing facilities need be undertaken only where other methods are inadequate to assure that a program is available to handicapped persons.").

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[4] HEW, Nondiscrimination on the Basis of Handicap, Notice of Intent, 41 Fed.Reg. 20295 (May 17, 1976); HEW, Nondiscrimination on the Basis of Handicap, Proposed Rules, 41 Fed.Reg. 29547 (July 16, 1976); HEW, Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, Final Rule, 42 Fed.Reg. 22675 (May 4, 1977); HEW, Coordination of Federal Agency Enforcement of Section 504 of the Rehabilitation Act of 1973, Final Rule, 43 Fed.Reg. 2131, 2132-36 (Jan. 13, 1978).

[5] See 45 C.F.R. §§ 84.22 (program access in existing facilities) & 84.23 (new construction and alteration); 28 CFR §§ 41.57 (program access in existing facilities) & 41.58 (new construction and alteration).

The regulations emphasize that the law "does not necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons." 28 C.F.R. § 41.57(a); 10 C.F.R. § 1040.72 (same). As the Supreme Court has acknowledged, for older facilities "structural change is likely to be more difficult." *Tennessee v. Lane*, 541 U.S. 509, 532 (2004). For this reason, the regulations include a requirement that recipients develop transition plans with priorities and schedules for achieving accessibility for programs offered in existing buildings. 42 Fed.Reg. 22690; 43 Fed. Reg. 2136. The Agency proposes to eliminate the rule requiring such planning.

The proposed "direct final rules" would destroy the careful compromise between the access requirements for existing facilities versus new construction and alterations.

Congressional Review and Approval of Regulatory Standards

HEW developed the original Section 504 rules with the participation and approval of Congress. HEW first proposed the regulations in May 1976 after consulting with the relevant committees of both the House and Senate.[6] Senate hearings in that year expressly considered the scope and effectiveness of the proposals.[7] In January 1977, HEW Secretary Mathews provided each member of Congress with a copy of the proposed regulations and requested review so that "Congress can advise us on congressional intent."[8] In April of the same year, Secretary Califano sent a revised draft, again requesting that Congress "evaluate the regulation, and the implementation process, to ensure that they conform to the will of Congress."[9]

Following the final promulgation of those regulations, a House subcommittee conducted further hearings on the implementation of Section 504 at which the Director of HEW's OCR reviewed the substantive content of the regulations[10] and expressly called attention to the provisions regarding existing buildings versus new construction and alterations:

> In its provisions on program accessibility the regulations require that construction of new facilities must be barrier-free and that alteration of

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[6] Hearings on Rehabilitation of the Handicapped Programs Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Public Welfare, 94th Cong. 1489-1525 (testimony of Martin Gerry, head of HEW OCR, describing Section 504 rulemaking including development of rules on architectural barriers), 1503-04 (list of entities consulted including Senate Subcommittee on the Handicapped and House Committee on Education and Labor), 1536-37 (addition information about rulemaking) (May 5, 1976).

[7] *See id.* at 323-27, 1502-03, 1511.

[8] Hearings Before the Subcomm. on Select Educ. of the H.R. Comm. on Educ. and Lab., 95th Cong. 73-75 (Sept. 1977).

[9] *Id.* at 76.

[10] *Id.* at 291-97.

> existing facilities shall provide, to the maximum extent feasible, accessibility for handicapped persons.
>
> Design, construction or alteration of facilities must meet American National Standards Institute accessibility standards. Structural changes in existing facilities are required only where there is no other method to make programs and services accessible. Such changes must be accomplished by June 3, 1980, in accordance with a transition plan which must be developed by December 3, 1977.[11]

The first reenactment of Section 504 occurred in November 1978, just ten months after HEW issued its Coordination Regulations. Congress extended Section 504's coverage to executive agencies as well as recipients of federal funding, ordered agency heads to issue regulations and submit them to congressional committees, and added a remedies provision. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120, 92 Stat. 2955 (Nov. 6, 1978).

In the legislative history accompanying the bill, Congress specifically referred to the "regulations promulgated by the [HEW]," and reasoned that the "amendment codifies existing practice as a specific statutory requirement." S. Rep. No. 95-890, at 19 (May 15, 1978); *see also id.* at 18 (the remedies provision was "designed to enhance the ability of handicapped individuals to assure compliance with … [Section 504] and the regulations promulgated thereunder.").

Given the participation and review of Congress in the development of the original regulations, together with Congress's subsequent ratification, the Supreme Court has long recognized that the Section 504 regulations have the force of law.[12]

The 1978 legislation also codified the consultative process between Congress and agencies engaged in Section 504 rulemaking by requiring that heads of agencies "promulgate such regulations as may be necessary … and that [c]opies of any proposed

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[11] *Id.* at 295.

[12] *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 635 nn.15 & 16 (1984) ("The regulations particularly merit deference in the present case: the responsible congressional Committees participated in their formulation, and both these Committees and Congress itself endorsed the regulations in their final form. … In adopting § 505(a)(2) in the amendments of 1978, Congress incorporated the substance of the Department's regulations into the statute.") (citing S. Rep. No. 95-890); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279 (1987) ("As we have previously recognized, these regulations were drafted with the oversight and approval of Congress; they provide 'an important source of guidance on the meaning of § 504.'") (citing *Darrone*, 465 U.S. at 634-635 & nn. 14-16 (1984)); *Alexander v. Choate*, 469 U.S. 287, 304 n. 24 (1985) ("We have previously recognized these regulations as an important source of guidance on the meaning of § 504."); *accord Helen L. v DiDario*, 46 F.3d 325, 332 (3d Cir. 1995) ("When Congress re-enacts a statute and voices its approval of an administrative interpretation of that statute, that interpretation acquires the force of law and courts are bound by the regulation.").

regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees." Pub. Law 95-602 at Sec. 119 (Nov. 6, 1978) (adding text at 29 U.S.C. § 794(a)). Between 1977 and today, more than 80 agencies have issued more than 100 sets of Section 504 regulations, all of which include the same compromise regarding the built environment. At least 50 sets of these regulations have been submitted to Congress under 29 U.S.C. § 794(a).

Subsequent statutory amendments to Section 504 similarly show Congressional approval of the regulatory framework that requires that new construction and alteration be done in a fully accessible manner, while allowing more flexibility for existing facilities. In 1988, Congress clarified the application of Section 504 to existing facilities in the context of small providers. Pub. Law 100-259 at sec. 4 (Mar. 22, 1988).[13] Similarly, in 1990, Congress amended Section 504 while enacting the Americans with Disabilities Act in ways that made clear its commitment to the "existing" versus "new" framework with respect to facilities.[14] Congress also incorporated the Section 504 regulations by reference as the minimum standards for Title II of the ADA.[15]

Consistently, appellate courts have regularly applied applicable access standards to recipients of federal financial assistance. *See*, *e.g.*, *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 291 (5th Cir. 2005) ("Mandating physical accessibility and the removal and amelioration of architectural barriers is an important purpose of [Section 504 and the ADA]. … [T]he regulations governing accessibility in schools under the ADA/504 require

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[13] 29 U.S.C. § 794(c) ("Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection.").

[14] *See*, *e.g.*, 42 U.S.C. §§ 12146(a) (unlawful under Title II of ADA and Section 504 "to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs"), 12147(a) (unlawful under Title II of ADA and Section 504 "to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations"), 12148(a)(1) (unlawful under Title II of ADA and Section 504 "to fail to operate a designated public transportation program or activity conducted in such facilities so that, when viewed in the entirety, the program or activity is readily accessible to and usable by individuals with disabilities"); *see also* 42 U.S.C. § 12142(a) (unlawful under Title II of ADA and Section 504 "to purchase or lease a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system, … if such bus, rail vehicle, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs").

[15] See 42 U.S.C. § 12134(a)-(c) (requiring the DOJ to promulgate regulations consistent with the HEW coordination regulations and to include standards consistent with previously published design standards similar to UFAS).

a school engaged in new construction to conform to … either the ADAAG or UFAS."); *Disabled in Action v. Sykes*, 833 F.2d 1113, 1121 (3d Cir. 1987) (applying then-applicable access standard and granting partial summary judgment to plaintiff where defendant failed to make subway entrance accessible during renovation); *see also Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982) ("In the context of public transportation and the handicapped, denial of access cannot be lessened simply by eliminating discriminatory selection criteria; because the barriers to equal participation are physical rather than abstract, some sort of action must be taken to remove them, if only in the area of new construction or purchasing. As plaintiffs pointedly observe, 'It is not enough to open the door for the handicapped …; a ramp must be built so the door can be reached.'").

Congress has repeatedly shown its approval of interpretations of the statute to require that new construction and alteration meet applicable access standards, while imposing a more flexible standard for existing facilities. The Agency cannot lawfully rescind regulatory standards approved by Congress.

Access Standards Are Key to Ensuring that New Construction and Alterations Are Built to Be Fully Accessible to People with Disabilities.

Compliance with access standards in new construction and alterations is critical to advancing the goals of Section 504 of the Rehabilitation Act. In 1978, Congress strengthened the role of the U.S. Access Board "develop standards and provide appropriate technical assistance to any public or private activity, person, or entity affected by regulations prescribed pursuant to this title with respect overcoming architectural, transportation, and communication barriers." Pub. L. No. 95-602, § 118 (adding text to 29 U.S.C. § 792(d)), a version of which is now found at 29 U.S.C. § 792(b)(2)). In the accompanying legislative history, Congress reviewed the critical role of access standards to making sure that new construction and alterations serve the remedial purpose of promoting a barrier-free society:

> The committee felt that the expertise of the Board in the area of architectural and transportation barriers should be made available to those in the general public wishing to create a barrier free environment by either renovation or new construction. An important function in achieving the desired goals of section 504 of the Rehabilitation Act of 1973 is the creation of a barrier free environment for the handicapped members of our society. … The Board must not let up on its compliance function because only with strict enforcement can a barrier free environment be achieved.

S. Rep. No. 95-890, at 17.

In 1984, the General Services Administration and three other agencies with authority under the Architectural Barriers Act of 1968 issued the Uniform Federal Accessibility Standards (UFAS). 49 Fed.Reg. 31528 (Aug. 7, 1984). In 1988, the Department of Justice (DOJ) adopted UFAS as a standard for measuring compliance with Section 504.

53 Fed.Reg. 3203 (Feb. 4, 1988). While the amended rule did not require compliance with UFAS, it clarified that compliance with UFAS was a means of meeting the required accessibility standard for new construction and alterations.

In 1990, the Department of Energy and 14 other departments and agencies followed suit, adopting UFAS as a means of measuring compliance with the regulatory standard. 55 Fed.Reg. 52136 (Dec. 19, 1990). The agencies reasoned that "governmentwide reference to UFAS will diminish the possibility that recipients of Federal financial assistance would face conflicting enforcement standards." *Id.* at 52137.

But here, the proposed rescissions would create the conflicting enforcement standards that the 1990 rulemaking sought to avoid. Recipients of federal financial assistance from the DOE include many entities that receive funding from other federal departments and agencies, and/or that are subject to the requirements of the ADA, which similarly requires that new construction and alteration comply with UFAS or the subsequently-developed ADA Accessibility Guidelines (ADAAG), *see* 28 C.F.R. § 35.151; 42 U.S.C. § 12183; 28 C.F.R. § 36.401-.406. Were DOE to rescind its new construction regulation, such covered entities would be required to follow access standards to comply with Section 504 and/or the ADA but would remain open to liability under the general nondiscrimination language at section 1040.71. They would essentially lose the safe harbor typically granted new construction and alteration that is done in compliance with access standards.[16]

The proposed rescission would encourage new construction and alteration that does not comply with access standards. Compliance with access standards is key to ensuring that new construction and alterations are fully accessible to people with disabilities:

> These standards state requirements "as precise as they are thorough, and the difference between compliance and noncompliance with the standard of full and equal enjoyment established by the ADA is often a matter of inches." "[O]bedience to the spirit of the ADA does not excuse noncompliance with [] ADAAG's requirements." …
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> [W]hen the content involves many precise dimensions such as inches of knee clearance underneath a sink, see ADAAG § 4.24.3, courts do not have the institutional competence to put together a coherent body of

[16] *See*, *e.g.*, *Colorado Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1220 (10th Cir. 2014) ("[T]he Design Standards provide the necessary guidance required to build an 'accessible' structure. … [New construction claims] must be evaluated through the lens of the Design Standards; were it otherwise, an entity's decision to follow the standards and build an 'accessible' facility would have little meaning."); *United States v. Nat'l Amusements, Inc.*, 180 F.Supp.2d 251, 258 (D.Mass. 2001) (To hold that compliance with the standards is not sufficient to satisfy the new construction and alterations provisions of the ADA "would render compliance with these regulations meaningless, because a fully compliant structure would always be subject to a claim under" the general nondiscrimination provisions).

> regulation. By contrast, a federal administrative agency can hire personnel with the specific skills needed to devise and implement the regulatory scheme. An[d as for the regulated entities, an architect putting thousands of measurements into his or her blueprint needs a holistic collection of design rules, not the incremental product of courts deciding cases and controversies one at a time. …
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> [While] focusing on overall accessibility is acceptable when evaluating *existing* facilities, avoiding "minor variations" is exactly what ADAAG requires of new or altered facilities.

Kirola v. City & Cty. of S.F., 860 F.3d 1164, 1178, 1180-81 (9th Cir. 2017) (citations omitted).

The proposed rescission of 10 C.F.R. § 1040.73, including its reference to the UFAS as a measure of compliance, would undermine enforcement of Section 504 by encouraging new construction and alterations which are not accessible to people with disabilities. It would create uncertainty for recipients and people with disabilities by abandoning 40 years of consistent accessibility standards. DOE should not proceed.

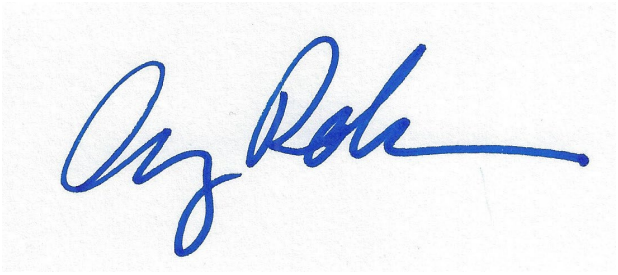
CONCLUSION

The proposed "direct final rules" amending DOE's Section 504 regulations must be rejected. They are procedurally unlawful as they cannot be adopted as direct final rules. Nor can they be adopted through ordinary rulemaking. Congress has repeatedly endorsed the regulatory standards that DOE proposes to rescind. The rulemaking must be withdrawn.

Sincerely,

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

Claudia Center
Legal Director



Amy Robertson
Fox and Robertson