

separate rules to incorporate the CRRRA's expanded definition of "program or activity" in their regulations—published its proposed rule on May 5, 2000, at 65 FR 26464, and its final rule on November 13, 2000, at 65 FR 68050. Among other modifications, ED's amendments contain several conforming changes to the following three subparts of its Section 504 regulations: (1) Preschool, Elementary, and Secondary Education; (2) Postsecondary Education; and (3) Health, Welfare, and Social Services.

Eight other Federal agencies have Section 504 regulations containing sections similar to all or a portion of the provisions in the above three subparts. Because we believe that it is particularly important to maintain consistency among Federal agencies with respect to these subparts, we have, with a few minor exceptions, followed ED's lead when amending these sections for the other eight agencies—Department of Agriculture, Department of Commerce, Department of Interior, Department of State, Department of Veterans Affairs, Agency for International Development, National Endowment for the Humanities, and National Science Foundation—that have similar regulations.

Coordination With the Department of Health and Human Services

The other agency implicated in the *Cureton* decision is the Department of Health and Human Services (HHS). Like ED, HHS promulgated its own separate NPRM, which was published on October 26, 2000 at 65 FR 64194. We coordinated with HHS, as we did with ED, to avoid any inconsistencies between this joint rule and those agencies' separate rules.

Differences Among Agencies

Some agencies lack regulations implementing section 504 or the Age Discrimination Act. In accordance with the limited scope of this regulation, we are not adding section 504 or Age Discrimination Act sections to agencies that lack such regulations. Outlined below are the agencies that do not have such implementing regulations, as well as agencies that have comprehensive rules implementing several statutes in one set of regulations or that follow the regulations of another Federal agency.

Agencies that do not have regulations implementing the Age Discrimination Act and, therefore, are amending only their regulations implementing Title VI and section 504 are: the Department of Agriculture, the Department of Labor, the Department of Defense, the Environmental Protection Agency, and

the Department of Transportation. The Federal Emergency Management Agency ("FEMA") does not have regulations applying section 504 to recipients of Federal financial assistance but, instead, operates in accordance with section 504 regulations developed by HHS. Therefore, FEMA is amending only its regulations implementing Title VI and the Age Discrimination Act. Likewise, the Small Business Administration does not have regulations applying section 504 to recipients of federal financial assistance and, therefore, is amending only its Title VI and Age Discrimination Act regulations.

In addition, the Corporation for National and Community Service ("the Corporation") lacks regulations applying the Age Discrimination Act, Title VI, and section 504 to recipients of Federal financial assistance. Instead, the Corporation, which is the successor of ACTION, operates in accordance with Title VI and section 504 regulations promulgated by ACTION and is amending only those regulations. Similarly, the National Endowment for the Arts, the National Endowment for the Humanities ("NEH"), and the Institute of Museum and Library Services ("IMLS"), which together constitute the National Foundation on the Arts and the Humanities ("NFAH"), operate in accordance with Title VI regulations developed jointly by these three agencies and thus are amending their Title VI regulations jointly. However, NEA is separately amending its section 504 and Age Discrimination Act regulations, while NEH, which lacks an Age Discrimination Act regulation, is amending its section 504 regulation only. IMLS, which operates in accordance with NEH's section 504 regulations and does not have regulations implementing the Age Discrimination Act, is not issuing any separate amendments.

Analysis of Comments and Changes

In the NPRM, we invited comments on the proposed regulations. We received two comments. The first commenter wrote in support of the NPRM, stating that Title VI, section 504, and the Age Discrimination Act needed to be strengthened and be made uniform by adding the definitions of "program or activity." The commenter also stated that the amendments would result in consistent and adequate enforcement of Title VI, section 504, and the Age Discrimination Act, and commended the Department of Justice and its "sister Federal agencies" for amending the regulations.

The second commenter advanced the view that the Agencies should not

amend the regulations at this time because the commenter believed an amendment would be untimely due to a case then-pending before the United States Supreme Court (*Alexander v. Sandoval*, 532 U.S. 275 (2001)). *Sandoval* did not, however, address the focus of this rulemaking—revising the regulations to conform them to the added definition of "program or activity" or "program." Instead, *Sandoval* addressed a different issue—whether there is an implied private right of action to enforce disparate-impact regulations promulgated under Section 602 of Title VI and concluded that there was not such a right. The Agencies have decided to proceed with the amendment of their regulations because we believe it is important to conform the regulations to the civil rights statutes as amended by the CRRRA. We are, however, mindful of the Supreme Court's statements in *Sandoval* that call the validity of the Title VI disparate-impact regulations into question.²

In addition, in consultation with the Department of Justice, the Agencies have reviewed the regulations since publication of the NPRM and have made minor editorial and technical changes.

Applicable Executive Orders and Regulatory Certifications

Executive Order 12067

These conforming changes have been reviewed by the Equal Employment Opportunity Commission pursuant to Executive Order 12067.

Executive Order 12250

These conforming changes to the Title VI and section 504 regulations have been reviewed and approved by the Attorney General pursuant to Executive Order 12250.

Executive Order 12866

These regulations have been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review", Section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is not a "significant regulatory action" under Executive Order 12866, Section 3(f), and accordingly this rule has not been reviewed by the Office of Management and Budget. Under the terms of the

² See *Sandoval*, 532 U.S. at 286 & 286 n. 6 ("[W]e assume for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations"; "[w]e cannot help observing, however, how strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' § 601 * * * when § 601 permits the very behavior that the regulations forbid.").