

In the Matter of Southwestern Virginia Training Center, Commonwealth of Virginia Dep't of Mental Health, Mental Retardation and Substance Abuse, and Commonwealth of Virginia Dep't of Education,  
Respondents.

Docket No. 93-125-CR  
93-504-1  
Civil Rights Proceeding

### INITIAL DECISION

Appearances: Lynne R. Fleming, Esq., Margaret A. Browne, Esq., Joan W. Murphy, Esq., William H. Hurd, Esq., and James S. Gilmore, III, Esq., Richmond, Virginia for the Respondents

David M. Leeman, Esq., and Robert F. Shaul, Esq., Washington, D.C. for the Office of Civil Rights, U.S. Department of Education

This is an action to terminate the continued eligibility of the Southwestern Virginia Training Center (Southwestern) to receive or apply for Federal financial assistance from the U.S. Department of Education. [See footnote 1 1/](#) This action was instituted as a result of a determination by the Assistant Secretary of Education for Civil Rights (ED) that Ms. Thelma Combs was subject to employment discrimination under Section 504 of the Rehabilitation Act of 1973, as amended, (29 U.S.C. § 794). Due to an agreement by the parties immediately prior to the hearing, the sole remaining issue concerns whether Ms. Combs was subject to employment discrimination.

Ms. Combs was employed as a developmental aide at Southwestern, a state operated intermediate care facility for the severely mentally retarded or profoundly mentally retarded. [See footnote 2 2/](#) These

residents possess IQ's of 35 or less. The developmental aides are responsible for the daily on-site care and instruction of the residents. This includes insuring that residents are awakened or taken to bed, and that they are dressed, toiletted, washed, and fed. It also includes supervising recreation, learning and social activities. Instruction is formal as well as informal. Informal instruction may include, for example, teaching an individual to scoop with a spoon during a meal. Developmental aides are charged with implementing behavioral programs for those residents who lose control of themselves on occasion. Lastly, developmental aides are responsible for the safety of the residents in emergencies.

Ms. Combs was one of four developmental aides who worked in Units 3E and 3F which housed approximately 20 residents. Ms. Combs was discharged from her employment in 1990 because she could not, pursuant to the order of her doctor, lift more than 15-20 pounds. This lifting restriction was imposed following her July 1986 surgery in her pelvic area and continues in effect to the present time.

This lifting restriction did not affect the majority of her duties which consumed the majority of her time. In the view of the management of Southwestern, however, it adversely affected her participation in the behavioral intervention programs of several residents, in providing assistance to residents with ambulation problems, and the general lifting required of some residents who could not support their own weight. As a result, Ms. Combs was discharged from her position in 1990.

Section 504 of the Rehabilitation Act of 1973, as amended, (29 U.S.C. § 794(a)(1990)) prohibits programs receiving federal financial assistance from discriminating against an individual with handicaps solely because of that disability--

(a) Promulgation of rules and regulations

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in . . . or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

Thus, in order for ED to prevail, it must establish that Ms.

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Combs was an "individual with handicaps" and that she was an "otherwise qualified individual." [See footnote 3 3/](#)

An individual with handicaps is defined as one who--

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities

. . . (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. [\[See footnote 4 4/ \]](#)

29 U.S.C. § 706(8)(B); See 34 C.F.R. § 104.3(j)(1) (1990).

A physical impairment is "any physiological disorder or condition . . . or anatomical loss affecting one or more of the following body systems: . . . musculoskeletal; [or] . . . genito-urinary." 34 C.F.R. § 104.3(j)(2)(ii). The physical impairment must substantially limit a major life activity which includes vocational and non-vocational activities as the term major life activities is defined as--

functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

34 C.F.R. § 104.3(i)(A)(2).

With respect to an individual with handicaps, an employer may not discriminate against such an individual if he or she is considered an "otherwise qualified individual." 29 U.S.C.

§ 794(a). An "otherwise qualified individual" is an individual with handicaps "who, with reasonable accommodation, can perform the essential functions of the job in question." 34 C.F.R. § 104.3(k)(1). Thus, an employer is required to "make reasonable accommodation to the known physical . . . limitations of an otherwise qualified handicapped . . . employee unless the [employer] . . . can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 34 C.F.R. § 104.12(a).

A reasonable accommodation may "include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." 34 C.F.R. § 104.12(b). Hence, measures of reasonable accommodation allow the job to be performed by compensating for the effect of the specific handicap.

### I. An Individual With Handicaps

In the case at hand, ED argues that Ms. Combs was an individual with handicaps under the Rehabilitation Act because she was physically impaired or, alternatively, was perceived as such by Southwestern.

Initially, Southwestern disputes that Ms. Combs had any physical impairment at the time of her dismissal. Southwestern admits that Ms. Combs had a disorder or condition which affected her genito-urinary system; however, it urges that this problem was corrected by the surgery in 1986 and, therefore, Ms. Combs did not have a physical impairment at the time of her dismissal in 1990. In Southwestern's view, the lifting restriction imposed by Ms. Combs' physician after the corrective surgery was a preventative measure -- one designed to prevent damage to the surgical posterior repair -- and thus, it was not a physical impairment. ED replies that the surgery did not fully restore her condition and, hence, she still had a physical impairment.

In the tribunal's view, a limitation, whether caused by a physical impairment due to an existing disorder or condition or imposed in order to prevent a reoccurrence of physical impairment, has the same effect upon the individual -- the individual no longer performs as well. As such, it constitutes a physical impairment under the Rehabilitation Act. This view is consistent with a self-evident purpose of the Rehabilitation Act, namely to ensure employment of individuals with limitations under reasonable circumstances. See *School Bd. of Nasau County v. Arline*, 480 U.S. 273, 282 (1987) ("[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a [contagiousness] disease on others and the effects of [this] . . . disease on a patient and use that distinction to justify discriminatory treatment.") As such, Ms. Combs had a physical impairment which limited her ability to lift to no more than 15-20 pounds.

A physical impairment must also substantially limit one or more of the individual's major life activities, either nonvocational or vocational, or be regarded as such by the employer. With regard to nonvocational activities, ED asserts that Ms. Combs' physical limitation substantially

limited her ability to perform activities in her daily life due to her inability to lift "items she might encounter [such as] a bucket of water, a bag of

groceries, a loaded trash bin, her lawn mower, or the corner of her bed or dresser." ED Br. at 26. Southwestern argues that the effect of the lifting restriction on Ms. Combs' daily life is minimal and that ED did not prove that she was unable to perform several of the above activities.

When viewed in the context of the activities of daily life, the few nonvocational activities affected by her lifting restriction are insufficient to constitute a substantial limitation. At best, the lifting restriction creates a minor inconvenience in her daily life. Hence, the 20-pound lifting restriction did not substantially limit Ms. Combs' ability to function in her daily life.

With regard to the vocational area, ED argues that her lifting restriction precluded employment in a wide variety of jobs and, therefore, the lifting restriction should be considered as substantially limiting. Southwestern responds that, as a matter of law, ED must show that Ms. Combs' impairment barred her employment from more than one particular job and that, as a matter of fact, ED failed to establish that "her lifting restriction foreclosed another job of any type." Southwestern Br. at 26.

In general, an impairment that interferes with an individual's ability to perform a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment, is not substantially limiting. *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1248 (6th Cir. 1985) (citing *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980)). The real focus must be on the impaired person, and not solely on the impairment or the perceived impairment. *Id.* at 1100.

As explained *infra*, there is some doubt whether the inability to lift more than 20 pounds interferes with the performance of a developmental aide. Developmental aides operate under a team concept within his or her immediate residential living unit and within the facility as a whole. This, in turn, may affect the necessity and frequency of lifting in excess of 20 pounds. In general, there appears to be virtually no lifting in excess of 20 pounds required during the third shift when the residents are sleeping. During the first and second shifts, the frequency of such lifting is dependent upon the particular job assignment. The frequency may vary on occasion between no lifting during a shift and lifting several times during the eight hour shift. There is, of course, a concern by Southwestern for the safety of the residents in the event of a fire or other emergency which may require a developmental aide to lift more than 20 pounds. This is a legitimate concern even though such an event may never or rarely occur. As such, the tribunal concludes that lifting in excess of 20 pounds constitutes an impairment to the general performance of a developmental aide. Such lifting is a marginal,

but nevertheless, essential function of a developmental aide.

As to other occupations, lifting is always a necessary function although the amount of weight lifted and the frequency of lifting will vary widely depending upon the occupation. The 20-pound restriction would not prevent Ms. Combs' employment in an unskilled, sedentary or light work position; however, it would preclude all employment in unskilled, medium and heavier

work occupations. Cf. 20 C.F.R. § 416.967. Thus, there is a broad spectrum of occupations from which she is precluded due to her limitation. As such, her limitation qualifies Ms. Combs as an individual with handicaps within the meaning of the Rehabilitation Act. Compare *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986)(person with acrophobia which precluded working on ladders is not a person with handicaps); *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985) (person with crossed eyes is not a person with handicaps); with *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987)(due to state and federal regulations and policies, epilepsy substantially limits an individual's ability to work by restricting the type of jobs available).

## II. An Otherwise Qualified Individual

In order to prevail, ED must establish that Ms. Combs was also an otherwise qualified individual, that is, "one who is able to meet all of a program's requirements in spite of his [or her] handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). This inquiry focuses on whether, "with or without reasonable accommodation, [the handicapped individual] can perform the essential functions of the position in question without endangering' her [or his] own health and safety or that of others." *Hall v. United States Postal Service*, 857 F.2d 1073, 1078 (6th Cir. 1988) (quoting 29 C.F.R. § 1613.702(f)(1987)).

A reasonable accommodation may include "job restructuring, part- time or modified work schedules, acquisition or modification of equipment or devices . . . and other similar actions." 34 C.F.R. § 104.12(b). An accommodation is not reasonable, as explained by the Court in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987)--

if it either imposes "undue financial and administrative burdens" on a grantee, *Southeastern Community College v. Davis*, 442 U.S. at 412, or requires "a fundamental alteration in the nature of [the] program," *id.*, at 410.

The employer bears the burden of showing that reasonable accommodation cannot be afforded. *Prewitt v. United States Postal Serv.*, 662 F.2d 292 (5th Cir. 1981).

ED asserts that accommodations for Ms. Combs' physical impairment

were feasible. In its view, Ms. Combs could perform in her present position so long as she was permitted to continue to trade or exchange with her fellow developmental aides a lifting task or two for nonlifting tasks. [See footnote 5 5/](#) Alternatively, ED urges that she could be reassigned to another developmental aide position in a cottage in Unit 1 which it asserts had no impaired residents who required lifting. ED also maintains that any concern by Southwestern that such an accommodation would pose a safety or health risk must be specific, substantial, and not speculative.

Southwestern maintains that trading or exchanging duties among the developmental aides in residential living units 3E and 3F or any other unit in order to avoid lifting over 20 pounds is not an appropriate accommodation. In its view, this is tantamount to the elimination of an essential duty which is not considered an acceptable accommodation under *Gilbert v. Frank*, 949 F.2d

637, 642 (2d Cir. 1991), *Hall v. United States Postal Serv.*, 857 F.2d 1073 (6th Cir. 1988), and *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985).

In the tribunal's view, Ms. Combs can perform her prior position at Southwestern as a developmental aide in Units 3E and 3F due, in part, to the team approach employed by Southwestern to oversee and assist the residents. Under the team concept, developmental aides work as a two-person team within each residential living unit. Occasionally, for purposes of heavy lifting and resident intervention, developmental aides in Units 3E and 3F work as a four-person team.

The team concept permits the developmental aides to shift duties by agreement between or among themselves in many circumstances. Lifting for purposes of bathing, toileting, etc., was necessary only a few instances each day in Ms. Combs' unit. Due to her restriction, other developmental aides in Units 3E and 3F performed this duty. It was done with the approval of management and without any apparent problems. Similarly, on occasions when she did not participate directly in an intervention action, Ms. Combs was otherwise attending to the needs of other residents -- a matter which was appropriate and necessary during

this occurrence. [See footnote 6 6/](#) Thus, the team approach, adopted and used by Southwestern for years, permitted Ms. Combs to work successfully within the system and provided the residents with all of the appropriate and necessary services.

Gilbert and the other cases relied upon above by Southwestern for the proposition that an essential function may not be eliminated by virtue of an accommodation are distinguishable. The common thread in these cases is that the individual was solely responsible for performing each of the duties of his or her position and that the essential function in question constituted a significant aspect of the position. [See footnote 7 7/](#) In the instant case, the shifting of this lifting function to other developmental aides is an existing feature of the position and, therefore, unlike the typical employment context, this occurrence does not constitute an accommodation. Hence, Ms. Combs can perform her position without reasonable accommodation. [See footnote 8 8/](#)

Southwestern further maintains that Ms. Combs' lifting restriction poses a safety hazard to the residents as well as herself. Of primary concern, according to Southwestern, was Ms. Combs' inability to lift residents during an emergency situation such as a fire. Southwestern was also concerned that Ms. Combs may be unable to discern her weight limitation in lifting and, as

a result thereof, injure herself. In such a situation, the Commonwealth of Virginia could presumably bear all or a portion of the cost of any workman's compensation or an equivalent-type award.

Clearly, the safety of residents is a legitimate concern even though the likelihood of an emergency event such as a fire is remote. Southwestern's structures are only single level buildings and cottages which facilitate the speedy removal of residents, including those confined to wheelchairs, in the case of an emergency. Ms. Combs can perform essential tasks in an emergency situation despite her lifting limitation. She can lead residents, who walk, or push

wheelchair bound residents to safety while her fellow developmental aides attend to others who may require some lifting. Thus, the safety aspect is not a persuasive argument.[See footnote 9 9/](#)

Lastly, ED argues, in the alternative, that Southwestern could reasonably accommodate Ms. Combs by reassigning her to a cottage in Unit 1. This would, in effect, eliminate most of the lifting activities. The residents in Unit 1 are, in fact, the better functioning residents at Southwestern. There are approximately ten residents per cottage and two developmental aides are assigned to each cottage during the first and second shifts. In a fashion somewhat similar to the buildings, cottages are paired together and the aides in one cottage may be called upon, in limited circumstances, to provide assistance in another cottage. In general, however, each cottage functions on its own. While lifting in excess of 20 pounds in anticipated situations such as bathing is substantially reduced or eliminated due to the ambulatory and weight bearing capacity of the residents, Ms. Combs' impairment presents a different problem, particularly with respect to the intervention aspect of the position. Unlike Units 3E and 3F which had three aides and Ms. Combs to execute an intervention program, the cottages have only two aides to administer an intervention program of which one aide would be Ms. Combs. In this circumstance and given her lifting restriction, there is some doubt that the intervention programs which require substantial restraint of a resident would be employed properly and safely with respect to the residents and the aides. In addition, such a pairing raises a concern regarding the safety of

the residents in the event of an emergency such as a fire.[See footnote 10 10/](#) In view of these concerns, an assignment to a cottage on a regular basis would not constitute a reasonable accommodation.

In summary, the tribunal concludes that Ms. Combs was an otherwise qualified individual with handicaps. As such, she was improperly dismissed from her position.[See footnote 11 11/](#)

### III. ORDER

Based upon the foregoing findings of fact and conclusion of law, it is HEREBY ORDERED that Southwestern's continued eligibility, directly or indirectly, to receive or apply for Federal financial assistance administered by the United States Department of Education shall be terminated.

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Allan C. Lewis  
Chief Administrative Law Judge

Issued: June 30, 1995  
Washington, D.C.

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### Appendix -- Supplemental Findings of Fact

1. Southwestern receives or has applied for Federal financial assistance administered by the U.S. Department of Education, either directly from the U.S. Department of Education or indirectly

through the Commonwealth of Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services, the Commonwealth of Virginia Department of Education, or other state and local agencies. [See footnote 12 12/](#)

2. Southwestern received Federal financial assistance administered by the U.S. Department of Education, either directly from the U.S. Department of Education, or indirectly from the Commonwealth of Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services or the Commonwealth of Virginia Department of Education during the fiscal years ending September 30, 1889 through September 30, 1993.

3. The Department of Mental Health, Mental Retardation and Substance Abuse Services is responsible for the operation of the residential facilities for the developmentally disabled, including Southwestern.

4. Ms. Combs resides at Galax, Virginia which is approximately 10 miles from Southwestern. She was first employed at Southwestern in 1977 as a Food Service Aide A. Prior thereto, she worked as a sales clerk from 1974 to 1976 and as a waitress from 1952 to 1957 and has an eighth grade education. She was employed as a food service aide from May 16, 1977, through June 1983.

5. Ms. Combs was reemployed as a developmental aide on December 16, 1983. She received approximately 6 weeks of training before beginning work and received additional training through in- service courses every six months. Ms. Combs worked in Units 3E and 3F. She held this position until December 1989 when she was placed on non-work status. She was 61 years old at this time.

6. For the period from May 26, 1985, through Ms. Combs' surgery in July 1986, she was under a restriction not to lift more than 25 pounds which was imposed by her treating physician, Dr. Hart. In July 1986, Ms. Combs underwent a Marshall-Marchetti Cystourethropey and posterior repair for pelvic pressure. Approximately six weeks after the surgery, she returned to work. Southwestern was informed by Dr. Hart that Ms. Combs "should refrain from heavy lifting in the future [and] [s]he should limit her lifting to 15-20 pounds." This restriction remained unchanged throughout her employment at Southwestern and was reaffirmed each year. There is nothing in the reaffirmations which implies or suggests that her lifting restriction was a temporary limitation. This was made perfectly clear in June 1987 when her treating physician notified Southwestern that she should refrain from heavy lifting "forever" and, again, in May and December of 1989 when her treating physician reiterated that the 15-20 pound lifting restriction was permanent.

7. In January 1989, Dr. Hart reiterated to Southwestern Ms. Combs' past problems, surgical repairs, and limitations. In view of her three past repairs, subsequent prolapses, and a hysterectomy, Dr. Hart believed that, absent following his lifting restriction, Ms. Combs stood a significant chance of a repeat prolapse of the bladder with even less chance of repairing it a fourth time.



8. After notification of Ms. Combs' lifting restriction in late August 1986, Southwestern informed Ms. Combs in September 1986, that it could accommodate her lifting restriction for two months. This period was subsequently extended until May 1987. The record does not reveal what, if any, accommodations were instituted. There was not a marked difference in the frequency of lifting performed by Ms. Combs before her surgery in 1986 and after she returned from her surgery.

9. As an employee of Southwestern, Ms. Combs was subject to annual evaluations. The annual evaluations as of June 1984 through June 1989 reflect that Ms. Combs performed satisfactorily as a developmental aide. She was described as a hard worker who had a good knowledge of the programs, followed official procedures, practiced safety awareness, and was willing to perform any jobs requested by her superiors. After the imposition of her limitation on lifting, there was no indication that her productivity or the quality of work was deficient or affected by her limitation.

10. In 1989-90, Southwestern housed 223 residents of which 145 were diagnosed as profoundly mentally retarded and 62 were diagnosed as severely mentally retarded. Of the total residents, 81 needed assistance with walking on occasion and 48 used wheelchairs. Of the total residents, 153 were diagnosed as

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having some specific behavioral disorder which required an individualized behavioral program.

11. A mildly retarded person has an IQ between 50 and 70; a moderately retarded person has IQ between 35 and 50 and has the equivalent skills of a five year old; a severely retarded person has an IQ between 20 and 35 and is dependent upon other people for his or her care and, in some cases, can do some things by him or herself; and a profoundly retarded person has an IQ between zero and 20 and is dependent upon other people for his or her care.

12. Southwestern assigns a resident to one of three general units -- Unit 1, 2, or 3 -- according to his or her level of functioning. Within each unit, a resident is then assigned to a residential living unit based on age, sex, and level of adaptive behavior.

Some residential living units are located in one-story cottages, while other residential living units are situated in one-story buildings. Generally, each living unit consists of a kitchen, dining room, bath room, living room, and sleeping quarters and accommodates eight to ten residents.

The residents of Unit 1 are the better functioning residents in terms of mobility and care for themselves. They are able to feed themselves. Several of the residents are able to or are learning to ride bicycles. There are approximately 130 residents in this unit and they are housed in 14 cottages. Some of the residents have behavior problems and, therefore, have specific behavioral programs.

Unit 3 consists of Building 3 which houses 54 residents and 4 cottages which house 22 residents. This unit contains the residents who are the most dependent individuals. Most of the residents are in the lower range of profound retardation. Some residents require wheelchairs for mobility, over half cannot feed themselves, many cannot toilet themselves, and others require diapers.

Building 3 is "T" shaped and has three wings. Each wing comprises two residential living units, one on each side of the corridor. Thus, there are 6 residential living units in the building and each unit accommodates 9 residents. Each residential living unit has a common living room, bedrooms, and bath facilities. Each residential living unit shares a dining room with its adjacent unit. Communication with the adjacent residential living unit is easily done without raising one's voice; however, communication between wings requires one to raise his or her voice.

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Of the 54 residents in Building 3, approximately 20 may exhibit aggression toward others and 10 possess self-injurious behavior such as hitting themselves or a wall or biting themselves. Each resident with a problem behavior has a behavioral program.

The residents of Unit 2 have a slightly higher skill level than the residents of Unit 3. They are all ambulatory; however, some residents may need occasional assistance in walking as they are prone to trip. As a group, these residents have less overwhelming medical problems than the residents of Unit 3. There are, however, more residents with behavior problems assigned to this group than Units 1 and 3. Unit 2's residents are housed in one large building and several cottages.

13. Some of the residents in all the Units have poor ambulation skills or unusual gait problems. As a result, they have a tendency to trip on occasion and may need assistance from a developmental aide in walking to and from the daily education classes located in another building. The assistance may include escorting by the arm, following close-by, or holding the gait-belt of a resident. It is Southwestern's policy not to place an individual who can walk in a wheelchair.

14. At the time of Ms. Combs' dismissal, Units 3E and 3F had six or seven residents who presented behavior intervention problems on a somewhat regular basis. Within these units, there were three or four residents who required the use of a wheelchair of which only one resident needed substantial assistance in getting into or out of a wheelchair. This lifting duty was performed by three or four individuals. Ms. Combs assisted in performing the lifting on occasion.

15. During 1989 and 1990, Southwestern employed approximately 140 full-time and between 11 and 30 temporary developmental aides.

16. Developmental aides and technicians are responsible for the daily on-site care and instruction of the residents of the facility which emphasizes developing and maintaining the personal dignity, self-esteem, and self-reliance of the residents and creating a normal living environment. A developmental technician performs essentially the same work as a developmental aide; however, this individual also functions as the leader of a group of developmental aides.

For each resident, the care and instruction is substantial and its nature will vary depending upon the extent of an individual's developmental level, social maturity, and physical handicap or handicaps. Instruction is formal as well as informal. Informal instruction may include, for example, teaching an individual to scoop with a spoon during a meal.

The developmental aides and technicians are responsible for an resident's compliance with his or her program plan and living unit's schedule. This includes insuring that residents are awakened or taken to bed, and that they are dressed, toiletted, washed, and fed. It also includes supervising recreation and learning and social activities. Aides are charged with protecting and subduing residents who lose control of themselves. Aides are similarly responsible for care of the mobility-impaired residents, including bathing and evacuating them in emergencies.

17. There have been several small fires at Southwestern, including one in Building 3. The relative frequency, magnitude, and extent of damage by the fires are not part of the record.

18. Prior to December 16, 1989, the position description of a developmental aide described the duties of a developmental aide as--

[p]rovides direct training, observation, and supervision and assistance to residents of the Center. Ensures compliance with resident's Individual Program Plans, individual and living unit schedules, and documentation requirements. Depending on the developmental levels and social maturity of particular residents, program and schedule compliance may require physical assistance, manual or verbal guidance, modeling, instruction or monitoring of behavior in the domains of personal hygiene and care, domestic competency, socialization and academic prevocational skills. Emphasis is placed on developing and maintaining personal dignity, self-respect, and self reliance of the residents and creating a normal environment. Escorts ambulatory residents and transports those confined to wheelchairs to and from on and off campus activities and appointments.

The position description estimates that 40% of total working time is spent conducting habilitation and care training and activities on the living unit; 15% on paper work; 10% on safe and orderly use of living unit supplies and equipment, resident clothing, and personal possessions; 10% on implementation of academic, prevocational or therapeutic programs conducted by professional staff; and the remainder on miscellaneous duties.

19. As of December 17, 1989, the position description was modified to add "lifting" as one of actions which may be necessary to achieve program and schedule compliance with respect to the residents. Further, "lifting as needed" was added to the category for the safe and orderly use of supplies; the program section was modified to add "[i]mplements programs involving the physical and mechanical restraint of residents;" and the transportation provision was modified to add "[p]ushes residents dependent on wheelchairs for mobility; assists with transfers to and from wheelchairs."

20. Southwestern utilized three shifts of developmental aides and technicians in its daily program. The first shift begins at 6:45 A.M. and concludes at 3:15 P.M. The second shift begins at 2:45 P.M. and concludes at 11:15 P.M. The third shift begins at 11:00 P.M. and concludes at 7:00 A.M. The residents are in bed by 9:30 P.M. and are awakened at approximately 6:45 A.M.

During the first and second shift, it was Southwestern's policy to have two employees working in each residential living unit. This may consist of a developmental technician and a developmental aide or two developmental aides. Southwestern occasionally lowered the coverage on some

residential living units to one developmental aide after the residents were put to bed in the second shift.

During the third shift, Southwestern's policy was to have one developmental aide per each residential living unit in a cottage. In Building 3, one aide was assigned to each of the three wings and two aides were assigned to rove among the residential living units to assist with any problems.

21. There was generally one developmental technician assigned to either Unit 3E or 3F during the first and second shift.

22. Occasionally during the day, such as meal breaks for employees, there was only one developmental aide on duty in each residential living unit.

23. The management of Southwestern was primarily concerned with the well-being of its residents. In this regard, the two developmental aides assigned to each residential living unit functioned as a team. As a team, it was common for tasks to be performed unequally by the aides. In some instances, a resident preferred or worked better with one aide than the other aide assigned to the unit. In other circumstances, developmental aides preferred some tasks over others and, therefore, traded tasks. The management of Southwest condoned such trading and sharing of the various tasks by the developmental aides so long as the needs of the residents were met.

24. It was appropriate and normal for aides to call for assistance for lifting, behavioral intervention, or other necessity. In addition, security personnel were also available in emergencies and for other situations which the aides could not handle.

25. The developmental aides and developmental technician assigned to corridors 3E and 3F in Building 3 worked also as a group in some circumstances, including behavioral intervention situations and lifting tasks in the residential living unit

areas. In this regard, they functioned, essentially, as a team. Ms. Combs participated to a limited degree in the behavioral intervention aspect of the job position. Generally, one or more of the other three developmental aides handled the direct physical aspect of the intervention program while she, simultaneously, ensured that the other residents were not involved in the situation and attended to their needs. Thus, Ms. Combs performed one of the duties required of the team in this circumstance. There is no evidence that the allocation of duties in this circumstance was not agreed upon by the developmental aides or that it was disapproved by management.

There was one resident in particular in Unit 3E or 3F who possessed enormous strength. During his episodes of misbehavior, two to three men were required to wrestle him to the floor in order to bring him under control. In some instances, Ms. Combs participated in the intervention process and was responsible for grabbing his legs which caused this resident to then fall to the floor.

26. Like other developmental aides, Ms. Combs was asked on occasion to work in other residential living units located in one of the buildings or cottages. There is no evidence that her work in these other residential living units was not satisfactory.

27. Ms. Combs used her best judgment in determining whether to lift various objects. She did not have any pain or other bodily manifestation which would warn her that she was lifting in excess of 20 pounds.

28. On June 6, 1989, Southwestern, due to the lifting restriction placed upon Ms. Combs, issued guidelines governing the performance of her duties as follows:

Due to your work restriction of not lifting more than 20 pounds, it is required of you to take the following precautions while working on your assigned R[esidential] L[iving] U[nit].

If a situation arises in which you need to lift something that is heavier than your limit mentioned above, (non- ambulatory resident needing on or off the toilet, etc.) you should first of all, see if someone else is available to do this (two or more people to do a two-person transfer). If two staff are not available, you should either let the resident wait until help is available, (if possible) or, use the Hoyer Hydraulic Lift. You should not assist during a two-person transfer if your share of the resident's weight will be greater than the limit mentioned above. Preferably, any lifting done by you will be done by using the lift.

29. The lifting restriction memorandum was an attempt to clarify

what her responsibilities were when she needed to lift beyond the limitation imposed by her doctor.

30. The June 1989 lifting restriction memorandum concerning Ms. Combs was one of several memoranda created shortly after the employment of Dr. Woods as the Assistant Program Director. Dr. Woods was concerned with the potential liability of Southwestern due to the employment of individuals with physical restrictions or impairments and, therefore, ordered the preparation of memorandum outlining the employee's restrictions and his or her limitations on pertinent duties.

31. In 1989, Southwestern had at least one Hoyer lift. A Hoyer lift is a movable crane-like device used to lift immobile residents. It was cumbersome to use. Among other things, it required the operator to lift substantial weight, i.e. in excess of 20 pounds, if the resident was not capable of lifting and moving herself or himself onto the sling which was attached to the device. The record does not disclose the number of lifts owned by Southwestern or the specific residential living units in which the lifts were located other than Units 3E and 3F did not have a Hoyer lift. As of 1989, training for new developmental aides included the use of the Hoyer lift.

32. On or about November 14, 1989, Southwestern issued a memorandum announcing its policy pertaining to employee injury, which provided in part that--

[e]mployees who have been absent from work because of a work-related injury may not return to work without a written statement from the attending physician that the employee is physically capable of performing all duties of his/her position. . . . Statements from physicians returning an employee to limited or restricted duty will be reviewed by the Supervisor and the Human Resource Manager. If the restrictions are temporary in nature and will not have adverse effect on other staff or residents, the employee may return to work, submitting another statement when the physician removes the restrictions. However, light duty cannot exceed 90 consecutive calendar days.

For personal illness or injury, no limited duty or consideration will be made unless the employee can perform all duties listed in his/her job description.

33. Southwestern had established procedures for dealing with uncontrolled behavior of residents. The nature of a resident's behavioral program varied. It could include actions such as timeouts, graduated guidance, enforced relaxation, counseling,

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off-campus restrictions, minimal force, wrap restraint, money management, or response cost.

One aspect of Southwestern's policy was that an aide shall obtain assistance, if needed, as soon as practicable when a resident exhibits uncontrolled behavior. The aide was not to endanger himself or herself. There was a designated person or group of individuals whom the particular aide was expected to call upon to obtain the assistance.

34. It was the policy of Southwestern that developmental aides should holler for assistance when they needed it, if this was appropriate, or to use the telephone to obtain assistance. Similarly, it was the policy of Southwestern that developmental aides and others such as security personnel were expected to respond to requests for assistance if it was possible.

35. The most common injury suffered by developmental aides was an injury caused by biting, striking, or similar inappropriate behavior by a resident. The second most common injury affected the back or upper body and was caused by attempting to break the fall of a resident with ambulation problems. There is no evidence in the record reflecting the frequency of injury among the staff or the relative degree of the injuries sustained.

36. The resident population changed in Unit 3 between 1986 and 1989. In 1986, some residents in Unit 3 had a few physical handicaps and all the residents could bear their own weight. Over the next 3 years, the residents with good physical skills were transferred to another facility or to a different unit within Southwestern and were replaced with new residents who required more physical care due to greater physical limitations. In addition, the remaining residents were aging and suffering from deteriorating physical conditions which required more physical assistance.

37. Southwestern did not have a policy which established a minimum lifting capacity required of a developmental aide. Southwestern hired individuals as developmental aides without regard to any inherent factor which may bear upon an individual's capacity to lift such as height, build, age, or weight. This included one woman who was in her 70's and was used as a developmental

aide on a temporary basis during the third shift. As such, the lifting strength of the developmental aides varied substantially. Southwestern did encourage, however, the use of 2- and 3-person teams in lifting residents.

Management did not remove a sign located in the office for Units 3A and 3B in Building 3 which forbade lifting in excess of 25 pounds. According to the testimony of one developmental technician, management orally discouraged lifting in excess of 25 pounds.

38. In the fall of 1989, Ms. Combs was informed that she would lose her position by the end of the year if her doctor did not remove her lifting restriction.

39. Ms. Combs refused to be examined by a physician selected by Southwestern; however, there is no evidence that Southwestern had a right to make such a demand upon Ms. Combs.

40. On December 2, 1989, Southwestern advised Ms. Combs that it could no longer accommodate her lifting restriction.

41. In Ms. Combs' view, there was no difference in the amount of assistance she received from her fellow employees regarding the lifting duties whether it was before her illness in 1986, after she returned from her illness, or after she received the guidelines governing her work restriction in June 1989.

42. Mr. Griffith is the Assistant Program Manager and has served as the Program Coordinator for Unit 3 since April 1985.

He supervised Ms. Combs' immediate supervisor. He has prior experience as developmental aide and technician and then as a team leader which supervises developmental aides and technicians. In 1989, Mr. Griffith had occasion to discuss Ms. Combs' work performance with her immediate supervisor and personally observed Ms. Combs' work once or twice. In his view, she was competent and a good worker but allowed other people to handle, on occasion, the more physical, hands-on type activity. In his view, Ms. Combs could no longer perform those aspects of the developmental aid position which required lifting more than 15-20 pounds. She was reluctant to participate in the behavioral interventions concerning several residents. In addition, he was of the view that bathing residents and escorting residents with walking problems presented problems.

43. Dr. Woods is the Assistant Director for Programs and had general responsibility for the residential and professional services. In his view, Ms. Combs' lifting restriction precluded her from performing all the essential elements of her position. This conclusion was not based upon his personal observation of Ms. Combs' performance of her duties; rather, it was based upon his understanding of duties required of a developmental aide. In his view, "I don't see how a person, given the nature of the work that they do, I don't see how a person could possibly do the job and protect the residents and carry out active treatment with such a restriction." It appears that his concern regarding the 20 pound lifting restriction was related to the intervention in behavioral disorders required by a developmental aide, the assistance provided by a developmental aide when a resident tripped and fell or was in the process of falling, and the general lifting required of some residents who could not support their own weight.

44. In November or December, 1989, the Executive Team reviewed, as it did every week, the various physical restrictions of its employees. In addressing Ms. Combs' situation, the Executive Team decided that Ms. Combs could not perform the essential functions of her job as a developmental aide. This decision was based upon its opinion as to whether an individual with a 15-20 pound lifting restriction could perform the duties of a developmental aide and the opinions of the management of Unit 3 that Ms. Combs could not perform the essential functions of the job.

45. On December 29, 1989, Unit 3 Manager Jerry Feets wrote a memo to Ms. Combs which informed her that she was being placed on non-work status due to the continuation of medical restrictions as of January 1, 1990--

[t]hese restrictions do not allow you to perform all the job duties described in the current job description for all 2nd shift developmental aides. You will continue in a non-work status until such time that you are able to perform all tasks of your current job description.

46. In the judgement of Dr. Woods, Ms. Combs could not work in the infirmary because it housed acutely ill residents with a wide range of behavioral problems, including severe behavioral disorders, and those individuals might have to be lifted or carried as needed.

47. After an employee is declared disabled by Southwestern, the Commonwealth's policy requires that reasonable accommodation must be examined. This includes the possibility of restructuring work or transferring or demoting employees into positions which they can perform. If no reasonable accommodation can be made, Rule 11.8 states that management can require employees to apply for disability or early retirement, even though they have sick leave balances or workers' compensation leave available.

48. On December 2, 1992, Southwestern offered Ms. Combs a position in the food service department at the same pay she was currently receiving as a developmental aide. The food service position required three eleven hour shifts and one seven hour shift, Sunday to Wednesday or Wednesday through Saturday. The position was located in one of the dining rooms and required Ms. Combs to set the tables, serve the meals, and clean up thereafter. She refused this offer of employment. In her opinion, the food service position was more physically demanding, had substantially less desirable hours, and did not allow any interaction with other members of the staff or the residents.

49. On December 29, 1989, Southwestern sent a copy of the food service position description to Ms. Combs' treating physician. In his view, Ms. Combs was physically capable of performing the

food service position so long as it did not require lifting in excess of 15-20 pounds. Her treating physician made no judgment regarding the lifting requirements of this position.

50. On December 29, 1989, February 2, 1990, and March 21, 1990, Southwestern offered Ms. Combs the food service position. She refused the position each time.



51. On March 21, 1990, Southwestern placed Ms. Combs on leave without pay effective March 11, 1990 and continuing through April 10, 1990. The basis for this action was described as "[y]ou have provided physician's documentation that you are unable to work without several restrictions which limit you being able to fully perform the job [as a developmental aide]." In the event Ms. Combs was not released by her physician to return to her regular job without restrictions, she was informed that she would be placed on conditional leave without pay beginning April 11, 1990 through July 11, 1990.

52. On April 10, 1990, Southwestern placed Ms. Combs on conditional leave without pay effective April 11, 1990 and continuing through July 11, 1990. The basis for this action was described as "[y]ou have provided physician's documentation that you are unable to work without several restrictions which limit you being able to fully perform the job [as a developmental aide]."

53. In the view of management of Southwestern, Ms. Combs' lifting restriction would preclude her from employment in any similar, large intermediate care state facility.

54. In 1990 or 1991, Southwestern began acquiring ARJO lifts for use in lifting residents. This lift was more user friendly than the Hoyer lift. Among its advantages, it had a better sling arrangement and, therefore, required substantially less physical effort on the part of the operator than the Hoyer lift. [See footnote 13 13/](#)

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## SERVICE

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On August 31, 1995, a copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

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*[Footnote: 1](#) 1/ Southwestern is an agency of the Department of Mental Health, Mental Retardation and Substance Abuse Services of the Commonwealth of Virginia.*

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*[Footnote: 2](#) 2/ The initial decision includes findings of fact relevant to the disposition of this matter. There are supplemental findings of fact in the Appendix, *infra*.*

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*[Footnote: 3](#) 3/ There is no dispute between the parties that Southwestern operated a program or activity which received Federal financial assistance. Similarly, there is no dispute between the parties that Ms. Combs was terminated from her position as a developmental aide by Southwestern due to the 15-20 pound lifting limitation imposed by her treating physician.*

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*[Footnote: 4](#) 4/ The phrase "is regarded as having such an impairment" refers to an individual who "has a physical . . . impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation." 34 C.F.R. § 104.3(j)(2)(iv).*

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*[Footnote: 5](#) 5/ ED also urges that the normal, regular lifting function pertaining to bathing, toileting, etc., in the residential living unit could be accommodated by the addition of an ARJO lift device. This device was first employed by Southwestern in its facility some two years after Ms. Combs was dismissed and approximately the time that the complaint herein was lodged. There is no evidence that this device was available at the time of Ms. Combs' dismissal. Thus, the tribunal finds that it is inappropriate to consider this device as a source of a potential accommodation for Ms. Combs.*

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*[Footnote: 6](#) 6/ There is some doubt whether the inability to lift over 20 pounds affects one's ability to participate in an intervention action. Many intervention actions did not require any physical force. In other actions, the upset resident was wrestled as gently as possible to the floor by the developmental aides and then held in place until he or she quieted down. This technique requires grasping, pulling, pushing, and very little, if any, lifting.*

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*[Footnote: 7](#) 7/ For example, in Gilbert, the individual had a lifting capacity of 25 pounds and applied for a manual mail distribution clerk position which required frequent lifting, carrying, and handling of mail sacks and parcels weighing up to 70 pounds. Gilbert at 642-44.*

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*[Footnote: 8](#) 8/ In the alternative, if the shifting of the lifting function to another developmental aide was considered an accommodation, the tribunal finds that it is a legally permissible type of accommodation. The lifting function arises very infrequently during the day and the shifting of*

*this function within Ms. Combs' team has worked successfully for three years without any problems and without any decrease in the nature of the services provided by Southwestern. Such a conclusion is fully consistent with an objective of the Rehabilitation Act -- to promote and retain employment of individuals with handicaps who can perform adequately.*

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*[Footnote: 9](#) 9/ Similarly, the potential for personal injury due to her limitation is not an overriding factor. Lifting over 20 pounds is necessary very infrequently and occurs in situations where Ms. Combs may apprise the situation and determine whether to lift. Thus, Southwestern's argument regarding potential injury to Ms. Combs as a justification for her dismissal is not particularly convincing.*

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*[Footnote: 10](#) 10/ At the conclusion of ED's case, Southwestern moved to dismiss the matter based upon a failure of its evidence to establish a prima facie case. This motion was taken under advisement. Upon review of ED's evidence, there is sufficient evidence to establish a prima facie case and, accordingly, Southwestern's motion is denied.*

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*[Footnote: 11](#) 11/ Under 34 C.F.R. § 100.8(c), "[n]o order . . . terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means . . . ." In the instant case, the Assistant Secretary of Education for Civil Rights determined and notified Southwestern by letter of October 4, 1993, of her determination that compliance by Southwestern in this matter cannot be secured by voluntary means. This letter was received by Southwestern on October 13, 1993.*

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*[Footnote: 12](#) 12/ ED objected to Southwestern's proposed exhibits R-12, R- 20, and R-25 on the ground of relevancy. R-20 and R-12 are letters by ED and Southwestern to the other party, respectively, which address concerns regarding purported misconduct by an ED employee during the investigative stage of the process. R-25 is ED's OCR Complaint Resolution Manual which outlines the administrative process. The documents are admitted into evidence as they relate to the administrative process and provide background.*

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*[Footnote: 13](#) 13/ Southwestern and ED filed posthearing proposed findings of fact and briefs with conclusions of law. These matters have been considered fully. Except to the extent that such findings and conclusions have been expressly or impliedly affirmed in the supplemental findings of fact or the decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.*