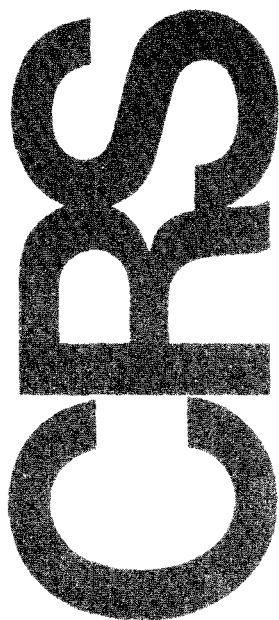


PROHIBITING DISCRIMINATION AGAINST HANDICAPPED INDIVIDUALS IN FEDERALLY
AIDED PROGRAMS: SECTION 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED

by
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ABSTRACT

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against handicapped individuals by recipients of Federal financial assistance. The first regulation implementing section 504 was promulgated by the former Department of Health, Education, and Welfare and serves as the model for other agencies. The 1978 amendments extended section 504 provisions to the executive agencies and the United States Postal Service.

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INTRODUCTION

Section 504 of the Rehabilitation Act of 1973, as amended, provides a broad congressional mandate prohibiting discrimination against handicapped individuals by recipients of Federal financial assistance and by executive agencies. It is the first major Federal law specifically protecting the civil rights of handicapped individuals. The Rehabilitation Act of 1973 prohibited discrimination by recipients of Federal financial assistance, and the 1978 amendments extend this prohibition against discrimination on the basis of handicap to agencies of the executive branch of Government and to the United States Postal Service. Section 504 provides that "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to, discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any executive agency or by the United States Postal Service . . ." Implicit in this statutory language is the right of a handicapped individual not to be discriminated against solely by reason of his handicap. Section 504 is patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964 (related to race, color, or national origin) and section 901 of the Education Amendments of 1972 (relating to sex).

I. STATUS OF SECTION 504 REGULATION DEVELOPMENT

The first regulation implementing section 504 was promulgated by the Department of Health, Education, and Welfare 1/ and serves as a model for other agencies. Thirty-seven Federal agencies are required to promulgate a section 504 regulation.

The following agencies have published their final rule affecting recipients of Federal financial assistance:

Department of Education
Department of Health and Human Services
Small Business Administration
Department of Transportation 2/
ACTION
National Endowment for the Arts
National Aeronautics and Space Administration
Nuclear Regulatory Commission
Tennessee Valley Authority
Department of Justice
Department of Energy
Veterans Administration
Department of Labor
Legal Services Corporation 3/
Agency for International Development
Community Services Administration 4/

1/ The Department of Health, Education, and Welfare has been replaced by the Department of Education and the Department of Health and Human Services.

2/ The Department of Transportation (DOT) has sent a proposed revised interim final rule to the Department of Justice for review. This proposed rule would amend the existing final rule. The proposed revision is in response to a Court of Appeals finding that the DOT interpretation of section 504 was inconsistent with the Supreme Court decision that section 504 did not mandate affirmative action to accommodate the handicapped. For further discussion of this issue see U.S. Law Week, June 2, 1981, page 2756. See also CRS white paper, Mass Transportation and the Handicapped: Recent Developments, by John Fischer, Economics Division, July 1981.

3/ Although not required to do so, Legal Services Corporation has published a section 504 regulation.

4/ Community Services Administration (CSA) has also proposed a subpart regarding facilities accessibility to be incorporated in the final CSA 504 rule.

Office of Personnel Management
Department of State
Office of Revenue Sharing (effective date has been postponed indefinitely)

The following agencies' final rules for recipients of Federal financial assistance are being reviewed by the Department of Justice:

National Endowment for the Humanities
National Science Foundation
Department of Agriculture
General Services Administration
Department of Interior
Equal Employment Opportunity Commission

The following agencies have published a proposed rule for recipients of Federal financial assistance:

Civil Aeronautics Board
Department of Commerce
Department of Defense
Federal Home Loan Bank Board
Department of Housing and Urban Development

The following agencies, which are required to publish a regulation implementing section 504 for recipients of Federal financial assistance, have not yet published a proposed rule:

Corporation for Public Broadcasting
Pennsylvania Avenue Development Corporation
Consumer Products Safety Commission
Smithsonian Institute
Federal Elections Commission
Federal Emergency Management Agency
International Communication Agency
International Development Corporation 5/

Although the 1978 amendments to the Rehabilitation Act of 1973 extended the prohibition against discrimination on the basis of handicap to any program or activity conducted by an executive agency or by the United States Postal Service,

5/ Four agencies are considering issuing a single section 504 regulation: Agency for International Development, Department of State, International Communication Agency, and the International Development Corporation Agency.

neither the United States Postal Service nor any of the executive agencies have published a proposed rule for implementation of section 504 within the executive agency.

Executive Order 12250 published on November 4, 1980, places responsibility for review and approval of section 504 regulations with the Department of Justice. This responsibility was formerly with the Department of Health and Human Services. The Department of Justice is currently developing a plan to implement the executive order. The implementation plan will establish procedures for the review of the published and the proposed regulations and will determine the guidelines for the development of regulations for the executive agencies and the United States Postal Service. It is anticipated that the regulation originally promulgated by the former Department of Health, Education, and Welfare and used as the model regulation since 1977 will continue to be used as such by the Department of Justice.

Further information regarding the status of section 504 regulations can be obtained from:

Mr. John Wodatch
Deputy Chief
Coordination and Review Section
Civil Rights Division
Department of Justice
(202) 724-5710

By court order, all departments and agencies that have not published section 504 regulations were required to publish in the Federal Register by July 9, 1981, a notice to all recipients of Federal funds that they are obligated and bound by the requirements of section 504 and that regulations will be published in an expeditious fashion.

Due to Administration concern regarding the potential costs of implementing section 504 regulations, the Office of Management and Budget will undertake a major review of all section 504 regulations.

II. LEGISLATIVE HISTORY

Section 504 was enacted as part of the Rehabilitation Act of 1973. The 1973 legislation defined a handicapped person solely with relationship to employability. The definition was geared toward the vocational rehabilitation objectives of the Act. In the 1974 amendments to the Rehabilitation Act (P.L. 93-516), the definition of handicap was revised for purposes of section 504 and the other provisions of titles IV and V of the Act. The definition of handicap was amended to make it clear that section 504 was intended to forbid discrimination against all handicapped individuals regardless of their need for or ability to benefit from vocational rehabilitation services.

There is very little legislative history surrounding the enactment of section 504. The legislative hearings and the scant floor debate provide no specific guidance related to implementing the statutory language.

The conference report accompanying the 1974 amendments to the Rehabilitation Act (Senate Report No. 93-1270) did establish the broad parameters of the nondiscrimination provision. The report states:

Section 504 was enacted to prevent discrimination against all handicapped individuals regardless of their need for or ability to benefit from vocational rehabilitation services, in relation to Federal assistance in employment, education, health services, or any other federally aided programs. Examples of handicapped individuals who may suffer discrimination in the receipt of federally assisted services but who may have been unintentionally excluded from the protection of section 504 by the references to enhanced employability in section 7(b) are as follows: physically or mentally handicapped children who may be denied admission to federally supported school systems on the basis of their handicap, handicapped persons who may be denied admission to federally assisted nursing homes on the basis of their handicap; those persons whose handicap is so severe that employment is not feasible but who may be denied the benefits of a wide range of Federal

programs; and those persons whose vocational rehabilitation is complete but who may nevertheless be discriminated against in certain federally assisted activities.

The 1974 conference report also explains the nature of discrimination against the handicapped in terms of the definition adopted. The report states:

The amended definition eliminates any reference to employment and takes cognizance of the fact that handicapped persons are discriminated against in a number of ways. First, they are discriminated against when they are, in fact, handicapped (this is similar to discrimination because of race and sex). Second, they are discriminated against because they are classified or labeled, correctly or incorrectly, as handicapped (this has no direct parallel in either race or sex discrimination, although racial and ethnic factors may contribute to misclassification as mentally retarded). Third, they are discriminated against if they are regarded as handicapped regardless of whether they are, in fact, handicapped (this has a parallel in race discrimination where a person is regarded as being of a minority group even though, in fact, he or she is not).

The conference report accompanying the 1978 amendments to the Rehabilitation Act (House Report No. 95-1780) states that section 504 is to be expanded to apply to any program or activity conducted by any executive agency or by the United States Postal Service. The head of each such agency is to promulgate regulations to carry out this amendment. Although no deadline is provided for completion of regulations, the report does state that copies of the proposed regulations are to be submitted to the appropriate authorizing committees of the Congress and are to take effect no earlier than the thirtieth day after such submission.

III. THE MODEL REGULATION

The first regulation implementing section 504 for recipients of Federal financial assistance was signed on May 4, 1977 (Federal Register, vol. 42, no. 86) and became effective on June 3, 1977. This regulation serves as the model for other agencies. The regulation applies only to programs and activities under the jurisdiction of the former Department of Health, Education, and Welfare. The original 504 regulation governs the activities of all programs receiving Federal financial assistance from the Department of Education and the Department of Health and Human Services. Schools, colleges, and universities, hospitals and other health facilities, and social services agencies, are the major institutions affected by the regulation. The regulation prohibits almost all forms of discrimination against all qualified handicapped individuals with any type of physical or mental impairment including drug addiction and alcoholism.

The 1978 amendments to the Rehabilitation Act state that for purposes of employment, the provisions of section 504 are not extended to any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents the person from performing the duties of the job in question or whose employment would constitute a threat to the property or safety of others because of current alcohol or drug use.

A. Significant Provisions and Requirements of the Model Regulation

The following are highlights of some of the more significant provisions and requirements of the model section 504 regulation. Regulations promulgated by other agencies are based on the scope and the definitions set forth in the model regulation.

1. Definitions

a. Handicapped person. The regulation follows the definition under section 7(7) of the Rehabilitation Act and defines "handicapped person" as any person who (a) has a physical or mental impairment which substantially limits one or more major life activities (defined as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working); (b) has a record of such an impairment; or (c) is regarded as having such an impairment. The breadth of this definition originally created some difficulty in determining who should be covered by the nondiscrimination requirements. At issue was whether the definition should include drug addicts and alcoholics. The regulation includes addicts and alcoholics based in part on the fact that medical and legal opinion define addiction as mental illness. The definition of handicapped person is limited to only physical and mental handicaps. Environmental, cultural and economic disadvantages, age, as well as criminal offender status, are not covered by the definition.

The 1978 amendments to the Rehabilitation Act revised the term "handicapped individual." Under the revised definition, for purposes of sections 503 6/ and 504 of the Act as such sections relate to employment, the term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents him from performing the duties of the job in question. It also excludes individuals whose employment, by reason of current alcohol or drug abuse, would constitute a threat to the property or the safety of others.

b. Qualified handicapped person. To receive protection from discrimination based on handicap, the person must not only be handicapped as defined under

^{6/} Section 503 requires Federal contractors to take affirmative action regarding employment of handicapped individuals.

the Act and regulation but also must be qualified or eligible for the particular program in spite of the disabling handicap. The regulation defines this differently with respect to employment, education, and other services. The regulation defines "qualified handicapped person" as follows:

- With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;
- With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (1) of any age during which nonhandicapped persons are provided such services, (2) of any age during which it is mandatory under State law to provide such services to handicapped persons, or (3) to whom a State is required to provide a free appropriate public education under section 612 of the Education for All Handicapped Children Act of 1975;
- With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity; and
- With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

c. Recipient. The regulation applies to any recipient receiving Federal financial assistance. "Recipient" is defined as follows:

. . . any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

The major recipients of Federal financial assistance from the Departments of Education and Health and Human Services are schools and universities, hospitals and medical service organizations, and State and local social service and income maintenance agencies. Medicaid providers including private physicians are included as recipients.

d. Federal financial assistance. The regulation defines "Federal financial assistance" as follows:

"Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guarantee), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

- Funds
- Services of Federal personnel, or
- Real and personal property or any interest in or use of such property, including:

Transfers or leases of such property for less than fair market value or for reduced consideration; and

Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

Procurement contracts are specifically excluded. However, they are covered under section 503 of the Rehabilitation Act of 1973, requiring affirmative action in the employment of handicapped individuals by employers receiving funds under contracts with the Federal Government.

2. Discriminatory Practices Prohibited

a. Generally. The regulation specifies the broad areas of discriminatory practices and actions which are prohibited under section 504 of the Act. The following summary describes the major provisions.

Under the regulation recipients may not on the basis of handicap:

- Deny qualified handicapped persons opportunities which are afforded others.
- Aid or perpetuate discrimination by providing assistance to agencies, organizations or persons which discriminate on the basis of handicap.
- Provide qualified handicapped persons benefits or services which are not as effective as those provided to others.
- Otherwise limit qualified handicapped individuals in the employment of any right, privilege, advantage or opportunity enjoyed by others.

- Provide different or separate aid, benefits, or services to handicapped persons unless such action is necessary to provide them with services which are as effective as those provided to others. Aids, benefits, or services to be equally effective are not required to produce the identical result or level of achievement for handicapped and nonhandicapped, but they must afford handicapped persons equal opportunity to obtain the same result or to reach the same level of achievement, taking into account the nature of a particular person's handicap.
- Discriminate in the determination of the types of aid, benefits, or services to be provided or in the determination of the site or location of facilities.

3. Specific Requirements

- All new facilities must be constructed with barrier-free designing so as to make them accessible to and usable by handicapped individuals.
- Programs or activities in existing facilities must be made accessible to the handicapped. If no other alternatives such as reassignment of classes will achieve program accessibility, structural changes in the facilities must be made. No exceptions to the program accessibility requirement are permitted.
- Employers may not refuse to hire handicapped persons solely by reason of their handicap if: (1) reasonable accommodations can be made by them to an individual's handicap, and (2) the handicap does not impair the ability of the applicant or employer to do the specific job.
- Employers may not require pre-employment physical examinations and may not make a pre-employment inquiry about whether a person is handicapped, or the nature or severity of a handicap. Employers may however, make a pre-employment inquiry into an applicant's ability to perform job-related functions.
- Every handicapped child will be entitled to free public education appropriate to his or her individual needs, regardless of the nature or the severity of the handicap. In those unusual cases where placement in a special residential setting is necessary, public authorities will be financially responsible for tuition, and room and board.
- Handicapped children must not be segregated in the public schools, but must be educated with the nonhandicapped in regular classrooms to the maximum extent possible.
- Educational institutions are required, each school year, to identify and locate unserved handicapped children.

- Colleges and universities must make reasonable modifications in academic requirements, where necessary, to ensure full educational opportunity for handicapped students.
- Educational institutions and other social service programs must provide auxiliary aids, such as readers in school libraries or interpreters for the deaf, to ensure full participation of handicapped persons.

IV. OTHER TITLE V PROVISIONS RELATED TO SECTION 504

The 1978 amendments to the Rehabilitation Act added several sections to title V which have the potential of strengthening and providing funding for implementation of section 504:

- Persons who feel their rights have been violated by an agency required to comply with section 504 have available to them the rights and procedures of title VI of the Civil Rights Act of 1964. The provision is made under section 505(a)(2).
- Persons who obtain a favorable judgment in a court proceeding related to a violation of title V of the Rehabilitation Act are allowed an attorney's fees as part of the costs of litigation. This is provided for under section 505(b).
- Technical assistance for the removal of architectural, transportation, or communication barriers may be provided to persons operating rehabilitation facilities. Such technical assistance may also be provided to public or nonprofit agencies, institutions, or organizations with the concurrence of the Architectural and Transportation Barriers Compliance Board (ATBCB). Section 506(1) makes this provision.
- Financial assistance may be provided to public or nonprofit entities for the purpose of removing architectural, transportation, and communication barriers if a study demonstrating the need for such assistance has been submitted to the ATBCB and if such financial assistance has the concurrence of the ATBCB and the President. Section 506(3) makes this provision.
- Section 507 establishes an Interagency Coordinating Council to oversee and coordinate the activities of the Federal Government related to implementation and enforcement of the title V provisions and the related regulations. The Council is composed of the following members.

Secretary of Education
Secretary of Health and Human Services
Secretary of Labor
Attorney General
Director of the Office of Personnel Management
Chairman of the Equal Employment Opportunity Commission
Chairman of the Architectural and Transportation Barriers
Compliance Board