

Section 504 of the Rehabilitation Act – An Overview

© 3/3/04 by Brian East
Advocacy, Inc.
7800 Shoal Creek Boulevard, Suite 171-E
Austin, Texas 78757-1014
512/454-4816
email: beast@advocacyinc.org

1. What is § 504?

- a. The name comes from the fact that this antidiscrimination mandate was in Section 504 of the Rehabilitation Act of 1973.
- b. Text: “No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected 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.”
- c. Legal citation: 29 U.S.C. § 794(a).

2. The § 504 regulations.

- a. The statute is written very broadly; the details are in the enforcing regulations.
 - i. For some history on the regulations, see the story and links at <http://www.ragged-edge-mag.com/0102/0102ft6.html>. See also National Council on Disability, *Rehabilitating Section 504*, Chapter I (Feb. 12, 2003), <http://www.ncd.gov/newsroom/publications/section504.html>.

- ii. *See also Cherry v. Mathews*, 419 F.Supp. 922 (D.D.C. 1976) (requiring federal agency to issue § 504 regulations).
- b. The statute requires each federal agency to issue such § 504 regulations as may be necessary to insure nondiscrimination by Executive agencies and the U.S. Postal Service. 29 U.S.C. § 794(a). In addition, each agency that provides Federal financial assistance must issue § 504 regulations covering those entities receiving their aid, and these regulations must be consistent with the coordinating regulations. 28 C.F.R. § 41.4(a) and (c)).
- c. The “coordinating regulations”
- i. The authority to issue “coordinating regulations” was originally given to the old Department of Health, Education & Welfare (HEW), and these original regulations are now codified (without change) by the Department of Health & Human Services at 45 C.F.R. Part 84.
 - ii. These “HEW” regulations are of particular significance because of that agency’s original role as coordinating agency. *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 194-195 (2002).
 - iii. The coordinating authority was transferred to the Department of Justice (DOJ) by Executive Order 12250 (Nov. 2, 1980), and the coordinating regulations now appear at 28 C.F.R. Part 41.
 - iv. Note that the § 504 regulations are important not just for interpreting § 504, but also for interpreting:
 - (1) The ADA’s definition of disability, because it is the same as that in § 504. *Compare Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 194-195 (2002).
 - (2) Title II of the ADA, since Congress required that the Title II regulations be consistent with those adopted under § 504. 42 U.S.C. § 12134(b); *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 591 (1999).

- d. Some other specific agency regulations are found at:
 - i. Health & Human Services - 45 C.F.R. Part 84
 - ii. Defense Department - 32 C.F.R. Part 56
 - iii. HUD - 24 C.F.R. Part 8
 - iv. Justice - 28 C.F.R. §§ 42.501-.540
 - v. Department of Labor - 29 C.F.R. Part 32
 - vi. Department of Transportation - 49 C.F.R. Part 27

- e. For a list of federal agency § 504 contacts, see <http://www.access-board.gov/enforcement/504.htm>.

3. To whom does § 504 apply?

- a. To programs or activities of:
 - i. Certain parts of the federal government
 - (1) Executive Branch - Yes. Sec. 504 applies to any program or activity conducted by any Executive agency, 29 U.S.C. § 794(a). Note, too, that although the Rehabilitation Act applies to civilian employees of the military, it does not apply to uniformed military personnel. *Leistiko v. Secretary of Army*, 922 F.Supp. 66, 75 (N.D.Ohio 1996), and cases cited.
 - (2) Legislative Branch - Indirectly and partially. Although the Rehabilitation Act does not by its own terms apply to the Legislative Branch, the Congressional Accountability Act of 1995 extended the *employment* protections of the Act to employees of the House, Senate, and certain specified arms of Congress. *See* 2 U.S.C. §§ 1301(3) and 1311.
 - (3) Judicial Branch - No. The Rehabilitation Act does not apply to the Judicial Branch or federal courts. For information on the internal policy of the federal courts to accommodate communications disabilities, see <http://www.pai-ca.org/Pubs/502601.htm#Federal>.

- ii. The United States Postal Service. 29 U.S.C. § 794(a)
 - iii. An entity receiving Federal financial assistance. 29 U.S.C. § 794(a).
- b. Program or activity means:
- i. With regard to State or local government:
 - (1) All of the operations of the department, agency, special purpose district, or other instrumentality, any part of which is extended Federal financial assistance. 29 U.S.C. § 794(b)(1)(A) and (B).
 - (a) The State itself as a whole is not a program or activity. *Jim C. v. U.S.*, 235 F.3d 1079, 1081 (8th Cir. 2000); *Lightbourn v. County of El Paso, Texas*, 118 F.3d 421, 427 (5th Cir. 1997) (§ 504 only applies to the particular department or agency that receives or distributes federal financial assistance; does not extend to the state as a whole)
 - (b) The city as a whole is not a program or activity. *Micek v. City of Chicago*, 1999 WL 966970, at *2 (N.D.Ill. Oct. 4, 1999).
 - (c) *See also* 160 A.L.R. Fed. 297.
 - (2) All of the operations of the entity of State or local government that *distributes* Federal financial assistance. 29 U.S.C. § 794(b)(1)(B).
 - ii. The following entities as a whole, even if only a portion of them receive Federal financial assistance:
 - (1) a college, university, or other post-secondary institution, or a public system of higher education. 29 U.S.C. § 794(b)(2)(A).

- (2) a local educational agency (i.e., school district), system of vocational education, or other school system. 29 U.S.C. § 794(b)(2)(B).
- iii. With regard to a corporation, partnership, private organization, or sole proprietorship:
 - (a) the entity as a whole, but only if:
 - (i) assistance is extended to the entity as a whole, 29 U.S.C. § 794(b)(3)(A)(I); *Boswell v. SkyWest Airlines, Inc.*, 217 F.Supp.2d 1212, 1216 (D.Utah 2002) (finding that the funds were not extended to the corporation as a whole); or
 - (ii) the entity is principally engaged in providing education, health care, housing, social services, or parks and recreation. 29 U.S.C. § 794(b)(3)(A)(ii); *Zamora-Quezada v. HealthTexas Medical Group of San Antonio*, 34 F.Supp.2d 433, 440 (W.D.Tex. 1998) (Medicare HMO).
 - (b) otherwise, program or activity means the plant or other comparable, geographically separate facility to which Federal financial assistance is extended. 29 U.S.C. § 794(b)(3)(B); *Boswell v. SkyWest Airlines, Inc.*, 217 F.Supp.2d 1212, 1216 (D.Utah 2002).
- iv. *See also* 160 A.L.R. Fed. 297, § 3.
- v. Note that the Civil Rights Restoration Act of 1987 expanded the definition of the term “program or activity” (to that described above) in order to address the much more limited view of the term in *Grove City v. Bell*, 465 U.S. 555 (1984). *See Boswell v. SkyWest Airlines, Inc.*, 217 F.Supp.2d 1212, 1215-1216 (D.Utah 2002). *Compare* 68 Fed. Reg. 51333-51391 (Aug. 26, 2003). Thus, pre-1988 cases defining

“program or activity” are suspect.

- c. A recipient (of Federal financial assistance):
 - i. May include, pursuant to 45 C.F.R. § 84.3(f) and 28 C.F.R. § 41.3(d), any of the following:
 - (1) any state or its political subdivision;
 - (2) any instrumentality of a state or its political subdivision;
 - (3) any public or private agency, institution, organization, or other entity; or
 - (4) 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.
 - ii. Includes public and private entities that receive federal funding subsidies, either directly or *indirectly* through another recipient. *Grove City College v. Bell*, 465 U.S. 555 (1984) (college was “recipient” of federal financial assistance to its students); *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2d Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999), *aff’d on remand on other grounds*, 226 F.3d 69 (2d Cir. 2000) (entity receiving assistance indirectly through vouchers is covered, even though it never was given opportunity to turn down federal aid); *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 787 (6th Cir. 1996) (en banc) (§ 504 covered rail company that received federal funds [to improve rail crossing] indirectly, through the state); *Horner v. Kentucky High School Athletic Ass’n*, 43 F.3d 265 (6th Cir. 1994) (athletic association, as agent of state board of education, indirectly received federal funds); *Dupre v. Roman Catholic Church of Diocese of Houma-Thibodaux*, 1999 WL 694081, at *4 (E.D.La. Sept. 2, 1999) (§ 504 applied to religious school that received federal funds through local school board).

- iii. Does *not* include those who are not recipients of Federal financial assistance, but merely beneficiaries of it. *U.S. Dept. of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597 (1986) (§ 504 did not apply to commercial airlines by virtue of federal financial assistance provided to airports or by virtue of nationwide air traffic control system operated by federal government). *See also NCAA v. Smith*, 525 U.S. 459, 468 (1999) (organization that received dues from federally-funded member colleges were mere beneficiaries of that funding, which was not earmarked for dues).
 - iv. Does not include a private landlord that accepts tenants through the Section 8 program. 24 C.F.R. § 8.3 (definition of “Recipient”).
 - v. *See also* 160 A.L.R. Fed. 297, §§ 9-15.
- d. Federal financial assistance:
- i. Includes any grant, loan, contract, or any other arrangement by which a federal agency provides or otherwise makes available assistance. 45 C.F.R. § 84.3(h); 28 C.F.R. § 41.3(e).
 - ii. Means money paid as a subsidy, rather than as compensation. *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377, 1381 (10th Cir.1990), *cert. denied*, 498 U.S. 1074 (1991); *Bowers v. National Collegiate Athletic Ass’n*, 118 F.Supp.2d 494, 531 (D.N.J. 2000). *But cf. Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 788 (6th Cir. 1996) (en banc) (compensation was in fact Federal financial assistance when it was used to pay for improvements to recipient’s property).
 - iii. Does not include procurement contracts, *Mass v. Martin Marietta*, 805 F.Supp. 1530, 1542 (D. Colo. 1992), or contracts of insurance or guaranty. 45 C.F.R. § 84.3(h); 28 C.F.R. § 41.3(e). *See Muller v. Hotsy Corp.*, 917 F.Supp. 1389, 1417-1418 (N.D.Iowa 1996) (holding that a private corporation does not receive Federal financial assistance unless it “receives a subsidy;” contract with GSA was insufficient).

iv. Examples of Federal financial assistance:

- (1) Medicare and Medicaid. *E.g.*, *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1042 (5th Cir.1984), *cert. denied*, 469 U.S. 1189 (1985); *Estate of Alcalde v. Deaton Specialty Hosp. Home, Inc.*, 133 F.Supp.2d 702, 708 (D.Md. 2001); *Lesley v. Chie*, 81 F.Supp.2d 217, 222 (D.Mass. 2000), *aff'd*, 250 F.3d 47 (1st Cir. 2001); *Dorer v. Quest Diagnostics Inc.*, 20 F.Supp.2d 898 (D.Md. 1998).
- (2) Federal student aid such as Pell grants. *Grove City College v. Bell*, 465 U.S. 555, 569-570 (1984) (Title IX coverage is not foreclosed because federal funds are granted to college's students rather than directly to one of the college's educational programs). *But cf. Bowers v. National Collegiate Athletic Ass'n*, 118 F.Supp.2d 494, 531 (D.N.J. 2000) (§ 504 may cover NCAA, but it did not apply to separate screening program that was only the administrator of scholarship money, not the recipient).
- (3) FEMA assistance. *Rivera-Flores v. Puerto Rico Telephone*, 64 F.3d 742, 746-748 (1st Cir. 1995).

v. *See also* 147 ALR Fed. 205.

- e. The courts are divided on whether or not government officials may be individually liable under § 504. *See* 160 ALR Fed. 205, 297, §6. Most recent cases appear to reject such liability. *See, e.g., Valder v. City of Grand Forks*, 217 F.R.D. 491, 494 (D.N.D. 2003) (no individual liability); *Berthelot v. Stadler*, 2000 WL 1568224, at *3 (E.D.La. Oct. 19, 2000) (similar). *See also* ¶ 7(b) below regarding the employment context. *Compare Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002) (plaintiff cannot bring a § 1983 individual capacity claim predicated on a violation of § 504); *Lollar v. Baker*, 196 F.3d 603, 608-610 (5th Cir. 1999) (similar).

4. Who is protected under § 504?

- a. Definition of disability
 - i. § 504 uses the same definition of disability as that of the ADA. 29 U.S.C. §§ 705(9)(B) and 705(20)(B); 28 C.F.R. § 41.31; 45 C.F.R. § 84.3(j).
 - ii. For more on this definition, see, e.g., “The Definition of Disability Under the ADA and § 504,” an ILRU webcast online at <http://www.ilru.org/online/handouts/2002/East/handout.html>.
- b. Qualified person with a disability means:
 - i. With respect to employment, a person with a disability who, with reasonable accommodation, can perform the essential functions of the job in question. 28 C.F.R. § 41.32; 45 C.F.R. § 84.3(k)(1).
 - ii. With respect to services, a person with a disability who meets the essential eligibility requirements for the receipt of such services. 28 C.F.R. § 41.32; 45 C.F.R. § 84.3(k)(4). Note that with respect to medical care, “disability alone is not a permissible ground for withholding medical benefits.” *Woolfolk v. Duncan*, 872 F.Supp. 1381, 1389 (E.D.Pa. 1995).
 - iii. With respect to public preschool elementary, secondary, or adult educational services, see 45 C.F.R. § 84.3(k)(2).
 - iv. With respect to post-secondary and vocational education services, see 45 C.F.R. § 84.3(k)(3).

5. Definition of discrimination under § 504.

- a. Section 504 is generally interpreted as imposing the same requirements as the ADA. *See, e.g., Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003) (“unless one of those subtle distinctions is pertinent to a particular case, we treat claims under the two statutes identically.”); *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir.

2003); *Garcia v. SUNY Health Sciences Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001).

- b. It is not necessary to show that the discrimination was the result of a government policy. *Delano-Pyle v. Victoria County, Texas*, 302 F.3d 567, 575 (5th Cir. 2002), *cert. denied*, 124 S.Ct. 47 (2003).
- c. A government entity is liable for the discriminatory acts of its employees, even if they are not policymaking officials. *Delano-Pyle v. Victoria County, Texas*, 302 F.3d 567, 574-575 (5th Cir. 2002), *cert. denied*, 124 S.Ct. 47 (2003).
- d. Prohibition against discrimination generally. 29 U.S.C. § 794(a); 45 C.F.R. § 84.4(a); 28 C.F.R. § 41.51(a).
- e. Specific prohibitions
 - i. No discrimination against a class of disabilities, or based on severity of disability. 45 C.F.R. § 84.4(b)(1)(iv); 28 C.F.R. § 41.51(b)(1)(iv); *Hahn ex rel. Barta v. Linn County*, 130 F.Supp.2d 1036, 1050 (N.D.Iowa 2001) (and cases cited); *Winkler v. Interim Services, Inc.*, 36 F.Supp.2d 1026, 1030 (M.D.Tenn. 1999) (“Several courts have concluded that the severity of one’s disability can itself be disability and that denial of services based on the severity of a handicap would contravene Section 504.”).
 - ii. No discrimination in “siting” decisions. 45 C.F.R. § 84.4(b)(5); 28 C.F.R. § 41.51(b)(4). *See also* 45 C.F.R. Part 84 App. A, Subpart A(6).
 - iii. No surcharges.
 - (1) There is no express provision prohibiting surcharges as there is under ADA Title II. *See* 28 C.F.R. § 35.130(f).
 - (2) DOJ has recognized that imposition of surcharges (e.g., the cost of interpreter services) is impermissible under § 504. *See* 28 C.F.R. Part 35 App. A, § 35.130(f).

- iv. No discrimination through contracting. 45 C.F.R. § 84.4(b)(1) and (b)(4); 28 C.F.R. § 41.51(b)(1) and (b)(3).
- v. No discrimination through licensing or certification programs. 45 C.F.R. § 84.4(b)(1); 28 C.F.R. § 41.51(b)(1).
- vi. Prohibits certain disparate impact discrimination. *See, e.g.*, 28 C.F.R. § 41.51(b)(3); 45 C.F.R. Part 84 App. A, Subpart B(17).
 - (1) Disparate impact discrimination involves rules or policies that are neutral on their face, but that have a discriminatory effect on persons with disabilities.
 - (2) In *Alexander v. Choate*, 469 U.S. 287 (1985), the Court explained that members of Congress made numerous statements during passage of § 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: “These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.” *Id.* at 297 (footnote omitted).
 - (3) While the Court rejected the argument that *all* disparate-impact showings violate § 504, it assumed that § 504 reaches at least some conduct that has an unjustifiable disparate impact on persons with disabilities. *Id.* at 299.
 - (4) The recent Supreme Court decision in *Sandoval* (restricting disparate impact claims brought under Title VI) should not affect the right to bring a disparate impact claim under § 504. *See Robinson v. State of Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002); *Ability Center of Greater Toledo v. City of Sandusky*, 181 F.Supp.2d 797 (N.D. Ohio 2001); *Frederick L. v. Department of Public Welfare*, 157 F.Supp.2d 509, 536-538 (E.D. Pa. 2001). *See also* National Council on Disability, *Rehabilitating Section 504*, Chapter I(c) (Feb. 12, 2003), online at <http://www.ncd.gov/newsroom/publications/section504.h>

tml. *Compare Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850 , 859-860 (10th Cir. 2003) (“We therefore hold that, although the conduct regulated by Title VI of the Civil Rights Act of 1964 is limited to intentional discrimination, Congress sought with § 504 . . . to remedy a broad, comprehensive concept of discrimination against individuals with disabilities, including disparate impact discrimination.”) (internal citation omitted).

f. Affirmative obligations:

- i. Provide effective communications. *See, e.g.*, 28 C.F.R. § 41.51(e); 45 C.F.R. § 84.44(d) (regarding post-secondary education); 45 C.F.R. § 84.52(d) (regarding health, welfare, or other social services or benefits).
- ii. Make reasonable modifications of policies, practices, and procedures if necessary to avoid discrimination. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273-276 (2d Cir. 2003).
 - (1) In assessing the reasonable modification requirement, courts often track the reasonable accommodation requirements in Title I of the ADA. *See, e.g.*, *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003); *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002) (adopting the case-by-case nature of the accommodation analysis, as well as the duty to engage in an interactive process); *Onishea v. Hopper*, 171 F.3d 1289, 1303-1304 (11th Cir. 1999) (regarding undue hardship defense), *cert. denied*, 528 U.S. 1114 (2000).
 - (2) It has also been held that a § 504 defendant may require reasonable evidence of disability before providing an accommodation, but it may not insist on data beyond that which would satisfy a reasonable expert in the field. *Vinson v. Thomas*, 288 F.3d 1145, 1153 (9th Cir. 2002).

- (3) The defendant can defend by showing that the modification would constitute a fundamental alteration, or undue hardship. *Onishea v. Hopper*, 171 F.3d 1289, 1303-1304 (11th Cir. 1999) (relying on the undue hardship regulations applicable to the employment context in assessing prison segregation policies), *cert. denied*, 528 U.S. 1114 (2000). For the applicable regulations in the employment context, see 45 C.F.R. § 84.12(a); 28 C.F.R. § 41.53.
 - (4) With regard to community integration claims, see *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 591 (1999).
- iii. Provide aids, benefits, and services “in the most integrated setting appropriate to the person’s needs.” 45 C.F.R. § 84.4(b)(2); 28 C.F.R. § 41.51(d).
- (1) This is the so-called “integration mandate.” *See also Olmstead v. L. C. by Zimring*, 527 U.S. 581, 591 (1999) (interpreting substantially similar provision in ADA Title II regulations).
 - (2) “A recipient may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.” 28 C.F.R. § 41.51(b)(2).
 - (3) The provision of unnecessarily separate or different services is discriminatory. 45 C.F.R. Part 84 App. A, Subpart A(6).

6. Notice and hearing obligations of recipients.

- a. Notice requirements - The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons. 28 C.F.R. § 41.51(e).

- b. Grievance procedures. 45 C.F.R § 84.7(b).
 - i. Required for recipients that employ 15 or more persons
 - ii. Must incorporate appropriate due process standards, and provide for the prompt and equitable resolution of complaints alleging any action prohibited by 45 C.F.R. Part 84.
 - iii. Need not be established for
 - (1) complaints from applicants for employment, or
 - (2) complaints from applicants for admission to post-secondary educational institutions.
- c. Some courts have held that these notice and grievance procedures do not create a private cause of action. *See Power v. School Bd. of City of Virginia Beach*, 276 F.Supp.2d 515, 519-521 (E.D.Va. 2003); *A.W. v. Marlborough Co.*, 25 F.Supp.2d 27, 30-32 (D.Conn.1998).
- d. Notice and grievance procedure provisions may be enforced by filing an administrative complaint. *See, e.g., OCR Letter to Mass. College of Pharmacy and Health Science*, 26 NDLR ¶ 186 (March 28, 2003).

7. Employment provisions of § 504.

- a. The 1992 Amendments to the Rehabilitation Act expressly adopt the liability standards in Title I of the ADA. 29 U.S.C. § 794(d). *See also* 29 C.F.R. § 1614.203.
- b. As with the ADA, most courts have held that individual supervisors cannot be sued for employment discrimination under § 504. *See, e.g., Hiler v. Brown*, 177 F.3d 542, 546-547 (6th Cir. 1999); *Lyman v. City of New York*, 2003 WL 22171518, at *10 (S.D.N.Y. Sept. 19, 2003).
- c. Some advantages of § 504 over the ADA include:
 - i. No administrative exhaustion requirement against non-federal defendants (see ¶ 14(b) below);

- ii. No damage caps in § 504 employment cases (see ¶ 15(b)(v) below);
 - iii. Waiver of state's 11th Amendment immunity (see ¶ 15(b)(vi) below);
 - iv. Applies to recipient employers no matter how small. *See, e.g., Schrader v. Ray*, 296 F.3d 698, 971-975 (10th Cir. 2002); 28 C.F.R. Part 35 App. A, § 35.140. This is in contrast to Title I of the ADA, which generally covers employers with 15 or more employees.
- d. General antidiscrimination provisions. 45 C.F.R. § 84.11; 28 C.F.R. § 41.52(a).
- e. Employer must provide reasonable accommodations if necessary. 45 C.F.R. § 84.12(a) and (d); 28 C.F.R. § 41.53.
- i. Examples of accommodations are set out in the regulations at 45 C.F.R. § 84.12(b).
 - ii. The examples are not exhaustive. 45 C.F.R. App. A, Subpart B(16).
 - iii. Definition of reasonable accommodation does not mention reassignment, but reassignment may also be accommodation under Rehabilitation Act, at least after 1992 amendments adopting ADA liability standards. *Gile v. United Airlines, Inc.*, 95 F.3d 492, 496-497 (7th Cir. 1996). *See also Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 633-634 (6th Cir.1999) (ADA case noting the change in the Rehabilitation Act); *Gonzagowski v. Widnall*, 115 F.3d 744, 748 (10th Cir.1997) (§ 501 case).
 - iv. Defense of undue hardship. 45 C.F.R. § 84.12(a). According to 45 C.F.R. § 84.12(c), the factors to be considered in assessing undue hardship include:
 - (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

- (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and
 - (3) The nature and cost of the accommodation needed.
- f. Disparate impact discrimination.
 - i. Prohibits certain employment tests or selection criteria that screen out, or tend to screen out, persons with disabilities. 45 C.F.R. § 84.13; 28 C.F.R. § 41.54.
 - ii. *See also Alexander v. Choate*, 469 U.S. 287 (1985), cited in ¶ 5(e)(vi) above.
- g. Pre-employment inquiries restricted. 45 C.F.R. § 84.14; 28 C.F.R. § 41.55.
- h. Retaliation
 - i. Claims of retaliation are actionable under § 504, even by persons who do not have a disability. *See, e.g., Hoyt v. St. Mary's Rehab. Ctr.*, 711 F.2d 864, 867 (8th Cir.1983); *Whitehead v. Sch. Bd. for Hillsborough County*, 918 F.Supp. 1515, 1522 (M.D.Fla.1996); *Ross v. Allen*, 515 F.Supp. 972, 976 (S.D.N.Y.1981).
 - ii. The elements of a § 504 retaliation claim, as described in *Gribcheck v. Runyon*, 245 F.3d 547, 550 (6th Cir. 2001), include:
 - (1) the plaintiff engaged in legally protected activity;
 - (2) the defendant knew about the plaintiff's exercise of this right;
 - (3) the defendant then took an employment action adverse to the plaintiff; and

- (4) the protected activity and the adverse employment action are causally connected.

- i. Causation.

- i. By its language, § 504 prohibits discrimination “solely” on the basis of disability. This is in contrast to the ADA, which requires the plaintiff to prove only that the discrimination was “because of” disability (meaning that disability need not be the only cause of the discrimination). *Parker v. Columbia Pictures Industries*, 204 F.3d 326, 337 (2d Cir. 2000); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995); *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 158 (3d Cir. 1995). *But cf. Hedrick v. Western Reserve Care System*, 355 F.3d 444, 453 (6th Cir. 2004) (mistakenly relying on earlier Rehabilitation Act precedent to read “sole cause” into the ADA).

- ii. In 1992, Congress amended § 504 to clarify that it is to be construed consistently with the ADA. 29 U.S.C. § 794(d). Since then, the case law is divided on whether a plaintiff must prove “sole cause” under § 504.

- (1) No need to prove sole cause: *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 157-158 (3d Cir. 1995); *Biddle v. Ruben*, 1995 WL 382961 (N.D.Ill. 1995) (1992 amendments to § 501 incorporate liability standards of ADA, and plaintiff need only show that adverse employment action was “because of” disability); *Ryan v. City of Highland Heights*, 1995 WL 584733 (N.D.Ohio 1995) (substantive standards of ADA and § 504 are same; causation standard is “because of”). *See also Henrietta D. v. Bloomberg*, 331 F.3d 261, 277-280 (2d Cir. 2003) (non-employment case suggesting that proof of sole cause is not required); *Myers v. Hose*, 50 F.3d 278, 281 (4th Cir. 1995) (§ 504 substantive liability standards same as that of ADA); *Johnson v. New York Hospital*, 897 F.Supp. 83 (S.D.N.Y. 1995) (same).
- (2) Must show sole cause: *Soledad v. U.S. Dept. of Treasury*, 304 F.3d 500, 503-505 (5th Cir. 2002) (holding

that Rehabilitation Act requires sole cause, and finding that jury charge using ADA causation standard was reversible error).

- (3) Mixed result: *Peebles v. Potter*, 354 F.3d 761, 767 n.5 (8th Cir. 2004) (suggesting that sole cause is not required in accommodation cases, although it may be for other kinds of discrimination claims).
- (4) Undecided: *Leary v. Dalton*, 58 F.3d 748, 752 (1st Cir. 1995) (causation standard under § 504 an open question).

j. Question of applicability to federal employees

- i. Although § 504 apparently overlaps § 501 in its application to federal employees, the courts are split as to whether individuals may sue federal agencies under § 504 for employment discrimination. 146 ALR Fed. 319, §§ 3-4.
 - (1) Allowing employment claims to be brought against the federal government under § 504: *Spence v. Straw*, 54 F.3d 196 (3d Cir. 1995); *Doe v. Garrett*, 903 F.2d 1455, 1459-1460 (11th Cir. 1990), *cert. denied*, 499 U.S. 904 (1991); *Gardner v. Morris*, 752 F.2d 1271, 1277 (8th Cir. 1985) (recognizing cause of action for employment discrimination against federal employer under both §§ 501 and 504); *Smith v. U.S. Postal Serv.*, 742 F.2d 257 (6th Cir. 1984) (same); *Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 302-304 (5th Cir. 1981).
 - (2) Holding or suggesting that employment cases may *not* be brought against the federal government under § 504, but must be brought under § 501: *Taylor v. Small*, 350 F.3d 1286, 1291-1292 (D.C. Cir. 2003) (collecting authorities on both sides); *Newland v. Dalton*, 81 F.3d 904, 905 n.1 (9th Cir. 1996); *Johnson v. Runyon*, 47 F.3d 911, 916-917 n.5 (7th Cir. 1995); *Johnson v. U.S. Postal Serv.*, 861 F.2d 1475, 1478 (10th Cir. 1988), *cert. denied*, 493 U.S. 811 (1989).

(3) Note that even those courts allowing federal employment claims to proceed under § 504 generally require exhaustion of § 501 administrative requirements. *See, e.g., Spence v. Straw*, 54 F.3d 196 (3d Cir. 1995); *Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 302-304 (5th Cir. 1981). *See also* 146 ALR Fed. 319, § 5. The administrative requirements under § 501 are mentioned at ¶16(b)(iii) below.

ii. The substantive prohibitions against discrimination are similar under § 501 and § 504, although there are a few differences, some of which are very briefly mentioned in ¶ 16(b) below.

8. Program access requirements.

a. “No qualified handicapped person shall, because a recipient’s facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.” 29 U.S.C. § 794(a); 45 C.F.R. § 84.21; 28 C.F.R. § 41.56.

b. Compliance “does not depend on the number of locations that are wheelchair-accessible; the central inquiry is whether the program, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” *Bird v. Lewis & Clark College*, 303 F.3d 1015, 1021 (9th Cir. 2002) (internal quotes omitted), *cert. denied*, 538 U.S. 923 (2003).

c. Self-evaluation requirements.

i. A recipient must evaluate its services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of the coordinating regulations. 45 C.F.R. § 84.6(c)(1)(i). *See also* 28 C.F.R. § 41.5(b)(2).

ii. Must provide an opportunity for input from the public and people with disabilities. 45 C.F.R. § 84.6(c)(1)(ii) and (iii).

- iii. The entity must make all required modifications to its services, policies, and practices. 45 C.F.R. § 84.6(c)(1)(ii).
- iv. The evaluation was to be done within one year of the effective date of this part. 45 C.F.R. § 84.6(c)(1). (The effective date is referenced in ¶ 9(a) below.)

9. Architectural barriers.

- a. The effective date of the original § 504 regulations (by HEW) regarding accessibility standards was June 3, 1977. 42 Fed. Reg. 22676 (May 4, 1977); *McGregor v. Louisiana State University Bd. of Sup'rs*, 3 F.3d 850, 861 (5th Cir. 1993); OCR Letter, University of North Carolina-Charlotte, 2 NDLR ¶ 208 (Oct. 28, 1991).
- b. New construction and alterations (after June 3, 1977):
 - i. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons. 28 C.F.R. § 41.58(a).
 - ii. Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons. 28 C.F.R. § 41.58(a).
 - iii. Guidelines
 - (1) Originally the § 504 regulations required compliance with the American National Standards Institute (ANSI) standards A117.1-1961 © 1971).
 - (2) Effective January 18, 1991, ANSI was replaced by the Uniform Federal Accessibility Standards (UFAS); after that date, the design, construction, or alteration of buildings in conformance with UFAS was deemed to

comply with the requirements of § 504. 45 C.F.R. § 84.23(c)(1). The UFAS are available online at <<http://www.access-board.gov/ufas/ufas-html/ufas.htm>>. Deviations from UFAS are permitted if substantially equivalent or greater access to and usability of the building is provided.

- (3) Compliance with ADAAG is also acceptable. *See, e.g.,* 19 IDELR ¶ 694 (OCR Memo Dec. 1, 1992).

c. Older, “existing facilities”

- i. Existing facility is one for which construction was commenced prior to June 3, 1977. *See* ¶ 9(a) above. *See also* OCR Senior Staff Memorandum, 19 IDELR ¶ 278 (Dec. 1, 1992).

- ii. “Program access” standard

- (1) “A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons.” 45 C.F.R. § 84.22(a); 28 C.F.R. § 41.57(a).

- (2) Program access does not necessarily “require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.” 45 C.F.R. § 84.22(a); 28 C.F.R. § 41.57(a). A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance.

- (3) According to 45 C.F.R. § 84.22(b), a recipient may comply with program access requirements through such means as:

- (a) redesign of equipment,

- (b) reassignment of classes or other services to accessible buildings,

- (c) assignment of aides to beneficiaries,
 - (d) home visits,
 - (e) delivery of health, welfare, or other social services at alternate accessible sites,
 - (f) alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or
 - (g) any other methods that result in making its program or activity accessible.
- (4) On the other hand, a school district or university system cannot just make one campus or school accessible, if the result is to segregate persons with disabilities in a single setting. 45 C.F.R. Part 84 App. A, Subpart C(20). Program access may not result in segregation. *Id.*
- (5) Consistent with longstanding interpretation of § 504, carrying an individual with a disability is considered an ineffective and therefore an unacceptable method for achieving program accessibility. *See* 28 C.F.R. Part 35 App. A, § 35.150(b)(1) (ADA Title II regulations), *citing* Office of Civil Rights, Policy Interpretation No. 4, 43 Fed. Reg. 36035 (HEW Aug. 14, 1978).
- (6) In choosing among available methods for meeting the program access requirement, a recipient shall give priority to those methods that offer programs and activities to persons with disabilities in the most integrated setting appropriate. 45 C.F.R. § 84.22(b).
- (7) Changes necessary to meet program access standards must be developed and implemented within 60 days of the effective date of this part [referenced in ¶ 9(a) above], unless structural changes are required. 45 C.F.R. § 84.22(d).

iii. Transition plan requirement

- (1) Applies if structural changes to facilities are necessary to meet program access, 28 C.F.R. § 41.57(c); 45 C.F.R. § 84.22(e);
- (2) Must be developed within 6 months of the effective date [referenced in ¶ 9(a) above] of this part, 45 C.F.R. § 84.22(e);
- (3) Structural changes pursuant to the plan shall be made as expeditiously as possible, but in any event within 3 years of the effective date. 28 C.F.R. § 41.57(b); 45 C.F.R. § 84.22(d). (The effective date is referenced in ¶ 9(a) above.) Outside ramps to buildings can usually be built easily and cheaply, and thus should be built promptly. 45 C.F.R. Part 84 App. A, Subpart C(20).
- (4) Must at a minimum:
 - (a) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons, 45 C.F.R. § 84.22(e)(1);
 - (b) Describe in detail the methods that will be used to make the facilities accessible, 45 C.F.R. § 84.22(e)(2);
 - (c) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify the steps of that will be taken during each year of the transition period, 45 C.F.R. § 84.22(e)(3); and
 - (d) Indicate the person responsible for implementation of the plan, 45 C.F.R. § 84.22(e)(4).

- (5) Must be developed with the assistance of persons with disabilities or organizations representing them. 28 C.F.R. § 41.57(c); 45 C.F.R. § 84.22(e).
 - (6) According to the DOJ, § 504 treats newly leased buildings as subject to the “existing facility” “program accessibility” standard. 28 C.F.R. Part 35 App. A, § 35.151.
- iv. Small provider exception. 29 U.S.C. § 794(c); 45 C.F.R. § 84.22(c); 45 C.F.R. Part 84 App. A, Subpart C(20).
- (1) Applies to recipient with fewer than fifteen employees that provides health, welfare, or other social services;
 - (2) Applies if provider finds, after consultation with the persons with a disability seeking its services, that there is no method of providing program access other than by making a significant structural alteration in its existing facilities;
 - (3) In such case the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.
- v. Defense of fundamental alterations or undue burden. *See* OCR Senior Staff Memorandum, 19 IDELR ¶ 278 (Dec. 1, 1992).

10. Education. *See also, The Public School’s Special Education System as an Assistive Technology Funding Source: The Cutting Edge*, Hager and Smith, 2nd Edition, April 2003, <http://www.nls.org/specedat.htm>.

- a. Preschool, Elementary, and Secondary Education
 - i. “Child find” obligation. 45 C.F.R. § 84.32; 34 C.F.R. § 104.32.
 - ii. Obligation to provide “free, appropriate public education” (FAPE). 45 C.F.R. § 84.33(a); 34 C.F.R. § 104.32(a); 45 C.F.R. Part 84 App. A, Subpart D(23).

- (1) Regulation--FAPE is defined as regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of non-disabled students are met. 34 C.F.R. § 104.33(b)(1).
- (2) Office for Civil Rights (OCR)--If a school district is meeting the needs of children without disabilities to a greater extent than it is meeting the needs of children with disabilities, discrimination is occurring. By meeting the educational needs of children with disabilities as adequately as it meets the needs of other children, the school district is eliminating discrimination, and even substantial modifications required to bring about this result are not suspect under the *Davis* decision. *OCR Policy Letter to Zirkel*, 20 IDELR 134 (8/23/93).
- (3) *Rowley v. Bd. of Ed. Of the Hendrick Hudson Sch. Dist.*, 483 F.Supp. 528 at 534 (S.D.N.Y. 1980)--The court set up three possible tests to determine whether a student was receiving an appropriate education under this definition. The first two tests were:
 - (a) An "appropriate education" could mean an "adequate" education that is, an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An "appropriate education" could also mean one which enables the handicapped child to achieve his or her full potential.
 - (b) Notably, the first standard sounds very similar to the standard ultimately adopted by the Supreme Court under the IDEA.
 - (c) The district court rejected these two options and found a middle ground: "Between those two extremes, however, is a standard, which I conclude is more in keeping with the regulations, with the

Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.”

- (4) Contrary cases:
- (a) *Smith v. Robinson*, 468 U.S. 992 at 1021 (1983)–“Where § 504 adds nothing to the substantive rights of a handicapped child, we cannot believe that Congress intended to have the careful balance struck in the [IDEA] upset by reliance on § 504 for otherwise unavailable damages or for an award of attorneys’ fees. We emphasize the narrowness of our holding. We do not address a situation where the [IDEA] is not available or where § 504 guarantees substantive rights greater than those available under the [IDEA].”
 - (b) *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720 at 728 (10th Cir. 1996)–“Relying on the similarity between the substantive and procedural frameworks of the IDEA and section 504, ... we conclude that if a disabled child is not entitled to a neighborhood school under the IDEA, he is not entitled to such a placement under section 504. [citing *Smith v. Robinson*] ... Thus section 504 requires accommodation in a neighborhood school when disabled children cannot receive educational benefit *without* accommodation; it does not require a school district to modify its program in order to accommodate a single child in a neighborhood school, especially if that child is already receiving educational benefits in another setting.” (Citations omitted, emphasis in original.)

- (c) *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609 at fn.20, p. 622, and 623 (5th Cir. 2003)–“Although IDEA plaintiffs can bring claims under other statutes, such as the ADA, they must first exhaust administrative remedies with regard to their claim if they are seeking relief that is also available under the IDEA. ... In this case, Pace is seeking relief through his ADA claims that is also available under the IDEA. The IDEA requires new construction and alteration of existing facilities to comply with either the ADA Accessibility Guidelines for Buildings and Facilities or the Uniform Federal Accessibility Standards, the same guidelines and standards used to determine compliance with Title II of the ADA. ... [E]ven if Pace’s ADA and § 504 claims were not precluded by Pace’s IDEA proceeding, summary judgement would still be proper because defendants provided reasonable accommodations for Pace through the provision of aides and assistance that allowed him to receive the full benefits of his school program.” (Citations omitted.)
- (d) *N.L. v. Knox County Schools*, 315 F.3d 688 at 695, 696 (6th Cir. 2003)–“In sum, precedent has firmly established [including *Smith* and *Urban*] that section 504 claims are dismissed when IDEA claims brought on the theory of a denial of free appropriate public education are also dismissed. ... Thus, the school system was on firm ground when it relied on the evaluations and conclusions of the IEP Team to conclude that N.L. was not eligible for services under section 504.” But see *U.S. Dept. Of Ed. Joint Policy Memorandum*, 18 IDELR 116 (9/16/91).

- iii. Inclusion mandate - the school district must provide for the education of each qualified student with a disability “with persons who are not handicapped to the maximum extent appropriate.” For students placed in a setting other than the

regular educational environment, the school shall take into account the proximity of the alternate setting to the person's home. 45 C.F.R. § 84.34; 34 C.F.R. § 104.34.

- iv. Evaluation and placement obligations. 45 C.F.R. § 84.35; 34 C.F.R. § 104.35. *See also* <<http://www.ed.gov/about/offices/list/ocr/docs/placpub.html>>.
 - (1) Prior to providing any services under section 504, the student must be provided with a comprehensive, individualized evaluation of his or her needs.
 - (2) Once the student begins receiving services, there must be regular reevaluations.
 - (3) There must also be a comprehensive reevaluation before any significant change in placement.
- v. Procedural safeguards. 45 C.F.R. § 84.36; 34 C.F.R. § 104.36.
 - (1) required for actions regarding identification, evaluation, or educational placement.
 - (2) must include notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.
 - (3) Compliance with the procedural safeguards of IDEA is one means of meeting this requirement.
- vi. Non-academic services - schools must provide an equal opportunity for participation not only in academic settings, but also in non-academic and extracurricular services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students. 45 C.F.R. § 84.37; 34 C.F.R. § 104.37.

vii. Accessibility

- (1) In keeping with the basic tenor of section 504, to prevent discrimination, schools must take all reasonable steps to ensure that students with disabilities have access to the full range of programs and activities offered by the school. 34 C.F.R. §§ 104.4, 104.21, 104.22, 104.34, 104.37. *See Eldon (MO) R-I School District*, EHLR 352:145 (OCR, 1/16/86); *Beaver Dam (WI) Unified Sch. Dist.*, 26 IDELR 761 (OCR, 2/27/97)(access to chorus room and auditorium); *Saddleback Valley (CA) Unified Sch. Dist.*, 27 IDELR 376 (OCR, 5/5/97); *Wisconsin Heights (WI) Sch. Dist.*, 30 IDELR 619 (OCR 11/5/98) (accessible restroom); *Shiloh (IL) Village Sch. Dist.* 85, 37 IDELR 188 (OCR 7/3/02) (access to playground).
- (2) A school district is not required to make every part of every building it owns fully accessible. However, it is responsible for ensuring that all of its programs are accessible to students with disabilities. 34 C.F.R. § 104.21; *Puerto Rico (PR) Department of Education*, 38 IDELR 103 (OCR 9/30/02).
- (3) In meeting this program accessibility mandate, a school does not need to make structural changes to existing facilities if other effective methods are available. However, the school must give priority to those methods which enable students with disabilities to participate “in the most integrated setting appropriate.” 34 C.F.R. § 104.22(b).

- viii. Preschool and adult education programs - recipients may not, on the basis of disability, exclude qualified persons with disabilities from preschools, or from adult education programs operated by elementary and secondary schools, and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity. 45 C.F.R. § 84.38; 34 C.F.R. § 104.38; 45 C.F.R. Part 84 App. A, Subpart D.

ix. Private education programs.

- (1) Private programs receiving federal financial assistance. 45 C.F.R. § 84.39; 34 C.F.R. § 104.39.
 - (a) Such programs may not, on the basis of disability, exclude a qualified person with a disability if the person can, with minor adjustments, be provided an appropriate education
 - (b) Such programs may not charge more for the provision of an appropriate education to persons with disabilities, except to the extent that any additional charge is justified by a substantial increase in cost to the recipient;
 - (c) A recipient that operates special education programs shall operate such programs in accordance with ¶ 10(a)(iii)-(vii) above.
- (2) According to 45 C.F.R. Part 84 App. A, Subpart A(1), private programs that do not themselves receive Federal financial assistance:
 - (a) Are not covered just because their students may participate in federally funded programs;
 - (b) May be indirectly subject to these requirements under 45 C.F.R. § 84.4(b)(4) and 34 C.F.R. § 104.4(b)(4) (prohibiting contracting with those who discriminate).

b. Post-secondary Education

- i. These provisions apply to post-secondary education programs and activities, including post-secondary vocational education programs and activities. 45 C.F.R. § 84.41; 34 C.F.R. § 104.41.
- ii. The regulations include provisions regarding:

- (1) Admissions and recruitment. 45 C.F.R. § 84.42; 34 C.F.R. § 104.42.
 - (2) Treatment of students. 45 C.F.R. § 84.43; 34 C.F.R. § 104.43.
 - (3) Academic adjustments. 45 C.F.R. § 84.44; 34 C.F.R. § 104.44.
 - (4) Housing. 45 C.F.R. § 84.45; 34 C.F.R. § 104.45.
 - (5) Financial and employment assistance to students. 45 C.F.R. § 84.46; 34 C.F.R. § 104.46.
 - (6) Auxiliary aids and services. *See, generally*, <http://www.ed.gov/about/offices/list/ocr/docs/auxaids.html>.
- c. For some answers to frequently asked questions about § 504 and the education of children with disabilities, *see* <http://www.ed.gov/about/offices/list/ocr/504faq.html>. *See also* <http://www.wrightslaw.com/info/sec504.index.htm>.

11. Health, welfare, and other social services. 45 C.F.R. § 84.52.

- a. In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of disability:
 - i. Deny a qualified person those benefits or services;
 - ii. Give unequal opportunities to receive benefits or services;
 - iii. Provide benefits or services that are not as effective as the benefits or services provided to others;
 - iv. Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified persons with disabilities; or

- v. Provide different or separate benefits or services except where necessary to provide benefits and services that are as effective as those provided to others.
- b. Notice - a recipient shall take such steps as are necessary to ensure that effective notice is not denied because of a disability.
- c. Emergency treatment for the hearing impaired - hospitals that provide health services or benefits shall establish procedures for effective communication with persons with impaired hearing.
- d. Auxiliary aids
 - i. A recipient that employs 15 or more people shall provide appropriate auxiliary aids where necessary to afford such persons an equal opportunity to benefit from the service in question. 45 C.F.R. § 84.52(d); *Davis v. Flexman*, 109 F.Supp.2d 776, 787 (S.D. Ohio 1999).
 - ii. Small providers. Although 45 C.F.R. § 84.52(d)(2) suggests that recipients with fewer than 15 employees may not be required to provide auxiliary aids unless the HHS OCR Director requires it, the Director has in fact done so in all cases except those in which it would constitute an undue burden, that is, would significantly impair the recipient's ability to provide its benefits or services. See "Notice of Exercise of Authority Under 45 CFR 84.52(d)(2) Regarding Recipients With Fewer Than Fifteen Employees," 65 Fed. Reg. 79368-79369 (Dec 19, 2000), reprinted at <http://www.resna.org/taproject/policy/hhs504.html>.
- e. Drug and alcohol addicts - A recipient that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism. 45 C.F.R. § 84.53.
- f. Education of institutionalized persons - A recipient that operates or supervises a program or activity for persons who are institutionalized because of disability shall ensure that each person in its program or

activity is provided a free, appropriate education. 45 C.F.R. § 84.54.

- g. Although the regulations included provisions regarding health care for infants with disabilities, see 45 C.F.R. Part 84 App. C, these were struck down in a series of cases, including *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986). But not all medical treatment decisions are immune from scrutiny under the Rehabilitation Act. See, e.g., *Zamora-Quezada v. HealthTexas Medical Group of San Antonio*, 34 F.Supp.2d 433, 445 (W.D.Tex. 1998).

12. Housing.

- a. Section 504 applies when housing is built or rented with the use of federal funds. See 24 C.F.R. § 8.3 (definitions of “Recipient” and “Federal financial assistance”). Examples:
 - i. Public housing.
 - ii. Section 8 housing programs. Note, however, that a private landlord that accepts tenants through the Section 8 program is not covered. 24 C.F.R. § 8.3 (definition of “Recipient”).
- b. Accessibility
 - i. New Construction
 - (1) Standards apply to:
 - (a) all new multifamily housing projects containing five or more dwelling units. 24 C.F.R. § 8.22(a).
 - (b) all newly constructed public housing and multi-family Indian housing projects. 24 C.F.R. §§ 8.22(a), 8.25(a)(1) and (2).
 - (2) Effective date: July 11, 1988. 24 C.F.R. § 8.32; 53 Fed. Reg. 20233 (June 2, 1988).
 - (3) Shall be designed and constructed to be readily accessible to and usable by individuals with handicaps.

24 C.F.R. §§ 8.3 (definition of “Accessible”) and 8.22(a). “Accessible” means that the unit is located on an accessible route and can be approached, entered, and used by individuals with physical handicaps. 24 C.F.R. § 8.3 (definition of “Accessible”).

- (4) Shall have:
 - (a) A minimum of 5% of total dwelling units (at least one) accessible (or adaptable) for individuals with mobility impairments, 24 C.F.R. § 8.22(b);
 - (b) An additional 2% of total dwelling units (at least one) accessible to persons with hearing or vision impairments, 24 C.F.R. § 8.22(b);
 - (c) A higher percentage of accessible units if HUD determines, based on census or other available data, that more accessible units are needed, 24 C.F.R. § 8.22(c);
- (5) Compliance with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS) shall satisfy these accessibility requirements. 24 C.F.R. § 8.32(a). The UFAS are available online at <http://www.access-board.gov/ufas/ufas-html/ufas.htm>.

ii. Alterations.

- (1) The above requirements also apply to:
 - (a) Public housing developed through rehabilitation, and all alterations to public housing. 24 C.F.R. § 8.25(a)(1) and (2).
 - (b) Substantial Alterations, meaning alterations undertaken to a project that has 15 or more units and the cost of the alterations is 75 percent or more of the replacement cost of the completed facility. 24 C.F.R. § 8.23(a).

- (2) Standards Applicable to Other Alterations:
 - (a) Other alterations to housing facilities with five (5) or more units must ensure that all elements affected by the scope of work are designed to provide accessibility to the maximum extent feasible. If the alterations to portions of a dwelling unit together amount to alteration of the entire unit, the unit must be made accessible.
 - (b) A minimum of 5% of units in a project must be made accessible (adaptable) for individuals with mobility impairments, unless 5% of the units are already accessible or adaptable. An additional 2% of total dwelling units (at least one) must be made accessible to persons with hearing or vision impairments. HUD may increase this percentage on the basis of data showing a greater need. Until 5% and 2% of the units are made completely accessible to people with mobility and sensory impairments, respectively, each alteration made in every unit must meet accessibility requirements. 24 C.F.R. § 8.23(b).
 - (c) Alterations to common areas (such as entrances, lobbies, etc.) must, to the maximum extent feasible, be made accessible to and usable by individuals with disabilities.

iii. Other accessibility provisions.

- (1) In developing public housing through the purchase of existing properties, public housing authorities shall give priority to facilities that are readily accessible to and usable by individuals with disabilities. 24 C.F.R. § 8.25(a)(3).
- (2) Accessible dwelling units referenced in ¶¶ 12(b)(i)(1) and 12(b)(ii)(1) above shall, to the maximum extent

feasible and subject to reasonable health and safety requirements, be distributed throughout projects and sites, and shall be available in a comparable range of sizes and amenities. 24 C.F.R. § 8.26.

- (3) When rehabilitating a unit, the resident and Contract Administrator may request alterations to units or common areas where no alterations were contemplated. If the request is reasonable in the context of the individual's disability, the owner must address the need through either reasonable accommodations or structural modifications unless it constitutes an undue financial and/or administrative burden.
 - (4) Existing housing must meet the "program access" standard, and comply with the transition plan requirements and deadlines described in 24 C.F.R. § 8.24. In choosing among available methods for meeting "program access," priority must be given to methods that offer programs and services in the most integrated setting possible. It is not required that each existing facility be accessible if other methods are effective (i.e, when the property is viewed in its *entirety*, it must be readily accessible to and usable by individuals with disabilities). 24 C.F.R. §§ 8.21(c), 8.24(a) and 8.24(b).
- c. Reasonable accommodations. Housing providers must make reasonable accommodations unless doing so would impose an undue financial or administrative burden. *See, e.g., Majors v. Housing Authority of DeKalb County, Ga.*, 652 F.2d 454, 457 (5th Cir. 1981) (public housing had to waive its "no pets" policy for a person with a mental disability who had a companion animal); *Green v. Housing Authority of Clackamas County*, 994 F.Supp. 1253 (D.Or.1998) (similar result regarding hearing assistance animal); *City Wide Associates v. Penfield*, 564 N.E.2d 1003 (Mass.1991) (eviction violated § 504)..
- d. Special Programs.
- i. Homeownership programs. 24 C.F.R. § 8.29.

- (1) Units must be made accessible if the expected occupant's disability so requires;
 - (2) The buyer may be permitted to depart from applicable accessibility standards to accommodate his/her disability;
 - (3) Costs for making the home comply with accessibility standards (UFAS) may be included in the mortgage amount;
 - (4) Costs above the limit may be passed on to the buyer.
- ii. Rental rehabilitation programs - each grantee or state recipient must give priority to the selection of projects that will result in accessible dwelling units. 24 C.F.R. § 8.30.
 - iii. Historic properties - accessibility need not be provided if alterations would substantially impair the significant historic features of the property or result in undue financial and administrative burdens. 24 C.F.R. § 8.31.
 - iv. Housing certificate/voucher programs. 24 C.F.R. § 8.28.
Compare 24 C.F.R. § 92.209.
 - (1) The recipient must insure that the notice of availability of housing assistance reaches individuals with disabilities;
 - (2) Owners having accessible units should be actively encouraged to participate;
 - (3) When considering requests for extensions from individuals with disabilities, grantees should take into account the special problems associated with locating an accessible unit;
 - (4) Exceptions to the fair market rents may be necessary to allow Section 8 certificate holders to rent accessible units;

- (5) Grantees must enter into HUD-approved contracts with participating owners that include assurances of non-discrimination on the basis of disability.

13. Transportation.

- a. DOJ suspended the coordinating guidelines prohibiting disability discrimination in transportation programs and activities. 46 Fed. Reg. 40687-01 (Aug. 11, 1981).
- b. Current Dep't of Transportation regulations require, among other things:
 - i. Compliance with ADA Title II transportation regulations. 49 C.F.R. § 27.19;
 - ii. Accessible airport facilities, 49 C.F.R. § 27.71, aircraft boarding assistance by airport personnel and equipment, 49 C.F.R. § 27.72, and appropriate actions with regard to service animals, Guidance Concerning Service Animals in Air Transportation, 61 Fed. Reg. 56409, 56420 (Nov. 1, 1996); and
 - iii. Accessible highway facilities such as rest areas, curb cuts, and pedestrian walkways. 49 C.F.R. § 27.75.

14. Enforcement of § 504 rights.

- a. Administrative enforcement.
 - i. Each agency is responsible for enforcing its own regulations.
 - ii. Administrative complaints must be filed within 180 days of the action complained of. *See* 28 C.F.R. § 42.107(b) (Title VI regulations).
 - iii. Other information on how to file § 504 complaints with the appropriate agency may be available from the Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66738, Washington, D.C. 20035-6738, (800) 514-0301 (voice), (800) 514-0383 (TTY), info at

<<http://www.usdoj.gov/crt/ada/adahom1.htm>>.

- iv. Administrative remedies can include termination of Federal financial assistance, 29 U.S.C. § 794a, for the particular program or part thereof that is not in compliance, 28 C.F.R. § 42.108(c).
 - v. Administrative enforcement has been lacking, and none of the agencies examined in a recent NCD study have initiated funding terminations to enforce § 504 against grantees that violate the law. National Council on Disability, *Rehabilitating Section 504*, Introduction (Feb. 12, 2003), online at <http://www.ncd.gov/newsroom/publications/section504.html>.
- b. Exhaustion of administrative remedies.
- i. It is generally not necessary to file a complaint with a Federal agency or to receive a “right-to-sue” letter before going to court. *See, e.g., Freed v. Consolidated Rail Corp.*, 201 F.3d 188 (3d Cir. 2000); *Smith v. Barton*, 914 F.2d 1330, 1338 (9th Cir. 1990); *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981); *Swenson v. Lincoln County School Dist. No. 2*, 260 F.Supp.2d 1136, 1147 (D.Wyo. 2003); *Shariff v. Artuz*, 2000 WL 1219381, at *3 (S.D.N.Y. Aug. 28, 2000). *See also* Education & Labor report at 98; S. Rep. No. 116, 101st Cong., 1st Sess., at 57-58 (1989). *Compare Hornstine v. Township of Moorestown*, 263 F.Supp.2d 887, 900 (D.N.J. 2003) (state exhaustion rules not applicable to § 504 claim); *Zamora-Quezada v. HealthTexas Medical Group of San Antonio*, 34 F.Supp.2d 433, 439-440 (W.D.Tex. 1998) (plaintiffs suing Medicare HMO for violation of § 504 did not need to exhaust Medicare administrative remedies, because they were not seeking relief under the Medicare Act).
 - ii. Some exceptions exist:
 - (1) Employment claims against federal agencies. See ¶ 7(j)(i)(3) above, and ¶ 16(b)(iii) below.

- (2) The Prison Litigation Reform Act requires administrative exhaustion of certain claims against prisons. *See, e.g., Hicks v. Monteiro*, 2002 WL 654086 (N.D.Cal. Apr. 11, 2002).
 - (3) IDEA requires exhaustion of IDEA procedures before filing a civil action under § 504 seeking relief that is also available under IDEA. 20 U.S.C. § 1415(i). Courts reach differing results in interpreting this provision. *Compare Polera v. Board of Educ. of Newburgh Enlarged City School Dist.*, 288 F.3d 478 (2d Cir. 2002) (exhaustion required even though plaintiff sought compensatory damages not available under IDEA, because the school's failures were related to FAPE), *with Hornstine v. Township of Moorestown*, 263 F.Supp.2d 887, 901-903 (D.N.J. 2003) (no exhaustion required for claim seeking damages and injunction allowing plaintiff to serve as valedictorian, because the claims had nothing to do with FAPE).
 - (4) According to some courts, administrative remedies must be exhausted in cases against the federal government. *See, e.g., Poynter v. U.S.*, 55 F.Supp.2d 558, 563 (W.D.La. 1999).
- c. Section 504 may also be enforced through private lawsuits. *Barnes v. Gorman*, 536 U.S. 181, 184-185 (2002).
- i. A common formulation of the elements of a case involving discrimination in services under § 504, as described in *Lesley v. Chie*, 250 F.3d 47, 53 (1st Cir. 2001), might include proof that the plaintiff:
 - (1) has a disability;
 - (2) sought services from a federally funded entity;
 - (3) was “otherwise qualified” to receive those services; and

- (4) was denied those services “solely by reason of her ... disability.”
- ii. A common formulation of the elements of an employment discrimination case under § 504, as described in *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993), includes proof that the plaintiff:
 - (1) has a disability;
 - (2) was otherwise qualified to perform the position in question (with or without a reasonable accommodation);
 - (3) worked for a “program or activity” that received federal financial assistance;
 - (4) was adversely treated solely because of his handicap. Note, however, that courts are divided on whether or not the plaintiff must show “sole cause.” See ¶ 7(i) above.
 - iii. Statute of limitations
 - (1) There is no express statute of limitation in § 504, so the most analogous state law statute of limitations applies.
 - (a) This is typically the statute of limitations for personal injury claims. *See, e.g., Hickey v. Irving Independent School Dist.*, 976 F.2d 980, 982-983 (5th Cir. 1992) (Texas two-year personal injury statute applied); *Swenson v. Lincoln County School Dist. No. 2*, 260 F.Supp.2d 1136, 1142-1143 (D.Wyo. 2003) (adopting state’s 4-year personal injury statute, and rejecting use of state law that attempted to set a 2-year limitations period for all federal law claims).
 - (b) *Compare Smith v. Isle of Wight County School Bd.*, 284 F.Supp.2d 370, 374-376 (E.D.Va. 2003) (one-year statute provided in the Virginia Rights of Persons with Disabilities Act applies, as does 180-

day notice provision in that state law).

- (2) State tolling rules (excusing delays beyond the limitations period) are also applicable. *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001) (involving ADA Title III and § 504 claims); *Harris v. Hegmann*, 198 F.3d 153, 156-157 (5th Cir. 1999) (§ 1983 case); *Wagner v. Texas A & M University*, 939 F.Supp. 1297, 1316-1317 (S.D.Tex. 1996) (similar). Compare *Smith v. Isle of Wight County School Bd.*, 284 F.Supp.2d 370, 376-377 (E.D.Va. 2003) (state law tolled limitations during minority, but state law permitted no such tolling of the pre-suit notice requirement held applicable to § 504 claims).
- iv. State pre-suit notice requirements. Compare *Smith v. Isle of Wight County School Bd.*, 284 F.Supp.2d 370, 374-376 (E.D.Va. 2003) (applying 180-day notice provision from Virginia Rights of Persons with Disabilities Act), with *Hornstine v. Township of Moorestown*, 263 F.Supp.2d 887, 897-898 (D.N.J. 2003) (rejecting application of 180-notice requirement in state tort claims act to § 504 claim).
- d. Intent is not necessary to state a claim under § 504, *Washington v. Indiana High School Athletic Ass'n, Inc.*, 181 F.3d 840, 847 (7th Cir.), cert. denied, 528 U.S. 1046 (1999), and discrimination may be established by evidence that:
 - i. The defendant intentionally acted on the basis of the disability;
 - ii. The defendant refused to provide a reasonable modification; or
 - iii. The defendant's rule disproportionately impacts disabled people.

15. Remedies.

- a. Generally, § 504 expressly provides the same remedies as Title VI of the Civil Rights Act of 1964. 29 U.S.C. § 794a(a)(2); *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

b. Actual damages

- i. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992), the Supreme Court held that, where a private right of action exists, “any appropriate relief” is available under federal statutes (specifically Title IX), expressly including compensatory damages. Because Title IX, like § 504, adopts the remedies of Title VI, the applicability of *Franklin* to § 504 cases seems clear. Compare *Barnes v. Gorman*, 536 U.S. 181 (2002).
- ii. The great majority of § 504 cases since *Franklin* to decide the issue have held that compensatory damages are available. See, e.g., *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 789 (6th Cir. 1996) (en banc) (citing cases, and noting that every circuit that has reached issue after *Franklin* has held that compensatory damages are available under § 504); *Kilroy v. Husson College*, 959 F.Supp. 22 (D.Maine 1997); *DeLeo v. City of Stamford*, 919 F.Supp. 70 (D.Conn. 1995). See also 145 ALR Fed. 353, although any cases decided prior to *Franklin* that hold that damages are unavailable are suspect. Note, however, that the recoverability of mental anguish damages is less clear. See, e.g., *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 126-127 (1st Cir. 2003) (suggesting that mental anguish may be recoverable if there are other economic losses); *Witbeck v. Embry-Riddle Aeronautical University, Inc.*, 269 F.Supp.2d 1338 (M.D.Fla. 2003) (the only compensatory damages available are those in the nature of expenses; damages for mental anguish are not available).
- iii. Most courts require plaintiffs to prove intentional conduct in order to recover money damages. See, e.g., *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 126 (1st Cir. 2003); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138-1139 (9th Cir. 2001) (using deliberate indifference standard); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999) (same); *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2d Cir. 1998) (same), vacated on other grounds, 527 U.S. 1031 (1999); *Bravin v. Mount Sinai Med. Center*, 58

F.Supp.2d 269, 273-274 (S.D.N.Y. 1999). *Compare Ferguson v. City of Phoenix*, 157 F.3d 668 (9th Cir. 1998) (finding no evidence of intent in part because of lack of notice to defendant, and its diligent efforts to remedy problems once it was notified); *Schultz v. YMCA*, 139 F.3d 286 (1st Cir. 1998) (YMCA is not automatically immune simply because its standards were adopted in good faith or based on widespread assumptions, but court rejects awarding damages for emotional distress in a debatable case on the merits with no animus or other concrete impact).

- iv. Note that none of the above are employment cases, which have their own formulas for proving “intentional” conduct. *See, e.g., Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 (2000) (ADEA case describing “pretext” method of proving intentional discrimination).
- v. While there are caps on the damages recoverable in employment cases brought under § 501, there are no caps on damages in cases under § 504. 42 U.S.C. § 1981a(a)(2); *Roberts v. Progressive Independence, Inc.*, 183 F.3d 1215, 1223-1224 (10th Cir. 1999).
- vi. States’ generally do *not* have immunity from claims for money damages under § 504.
 - (1) Most lower courts since *Garrett* have held that Congress cannot abrogate the states’ immunity from damages under the Rehabilitation Act. *See, e.g., Garcia v. SUNY Health Sciences Center of Brooklyn*, 280 F.3d 98, 113 (2d Cir.2001); *Garrett v. University of Alabama at Birmingham Bd. of Trustees*, 276 F.3d 1227, 1228-1229 (11th Cir. 2001) (on remand); *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000). *But cf. Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1185-1186 (9th Cir. 2003) (not deciding the issue, but suggesting that Congress validly abrogated states’ immunity).

- (2) But most lower courts have also found that under Congress' Spending Clause authority, the states validly waive their 11th Amendment immunity from § 504 claims by accepting federal funds conditioned on such a waiver. *See, e.g., Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 127-130 (1st Cir. 2003); *Pugliese v. Dillenberg*, 346 F.3d 937 (9th Cir. 2003) (per curiam); *Doe v. Nebraska*, 345 F.3d 593 (8th Cir. 2003); *Garrett v. Univ. of Ala. Bd. of Trustees*, 344 F.3d 1288 (11th Cir. 2003); *A.W. v. Jersey City Public Sch.*, 341 F.3d 234 (3rd Cir. 2003), *Bruggeman v. Blagojevich*, 324 F.3d 906, 912 (7th Cir. 2003); *Robinson v. Kan.*, 295 F.3d 1183, 1190 (10th Cir. 2002), *cert. denied*, 123 S.Ct. 2574 (2003); *Carten v. Kent State University*, 282 F.3d 391, 398 (6th Cir. 2002).
- (3) *Compare Garcia v. SUNY Health Sciences Center of Brooklyn*, 280 F.3d 98, 113-115 (2d Cir.2001) (no knowing waiver because at the time the state accepted funds, Title II was reasonably understood to abrogate state's sovereign immunity under Commerce Clause authority, so a state accepting federal funds conditioned on a waiver of immunity from § 504 claims, which proscribed the same conduct, could not have understood that it was actually giving up anything). Note that although it could be argued from the *Garcia* analysis that the date by which a state should have known it had something meaningful to waive was the date of the Supreme Court's decision in *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996), at least one court has held that the relevant date is the date of the *Garrett* decision in 2001. *Smith v. State University of New York*, 2003 WL 1937208, at *6-7 (N.D.N.Y. Apr. 23, 2003).
- (4) In the Fifth Circuit, one panel agreed with the analysis in *Garcia*, *Pace v. Bogalusa City School Bd.*, 325 F.3d 609 (5th Cir. 2003), but the court subsequently granted rehearing en banc in that case, *Pace v. Bogalusa City School Bd.*, 339 F.3d 348 (5th Cir. 2003) (en banc), and in all of the other cases that had relied on it. Under Fifth

Circuit rules, those panel opinions are thus vacated. Fifth Cir. Loc. R. 41.3. The en banc court has not been decided the case.

- vii. Even if the states have not validly waived immunity under § 504, state officials may still be sued for prospective relief under the *Ex parte Young* theory. See, e.g., *Henrietta D. v. Bloomberg*, 331 F.3d 261, 287-289 (2d Cir. 2003); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1187-1189 (9th Cir. 2003); *Bruggeman v. Blagojevich*, 324 F.3d 906, 912-913 (7th Cir. 2003); *Robinson v. Kan.*, 295 F.3d 1183 (10th Cir. 2002), *cert. denied*, 123 S.Ct. 2574 (2003).
- viii. Damages are not available, however, against the federal government or its agencies under § 504, because the Rehabilitation Act does not waive the federal government's sovereign immunity from damage claims. *Lane v. Pena*, 518 U.S. 187 (1996).
- c. Punitive damages are not available. *Barnes v. Gorman*, 536 U.S. 181 (2002). Although *Barnes* involved a government defendant, its analysis is broad enough to be extended to private recipients under § 504, and some courts have done so. See, e.g., *Witbeck v. Embry-Riddle Aeronautical University, Inc.*, 269 F.Supp.2d 1338 (M.D.Fla. 2003).
- d. Equitable and injunctive relief. See, e.g., *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984) (back pay available); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280-284 (2d Cir. 2003) (injunction requiring reasonable accommodation was appropriate); *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998) (trial court abused its discretion by not ordering mandatory injunctive relief after finding violations of the ADA and the Rehabilitation Act at the county courthouse; once success on the merits is shown, three factors should be considered in determining whether injunctive relief is appropriate: the threat of irreparable harm to the plaintiff, the harm to be suffered by the defendant if the injunction is granted, and the public interest at stake); *Chalk v. United States Dist. Court Cent. Dist. of California*, 840 F.2d 701 (9th Cir. 1988); *Jackson v. State of Maine*, 544 A.2d 291, 299 (Maine 1988).

- e. In employment cases, in addition to the remedies described above, courts have also granted:
 - i. Back pay. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984).
 - ii. Reinstatement. *Chalk v. United States Dist. Court Cent. Dist. of California*, 840 F.2d 701 (9th Cir. 1988).
 - iii. Front pay. *Arline v. School Board of Nassau County*, 692 F.Supp. 1286 (M.D. Fla. 1988) (opinion on remand).
- f. Attorneys fees
 - i. Available to prevailing party. 29 U.S.C. § 794a(b).
 - ii. Supreme Court has restricted “catalyst” attorneys fees, purportedly based on Congressional intent. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001).

16. Some other parts of the Rehabilitation Act.

- a. Title I
 - i. Title I of the Rehabilitation Act authorizes grants to assist states in helping handicapped individuals prepare for and engage in gainful employment. 29 U.S.C. § 720(a).
 - ii. Title I requires states that wish to obtain federal funds to submit a plan for vocational rehabilitation (VR) services that provides, at a minimum, for the specified VR services listed in 29 U.S.C. § 721(a)(8).
 - iii. Title I now expressly provides for a private right of action to review adverse decisions “in any State court of competent jurisdiction or in a district court of the United States of competent jurisdiction without regard to the amount in controversy.” 29 U.S.C. § 722(c)(5)(J). Prior to the enactment

of this provision, some courts had held that vocational rehabilitation clients could enforce parts of Title I under 42 U.S.C. § 1983. *See, e.g., Mallett v. Wisconsin Div. of Vocational Rehabilitation*, 130 F.3d 1245, 1251-1257 (7th Cir. 1997) (enforcing 29 U.S.C. § 722); *Marshall v. Switzer*, 10 F.3d 925 (2d Cir.1993) (enforcing 29 U.S.C. § 721). *Compare Doe v. Pfrommer*, 148 F.3d 73, 78, 80-81 (2d Cir. 1998) (§ 1983 can be used to challenge a state policy that conflicts with Title I, but it cannot be used to enforce a state regulation that does not conflict with Title I). Because those decisions were based in part on the lack of a private right of action under prior law, their viability may now be questioned.

b. § 501

- i. Section 501 requires affirmative action and nondiscrimination in employment by Federal agencies of the executive branch. 29 U.S.C. § 791. The regulations also require that the federal government be a “model employer.” 29 C.F.R. § 1614.203(a).
- ii. Liability standards
 - (1) The standards used in claims under § 501 are discussed in the January 2004 Legal Fact Sheet from NAPAS entitled “Understanding Sections 501, 503, and 504 of the Rehabilitation Act,” prepared for the Disabilities Law Project by the Bazelon Center for Mental Health Law, and available from NAPAS.
 - (2) In general, the standards used in § 501 cases that do not involve affirmative action are those in Title I of the ADA. 29 U.S.C. § 791(g); 29 C.F.R. § 1614.203(b).
 - (3) As to the reasonable accommodation obligation, see also the “Policy Guidance On Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation,” (EEOC Oct. 20, 2000), online at http://www.eeoc.gov/policy/docs/accommodation_procedures.html

- iii. Exhaustion of administrative remedies required, through an EEO/EEOC process. 29 C.F.R. Part 1614. Alternatively, a federal employee can go through the Merit System Protection Board (MSPB), 5 U.S.C. §§ 7701 et seq.; 5 C.F.R. Part 1201, or a collectively bargained grievance and arbitration process.
- c. § 503
- i. Section 503 requires affirmative action and prohibits employment discrimination by Federal government contractors and subcontractors with contracts of more than \$10,000. [Note that as used in § 503, contractor means a party to a procurement contract; such a contract is not considered Federal financial assistance for purposes of § 504. See ¶ 3(d)(iii) above.]
 - ii. Most of the cases interpreting § 503 hold that there is no private right of action under it. *See, e.g., Ortega v. Rhone-Poulenc of Wyoming, L.P.*, 842 F.Supp. 488 (D.Wyo. 1994).
 - iii. § 503 is enforced by Office of Federal Contract Compliance Programs, U.S. Department of Labor, 200 Constitution Avenue, NW, Room C-3325 Washington, D.C. 20210, (202) 693-0106 (voice/relay), info at <http://www.dol.gov/esa/ofccp/index.htm>.
 - iv. The federal government may exempt certain entities from the requirements of § 503. *See, e.g., Executive Order 11246* (Sept. 30, 2003).
- d. § 508
- i. Applies to electronic and information technology developed, maintained, procured, or used by the Federal government.
 - ii. Requires Federal electronic and information technology to be accessible to people with disabilities, including employees and members of the public.
 - iii. For more information on § 508, contact:

- (a) U.S. General Services Administration, Center for IT Accommodation (CITA), 1800 F Street, N.W., Room 1234, MC:MKC, Washington, DC 20405-0001, (202) 501-4906 (voice), (202) 501-2010 (TTY), info at <<http://www.section508.gov/>>.
- (b) U.S. Architectural and Transportation, Barriers Compliance Board, 1331 F Street, N.W. Suite 1000, Washington, DC 20004-1111, 800-872-2253 (voice), 800-993-2822 (TTY), info at <<http://www.access-board.gov/>>.