

Emerging Section 504 and the ADA: Slumbering Giants Awaken

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2015 Leadership Symposium
June 24-25

What About the "Serious"?
The ADA and Section 504 have been interpreted to require a "serious" disability. This slide discusses the implications of this requirement and provides examples of conditions that may or may not be considered "serious".

What About the "Substantial"?
The ADA and Section 504 have been interpreted to require a "substantial" disability. This slide discusses the implications of this requirement and provides examples of conditions that may or may not be considered "substantial".

What is Section 504?
Title V, Section 504 of the Rehabilitation Act of 1973
Requires that programs with a disability cannot receive benefits or funds, or be denied admission, unless they are not accessible to persons with disabilities.

Substantial Impairment of Major Life Activities
The ADA and Section 504 have been interpreted to require a "substantial" impairment of a "major life activity". This slide discusses the implications of this requirement and provides examples of conditions that may or may not be considered "substantial".

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What does Section 504 Require?

Child Find: All public schools are required to identify, locate, and evaluate all children with disabilities who are in need of special education services, regardless of whether the child is enrolled in school.

FAPE: Each child with a disability must be provided with a free appropriate public education (FAPE) to the maximum extent appropriate with children who are not disabled, in the state educational agency (SEA) jurisdiction.

FREE FOR APPROPRIATE EDUCATION (FAPE) REQUIREMENTS:

- 1. Individualized Education Program (IEP)
- 2. Appropriate
- 3. Free
- 4. Public
- 5. Education

Free Appropriate Public Education (FAPE)

FAPE is a requirement of the Rehabilitation Act of 1973, Section 504, and the Individuals with Disabilities Education Act (IDEA). It is the right of every child with a disability to receive a free appropriate public education (FAPE) in the least restrictive environment (LRE) appropriate to the child's needs.

What is Section 504?

Title V, Section 504 of the Rehabilitation Act of 1973

General Principle: Persons with disabilities cannot be denied benefits or in any way be discriminated against in a program receiving federal financial assistance.

Who does Section 504 cover?

1. Employment practices
2. Program accessibility (availability)
3. Physical accessibility, and auxiliary aids
4. Post secondary education
5. Health, welfare, and social services

What qualifies as discrimination?

1. Denial of participation
2. Denial of benefits
3. Subjecting to discrimination

Regulation on Discrimination (28 CFR 101.33.1-101.33.10)

Substantive Requirements of Section 504 and the ADA

Who is protected?

This covers whether individual with a disability is... shall, solely by reason of his or her disability be excluded from the participation in, the denial of the benefit of, or the substantial discrimination on the enjoyment or denial of the benefits of any program or activity receiving federal financial assistance.

Who and how do the "substantive" or "prohibited" requirements that constitute Title V or VI, receive the benefits of an individual, a record of such requirements, or being subjected to any such action or impairment?

Program or activity: Includes "local, state, and federal agencies; that, part or all of them are or have been or are to be or are receiving federal financial assistance; and any Federal agency."

Enforcement in Federal Court

Section 504 of the Rehabilitation Act of 1973 is enforced in Federal Court. The Supreme Court has held that Section 504 is a federal statute that creates a federal cause of action for individuals who are discriminated against on the basis of their disability. This means that individuals who are discriminated against on the basis of their disability can sue their employer or service provider in Federal Court for damages and injunctive relief.

Section 504 and the ADA

Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA) are two federal laws that prohibit discrimination against individuals with disabilities. Section 504 applies to programs and activities that receive federal financial assistance, while the ADA applies to a broader range of public accommodations and services. Both laws require entities to provide reasonable accommodations and modifications to ensure that individuals with disabilities have equal access to opportunities and services.

Discrimination Under Section 504 and the ADA

Title V of the Rehabilitation Act of 1973: This statute prohibits discrimination on the basis of disability in any program or activity that receives federal financial assistance. It covers a wide range of areas, including employment, education, and public services.

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The Americans with Disabilities Act (ADA): This statute prohibits discrimination on the basis of disability in public accommodations, employment, and telecommunications. It covers a wide range of areas, including public places, workplaces, and telecommunications services.

The Americans with Disabilities Act

The ADA is a federal law that prohibits discrimination against individuals with disabilities in all areas of life, including employment, public accommodations, and telecommunications. It is the most comprehensive civil rights law in America, and it has helped to ensure that individuals with disabilities have equal access to opportunities and services.

Questions?

What is Section 504?

Title V, Section 504 of the Rehabilitation Act of 1973

General Principle: Persons with disabilities cannot be denied benefits or in any way be discriminated against in an program receiving federal financial assistance.

What does 504 cover?

1. Employment practices
2. Program and activity accessibility
3. Preschool, elementary, and secondary education
4. Post-secondary education
5. Health, welfare, and social services



What qualifies as discrimination?

1. Exclusion from participation
2. Denial of benefits
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Eligibility for Section 504

"Disability": a physical or mental impairment that substantially limits one or more major life activities, a record of the impairment, or being regarded as having such an impairment.

The expanded ADA definition of "disability" is now incorporated into Section 504!
"Major life activities" now includes (but is not limited to):

- Learning
- Reading
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting
- Bending
- Speaking
- Breathing
- Caring for oneself
- Performing manual tasks
- Concentrating
- Thinking
- Communicating
- Working

Eligibility for Section 504

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What does Section 504 Require?

"Child Find":

- *Public* elementary and secondary schools *must* annually undertake to identify and locate *every* qualified person in the jurisdiction not receiving a public education, and take *appropriate steps* to notify children with disabilities and their parents or guardians of their duties under Section 504.

"FAPE":

- Public schools *must* provide a **FAPE** to each qualified person in the jurisdiction regardless of the nature or severity of the disability.
- An IEP that complies with IDEA is one method of meeting the FAPE standard. The IEP *must comply* with IDEA **AND** meet the equally adequate standard of Section 504.

**FREE FOR
APPROPRIATE STUDENTS
PUBLIC WITH
EDUCATION DISABILITIES:**

REQUIREMENTS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Other Regulations

Students with disabilities must be educated with non-disabled students to the *maximum extent appropriate!*

The LRE requirement applies to academic, non-academic, and extracurricular activities. Facilities used for students with disabilities must be comparable to other facilities.

Also required...



Other Regulations

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The LRE requirement applies to academic, non-academic, and extracurricular activities. Facilities used for students with disabilities must be comparable to other facilities.

Also required...

Evaluation

An evaluation must be conducted for any person *believed* to have a disability and a need for special education *before an initial placement and before any significant change in placement.*



- Schools **must**:
- Use tests and materials valid for the specific purpose
 - Have trained personnel administer the evaluation
 - Use evaluations that are in accordance with publisher instructions
 - Tailor the evaluation to assess areas of educational need (not merely IQ)
 - Select and administer evaluations to ensure accurate reflection of aptitude or achievement or other factors, rather than reflecting impaired abilities
 - Conduct periodic re-evaluations if special education and related services are provided

Placement

- Consider information from a variety of sources, including aptitude and achievement, teacher recommendations, physical condition, social or cultural background and adaptive behavior
- Document all information from such sources
- Ensure placement decisions are made by a group of persons knowledgeable about the child and about the meaning of the evaluation data and placement options
- Ensure the placement is in accord with LRE principles



Procedural Safeguards

Schools **must** provide:

- Notice
 - An opportunity to examine the relevant records
 - An impartial hearing with parent participation and counsel
 - A review procedure
- Compliance with IDEA procedural safeguards is a means to satisfy these requirements.

Equal Opportunity to Participate

Nonacademic and extracurricular activities **must** afford students with disabilities equal opportunity to participate in...



- Counseling
- Physical recreational activities
- Transportation
- Health Services
- Recreational activities
- Social interest groups
- Sponsored clubs
- Referrals to outside agencies
- Student employment
- Physical education courses
- Interscholastic club, or intramural activities

*Activities may be separate if they are consistent with LRE and qualified students can compete for teams or participate in inclusive activities.

Other

Preschool and adult education **may not exclude** handicapped persons on the basis of disability.

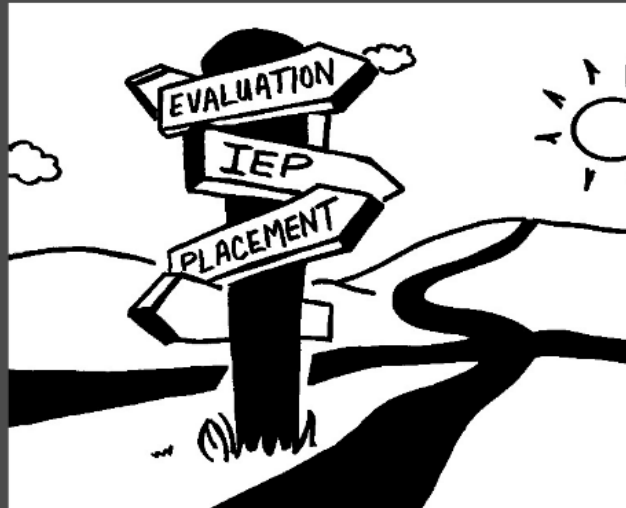


Private school recipients **may not exclude** students with disabilities if, with minor adjustments, a FAPE can be provided. These recipients may not charge the students more unless it is justified by a substantial increase in cost.



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Substantive Requirements of Section 504 and the ADA

Who is protected?:

"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..."

504 and ADA define "*Disability*" as: "a physical impairment that substantially limits one or more major life activities of an individual, a record of such impairment, or being regarded as having such an impairment."

"*Program or activity*" includes "local educational agencies." Thus, 504's anti-discrimination mandate applies to public school districts that receive any Federal funding.

The Americans with Disabilities Act



The **ADA Amendments Act of 2008** (ADAAA) reversed the previously unjustified narrowing of the ADA to reflect the undeniable Congressional intent to ensure the broadest possible reading of the ADA to eliminate all discrimination against individuals with disabilities. These definitional changes also apply to Section 504.

"The Congress finds that...physical or mental disabilities in no way diminish a person's right to participate in all aspects of society, yet many people with...disabilities have been precluded from doing so because of discrimination..."



What Changes did the ADAAA Make?



- 1. Rejects the high standards** imposed by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*, 534 U.S. 184 (2002) (specifically rejecting the idea that the impairment of a major life activity should be determined by a consideration of the "ameliorative effects of mitigating measures")
- 2.** Clarifies that **the intended scope of the ADA is broad and inclusive** and provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"
- 3. Removes** what the Court had determined was **limiting language**: "43,000,000 Americans have one or more physical or mental disabilities" and "individuals are a discrete and insular minority" and replaces it with more **broad and inclusive language**
- 4.** Notes that the EEOC's ADA regulations defining "substantially limits" as "significantly restricted" are expressing a standard that is too high and inconsistent with congressional intent and requires the EEOC to revise the definition consistent with the Act

Discrimination Under Section 504 and the ADA

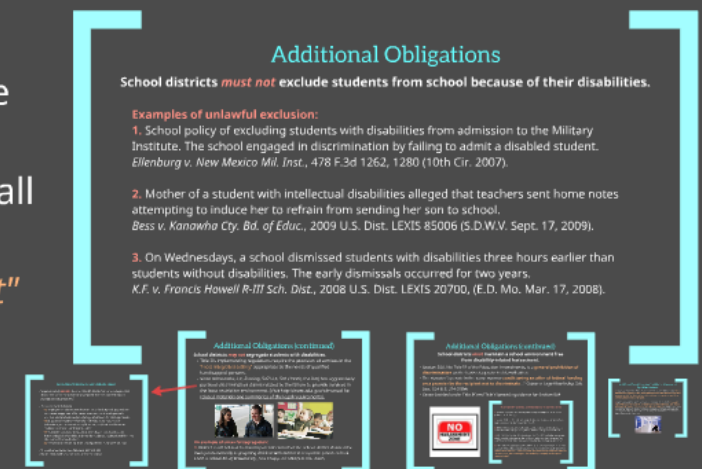
Title II of the ADA: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

Regulated by the Department of Education

Application of the Section 504 FAPE Obligation

Mark H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008).

- Parents sued HDOE and school officials for *failing to provide appropriate educational services* to their daughter with autism
- **District court:** Section 504 does not support a claim for violations of the IDEA, and no private action under 504
- **Ninth Circuit:** *reversed based on a clear congressional intent* to preserve all remedies under Section 504 for acts that violated both 504 and IDEA
- The FAPE requirements in 504 and the ADA are "*overlapping but different*"
- Reversed and remanded for consideration of whether the agency had violated the FAPE requirement in 504



Additional Obligations

School districts **must not** exclude students from school because of their disabilities.

Examples of unlawful exclusion:

1. School policy of excluding students with disabilities from admission to the Military Institute. The school engaged in discrimination by failing to admit a disabled student. *Ellenburg v. New Mexico Mil. Inst.*, 478 F.3d 1262, 1280 (10th Cir. 2007).

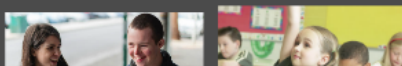
2. Mother of a student with intellectual disabilities alleged that teachers sent home notes attempting to induce her to refrain from sending her son to school. *Bess v. Kanawha Cty. Bd. of Educ.*, 2009 U.S. Dist. LEXIS 85006 (S.D.W.V. Sept. 17, 2009).

3. On Wednesdays, a school dismissed students with disabilities three hours earlier than students without disabilities. The early dismissals occurred for two years. *K.F. v. Francis Howell R-III Sch. Dist.*, 2008 U.S. Dist. LEXIS 20700, (E.D. Mo. Mar. 17, 2008).

Additional Obligations (continued)

School districts **may not** segregate students with disabilities.

- Title II's implementing regulations require the provision of services in the "most integrated setting" appropriate to the needs of qualified handicapped persons.
- Since *Olmstead v. L.C. Zimring*, 527 U.S. 581 (1999), the DOJ has aggressively pursued discrimination claims related to the failure to provide services in the least restrictive environment. (Visit <http://www.ada.gov/olmstead> for related materials and summaries of the legal requirements).



Additional Obligations (continued)

School districts **must** maintain a school environment free from disability-related harassment.

- Section 504, like Title IX of the Education Amendments, is a **general prohibition of discrimination** on the basis of a protected classification
- The statutes "operate in the same manner **conditioning an offer of federal funding on a promise by the recipient not to discriminate.**" *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1994)
- Cases decided under Title IX and Title VI provide guidance for Section 504

Title IX and 504 cases that form the basis for harassment claims:
1. *Needles v. Gannett*, 704 F.2d 1015, 1016 (9th Cir. 1983); 704 F.2d 1015, 1016 (9th Cir. 1983).
2. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1994).

Additional Cases Discussing Liability for Harassment by Fellow Students

1. *Harmon v. Board of Education of the City of New York*, 1998 WL 10488 (S.D.N.Y. 1998). "Title IX prohibits harassment of a young girl by fellow students that is tolerated or reinforced by school authorities if it causes a girl to have a fear greater than that of other children who are in school."

2. *Amerson v. Madison Area Sch. Dist.*, 2011 WL 4341, 4344 (S.D. Ohio 2011). "The school district's failure to respond to harassment and the harassment continued, if any, may find that the response was clearly unreasonable. A school district is not liable for harassment if it can be shown that the response was clearly unreasonable."

3. *Amerson v. Madison Area Sch. Dist.*, 2011 WL 4341, 4344 (S.D. Ohio 2011). "The school district's failure to respond to harassment and the harassment continued, if any, may find that the response was clearly unreasonable. A school district is not liable for harassment if it can be shown that the response was clearly unreasonable."

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An example of unlawful segregation:

1. District court refused to dismiss parents' claim that the school district violated the law by automatically segregating children with autism in a separate private school. *L.M.P. v. School Bd. of Broward Cty.*, 516 F.Supp.2d 1294 (S.D. Fla. 2007).

DOJ ADA Settlement with Rhode Island

- "Approximately **450,000** individuals with intellectual or developmental disabilities spend their days in segregated sheltered workshops or segregated day programs"
- The agreement includes:
 - **1)** Employment placements that are individual, typical, pay at least minimum wage, and offer hours consistent with each person's abilities and preferences (an average of at least 20 hours per week)
 - **2)** Support services for when the individuals are not at work (education, volunteer activities, libraries, etc.) that use the same facilities as the rest of the population
 - **3)** Transition services for students with disabilities that include internships, job site visits, and mentoring (encouraging transition into the competitive workplace)
 - **4)** Redirection of funding from segregated to integrated settings
- This settlement enforces *Olmstead*, 527 U.S. 581
- Rhode Island will serve as a model for the nation

Additional Obligations (continued)

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Title IX and 504 cases that form the basis for harassment claims:

1. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992): Title IX authorizes private suits for damages.
2. *Gebser*, 524 U.S. 274.: Students subjected to sexual harassment by teachers may have a claim for damages under Title IX.
3. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999): Students subjected to sexual harassment by peers may have a claim for damages under Title IX.
4. *MP v. Ind. Sch. Dist. No. 721, New Prague*, 326 F.3d 975 (2003): Student-against-student disability harassment that creates a hostile educational environment constitutes discrimination and requires investigation and appropriate action.
5. *T.K. v. New York City Dep't of Educ.*, 779 F.Supp.2d 289, 308 (E.D.N.Y. 2011): This case summarizes the statutory bases for claims of disability-related harassment. **"Where the institution learns that disability harassment may have occurred, the institution must investigate the incident(s) promptly and respond appropriately."**

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"Where the institution learns that disability harassment may have occurred, the institution must investigate the incident(s) promptly and respond appropriately."

Additional Cases Discussing Liability for Harassment by Fellow Students

1. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998): **"Verbal harassment of a young child by fellow students that is tolerated or condoned in any way by adult authority figures is likely to have a far greater impact than similar behavior would on an adult."**
2. *Patterson v. Hudson Area Sch. Dist.*, 551 F.3d 438, 448 (6th Cir. 2009): **If a school takes some action in response to harassment but the harassment continues, a jury may find that the response was clearly unreasonable.** A school district is not shielded from liability if the district knows its responsive methods are ineffective against persistent harassment directed at a single student. This creates a genuine issue of material fact for a jury.



Retaliation and Interference

Retaliation: No person may discriminate against an individual for opposing an unlawful practice or for participating (in any way) in an investigation, proceeding, or hearing.

Interference: It is unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of his or her rights or the rights of another individual.



The **standard for retaliation claims** is the same for Section 504 and the ADA. *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1131 (10th Cir. 2010) and *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1324 (10th Cir. 1997).

- In the absence of direct evidence, plaintiffs may rely on the burden-shifting framework of *McDonnell Douglas Corp. v. Green*
- A prima facie case can be established by showing:
 - **1)** a protected employee action;
 - **2)** an adverse action by an employer either after or contemporaneous with the protected action; AND
 - **3)** a casual connection between the protected and adverse actions.

Enforcement in Federal Court

Administrative exhaustion is only necessary for a Section 504/ADA claim if they are subject to the exhaustion provision in IDEA.

Approaches to Exhaustion Requirements

"Relief-centered" approach: it does not matter whether the plaintiff could have sought relief under IDEA but whether a court could award the relief requested under IDEA. *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874 (9th Cir. 2011) and *H.W. v. Long Beach Unified Sch. Dist.*, No. 11-55595, 2012 U.S. App. LEXIS 17891 (9th Cir. August 23, 2012).. There are **three** circumstances where exhaustion is required. When the student seeks:

- 1) an IDEA remedy or the functional equivalent
- 2) prospective injunctive relief to alter an IEP or the educational placement of a student with disabilities
- 3) to enforce rights that arise as a result of a denial of FAPE

"Injury-centered" approach (7th and 10th Circuits): exhaustion is necessary unless the plaintiff has alleged injuries that the IDEA cannot redress to any degree. *McCormick v. Waukegan Sch. Dist. No. 60*, 374 F.3d 564, 568-69 (7th Cir. 2004) and *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002).

Chevron deference: courts rely on administrative agencies (i.e. the Department of Education) for guidance because, as they experts, they are more familiar with the subject matter.

- This is allowed by the Constitution, which allows for the delegation of authority to federal agencies.
- Congress requires the agencies to promulgate regulations.
- Those facing these issues should also look to these materials for guidance.

CART Cases:

K.M. v. Parkview Sch. Dist., 725 F.3d 1188 (9th Cir. 2013).

- Students with hearing disabilities requested CART (word for word transcription) in the classroom; both schools refused.
- Compliance with IDEA does not necessarily establish compliance with Title II of the ADA.
- The 9th Circuit affirmed the court's interpretation; the court accorded deference and used the brief to bolster the conclusion.

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CART Cases:

K.M. v. Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013):

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- **Compliance with IDEA does not necessarily establish compliance with Title II of the ADA**
- The DOJ filed an amicus brief supporting this interpretation: the court accorded deference and used the brief to bolster the conclusion



Dear Colleague Letter (DCL) and Frequently Asked Questions on Effective Communication

- Released Nov. 12, 2014
- Addresses a national issue regarding the education of students with significant communication needs
- "Title II **requires** schools to ensure that students with disabilities receive communication that is **as effective** as communication with others through the provision of appropriate auxiliary aids and services."
- The DCL cites *K.M. v. Tustin*, noting that schools may be required to provide auxiliary aids or services not required by IDEA in order to comply with Title II
- Schools must give "primary consideration" to the particular auxiliary aid or service requested by the person with the disability



Questions?

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Discrimination Under Section 504 and the ADA

Discrimination under Section 504 and the ADA occurs when a person with a disability is treated differently than a person without a disability because of their disability. This can happen in many ways, including in employment, education, and public accommodations.

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Section 504 of the Rehabilitation Act of 1973 (504) and the Americans with Disabilities Act (ADA) are two federal laws that prohibit discrimination against people with disabilities. Both laws apply to federal agencies, state and local governments, and private entities that receive federal funds or contracts.

Substantive Requirements of Section 504 and the ADA

Section 504 and the ADA have similar substantive requirements. Both laws prohibit discrimination against people with disabilities in employment, education, and public accommodations. The laws also require that people with disabilities be given equal opportunities to participate in programs and activities.

The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) is a federal law that prohibits discrimination against people with disabilities. The ADA applies to federal agencies, state and local governments, and private entities that provide public accommodations, services, and employment.

Questions?