

October 2017

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Recommended Citation

John A. Liekweg (1998) "The Americans With Disabilities Act, Section 504, And Church-Related Institutions," *The Catholic Lawyer*. Vol. 38 : No. 2 , Article 3.

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THE AMERICANS WITH DISABILITIES ACT, SECTION 504, AND CHURCH-RELATED INSTITUTIONS

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The Americans with Disabilities Act of 1990¹ (“ADA”) and the Rehabilitation Act of 1973² address discrimination on the basis of a disability. These statutes provide minimum guidelines to ensure that entities subject to the statutes provide for the needs of persons with disabilities. The two Acts often interrelate when applied to church-related institutions. These legal requirements impact the role of the Church as educator, employer, and provider of public services. This Article discusses the rights of individuals with disabilities and the legal obligations of church-related institutions to these individuals.³

Part I of this Article gives a broad overview of the ADA and discusses the obligations church-related institutions may have as employers and providers of public services. Part II discusses section 504 of the Rehabilitation Act of 1973 as applied to church institutions as educators and employers. This Article concludes that while it is important for church-related institutions to ensure compliance with these statutes, there also exists a moral dimension with regard to how church-affiliated institutions

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¹ 42 U.S.C. §§ 12101–12213 (1994). See discussion *infra* Part I, A-D.

² 29 U.S.C. § 794 (1994). See discussion *infra* Part II, A-C.

³ State laws prohibiting discrimination on the basis of disability are beyond the scope of this article. These laws, however, must be considered when analyzing issues in this area.

should relate to persons with disabilities. Consistent with the Church's teachings,⁴ our ultimate goal should be to find ways to enable Catholic institutions to become more inclusive and open to persons with disabilities, rather than simply counseling them on the minimum requirements of the law.

I. AMERICANS WITH DISABILITIES ACT (ADA)

A. General Overview

The Americans with Disabilities Act of 1990 was enacted on July 26, 1990.⁵ Its stated purposes include providing (i) "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"⁶ and (ii) "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."⁷

Structurally, the ADA consists of five titles.⁸ Generally, Ti-

⁴ See generally Joseph N. Perry, *Rights in Canon Law for Persons with Mental Disabilities*, 33 CATH. LAW. 131 (1990); *Guidelines for the Celebration of the Sacraments with Persons with Disabilities*, 25 ORIGINS 105 (1995); *Pastoral Statement on the Handicapped*, 8 ORIGINS 372 (1978).

⁵ The Act became effective on July 26, 1992. See 42 U.S.C. § 12111 (1994); *Brown v. General Tel. Co.*, 108 F.3d 208, 209 (9th Cir. 1997); see also H.R. REP. NO. 101-485 (II), at 23 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 304 (effective date of Title I is two years from enactment).

While Title I became effective on July 26, 1992, see *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 443 (1st Cir. 1997); *Graehling v. Village of Lombard*, 58 F.3d 295, 296 (7th Cir. 1995); *Burfield v. Brown, Moore & Flint, Inc.*, 51 F.3d 583, 588 (5th Cir. 1995), courts are split as to the date when Title II became effective. See *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, No. 96-16526, 1998 U.S. App. LEXIS 1398, at *9 (9th Cir. Feb. 3, 1998) (finding that Title II became effective on January 26, 1992); *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1529 (11th Cir. 1997) (determining that Title II became effective on the same date Title I became effective).

⁶ 42 U.S.C. § 12101(b)(1) (1994). See *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, No. 96-5375, 1998 U.S. App. LEXIS 888, at *11 (11th Cir. Jan. 22, 1998); *Duda v. Board of Educ.*, No. 97-2457, 1998 U.S. App. LEXIS 700, at *10 (7th Cir. Jan. 16, 1998); *Gerdes v. Swift-Eckrich, Inc.*, 125 F.3d 634, 637 (8th Cir. 1997); *Lightbourn v. County of El Paso*, 118 F.3d 421, 430 (5th Cir. 1997), cert. denied, 118 S. Ct. 700 (1998); *Jacques v. Clean-up Group*, 96 F.3d 506, 510 (1st Cir. 1996).

⁷ 42 U.S.C. § 12101(b)(2) (1994). See *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 732 (D. Md. 1996); *Stola v. Joint Indus. Bd.*, 889 F. Supp. 133, 136 (S.D.N.Y. 1995); *Raya v. Maryatt Indus.*, 829 F. Supp. 1169, 1174 (N.D. Cal. 1993).

⁸ For the text of the original Act, see *Americans with Disabilities Act of 1990*, Pub. L. No. 101-336, reprinted in 1990 U.S.C.C.A.N. (104 Stat.) 327. The original Act was divided into five titles. Most of the ADA is now found at 42 U.S.C. §§ 12101-

title I prohibits discrimination in employment practices on the basis of a disability.⁹ Title II prohibits discrimination in the provision of state and local government programs and services, including public transportation.¹⁰ Title III prohibits discrimination against individuals with disabilities in places of public accommodation and with regard to private services providers.¹¹ Title IV, amended by the Communications Act of 1934,¹² was enacted to improve telecommunications services for hearing-impaired and speech-impaired individuals.¹³ Title V contains rules of statutory construction and other miscellaneous provisions.¹⁴ In terms of the ADA's application to Catholic institutions, Title I, prohibiting discrimination in employment practices, is most directly relevant. Title II and Title III are also of importance and must be considered. Each of these Titles is discussed briefly below.

B. Title I - Employment

The general rule under Title I provides that "[n]o covered entity shall discriminate against a qualified individual ... because of the disability of such individual."¹⁵ This applies to all

12213 (1994). Title IV of the original act, however, can be found at 47 U.S.C. § 225 (1994) and 47 U.S.C. § 611 (1994).

⁹ See 42 U.S.C. §§ 12111-12117 (1994). See generally Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 454-64 (1991); Nancy L. Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMPLE L. REV. 471, 481-84 (1991); Bonnie P. Tucker, *The Americans with Disabilities Act of 1990: An Overview*, 22 N.M. L. REV. 13, 25-48 (1992); Robin Andrews, Comment, *The Americans with Disabilities Act of 1990: New Legislation Creates Expansive Rights for the Disabled and Uncertainties for Employers*, 21 CUMB. L. REV. 629, 639-46 (1991).

¹⁰ See 42 U.S.C. §§ 12131-12165 (1994). See generally Burgdorf, Jr., *supra* note 9, at 464-470; Jones, *supra* note 9, at 484-485; Tucker, *supra* note 9, at 50-64.

¹¹ See 42 U.S.C. §§ 12181-12189 (1994). See generally Paul Sullivan, Note, *The Americans With Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law*, 29 SUFFOLK U. L. REV. 1117 (1995); Burgdorf, Jr., *supra* note 9, at 470-81; Jones, *supra* note 9, at 485-86; Tucker, *supra* note 9, at 70-93; Andrews, *supra* note 9, at 632-634.

¹² See 47 U.S.C. §§ 151-612 (1994).

¹³ The two amendments to the Communications Act of 1934, definitions and closed-captioning of public service announcements, were codified at 47 U.S.C. § 225 (1994) and 47 U.S.C. § 611 (1994), respectively.

¹⁴ See 42 U.S.C. §§ 12201-12213 (1994).

¹⁵ 42 U.S.C. § 12112(a). See Ashley S. Heron, Note, *The Americans with Disabilities Act: Who Can Claim Its Protection?*, 48 ALA. L. REV. 1023, 1023-24 (1997) (discussing who is a "qualified individual").

aspects of the employment relationship, including recruiting and application procedures.¹⁶ Covered employers¹⁷ are required to make reasonable accommodations for the known disabilities of applicants and employees unless this concession would cause undue hardship.¹⁸

Title I contains two provisions specifically directed at religious entities. The first provision is modeled after the current exemption in Title VII of the Civil Rights Act of 1964. This provision allows religious organizations to give preference to members of their own denominations with regard to employment decisions.¹⁹ The second provision allows religious organizations to require that employees and applicants conform to the religious tenets of the organization.²⁰ For example, such a provision might be applied where an organization has a rule against the use of alcohol or illegal drugs.

An additional aspect of Title I, however, is unique to religious organizations. Legislative history indicates that Title I of

¹⁶ See *id.*

¹⁷ Employers covered by the ADA are those who are "engaged in an industry affecting commerce who [have] 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year" 42 U.S.C. § 12111(5)(A). Individuals who do not meet the definition of "employer" are not liable under the ADA. See *Fedor v. Illinois Dep't of Employment Sec.*, 955 F. Supp. 891, 894 (N.D. Ill. 1996); see also *Gonzales v. Garner Food Servs., Inc.*, 89 F.3d 1523, 1525 n.6 (11th Cir. 1996), *reh'g denied sub nom. Thomas v. Garner Food Servs., Inc.* 104 F.3d 373 (11th Cir. 1996), *cert. denied sub nom. Wood v. Garner Food Servs., Inc.* 117 S. Ct. 1822 (1997) (holding that former employee still receiving health benefits did not qualify for protection under ADA); *DeVito v. Chicago Park Dist.*, 83 F.3d 878, 880 (7th Cir. 1996) (determining that an individual who was reinstated in 1992 after a 1989 dismissal was an "employee" and thus protected under the ADA).

¹⁸ A "reasonable accommodation" is defined to include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities ...," 42 U.S.C. § 12111(9)(A), and "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B).

"Undue hardship" is defined as "an action requiring significant difficulty or expense" that requires consideration of at least four factors. 42 U.S.C. § 12111(10)(A). These factors include, "the nature and cost of the accommodation," 42 U.S.C. § 12111(10)(B)(i); "the overall financial resources of the facility ... [and] the effect on expenses and resources," 42 U.S.C. § 12111(10)(B)(ii); the overall financial resources, size of business, and "number type and location" of the facilities of the covered entity, 42 U.S.C. § 12111(10)(B)(iii); and "the type of operation or operations of the covered entity" 42 U.S.C. § 12111(10)(B)(iv).

¹⁹ See 42 U.S.C. § 12113(c)(1).

²⁰ See 42 U.S.C. § 12113(c)(2).

the ADA is to be interpreted in a manner consistent with Title VII of the Civil Rights Act of 1964 as it applies to the employment relationship between a religious organization and those who minister on its behalf.²¹ Beginning with *McClure v. Salvation Army*,²² courts have consistently interpreted Title VII as not applying to the relationship between a minister and his or her congregation.²³ Therefore, for example, it is unlikely that Title I of the ADA will be applied to situations concerning the assignment of priests by a diocese or the selection of candidates for the priesthood.

C. Title II - Public Services

Title II of the ADA prohibits discrimination on the basis of disability (i) in the services, programs, and activities of all state and local governments;²⁴ and (ii) in public transportation by bus

²¹ See H.R. REP. NO. 101-485, at 54 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 336.

²² 460 F.2d 553 (5th Cir. 1972). In *McClure*, the plaintiff was an officer, a position equivalent to that of a minister, in the Salvation Army. The court below determined that the Salvation Army was a "church" and the plaintiff an "ordained minister." See *McClure v. Salvation Army*, 323 F. Supp. 1100, 1106 (N.D. Ga. 1971). Plaintiff alleged that she was discharged due to her complaints to the EEOC that she received less salary and benefits than male officers in similar positions. In finding that the First Amendment barred application of Title VII to the relationship between a church and its minister, the court stated, "[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *Id.* at 558-59.

²³ See *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) (declining to review church's denial of an appointment as an "elder" under the Establishment Clause of the First Amendment); *Little v. Wuerl*, 929 F.2d 944, 948 (3rd Cir. 1991) (finding that the application of Title VII to Catholic schools would raise substantial constitutional questions); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 (8th Cir. 1991) (affirming a grant of summary judgment for a church-affiliated hospital in suit brought by priest for age and sex discrimination on First Amendment grounds); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989) (finding an inquiry into church rules, policies and decisions in wrongful termination action was barred by the Free Exercise Clause of the First Amendment); see also *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1044 (8th Cir. 1994) (holding that the ministry exception would not apply to non-clergy employees in suits arising under the Age Discrimination in Employment Act); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990) (holding that consideration of an age discrimination suit against church by minister would violate Free Exercise clause).

²⁴ See 42 U.S.C. § 12132 (1994); see also *Crawford v. Indiana Dep't of Correc-*

and rail, including inter-city and commuter rail.²⁵ The focus of Title II is on government programs and public transportation systems, therefore, Title II does not directly apply to private nonprofit organizations.

Private nonprofit organizations, however, may be indirectly affected by Subtitle A of Title II if they participate in state or local programs as subcontractors, grantees or otherwise.²⁶ The regulations implementing Subtitle A specifically provide that, "in providing any aid, benefit or service, [public entities] may not, directly or through contractual, licensing, or other arrangements ... [d]eny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service."²⁷ In addition, the regulations prohibit a public entity from providing significant assistance to an organization that "discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program."²⁸ In administrative practice, the word "significant" has been interpreted broadly to include many types of direct or indirect assistance.²⁹ Taken from

tions, 115 F.3d 481, 487 (7th Cir. 1997) (holding that the ADA protects state prisoners).

²⁵ See 42 U.S.C. § 12162 (1994).

²⁶ Subtitle A has resulted in the application of Title II to a variety of situations not directly controlled by the government. For a discussion on student athletics, see Katie M. Burroughs, *Learning Disabled Student Athletes: A Sporting Chance Under the ADA?*, 14 J. CONTEMP. HEALTH L. & POLY 57 (1997); John T. Wolohan, *An Ethical and Legal Dilemma: Participation in Sports by HIV Infected Athletes*, 7 MARQ. SPORTS L.J. 373 (1997); Julia V. Kasperski, Comment, *Disabled High School Athletes and the Right to Participate: Are Age Waivers Reasonable Modifications Under the Rehabilitation Act and the Americans with Disabilities Act?*, 49 BAYLOR L. REV. 175 (1997). For issues in standardized testing, see Stanley S. Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635 (1997); Diana C. Pullin and Kevin J. Heaney, *The Use of "Flagged" Test Scores in College and University Admissions: Issues and Implications Under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act*, 23 J.C. & U.L. 797 (1997); Michael K. McKinney, Comment, *The Impact of the Americans with Disabilities Act on the Bar Examination Process: The Applicability of Title II and Title III to the Learning Disabled*, 26 CUMB. L. REV. 669 (1995-96). For an argument for the application of section 12132 to assisted suicide, see Richard E. Coleson, *The Glucksberg & Quill Amicus Curiae Briefs: Verbatim Arguments Opposing Assisted Suicide*, 13 ISSUES L. & MED. 3, 101-102 (1997).

²⁷ 28 C.F.R. § 35.130(b)(1)(i) (1997).

²⁸ *Id.* § 35.130(b)(1)(v).

²⁹ Administrative interpretations of the Act by an enforcing agency, although not controlling on the courts, do constitute a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976), quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140

the regulations implementing section 504 of the Rehabilitation Act of 1973, this provision will be discussed further below.³⁰ Generally, the regulations under Title II and section 504 are consistent.

As a result of their obligations under Title II, state and local governmental agencies will likely require, by contract or grant conditions, that any nonprofit organization participant mandate a policy of nondiscrimination against, and provide accessible facilities to, disabled beneficiaries of publicly funded programs. For example, a local government funding a soup kitchen or similar type of public service, operated by a church or other private organization, would likely require accessibility to individuals with disabilities.³¹ Similarly, the nondiscrimination requirements will apply to church-related institutions participating in government programs, as they too are indirectly affected by Title II and section 504.³²

D. Title III - Public Accommodations and Services Operated by Private Entities

As a general rule, Title III provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or

(1944)). See *Rivera v. Delta Airlines*, No. Civ. A. 96-CV-1130, 1997 WL 634500, at *1 (E.D. Pa. 1997) (holding that in order to be held liable for providing significant assistance, the assistance must go to the heart of the relationship between the two parties) (citing *Independent Hous. Serv. v. Fillmore Assocs.*, 840 F. Supp. 1328, 1344 (N.D. Cal. 1993)). In *Fillmore*, a public agency issued bonds for a housing project, thus making it a part of a program or activity of the agency. Such a relationship fulfilled the requirement of “significant” assistance, and therefore the ADA was held applicable. See *Fillmore*, 840 F. Supp. at 1343-44.

³⁰ See 45 C.F.R. § 84.3(f) (1997). ADA Title II incorporates the nondiscrimination principles of section 504, extending them to state and local governments. See *McDonald v. Massachusetts*, 901 F. Supp. 471, 478 (D. Mass. 1995) (citing *Helen L. v. DiDario*, 46 F.3d 325, 331 (3d Cir. 1995)); see also *Messier v. Southbury Training Sch.*, 916 F. Supp. 133, 141 (D. Conn. 1996) (affirming congressional intent in drafting the ADA as extending the provisions of section 504).

³¹ See 28 C.F.R. §§ 35.149-151 (1997) (outlining accessibility requirements under Title II).

³² The source of the funds, whether federal, state or local, does not affect the application of Title II. Even if the public entity’s program is fully funded with federal dollars, Title II applies, as well as section 504. If no federal funds are involved, Title II still applies, but not section 504. See *infra* note 42 and accompanying text.

operates a place of public accommodation."³³ The statute, in defining a "public accommodation," enumerates twelve different types of private entities encompassing hotels, restaurants, theaters, lecture halls, stores, banks, attorney offices, hospitals, museums, amusement parks, private schools, health spas, day care centers, homeless shelters, and social services agencies.³⁴

At first glance, it appears that Title III applies to the majority of Catholic institutions. This, however, is not the case. Section 307 of Title III specifically excludes such institutions, providing that Title III "shall not apply ... to religious organizations or entities controlled by religious organizations, including places of worship."³⁵ Published with Title III's final regulations, the Justice Department's analysis takes the position that the religious exemption is very broad.³⁶ As examples, it cites nursing homes, schools, and day care centers operated by a church as being exempt.³⁷ Neither the regulations, nor the statute, define the term "control" or the point at which exercise of control would subject such an institution to the requirements of the ADA. No-

³³ 42 U.S.C. § 12182 (1994); see Peter A. Susser, *The ADA: Dramatically Expanded Federal Rights for Disabled Americans*, 16 EMPL. REL. L.J. 157, 169 (1994) (noting significant implications of Title III of the ADA); see also Thomas P. Murphy, *Disabilities Discrimination Under the Americans with Disabilities Act*, 36 CATH. LAW. 13, 32-37 (1995) (discussing the nuances of Title III and its application to religious organizations operating public accommodations).

³⁴ See 42 U.S.C. § 12181(7) (1994). The legislative history of the ADA, however, clarifies that "other similar" entities" does not include residential facilities. See H.R. REP. NO. 101-485 (II), 101st Cong., 2d Sess. 383 (1990). It is important to note that Title III only regulates private entities, not public entities; and it does not regulate places. Title III applies if the defendant is (1) a private entity; and (2) owns, leases or operates a place of public accommodation. See *Ganden v. National Collegiate Athletic Ass'n.*, 23 A.D.D. 1154, 1169, available in 1996 WL 680000 (N.D. Ill. 1996) (holding parties may not escape the requirements of the ADA through multiple ownership or management of a facility).

³⁵ See 42 U.S.C. § 12187 (1994); 28 C.F.R. § 36.102(e) (1997) ("This part does not apply to any private club (except to the extent that the facilities of the private club are made available to customers or patrons of a place of public accommodation), or to any religious entity or public entity.").

³⁶ See *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 56 Fed. Reg. 35,544, 35,554 (1991) (to be codified at 28 C.F.R. at 36) ("The ADA's exemption of religious organizations and religious entities ... is very broad ... [r]eligious organizations and entities controlled by religious organizations have no obligations under the ADA. Even [if] ... carr[ying] out activities that would otherwise make it a public accommodation").

³⁷ See *id.* ("The religious entity would not lose its exemption merely because the services provided were open to the general public."). See generally Murphy, *supra* note 33, at 33; Tucker, *supra* note 9, at 75 (discussing the religious entity exemption from Title III).

tably, the operation of a school or social service agency by a board of lay persons alone does not preclude the application of the religious exemption.³⁸ "The test remains a factual one, whether the church or other religious organization controls the operations of the school or of the service or whether the school or service is itself a religious organization."³⁹

Finally, if a religious organization leases space to a public accommodation, the public accommodation is responsible for ensuring that its activities are in compliance with Title III's requirements.⁴⁰ To this end, it would be wise to insert a specific reference in the lease agreement explicitly stating the lessee's responsibility for compliance with the provisions of Title III.

II. SECTION 504 OF THE REHABILITATION ACT OF 1973

While church institutions such as schools and social service agencies may be exempt from Title III of the ADA, they may be subject to the requirements of section 504 of the Rehabilitation Act of 1973.⁴¹ Generally, section 504 prohibits discrimination against qualified individuals with disabilities in any program or activity receiving federal financial assistance.⁴² Thus, a school or

³⁸ See 56 Fed. Reg. at 35,554 ("The use of a lay board or other mechanism does not itself remove the ADA's religious exemption.")

³⁹ *Id.*

⁴⁰ See *id.* (citing, as examples, private independent day care programs and local community groups as subject to the ADA if a lease exists and consideration is paid thereupon).

⁴¹ See 29 U.S.C. § 794 (1994) ("No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from ... participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). See generally Ronald D. Wenkart, *Providing a Free Appropriate Education Under Section 504*, 65 ED. LAW. REP. 1021 (1991) (outlining the history, statutory language and regulations relevant to section 504).

⁴² See 29 U.S.C. § 794 (1994). To successfully prosecute a cause of action under the Rehabilitation Act a plaintiff must prove four elements: 1) that he suffers from a disability; 2) he is otherwise qualified for participation in the program; 3) he is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his disability; and 4) the program or activity is receiving federal funding. See *Rhodes v. Ohio High Sch. Athletic Ass'n*, 939 F. Supp. 584, 588 (N.D. Ohio 1996) (citing *Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, 1030-31 (6th Cir. 1995)). Currently, section 504 prohibits discrimination only by recipients of federal financial assistance. See H.R. REP. NO. 101-485 (II), 101st Cong., 2d Sess. 84 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 366. Section 504 is also applicable to employment discrimination. See *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626 (1984); see also 28 C.F.R. § 41.52 (a) (1994) ("No qualified handicapped person shall, on the basis of handicap,

social service agency receiving federal funds will be subject to section 504.⁴³ If a school enrolls students who participate in federally funded programs operated by a local public school district, e.g., Titles I and VI of the Elementary or Secondary Education Act, under administrative interpretations of the Office of Civil Rights ("OCR") of the U.S. Department of Education, the school may be indirectly subject to the substantive requirements of the section 504 regulations even though it is not a direct recipient of funds.⁴⁴ This rationale follows from the public school district's inability to provide program services in private schools that discriminate against beneficiaries of the public school district's federally funded program.⁴⁵

When confronted with the question of whether section 504 applies to a Catholic institution, particularly with regard to a Catholic school, two factors are to be considered. First, it is essential to determine in which federally funded programs the institution, or its beneficiaries, participate. Second, the manner of participation must be considered. These are critical to determining whether the institution is a "recipient" under the applicable section 504 regulations. Greater obligations are imposed on an institution that is a "recipient" under the regulations than an institution that is not itself a recipient, but whose clients or employees are beneficiaries of a federally funded program operated by a governmental entity or third party.

be subjected to discrimination in employment under any program or activity that receives or benefits from federal financial assistance.").

⁴³ For example, participation in a school lunch program or community development block grant program would bring a school or social agency within the ambit of section 504. See, e.g., *United States v. University Hosp. of State Univ.*, 575 F. Supp. 607, 612 (E.D.N.Y. 1983), *aff'd*, 729 F.2d 144 (2d Cir. 1984) (holding that a hospital receiving Medicare or Medicaid reimbursement is subject to the prohibition of discrimination); *Rogers v. Frito-Lay Inc.*, 433 F. Supp. 200, 204 (N.D. Tex. 1977), *aff'd*, 611 F.2d 1074 (5th Cir. 1980) (clarifying that grant assistance must go primarily to public entities to fall within section 504, and specifically excluding government procurement contracts).

⁴⁴ See 34 C.F.R. §§ 104.1-.61 (containing the Department of Education's regulations pertaining to the applicability of section 504); see also *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1212 (9th Cir. 1984) (holding that an indirect receipt of federal assistance is within the scope of the Rehabilitation Act).

⁴⁵ See 34 C.F.R. § 104.4(b)(v) (1997). See generally Laura F. Rothstein, *Section 504 of the Rehabilitation Act: Emerging Issues for Colleges and Universities*, 13 J.C. & U.L. 229 (1986) (reviewing emerging issues under the Rehabilitation Act that are applicable to schools and students).

A. Recipient Institutions

Generally, an institution will be considered a recipient if it receives, through grants, loans or other arrangements, federal financial assistance, directly or through another recipient, in the form of funds, or real or personal property.⁴⁶ Examples of such intermediary recipients would include a social service agency receiving a grant from the Department of Housing and Urban Development, or a school receiving school lunch funds from the Department of Agriculture.

The Department of Health and Human Services regulations implementing section 504 mandate that qualified individuals with disabilities not be excluded from participating in a recipient's program because its facilities are inaccessible to, or unusable by, persons with physical disabilities.⁴⁷ Institutions must make their programs readily accessible to individuals with disabilities. For example, this may be accomplished by the redesigning of equipment, reassigning of classes or other services, home visits, delivery of services at alternate sites, and physical alteration of existing facilities.⁴⁸ Newly constructed facilities must be designed and constructed so that the facility is readily accessible to, and usable by, handicapped persons with disabilities.⁴⁹ Recipients are not required to make every facility or every

⁴⁶ There is no statutory definition of "recipient" of federal financial assistance. The Department of Justice, however, has defined "recipient" as "any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient ... but excluding the ultimate beneficiary of the assistance." 28 C.F.R. § 41.3(d) (1997); see also *Lundstedt v. City of Miami*, No. 93-1402-CIV, 1995 WL 852443, at *13 (S.D. Fla. Oct. 11, 1995) (judging a retirement trust to be an entity recipient, and thus subjecting it to the provisions of the Rehabilitation Act).

The Department of Health and Human Services has defined "recipient" in a manner identical to its own regulations. See 45 C.F.R. § 84.3(f) (1996).

⁴⁷ See 45 C.F.R. § 84.21 (1996). See generally Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 U.C.L.A. L. REV. 1341, 1359-75 (1993) (discussing the evolution and treatment of people with disabilities under Federal law).

⁴⁸ See 45 C.F.R. § 84.22 (1996); see also Chai R. Feldblum, *The Americans with Disabilities Act: Planning for Compliance*, 412 PLI/LIT 23 (1991). See generally Lisa Luggins, *You Can Get There From Here: Program Accessibility Requirements Under the Americans with Disabilities Act*, 56 ALA. LAW. 363, 364 (1995) (providing a general overview of accessibility requirements).

⁴⁹ See 45 C.F.R. § 84.23(a) (1996) (explaining "Design and construction" requirements). Recipients under the statute need not make every facility or every part

part of a facility accessible.⁵⁰ Rather, viewed in its entirety, a recipient's programs and activities must be readily accessible.⁵¹ New construction and alterations begun after June 2, 1977 must also be consistent with the Uniform Federal Accessibility Standards.⁵²

Regulations under section 504 apply to employment practices as well, including recruitment, hiring, promotions, job classifications, compensation, and fringe benefits.⁵³ Organizations that receive federal financial assistance must make reasonable accommodations for the physical and mental limitations of otherwise qualified employees with disabilities unless the organization can demonstrate that the accommodation would impose an undue hardship on its operations.⁵⁴ The need to make reasonable accommodations may not be used to justify denial of employment opportunities.⁵⁵ Reasonable accommodations may include making facilities physically accessible, job restructuring, part-time or modified work schedules, acquisition or modification of equipment, provision of readers or interpreters, and other similar actions.⁵⁶ Additionally, recipients of federal funding

of a facility accessible. See 45 C.F.R. § 84.22(a) (1996) ("A recipient shall operate each program or activity ... so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons.").

⁵⁰ See 45 C.F.R. § 84.22(a) (1996).

⁵¹ See *id.*

⁵² See 45 C.F.R. § 84.23(c)(1) (1996) ("Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards ... shall be deemed to comply with the requirements of this section").

⁵³ See 45 C.F.R. §§ 84.11-.14 (1996); see also Cheryl D. Fells, *Employee Benefit Plan Implications of the Americans with Disabilities Act*, 714 PLI/CORP. 117 (1990). See generally Maureen O'Connor, *Defining 'Handicap' for Purposes of Employment Discrimination*, 30 ARIZ. L. REV. 633 (1988) (discussing various judicial interpretations of "handicap").

⁵⁴ See 45 C.F.R. § 84.12 (1997) (describing the "Reasonable Accommodations" requirements that an organization receiving federal financial assistance must implement); see also *School Bd. v. Arline*, 480 U.S. 273, 289 (1987) (holding that an elementary school teacher was handicapped under section 504); Stephen B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 405-45 (1995) (discussing the "undue hardship" requirement of the Rehabilitation Act of 1974 and concluding that it is a vague standard).

⁵⁵ See 45 C.F.R. § 84.12(d) (1996) (stating that an employer may not deny employment to a disabled person in order to prevent making reasonable accommodations); see also *Arline*, 480 U.S. at 289 n.19 (reasoning that an employer has an affirmative obligation to make reasonable accommodation for a handicapped employee).

⁵⁶ See 45 C.F.R. § 84.12(b) (1996) (providing a list for employers of reasonable

must comply with certain procedural requirements such as notice requirements, self-evaluations, and adoption of grievance procedures.⁵⁷

In the area of education, physical accessibility has been a source of concern to some Catholic educators, particularly in the Northeast where a large number of administrative complaints have been filed with OCR Regional Offices alleging that nonpublic school facilities are not accessible.⁵⁸ However, section 504's impact on educational institutions is not limited to the accessibility requirements. Students with disabilities must be placed in the regular educational environment unless it can be demonstrated that the education of the student, with the use of supplementary aids and services, cannot be achieved satisfactorily.⁵⁹ Private schools that operate special education programs are required to follow evaluation, placement, and procedural safeguard procedures for students with disabilities specified in the regulations.⁶⁰

It should be noted that the regulations do not require a private school to put in place special education services for children with disabilities if the school does not normally offer special education programs to meet those needs. A private school, however, must serve a child with a disability if the child is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.⁶¹ Defining the

accommodations); *see also* John R. Byers, *Cook v. Rhode Island: It's Not Over Until the Morbidly Obese Woman Works*, 20 J. CORP. LAW 389, 408 (1995) (discussing how an employer may have to accommodate obese employees).

⁵⁷ *See* 45 C.F.R. §§ 84.6-.8 (1996) (reciting procedures that must be followed in filing a complaint).

⁵⁸ The focus of this part of the article is on private elementary and secondary schools that have generated the vast majority of inquiries. Section 504 regulations have separate provisions for institutions of higher education. *See* 34 C.F.R. §§ 104.41-.47 (1997).

⁵⁹ *See* 34 C.F.R. § 104.34(a) (1997) (stating the requirement that a disabled person should be educated in a regular classroom if at all possible); *see also* *Oberti v. Board of Educ.*, 995 F.2d 1204, 1223 (3d Cir. 1993) (holding that a school district failed to prove that a child with Down Syndrome could not be educated in a regular classroom with supplementary aids and services); *D.F. v. Western Sch. Corp.*, 921 F. Supp. 559, 566 (S.D. Ind. 1996) (stating that qualified handicapped children must be educated with nonhandicapped children to the "maximum extent appropriate").

⁶⁰ *See* 34 C.F.R. § 104.39 (1997) (stating that private schools that receive federal funds must also follow the regulations).

⁶¹ *See* 34 C.F.R. § 104.39(a) (1997) (stating a private school must make minor adjustments to accommodate the disabled child); *see also* Joseph F. Smith, Jr. & M. Kay Runyan, *How Private Secondary Schools Can Meet Their Obligation to Accom-*

term "minor adjustment" is problematic and unfortunately neither the regulations, nor the analysis,⁶² defines the term or offers clear guidance. It is safe to assume that minor adjustments would include such things as (i) moving classroom assignments from one floor to another; (ii) allowing students time off for recurring medical treatments; (iii) accommodating parentally-compensated sign interpreters for students with hearing deficiencies; and (iv) allowing extra time to complete assignments or tests. Case law addressing what constitutes a "minor adjustment" is virtually nonexistent and, consequently, few clear-cut answers exist. It should also be noted that the regulations allow private schools to charge more for providing services to students with disabilities to the extent that the additional charge can be justified by a significant increase in costs.⁶³

When problems in this area arise, the school personnel or Diocesan attorneys should be advised of section 504's requirements. Mere explanation of the legal requirements, however, would be insufficient. Such parties should also be urged to encourage schools to do everything possible to serve children with disabilities, while recognizing and taking into consideration the reality of their limited resources. The ultimate goal is for all schools to be as inclusive as possible, rather than focusing on the bare minimum legal requirements. This approach is fully consistent with Catholic teachings in this area. Furthermore, this approach is wise from a legal point of view as well. By being as inclusive as possible, a school is not likely to run afoul of the minor adjustment test.⁶⁴

modate Students with Specific Learning Disabilities, 17 W. NEW ENG. L. REV. 77, 82-90 (1995) (discussing how students who attend private schools can be given accommodation for their specific disability).

⁶² See 34 C.F.R. pt. 104, app. A, para. 28.

⁶³ See 34 C.F.R. § 104.39(b) (1997) (allowing private schools to charge for additional services).

⁶⁴ Private schools and parents of children in private schools should be advised that according to the Individuals With Disabilities Education Act ("IDEA"), state and local public school districts are required to identify, evaluate and provide special educational services to children with disabilities enrolled in private schools. See 20 U.S.C. § 1413(g) (Supp. 1998). In the past, disputes have arisen with regard to the U.S. Department of Education's interpretation of the extent and location of services that public schools must provide. In 1997 Congress amended IDEA to clarify that local public school districts are only required to spend a proportionate amount of their federal IDEA funds on services for children with disabilities in private schools. See 20 U.S.C. § 1412(a)(10)(A)(i)(I). The practical effect of the amendment is that many private school children will not receive services because IDEA

B. When a Non-Recipient Institution Is Indirectly Subject to the Substantive Requirements of Section 504

In many federal education programs, federal funds are provided by grant to state and local public school agencies to implement the federal program. Often the operative statute will require the public agency to provide educational services to private elementary and secondary school students and teachers.⁶⁵ For example, under Title VI of the Elementary and Secondary Education Act of 1965 ("ESEA"), a local public school agency may provide computers, software, and library materials for use by private school students.⁶⁶ The public school agency retains ownership and title to the equipment and materials even though they are placed at the private school for use by the students.⁶⁷

As a result, the crucial issue to be resolved becomes whether the private school is a recipient of federal financial assistance within the meaning of section 504. In this type of situation, the OCR has consistently taken the position that the local public school district, not the private school, is the recipient.⁶⁸ This does not mean, however, that the private school is not affected by section 504 and its regulations. The OCR has consistently held that the private school is indirectly subject to the substantive requirements of the regulations. The local public school agency, as a recipient, is prohibited under section 104.4(b)(1)(v) of the regulations from assisting any third party, such as a private school, that acts discriminatorily on the basis of disability while

provides less than ten percent of the cost of providing special education services.

⁶⁵ See generally Allan G. Osborne, Jr., *Providing Special Education Services to Handicapped Parochial School Students*, 42 ED. LAW REP. 1041 (1988) (discussing how the Education for All Handicapped Children Act states that public schools receiving federal funds must provide special education for handicapped children in private schools).

⁶⁶ See Pub. L. No. 89-750 § 161 (Title VI), 80 Stat. 1191 (1966); see also Neal Devins & James B. Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1246-48 (1984) (addressing the history and impact of the Elementary and Secondary Education Act of 1965); Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 355-66 (1990) (discussing same).

⁶⁷ See *supra* notes 65-66.

⁶⁸ There is one reported case, *Thomas v. Davidson Academy*, 846 F. Supp. 611 (M.D. Tenn. 1994), that held, without discussion of recipient/nonrecipient status, that a nonreligious private school participating in Title VI programs was subject to section 504. See *id.* at 618. Two unreported decisions have also concluded that private religious schools whose students receive Title VI services are recipients for the purposes of the regulations.

providing services to beneficiaries.⁶⁹ Unfortunately, the OCR has not defined with any clarity what constitutes "substantive," and what does not. Nonetheless, private schools can be subjected to the substantive requirements of section 504 regulations despite the fact that they are not recipients of federal financial assistance.⁷⁰

The distinction between recipient status and nonrecipient status, therefore, is crucial. In the example cited above, the private school, as a nonrecipient, would not be subjected to nonsubstantive requirements of the regulations; as a recipient, the local public school agency would be. Furthermore, while investigating discrimination complaints brought against the private school, the OCR will focus on the federally funded program. Consequently, in the example cited above, the OCR would investigate whether all rooms utilizing Title VI materials and equipment, whether all common areas such as restrooms and cafeterias, and whether ingress and egress to and from the private school building are physically accessible to students with disabilities.

C. Administrative Complaints Filed with the OCR

This section does not provide in detail how the OCR conducts investigations of complaints,⁷¹ but rather makes general comments on the complaint process. First, almost anyone can file a complaint with the OCR alleging discrimination in a federally funded program.⁷² Judicial concepts of standing do not apply. A resident of one state can file a complaint against a school in another state in which the complainant has no connec-

⁶⁹ *See id.*

⁷⁰ *See* Smith, Jr. & Runyan, *supra* note 61, at 92-94 (discussing how private nonreligious schools not receiving federal funds have to accommodate students with specific learning disabilities pursuant to Title III of the Americans with Disabilities Act of 1990); *see also* Michael Heise, *Public Funds, Private Schools and the Court: Legal Issues and Policy Consequences*, 25 TEX. TECH. L. REV. 137, 137 (1993) (stating that private schools may have to succumb to the requirements of section 504 when they receive a small amount of funding from the state).

⁷¹ The focus here is on the administrative process because that is where much of the recent activity has occurred. It should also be noted that a private cause of action under section 504 has been recognized by the courts and in many instances an exhaustion of administrative remedies was not required. *See* Tuck v. HCA Health Services of Tenn., Inc., 842 F. Supp. 988, 991 (M.D. Tenn. 1992), *aff'd*, 7 F.3d 465 (6th Cir. 1993).

⁷² *See* 28 C.F.R. § 35.170 (1997) (stating any person who believes that he or she or a specific class of persons has been discriminated against can file a complaint).

tion whatsoever;⁷³ if the proper allegations are made, the OCR will investigate. Second, the OCR will request, often through the local public school district, information regarding federally funded programs at the private school or schools involved.⁷⁴ After this initial investigation, an on-site visit will often follow.⁷⁵ Finally, the OCR prefers to resolve issues informally through negotiations rather than initiate proceedings to cut off federal funding.⁷⁶ These informal negotiations, however, may be protracted.

The mechanisms of applying the ADA and section 504 to church-related institutions are complex. There are, however, general guidelines that should be adhered to while analyzing and responding to questions arising under the ADA and section 504. First, it must be noted that the general prohibition on the basis of disability in employment practices in Title I of the ADA does apply to church-related employers with 15 or more employees. Second, under Title II of the ADA, church-related institutions that participate in programs operated by or implemented through state or local governmental agencies will likely be required by those agencies to prohibit discrimination on the basis of a disability or face termination from the programs. Third, Title III of the ADA does not apply to religious organizations or entities controlled by religious organizations.

Moreover, section 504 will apply, directly or indirectly, to church-related institutions that participate in federally funded

⁷³ See 28 C.F.R. § 35.171 (1997) (establishing procedures to process a complaint even though it was filed with a federally funded agency without proper jurisdiction).

⁷⁴ See 34 C.F.R. § 100.6(c) (1997) (stating that any recipient of federal funds must allow a department official access to information pertinent to an investigation). See generally Arthur R. Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 HARV C.R.-C.L. L. REV. 1, 13-14 (1983) (discussing generally how the OCR has investigated in the past).

⁷⁵ See Robert M. Hendrickson, et al., *The Impact of the Civil Rights Restoration Act on Higher Education*, 60 ED. LAW REP. 671, 673-75 (1990) (discussing a federal agency's procedure in investigating discrimination); see also Adam A. Milani, *Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability Law*, 22 J.C. & U.L. 989, 993 n.18 (1996) (exploring the procedure the OCR follows when investigating discrimination under section 504).

⁷⁶ See 34 C.F.R. § 100.7(d)(1) (1997) (stating that if an investigation indicates noncompliance the Department official will inform the recipient of the federal funds that the dispute will be resolved by informal means wherever possible); see also Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 516-17 (1987) (examining the procedures that the OCR officials follow in an attempt to settle the dispute informally).

programs. Before the responsibilities of any particular institution can be determined, it is essential to ascertain in which federally funded programs, if any, the institution participates and the manner of participation. Finally, it must be noted that the ADA and section 504 overlap in many areas and must be dealt with appropriately.

These general guidelines provide a basic framework for determining whether the ADA or section 504, or both, may apply to a church-related institution in any particular situation. Once it is determined that one or both apply, the relevant regulations, guidance, and case law need to be researched. The legal ramifications can then be evaluated. As indicated above, the inquiry should not stop with identification of the minimum legal requirements. The ultimate goal is to ensure that our Catholic institutions and their services are open and available to all persons with disabilities.