

Section 504 and the ADA: Past, Present and Future

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The term disability does not mean incompetence, nor does it insinuate lack of function. Yet, discrimination produced by overt actions or thoughtless attitudes still produces segregation, exclusion and the denial of equal and meaningful opportunity for individuals with disabilities. This exclusion of the disabled individuals from the working class cost society billions of dollars annually (Bush, 1991). The 1986 Louis Harris Poll (Hoyer, 1990), found that 72% of top managers, 76% of equal opportunity officers and 80% of department heads/line managers felt that persons with disabilities encounter discrimination and that discrimination remains as an inexcusable barrier to equal opportunity. The poll further indicates that discrimination against disabled individuals persists not only in areas of employment but also in public accommodation, telecommunications and transportation (Hoyer, 1990).

While the disability movement has traveled from the early belief that disability was punishment for committing a sin to the current self-determination, integration and independence perspective (Chappel, 1994), discrimination against these individuals with disabilities still exists. The emergence of the Americans With Disabilities Act (ADA), signed into law July 26, 1990 by President George Bush, overcomes past failures to eliminate attitudinal, architectural, and communication barriers for the disabled (Weicker, 1991). The ADA codifies many regulatory concepts and guidelines from previous laws and extends the prohibition of discrimina-

tion to the private sector in the areas of employment, public accommodation, transportation, public services, and telecommunications. The purpose of this paper is to explore development of disability laws as they relate to the discriminatory practices affecting individuals with disabilities and in particular the ADA. The paper (1) examines similarities and differences among various statutes, (2) discusses case law pertaining to the development and implementation process, (3) identifies past, present, and future case law relevant to disability rights application, and (4) identifies similarities among civil rights application in tests for determining discrimination.

Litigation Relevant to Development

The initial impetus for establishing rights for education and participation of the disabled came in 1954 in the Supreme Court case Brown v. Board of Education. In Brown, the Court addressed the doctrine of "separate but equal" in public education which resulted in segregation that denied opportunity and violated the constitutional rights of persons of color. The Court's decision provided a rationale that expressed reasonable doubt of success in life if a person is denied the opportunity for education that is equal on all terms. Relying on the legal principle of the Court's decision in Brown, parents of disabled children demanded for their children's rights to a free and appropriate education.

Although legislation was enacted to support claims in Brown, many schools circum-

vented the legislative directives. Resulting implications which were to become a national phenomenon had to be addressed further by the courts, e.g. Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, (1971). In PARC equal protection and due process clauses associated with the Fifth and Fourteenth Amendments served as the constitutional basis for the children's argument to a public education that should be equal to that afforded to other children. In a consent agreement, the Court ruling in favor of the plaintiffs cited:

- All mentally ill persons are capable of benefitting from a program of education and training.
- Mutual age capacity may not be used to postpone or deny access to free public programs of education and training.
- Labeling a child mutually ill or to deny public education or placement in a regular setting without due process or a hearing is a violation of rights of the individual.
- A state in undertaking to provide free appropriate education to all children may not deny the disabled the equal (Winnick, 1990).

Another important case occurring one year later was Mills v. Board of Education of the District of Columbia (1972). The class action suit sought to restrain the District of Columbia from excluding children from public schools or publicly supported education. The U.S. District Court held that all children have a right to suitable publicly supported education, regardless of the child's mental, physical or emotional disability. The court stated violations with controlling statutes, the District's regulations, and due process. In directing, the court required the District of Columbia to provide publicly supported education, procedural due process and equitable funding. These opinions were followed with an avalanche of law suits to enforce the constitutional rights of the disabled individual (Eichstaedt & Kalakian, 1987).

The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 as originally proposed focused solely on expanding vocational and employment opportunities for dis-

abled individuals (Rothstein, 1992). In its final version the legislation provided protection from discrimination in the areas of employment, education, public facilities, transportation and health and welfare services.

The Rehabilitation Act of 1973 protected individuals who had impairments as well as those individuals with a record of impairments and those perceived to have impairments. The Rehabilitation Act defined an individual with a handicap as a person who:

- I. has a physical or mental impairment which substantially limits one or more of such person major life activities, ii. has record of such an impairment or iii. is regarded as having such an impairment (Rehabilitation Act (1973)).

Major life activities include function of caring for one's self, walking, seeing, hearing, speaking, breathing, learning, working and performing manual tasks. The Rehabilitation Act of 1973 went about achieving these protections in several different ways.

First, Section 501 required establishment of the Interagency Committee on Handicapped Employees (ICHE). The ICHE's purpose as originally set-forth, was to provide focus on hiring, placement, and advancement practices regarding disabled individuals. The ICHE was to ensure that all federal departments, agencies and other executive branches were meeting the needs of disabled individuals. In addition to nondiscriminatory and reasonable accommodation requirements, Section 501 required all federal departments and agencies to implement affirmative action plans (Rothstein, 1992).

Section 503 placed similar objectives and affirmative action requirements on contractors with federal contracts. Any contract with the federal government equal to or in excess of \$2,500 has to be in compliance with provisions of Section 503. This section requires the recipients of federal contracts to institute affirmative action programs and hire and promote qualified individuals with disabilities (Griffin, 1991).

The legislative history of the Rehabilitation Act contains only passing references to Section 504 (Scotch, 1984). Unlike the other sections of the legislation no references were made to

potential significance. Nor, no projections made for expenditures. Section 504 was a single sentence at the very end of the Rehabilitation Act that read:

“No otherwise qualified handicapped individual in the United States, as defined in Section 7(6), shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” (Rehabilitation Act of (1973)).

At the time of its inclusion little reference was given to what soon would be the federal government’s most important public-policy edict affecting the rights of persons with disabilities to date (Scotch, 1984; Griffin, 1991).

Undoubtedly, the federal government’s most far reaching impact on discrimination in the public and private sector came from Section 504. Section 504 prohibits all discrimination including employment, against individuals with disabilities in any program or activity receiving financial federal assistance. In 1977, the U.S. Department of Health, Education, and Welfare further defined Section 504 rules and regulations to include all aspects of physical education instruction, intramural, interscholastic sports and in many instances, recreation. With its enactment came the reserved parking spaces, curb cuts, and wheel chair ramps that have become part of federally funded construction (Griffin, 1991). Although the section covers affirmative action, reasonable accommodation, permissible pre-employment inquires, and exemptions, these prohibitions are limited to those actually receiving money from the federal government.

Aside from employment coverage and limited extension protection, Section 504 is important for another reason as well; it provides a statutory model for the ADA (Gerson & Addison, 1991). Over the past 20 years numerous court decisions have examined the application of Section 504. The courts have examined how to determine when a person with a disability is otherwise qualified, when a reasonable accommodation crosses the line to become an undue burden and when a person with a disability presents a threat to the health and/or safety of oth-

ers (Griffin, 1991).

504 Case Law

Initial application of the law was influenced by a substantial degree from three Supreme Court rulings. The first in Grove City v. Bell (1984), the Court held that receipt of federal assistance by Grove City College financial aid program did not subject the entire institution to Title IX coverage. In addition, Grove City v. Bell (1984), recognized that if an entity should choose not to bear the cost of employment of handicapped as a quid pro quo for receipt, it was free to terminate its participation. These analysis were further applied to other Section 504 cases, i.e., Martin v. Delaware Law School (1985). Then in 1987, Congress amended Section 504 to clarify that any part of any program or activity which receives federal assistance was subject to laws of Section 504.

In Consolidated Rail Corp v. Darrone (1984), the Court held that the primary objective of federal assistance need not be for employment where a plaintiff seeks relief for employment discrimination under Section 504. The Court stated that Section 504 prohibits discrimination against the handicapped under “any program or activity receiving federal financial assistance.”

The third Supreme Court ruling was in Department of Transportation v. Paralyzed Veterans of America (1985). Here the Court ruled on the issue of what constitutes federal assistance, emphasizing “receipt” of and not “benefit” from. A number of lower courts have also addressed the issue of federal assistance. In Moore v. Sun Bank (1991), the court recognized Congress’s intent of the ADA not to effect or change the breadth of enforcement under the Rehabilitation Act or any other civil rights law. The court further affirmed that to read into the limitation of Section 504 would be acting beyond their authority. However, the court emphasized application similar to other civil rights statues to promulgate regulation defining the meaning of federal financial assistance.

In addition to federal assistance, substantive requirements of Section 504 further define employment. Mandates of 504 effect the fol-

lowing practices:

- 1) Recruiting, advertising, and processing applications for employment
- 2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right to return from layoff and rehiring
- 3) Rates of pay or any other form of compensation and changes in compensation
- 4) Job assignment, job classification, organizational structures, position descriptions, lines of progression and seniority lists
- 5) Leave of absence, sick leave, and any other leave
- 6) Fringe benefits available by virtue of employment, whether or not administered by the recipient
- 7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training
- 8) Employer sponsored activities, including social or recreational programs
- 9) Any other term, condition, or privilege of employment (45 C.F.R. 84.11).

However, by neglecting to indicate the role that qualifications and mandates play in the employment process and failing to provide substantive content to define terms under Section 504, much ambiguity of the legislative intent remains.

Disagreement has focused around the broad statutory language. Some courts have narrowly construed 504 as a simple mandate to install equal treatment of individuals with disabilities: i.e., Southeastern Community College v. Davis (1976 & 1979), Walker v. Attorney General of the United States (1983). Contrarily, these Court's have expanded that Section 504 imposes a responsibility on employers to make reasonable accommodations for individuals with disabilities: i.e., Southeastern Community College v. Davis (1979): Nelson v. Thornburgh (1983). The inconsistent application as a result of congressional default did little to remove the obstacles hindering employment, social animus, fear, stereotypes, and disparate impact of neu-

tral standards.

Inconsistency in these applications presented individuals with disabilities an intractable set of impairments, which the courts were forced to further define. Employment claims in court varied substantially; i.e., Strathie v. Dept. of Transportation (1983) based burden of proof to be qualified on the individual with disability, Simon v. St. Louis County (1981) questioned private right of action emphasizing the need to meet all program requirements, and Garrity v. Gallen, (1981) rationalized common good, entitlement, habilitation and political powerlessness of disabled individuals, forcing further definition of 504 application through case law.

Section 504 regulations prohibited discriminatory actions: (a) denial of opportunity to participate or benefit from the aid, benefit, or service; (b) afford unequal or less effective aids, benefits or services; (c) provide significant aid or assistance that is discriminatory to individuals with disabilities; (d) deny opportunity to participate; or (e) limit opportunity enjoyed by others (IDLR, 1992). However, these regulations failed to define terminology. Items such as discrimination, reasonable accommodation, undue hardship, qualified handicapped person, and essential functions all had to be addressed by the courts to properly apply 504 regulations.

Discrimination is seen as both a descriptive and evaluative term. Evaluation of the term requires choices among contestable interpretations (HLR, 1984). Any vulnerability to legal redefinition can decrease evaluative equality of 504 regulation. Prohibition of discrimination under Title VII case law application aims to promote employment on basis of merit, and eradicate unnecessary barriers (HLR, 1984). In Southeastern Community College v. Davis (1979), the Court recognized the need of the Department of Health Education and Welfare (HEW) to continually identify discrimination instances. The Court failed to provide opinion which elaborated upon a list of situations which might be discriminatory, but did recognize that one of the requirements in proving that discrimination has occurred is showing that an individual with disability is qualified (IDLR, 1992).

The perpetuated conflict between dis-

crimination and qualification of an individual with disability was clarified in Southeastern Community College v. Davis (1979). Davis (1979) defined "otherwise qualified" as a "qualified individual" who is able to meet all of the program requirements in spite of his/her handicap. Davis (1979) further added that a program does not have to lower standards to accommodate the individual with disability. However, recognizing that Section 504 does not compel educational institutions to disregard individuals with disabilities or require substantial modifications in programs to allow individuals with disabilities to participate, the Court stressed the essentiality of the issuance of specific technical standards.

Davis court opinions further clarified the legislative ambiguity exposed and written by Congress. The Court clarified that mere possession of a disability is not permissible ground for assuming inability to function. Adding, that this does not mean that a person need not meet legitimate physical requirements in order to be otherwise qualified. Davis Court interpretations further promulgated HEW interpretations and laid foundation for future case law interpretations.

In Doherty v. Southern College of Optometry (1988) attention was drawn to the burden of persuasion. The court helps to depict the element or cause of action under Section 504 and reevaluates the opinion presented in Davis (1979), observing that an otherwise qualified individual is one who is able to meet all program requirements in spite of his/her handicap. In Hoot v. Milan Area Schools (1994) the Rehabilitation Act of 1973 and ADA application regarding "otherwise qualified" are compared and rationalized. In Alexander v. Choate (1985) the paradoxical quality of the phrase "otherwise qualified" is distinguished. Finally, in School Board of Nassau County Florida v. Arline (1987), the Court addresses basic factors to be considered when determining whether an individual with a disability is "otherwise qualified". The Court speaks of the nature, duration and severity of risk as well as the likelihood of harm and transmission. Overall opinion illustrates that the determination of whether an individual is quali-

fied should be based upon job prerequisites, essential functions and capabilities at the time of employment (Tucker, 1994).

Simply opening the doors to employment and participation opportunities will be a help to many individuals with disabilities, (see Alexander v. Gardner Denver Co. (1974)). In employment, an individual with disability must be able to perform 'essential functions' of job with or without reasonable accommodation. In public accommodation, reasonable accommodations may be necessary to perform the task or function. Though these items were recognized within Section 504 legislation they had to be further defined by the courts.

"Essential functions" retains the notion of functional competence and efficiency (HLR 1984). At the same time the margin for distinction between essential and nonessential through accommodation and toleration is artificial and hard to define. The inconsistency is dependent upon functions of the particular job and the goals of its employees. The overwhelmingly difficult issue is the determination of cost and time both parties should bear. Since Section 504 application, the HEW, case law, (i.e. Nelson v. Thornburgh (1983); Simon v. Louis County (1981)), and congress have helped to further define this term.

Essential functions means job tasks that are fundamental and not marginal, (Equal Employment Opportunity (1991)). The term refers to the task at hand and not the manner of which it is to be performed. The essential function requirement has many relevant considerations. Time spent performing, work experience, job description, term of bargaining agreement and consequences of not hiring one employee to perform, are all relevant, but not determinative of the issue (Tucker, 1994; Cook 1991). Essential functions requirement does not limit the content, nature, or functions of a job. However, employer modification must define these functions and provide reasonable accommodations if necessary.

In order for disabled individuals to take advantage of opportunities, reasonable accommodations may be necessary. Job modification, equipment modification, facility access, provid-

ing readers and interpreters, modifying work schedules, and other restructuring in the environment may help provide equal opportunity to individuals with disabilities (Mikochik, 1991). In Davis (1979), the Court recognized that while Section 504 does not require employers and programs to make fundamental or substantial modifications to accommodate individuals with disabilities, they may be required to make reasonable ones. The Court in Davis (1979), miserly interpreted reasonable accommodation. The Court limited accommodation to those items that pose no undue financial or administrative burdens on a specific entity, and failed to provide any specific statutory direction. Hence, few other courts required places to make specific adjustments to existing facilities and conditions.

The term reasonable as it relates to Section 504 is elaborated upon further in U.S. v. Board of Trustees for University of Alabama (1990). In University of Alabama (1990), the court makes an independent determination of Congress' intent in passing Section 504 as it relates to the provisions of auxiliary aids. In acknowledging guidelines set in Davis (1979) and Alexander v. Choate (1985), the Federal Court recognized that it does not require a program to alter its status to meet the greater medical needs of individuals with disabilities. However, the court indicated the HEW's auxiliary aids regulation is based on a permissible construction of the statute. Further discussion/modification may be found within 42 U.S.C.A. 12111 & 12112, 45 C.F.R. 84.12 (1990) and the ADA (1990).

Suggested reasonable accommodations developed through case law and legislation enacted over time provide the basis for a definition for ADA legislation. Reasonable accommodation has been defined as; (1) modification to job application process, work environment, or manner in which performed, and (2) modification which allows disabled individuals to enjoy the same benefits and privileges of the non-disabled (ADA, 1990; Tucker, 1994). Prior to the ADA and Rehabilitation Act Amendments of 1992, numerous courts held the obligation to accommodate under Section 501, because of the Section 501's affirmative action requirement,

differently than under 504. However, the mandate in the Rehabilitation Act (1992), that all four laws be interpreted in the same manner may help clarify this issue in the future.

Providing accommodation inevitably raises the question of cost (Thornburgh, 1991). Hardship on programs or operation has to take into account the size and type of the operation and the nature and cost of the accommodation. Though reasonable accommodation requires some degree of positive effort to benefit and be available to individuals with disabilities, i.e. Jennings v. Alexander (1983), accommodations to permit access should not pose undue financial and administrative burdens. In Treadwell v. Alexander (1983) doubling up on other part-time technicians to accommodate the needs of disabled was found to present an undue financial hardship. In Wood v. School District (1992), the insuring an assigned additional driver to accommodate a driver with diabetes was found to pose an undue financial burden. Finally, in Fitzgerald v. Green Valley Education Agency (1984) discrimination was found to be present by the agency refusing to hire the plaintiff for teaching duties when the bus duties stipulated may have been eliminated or altered.

An accommodation is not reasonable if it poses an "undue hardship" on a business or entity. Undue hardship, defined as "an action requiring significant difficulty or expense", has no presumption of cost and must be decided upon on an individual basis (ADA 1990, Tucker, 1994).

Other Terminology

Section 504 case law further identifies and defines other terms that relate to ADA legislation. Terms like handicapped individual, are further defined in: School Board of Naussau County v. Arline (1987) which defines a person suffering from contagious disease, i.e., tuberculosis; and in Hoot v. Milan Area School (1994), which identifies applicable regulations defining a handicapped person as "an individual with a disability who, with or without reasonable modification to rules, policies, or practices... meets the essential eligibility requirements for the receipt of services or the participation in programs or

activities provided by a public entity”.

Auxiliary aids and services, are further defined in Davis (1979), Alexander (1983) and U.S. v. Board of Trustees for University of Alabama (1990). In Davis (1979), the Court provides an additional interpretation to the Code of Federal Regulations. In Alexander (1983), the Court addresses the issues of meaningful access and in U.S. Board of Trustees for University of Alabama (1990) the court discussed issues of placement for bulk of auxiliary application cost. In addition, Board of Trustees (1990) depicted reasonableness of auxiliary aid application and defines accessibility as that “equal to” or “as effective as” other offered services.

Items such as affirmative action, detailed in Davis (1979) and Norcross v. Sneed (1985) define that Section 504 does not impose affirmative action obligations on all recipients of federal funds. Additionally, harassment, discussed in Ramsey v. City and County of Denver (1990), has also been further defined through case law and legislation which has been applied to ADA application. In addition, legislation, i.e. Civil Rights Act 1991, ADA, and case law (i.e. Davis v. Passman (1979), Franklin v. Gwinnett County Public Schools (1992)), not intending to foreclose remedies available to those unprotected, helped to define damages, cost, awards and remedies available, including attorney fees, for discriminatory treatment.

Remedies

Section 504 remedies are the same as those available in Title IV of the Civil Rights Act of 1964. At times compensatory damages are available under Section 504, i.e., Miener v. Missouri (1982), while to the contrary, these same awards, via other court opinions are not available; i.e., Ruth Anne M. v. Alvin Independent School District (1991); Doe v. Southeastern University (1990).

In Franklin v. Gwinnett (1992), the Supreme Court held monetary remedies available. The opinion stated that the courts have the power to award. Since equitable remedies would not provide adequate redress, appropriate relief was awarded via monetary damages. Compensatory damages as indicated in Franklin (1992),

would be made available where the covered entity was found liable for intentional discrimination. In addition, punitive damages are presumed to be available since Congress has not shown intent to limit remedies (Tucker, 1994).

Title IX remedies have shown to be similar to 504 in Tangber v. Weld County Sheriff (1992); and Doe v. District of Columbia (1992). Title I of the ADA, being the same as Title VII of the Civil Rights Act of 1964, does not follow suit. In Title I of the ADA and Title VII employers must exhaust administrative remedies first. In Title II of the ADA, remedies and procedures follow those set forth in Section 505 of the Rehabilitation Act. In Title III, remedies and procedures set forth follow those in Section 204(a) of the Civil Rights Act of 1964. For intentional discrimination, in all cases, punitive and compensatory damages are available. A jury may also be called upon in instances of intentional discrimination.

Section 505(b) of the Rehabilitation Act of 1973, allows for reasonable attorney fees to be dispersed, with exception given to the United States Government. The ADA addresses these issues and includes cost of expert witnesses in its description. However, law applicable to the Civil Rights Act of 1991 clarifies that the awardment of attorney fees must be in “frivolous” instances and further clarifies that no damage may be present if employer/entity demonstrates a good faith effort to accommodate or avoid discriminatory practice.

Applicable Differences

Legislation and case law applicable to Section 504 and ADA regulation has developed for over twenty years. However, many identifiable differences still exist. The foremost being that the ADA applies to all entities, not just those receiving federal assistance. Others include, but are not limited to: (1) Laws requiring public entities to operate programs so that they are readily accessible to and usable by persons with disabilities (Tucker, 1994). (2) Dates of structural changes do differ in content and application. (3) The ADA further emphasizes undue hardship defenses stating that they must be made in writing by the head of the public entity. Section 504 does not have this requirement. (4) Sec-

tion 504 requires all recipients subject to structural changes to make a plan which details those changes, the ADA only requires those who employ more than 50 employees to enact a plan. (5) The ADA requires accessibility to all public entities, Section 504 has exemptions for those with less than 15 employees. (6) The ADA allows for choice in adopting facility guidelines (ADAAG & UFAS), Section 504 does not. (7) Initial application of the ADA did not exempt state and local officials like the Civil Rights Act of 1964. Since the ADA, the CRA has since deleted this exempt status (EEOC, 1995). (8) The ADA is unique among most civil right laws in that it prohibits certain inquires (e.g. nature, extent, severity of disability), at the pre-offer stage (EEOC, 1995).

The ADA law unlike other discriminatory legislation has been developed through case law. Terms and application are presented to provide equal protection and identify meaningful differences between disabled and non-disabled individuals. In City of Cleburne v. Cleburne Living Center (1985), the Court clearly evidenced its intent to prohibit application of seemingly neutral laws, which were based on misconception and prejudice (Tucker, 1994). In Cleburne (1985), the Court held that mentally retarded individuals do not constitute a suspect or quasi-suspect class. Therefore, the action denied judicial review of state action under strict of heightened scrutiny.

The Court articulated that discrimination by itself is not a crime. However, to discriminate one must demonstrate compelling, important and/or rational reasons.

Viewing classifications in Cleburne (1985), one associated racial discrimination with compelling reasons that signify stronger immutable characteristics. Sustainment of racial discrimination is suitable only if there serves a compelling state interest. Gender classification calls for a higher standard of review than disability discrimination. Since no sensible grounds differentiate sex from non-suspect statuses as intelligence, gender classification fails unless it substantially relates to a sufficiently important governmental interest; i.e., Mississippi University for Women v. Hogan (1988), Cleburne, (1985).

Rational-basis test, includes elements of legitimacy and neutrality that must always characterize the performance of duty to impartiality. Since the Court found it difficult to differentiate between disabled individuals, persons with disabilities do not have any special constitutional protection as distinct from other members of society at large (Tucker, 1994).

The Supreme Court in Cleburne (1985) recognized Congress's naivety of these discriminatory practices against individuals with disabilities. In Cleburne (1985), the Supreme Court denied the disabled the benefit of strict or intermediate scrutiny however, the Court, recognizing that existing legislation had addressed disabled individuals difficulties in a manner which belies continuing antipathy and prejudice, elaborated upon the absence of controlling congressional direction (Mikochik, 1991).

In rendering a decision the Supreme Court articulation invited a response, and finally, in 1990, Congress responded with the ideologies encompassed in the five titles of Public Law 101-336. The following is a list of Titles I-V, (ADA, 1991):

Title I. Employment: Equal Employment Opportunity for individuals with disabilities

Title II Public Services: Nondiscrimination on the basis of Disability in State and Local government

Title III Accommodation: Nondiscrimination on the basis of Disability by public accommodation and services operated by private entities and in commercial facilities

Title IV Telecommunications

Title V Miscellaneous provisions (ADA, 1991).

Together these titles combine to create a clear and comprehensive prohibition of discrimination on the basis of disability and offer further means to redress the various forms of discrimination (Feldblum, 1991).

Congress took a step forward in establishing a clear and comprehensive Federal prohibition of discrimination. However, not with standing legal interpretation, there still is much to be learned from the application of civil rights statutes. The anti-discriminatory statute, modeled after section 504 of the Rehabilitation Act of 1973, which prohibits discrimination of disabled

individuals by private entities receiving Federal funds, and case law, extends to the American public with disabilities protection against discrimination as that afforded to people of color and women (Mayerson, 1991). The primary difference between the ADA and Section 504 is the extended coverage; to entities covered by Title VII of the Civil Rights Act of 1964, the landmark statute that prohibits discrimination in employment on the basis of race, sex, national origin and religion.

Determination of Discrimination

Title VII, Section 504 and the ADA all have similar test for determining discrimination. However, afforded procedures and protections in the enforcement of the ADA differ slightly. Title I of the ADA is enforced by the Equal Employment Opportunity Commission (EEOC) (EEOC, 1992). ADA Title I follows procedures for processing used to enforce Title VII of the Civil Rights Act of 1964. In most respects, Title I ADA employment requirements are also the same as those in Section 504 because the ADA was based on many of Section 504's regulatory requirements, which also follow Title VII.

Title II of the ADA is enforced by the U.S. Department of Justice. Title II prohibits discrimination in all state and local government programs and activities, including employment after January 26, 1992 (EEOC, 1995). Title II serves closely the mandates of Section 504 and 505 of the Rehabilitation Act of 1973. However Title II is also specific to state and local governments not receiving Federal assistance. Title III, enforced by the Attorney General/(assigned) Assistant Attorney General for Civil Rights, follows the language of the Civil Rights Act of 1964 remedies and procedures (see section 204(a); 42 U.S.C. 2000a).

Despite the large number of regulations and regulatory agencies implementing Section 504, there is little variation in substantive requirements, language and purpose. The same is true of the ADA, whose guide laws closely resemble those set forth in Section 504 and Title VII. The ADA directs the agencies with overlapping federal requirements to coordinate activities to avoid duplication (EEOC, 1995). These

requirements exist for both public and private employers.

ADA Case Analysis

In sport and physical activity recent ADA litigation has only begun to establish parameters to clarify application of issues depicted within the ADA statute. While the onslaught of litigation that many non-favorable supporters suspected has not been present, there is a dearth of cases that have identified issues within sport and physical activity in the areas of employment (Title I), and facility/arena access (Title III). In addition to these cases, there also has been numerous cases cited which have addressed the issues of athletic eligibility and participation.

Employment issues have been cited in: Maddox v. University of Tennessee (1995), giving rise to what establishes existence of genuine issue of material of fact with respect to whether termination was related to criminal conduct or possible disability (alcoholism); David L. Jones v. Southeast Alabama Umpires Association (1994), where the court further defines the "employer" and "employment agency" under ADA and Title VII statutes; Borkowski v. Valley Central School (1995) in which the court deals with the issues of employment discrimination of teachers with disabilities by addressing essential functions, accommodation cost and defines undue hardship. In Flight v. Gloeckler NYS Department of Education (1995), the court addresses issues of cost applicable to provide aid, and in an ADEA case, Eggleston v. South Bend Community School (1994), the issue was employment and age.

Issues regarding facility usage and access have been cited in: Diamond v. Springfield Metropolitan Exposition Auditorium Authority (1995) and Ganden V. NCAA (1996). In Diamond, a plaintiff tripped in a doorway to an underground tunnel leading to the convention center. The issue of public property and liability of a multi-purpose facility was addressed with the court affirming the districts court decision in barring the plaintiff's claim. In addition, Pahulu v. University of Kansas (1995) the court addressed the rules of access and participation in denying an injunction and in Miller v. Crystal

Lake Park District (1995) the court found no just cause for property interest.

Other cases, i.e. EEOC v CNA Ins.(1996), elaborate upon defining the essential functions requirement, while Augh v. Shalula (1995), Robert v. Kindercare Learning Centers (1995) and Elitt v. USA Hockey (1996), all address issues of accommodation and modification. In addition these cases provide good descriptors on alteration of the fundamental focus of a particular program(s).

While relatively few cases have addressed the issues of employment and access, numerous cases have outlined the investigation of eligibility requirements and participation. Names like Gabriel Lane of Colorado (1996) and David Dennin of Connecticut (1996) have headlined the common law issues of age restriction requirements and participation with differing results. These laws in effect are designed to equalize competition between teams. The use of these requirements have been defended on the following grounds: (1) it prevents older more mature students from endangering the health and safety of younger students; (2) those of the age of 19 and older are not the average high school student; and (3) it diminishes the possibility of gaining a competitive athletic advantage through red shirting (Wolohan, 1997).

The majority of these court decisions have favored these eligibility requirements i.e. Lane v. Colorado High School Activities Association (1996). Many cite Section 504 case law i.e. Mahan v. Agee (1982), where the State Supreme Court acknowledged the adoption of rules by the Oklahoma Secondary Schools Activities Association (OSSAA) as long as they were deemed reasonable. In Sadler v. University Interscholastic League (1992) and Landers v. West Virginia Secondary School Activities Commission (1994), the courts found no detriment of rights since participants had already used up their years of eligibility, where eligibility given was recognized as the same as that was given to all participants - 4 years.

In Pottgen v. Missouri State High School Athletic Association (1994), the court upon appeal found that a person was not a "qualified individual" with a disability since they failed to

meet the age requirement and any alteration would mute the fundamental alteration concept. Sandison and Stanley v. Michigan High School Athletic Association (1995), revealed denial of original summary judgement, however upon appeal the court found error in application of Title II and in granting an injunction stated the lower court failed to meet the qualification of an "otherwise qualified" individual. The court in Sandison added the explanation that age restriction does not prevent the plaintiffs from equally enjoying the interscholastic sports program. As indicated by Wolohan (1997), Reaves v. Mills (1995), found the court concurring with the earlier decision presented in Cavallaro v. Ambach (1983) under section 504, which addressed the issues of advantage in maturity, and again reinforced the determination of an "otherwise qualified" individual.

However, recent connotations by U.S. District Judge Zita Weinshienk in the Lane case, expressing an opinion elaborating upon the potential exploration of extension in certain instances conforms to many minority court decisions. These courts emphasize the added emotional benefit without any additional danger as expressed in the dissenting opinion in Pottgen v. Missouri State High School Athletic Association (1994), Johnson v. Florida (1995), and University Interscholastic League and Baily Marshall v. Buchanan (1993). In addition, Marshal v. Buchanan (1993) also elaborates upon the "waiver rule" which must be implemented to yield reasonable accommodation requirement. The court in Dennin v. Connecticut Interscholastic Athletic Conference (1996) again addresses the issue of danger, advantage and circumstance, and establishes irreparable harm absent an injunction. The court in ruling in favor of an injunction for the plaintiff makes mention to the inclusion of programs within the scope of an IEP program. T.H. v. Montana High School Athletic Association (1992) provides further discussion of IEP's in stating that inclusion is a constitutional right if the activity is found to be a part of an IEP (Wolohan, 1997). The court adds that in being part all proceeding and forthcoming steps must proceed with due process of the law. Finally, in a section 504 case, Booth v.

University Interscholastic League (1990), the court, recognizing the need to provide reasonable accommodation, insists that to uphold UIL's eligibility rule would undermine the objectives of the Rehabilitation Act, hence the ADA.

Current application of the law once again shows concurring and dissenting court opinions. These opinions fail to substantiate congruence among application. Most essential eligibility requirements have been made without requiring proof of detriment from the athletic associations (Wolohan, 1997). In many instances there still is dispute as to what the term "reasonable accommodation" encompass. This inconsistent application neglects specific interpretation or direction and has left many questions regarding the impact and application of the law unanswered.

Conclusion

Since there are many meaningful differences between disabled and non-disabled individuals, it can not be assumed that different is discriminatory (Tucker, 1994, Cleburne, 1988). Discrimination can be based upon hostile animus, embarrassment, discomfort, paternalistic fashion, mistaken belief, stereotypes, attitudes, attached stigmas, and thoughtlessness and indifference which often lead to benign neglect. Congress, recognizing discrimination has attempted to apply the numerous views presented by the courts within the ADA legislation. Not only has this litigation enhanced the development of instructional models, but it has also resulted in more money being spent in professional preparation, government grants, research and other special projects relevant to increasing the opportunity for disabled individuals (Winnick, 1990).

Case law helped to clarify implementation of the law. Section 504 unlocked the door for individuals with disabilities to enter the mainstream of society. However, Section 504 failed to accommodate the means necessary to achieve these goals. Problems in substantive requirements and adequate enforcement provisions failed in opening the door wide enough to provide equal opportunity. Not intending to replace previous legislation with the ADA, Con-

gress carefully characterized terms, definitions, applications and remedies so that implementation of the ADA could be smooth and successful. This decree of implementation has yet to be significantly judged by the courts.

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