

ATTACHMENT A to DRC Comments to HUD
Recommendations for Improved Section 504 Scoping Regulations
July 24, 2023

I. Introduction

As noted in Section II of the Comments submitted by DRC on July 24, 2023, we urge HUD clarify its regulations so that Section 504 is appropriately interpreted consistently with the Civil Rights Restoration Act of 1987. (DRC Letter pp. 9-10). Misunderstandings and lack of familiarity with the full scope of Section 504 create significant barriers to accessibility. See, for example, comments on DRC letter at pp. 31 and 45-46. On page 46, we make several recommendations for addressing this problem. In this Attachment, we set out the analysis supporting such changes and specific recommendations for updates to the regulations.

In Section 8.23, HUD correctly defines the broad scope of “program or activity” to include all the operations of recipients. However, many other portions of the regulations are ambiguous or incorrectly imply or state that only the specific project getting direct HUD funds is obligated under Section 504. This exacerbates one of the biggest problems we face in getting widespread accessibility and program access. The state, cities, developers, and others continue to insist that they are not covered by Section 504 of the wide-spread belief that it only applies to particular projects or programs receiving federal funds. In fact, under the Civil Rights Restoration Act, Section 504 applies to “all the activities” of the recipient of federal funds. In other words, if a local or state housing department receives HUD funding, all their housing activities, and those of their subgrantees and contractors, are covered under Section 504, regardless of whether a particular project or development received federal funds. HUD should revise the regulations to capture the appropriate scope of the regulation as intended by the Civil Rights Restoration Act of 1987, P.L. 100-259.

24 C.F.R. Sections 8.1–8.4, 8.20-22, 8.24, 8.25, 8.29, and 8.33 contribute to ambiguity regarding the coverage of the Section 504 regulations. As drafted, many of the regulations are inconsistent with the Civil Rights Restoration Act and interpretation of the scope of Section 504

by the Civil Rights Division of the U.S. Department of Justice, as detailed more below.

For example, Section 8.2 says “This part applies to all applicants for, and recipients of, HUD assistance *in the operation of programs or activities that receive such assistance.*” [Emphasis added.] This implies that coverage is contingent on receipt of federal funds in specific programs and activities, which is incorrect. For clarity, what it should say is: “This part *applies to all the programs and activities of applicants for, and recipients of, HUD assistance.*”

For another example, 24 C.F.R. § 8.4(b) states that “A recipient, in providing any housing, aid, benefit, or service *in a program or activity that receives Federal financial assistance from the Department*” may not discriminate based on disability. [Emphasis added.] It would be more accurate to say: “A *recipient of Federal financial assistance from the Department may not discriminate*, in providing any housing, aid, benefit or service, directly or through contractual, licensing, or other arrangements, solely on the basis of [disability].” The regulations should also be clear that this applies to grantees and subgrantees.

See also comments on pp.1-2 in the letter submitted by the National Fair Housing Alliance on the history of Section 504 and their recommendations on p. 3-4.

See below for additional recommendations for regulatory change.

II. Background and Legal Analysis

Following adoption of Section 504 and similar civil rights statutes, and prior to 1984, the federal agencies charged with enforcing the Civil Rights Act consistently interpreted the protections of those statutes to apply institution-wide. Federal courts generally viewed the statutes in the same manner. However, in 1984 the U.S. Supreme Court issued a key decision that considerably narrowed the scope of the "program and activities" language. *Grove City College v. Bell*, 465 U.S. 555 (1984). Congress reacted by adopting the Civil Rights Restoration Act of 1987 ("Restoration Act"), whose purpose was to "restore Title IX, Section 504, the Age Discrimination Act, and Title VI to the broad, institution wide application

which characterized coverage and enforcement from the time of initial passage until the *Grove City* decision." Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988). The Senate Report regarding the Restoration Act provides an excellent overview of the broad interpretation of coverage prior to *Grove*. S. Rep. No. 100-64, at 4-11.

Congress made explicit findings, in adopting the Restoration Act, that "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of [the four Civil Rights laws]." Pub. L. No. 100-259, § 2(2), (20 U.S.C. § 1687, note). The legislative history makes it clear that the purpose of the Restoration Act and its additional language is "to reaffirm pre-*Grove City* College judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the anti-discrimination provisions of these civil rights statutes," not to adopt new requirements. S. Rep. 100-64 at 2.

The Restoration Act's first paragraph describes it as: "An Act to restore the broad scope of coverage and to clarify the application of [the four laws]." *Id.* In adopting the Restoration Act, Congress was careful not to change the "program or activity" or "program" language that had been in the statutes from the beginning. Instead, it added to each of the statutes a section interpreting and defining "program or activity" to restore its prior interpretation. It did this by making it explicit that discrimination is prohibited throughout entire local government agencies or departments if any part of the agency or department receives federal assistance. For example, the new language added to Title IX in Public Law 100-259, 102 Stat. 28, was placed under a caption entitled "Interpretation of 'Program or Activity'". The Senate Report highlighted that the earlier broad interpretation was critical for effective enforcement of the civil rights statutes, particularly given the difficulty in tracing funds once they have been disbursed to an entity. Post-*Grove City*, enforcement agencies testified that they encountered serious difficulties because data systems did not include program specific information and because it was difficult to trace the path of some funds. Searching for specific money or specific pathways increased the cost, paperwork, and time for enforcement. S. Rep. 100-64 at 11.

Now the federal law makes it clear that when any state or local agency or department gets any federal financial assistance, all its activities are covered, thus restoring the pre-*Grove* interpretation of the language in the federal acts. For example, under Section 504, once a department, agency, special purpose district, or other instrumentality of a local government receives federal dollars, "all of the operations of" that department or agency are covered by the nondiscrimination requirements. See 29 U.S.C. § 794(b) (1)(A). (... "the term 'program or activity' means all of the operations of-- a department, agency, special purpose district or other instrumentality of a State or of a local government.") The nondiscrimination provisions also extend to all activities of any entity that distributes the funds and any department or agency that receives the funds. See 29 U.S.C. § 794(b) (1)(A). (... "program or activity" means all of the operations of... the entity of such . . . local government that distributes such assistance and each such department or agency (and each other ... local government entity) to which the assistance is extended, in the case of assistance to a local government.") In other words when an agency of a local government receives federal aid and distributes it to another department or agency, both are covered.

For a further description of the history and the appropriate scope of the regulations, see *also* U.S. Dept. of Justice, Civil Rights Division, Title VI Legal Manual (Updated).¹ (The Civil Rights Restoration Act applies to 504 as well as Title VI.)² Section V, Defining Title VI, section page 1 *et seq.* has an excellent description of the broad coverage that applies equally to Title VI and 504. Of particular note for the HUD regulations are the discussions in Section V(C) ("What is Federal Financial Assistance?"), Section V(D) ("What/Who is a Recipient?"), and Section V(E) ("Program or Activity".)

¹ The DOJ manual is available at <https://www.justice.gov/media/1121301/dl?inline>. See also <https://www.justice.gov/crt/fcs/T6manual>. Check to be sure you have the Updated version.

² Broad coverage is also consistent with the ADA. See, e.g., 28 C.F.R. section 35.151 applies to facilities "constructed by, on behalf of, or for the use of a public entity."

See, for example, this paragraph from the DOJ Manual:

“With regard to public institutions or private institutions that serve a public purpose, the “program or activity” that Title VI covers encompasses the entire institution and not just the part of the institution that receives federal financial assistance. 42 U.S.C. § 2000d-4a. Moreover, the part of the program or activity that receives assistance can be, and often is, distinct from the part that engages in the allegedly discriminatory conduct. See *White v. Engler*, 188 F. Supp. 2d 730, 745–47 (E.D. Mich. 2001) (plaintiffs could pursue a Title VI claim against a scholarship program, even though the program operated without federal financial assistance, because it was part of a department that received federal funds); *D.J. Miller & Assocs. v. Ohio Dep’t of Admin. Servs.*, 115 F. Supp. 2d 872, 878 (S.D. Ohio 2000) (granting a preliminary injunction under Title VI regarding alleged discrimination in a state contract where the contract was administered by a department that received federal funds).”

Section V, p. 23.

Despite this clear legislative history and DOJ’s detailed interpretation of the scope of 504, many of the HUD 504 regulations still use language that implies that only programs, projects, or developments that have federal funding in that particular development or program are covered, regardless of whether the entity funding the project or developing the project as part of its programs receives federal funding. The sections discussed below do not reflect the intent, language, or legislative history of the Civil Rights Restoration Act. This is not an exhaustive list. All of the regulations should make clear that once a local or state government entity or agency receives federal funding (not just HUD funding), all of their activities, including all housing developments that are funded by the entity or developed as part of the programs of the entity, are covered by Section 504.

III. Specific Recommendations

This section addresses specific proposed regulatory changes in redline format, with some brief explanations of the proposed changes. We recognize that these suggestions may not be the only way to accomplish the purpose, but we believe that the recommendations do accomplish the

purpose. All sections are found in 24 C.F.R. Part 8. Changes are shown in red and underlined for additions, deletions are shown in ~~strike-out~~ text. This is not a complete list of possibly needed clarifications.

“§ 8.1 Purpose.

(a) “The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C 794), to the end that no otherwise qualified individual with handicaps in the United States shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of any entity directly or indirectly receiving Federal financial assistance from the Department of Housing and Urban Development.”

[Remainder of Section omitted – no further changes suggested.]

This proposed change clarifies that all the programs and activities of an entity receiving Federal financial assistance are covered, not just programs or activities directly receiving such assistance.

“§ 8.2 Applicability.

“This part applies to all the programs and activities of all applicants for, and recipients of, HUD assistance ~~in the operation of programs or activities receiving such assistance.~~”

This proposed change clarifies that all the programs and activities of an entity receiving Federal financial assistance are covered, not just programs or activities directly receiving such assistance.

“§ 8.3 Definitions. [Selected definitions – only included if proposed changes are recommended]

“**Auxiliary aids** means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities of any entity receiving Federal financial assistance. . . .”

This proposed change clarifies that all the programs and activities of an entity receiving Federal financial assistance are covered, not just programs or activities directly receiving such assistance.

“**Federal financial assistance** means any assistance provided or otherwise made available by the Department through any grant, subgrant, loan, contract, subcontract, or any other arrangement, in the form of:

(a) Funds;

(b) Services of Federal personnel; or

(c) Real or personal property or any interest in or use of such property, including:

(1) Transfers or leases of the property for less than fair market value or for reduced consideration; and

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

This section has an appropriately broad scope but should make explicit that all subrecipients, whether through grants, contracts or other arrangements, are required to comply with section 504.

“**Primary recipient** means a person, group, organization, State or local unit of government that is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program or activity.”

This is a good definition. However, revisions should be added to clarify that such subrecipients are also covered, perhaps through a definition of subrecipient. If a definition of subrecipient is added, then all references to recipients should be changed to “**recipients and subrecipients.**”

“Program or activity means all of the operations of:

(a)(1) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(2) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(b)(1) A college, university, or other post-secondary institution, or a public system of higher education; or

(2) A local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(c)(1) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(2) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, or which are part of a program or activity of another recipient of Federal financial assistance, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(d) Any other entity which is established by two or more of the entities described in paragraphs (a), (b), or (c) of this section; any part of which is extended Federal financial assistance.”

This broad definition of “primary recipient” is helpful. Additional clarification would be useful. In particular, the regulation should be modified to explain that this includes any assisted housing facility, whether that housing facility receives Federal Financial Assistance directly from HUD or if it receives financial assistance from another entity or recipient that receives Federal Financial Assistance.

Subsection (c)(1) should be amended to clarify that if an owner of a housing facility receives Federal financial assistance directly or receives financial assistance from another entity or recipient that receives Federal financial assistance, all of the program and activities of that owner are covered, including all of its housing operations and developments.

Similarly, Subsection (c)(2) should be amended to make it explicit that if a housing facility receives Federal financial assistance directly or receives financial assistance from another entity or recipient that receives Federal Financial Assistance, all of the operations of that housing facility are covered. For example, if only some units in the housing facility received HUD assistance, such as Project Based Vouchers; or if the housing facility receives funds from a City that receives HUD funds; or if the financing for the facility includes in part either type of assistance, all units and common areas are covered. Owners would be required to abide by Section 504, including paying for reasonable modifications for all applicants and tenants.

“Project means the whole of one or more residential structures and appurtenant structures, equipment, roads, walks, and parking lots which are covered by a single contract ~~for Federal financial assistance or application for assistance~~, or are treated as a whole for processing purposes, whether or not located on a common site.”

As written, this implies that a project has to receive Federal financial assistance to be covered. However, a project may receive other assistance from an entity that receives Federal financial assistance and thus would also be covered. Deletion of the phrase “for Federal financial assistance or application for assistance” eliminates the confusion.

“Recipient means 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 for any program or activity directly or through another recipient, including any grantee, successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. Recipient also means 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 that receives assistance, whether Federal financial assistance or other assistance, as part of a program or activity of an entity receiving Federal financial assistance. An entity or person receiving housing assistance payments from a recipient on behalf of eligible families under a housing assistance payments program or a voucher program is not a recipient or subrecipient merely by virtue of receipt of such payments.

This amendment expands the scope to include recipients of assistance from entities receiving Federal financial assistance, even if they don't receive federal assistance. This is necessary because *all of the program or activities* of a recipient are covered, including subrecipients, grantees, contractors, etc. Adding "grantee" also adds clarity as to scope.

"Section 504 means section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, as it applies to programs or activities of any entity receiving Federal financial assistance."

This proposed change clarifies that all the programs and activities of an entity receiving Federal financial assistance are covered, not just programs or activities directly receiving such assistance.

"§ 8.4 Discrimination prohibited.

(a) No qualified individual with handicaps shall, solely on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity of an entity that receives Federal financial assistance from the Department.

(b)(1) A recipient, in providing any housing, aid, benefit, or service in a program or activity of an entity that receives Federal financial assistance from the Department may not, directly or through

contractual, licensing, or other arrangements, solely on the basis of handicap: . . .”

These proposed changes clarify that all the programs and activities of an entity receiving Federal financial assistance are covered, not just programs or activities directly receiving such assistance.

. . .

(3) A recipient may not deny a qualified individual with handicaps the opportunity to participate in any ~~federally assisted~~ program or activity that is not separate or different despite the existence of permissibly separate or different programs or activities.

(4) In any program or activity ~~receiving Federal financial assistance from the Department~~, covered by these regulations, a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would:

. . .

(ii) Defeat or substantially impair the accomplishment of the objectives of the recipient's ~~federally assisted~~ program or activity for qualified individuals with a particular handicap involved in the program or activity, unless the recipient can demonstrate that the criteria or methods of administration are manifestly related to the accomplishment of an objective of a program or activity; . . .

(5) In determining the site or location of a ~~federally assisted~~ facility covered under these regulations, an applicant for assistance or a recipient may not make selections the purpose or effect of which would:

(i) Exclude qualified individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under, any program or activity ~~that receives Federal financial~~

~~assistance from the Department~~ covered under these regulations, . . .

(6) As used in this section, the housing, aid, benefit, or service provided under a program or activity ~~receiving Federal financial assistance~~ covered under these regulations includes any housing, aid, benefit, or service provided in or through a facility that has been constructed, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance or with assistance from an entity receiving Federal financial assistance.

. . .

(d) Recipients shall administer programs and activities ~~receiving Federal financial assistance~~ covered under these regulations in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

These proposed changes clarify that all the programs and activities of an entity receiving Federal financial assistance are covered, not just programs or activities directly receiving such assistance.

“§ 8.20 General requirement concerning program accessibility.

“Except as otherwise provided in §§ 8.21(c)(1), 8.24(a), 8.25, and 8.31, no qualified individual with handicaps shall, because a recipient's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity of an entity that receives Federal financial assistance.”

This proposed change clarifies that all the programs and activities of an entity receiving Federal financial assistance are covered, not just programs or activities directly receiving such assistance.

“§ 8.21 Non-housing facilities.

. . .

(b) Alterations to facilities. Alterations to existing non-housing facilities shall, to the maximum extent feasible, be made to be readily accessible to and usable by individuals with handicaps. For purposes of this paragraph, the phrase to the maximum extent feasible shall not be interpreted as requiring that a recipient the owner or operator of the facility make a non-housing facility, or element thereof, accessible if doing so would impose undue financial and administrative burdens on the operation of the recipient's owner's program or activity.

(c) Existing non-housing facilities—

(1) General. A recipient Owners and operators of a facility shall operate each non-housing program or activity ~~receiving Federal financial assistance~~ covered by these regulations so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not— . . .”

These proposed changes clarify that all the programs and activities of an entity receiving Federal financial assistance are covered, not just programs or activities directly receiving such assistance. Existing language appears to limit coverage only to facilities that have directly received Federal financial assistance, excluding those that have received assistance (whether it's Federal assistance or not) from an entity receiving Federal financial assistance.

This paragraph from Section V, p. 29 of the DOJ Manual is instructive:

“The definition of “program or activity” is broader for private entities that engage in certain public works. For recipients “principally engaged” in the business of providing education, health care, **housing**, social services, or parks and recreation, the term “program or activity” has an institution-wide application. 42 U.S.C. § 2000d-4a(3)(A)(ii). In other words, Title VI covers the entire entity when any part of it receives federal

financial assistance. For example, Nursewell Corporation owns and runs a chain of five nursing homes as its principal business. One of the five nursing homes receives federal financial assistance under the Older Americans Act. Because the corporation is principally engaged in the business of providing social services and housing for elderly persons, aid to one home will subject the entire corporation to the requirements of Title VI. See S. Rep. No. 64 at 18, reprinted in 1988 U.S.C.C.A.N. at 20; see also Mary Crossley, *Infected Judgment: Legal Responses to Physician Bias*, 48 Vill. L. Rev. 195, 265 (2003).”

“§ 8.24 Existing housing programs.

(a) General. A recipient receiving Federal financial assistance shall operate each existing housing program or activity ~~receiving Federal financial assistance~~ so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not— . . . “

This proposed change clarifies that all the programs and activities of an entity receiving Federal financial assistance are covered, not just programs or activities directly receiving such assistance.

“§ 8.29 Homeownership programs (sections 235(i) and 235(j), Turnkey III and Indian housing mutual self–help programs).

Any housing units newly constructed or rehabilitated for purchase or single family (including semi-attached and attached) units to be constructed or rehabilitated in a program or activity of an entity receiving Federal financial assistance shall be made accessible upon request of the prospective buyer if the nature of the handicap of an expected occupant so requires. . . .”

This proposed change clarifies that all the programs and activities of an entity receiving Federal financial assistance are covered, not just programs or activities directly receiving such assistance.

§ 8.33 Housing adjustments.

This section is accurate *if* the definition of recipient is expanded as suggested above. Otherwise, it excludes significant numbers of covered recipients.

Additional sections.

We recommend additional sections be added providing more clarity about the scope of 504 coverage for housing developments which are part of a program or activity of a recipient or who receive some financial assistance from a recipient of Federal financial assistance, to further inform individuals that they are covered in many instances even if there is no Federal financial assistance in the development. It may also be helpful to add definitions of subrecipient, grantee/subgrantee, and other terms.