



Brigham Young University–Hawaii
Office of Compliance & Ethics Research Memo
Testing Accommodations

Law/Act:	Section 504 of the Rehabilitation Act of 1973 (Section 504) Americans with Disabilities Act of 1990 (ADA)	
U.S. Code Citation:	29 U.S.C. § 794 (Section 504) ; 42 U.S.C. §§ 12181–12189 (ADA)	
Code of Federal Regulations Citation:	28 C.F.R. pt. 36 (Title III of ADA) ; 34 C.F.R. pt. 104 (Section 504)	
Responsible Regulator:	U.S. Dep’t of Educ. Office for Civil Rights (Section 504) U.S. Attorney General (ADA)	
BYU–Hawaii Responsible Officer:	Section 504 Coordinator	
	Updated: Feb. 2017	Updated By: MKC
	Version: 1.0	Effective Date: Sept. 26, 1973 (Section 504); Jan. 26, 1992 (Title III of ADA)

PURPOSE

Both Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act of 1990 (ADA) are intended to eliminate discrimination against individuals on the basis of disability.¹

HISTORY

Congress passed Section 504 on September 26, 1973, largely in response to civil rights activists advocating protections for persons with disabilities.² In July 1990, Congress passed the Americans with Disabilities Act (ADA), which provided further protection for disabled individuals.³ The next year, the U.S. Department of Justice (DOJ) issued rules under Title III of the ADA, which prohibits disability-based discrimination in places of public accommodation.⁴ In 2008, Congress passed the ADA Amendments Act to make it easier for persons seeking protection under the ADA to claim a disability as defined in the law.⁵ Two years later, the DOJ published revised ADA regulations, which became effective in 2011.⁶ In 2016, the DOJ amended its ADA regulations in order to incorporate statutory changes to the ADA.⁷

APPLICABILITY TO BYU–HAWAII

Section 504 requirements apply generally to all the operations of a college, university, or postsecondary institution that receives federal financial assistance from the U.S. Department of Education (ED).⁸ Additionally, Title III of the ADA applies to places of public accommodations, including undergraduate and postgraduate private schools or other places of education.⁹ Entities controlled by religious

¹ 29 U.S.C. § 794(a) (2016); 42 U.S.C. § 12101(b)(1)–(4). Section 504 aims to eliminate discrimination against persons with disabilities in programs that receive federal financial assistance. 29 U.S.C. § 794(a).

² Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.

³ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

⁴ Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544 (July 26, 1991).

⁵ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. § 12101 NOTE); *Fact Sheet on the EEOC’s Final Reg. Implementing ADAAA*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N https://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm (last visited Feb. 1, 2017).

⁶ Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,237 (Sept. 15, 2010).

⁷ Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 81 Fed. Reg. 53,204 (Aug. 11, 2016) (codified at 28 C.F.R. pts. 35, 36).

⁸ See 29 U.S.C. § 794(a)–(b) (2016) (prohibiting disability-based discrimination under any program or activity that receives federal financial assistance); 34 C.F.R. § 104.2 (stating that each recipient of federal financial assistance from ED must follow the regulations outlined in part 34) (2017); 34 C.F.R. § 104.3(f) (defining “recipient”); *id.* § 104.3(k)(2)(i) (2017) (defining “program or activity”).

⁹ See 42 U.S.C. § 12182 (prohibiting discrimination by places of public accommodation); *id.* § 12181(7)(I) (defining “public accommodation” as specifically listed private entities whose operations affect commerce); see also 28 C.F.R. § 36.102 (applying regulations to any public accommodation); *id.* § 36.104 (defining “place of public accommodation”).



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organizations are exempt from Title III of the ADA;¹⁰ however, the ED Office for Civil Rights (OCR) expects institutions to meet Section 504 requirements consistent with the ADA Amendments Act.¹¹

As a recipient of federal financial assistance, BYU–Hawaii must comply with Section 504.¹² BYU–Hawaii is exempt from the Title III requirements of the ADA as an entity controlled by a religious organization;¹³ however, OCR enforces Section 504 consistent with the ADA.¹⁴

REQUIREMENTS

A. Definition

In this memo, the term “person with a disability” refers to one who has a physical or mental impairment that substantially limits one or more major life activities of the individual, one who has a record of such an impairment, or one who is regarded as having such an impairment.¹⁵

B. General Requirements

A university that employs fifteen or more people must designate an employee to coordinate its efforts to comply with Section 504.¹⁶ Under Section 504, qualified persons with disabilities must not, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in educational programs and activities.¹⁷ Specific acts of discrimination include the following:

- Denying a person with a disability the opportunity to participate in or benefit from a provided aid, benefit, or service¹⁸
- Providing different or separate or less effective service, aid, or other benefit to a person with a disability, unless such action is required in order to provide qualified persons with disabilities with services, aids, or benefits that are as effective as those provided to others¹⁹
- Selecting a facility’s location with the purpose or effect of excluding persons with disabilities from, denying them the benefits of, or subjecting them to discrimination²⁰
- Limiting a person with a disability from enjoying any advantage or privilege enjoyed by others receiving any service, financial aid, or benefit under the program²¹
- Affording a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others²²

¹⁰ 42 U.S.C. § 12187.

¹¹ See U.S. Dep’t of Educ. Office for Civil Rights, *Protecting Students with Disabilities*, <https://www2.ed.gov/about/offices/list/ocr/504faq.html> (last modified Oct. 16, 2015) (stating that OCR enforces Section 504 regulations consistent with the ADA Amendments Act).

¹² BYU–HAWAII ACCOMMODATION OF PERSONS WITH DISABILITIES (2012), <https://byuh.teamdynamix.com/TDClient/1902/Portal/KB/ArticleDet?ID=59173> herein after BYU–HAWAII PROCEDURES.

¹³ BYU–Hawaii, *Mission & Vision*, <https://about.byuh.edu/about-byuh/mission-and-vision> (last accessed 5/6/2020).

¹⁴ U.S. Dep’t of Educ. Office for Civil Rights, *supra* note 11.

¹⁵ 42 U.S.C. § 12102(1) (defining “disability”); 28 C.F.R. § 36.105(a) (defining “disability”); 34 C.F.R. § 104.3(j) (defining “handicapped person”).

¹⁶ 34 C.F.R. § 104.7(a). This responsible employee is known as the Section 504 coordinator.

¹⁷ 42 U.S.C. § 12182(a); 28 C.F.R. § 36.201(a); 34 C.F.R. § 104.4(a).

¹⁸ 34 C.F.R. § 104.4(b)(1)(i).

¹⁹ *Id.* § 104.4(b)(1)(iii)–(iv).

²⁰ *Id.* § 104.4(b)(5).

²¹ *Id.* § 104.4(b)(1)(vii).

²² *Id.* § 104.4(b)(ii).



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- Using criteria or administration methods that effectively subject persons with disabilities to discrimination, defeat or substantially impair the accomplishment of program objectives with respect to persons with disabilities, or that perpetuate the discrimination of another recipient²³

C. Testing Accommodations

During course examinations, both Section 504 and the ADA require a university to provide methods that will accurately measure a “student’s achievement in the course,” rather than reflecting that student’s disability.²⁴ However, if the test claims to measure sensory, manual, or speaking skills, no such accommodation is required.²⁵ Universities must provide necessary auxiliary aids (e.g., taped texts, interpreters, or readers) to students with disabilities.²⁶

Under Title III of the ADA, universities must offer courses and course examinations in a place and manner accessible to persons with disabilities or offer to make accessible accommodations for such persons.²⁷ Universities must also ensure the following with regards to course examinations²⁸:

- An examination designed for persons with disabilities is offered at equally convenient locations, as often, and in as timely a manner as other examinations.
- The examination is administered in accessible facilities, or alternative accessible arrangements are made.
- Any request for documentation, if such is required, must be reasonable and limited to the need for a requested accommodation.
- Considerable weight is given to documentation of past accommodations in similar testing situations when considering requests for accommodations.
- Responses to requests for accommodations are provided in a timely manner.

Required modifications to an examination may include changes in the length of time permitted to complete the examination, adaptation of the manner in which the examination is given, provision of auxiliary aids (except when such aids would “fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden”), and alternative accessible arrangements (e.g., providing the examination at the individual’s home with a proctor, if accessible facilities are not available).²⁹

In 1997, ED suggested the following as possible testing accommodations: oral administration, large print, Braille version, individual or separate test-taking locations, extended time, and multiple test sessions.³⁰ Students with disabilities should work with appropriate individuals to decide whether they will participate in a particular test or assessment and what types of accommodations they may utilize.³¹

²³ *Id.* § 104.4(b)(4); 28 C.F.R. § 36.204.

²⁴ 34 C.F.R. § 104.44(c); 28 C.F.R. § 36.309(b)(1).

²⁵ 34 C.F.R. § 104.44(c); 28 C.F.R. § 36.309(b)(1).

²⁶ 34 C.F.R. § 104.44(d); 28 C.F.R. § 36.303(a)–(c).

²⁷ 28 C.F.R. § 36.309(a).

²⁸ *Id.* § 36.309(b)(1); *see also*, Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,298 (Sept. 15, 2010) (“Access to examinations should be offered to persons with disabilities in as timely a manner as it is offered to persons without disabilities.”).

²⁹ 28 C.F.R. § 36.309(b)(2)–(4).

³⁰ U.S. Dep’t of Educ., Dear Colleague Letter: Including Students with Disabilities in all Educational Reform Activities (Sept. 29, 1997), <https://www2.ed.gov/about/offices/list/ocr/docs/asses902.html>.

³¹ *Id.*



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Furthermore, the U.S. Department of Justice Civil Rights Division created a publication outlining obligations of testing entities.³² While these obligations pertain to high school equivalency exams, college entrance exams, and graduate school exams, many of these principles may be applied in a traditional undergraduate testing environment. For example, an institution may give persons with disabilities permission to bring and take medications during an exam, and it may provide students with wheelchair accessible testing stations and distraction free rooms.³³

D. Facilities

Facilities must be accessible to and usable by persons with disabilities.³⁴ Universities may come into or maintain compliance by redesigning equipment, reassigning classes or other services to accessible buildings, altering existing facilities, and constructing new facilities.³⁵ Under the ADA, places of public accommodation must remove architectural barriers in facilities.³⁶ Removing barriers may be achieved by installing ramps; repositioning shelves; rearranging furniture; adding raised markings on elevator control buttons; widening doors; creating designated accessible parking spaces; and removing high pile, low density carpeting.³⁷ If removing barriers is not readily achievable, a university must ensure that its goods, services, and accommodations are available to persons with disabilities through alternative methods.³⁸ A university must also permit students with disabilities to use wheelchairs and manually powered modes of mobility (e.g., crutches or braces) in any area that is open to pedestrian use.³⁹

Additionally, a university must modify policies, practices, or procedures in order to permit the use of a service animal by a person with a disability.⁴⁰ If the animal is out of control or is not housebroken, the public accommodation may ask the person with a disability to remove the animal from the premises.⁴¹

PENALTIES

Failure to comply with Section 504, may result in suspension or termination of a school's federal financial assistance.⁴² The assistant secretary for OCR may also enforce any action deemed necessary to remedy the effects of discrimination.⁴³ Under the ADA, if the U.S. attorney general has reasonable cause to believe that the university is engaged in a pattern or practice of disability-based discrimination, he or she may investigate alleged violations of the ADA, initiate a compliance review, or sue the institution.⁴⁴

³² U.S. Dep't of Justice Civil Rights Div., *Americans with Disabilities Act Technical Assistance: Testing Accommodations*, https://www.ada.gov/regs2014/testing_accommodations.html (last visited Feb. 2, 2017).

³³ *Id.*

³⁴ See 34 C.F.R. § 104.21 (prohibiting discrimination against a qualified person with a disability on the basis of inaccessible or unusable facilities); 28 C.F.R. § 36.211(a) (stating that public accommodations must maintain features of facilities and equipment that are to be readily accessible to and usable by persons with disabilities).

³⁵ 34 C.F.R. §§ 104.22(b), 104.23. Recipients do not have to structurally change existing facilities if they can implement other methods that will effectively make the facility accessible. *Id.* § 104.22(b).

³⁶ 28 C.F.R. § 36.304(a).

³⁷ *Id.* § 36.304(b).

³⁸ *Id.* § 36.305(a).

³⁹ *Id.* § 36.311(a).

⁴⁰ 28 C.F.R. § 36.302(c)(1)–(2).

⁴¹ *Id.* More information on service animal requirements is available in the university's *Animals on Campus* policy at <https://byuh.teamdynamix.com/TDClient/1902/Portal/KB/ArticleDet?ID=80938>; last accessed 5/6/2020.

⁴² 34 C.F.R. § 100.8(a).

⁴³ *Id.* § 104.6(a)(1)–(3).

⁴⁴ See 28 C.F.R. §§ 36.502(a)–(c), 36.503(a)–(b) (describing when the attorney general may commence a civil action in any appropriate U.S. district court).



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STAYING UP-TO-DATE

The following websites provide valuable information regarding this law and its applicability.

DOCUMENT/REFERENCE	DESCRIPTION
Accommodation of Persons with Disabilities	Current BYU–Hawaii policy regarding persons with disabilities
A Guide to Disability Rights Laws	A DOJ guide that provides an overview of federal laws that protect rights of people with disabilities
Americans with Disabilities Act	The Department of Justice ADA website, which provides detailed information about requirements and compliance
ADA Requirements: Testing Accommodations	DOJ Civil Rights Division handout, which provides examples of testing accommodations