



U.S. Department of Justice

Civil Rights Division

*Assistant Attorney General
950 Pennsylvania Ave, NW - RFK
Washington, DC 20530*

MEMORANDUM

August 19, 2020

TO: Federal Agency Civil Rights Directors and General Counsels

FROM: Eric S. Dreiband
Assistant Attorney General

SUBJECT: Reminder of Clearance Requirements for Title VI, Title IX, Section 504, and Related Nondiscrimination Regulations and Policy Guidance Documents

Under Executive Order 12250, *Leadership and Coordination of Nondiscrimination Laws* (EO 12250), the Department of Justice is charged with ensuring the consistent and effective implementation of civil rights law prohibiting discriminatory practices in Federal programs and programs receiving federal financial assistance, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments Act of 1972, and Section 504 of the Rehabilitation Act (Section 504).

In April 2018, the Department issued memoranda addressing the clearance requirements under EO 12250 and the coordination of Federal agencies' implementation of Title II of the Americans with Disabilities Act and Section 504, along with a one-page summary chart on EO 12250. As we approach the Fall Unified Agenda of Regulatory and Deregulatory Actions, I am redistributing these documents for your reference.

The Division's Federal Coordination and Compliance Section (FCS), Educational Opportunities Section (EOS), and Disability Rights Section (DRS) work together to ensure the clearance process runs as effectively as possible. Please do not hesitate to contact Christine Stoneman, Principal Deputy performing the duties of Chief of FCS, at 202-616-6744, Shaheena Simons, Chief of EOS, at 202-305-3364, or Rebecca Bond, Chief of DRS, at 202-307-0663 with questions about the clearance process.

Attachments:

- Memorandum: Clearance Requirements for Title VI, Title IX, Section 504, and Related Nondiscrimination Regulations and Policy Guidance Documents
- Executive Order 12250 Clearance Summary Chart
- Memorandum: Coordination of Federal Agencies' Implementation of title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act



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Assistant Attorney General
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Washington, DC 20530

APR 24 2018

MEMORANDUM

TO: Federal Agency Civil Rights Directors and General Counsels

FROM: John M. Gore 
Acting Assistant Attorney General

SUBJECT: Clearance Requirements for Title VI, Title IX, Section 504, and Related
Nondiscrimination Regulations and Policy Guidance Documents

I am writing to provide you with information and a helpful tool to support your agency's efforts to comply with longstanding clearance requirements for certain nondiscrimination regulations and policy guidance documents. The Civil Rights Division periodically issues memoranda to federal agencies on coordinated, government-wide civil rights enforcement, particularly during times of staff and leadership transition. This memorandum provides background information to assist your staff in identifying the types of documents that may require review by the Civil Rights Division.

Under Executive Order 12250 (EO 12250), the Department of Justice (DOJ) is charged with ensuring the consistent and effective implementation of civil rights laws "prohibiting discriminatory practices in Federal programs and programs receiving federal financial assistance." Exec. Order No. 12250, *Leadership and Coordination of Nondiscrimination Laws*, reprinted at 45 Fed. Reg. 72,995 (Nov. 4, 1980).¹ Document clearance is a critical and longstanding component of this DOJ mandate.

Clearance Authority. Clearance requirements under EO 12250 should be routinely considered during your agency's regulatory review process, and during the development of any new document addressing the laws covered by the Order. Importantly, these requirements apply

¹ Under Executive Order 12250, DOJ is charged with coordinating the implementation and enforcement by Executive agencies of various provisions of the following laws: (a) Title VI of the Civil Rights Act of 1964 (prohibiting race, color, and national origin discrimination, which includes language access for limited English proficient individuals, in federally funded programs and activities), 42 U.S.C. §2000d *et seq.*; (b) Title IX of the Education Amendments of 1972 (prohibiting sex discrimination in education programs and activities of recipients of federal funds), 20 U.S.C. §1681 *et seq.*; (c) Section 504 of the Rehabilitation Act of 1973 (prohibiting disability discrimination in both federally conducted and federally funded programs and activities), 29 U.S.C. §794; and (d) "any other provision of Federal statutory law which provides, in whole or in part, that no person in the United States shall on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Exec. Order 12250 at §1-201.

not only to new and amended regulations and guidance documents, but also to the repeal of such documents. There are two basic levels of clearance:

1. The Department of Justice must review and approve regulations implementing Title VI, Title IX, and Section 504. The Attorney General must approve Federal regulations that effectuate Title VI and Title IX. 42 U.S.C. §2000d-1; 20 U.S.C. §1682; Exec. Order 12250 at §1-1. The Assistant Attorney General for Civil Rights must approve regulations that effectuate Section 504. 28 C.F.R. §41.4(b). These requirements also apply to the portions of regulations that affect Title VI, Title IX, or Section 504 enforcement, but that primarily implement other statutes. For example, if a federal agency drafts a general rule governing administrative complaints, the EO 12250 requirements apply to that rule to the extent it covers Title VI, Title IX, or Section 504 enforcement by that agency.

2. The Department of Justice may require that some or all regulations implementing the nondiscrimination provisions of laws *other than* Title VI, Title IX, and Section 504 or policy guidance issued under *any* of the laws covered by EO 12250 be “submitted for approval before taking effect.” Exec. Order 12250 at §1-402. Documents subject to this requirement include regulations issued to effectuate statutes that “provide, in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Exec. Order 12250 at §1-201(d), 1-402. This requirement also applies to policy guidance documents addressing any of the laws covered by EO 12250, whether or not they will be issued for public notice and comment. Exec. Order 12250 at §1-402.

To better inform agencies, I am attaching a chart that summarizes the EO 12250 clearance process. It is intended to be a plain language “how-to” guide, with relevant citations, that should support agencies’ accurate and early identification of documents covered by EO 12250 and timely notice of such documents to DOJ.

With respect to nondiscrimination on the basis of disability, DOJ is in the unique position of having to ensure not only the consistent implementation of Section 504 across the federal government but also parity between Section 504 and the Americans with Disabilities Act (ADA).² While not addressed by EO 12250, the authority to issue regulations and technical assistance implementing or interpreting subtitle A of Title II of the ADA is within the exclusive domain of DOJ unless provided otherwise under statute³ or by express delegation by DOJ. I am

² See 42 U.S.C. §12134(b); 42 U.S.C. §12201(a); H.R. Rep. 102-822 at 83 (Aug. 10, 1992); S. Rep. 102-357 at 12 (Aug. 3, 1992).

³ Section 202 of the Rehabilitation Act provides the Director of the National Institute on Disability and Rehabilitation Research with the responsibility for “coordinating activities with the Attorney General regarding the provision of information, training, or technical assistance regarding the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*) to ensure consistency with the plan for technical assistance required under section 506 of such Act (42 U.S.C. 12206).” 29 U.S.C. §762.

attaching a memorandum that describes the legal authority of DOJ and other agencies under Title II of the ADA and Section 504, the relationship between these two laws, and DOJ's responsibility for coordination of these statutes among federal agencies. Please ensure the distribution of these two reference documents to your staff.

The Division's Federal Coordination and Compliance Section (FCS) runs a comprehensive program of assistance and oversight to agency civil rights offices on Title VI, Title IX, and related program matters. In addition, the Disability Rights Section (DRS) coordinates the implementation and enforcement of Section 504 and other disability-related matters, and the Educational Opportunities Section (EOS) coordinates assistance on education-related matters. Recognizing that many of your documents may cover multiple statutes, these Sections work closely together to ensure that the EO 12250 clearance process runs as smoothly and effectively as possible.

Next steps. If your agency identifies civil rights regulations or policy guidance documents for possible development, repeal, replacement, or modification, DOJ review and clearance may be required under EO 12250. This is particularly important in the case of modification or repeal of regulations or policy guidance that the Attorney General or the Assistant Attorney General approved previously. Please ensure early coordination with FCS, EOS, or DRS for assistance in identifying applicable clearance requirements. My staff will contact your office in the coming months to arrange a brief staff training on the EO 12250 clearance process requirements.

Thank you for your continuing efforts to ensure consistent and effective enforcement of Title VI, Title IX, Section 504, and related laws through our close coordination on documents covered by EO 12250. Please do not hesitate to contact Tamara Kessler, Chief of FCS, at 202-307-2222, Shaheena Simons, Chief of EOS, at 202-305-3364, or Rebecca Bond, Chief of DRS, at 202-307-0663 with questions about the clearance process.

Attachments

Executive Order 12250 Clearance Summary Chart

Memorandum: Coordination of Federal Agencies' Implementation of title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act



Department of Justice Regulatory Clearance Role Under Executive Order 12250

Regulations Implementing Title VI, Title IX, Section 504: DOJ review and approval always required*

What documents? Regulations implementing Title VI, Title IX, and Section 504 that are new or are amending or repealing previously issued regulations in whole or in part.

NPRMs and Final Rules. Agencies must submit such documents to the Assistant Attorney General for Civil Rights (AAG) for review and must obtain approval. Approval of the final text is required before publication. In addition:

Section 504 Final Rules. The AAG must approve final regulations before they may take effect.

Title VI and Title IX Final Rules. The Attorney General must approve final regulations before they may take effect.

Coordinate early, ideally during the drafting stage.

Regulations Implementing Nondiscrimination Provisions of Laws Other than Title VI, Title IX, Section 504: DOJ submission always required and approval sometimes required**

What documents? Regulations implementing laws other than Title VI, Title IX, and Section 504 that prohibit discrimination based on race, color, national origin, sex, disability, or religion in programs receiving federal financial assistance that are new or are amending or repealing previously issued regulations in whole or in part.

NPRMs and Final Rules. Agencies must submit such documents to the AAG and must obtain approval if the AAG so requires.

Coordinate early, ideally during the drafting stage.

Other Types of Documents***

What documents? To fulfill its mandate to ensure the consistent and effective government-wide implementation of the laws covered by EO 12250, DOJ often reviews other types of agency documents issued under the laws described above. For example, EO 12250 authorizes DOJ to require that covered policy guidance documents be submitted for approval before taking effect.

Case-by-case determination. The AAG determines, in coordination with federal agency partners, which documents require review and approval.

Factors considered. Early coordination is essential for documents that (1) may implicate other agencies' compliance programs; (2) adopt new or changed legal interpretations; (3) could result in a conflict among agencies' legal interpretations of Title VI, Title IX, Section 504, or nondiscrimination provisions of other federal laws; and/or (4) are intended for publication in the Federal Register.

Coordinate early to determine whether EO 12250 review will be required.



Please contact the Civil Rights Division's Federal Coordination and Compliance Section, 202-307-2222, Disability Rights Section, 202-307-0663, or Educational Opportunities Section, 202-514-4029, early in the development of documents that may be covered by EO 12250. Staff are available to discuss the applicability of these requirements, and to provide legal counsel to ensure consistency with case law and other agencies' documents.

* 42 U.S.C. §2000d-1 (Title VI); 20 U.S.C. §1682 (Title IX); 28 C.F.R. §0.51 (delegation of EO 12250 responsibilities to the AAG for Civil Rights), 28 C.F.R. §41.4(b) (each agency shall submit its proposed Section 504 final regulation to the AAG for Civil Rights for review at least 45 days before it is to be issued); 28 C.F.R. §42.403(c) (Title VI proposed rules require approval of the AAG for Civil Rights before publication in the Federal Register for comment, and Title VI regulations require final approval of the AG); EO 12250 at 1-1 (delegations to the AG); 1-201 (laws covered by EO 12250), 1-202 (review of existing and proposed rules "in order to identify those which are inadequate, unclear or unnecessarily inconsistent"), 1-205 (authority to implement a schedule for the review of implementing regulations).

** See EO 12250 at 1-201 (laws covered by EO 12250), 1-202 (review of existing and proposed rules "in order to identify those which are inadequate, unclear or unnecessarily inconsistent"), and 1-402 (regulations implementing a law covered by EO 12250 "subject to the approval of the Attorney General, who may require that some or all of them be submitted for approval before taking effect").

*** See EO 12250 at 1-401 (authority to require "reports and information"), 1-402 (policy guidance on a law covered by EO 12250 "subject to the approval of the Attorney General, who may require that some or all of them be submitted for approval before taking effect").



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APR 24 2018

MEMORANDUM

TO: Federal Agency Civil Rights Directors and General Counsels

FROM: John M. Gore 
Acting Assistant Attorney General

SUBJECT: Coordination of Federal Agencies' Implementation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act

I. Introduction

During the course of its work with other Federal agencies on disability nondiscrimination laws, the Department of Justice (the Department) has become aware of the need to provide further clarity on the scope of the Department's and other agencies' authority under Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504). This memorandum sets forth the authorizations provided to the Department and other agencies under Title II and Section 504 and discusses the implications for the Department's coordination of these statutes among Federal agencies. The Department hopes to eliminate inconsistencies in the implementation and enforcement of Title II and Section 504 among Federal agencies, which often results in confusion to the public.

The Assistant Attorney General for Civil Rights is responsible for ensuring consistency in the implementation of Section 504 and Title II across the Federal government. In addition, given Congress' intent for parity between Section 504 and Title II of the ADA, the Assistant Attorney General for Civil Rights must also ensure that any interpretations of Section 504 are consistent with Title II (and vice versa). Accordingly, it is critical that the Assistant Attorney General for Civil Rights have the opportunity to review and approve any regulations and guidance from other Federal agencies implementing Section 504. In addition, unless provided otherwise under statute or by express delegation by the Department, the issuance of regulations and technical assistance implementing or interpreting Subtitle A of Title II of the ADA are within the exclusive domain of the Department; therefore, agencies may not issue such documents independently.

II. Authority under the ADA

The ADA prohibits discrimination on the basis of disability by state and local entities as well as public accommodations. Congress provided various Federal agencies with the authority to issue regulations to implement Titles I – IV of the ADA. For purposes of the discussion of the ADA in this memorandum, the Department is addressing only Title II. The ADA authorizes the

Attorney General to promulgate regulations implementing Subtitle A of Title II, covering all services, programs, or activities of a public entity, except those related to public transportation that are covered by Subtitle B.¹ The ADA authorizes the Secretary of Transportation to promulgate regulations implementing Subtitle B of Title II of the ADA, covering public transportation provided by public entities.²

Additionally, Congress recognized the necessity of educating the public about the rights and responsibilities under the Act. Specifically, section 506 of the ADA, entitled “Technical Assistance,” delineates which agencies may render technical assistance and specifically provides the Attorney General with the responsibility for issuing technical assistance for Subtitle A of Title II, and the Secretary of Transportation with the authority for issuing technical assistance for Subtitle B of Title II.³ Section 202 of the Rehabilitation Act also provides the Director of the National Institute on Disability and Rehabilitation Research with the responsibility for “coordinating activities with the Attorney General regarding the provision of information, training, or technical assistance regarding the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) to ensure consistency with the plan for technical assistance required under section 506 of such Act (42 U.S.C. 12206).”⁴

As to enforcement of Title II, the Department’s Title II regulation requires the Assistant Attorney General for Civil Rights to coordinate the compliance activities of Federal agencies with respect to State and local government entities, and to provide policy guidance and interpretations to designated Federal agencies to ensure the consistent and effective implementation of the requirements of the Title II regulation.⁵ The Title II regulation assigns responsibility for administrative enforcement, such as conducting investigations of complaints, to eight Federal agencies based upon certain functional areas.⁶ For instance, the Department of Labor is responsible for Title II administrative enforcement of all programs, services, and regulatory activities relating to labor and the work force.⁷ The Department maintains the authority to assign enforcement responsibilities to one agency when two or more agencies have apparent responsibility over a complaint⁸ and to itself when it receives a complaint directed to the Attorney General alleging a violation of Title II that may fall within the jurisdiction of a designated agency or another Federal agency that may have jurisdiction under Section 504.⁹

III. Authority under Section 504

Section 504 prohibits discrimination on the basis of disability in federally assisted and federally conducted programs.¹⁰ Agencies are responsible for issuing their own Section 504 regulations for their federally assisted and federally conducted programs.¹¹ However, Executive

¹ See 42 U.S.C. § 12134.

² See 42 U.S.C. §§ 12149 and 12164.

³ See 42 U.S.C. § 12206(c).

⁴ 29 U.S.C. § 762.

⁵ See 28 C.F.R. § 35.190(a).

⁶ See 28 C.F.R. § 35.190(b).

⁷ See 28 C.F.R. § 35.190(b)(7).

⁸ See 28 C.F.R. § 35.190(d).

⁹ See 28 C.F.R. § 35.190(e).

¹⁰ See 29 U.S.C. § 794(a).

¹¹ See *id.*; 28 C.F.R. § 41.4.

Order 12250 provides the Attorney General with the authority to coordinate Executive agencies' implementation and enforcement of Section 504 and other provisions of Federal law prohibiting disability discrimination under any program or activity receiving Federal financial assistance. The Attorney General delegated the Section 504 coordination authority under Executive Order 12250 to the Assistant Attorney General for Civil Rights.¹²

Among the Assistant Attorney General for Civil Rights' responsibilities under Executive Order 12250 are reviewing Executive agencies' existing and proposed rules, regulations, and orders of general applicability in order to identify those which are inadequate, unclear or unnecessarily inconsistent;¹³ and developing standards and procedures for taking enforcement actions and for conducting investigations and compliance reviews.¹⁴ Executive Order 12250 also requires each Executive agency responsible for implementing Section 504's nondiscrimination provisions to issue "appropriate implementing directives (whether in the nature of regulations or policy guidance)" that are "consistent with the requirements prescribed by the Attorney General ... and ... subject to the approval of the Attorney General, who may require that some or all of them be submitted for approval before taking effect."¹⁵ The Department's Section 504 coordination regulation at 28 CFR part 41 specifies the procedures for the promulgation and enforcement of Section 504 regulations by all agencies providing financial assistance, the standards for determining protected individuals under Section 504, and the guidelines for determining what practices are discriminatory under Section 504.¹⁶

IV. Relationship between the ADA and Section 504

Section 504 laid the foundation for the development of Title II of the ADA, as Congress stated that the purpose of Title II was to "make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance."¹⁷ Subsequently, the ADA has played an important role in the interpretation of Section 504, with Congress amending the Rehabilitation Act in 1992 to make clear that the principles underlying the ADA also apply to all sections of the Rehabilitation Act, including Section 504.¹⁸ The legislative history of the 1992 amendments explains that one of the purposes of the legislation is "to ensure that the precepts and values embedded in the Americans with Disabilities Act are reflected in the Rehabilitation Act of 1973."¹⁹ The legislative history further provides the following:

¹² See 28 C.F.R. § 0.51.

¹³ See Executive Order 12250, § 1-202.

¹⁴ See Executive Order 12250, § 1-203.

¹⁵ See Executive Order 12250, § 1-402.

¹⁶ For a detailed explanation of Executive Order 12250's clearance requirement for regulations and policy guidance documents that implement Section 504 regulations and other provisions of Federal law prohibiting disability discrimination, please refer to the April 24, 2018 memorandum entitled, Clearance Requirements for Title VI, Title IX, Section 504, and Related Nondiscrimination Regulations and Policy Guidance Documents.

¹⁷ H.R. Rept. 101-485(II) at 84 (May 15, 1990).

¹⁸ See Public Law 102-569 (1992).

¹⁹ S. Rep. 102-357 at 2 (Aug. 3, 1992).

The statement of purpose and policy is a reaffirmation of the precepts of the Americans with Disabilities Act, which has been referred to as the 20th century emancipation proclamation for individuals with disabilities. It is the Committee's intent that these principles guide the policies, practices, and procedures developed under all titles of the [Rehabilitation] Act.²⁰

Section 501 of the ADA also provides that "[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title."²¹ Therefore, Section 504 provides the floor for the ADA, as the ADA potentially could provide broader protections. Courts also have generally treated claims under the ADA and the Rehabilitation Act identically.²²

V. Implications for Coordination Among Federal Agencies

The Assistant Attorney General for Civil Rights must ensure consistency in the implementation of Section 504 and Title II across the Federal government, as well as in the interpretation of Section 504 with Title II (and vice versa). Therefore, the Assistant Attorney General for Civil Rights must have the opportunity to review and approve any regulations and guidance from other Federal agencies implementing Section 504. In addition, unless otherwise provided, the Department maintains the exclusive authority to issue regulations and technical assistance implementing or interpreting Subtitle A of Title II, and therefore, agencies may not issue such documents independently.

We hope that this memorandum helps to clarify the scope of authority of both the Department and other Federal agencies for implementing and enforcing Title II of the ADA and Section 504. Please feel free to contact the Regulations, Interpretations, and Coordination Unit of the Disability Rights Section at 202-307-0663, if you have any questions about the substantive requirements of the ADA or Section 504 or the coordination process under either statute. We look forward to working with your respective agencies in ensuring the consistent application of these disability rights laws.

²⁰ S. Rep. 102-357 at 12 (Aug. 3, 1992). *See also* H.R. Rep. 102-822 at 81 (Aug. 10, 1992).

²¹ 42 U.S.C. § 12201(a).

²² *See, e.g., Theriault v. Flynn*, 162 F.3d 46, 48 n.3 (1st Cir. 1998); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003); *Helen L. v. DiDario*, 46 F.3d 325, 330 n.7 (3rd Cir. 1995); *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468 (4th Cir. 1999); *Delano-Pyle v. Victoria Cty., Tex.*, 302 F.3d 567, 574 (5th Cir. 2002); *McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453, 459-460 (6th Cir. 1997); *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999); *Cohon ex rel. Bass v. N.M. Dept. of Health*, 646 F.3d 717, 725-26 (10th Cir. 2011); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1088 n.21 (11th Cir. 2007).