

**U.S. DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
REHABILITATION SERVICES ADMINISTRATION
WASHINGTON, D.C. 20202**

**TECHNICAL ASSISTANCE CIRCULAR
RSA-TAC-FY-93-01
RSM-2035
DATE: October 2, 1992**

ADDRESSEES: STATE VOCATIONAL REHABILITATION AGENCIES (GENERAL)
STATE VOCATIONAL REHABILITATION AGENCIES (BLIND)
CLIENT ASSISTANCE PROGRAMS
RSA DISCRETIONARY GRANTEEES
RSA SENIOR MANAGEMENT TEAM
REGIONAL REHABILITATION CONTINUING EDUCATION
PROGRAMS

SUBJECT: The Implications of §504 and the ADA Regarding Client Placement
Services and Pre-employment Inquiries by Employers

CITATIONS IN LAW, REGULATION, AND POLICY:

Section 504 of the Rehabilitation Act of 1973 as amended through 1988

Section 102(c)(2) of the Americans with Disabilities Act of 1990

34 CFR 104.14; 29 CFR 1630.2(n)(3), 1630.13(a) and 1630.14(a)

34 CFR 361.49

BACKGROUND: Since 1980, recipients of Federal financial assistance from the U.S. Department of Education (ED) have had to comply with the regulations enforcing Section 504 of the Rehabilitation Act (§504) found at 34 CFR Part 104. Recipients of Federal financial assistance from other Federal agencies have had to comply with similar, if not identical, regulations promulgated by these agencies to enforce §504.¹ Each of the agencies' regulations has a subpart (Subpart B under ED's regulation, 34 CFR Part 104) focusing on employment issues including the prohibition on pre-employment inquiries.

In its development of Title I of the Americans with Disabilities Act (ADA), Congress borrowed heavily from the regulatory language of §504, including the prohibition on pre-employment inquiries. It went further

than ED's §504 regulations, however, by explicitly stating what is an acceptable pre-employment inquiry. (Section 102(d)(2)(B) of the ADA states, "Acceptable inquiry -- A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.")

The Equal Employment Opportunity Commission (EEOC), the enforcement agency for Title I of the ADA, has promulgated regulations, interpretive guidance, and a technical assistance manual which provide guidelines and guidance concerning compliance with this issue.

Although §504 and Title I of the ADA are distinct laws with separate regulations and different enforcement agencies, the language concerning pre-employment inquiries is similar enough as to be indistinguishable between the laws.² At least, for the purposes of this discussion, the impact on counselor actions is identical whether the employer is a recipient of Federal financial assistance or not.

The fundamental approach taken by the regulations for each law³ is that an employer cannot ask whether the applicant is a person with a disability nor ask about the nature or severity of the disability.⁴ However, the employer may make preemployment inquiry into an applicant's ability to perform job-related tasks or functions⁵ or, if there is a known disability, ask the applicant to demonstrate or explain how, with or without reasonable accommodation, he or she would perform job-related functions.⁶

In placement efforts, a rehabilitation counselor should present a functional limitation model of disability. As the employer only needs to know whether the client has any functional limitations which will impact on job tasks, the counselor must limit the discussion to any potential functional limitations that will impact on the client's ability to perform the job tasks or functions identified by the employer. This discussion may also include identifying reasonable accommodations that have been provided or could be provided. Using an example provided by EEOC in its Interpretive Guidance⁷ concerning an individual with one leg, a counselor may call a small appliance repair company and tell them that he or she has a qualified client for their home washing machine repair position. The counselor might explain that the client could only drive a vehicle with automatic transmission and may need a specially-built tool box. If the client does not wear a prosthesis or self-identifies to the employer about having only one leg, the employer may ask the applicant to demonstrate or explain how he or she would go up and down basement stairs with a toolbox. The employer cannot ask, nor should the counselor state, whether asked or not, how or when the client lost his/her leg, or whether the loss of the leg is indicative of an underlying disease or impairment.

Regulatory requirements at 34 CFR 361.49 safeguard the confidentiality of all personal information concerning the individuals served by the State

vocational rehabilitation agency. A counselor must be cognizant of these requirements in discussions with employers or potential employers of persons served by the State agency.

INQUIRIES: RSA Regional Commissioners

Nell C. Carney, CRC
Commissioner
Rehabilitation Services Administration

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- 1.. See also the Department of Justice Government-wide guidelines for regulations enforcing § 504.
 - 2.. See 34 CFR 104.14(a) and §102.2(c)(2) of the ADA.
 - 3.. See Section-by-section Analysis for 34 CFR 104.14 at 45 FR 30,949 (May 9, 1980) and Interpretive Guidance for 29 CFR 1630.13 and 1630.14(a) at pp. I-70, 71 of the ADA Handbook.
 - 4.. 504 regulations use the terminology: handicapped person, qualified handicapped person and handicap to refer to the ADA concepts of person with disability, qualified individual with a disability and disability. See 34 CFR 104.3(j), (k) and (l) and §§3(2) and 102(8) of the ADA.
 - 5.. See 34 CFR 104.14(a).
 - 6.. See The Section-by-section analysis of the Department of Education §504 regulation for 34 CFR 104.14 found at 45 Federal Register p. 30949. See also the Interpretive Guidance for 29 CFR 1630.13 and 1630.14(a) found on pp. I-70 through I-73 of the ADA Handbook and Sections 5.5 and 5.5(a) of the Technical Assistance Manual for Title I of the ADA.
 - 7.. See Interpretive Guidance of 29 CFR 1630.14(a) at I-71 of the ADA Handbook.