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Federal Financial Assistance and Civil Rights Requirements

May 18, 2022

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R47109

CRS REPORT
Prepared for Members and
Committees of Congress

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SUMMARY

R47109

May 18, 2022

Christine J. Back
Legislative Attorney

Jared P. Cole
Legislative Attorney

Federal Financial Assistance and Civil Rights Requirements

As the Supreme Court has recently observed, Congress has "broad authority under the Spending Clause of the Constitution to set the terms on which it disburses federal funds." Congress directs federal agencies to distribute billions of dollars in federal financial assistance to further various policies in a broad range of contexts—from hospitals, local police departments, and transportation projects, to school lunch programs and airport construction. In disbursing these funds, Congress sets conditions, parameters, and objectives concerning recipients' use of federal money. A longstanding and related federal policy has been to ensure that recipients of federal financial assistance do not use that aid in connection with discriminatory practices.

Congress has legislated with this goal in mind. Four civil rights statutes condition the receipt of "federal financial assistance" on recipients' compliance with a mandate not to discriminate in federally funded programs or activities: Title VI of the Civil Rights Act of 1964 ("on the ground of race, color, or national origin"), Title IX of the Education Amendments of 1972 ("on the basis of sex" in education programs), Section 504 of the Rehabilitation Act of 1973 ("by reason of . . . disability"), and the Age Discrimination Act of 1975 ("on the basis of age"). While these statutes differ in important ways, federal courts have commonly interpreted them as legislation enacted pursuant to Congress's Spending Clause authority. Because federal financial assistance reaches many contexts and programs, these statutory mandates correspondingly apply to a broad range of entities and activities, although there are exceptions. For instance, Title IX and the Age Discrimination Act contain express exceptions permitting sex and age-based distinctions respectively, in certain circumstances.

Both federal agencies and courts play important roles in interpreting and applying these statutes to ensure compliance by recipients of federal aid. Federal agencies, for example, issue regulations and guidance addressing potential violations under these statutes, and enforce these requirements through investigations and compliance reviews. While agencies may terminate or suspend federal funding for violations, they may only do so after exhausting a statutorily-required procedure. Rather than resulting in the termination of funds, however, agency investigations most commonly end in a recipient's agreement to reform its discriminatory practices. Federal courts play a crucial role in enforcing these laws as well, as individuals can bring a private suit against recipients of federal financial assistance for discriminatory conduct that violates these laws and obtain relief, including monetary damages.

It may not always be clear whether an entity is a recipient of federal financial assistance for the purposes of these four civil rights statutes. For example, federal aid can take different forms, and it may not be clear whether certain types of aid constitute federal financial assistance. In addition, the Court has distinguished between entities that Congress intended to treat as recipients subject to these four civil rights laws and mere beneficiaries of that assistance who are not subject to those laws.

Congress has wide latitude in setting the terms and conditions of a federal program. For example, Congress may create new statutes addressing other forms of discrimination, or amend the four statutes discussed in this report to clarify, expand, or narrow their prohibitions, add or remove specific exceptions, or address available remedies. Further, as federal courts and federal agencies address debates or uncertainty over these statutory requirements, Congress can resolve such debates by amending the statutes to clarify their application. Congress can also define or differentiate certain forms of federal aid as "federal financial assistance" to which the four civil rights statutes apply, and clarify which entities are to be treated as recipients and those which are not. Critically, however, because these four civil rights laws are understood as Spending Clause legislation, they are subject to constitutional limitations recognized by the Supreme Court. Specifically, the Court requires that changes to these laws' made pursuant to Congress's Spending authority, such as changes to the funding conditions or available remedies, must be clear and unambiguous. Likewise, any newly enacted statutory provisions tying the receipt of federal funding to civil rights compliance must also give recipients clear notice of the applicable requirements.

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Congress has authorized federal agencies to distribute federal funding to aid a wide range of industries and entities. For instance, the Department of Education disburses financial assistance to elementary and secondary schools, as well as most institutions of higher education.[1] The Department of Health and Human Services issues funding to many health care providers.[2] The Federal Aviation Administration provides grants to thousands of airports to, for example, fund infrastructure improvements.[3]

The recipients of federal financial assistance are obligated to comply with various laws and regulations, including the requirements of four major civil rights laws: Title VI of the Civil Rights Act of 1964 (Title VI) which prohibits discrimination based on race, color, or national origin;[4] Title IX of the Education Amendments of 1972 (Title IX), which bars discrimination based on sex in educational programs;[5] Section 504 of the Rehabilitation Act (Section 504), which forbids discrimination based on a disability;[6] and the Age Discrimination Act of 1975, which bars discrimination based on age.[7] Congress and federal courts have often treated these statutes as interrelated, as all four prohibit discrimination in federally funded programs.[8]

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[1] *See Education and Title VI*, U.S. DEP'T. OF EDUC., Office of Civil Rights, https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html (last visited May 16, 2022) ("Agencies and institutions that receive ED funds covered by Title VI include . . . 17,000 local education systems; 4,700 colleges and universities; 10,000 proprietary institutions; and other institutions, such as libraries and museums").

[2] *See Frequently Asked Questions*, DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE FOR CIVIL RIGHTS, https://www.hhs.gov/civil-rights/for-individuals/faqs/what-qualifies-as-federal-financial-assistance/301/index.html (last visited May 16, 2022); Cummings v. Premier Rehab Keller, No. 20-219 (Apr. 28, 2022), slip op. 2 ("Premier Rehab is subject to these statutes, which apply to entities that receive federal financial assistance, because it receives reimbursement through Medicare and Medicaid for the provision of some of its services.").

[3] *See, e.g.*, *2022 Airport Improvement Program (AIP) Grants*, FEDERAL AVIATION ADMINISTRATION, https://www.faa.gov/airports/aip/2022_aip_grants/ ("The Airport Improvement Program (AIP) airport grant program funds airport infrastructure projects such as runways, taxiways, airport signage, airport lighting, and airport markings. . . . Airports are entitled to a certain amount of AIP funding each year, based on passenger volume. If their capital project needs exceed their available entitlement funds, then the FAA can supplement their entitlements with discretionary funding."); *see* generally CRS Report R43327, *Financing Airport Improvements*, by Rachel Y. Tang.

[4] 42 U.S.C. §§ 2000d *et seq*.

[5] 20 U.S.C. §§ 1681 *et seq*. In 2010, Congress enacted Section 1557 of the Affordable Care Act, which bars discrimination on each of the grounds of these four civil rights laws in federally funded health care programs or activities. *See* 42 U.S.C. § 18116 ("[A]n individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.").

[6] 29 U.S.C. §§ 794 *et seq*.

[7] 42 U.S.C. §§ 6101 *et seq*. In addition to these four civil rights statutes predicated on the receipt of federal funds, other statutes also apply civil rights obligations. The Religious Land Use and Institutionalized Persons Act (RLUIPA), for example, creates protections for "the religious exercise" of residents in federally funded institutions (primarily prisons), although there are other ways RLUIPA may apply to covered institutions. 42 U.S.C. § 2000cc-1.

[8] For example, Congress amended these four civil rights statutes together in the Civil Rights Restoration Act in response to a Supreme Court decision interpreting Title IX, which narrowed that statute's coverage in a way that Congress viewed to "cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964." Civil Rights Restoration Act of 1987, P.L. 100-259 § 2 (finding that "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered").

As explored in more detail below, these civil rights laws are generally enforced in two ways. First, when an agency distributes financial assistance, it is responsible for ensuring recipients' compliance with the relevant civil rights laws in the funding programs it administers. This responsibility includes the promulgation of regulations implementing each of the four statutes, as well as enforcement activity and investigations that can result in an agency suspending or terminating funds.[9] Second, private litigants harmed by a violation of these laws can sue in federal court to enforce relevant requirements against recipients directly.[10] Crucially, due to the limited detail in the statutory text of these laws, federal judicial and agency interpretations of their provisions play an important role in determining the obligations of recipients under each statute.

This report opens with a brief discussion of the Supreme Court's treatment of Title VI, Title IX, Section 504, and the Age Discrimination Act as legislation enacted pursuant to Congress's authority under the Spending Clause before turning to an examination of these statutes' requirements, which apply to recipients of federal financial assistance. The report then notes how federal agencies and federal courts enforce these statutory and regulatory requirements. Given the legal obligations that come with the receipt of federal financial assistance, this report also explores questions regarding which types of federal aid qualify as federal financial assistance for the purposes of these civil rights spending laws,[11] and which entities constitute recipients of such assistance. This report closes with potential legislative considerations, including a discussion of the unique aspects of legislation enacted pursuant to Congress's Spending Clause authority.

Spending Clause Statutes

The Supreme Court has generally treated the four civil rights statutes discussed in this report—Title VI;[12] Title IX;[13] Section 504;[14] and the Age Discrimination Act of 1975[15]—as enacted based on Congress's Spending Clause power[16] in Article I, Section 8, Clause 1 of the U.S. Constitution.[17] Pursuant to this authority, "Congress may attach conditions on the receipt of

[9] *See infra* "Administrative Requirements."

[10] *See infra* "Judicial Enforcement Through a Private Right of Action."

[11] The receipt of federal financial assistance to religious providers can also have First Amendment-related implications. These issues, including the legal relevance of "direct" versus "indirect" federal financial assistance for First Amendment purposes, is beyond the scope of this report. For further discussion, see CRS Report R46517, *Evaluating Federal Financial Assistance Under the Constitution's Religion Clauses*, by Valerie C. Brannon.

[12] 42 U.S.C. §§ 2000d *et seq*.

[13] 20 U.S.C. §§ 1681 *et seq*.

[14] 29 U.S.C. §§ 794 *et seq*.

[15] 42 U.S.C. §§ 6101 *et seq*.

[16] *See* Barnes v. Gorman, 536 U.S. 181, 189 n.3 (2002) (referring to the Rehabilitation Act as "Spending Clause legislation"); *id*. at 185-86 ("Title VI invokes Congress's power under the Spending Clause, U.S. Const., Art. I, § 8, cl. 1, to place conditions on the grant of federal funds."); Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) (stating that the Court has "repeatedly treated Title IX [of the Education Amendments of 1972] as legislation enacted pursuant to Congress' authority under the Spending Clause"). Meanwhile, courts have described the Age Discrimination Act of 1975 as modeled after Title VI, Title IX, and the Rehabilitation Act. *See generally, e.g.,* Schmitt v. Kaiser Foundation Health Plan of Washington, 965 F.3d 945, 953 (9th Cir. 2020) ("Title VI served as the model for Title IX, the Age Discrimination Act, and the Rehabilitation Act, so we interpret the four statutes similarly.") (citations omitted); Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler, 789 F.2d 931, 934 n.1 (D.C. Cir. 1986) (Ginsburg, J.) (stating that the Age Discrimination Act of 1975 follows the model of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972).

[17] U.S. CONST., art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"). Given the Supreme

federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'"[18] While Congress uses its spending authority for various purposes—directing federal aid, for example, to facilitate infrastructure initiatives or support public education or health care programs—an important federal goal has been to ensure that federal dollars received by states and other recipients are not used in connection with discriminatory practices.

With respect to civil rights policy, an early model for such Spending Clause legislation was Section 601 of Title VI,[19] which Congress enacted in 1964 in part to address the distribution of extensive federal funding to entities that racially segregated their facilities.[20] Section 601 conditions the receipt of federal funding on entities' compliance with the mandate that no person be subjected to discrimination based on race in federally funded programs or activities.[21] Congress later enacted Title IX in 1972 to prohibit discrimination on the basis of sex in education programs or activities,[22] Section 504 in 1973 to bar discrimination based on disability,[23] and the Age Discrimination Act in 1975 to address age discrimination.[24]

The Court has observed that a distinctive feature of these statutory requirements, in contrast to civil rights requirements that apply under other federal laws, is that covered entities voluntarily agree to Spending Clause civil rights requirements as conditions for receiving federal funding.[25] "Unlike ordinary legislation, which 'imposes congressional policy' on regulated parties 'involuntarily,'" the Court explained, "Spending Clause legislation operates based on consent."[26]

Court's treatment of these laws as Spending Clause legislation, for ease of reference, this report refers to them as the civil rights spending statutes. *See generally* Cong. Rsch. Serv., *ArtI.S8.C1.2 Spending Power*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C1-2/ALDE_00001055/ (last visited May 18, 2022).

[18] South Dakota v. Dole, 483 U.S. 203, 206 (1987) (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). For further discussion of Congress's Spending Clause power, *see* CRS Report R46827, *Funding Conditions: Constitutional Limits on Congress's Spending Power*, by Victoria L. Killion.

[19] *See* Fitzgerald v. Barnstable School Committee, 555 U.S. 246, 258 (2009) (stating that "Congress modeled Title IX after Title VI of the Civil Rights Act of 1964, and passed Title IX with the explicit understanding that it would be interpreted as Title VI was") (internal citation omitted) (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 694–696 (1979)); Sch. Bd. of Nassau Cty., Fla. v. Arline, 480 U.S. 273, 277–78 n.2 (1987) (explaining that "Congress' decision to pattern § 504 after Title VI is evident in the language of the statute, compare 29 U.S.C. § 794 with 42 U.S.C. § 2000d, and in the legislative history of § 504") (citations omitted).

[20] *See generally* Regents of Univ. of California v. Bakke, 438 U.S. 265, 413, n. 11 (1978) (Stevens, concurring in the judgment in part and dissenting in part, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist) ("It is apparent from the legislative history that the immediate object of Title VI was to prevent federal funding of segregated facilities.") (citing 110 Cong. Rec. 1521 (1964) (remarks of Rep. Celler); *id.*, at 6544 (remarks of Sen. Humphrey)). For further discussion, *see* CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back.

[21] *See* 42 U.S.C. § 2000d.

[22] Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified at 20 U.S.C. §§ 1681 *et seq.*)

[23] P.L. 93-113, 87 Stat. 394 (1973) (codified at 29 U.S.C. § 794).

[24] P.L. 94-135, 89 Stat. 728 (1975) (codified at 42 U.S.C. §§ 6101 *et seq.*)

[25] Cummings v. Premier Rehab Keller, No. 20-219 (Apr. 28, 2022), slip op. 4.

[26] *Id.* (quoting Pennhurst v. Halderman, 451 U.S. 1, 16, 17 (1981).

Antidiscrimination Requirements for Recipients of Federal Financial Assistance

While Title VI, Title IX, Section 504, and the Age Discrimination Act share certain common features, they are nonetheless distinct in ways apart from addressing discrimination based on different characteristics.[27] For example, Title IX and Section 504's prohibitions apply to a program's employment practices as well as its treatment of applicants for and participants in its federally funded activity;[28] Title VI and the Age Discrimination Act generally do not apply to employment practices.[29] Title IX and the Age Discrimination Act contain several statutory exceptions that permit certain distinctions based on sex and age respectively, with Title IX being the only statute with a religious exception.[30] The following section provides a brief overview of the statutory and regulatory requirements[31] that apply to a covered "program or activity"[32] and notes some distinctive features of these statutes.[33]

Title VI of the Civil Rights Act of 1964

Section 601 of Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be

[27] *See, e.g.*, Alexander v. Choate, 469 U.S. 287, 294-96 and n. 11 (1985) (discussing the potential applicability of the Court's Title VI interpretation to Section 504 and stating that "there are reasons to pause before too quickly extending" the Court's Title VI analysis to § 504; footnoting, among other things, that its precedent construing Title VI as coextensive with the Equal Protection Clause "locked in a certain construction of Title VI [that] would not seem to have any obvious or direct applicability to § 504.").

[28] *See infra* "Title IX of the Education Amendments of 1972" and "Section 504 of the Rehabilitation Act of 1973."

[29] *See infra* "Title VI of the Civil Rights Act of 1964" and "The Age Discrimination Act of 1975."

[30] *See infra* "Title IX Religious and other Exceptions" and "Exceptions Permitting Age-Based Distinctions."

[31] As discussed in other sections of this report, federal agencies that distribute federal financial assistance are authorized to promulgate regulations effectuating and interpreting these statutory mandates. These federal regulations generally set out the types of conduct that might constitute a violation under one of the four spending civil rights statutes. *See generally, e.g.*, 28 C.F.R. Part 42, Subpart C (Department of Justice (DOJ) regulations addressing "Nondiscrimination in Federally Assisted Programs – Implementation of Title VI of the Civil Rights Act of 1964"); 28 C.F.R. § 42.104(b) (setting out specific discriminatory actions); 45 C.F.R. Part 86 (HHS regulations addressing "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance"); 45 C.F.R. § 86.31(b) (setting out specific discriminatory actions).

[32] All four statutes contain similarly-phrased provisions that define a "program or activity" to mean "all the operations of" any entity that falls within at least one of four categories, "any part of which is extended Federal financial assistance." *See* 42 U.S.C. § 2000d-4(a) (defining "program or activity" for Title VI purposes as "all the operations of" an entity that falls under one or more of four categories, "any part of which is extended Federal financial assistance."); 20 U.S.C. § 1687 (parallel Title IX provision defining a "program or activity"); 29 U.S.C. § 794(b) (parallel provision of Section 504 of the Rehabilitation Act); 42 U.S.C. § 6107(4) (parallel provision of the Age Discrimination Act).

[33] This section is intended to provide a general understanding of these statutes' requirements in the context of this report's broader discussion of civil rights obligations triggered by the receipt of federal financial assistance. A considerable range of legal issues, however, can arise under these statutes, including debates over their precise requirements in circumstances such as racial and sexual harassment, disparate impact analysis, standards governing single-sex athletics, the application of Title IX to discrimination based on sexual orientation or gender identity, and the potential interaction of these statutory requirements with other legal requirements. Some of these issues are addressed in other CRS products. *See, e.g.*, CRS Legal Sidebar LSB10726, *Sexual Harassment and Assault at School: Divergence Among Federal Courts Regarding Liability*, by Jared P. Cole; CRS Report R46832, *Potential Application of Bostock v. Clayton County to Other Civil Rights Statutes*, by Christine J. Back and Jared P. Cole; CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back; CRS Report R45665, *Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964*, coordinated by Jared P. Cole.

subjected to discrimination under any program or activity receiving Federal financial assistance."[34] In notable contrast to the other statutes discussed in this report, the Supreme Court interprets the requirements of Title VI coextensively with the Equal Protection Clause of the Fourteenth Amendment.[35]

In general, Title VI prohibits covered programs or activities[36] from various forms of race-based conduct,[37] such as admitting or denying admission to a program based on an individual's race,[38] providing differentiated levels of service to program participants based on race,[39] or responding with deliberate indifference to racial harassment.[40] In addition, federal regulations interpreting Title VI prohibit practices that have a disparate impact on participants based on race or national

[34] 42 U.S.C. § 2000d. For further discussion of Title VI, see CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back (Sept. 21, 2021).

[35] *See generally*, *e.g.*, Gratz v. Bollinger, 539 U.S. 244, 275-76 n.23 (2003) ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.") (citing *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001)). As is the case with state actors under the Equal Protection Clause, a federally funded institution is generally prohibited from using racial classifications unless the classification at issue is narrowly tailored to serve a compelling government interest. *See* Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 310 (2013) (citing Grutter v. Bollinger, 539 U.S. 306, 326 (2003). For further discussion of the Court's interpretation of Title VI as coextensive with equal protection, see CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back (Sept. 21, 2021). By contrast, the Court has not read Title IX as coextensive with equal protection. *See, e.g.*, Fitzgerald v. Barnstable School Committee, 555 U.S. 246, 256-58 (2009) (discussing "divergent coverage" of Title IX in comparison to the Equal Protection Clause).

[36] *Id*. § 2000d-4(a). *See also id*. § 2000d-4(a)(3)(A)–(B) (outlining when an entire corporation, partnership, private organization or sole proprietorship constitutes a "program or activity").

[37] *See generally Education and Title VI*, U.S. DEP'T. OF EDUC., Office of Civil Rights, https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html (last visited May 16, 2022) ("Programs and activities that receive ED funds must operate in a non-discriminatory manner. These may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing and employment, if it affects those who are intended to benefit from the Federal funds. Also, a recipient may not retaliate against any person because he or she opposed an unlawful educational practice or policy, or made charges, testified or participated in any complaint action under Title VI.").

[38] *See generally*, *e.g.*, *Grutter*, 539 U.S. at 316–17 (reflecting that petitioner brought a Title VI claim alleging that the law school's denial of her admission was based on race). *See also* 28 C.F.R. § 42.104(b)(1)(i) (DOJ Title VI regulation prohibiting covered recipients from "[d]eny[ing an individual any disposition, service, financial aid, or benefit provided under the program" on the ground of race, color, or national origin); *id*. at (b)(1)(v) (prohibiting covered recipients from "[t]reat[ing] an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program" on the ground of race, color, or national origin).

[39] *See* 28 C.F.R. 42.104(b)(1)(ii) (DOJ Title VI regulation stating that a "recipient to which this subpart applies may not . . . on the ground of race, color, or national origin . . . [p]rovide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program"). *See generally*, *e.g.*, Astaraee v. Villanova University, 509 F. Supp. 3d 265, 269–72 (E.D. Pa. 2020) (analyzing Title VI claim raised by doctoral student alleging differential treatment in his oral examination process and dismissal from the program based on his Iranian national origin, in contrast to other non-Iranian students).

[40] *See*, *e.g.*, Bryant v. Independent School Dist. No. I-38 of Garvin County, OK, 334 F.3d 928, 934 (10th Cir. 2003) (concluding that "deliberate indifference to known instances of student-on-student harassment is a viable theory in a Title VI intentional discrimination suit" and directing the district court on remand to apply the deliberate indifference standard applicable to Title IX harassment claims); L. L. v. Evesham Twp. Bd. of Educ., 710 F. App'x 545, 549 (3d Cir. 2017) (listing elements of hostile environment or racial harassment claim under Title VI and reversing summary judgment as to one of the plaintiffs' hostile environment claims); DJ by and through Hughes v. Sch. Bd. of Henrico Cnty., 488 F.Supp.3d 307, 332–36 (E.D. Va. 2020) (discussing alleged facts of racial harassment, race-based attack of student, and the school's response to the racial harassment; denying the defendant's motion to dismiss the plaintiff's Title VI claim).

origin.[41] While individuals may generally bring a private right of action to seek relief for Title VI violations,[42] no private right of action is available to enforce Title VI disparate impact regulations.[43]

Title VI's requirements, however, generally do not bear on a program or activity's employment practices "except where a primary objective of the Federal financial assistance is to provide employment."[44] Thus, where a primary objective of a funded program or activity is to provide services *unrelated* to employment, Title VI's requirements generally do not apply to an entity's employment practices.[45]

Title IX of the Education Amendments of 1972

Section 901 of Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," subject to certain exceptions discussed below.[46] Unlike Title VI, which

[41] *See, e.g.*, 28 C.F.R. § 42.104(b)(2) (DOJ Title VI regulation stating that a "recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin."). For further discussion of Title VI and disparate impact liability, *see* CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back.

[42] *See infra* "Judicial Enforcement."

[43] In its decision Alexander v. Sandoval, 532 U.S. 275 (2001), the Court held that individuals cannot enforce Title VI disparate impact regulations in a private right of action. *Id*. at 293 ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.") (footnote omitted). For further discussion of Title VI and disparate impact liability, *see* CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back.

[44] *See* 42 U.S.C. § 2000d-3 ("Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."). *See generally*, *e.g.*, Reynolds v. School Dist. No. 1, Denver, Colo., 69 F.3d 1523, 1531-32 (10th Cir. 1995) (dismissing plaintiff's Title VI claim alleging discrimination in employment because she had offered "no evidence that the federal funds [her employer] receives are for a primary objective of providing for employment").

[45] *See* 28 C.F.R. § 42.104(c)(1) ("Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies, is to provide employment, a recipient of such assistance may not . . . subject any individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff, or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities)."); *id*. at 42.104(c)(1)(i) - (ii) (stating that Title VI applies to "programs as to which a primary objective . . . is (i) to assist individuals, through employment, to meet expenses incident to the commencement or continuation of their education or training, or (ii) to provide work experience which contributes to the education or training of the individuals involved"). *But see id*. at 42.104(c)(2) ("In regard to Federal financial assistance which does *not* have providing employment as a primary objective, the provisions of paragraph (c)(1) of this section apply to the employment practices of the recipient if discrimination on the ground of race, color, or national origin in such employment practices tends, on the ground of race, color, or national origin, to exclude persons from participation in, to deny them the benefits of or to subject them to discrimination under the program receiving Federal financial assistance. In any such case, the provisions of paragraph (c)(1) of this section shall apply to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.") (emphasis added). More generally, Title VII of the Civil Rights Act of 1964 applies to employers with at least 15 employees and bars all covered employers from discriminating against applicants for employment and employees based on race, among other protected traits. *See* 42 U.S.C. §§ 2000e *et seq*.

[46] 20 U.S.C. § 1681(a).

applies to federally funded programs or activities of various kinds, Title IX applies only to *education*[47] programs or activities.[48] Common examples of entities subject to Title IX include elementary and secondary schools in local school districts that receive federal funding.[49] In contrast to Title VI, Title IX's prohibition applies to a covered entity's treatment of its employees as well as program participants.[50]

In general, Title IX prohibits covered programs from engaging in various forms of sex-based conduct, such as admitting or denying admission to a program based on an individual's sex,[51] providing differentiated levels of service to program participants based on sex,[52] or responding with deliberate indifference to the sexual abuse or sexual harassment of program participants.[53] In addition, federal agencies including the Department of Justice (DOJ),[54] the Department of

[47] *See id*. As Title IX does not define "education," some federal courts conduct a context-specific analysis of whether a challenged program is an education program or activity within the meaning of Title IX. *See, e.g.*, Doe v. Mercy Cath. Med. Ctr., 850 F.3d 545, 553–58 (3d Cir. 2017) (observing that Congress did not define the term "education" in 20 U.S.C. § 1681(a) and analyzing whether a residency program at a hospital constituted an education program subject to Title IX's requirements; holding that plaintiff had plausibly alleged that the residency program was subject to Title IX); Roubideaux v. North Dakota Dep't. of Corr. and Rehab., 570 F.3d 966, 977–78 (8th Cir. 2009) (observing that the "term 'education' is not defined by the statute or in the regulations governing Title IX"; analyzing whether a "'prison industries' program" constituted an education program subject to Title IX, discussing specific features of the program, and holding that it was not an education program).

[48] *See* 20 U.S.C. § 1687 (defining "program or activity" to mean "all the operations of" various entities that fall within four categories, "any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization").

[49] *See generally Title IX and Sex Discrimination*, U.S. DEP'T. OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last visited Nov. 29, 2021) ("Title IX applies to schools, local and state educational agencies, and other institutions that receive federal financial assistance from the Department. These recipients include approximately 17,600 local school districts, over 5,000 postsecondary institutions, and charter schools, for-profit schools, libraries, and museums. Also included are vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories of the United States.").

[50] *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530 (1982) ("In our view, the legislative history thus corroborates our reading of the statutory language and verifies the Court of Appeals' conclusion that employment discrimination comes within the prohibition of Title IX."). *See also, e.g.*, 28 C.F.R. § 54.500 (DOJ regulation addressing discrimination on the basis of sex in employment in education programs or activities).

[51] *See, e.g.*, Tingley-Kelley v. Trs. of Univ. of Pa., 677 F. Supp. 2d 764, 775–81 (E.D. Pa. 2010) (analyzing Title IX claim alleging denial of admission to graduate veterinary school based on sex). *See* 28 C.F.R. § 54.300 (DOJ Title IX regulation stating that "[n]o person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which §§ 54.300 through §§ 54.310 apply, except as provided in §§ 54.225 and §§ 54.230.").

[52] *See* 28 C.F.R. § 54.400(b)(2) ("Except as provided in §§ 54.400 through 54.455, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex . . . [p]rovide different aid, benefits, or services or provide aid, benefits, or services in a different manner").

[53] *See generally* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (holding that a school district may be held liable for damages in a private right of action under Title IX for its deliberate indifference to a teacher's sexual harassment of a student). For more information, see CRS Report R45685, *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations*, by Jared P. Cole and Christine J. Back (Apr. 12, 2019).

[54] *See* Letter from Pamela S. Karlan, Principal Deputy Assistant Attorney General for the Civil Rights Division, to Federal Civil Rights Directors and General Counsels (Mar. 26, 2021), available at: http://www.justice.gov/crt/page/file/1383026/download (concluding that Title IX prohibits discrimination on the basis of gender identity and sexual orientation).

Education (ED),[55] and the Department of Health and Human Services (HHS)[56] currently interpret "on the basis of sex" in Title IX to prohibit discrimination based on sexual orientation or gender identity, in light of the Supreme Court's 2020 decision *Bostock v. Clayton County*. In *Bostock*, the Court interpreted the prohibition of sex discrimination in Title VII of the Civil Rights Act of 1964 to prohibit discrimination based on sexual orientation and gender identity.[57] DOJ has pointed to similarities in the statutory text of Title IX and Title VII, as well as federal courts' reliance on Title VII precedent to analyze Title IX claims, to support applying the reasoning of *Bostock* to Title IX.[58]

Title IX Religious and other Exceptions

Title IX has nine statutory exceptions that identify certain sex-based distinctions that do not violate its mandate prohibiting discrimination "on the basis of sex."[59] One exception, for example, applies specifically to educational institutions "controlled by a religious organization."[60] This religious exception provides that Title IX's requirements shall not apply to such institutions "if the application of this subsection would not be consistent with the religious tenets of such organization."[61] As the statutory text indicates, this exception applies in circumstances where a religious entity's compliance with Title IX would conflict with a religious tenet.[62] Put another way, the Title IX religious exception is not a wholesale or blanket exception that makes religious entities generally exempt from the statute's requirements, nor does it operate to permit any and all

[55] *See* Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32,637 (June 22, 2021), available at: https://www.federalregister.gov/documents/2021/06/22/2021-13058/enforcement-of-title-ix-of-the-education-amendments-of-1972-with-respect-to-discrimination-based-on.

[56] *See* Notification of Interpretation and Enforcement, 86 Fed. Reg. 27,984 (May 25, 2021) ("This Notification is to inform the public that, consistent with the Supreme Court's decision in *Bostock* and Title IX, beginning May 10, 2021, the Department of Health and Human Services (HHS) will interpret and enforce section 1557 of the Affordable Care Act prohibition on discrimination on the basis of sex to include: Discrimination on the basis of sexual orientation; and discrimination on the basis of gender identity.").

[57] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020). For further discussion of the *Bostock* decision, see CRS Report R46832, *Potential Application of Bostock v. Clayton County to Other Civil Rights Statutes*, by Christine J. Back and Jared P. Cole (July 2, 2021).

[58] *See* Letter from Pamela S. Karlan, Principal Deputy Assistant Attorney General for the Civil Rights Division, to Federal Civil Rights Directors and General Counsels (Mar. 26, 2021), available at: http://www.justice.gov/crt/page/file/1383026/download.

[59] 20 U.S.C. § 1681(a)(1)–(9).

[60] *See* 20 U.S.C. § 1681(a)(3) ("[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization"). *See also, e.g.*, Maxon v. Fuller Theological Seminary, No. 20-56156, 2021 WL 5882035, at *1 (9th Cir. Dec. 13, 2021) (addressing whether Title IX's text referring to institutions that are "controlled by a religious organization" required institutions seeking the exemption to be controlled by an external religious organization; concluding that the defendant seminary, which was controlled by its religious board of trustees rather than an external organization, qualified for the Title IX exception).

[61] *See* 20 U.S.C. § 1681(a)(3).

[62] *See id*. *See also, e.g.*, *Maxon*, 2021 WL 5882035, at *1-2 (9th Cir. Dec. 13, 2021) (affirming district court's application of Title IX's religious exemption to dismiss plaintiffs' claim challenging the defendant seminary's expulsion of students for marrying same-sex partners; discussing the school's religiously-based standards concerning sex and marriage and concluding that "[t]o the extent that Plaintiffs were dismissed because their marriages were with spouses of the same sex, rather than the opposite sex, Plaintiffs' claim fails because the religious exemption applies to shield these religiously motivated decisions that would otherwise violate Title IX's prohibition on sex discrimination.").

kinds of sex-based conduct by a religious entity.[63] To that end, DOJ and ED regulations addressing Title IX's religious exception provide that an entity seeking to assert it must submit a written statement "identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization."[64]

ED regulations also identify various educational institutions that may assert the exception.[65] Such institutions include, among others, "a school or department of divinity," an educational institution that "requires its faculty, students, or employees to be members of, or otherwise engage in religious practices of, or espouse a personal belief in, the religion of the organization by which it claims to be controlled," and an educational institution with "a published institutional mission that is approved by the governing body of an educational institution and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings."[66] It appears that few federal courts have analyzed the scope and application of Title IX's religious exemption.[67]

Title IX's separate definition of a covered "program or activity" similarly provides that "such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization."[68]

Other exceptions to Title IX permit sex-based distinctions in certain circumstances, such as sex-based admissions to private single-sex colleges;[69] and the consideration of sex in the membership practices of certain fraternities and sororities at institutions of higher education and voluntary youth organizations such as the Girl Scouts and Boy Scouts.[70] Another Title IX exception permits covered programs and activities to provide "father-son or mother-daughter activities at an educational institution," so long as "opportunities for reasonably comparable activities" are "provided for students of the other sex."[71] In addition to its exceptions, another Title IX provision separately provides that educational institutions receiving federal funds can maintain separate living facilities based on sex.[72] Long-standing Title IX regulations addressing athletics programs

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[63] *See id*.

[64] *See* 28 C.F.R. § 54.205(b) (DOJ regulation addressing Title IX's religious exemption; 34 C.F.R. § 106.12(b) (ED regulation addressing Title IX's religious exemption).

[65] *See* 34 C.F.R. § 106.12(c).

[66] *See id*.

[67] *See generally, e.g.,* Goodman v. Archbishop Curley High Sch., Inc., 149 F. Supp. 3d 577, 584 (D. Md. 2016) ("Few courts have addressed the breadth of Title IX's religious exemption and none have addressed it in the context of employment discrimination or retaliation claims.").

[68] *See* 20 U.S.C. § 1687 (defining "program or activity" to mean "all the operations of" various entities that fall within four categories, "any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.").

[69] *See* 20 U.S.C. § 1681(a)(1) (providing that with respect to admissions in educational institutions, Title IX's prohibition "shall apply *only* to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education") (emphasis added); Naranjo v. Alverno Coll., 487 F. Supp. 635, 637 (E.D. Wis. 1980) ("By its express terms, it is apparent that the proscription of [Title IX] does not apply with regard to admissions to private institutions of undergraduate higher education."). *See also* 20 U.S.C. § 1681(a)(5) (stating that "in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex").

[70] 20 U.S.C. § 1681(a)(7).

[71] *Id*. § 1681(a)(8).

[72] *Id.* § 1686 ("Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living

in federally funded schools also permit certain sex-based distinctions in athletic teams and competition.[73]

Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act prohibits any program or activity receiving federal financial assistance from excluding any person from participation in, denying the benefits of, or discriminating against any person "solely by reason of her or his disability" in the program or activity.[74] As with Title IX, Section 504 applies to both a covered program's treatment of program participants as well as its employment practices.[75]

As a general matter, federal courts often analyze and construe the requirements of Section 504 and the Americans with Disabilities Act (ADA) in a similar manner.[76] Section 504 prohibits covered programs and activities[77] from various forms of disability-based conduct such as denying an individual admission to a program based on a disability,[78] or providing differentiated levels of service based on disability.[79] Section 504 also requires that covered programs or activities

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facilities for the different sexes."). *See also* 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.").

[73] 34 C.F.R. § 106.41(b). Congress specifically required promulgation of regulations pertaining to athletics. Education Amendments of 1974, P.L. 93-380, § 844, 88 Stat. 484 (1974) (codified at 20 U.S.C. § 1681 note.); *see* McCormick ex. rel. McCormick v. Sch. Dist. Of Mamaroneck, 370 F.3d 275, 287 (2d Cir. 2004) (describing the rulemaking process including the publishing of the final rule and the congressional hearings thereafter).

[74] 29 U.S.C. § 794(a).

[75] With respect to claims alleging discrimination in employment, Section 504 expressly provides that the standards to be applied when determining a violation of Section 504 "shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.)." 29 U.S.C. § 794(d). *See generally* Consol. Rail Corp. v. Darrone, 465 U.S. 624, 631–34 (1984) (addressing the scope of a private right of action under Section 504 and concluding that Section 504 reaches employment discrimination based on disability). *See also* 28 C.F.R. § 42.510 – § 42.513 (DOJ regulations setting out requirements of Section 504 concerning employment).

[76] *See generally* Durand v. Fairview Health Servs., 902 F.3d 836, 841 (8th Cir. 2018) (analyzing claims brought under both Section 504 of the Rehabilitation Act and Title III of the ADA and stating that "[a]lthough there are differences between the ADA and the [Rehabilitation Act], . . . the case law interpreting the two statutes is generally used interchangeably."); Wright v. New York State Dep't of Corr., 831 F.3d 64, 72 (2d Cir. 2016) (in the context of analyzing claims brought under Section 504 and Title II of the ADA, stating "[b]ecause the standards under both statutes are generally the same and the subtle distinctions between the statutes are not implicated in this case, 'we treat claims under the two statutes identically'" (quoting Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003))).

[77] *See* 29 U.S.C. § 794(b).

[78] *See, e.g.,* Sjostrand v. Ohio State Univ., 750 F.3d 596, 599–602 (6th Cir. 2014) (where plaintiff alleged that she was denied admission to a PhD program based on her disability, Crohn's disease, discussing circumstances surrounding her application and rejection and holding that plaintiff had submitted sufficient evidence to submit ADA and Rehabilitation Act claims to a jury). *See also* 28 C.F.R. § 41.51(b)(1)(i) ("A recipient, in providing any aid, benefit, or service, may not . . . on the basis of handicap . . . [d]eny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service"); 45 C.F.R. § 84.38 ("A recipient to which this subpart applies that provides preschool education or day care . . . may not, on the basis of handicap, exclude qualified handicapped persons and shall take into account the needs of such persons in determining the aids, benefits, or services to be provided.").

[79] *See generally, e.g.,* L.E. v. Ragsdale, No. 21-4076, 2021 WL 4841056, at *2–3 (N.D. Ga. Oct. 15, 2021) (stating that "'[d]isparate treatment involves discriminatory intent and occurs when a disabled person is singled out for disadvantage because of his disability,'" and stating that such a claim "'requires a plaintiff to show that he has actually been treated differently than similarly situated non-handicapped people'") (citations omitted). *See also* 28 C.F.R. § 41.51 (DOJ regulation listing actions that constitute disability discrimination under Section 504, including providing "different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are

reasonably accommodate an individual with a disability to enable their meaningful access to or participation in the program or activity[80] (such as adapting classroom equipment for use by children with physical impairments).[81]

Physical Access and Related Requirements

Section 504 has also been interpreted to require that covered programs and activities make their facilities physically accessible to individuals with disabilities,[82] though this obligation does not require a recipient to make each and every part of its existing facilities accessible.[83] Relatedly, DOJ regulations implementing Section 504 do not require "structural changes in existing facilities where other methods are effective in achieving compliance."[84] Entities may satisfy compliance, for example, by acquiring or redesigning equipment, delivering services from an accessible site, altering existing facilities, or through other methods that "make its program or activity accessible to handicapped persons."[85] Where structural changes are necessary, federal regulations require that they be made expeditiously.[86]

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as effective as those provided to others").

[80] *See generally* Alexander v. Choate, 469 U.S. 287, 301 (1985) (interpreting Section 504 to require that "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers"; explaining that "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made"); Mark H. v. Hamamoto, 620 F.3d 1090, 1097 (9th Cir. 2010) ("An organization that receives federal funds violates § 504 if it denies a qualified individual with a disability a reasonable accommodation that the individual needs in order to enjoy meaningful access to the benefits of public services."). *See also* 28 C.F.R. § 42.503(e) ("Recipients shall insure that communications with their applicants, employees and beneficiaries are effectively conveyed to those having impaired vision and hearing."); *id*. at § 42.503(f) ("A recipient that employs fifteen or more persons shall provide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual, or speaking skills where a refusal to make such provision would discriminatorily impair or exclude the participation of such persons in a program or activity receiving Federal financial assistance. Such auxiliary aids may include brailled and taped material, qualified interpreters, readers, and telephonic devices. Attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature are not required under this section. Departmental officials may require recipients employing fewer than fifteen persons to provide auxiliary aids when this would not significantly impair the ability of the recipient to provide its benefits or services.").

[81] *See* 45 C.F.R. § 84.44(d)(1) ("A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills."); *id*. at § 84.44(d)(2) ("Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature."). *See also* 34 C.F.R. 104.4(b)(2) (ED regulation addressing obligations under Section 504 and stating that "[f]or purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.").

[82] *See generally* Barden v. City of Sacramento, 292 F.3d 1073, 1075 (9th Cir. 2002) (discussing the requirements of Section 504 and stating that "[o]ne form of prohibited discrimination is the exclusion from a public entity's services, programs, or activities because of the inaccessibility of the entity's facility"). *See also* 28 C.F.R. § 42.521(a) ("A recipient shall operate each program or activity to which this subpart applies so that when each part is viewed in its entirety it is readily accessible to and usable by handicapped persons. This section does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.").

[83] *See* 28 C.F.R. § 42.521(a).

[84] *Id*. at § 42.521(b).

[85] *Id*.

[86] *See id*. at § 41.57(b) (requiring that "such changes shall be made as soon as practicable"); *id*. at § 42.521(d)

The statutory text of Section 504 explicitly excepts "small providers" from "mak[ing] significant structural alterations to their existing facilities for the purpose of accessibility, if alternative means of providing the services are available."[87] Section 504 does not define "small providers,"[88] but federal regulations describe such providers as a "recipient with fewer than fifteen employees."[89]

Federal regulations also govern construction. New facilities "constructed by, on behalf of, or for the use of a recipient," must "be designed and constructed in such a manner that the facility is readily accessible to and usable by handicapped persons."[90]

The Age Discrimination Act of 1975

The Age Discrimination Act of 1975 provides that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance."[91] HHS has coordinating authority over the Age Discrimination Act,[92] which means that other federal agencies' regulations implementing the Act must be consistent with HHS's government-wide regulations[93] and subject to HHS approval.[94]

As a general matter, the Act prohibits covered programs or activities[95] from various forms of age-based conduct such as denying an individual admission to a program on the basis of that

(requiring that "such changes shall be made as expeditiously as possible"); 45 C.F.R. 84.22(d) (requiring such changes "as expeditiously as possible").

[87] *See* 29 U.S.C. § 794(c).

[88] *See id*.

[89] *See* 28 C.F.R. § 42.521(c) (DOJ regulation). *See also* 45 C.F.R. § 84.22(c) (HHS regulation addressing "[s]mall health, welfare, or other social service providers" as a recipient "with fewer than fifteen employees that provides health, welfare, or other social services"). In the case of small providers, DOJ regulations state that if an entity determines, after consulting with the individual with a disability, "that there is no method of complying . . . other than making a significant alteration in its existing facilities," the recipient may refer the individual "to other available providers of those services that are accessible." *See* 28 C.F.R. § 42.521(c).

[90] *See* 28 C.F.R. § 42.522(a) (noting that the requirement regarding new facilities applies to construction that began after the regulations' effective date).

[91] 42 U.S.C. § 6102.

[92] *See* 42 U.S.C. § 6103(a)(4) (directing "the head of each Federal department or agency which extends Federal financial assistance to any program or activity by way of grant, entitlement, loan, or contract" to issue final regulations implementing the Age Discrimination Act of 1975, and requiring that such regulations "be consistent with the final general regulations issued by the Secretary [of HHS]," and stating that such regulations "shall not become effective until approved by the Secretary."). *See also* Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from HHS, 47 Fed. Reg. 57850 (Dec. 28, 1982) ("The Act requires each department or agency which operates programs of Federal financial assistance to issue proposed and then final regulations which must be consistent with the general regulations. The Secretary of HEW (now HHS) must approve all agency and department regulations.").

[93] *See generally* 45 C.F.R. Part 90. *See also* 45 C.F.R. § 90.2(a) ("The purpose of these regulations is to state general, government-wide rules for the implementation of the Age Discrimination Act of 1975, as amended, and to guide each agency in the preparation of agency-specific age discrimination regulations.").

[94] *See supra* note 92.

[95] 42 U.S.C. § 6107(4) (defining "program or activity).

individual's age[96] or providing differentiated services to a program participant based on age except in specified circumstances.[97]

Exceptions Permitting Age-Based Distinctions

Importantly, and relevant for a program with age-based participation criteria such as a child care or age-specific education program, the Age Discrimination Act permits certain age-based distinctions.[98] The statute, for example, expressly allows programs and activities to consider age when "such action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity."[99] The statute also contains an exception providing that the Act "shall not apply to any program or activity established under authority of any law which (A) provides any benefits or assistance to persons based upon the age of such persons; or (B) establishes criteria for participation in age-related terms or describes intended beneficiaries or target groups in such terms."[100] Thus, if federal legislation creates a program or activity to target certain age groups, such a program or activity is likely to fall under one or more of these exceptions.

The requirements of the Age Discrimination Act do not apply to a covered program's employment practices.[101] Instead, the statute points to the Age Discrimination in Employment Act as governing employment-related claims.[102]

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[96] *See*, *e.g.*, Harris v. Members of Bd. of Governors of Wayne State Univ., No. 10-11384, 2011 WL 3799769, at *1, 3-4 (E.D. Mich. Aug. 26, 2011) (where 54-year old plaintiff brought an Age Discrimination Act claim alleging that the denial of his admission to graduate school was based on age, stating that the Act prohibits discrimination based on age in admissions, and discussing the elements necessary to establish a prima facie case of age discrimination).

[97] *See generally* 45 C.F.R. § 90.12(b) (HHS regulation stating that a "recipient may not, in any program or activity receiving Federal financial assistance . . . use age distinctions or take any other actions which have the effect, on the basis of age, of: (1) [e]xcluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance; or (2) [d]enying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.").

[98] 42 U.S.C. § 6103(b).

[99] *Id*. § 6103(b)(1). *See also* 45 C.F.R. § 90.13 (defining the terms "normal operation" and "statutory objective"); *id*. at § 90.14 (HHS regulation stating that an "action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if: (a) Age is used as a measure or approximation of one or more other characteristics; and (b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity; and (c) The other characteristic(s) can be reasonably measured or approximated by the use of age; and (d) The other characteristic(s) are impractical to measure directly on an individual basis.").

[100] *Id*. § 6103(b)(2). *See* 45 C.F.R. § 90.3(b)(1) (stating that the Act does not apply to: "An age distinction contained in that part of a Federal, State or local statute or ordinance adopted by an elected, general purpose legislative body which: (i) Provides any benefits or assistance to persons based on age; or (ii) Establishes criteria for participation in age-related terms; or (iii) Describes intended beneficiaries or target groups in age-related terms.").

[101] *See* 42 U.S.C. § 6103(c)(1) ("Nothing in this chapter shall be construed to authorize action under this chapter by any Federal department or agency with respect to any employment practice of any employer, employment agency, or labor organization, or with respect to any labor-management joint apprenticeship training program."). *See also* 45 C.F.R. § 91.3(b)(2) ("The Act and these regulations do not apply to . . . [a]ny employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program, except for any program or activity receiving Federal financial assistance for public service employment under the Comprehensive Employment and Training Act (CETA), (29 U.S.C. 801 *et seq.*)[.]").

[102] 42 U.S.C. § 6103(c)(2) ("Nothing in this chapter shall be construed to amend or modify the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621–634), as amended, or to affect the rights or responsibilities of any person or party pursuant to such Act.").

Enforcement of the Civil Rights Spending Statutes

The civil rights requirements that apply to recipients of federal financial assistance are generally enforced in two ways: (1) by the individual federal agencies that distribute financial assistance to recipients—typically through the potential suspension or termination of funds,[103] and (2) through private rights of action brought directly against recipients in federal court for violations of these nondiscrimination laws.[104] As a general matter, administrative enforcement of these statutory requirements can help ensure that federal aid is not used to support discrimination,[105] while private enforcement can seek relief for discriminatory harm to individuals.[106]

Administrative Requirements

Federal agencies generally enforce these civil rights requirements against the recipients they fund.[107] They are responsible for promulgating regulations to implement these laws and may terminate or suspend assistance in cases of non-compliance.[108]

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[103] *See, e.g.*, 42 U.S.C. § 2000d-1.

[104] *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 709, 717 (1979) (concluding that the text, history, and purpose of Title IX "counsel implication of a cause of action in favor of private victims of discrimination"; and holding that the private plaintiff in that case could maintain her Title IX lawsuit). The Department of Justice may also bring suit to enforce certain nondiscrimination provisions against recipients. *See* Nat'l Black Police Ass'n, Inc. v. Velde, 712 F.2d 569, 575 (D.C. Cir. 1983) ("Title VI clearly tolerates other enforcement schemes. Prominent among these other means of enforcement is referral of cases to the Attorney General, who may bring an action against the recipient."); Dep't of Justice, Title IX Legal Manual, Chapter VII (Updated Aug. 12, 2021), https://www.justice.gov/crt/title-ix#VII.%C2%A0%20Federal%20Funding%20Agency%20Methods%20to%20Enforce%20Compliance ("The Department of Justice's statutory authority to sue in federal district court on behalf of an agency for violation of Title VI (and, likewise, Title IX) is contained in the phrase "by any other means authorized by law.").

[105] *See generally*, *e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 704-05 (1979) ("Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."). *See also id*. at 704 (explaining that the "first purpose is generally served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices").

[106] *See id*. at 705-06 (discussing why the termination of funds "may not provide an appropriate means of accomplishing the second purpose" of protecting individual citizens against discriminatory practices and stating that the "award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute."). This is not to say that federal agency enforcement and judicial actions always operate with independent purposes, as the two may overlap.

[107] *See* 28 C.F.R. § 42.401 ("Responsibility for enforcing title VI rests with the federal agencies which extend financial assistance."); 28 C.F.R. § 41.5 ("Each agency shall establish a system for the enforcement of section 504 [of the Rehabilitation Act] and its implementing regulation with respect to the programs and activities to which it provides assistance."). Agencies often have a designated unit that carries out their enforcement responsibilities under these and other civil rights statutes. *See, e.g.*, *About DOCR*, U.S. Dep't of Transp., https://www.transportation.gov/civil-rights/about-docr (last visited April 22, 2022) (stating that the Departmental Office of Civil Rights "is responsible for ensuring that recipients of funds from the Department of Transportation (DOT) conduct their Federal assisted programs and activities in a non-discriminatory manner and in accordance with United States civil rights laws and labor laws."); *About OCR*, U.S. Dep't of Educ., https://www2.ed.gov/about/offices/list/ocr/aboutocr.html (last visited April 22, 2022) ("These civil rights laws enforced by OCR extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive U.S. Department of Education funds.").

[108] Agencies have sometimes delegated their responsibilities to enforce civil rights requirements tied to receipt of financial assistance to another agency. *See, e.g.*, Agreement Between National Aeronautics and Space Administration and Department of Education To Delegate Certain Civil Rights Compliance Responsibilities for Elementary and Secondary Schools and Institutions of Higher Education, 52 Fed. Reg. 43385 (Nov. 12, 1987).

Agency-Specific Regulations

Agencies that distribute federal financial assistance are authorized and directed to promulgate regulations implementing each of the civil rights spending statutes.[109] As a general matter, an agency's regulations can sometimes adopt requirements specific to their jurisdiction. For instance, Department of Transportation regulations implementing Section 504 contain provisions specific to airport facilities.[110]

To guide agency enforcement of Title VI, Title IX, and Section 504, an Executive Order directs the Attorney General to coordinate federal agencies' implementation of these statutes.[111] Under this EO, agency regulations must comply with the Attorney General's requirements, and are subject to his or her approval.[112] DOJ has also promulgated regulations that guide agencies in their own enforcement of Title VI.[113] By contrast, HHS is entrusted with coordinating authority for the Age Discrimination Act of 1975.[114]

Enforcement Tools: Investigations, Voluntary Resolutions, Terminating Funds

Agencies enforce the nondiscrimination requirements for recipients of federal financial assistance pursuant to procedures set out in the administrative enforcement provisions of the civil rights spending statutes.[115] Those provisions generally authorize agencies to enforce their rules implementing the nondiscrimination mandates through enforcement proceedings that can suspend

[109] 42 U.S.C. § 2000d-1 (Title VI); 20 U.S.C. § 1682 (Title IX); 29 U.S.C. § 794 (Rehabilitation Act); 42 U.S.C. § 6101 (Age Discrimination Act).

[110] 49 C.F.R. § 27.71.

[111] Executive Order 12250, Leadership and Coordination of Nondiscrimination Laws (Nov. 2, 1980).

[112] *See id*. Relatedly, DOJ regulations coordinating Title VI provide that agencies use enforcement procedures as contained in DOJ Guidelines. 28 C.F.R. § 42.411. Those Guidelines may be found at 28 C.F.R. § 50.3.

[113] 28 C.F.R. § 42.401-15. Numerous agencies have incorporated their Title VI enforcement procedures when promulgating other regulations pursuant to the civil rights spending statutes, such as Title IX and the Rehabilitation Act. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Financial Assistance; Final Common Rule, 65 Fed. Reg. 52,858 (2000) (reflecting the incorporation by numerous agencies of the enforcement provisions of Title VI for purposes of Title IX regulations); *see e.g.*, 45 C.F.R. § 84.71 (Department of Health and Human Services Title IX regulation incorporating Title VI procedures). DOJ regulations implementing Executive Order 12250 provide that agencies establish an enforcement system for Section 504 that includes the procedures an agency has adopted under Title VI. 28 C.F.R. 41.5(a). Various agency regulations implementing Section 504 simply incorporate the enforcement provisions of Title VI. *See, e.g.*, 45 C.F.R. § 84.61 (Department of Health and Human Services); 34 C.F.R. § 104.61 (Department of Education); 28 C.F.R. § 42.530(a) (Department of Justice).

[114] HHS was charged with promulgating regulations under the Age Discrimination Act and other agencies must issue regulations consistent with them. 42 U.S.C. § 6103. Those regulations contain their own enforcement procedures. 45 C.F.R. § 91.41-50.

[115] 42 U.S.C. § 2000d-1 (Title VI); 20 U.S.C. § 1682 (Title IX); 42 U.S.C. § 6104(a) (Age Discrimination Act). Section 504 of the Rehabilitation Act lacks these express requirements regarding funding termination or suspension. However, Executive Order 12250 directs the Attorney General to coordinate the implementation of the law and provide that agency regulations under the Rehabilitation Act, as well as Title VI and Title IX, be consistent with the requirements established by the Attorney General and be subject to his or her approval. Executive Order 12250, Leadership and Coordination of Nondiscrimination Laws (Nov. 2, 1980). DOJ regulations implementing this Executive Order provide that agencies establish an enforcement system for Section 504 that includes the procedures an agency has adopted under Title VI. 28 C.F.R. 41.5(a). Various agency regulations implementing Section 504 simply incorporate the enforcement provisions of Title VI. *See, e.g.*, 45 C.F.R. § 84.61 (Department of Health and Human Services); 34 C.F.R. § 104.61 (Department of Education); 28 C.F.R. § 42.530(a) (Department of Justice).

or terminate assistance.[116] However, agencies may only do so once they have alerted the recipient of their noncompliance and determined that compliance cannot be reached voluntarily.[117]

DOJ has promulgated its own regulations implementing Title VI for those programs it funds.[118] In light of DOJ's coordinating role with respect to Title VI, Title IX, and Section 504, the enforcement provisions of these regulations can provide a helpful model for how the civil rights spending statutes may be enforced.[119] These regulations provide that in order to receive financial assistance, applicants, as a condition for approval, must include assurances that the recipient's program will comply with the regulations.[120] The regulations also provide that individuals who believe themselves subjected to discrimination in an applicable program may file a complaint with the DOJ.[121] These regulations also direct the DOJ to conduct periodic compliance reviews, and conduct an investigation when appropriate.[122] When investigations reveal noncompliance, DOJ will seek to resolve the issue informally.[123] If a recipient fails or refuses to comply with Title VI, the Department may suspend or terminate assistance.[124] Before doing so, consistent with the statutory provisions mentioned above, the Department must notify the recipient of the failure to comply and determine that compliance cannot be attained voluntarily.[125] In addition, suspension or termination is only allowed after a finding on the record, after an opportunity for a hearing, of noncompliance.[126]

Judicial Enforcement Through a Private Right of Action

Private parties may also enforce the civil rights spending statutes through suit in federal court against the recipients of federal financial assistance. The Supreme Court has interpreted Title VI, Title IX, and Section 504 of the Rehabilitation Act to allow private suits for injunctive relief and compensatory monetary damages.[127] Federal law also allows recovery of attorney's fees in such

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[116] 42 U.S.C. § 2000d-1 (Title VI); 20 U.S.C. § 1682 (Title IX); 42 U.S.C. § 6104(a) (Age Discrimination Act).

[117] 42 U.S.C. § 2000d-1 (Title VI); 20 U.S.C. § 1682 (Title IX); 42 U.S.C. § 6104(c) (Age Discrimination Act).

[118] *See* 28 C.F.R. § 42.105-110.

[119] Executive Order 12250, Leadership and Coordination of Nondiscrimination Laws (Nov. 2, 1980).

[120] 28 C.F.R. § 42.105. *See* 45 C.F.R. § 91.33 (HHS regulations implementing Age Discrimination Act requiring assurances of compliance from recipients).

[121] 28 C.F.R. § 42.107(b).

[122] 28 C.F.R. § 42.107(a), (c). HHS regulations implementing the Age Discrimination Act provide for investigations when complaints are not resolved through mediation or reopened due to violation of a mediation agreement. 45 C.F.R. § 91.44.

[123] 28 C.F.R. § 42.107(d)(1).

[124] 28 C.F.R. § 42.108.

[125] *Id*.

[126] 28 C.F.R. § 42.108(c)(1), (2). The regulations contain provisions for a hearing before an agency official. 28 C.F.R. § 42.109. In addition, the Attorney General must approve decisions to terminate or suspend assistance. 28 C.F.R. § 42.108(c)(3); § 110(e). Also, termination may only come after 30 days' notice to Congress. *Id*. § 42.10(c)(4). *See also* 45 C.F.R. § 91.47 (incorporating Title VI enforcement provisions for the Age Discrimination Act).

[127] Barnes v. Gorman, 536 U.S. 181, 185 (2002); Alexander v. Sandoval, 532 U.S. 275, 279 (2001); Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 76 (1992). Title VI and Title IX do not expressly provide for a private right of action. However, the Court has held that Title VI and Title IX contained an implied cause of action to enforce their provisions. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 703 560 (1979) ("We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination."). *See also* Barnes v. Gorman, 536 U.S. 181, 185 (2002) (reasoning that "the remedies for violations of … § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964"). The Court has since modified its approach to recognizing implied private rights of action, generally requiring express statutory

suits.[128] However, the Court has interpreted Section 504, which adopts the remedies available under Title VI, not to allow for punitive damages.[129] Recently, when addressing whether a private individual suing under Section 504 and Section 1557 of the Affordable Care Act could recover emotional distress damages, the Court interpreted these statutes to foreclose that relief as well.[130]

The judicial enforcement provisions of the Age Discrimination Act stand in some contrast to the other spending statutes. As an initial matter, the Supreme Court has not addressed its provisions in much more than a passing manner.[131] Unlike the other civil rights spending statutes,[132] the Act requires plaintiffs to exhaust their administrative remedies before bringing suit in federal court.[133] In addition, there may be questions about what remedies the Age Discrimination Act allows. The statute mentions injunctive relief and the award of attorney's fees,[134] but does not mention compensatory damages.[135]

When Do the Civil Rights Spending Statutes Apply?

As discussed above, the civil rights spending statutes apply to recipients of federal financial assistance. Having examined the statutes' substantive requirements and enforcement procedures, this report now considers two threshold questions that often arise in determining their application. First, what counts as "federal financial assistance"? Second, who exactly is a "recipient" of that assistance?

language before inferring private rights of action or remedies. *See* Alexander v. Sandoval, 532 U.S. 275, 287 (2001) ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."). As noted earlier, a private suit under Title VI may only seek relief for intentional, not disparate impact, discrimination. *See supra* "Title VI of the Civil Rights Act of 1964."

[128] 42 U.S.C. § 1988(b) (Title IX and Title VI); 29 U.S.C. § 794a(b) (Section 504 of the Rehabilitation Act).

[129] Barnes v. Gorman, 536 U.S. 181, 189-90 (2002).

[130] Cummings v. Premier Rehab Keller, No. 20-219 (Apr. 28, 2022), slip op. 7 ("Under Barnes [v. Gorman], we therefore cannot treat federal funding recipients as having consented to be subject to damages for emotional distress. It follows that such damages are not recoverable under the Spending Clause statutes we consider here.").

[131] *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 466 n.3 (1999) (noting that the scope of Title IX, VI, 504 of the Rehabilitation Act, and the Age Discrimination Act are "defined in nearly identical terms").

[132] *See, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 255 (2009) ("Title IX has no administrative exhaustion requirement."); Wade v. Knoxville Util. Bd., 259 F.3d 452, 460 (6th Cir. 2001) (noting that "plaintiff was not required to exhaust administrative remedies before bringing a Title VI claim"). As noted above, the private right of action available is implied, rather than express.

[133] 42 U.S.C. § 6104(f); D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist., 629 F.3d 450, 455 (5th Cir. 2010).

[134] 42 U.S.C. § 6104(e).

[135] 42 U.S.C. § 6104(e)(1). A number of federal district courts have concluded that the Age Discrimination Act therefore does not authorize compensatory damages. Doe v. Regents of Univ. of California, No. 21-CV-09605-LB, 2022 WL 833627, at *6 (N.D. Cal. Mar. 20, 2022); Young v. W. Virginia Univ., No. 1:21-CV-35, 2021 WL 6882317, at *10 (N.D.W. Va. June 25, 2021), report and recommendation adopted, No. 1:21-CV-35, 2022 WL 816041 (N.D.W. Va. Mar. 17, 2022); Montalvo-Padilla v. Univ. of P.R., 498 F. Supp. 2d 464, 467 n.3 (D.P.R. 2007); Tyrrell v. City of Scranton, 134 F. Supp. 2d 373, 383 (M.D. Pa. 2001). *Cf.* 42 U.S.C. 2000d-7 (expressly providing that states are not immune from suit in federal court for violations of Title VI, Title IX, Section 504, and the Age Discrimination Act, and that remedies both at law and in equity are available against states to the same extent as they are against public or private entities other than a state).

What Is Federal Financial Assistance?

A clear form of federal financial assistance is funding provided through a federal grant or loan.[136] Title VI, Title IX, and the Age Discrimination Act, for example, all explicitly describe "federal financial assistance" as grants, loans, or contracts.[137] Section 504 of the Rehabilitation Act does not provide examples of what constitutes federal financial assistance,[138] but agency regulations implementing Section 504 note that federal assistance "means" grants, loans, and contracts.[139]

While money is a common form of federal financial assistance, there are other types as well.[140] According to agency regulations, the donation of real or personal property from the federal government, as well as the sale or lease of federal property at a reduced cost can constitute federal financial assistance.[141] Likewise, the detail of federal employees to states and local governments can constitute federal financial assistance.[142]

One situation in which these civil rights laws can differ is with respect to a "contract of insurance or guaranty."[143] Title VI, Title IX, and the Age Discrimination Act all exempt such contracts from their requirements.[144] As explained by the U.S. Court of Appeals for the Fifth Circuit, Congress initially exempted such contracts from Title VI's requirements in order to prevent the statute "from reaching individually owned homes financed with federally guaranteed mortgages, or individual bank accounts in a bank with federally guaranteed deposits."[145] Just as Section 504 lacks examples of what constitutes federal financial assistance, it lacks examples of what forms of

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[136] *See* Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 604 (1986) ("We examine first the grants of federal funds to airport operators, which clearly are federal financial assistance.").

[137] 42 U.S.C. § 2000d-1 (Title VI); 20 U.S.C. § 1682 (Title IX); 42 U.S.C. § 6103(a)(4) (Age Discrimination Act) (describing federal financial assistance as a "grant, entitlement, loan, or contract"). As discussed in this section, grants, loans, and contracts are not the only forms of aid that can constitute federal financial assistance.

[138] 29 U.S.C. § 794.

[139] *See, e.g.*, 28 C.F.R. § 42.540(f) (Dep't of Justice); 45 C.F.R. § 84.3 (Dep't of Health and Human Servs.); 34 C.F.R. § 104.3(h) (Dep't of Educ.). The Supreme Court has also interpreted "federal financial assistance" under Section 504 as "clearly" including grants. *See* Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 604 (1986) ("Section 504 prohibits discrimination against any qualified handicapped individual under 'any program or activity receiving Federal financial assistance.' We examine first the grants of federal funds to airport operators, which clearly are federal financial assistance . . . .").

[140] *See* Dep't of Justice, Title IX Legal Manual, Chapter VII (describing different kinds of federal financial assistance, such as the use of federal property at reduced cost). *See* Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. at 607 n.11 ("Although the word 'financial' usually indicates 'money,' federal financial assistance may take nonmoney form.").

[141] *See, e.g.*, 28 C.F.R. § 42.540(f) (Department of Justice); 45 C.F.R. § 84.3 (Department of Health and Human Services); 34 C.F.R. § 104.3(h) (Department of Education).

[142] *See* Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 612 n.14 (1986) ("Since the first regulations under Title VI, the interpretation of federal financial assistance has been that the detail, or loan, of federal personnel can constitute federal assistance.").

[143] *See* Dep't of Justice, Title VI Legal Manual, Chapter V (C)(2)(d); Dep't of Justice, Title IX Legal Manual, III(A)(3).

[144] 42 U.S.C. § 2000d-1 (Title VI); 20 U.S.C. § 1682 (Title IX); 42 U.S.C. § 6103(a)(4) (Age Discrimination Act). *See* United States v. Baylor Univ. Med. Ctr., 736 F.2d 1039, 1048 (5th Cir. 1984); Moore v. Sun Bank of N. Fla., N.A., 923 F.2d 1423, 1426 (11th Cir. 1991). Section 1557 of the ACA, which prohibits discrimination on various grounds in health programs receiving federal financial assistance, describes such assistance as "including credits, subsidies, or contracts of insurance." 42 U.S.C. § 18116.

[145] United States v. Baylor Univ. Med. Ctr., 736 F.2d 1039, 1048 (5th Cir. 1984) ("As the legislative history makes abundantly clear, in excluding 'contracts of insurance or guaranty' from Title VI, Congress intended to prevent Title VI from reaching individually owned homes financed with federally guaranteed mortgages, or individual bank accounts in a bank with federally guaranteed deposits.").

assistance do not qualify as federal financial assistance.[146] A number of agency regulations nonetheless exclude contracts of insurance and guaranty from their definition of federal financial assistance under Section 504.[147] Courts, however, have taken different approaches in determining whether such contracts should, in fact, be exempt.[148]

Who Is a Recipient of Federal Financial Assistance?

Only *recipients* of federal financial assistance are obligated to comply with the requirements discussed above.[149] The Supreme Court has treated these statutes as stemming from Congress's power to place conditions on federal grants. It has reasoned that they operate like a contract between recipients and the federal government—a "recipient's acceptance of the funds triggers coverage under the nondiscrimination provision."[150] By limiting their reach to recipients of federal financial assistance, Congress only "imposes" these statutory requirements "upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds."[151]

Who qualifies as a recipient of federal financial assistance for purposes of these civil rights laws, however, is not always self-evident. For example, when financial assistance is passed through multiple entities or benefits multiple groups, questions may arise as to who precisely is a recipient of that assistance for purposes of these statutes.

Direct v. Indirect Recipient[152]

Recipients include entities that apply for and receive federal financial assistance directly from a federal agency. For example, if a local police department applies for and receives a direct grant from DOJ to support a particular program, the police department is a recipient of federal financial

[146] 29 U.S.C. § 794.

[147] *See, e.g.*, 28 C.F.R. § 42.540(f) (Department of Justice); 45 C.F.R. § 84.3 (Department of Health and Human Services); 34 C.F.R. § 104.3(h) (Department of Education).

[148] *Compare* Gallagher v. Croghan Colonial Bank, 89 F.3d 275, 278 (6th Cir. 1996) ("[W]e hold that Croghan [Colonial Bank] did not receive federal financial assistance for purposes of the Rehabilitation Act by disbursing loans to students pursuant to federal student loan legislation."), *with* Moore v. Sun Bank of N. Fla., N.A., 923 F.2d 1423, 1433 (11th Cir. 1991) ("Sun Bank, through participation in the SBA's guaranteed loan program, is a 'program or activity receiving Federal financial assistance' and is thereby amenable to suit under section 504.").

[149] *See Paralyzed Veterans*, 477 U.S. at 605.

[150] *Id.* at 605 (describing Title VI, Title IX, and Section 504 of the Rehabilitation Act); Barnes v. Gorman, 536 U.S. 181, 186 (2002) (interpreting Section 504 of the Rehabilitation Act, which incorporates the remedies of Title VI, and noting that "we have repeatedly characterized [Title VI] and other Spending Clause legislation as "much in the nature of a *contract:* in return for federal funds, the [recipients] agree to comply with federally imposed conditions" (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)) (internal quotation marks omitted)). The Court has not examined the Age Discrimination Act in as much depth as Title IX, Title VI, and the Rehabilitation Act, but has noted that the scope of all four are "defined in nearly identical terms." Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 466 n.3 (1999) (noting the scope of the Age Discrimination Act, Title IX, Title VI, and Section 504 of the Rehabilitation Act). *See* Action All. of Senior Citizens of Greater Philadelphia v. Heckler, 789 F.2d 931, 935 n.1 (D.C. Cir. 1986) (Ginsburg, J.) (observing that the Age Discrimination Act was modeled after Title VI and Title IX).

[151] Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 606 (1986).

[152] It is important to clarify that whether such federal financial assistance is "direct" or "indirect" can have potential constitutional implications for religious programming of a religious provider that receives federal funds. *See* CRS Report R46517, *Evaluating Federal Financial Assistance Under the Constitution's Religion Clauses*, by Valerie C. Brannon.

assistance.[153] Entities that receive reimbursements from the federal government through Medicare for services rendered can also be recipients.[154] Importantly, however, entities that indirectly receive assistance through another entity may sometimes qualify as recipients as well.

In *Grove City College v. Bell*, the Supreme Court held that a college's receipt of federal funding indirectly through a student aid program constituted receipt of federal financial assistance under Title IX.[155] In that case, the college declined to participate in "direct institutional aid programs," as well as certain other federal student assistance programs, in an attempt to avoid federal oversight.[156] However, the college still enrolled students who received federal grants earmarked for education expenses.[157] In concluding that Title IX applied to the college, the Court pointed to a number of factors that indicated it was a recipient of federal financial assistance.

First, the students received grants created under the Education Amendments of 1972, the same law that imposed Title IX's requirements; and the statute's legislative history showed a direct connection between those grants and Title IX.[158] Second, the Court reasoned that Congress intended those student grant programs to aid colleges and universities, and the "economic effect of direct and indirect assistance is often indistinguishable."[159] This intent was clear both from the legislative history, as well as the stated purposes of the legislation itself, one of which was to "provid[e] assistance to institutions of higher education."[160] Third, Title IX was drafted with essentially identical language to Title VI, which Congress intended to apply to colleges taking student aid.[161] Finally, there was a "longstanding and coherent administrative construction of the phrase 'receiving Federal financial assistance" that interpreted student aid as constituting federal financial assistance to schools. Congress had "never disavowed" this position and had "acted consistently with it" a number of times.[162] Given the "clear statutory language," plain congressional intent, and consistent agency practice, the Court rejected the argument that federal

[153] *See* Dep't of Justice, Title VI Legal Manual, Chapter V(D)(2).

[154] *See* Cummings v. Premier Rehab Keller, No. 20-219 (Apr. 28, 2022), slip op. 2 ("Premier Rehab is subject to these statutes, which apply to entities that receive federal financial assistance, because it receives reimbursement through Medicare and Medicaid for the provision of some of its services.").

[155] Grove City Coll. v. Bell, 465 U.S. 555, 560–61, 563 (1984). Congress amended Title IX (as well as Title VI, Section 504 of the Rehabilitation Act, and the Age Discrimination Act) to supersede the portion of the Court's *[Grove City College]* decision that concluded Title IX only applied to the specific program that receives federal funds. *Id*. at 570–74. *See* Civil Rights Restoration Act of 1987, P.L. 100-259 (1988).

[156] *Grove City Coll.*, 465 U.S. at 559.

[157] *Id.* at 565, 566 n.13. Students enrolled at the college also received Guaranteed Student Loans, which the district court ruled were "contract[s] of guaranty." The district court ruled that Title IX does not permit terminating such assistance to enforce its terms. Grove City Coll. v. Harris, 500 F. Supp. 253, 260 (W.D. Pa. 1980); *see* 20 U.S.C. § 1682. The Supreme Court did not take a position on this aspect of the court's reasoning. *Grove City Coll.*, 465 U.S. at 561 n.9.

[158] *Grove City Coll.*, 465 U.S. at 563.

[159] *Id*. at 564–65.

[160] *Id*. at 565-66; *see* 20 U.S.C. § 1070(a)(5).

[161] *Grove City Coll.*, 465 U.S. at 566.

[162] *Id*. at 566–68. The Court noted that Title IX's history was unique in that the General Education Provisions Act afforded Congress "an opportunity to invalidate aspects of the regulations it deemed inconsistent with Title IX." Under that process, the Department submitted Title IX regulations to Congress for review, and the rules would go into effect after 45 days unless Congress disapproved of the regulations in a concurrent resolution. P.L. 93-380, 88 Stat. 567 Sec. 509(A)(2). No disapproval resolutions were passed and the regulations went into effect. N. Haven Bd. of Ed. v. Bell, 456 U.S. 512, 533 (1982).

funds received by the educational institution indirectly through students should be treated differently than direct federal grants to the institution.[163]

Primary and Subrecipient

A closely related issue that sometimes arises with respect to who qualifies as a recipient of federal financial assistance is a distinction between the primary recipient of federal aid and a subrecipient of that aid.[164] Often a primary recipient receives the funds directly from the federal government but then distributes it to subrecipients to carry out a specific program.[165] For instance, federal funds are sometimes distributed directly to states as primary recipients, who are then entrusted with allocating those funds to subrecipients—such as local entities like school boards—consistent with federal guidelines.[166] Federal agency regulations implementing the funding-based nondiscrimination statutes often define "recipients" as entities taking federal financial assistance directly or through another recipient.[167] Courts appear to generally treat these "subrecipients" as recipients of federal financial assistance that must comply with the civil rights laws predicated on federal funding.[168]

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[163] *Grove City Coll.*, 465 U.S. at 564–69. *See* Bennett-Nelson v. Louisiana Bd. of Regents, 431 F.3d 448, 452–53 (5th Cir. 2005) ("Thus, under *Grove City* and *Paralyzed Veterans of America*, the relevant question is not whether the University passes federal funds through to students—who, it should be noted, typically pass them back to the University in the form of tuition payments and other expenses—but whether the University is an 'intended recipient' of the funds Congress has appropriated. . . . In sum, here, no less than in *Grove City*, the University is an intended recipient of federal financial assistance. Accordingly, for that reason, it is subject to the requirements of § 504 of the Rehabilitation Act.").

[164] *See* Dep't of Justice, Title VI Legal Manual, Chapter VII ("Many programs have two or more recipients. The primary recipient directly receives the federal financial assistance. The primary recipient then distributes the federal assistance to a subrecipient to carry out a program. *See, e.g.*, 28 C.F.R. § 42.102(g). The primary recipient and all the subrecipients are covered by and must conform their actions to Title VI."). Agencies sometimes, particularly in the context of religious programming by recipients of federal financial assistance, characterize funding that passes through an intermediary as "direct," while referring to "indirect" assistance as that provided to a beneficiary and paid through a voucher or certificate to the provider. *See, e.g.*, 7 C.F.R. § 16.2 (Department of Agriculture); *see* Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations, 81 Fed. Reg. 19,355, 19,413 (2016).

[165] *See* Dep't of Justice, Title VI Legal Manual, Chapter VII.

[166] *See, e.g.*, Rogers v. Board of Education, 859 F. Supp. 2d 742, 752 n.11 (D. Md. 2012) ("The fact that the Board received this money as a disbursement from the State of Maryland, rather than directly from the federal government, does not defeat Plaintiffs' Title VI claims. The reach of Title VI does not depend on whether a state receives federal funding and then distributes it to local educational agencies and others, or instead allows the aid to go more directly to the ultimate recipients.").

[167] *See, e.g.*, 34 C.F.R. § 106.2 ("Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof."); 28 C.F.R. § 42.102 (defining recipient as "any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient" for purposes of Title VI); 28 C.F.R. § 42.540 ("Recipient means any State or unit of local government, any instrumentality of a State or unit of local government, any public or private agency, institution, organization, or other public or private entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient."); 28 C.F.R. § 42.702 ("Recipient means any state or political subdivision, any instrumentality of a State or political subdivision, any public or private agency, institution, organization, or other entity, or any person to which federal financial assistance is extended, directly or through another recipient. 'Recipient' includes any successor, assignee, or transferee.").

[168] *See* Grove City Coll. v. Bell, 465 U.S. 555, 564 n.11 (1984) (observing that the argument that indirect funding

Intended Recipients v. Beneficiaries

Another consideration in applying these civil rights spending statutes is distinguishing between the intended recipients of federal aid, who must comply with those requirements, and mere beneficiaries of federal funding, who are not subject to the requirements.[169] The Court's decision in *Department of Transportation v. Paralyzed Veterans of America* illustrates the distinction. In that case, the Court considered whether Section 504 of the Rehabilitation Act applied to commercial airlines based on funds extended to airports.[170] The Court first examined the underlying grant statutes, which established an "Airport and Airway Trust Fund," and authorized disbursements from the Fund for the "Airport Improvement Program."[171] Under that program airport operators submitted grant applications for airport development projects and funds were disbursed to support various construction projects.[172] The Court concluded that Congress made it clear that the funds should go to airport operators, and thus they were the recipients of federal financial assistance for purposes of Section 504.[173] By contrast, airport users, such as airlines, were not given any funds and thus were not recipients.[174]

The Court observed that the scope of Section 504 is limited to "those who actually 'receive'" funds because the statute operates "as a form of contractual cost of the recipient's agreement to accept the federal funds."[175] Under Section 504, as well as Title VI and Title IX, the Court noted, "Congress enters into an arrangement in the nature of a contract with recipients of funds," and accepting those funds "triggers coverage under the nondiscrimination provision."[176] This

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cannot constitute federal financial assistance would be "problematic," as that view "logically would exclude from coverage under Title IX local school districts that receive federal funds through state educational agencies," a result that "Grove City wisely does not attempt to defend"); Moreno v. Consolidated Rail Corp., 99 F.3d 782, 787 (6th Cir. 1996) (en banc) ("It makes no difference, in our view, that the federal funds of which Conrail is the recipient come to it through the State of Michigan rather than being paid to it by the United States directly. . . . The ultimate beneficiaries of the federal funds at issue in the case before us are the members of the traveling public, just as the ultimate beneficiaries in the funds at issue in Grove City were the students—but Conrail, like the college, is clearly a 'recipient' of federal funds."); Bentley v. Cleveland Cnty. Bd. of County Comm'rs, 41 F.3d 600, 603 (10th Cir. 1994) (rejecting, in a Section 504 case, the defendant county's argument that "it is not a covered 'program or activity' . . . because it received the [federal] funds indirectly from the State Department of Transportation"); *Rogers*, 859 F. Supp. 2d at 752 n.11; Doe v. League Sch. of Greater Bos., Inc., No. 16-CV-11940-IT, 2017 WL 3594257, at *4 (D. Mass. Aug. 21, 2017) (concluding that a private school, which received federal funds through a public agency pursuant to the Individuals with Disabilities Education Act, was subject to Title IX); Graves v. Methodist Youth Servs., Inc., 624 F. Supp. 429, 433 (N.D. Ill. 1985) ("Thus, when defendant received its funding from [the Illinois Department of Children and Family Services] which was reimbursed by the federal government, this was equivalent to Grove City College receiving indirect federal funds through its students who received BEOGs. In both cases, federal funds were received 'through another recipient.' Consequently, relying on the Third Circuit's holding in *Grove City College*, and on the definitions of 'recipient' in the regulations issued by the Office of the Secretary of Labor and the Department of Health and Human Services, this court concludes that defendant indirectly received federal funding. Since this is so, it is subject to the Rehabilitation Act.").

[169] *Id*. at 604.

[170] Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597, 606–07 (1986).

[171] *Id*. at 604.

[172] *Id*. at 605.

[173] *Id*. at 605.

[174] *Id*. at 605.

[175] *Id.*

[176] *Id*. The Court favorably cited to an appellate decision that relied on similar reasoning to conclude that Title VI does not apply to direct benefit programs like Social Security because of the absence of a contractual relationship. Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d. Cir. 1983) ("This emphasis upon the contractual nature of the receipt of federal moneys in exchange for a promise not to discriminate is still another reason to conclude that Title VI does not cover direct benefit programs since these programs do not entail any such contractual relationship"), *cert. denied*, 466 U.S.

limitation of coverage to actual recipients ensures that Section 504 obligations apply only to those who can choose to accept or reject those requirements when deciding to receive federal funds. In that case, while the airport operators were in that position, the airlines were not.[177]

The Court also rejected the contention that the money given to airports constituted indirect assistance to airlines because the funds were spent in ways that benefitted airlines.[178] Distinguishing between "intended beneficiaries" and "intended recipients," the Court explained that federal financial assistance can certainly be indirect, as it was in its previous decision of *Grove City College* where Congress's intended aid recipient was the college, not the students who received the money before passing it on to the school.[179] Nevertheless, that principle did not mean "that federal coverage follows the aid past the recipient to those who merely benefit from the aid."[180] Here, the airlines were only beneficiaries of federal aid given to airport operators, not the intended recipients of that aid.[181] The Court emphasized that applying Section 504 to entities that simply derive economic benefit from federal funds would give that provision "almost limitless coverage."[182] The statute therefore, in the same manner as Title IX, "draws the line of federal regulatory coverage between the recipient and the beneficiary."[183]

Relatedly, the Court in *National Collegiate Athletic Association v. Smith* addressed another limitation on which entities qualify as recipients of federal financial assistance.[184] In that case, the Court examined whether the NCAA's receipt of dues from federally funded colleges and universities rendered it a recipient under Title IX.[185] The Court rejected this argument, concluding that it would contradict the reasoning of *Grove City College* and *Paralyzed Veterans*: an entity that receives federal assistance, "directly or through an intermediary," is a recipient; but an entity that only benefits economically from that assistance is not.[186] The Court contrasted the situation in *Grove City College*, where the student aid was "earmarked" for education expenses, to the facts in *Smith*, where there was no indication "that NCAA members paid their dues with federal funds earmarked for that purpose."[187] The NCAA may have benefited economically from the dues it received from colleges that accept federal assistance, but that fact alone could not transform the NCAA itself into a recipient of federal assistance.[188]

According to the Court, therefore, the intended recipients of federal financial assistance are subject to the civil rights spending laws, regardless of whether the receipt of funds is direct or

929 (1984).

[177] *Paralyzed Veterans,* 477 U.S. at 606.

[178] *Id*.

[179] *Id*.

[180] *Id*. at 607.

[181] *Id*. The Court also rejected the conclusion of the appellate court below that the federal air traffic control system was a form of federal financial assistance to airlines. The Court ruled that the air traffic control system was a "federally conducted program that has many beneficiaries but no recipients." *Id*. at 612.

[182] *Id*. at 608.

[183] *Id*. at 609.

[184] Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 462 (1999).

[185] *Id*. at 468–69.

[186] *Id*.

[187] *Id*. at 468.

[188] *Id*. at 469–70. The Court declined to rule on two arguments not decided in the courts below. First, whether the NCAA actually received federal financial assistance through the National Youth Sports Program it administered; and second, whether "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient." *Id*. at 469–70.

indirect. Entities that only benefit economically from federal assistance, however, are not.[189] Likewise, if an entity simply receives payments from third parties who themselves are recipients of federal funds, absent some indication that the entity is the intended recipient of assistance (such as federal funds earmarked for that purpose), the entity is not subject to the civil rights spending laws.[190]

Program-Specific Provisions

The antidiscrimination requirements of Title VI, Title IX, Section 504, and the Age Discrimination Act generally apply to recipients of federal financial assistance provided under all federal programs, regardless of whether statutory text creating a specific federal program refers to these four statutes explicitly.

In addition to these statutory requirements, some federal programs also have antidiscrimination requirements that apply specifically to recipients under a particular program. For example, Section 654 of the Head Start Act contains antidiscrimination requirements specific to entities that receive grants under the Head Start child development program.[191] The Work Force Innovation Opportunity Act (WIOA) also contains antidiscrimination requirements applicable to entities that receive federal financial assistance under that statutory program.[192] While discussing such program-specific provisions in detail is beyond the scope of this report, as a general matter these provisions at times address distinct factual contexts or characteristics, or set out a different scope of coverage than the four cross-cutting statutes discussed in this report.[193]

Legislative Considerations

As discussed in this report, the requirements of Title VI, Title IX, Section 504, and the Age Discrimination Act generally apply to recipients of federal financial assistance, barring an exception. Whether amending these statutes, or enacting new civil rights requirements based on Congress's Spending Clause power, Congress has broad authority to set civil rights conditions on the receipt of federal funding.[194] Legislation enacted on this basis, however, involves different legal considerations and requirements than civil rights legislation enacted under Congress's

[189] Grove City Coll. v. Bell, 465 U.S. 555, 569–70 (1984); Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597, 604 (1986).

[190] Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 469–70 (1999).

[191] 42 U.S.C. § 9849.

[192] 29 U.S.C. § 3248. For discussion of WIOA, see CRS Report R44252, *The Workforce Innovation and Opportunity Act and the One-Stop Delivery System*, by David H. Bradley.

[193] *See, e.g.*, 29 U.S.C. § 3248(a)(2) (prohibiting the exclusion of, denial of benefits to, or discrimination because religion, political affiliation, or belief). While some program-specific provisions may prohibit discrimination based on the same characteristic as one of the four cross-cutting statutes (race or sex, for example), these provisions at times have a different scope than Title VI or Title IX. *Cf.* 29 U.S.C. § 3248(a)(2) (mandating that no individual be "denied employment in the administration of or in connection with, any such program or activity because of race"); 42 U.S.C. § 2000d-3 (reflecting that the requirements of Title VI do not apply to "any employment practice . . . except where a primary objective of the Federal financial assistance is to provide employment."). *Cf.* 29 U.S.C. § 3248 (a)(2) (prohibiting discrimination because of sex); 20 U.S.C. § 1681(a) (prohibiting discrimination on the basis of sex in federally funded *education* programs or activities).

[194] Arlington Cent. School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) ("Congress has broad power to set the terms on which it disburses federal money to the States, but when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously'") (internal citation omitted).

Commerce Clause power[195] or its authority to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments of the U.S. Constitution.[196] This section sets out at least two unique features of Spending Clause legislation before turning to a brief discussion of issues or questions that may arise when amending or enacting civil rights laws on this basis.

Unique Features: Clear Terms and Sovereign Immunity

Two distinctive features of Spending Clause legislation include the requirement that such legislation be "unambiguous" in the conditions that it applies to recipients, and that Congress can condition the receipt of federal funds on a state's voluntary waiver of sovereign immunity to a suit.

First, unlike legislation enacted on other constitutional bases, the Court has characterized Spending Clause legislation as akin to a contract.[197] Civil rights laws enacted on this basis, the Court has explained, "condition an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds."[198] Because a recipient must voluntarily and knowingly accept the terms of this "contract," the Court requires that such legislation be "clear" and "unambiguous[]" in stating the terms that recipients agree to as conditions for receiving federal financial assistance.[199] As the Court recently explained, "the 'legitimacy of Congress' power' to enact Spending Clause legislation rests not on its sovereign authority to enact binding laws, but on 'whether the [recipient] voluntarily and knowingly accepts the terms of th[at] 'contract.'"[200] Accordingly, ambiguities in statutory conditions or requirements in Spending Clause legislation can prompt legal challenges to those provisions.[201] Related to the necessity for clear and unambiguous terms,

[195] *See generally*, *e.g.*, United States v. Lopez, 514 U.S. 549, 558-59 (1995) (discussing three categories of activity that Congress may regulate under its Commerce Clause power, such as regulating "the use of the channels of interstate commerce" and "those activities having a substantial relation to interstate commerce"). For further discussion, see CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Andrew Nolan and Kevin M. Lewis.

[196] *See generally*, *e.g.*, United States v. Morrison, 529 U.S. 598, 618-21 (2000) (discussing Congress's authority to legislate under Section 5 of the Fourteenth Amendment and limitations on that authority, including that such legislation address state action). *See also* Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981) ("Unlike legislation enacted under § 5 [of the Fourteenth Amendment], however, legislation enacted pursuant to the spending power is much in the nature of a contract"). For further discussion, see also CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Andrew Nolan and Kevin M. Lewis.

[197] *See*, *e.g.*, Cummings v. Premier Rehab Keller, No. 20-219 (Apr. 28, 2022), slip op. 1 ("'Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.'") (quoting *Pennhurst*, 451 U.S. at 17).

[198] Gebser v. Lago Vista Independent School Dist., 524 U.S. 274, 286 (1998) (describing the operation of Title VI and Title IX).

[199] *See Pennhurst*, 451 U.S. at 17 (stating that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously" and that Congress must "speak with a clear voice" to enable recipients to "exercise their choice knowingly, cognizant of the consequences of their participation."). *See also*, *e.g.*, Arlington Cent. School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) ("Congress has broad power to set the terms on which it disburses federal money to the States, but when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously'") (internal citation omitted).

[200] *Cummings*, No. 20-219 (Apr. 28, 2022), slip op. 4 (citing Barnes v. Gorman, 536 U.S. 181, 186 (2002) (quoting *Pennhurst*, 451 U.S. at 17)).

[201] *See*, *e.g.*, *Pennhurst*, 451 U.S. at 10, 24-27 (where parties debated whether a provision in the Developmentally Disabled Assistance and Bill of Rights Act of 1975 required federal funding recipients to provide individuals "'appropriate treatment' in the 'least restrictive' environment," concluding that the debated provision did not impose such a requirement).

the Court has emphasized in its Spending Clause jurisprudence that entities must have adequate "notice" of their obligations.[202]

Second, Congress may also condition receipt of federal financial assistance on a state's agreement to voluntarily waive its sovereign immunity to suit.[203] The waiver, however, must be "'unequivocally expressed' in the text of the relevant statute."[204] By way of example, to effectuate such a waiver, Congress enacted a 1986 provision that provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of" Section 504, Title IX, the Age Discrimination Act, and Title VI.[205] Sovereign immunity is thus no bar to suits seeking judicial enforcement of those specific statutory provisions against state entities.[206] By contrast, Congress cannot subject states to suit when it enacts legislation under its Commerce Clause power.[207]

Should there be legislative interest in changing or clarifying the statutory requirements of Title VI, Title IX, Section 504, or the Age Discrimination Act, Supreme Court precedent requires—to the extent those amendments are premised on Congress's Spending Clause authority—that conditions be imposed in clear and unambiguous terms.[208] As federal courts and agencies address the proper interpretation of these civil rights statutes,[209] Congress can resolve uncertainties by

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[202] *See, e.g., Arlington Cent. School Dist.*, 548 U.S. at 296 (where parties debated whether the Individuals with Disabilities Education Act (IDEA) required defendant school district to compensate the prevailing party for expert fees, describing the Court's analysis as asking whether a state official "would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees. In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case."); Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) ("Because we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause . . . private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue.") (internal citations omitted); *Pennhurst*, 451 U.S. at 25 ("In this case, Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010.").

[203] *See* Sossamon v. Texas, 563 U.S. 277, 280, 284-86 (2011) (addressing whether states, by accepting federal funding, had waived their sovereign immunity to suits for money damages under the Religious Land Use and Institutionalized Persons Act of 2000; explaining that while a state "may choose to waive its immunity in federal court at its pleasure," concluding that the federal statutory text at issue "was not the unequivocal expression of state consent that our precedents require"); Gruver v. Louisiana Board of Supervisors for Louisiana State Univ. Agricultural and Mechanical College, 959 F.3d 178, 180-81 (5th Cir. 2020) (explaining that "a state may waive its immunity, and Congress can induce a state to do so by making waiver a condition of accepting federal funds").

[204] *Sossamon*, 563 U.S. at 284 ("A State's consent to suit must be 'unequivocally expressed' in the text of the relevant statute.") (citations omitted).

[205] *See* 42 U.S.C. 2000d-7. *See generally* Lane v. Pena, 518 U.S. 187, 197-98 (1996) (explaining that 42 U.S.C. § 2000d-7 had been "enacted in response to our decision in *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), where we held that Congress had not unmistakably expressed its intent to abrogate the States' Eleventh Amendment immunity in the Rehabilitation Act," and was intended to "provide the sort of unequivocal waiver that our precedents demand").

[206] *See Gruver*, 959 F.3d at 181 and n.2 ("Every circuit to consider the question—and all but one regional circuit has—agrees that section 2000d–7 validly conditions federal funds on a recipient's waiver of its Eleventh Amendment immunity") (citing cases in footnote).

[207] *See generally* Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 727 (2003) ("Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce."). In certain circumstances, Congress may abrogate state sovereign immunity pursuant to "a valid exercise of its power under § 5 of the Fourteenth Amendment." *See id*. at 726, 729-30 (pointing to Congress's abrogation of "States' sovereign immunity in Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e–2(a)").

[208] See supra note 199. See also CRS Report R46827, *Funding Conditions: Constitutional Limits on Congress's Spending Power*, by Victoria L. Killion.

[209] In recent years, for example, federal courts and federal agencies have addressed debated matters of interpretation regarding Title IX's statutory requirements as they relate to athletics programs in federally funded schools and sexual

amending the statutes to clarify their operation and scope, including in response to Supreme Court decisions construing these statutes. The Court, for example, has interpreted Section 601 of Title VI to prohibit intentional discrimination only[210] and to foreclose private suits to enforce Title VI federal disparate impact regulations promulgated by DOJ and other agencies pursuant to Section 602.[211] In addition, the Supreme Court has repeatedly addressed which type of monetary remedies are available for statutory violations in a private suit,[212] holding that neither punitive[213] nor emotional distress damages are available.[214] Meanwhile, should there be legislative interest in creating new civil rights requirements pursuant to Congress's Spending authority, such newly enacted prohibitions or requirements must also be stated in clear and unambiguous terms.

Potential Considerations When Enacting New Programs

In creating new programs or reauthorizing existing programs that distribute federal financial assistance, several potential considerations may arise. First, while it is well-established that grants, loans, or contracts distributed from a federal agency directly to a recipient constitute "federal financial assistance" within the meaning of Title VI, Title IX, Section 504, and the Age Discrimination Act,[215] other types of federal assistance may raise questions regarding whether that aid also constitutes the type of "federal financial assistance" that triggers the application of those statutory requirements. To avoid these potential ambiguities, Congress could explicitly designate whether the federal assistance provided under a particular federal program is or is not "federal financial assistance." Should Congress expressly designate assistance under a program as *not* constituting "federal financial assistance," that designation, among other things, would operate to exempt recipients of that assistance from the four civil rights statutes discussed in this report.

Questions can also arise regarding whether certain entities are "recipients," particularly in cases where the federal financial assistance flows from a federal agency to the intended recipient indirectly.[216] While courts have considered several factors to determine whether an entity is a "recipient,"[217] Congress may also clarify in statute which entities are or are not "recipients" under a particular program.

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harassment liability. *See e.g.*, CRS Legal Sidebar, LSB 10726, *Sexual Harassment and Assault at School: Divergence Among Federal Courts Regarding Liability*, by Jared. P. Cole; CRS Legal Sidebar, LSB 10531, *Title IX's Application to Transgender Athletes: Recent Developments*, by Jared P. Cole.

[210] *See* Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (stating that it is "beyond dispute that private individuals may sue to enforce § 601" and "similarly beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination.").

[211] As noted earlier, the Court interpreted Title VI to foreclose a private right of action to enforce Title VI disparate impact regulations in its 2001 decision *Alexander v. Sandoval*. *See supra* note 43.

[212] *See, e.g.*, *Cummings*, No. 20-219 (Apr. 28, 2022), slip op. 3-5 (discussing the Court's precedent addressing the availability of monetary damages for intentional violations of Title IX, and punitive damages under Title VI and Section 504, in the absence of text in these statutes expressly identifying available remedies in a private right of action).

[213] *Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (holding that punitive damages may not be awarded in a private suit under Title VI and Section 504).

[214] The Court in *Cummings* recently reached the question of whether emotional distress damages are available in the context of claims brought under Section 504, and Section 1557 of the Affordable Care Act, and held that such damages "are not recoverable under the Spending Clause antidiscrimination statutes we consider here." *Cummings*, No. 20-219 (Apr. 28, 2022), slip op. 16.

[215] *See supra* "What Is Federal Financial Assistance?"

[216] *See* Grove City Coll. v. Bell, 465 U.S. 555, 560–61, 563 (1984).

[217] *See supra* "Who Is a Recipient of Federal Financial Assistance?"

Author Information

Christine J. Back
Legislative Attorney

Jared P. Cole
Legislative Attorney

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