

**Students Who are Depressed, Distressed or Disruptive:  
A Proactive Approach within Disability Discrimination Law**

**Webinar for The Campus Suicide Prevention Center of Virginia<sup>1</sup>**

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[The information provided in this outline and in this presentation should not be considered to be legal advice. Administrators and faculty members on campus should consult university counsel about specific situations on their campus.]

September 21, 2022

**OVERVIEW**

Both Section 504 of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA) prohibit discrimination against individuals with disabilities on the basis of the disability. They also both require that in addition to *nondiscrimination*, that entities must provide *reasonable accommodations* to protected individuals. These two major statutes define those protected as those who are *substantially* limited in one or more major life activities; are regarded as so impaired or have a record of such an impairment. These statutes require that for protection the individual must be *otherwise qualified* – able to carry out the *essential functions* of the program with or without reasonable accommodation. Almost 50 years have passed since Section 504 was enacted, and although there have been numerous legislative, regulatory, and judicial clarifications to what these provisions mean, there are still many unanswered questions and new situations raise new issues. Higher education is a setting in which many new issues arise. And issues relating to mental health disabilities are particularly challenging and evolving.

Mental health challenges in college students are on the rise, and COVID has exacerbated that. This session will provide an overview of the ADA and Section 504 statutes and guidance as applied to higher education. What **must**, **can**, and **should** colleges and universities do? How can administrators, service providers, faculty members, and others on the front line best respond and be proactive in anticipating these issues? What policies, practices, and procedures can be in place and how can these best be communicated to students and those responsible for their wellbeing? The presentation is focused primarily for front line student service administrators, including disability service center staff members, but can provide a framework for others.

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<sup>1</sup> The Campus Suicide Prevention Center of Virginia website is [www.campusuicideprevention.org](http://www.campusuicideprevention.org) and for the legal page is found at <http://www.campusuicidepreventionva.org/legal-csp.php>.

## OUTCOMES

- Attendees will have a quick review of the applicable *disability discrimination* law (504/ADA/Fair Housing Act) and a few related statutes and laws and their interpretations by courts and agencies (FERPA, HIPAA, liability for negligence). Disability discrimination (not negligence liability) is the primary focus, although these issues can be related.
- Attendees will be introduced to some of the frequent recent scenarios and situations involving students with mental health challenges that result in interference with the student's learning and/or well-being and/or interference with the educational experience for other students or safety of others.
- Attendees will be provided with a framework for addressing these challenging situations

The approach to be provided is knowing what

- **MUST** be done – what is required by statute, regulation, judicial guidance, university policy? Who is protected by these statutes? What documentation is needed to demonstrate protection? What does it mean to be “otherwise qualified” (including when there may be a direct threat issue)? What is required with respect to reasonable accommodation?
- **CAN** be done – what might a university, faculty member, administrator do beyond what is MANDATED by disability discrimination law – drawing guidance from experiences of others in similar situations?
- **SHOULD** be done – even if responses CAN go beyond what is legally mandated. What are the valid concerns about doing so -- fairness? creating a slippery slope? Will this mean that the entity must continue an accommodation indefinitely and/or allow it for everyone? Might this result in an undue burden (administratively or financially) if an accommodation is allowed for everyone? And what is the potential that others will request the same accommodation?

What this presentation is **NOT**

- It is **not** intended to provide a compliance review checkoff, but instead a *framework* of key principles and practices for approaching difficult issues of mental health challenges for students.
- It is **not** legal advice.
- It is **not** a review of tort liability and risk management law generally (although how disability law is applied may raise some of these issues).
- It is **not** a list of what mental health services should be provided on campus (although that will be touched on as a MUST/CAN/SHOULD issue).
- It is **not** a set of “best practices” but rather a framework for proactive planning

Note also that state laws and judicial precedent in various jurisdictions may affect issues on some campuses. Policies at individual institutions must also be considered.

Substantial resource references on many of these issues can be found on the website for the Campus Suicide Prevention Center of Virginia. <http://www.campussuicidepreventionva.org/legal-csp.php>. See also <http://www.campussuicidepreventionva.org/echodidactics/echo-didactic-2-4-20.pdf> (providing a quick overview of laws and action plans) See also <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-students-self-harm-covid-19.pdf> (October 13, 2021 OCR letter)

Overview of Power Point Presentation (using references that follow)

- **Introduction**
- **Examples of common scenarios and questions**
- **Overview of law – statutes, regulations, guidance, OCR opinions, case law**
- **Basic questions to address for all situations**
- **Framework for responding to issues that arise**
- **ADA Coordinator as a tool/strategy for both proactive planning and reactive responses**
- **Final thoughts**

## Examples of common scenarios and questions (based on questions raised by prospective attendees and other commonly asked questions)

- Concerning conduct or behavior in various settings
  - \*A faculty member notices a student in class whose behavior has recently become distressed
  - \*A student tells her residence hall advisor that she has become extremely depressed and just doesn't think she can "go on"
  - \*A student tells his residence hall advisor that his roommate watches violent videos until late hours and it is disturbing to his ability to concentrate
  - \*A student is reported as stalking a classmate by following her around campus (it is suspected that the "stalking student" is on the autism spectrum)
  - \*Serious self-harming conduct or threats
- Does the student meet the definition of "disability" for protection by disability law?
  - \*Is anxiety a disability? What about ADD or ADHD? Mild depression?
  - \*What if a student has not been identified by Disability Services office on campus and engages in concerning conduct?
  - \*Do statements by faculty members and administrators set up the "regarded as" part of the definition?
  - \*A student notes counseling for serious stress in her application for admission. The admissions staff is concerned and wants to communicate this to an appropriate campus office (Disability Services; Counseling)? Is such "red-flagging" a permissible/acceptable practice?
- "Otherwise Qualified"
  - \*When is it legal/appropriate to **remove** a student from campus (or an aspect of campus such as housing)? (when disruptive conducts is occurring? when a student is engaged in self-harming and indicates that he/she might be?)
    - How to deal with the chronically self-harming student who is distressing to others who know or come into contact with the student, but who is academically still achieving and not ending up in the hospital, and who refuses to take a voluntary leave. Is mandatory leave ever appropriate? What is the line for "threat to others"?
    - What are requirements for **returning** after a leave of absence – how to balance having an individualized but equitable response? What are campuses allowed to require? Are campuses allowed to require counseling to stay on campus?
  - \*What is the current status of "threat to self" (2011 and 2021 OCR letters)?
  - \*A student engages in misbehavior towards a faculty member in violation of campus student conduct rules (e.g., screaming at the professor in his office) and is removed from campus after following campus disciplinary rules. She is later diagnosed with bipolar disorder, is now on medication, and seeks readmission and expungement of the record
- Privacy/Confidentiality Concerns
  - \*Student approaches dean of students and wants to have counseling but is concerned about that being reported in the professional certification process (particularly concerning for legal profession and medical profession)
  - \*What are obligations to "inform" others?
    - When must, can, should others be informed of mental health concerns? E.g., roommates, residence hall advisors, faculty members, campus security, family members, administrators?
  - \*To what extent is parental involvement to be allowed? When should they be involved? What should be done if a student is at high risk but not in acute suicidal crisis.
    - In Virginia, legislation requires public colleges to inform parents if a student is suicidal ([§ 23.1-1303. Governing boards; duties \(virginia.gov\)](#)- see B.5
- Reasonable accommodations
  - \*Who gets to decide what is reasonable? What opportunity does a faculty member have to respond to a recommended accommodation that comes from the Disability Services Office? Who is to be given

deference in such decisions (the student, the therapist or disability specialist)? How is undue burden or fundamental alteration get addressed?

\*Housing -- A student with mental depression requests a single room in university housing at the double room rate? Or a student with ADHD makes that request? What about fraternities and sororities?

“Facilitated housing?”

\*Animals -- A student with anxiety seeks to have his emotional support snake in university housing where pets are not permitted. Must this be allowed? What about bringing the snake to class? To the library where he is a work-study student? (raises employment issues)

\*Attendance -- A student claims to have health conditions that make it risky to attend class in person and wants to be allowed to have all classes provided remotely? What if it is a family member with whom the student lives who has the health condition? The student raises issues of mental distress if required to attend in person.

\*Deadlines for assignments waivers?

\*Excusing misconduct?

- Unique settings – community colleges, professional education (particularly health care programs)

\*Community colleges often have more open admissions and last minute requests for accommodations, have more adjuncts who may be unfamiliar with disability issues, and are less well resourced in general – what does that mean for expectations about students with disabilities?

\*Are there special concerns when the student is in a health care professional program where patient safety is at issue?

\*Student’s behavior and conduct raises concerns about a clinical placement in a professional education program (health care; law; teaching; etc.) or participation in a program abroad

- Special obligations of higher education?

\*To what extent is a university required to provide mental health services? In Virginia, community colleges are prohibited from providing mental health services. Is there a certain level of service that is expected?

\*To what extent is a university required to provide training?

**Overview of law** – statutes, regulations, guidance, OCR opinions, case law (see outlines that follow) Case settlements are not extensively referenced in this document because they are not viewed as precedent. These settlements, however, are a cautionary tale of the costs that can be incurred in these difficult situations.

### **Basic questions to address for all situations**

\*Is the individual *disabled* under the applicable statute(s)?

\*What *documentation* can/should be required? (evaluator, currency, cost, burden)

\*Is the individual *otherwise qualified* (including issues of *direct threat*)?

\*Are there *reasonable accommodations* that should be considered? Who has the *burden* to demonstrate reasonableness?

\*Is the disability “*known*” to the entity that took action based on conduct?

### **Framework for responding to issues that arise**

\*Do not conflate responses – e.g., take care to not reach a conclusion without going through all of the steps above

\*Follow the MUST/CAN/SHOULD analysis

\*Make sure assessments and situations are *individualized*

\*Make sure an *interactive process* is applied in considering accommodations

\*Be wary of rigid requirements and rules that do not allow for exceptions

**ADA Coordinator** as a tool/strategy for both proactive planning and reactive responses  
In light of the many varied conditions and settings in which disability issues can arise, institutions of higher education should consider the benefits of an ADA Coordinator.

## **Final thoughts**

### **TABLE FOR REFERENCE MATERIALS PROVIDED BELOW**

1) Access for All (pages 7-10)

The Current Legal Climate in Enforcement and Why a Holistic Approach to ALL Disability Discrimination Issues Should Be Taken

Focus on Student Issues in Higher Education

What *Must* You Do, What *Can* You Do, What *Should* You Do?

*This is a document prepared for presentations at higher education and policy programs and adapted and updated for use for this presentation. It provides a framework for approaching these issues.*

2) A Primer on Disability Discrimination in Higher Education (pages 11-30)

*This document is adapted from previous presentations and provides the legal framework and references for key provisions. It has been edited to focus only on mental health and related issues.*

3) Animal Accommodations (pages 31-34)

*An excerpt of a law review article on animal accommodations. Excerpt highlights these issues on campus.*

4) A Proactive Approach (pages 35-37)

*Provides a framework for a proactive approach with emphasis on creation of an ADA Coordinator on campus.*

5) Scholarship by Presenter (pages 38-39)

*A listing of publications by presenter relevant to this presentation.*

6) Bio Summary of Presenter (page 40)

*Provides the summary relevant to higher education and disability issues of the presenter's academic credentials and scholarship and administrative and faculty experience in implementing these requirements.*

## **Access for All**

### **The Current Legal Climate in Enforcement and Why a Holistic Approach to ALL Disability Discrimination Issues Should Be Taken**

#### **Focus on Student Issues in Higher Education**

##### **What *Must* You Do, What *Can* You Do, What *Should* You Do?**

Prepared by Laura Rothstein ©

Updated from earlier versions – September 12, 2022

Almost 50 years after Section 504 of the Rehabilitation Act, which provided the framework for the 1990 Americans with Disabilities Act (1990) and more than forty-five years after the passage of the Individuals with Disabilities Education Act (1975), today's college campuses continue to face a range of issues, some new, some continuing.

The need to have in place a set of coordinated policies, practices, and procedures to address the range of issues – students, staff, faculty, public events, athletics, technology, physical plant issues, housing, mental health – is more important than ever. It is the right thing to do, the most efficient thing to do, and it can avoid costly disputes that expend funds unnecessarily, are costly to morale of faculty and staff and the wellbeing of the individual with a disability and give bad publicity to a university. Ensuring that key administrative staff members are culturally competent on disability issues is critical to avoiding disputes and demonstrating a compassionate, fair, and legal approach to these complex issues.

Higher education institutions vary greatly with respect to size, resources, internal organization, staffing, mission, types of students enrolling, and other issues. This can affect the policies, practices, and procedures that need to be in place.

Community colleges often have more open enrollment and students who register and enroll later and thus have less lead time than four-year institutions and professional programs to implement student accommodation requests. They also often have fewer resources and smaller staff size to address student services. They also often have more adjunct faculty members who may have less awareness of how disability services work for students in their classes.

Four-year colleges often have student service offices within each department or college, although they generally rely on a centralized office to provide services for and to evaluate the documentation of students with disabilities. Professional schools (particularly those for health care professions) may have special concerns about character and fitness and technical standards as well as health and safety issues.

Most (if not all) of these institutions should have a 504/ADA coordinator and an office for disability services for students. Depending on the institution, there may be less coordination of various disability issues among individuals responsible for disability access. Faculty members, who are often called on to implement the 504/ADA requirements of nondiscrimination and reasonable accommodation often do not have the necessary knowledge or training to do so and may not know whom to contact within the institution to address those concerns.

The following are the types of programmatic areas where student disability issues arise related to mental health: classroom (attendance, testing, performance), housing, counseling, police/law

enforcement, admissions. The following suggests the primary areas of responsibility between administrators and faculty.

For leaders – presidents, provosts, deans, department chairs (and the university counsel who advise them)

- Ensuring that all searches for front line and other key administrators include attention to awareness and cultural competence about disability issues in their position description and in interview/appointment process discussions

For administrators – need to have done self-evaluation and have policies in place

- Dispute resolution
- Ensuring appropriate procedures for addressing issues related to mental health (including disciplinary actions)

For administrators and faculty – having policies and knowledge of policies

- Accommodations and related documentation issues
- Ensuring privacy and confidentiality
- Process for requesting accommodations or services (ability to assist the navigation of these issues for students)

The following are some of the common issues that institutions should be prepared to address and advise faculty members about. These apply not only to mental health issues, but also learning disabilities and other conditions that might necessitate accommodations.

What should be in the syllabus? How student should apply for accommodations.

Who should decide if the student is entitled to accommodations? Should be centralized? Or are some “common sense” accommodations?

Testing – in class quizzes, essential functions – What about “speededness” – is that really what is being measured? How to handle “pop” quizzes and address confidentiality/stigma.

Deadlines – must they be extended, who decides, what standard?

Absences -- must they be allowed beyond stated limit? How has COVID affected establishing that attendance is “essential”?

Excusing misconduct – is that required when a student has a mental health concern?

Resolving disputes – should allow for faculty consultation, process should be clear and reasonable (burden is on institution to justify why requested accommodations are unduly burdensome or are fundamental alterations)

Referring students with mental health concerns – awareness of signs of stress and knowledge of steps to take, knowing who is the person to consult

Addressing animals in the classroom issues – ensuring consistency and a policy to address these issues; assistance versus comfort animal situations (service versus emotional support); requirements to “register” or give advance notice are problematic, but might have policy to advise about animals to avoid reactive, rather than proactive approach.

The following are some of the most recent issues and developments that should encourage universities to be proactive and holistic and addressing disability rights.

- The 2008 amendments regarding the definition of disability and how courts are opening the doors for more individuals (**mental health**; health impairments; learning and related disabilities)
- 2010 DOJ regulations regarding service animals
- Mental health issues – Virginia Tech issues receive attention, but remain unresolved and COVID has made mental health an even greater concern on campus
- “Otherwise qualified” – a revisit of *Southeastern Community College v. Davis* – how is danger to “self” or others currently an issue for students with self-harming behaviors
- Uncertainty about when a university can act on the basis of direct threat to “self” against students, staff, or faculty
- Returning veterans and others traumatized (those who have been subject to sexual assault) by events with range of PTSD and brain injuries and appropriate accommodations (concern about documentation of condition in time to receive accommodations)
- Uncertainty about what must be provided in testing situations to “best ensure” performance
- Some signals from a few courts that universities may not receive as much deference to their decision making as was the case in earlier times
- Findings by courts and Office for Civil Rights and Department of Justice that while there was not discrimination, procedures were inadequate, there was a failure of interactive processes, failure to make an individualized assessment, or there was retaliation
- Deterrent effect of required reporting of mental health treatment and diagnosis to licensing agencies (law/medicine)

## Some Basic Principles When Addressing Students with Mental Health Challenges

### **Proactive Disability Policies, Practices and Procedures Should Contemplate**

- *Communication across programs (avoiding silos)*
- *Discussion of funding sources (across programs)*
- *Consultation with affected stakeholders (including individuals with disabilities of all types as appropriate)*
- *Common sense and reasonable flexibility*
- *Communication to individuals with disabilities about access and accommodations*
- *Clear lines of authority and responsibility*

### **Some Specific Practices to Consider for Administrators**

- Inviting accepted students to self-identify to receive accommodations
- Having a usable (not just “accessible”) website
- Feasible training plans for faculty and staff
- Ensuring means of communicating within institution about students that protects confidentiality
- Having workable conflict resolution policies for students, faculty, and staff
- Having advisory board of many stakeholders (perhaps in conjunction with an ADA Coordinator Office)
- Regular ongoing plan for “self-evaluation”

### **Faculty Issues to Clarify Within the Institution**

- What should be in the syllabus? How student should apply for accommodations.
- Who should decide if the student is entitled to accommodations? Should be centralized.
- Deadlines – must they be extended, who decides, what standard
- Absences -- must they be allowed beyond stated limit?
- Misconduct – must it be excused if based on mental health issues?
- Resolving disputes – should allow for faculty consultation, process should be clear and reasonable
- Referring students with mental health concerns – awareness of signs of stress and knowledge of steps to take, knowing who is the person to consult
- Addressing animals in the classroom issues – ensuring consistency and a policy to address these issues; assistance versus comfort animal situations

## **A Primer on Disability Discrimination in Higher Education**

Published as a Conference Report by *Laws* (ISSN 2075-471X; <http://www.mdpi.com/journal/laws>), a journal published by MDPI AG, Basel, Switzerland. Permission to use as conference outlines granted by publisher.

(c) Laura Rothstein

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[This article was adapted from a presentation given at the Stetson Conference on Higher Education Law and Policy on February 3, 2018, with permission of Stetson University College of Law. This version has been updated with court decisions from 2018 through 2022 and changes in web side links from the original version. The version for the September 21, 2022, presentation focuses only on mental health issues and has deleted other issues that were provided the original 2018 publication.]

**The date of this update is September 16, 2022.**

Because some of the decisions cited in this Primer may have been modified or overruled on appeal, the user of this reference document should check the current status before relying on the holding noted in the outline.

### **Article Abstract**

This article provides an overview of key issues and a focus on some of the most significant and important recent developments that should be given a high priority by university attorneys and higher education administrators and policymakers. It emphasizes the role that administrators responsible for facilitating or coordinating disability services on campus can play in ensuring that faculty members, staff members, and other administrators have the knowledge and tools to ensure access and also to avoid liability to the institution. While repeal of the ADA is unlikely, regulatory activities might affect its impact. Judicial and agency approach to federal regulation and funding has changed and evolved from the Trump administration approach to regulation to the Biden administration's substantially different approach.

The article will

- 1) Highlight the most important disability issues in higher education today and why:  
Most important because –
  - Costly (buildings, technology, auxiliary aids and other accommodations)
  - Getting enforcement and litigation attention (technology, food, animals)
  - Extremely challenging (mental health issues)
  - Evolving and changing
  - Confusing (otherwise qualified, reasonable accommodations for learning disabilities, documentation of disability, post COVID coverage)
  - Concerns about safety and qualifications (issues in professional education, especially health care programs)

- 2) Indicate the priority for attention
  - Cost Issues – Shrinking Resources (affects the ability to provide counseling on campus)
  - Changes in enforcement by Department of Education and Department of Justice – still in early stages since the 2021 change in presidential administration
  - Accommodations and related documentation issues
  - Animals on campus
  - Mental health issues
  - Health care professional program issues
  
- 3) Provide a basic reference on the sources of legal guidance for addressing these issues
  - Statutes and regulations
  - Agency guidance
  - Regulatory guidance
  - Judicial decisions
  - Case settlements
  
- 4) Provide principles and framework for compliance
  - Holistic approach – avoiding silos
  - Proactive approach
  - Individualized and interactive
  - Consistency and fairness
  
- 5) Provide a prediction of issues to watch in light of federal government changes in administration and Congress and in light of financial challenges
  - Department of Education guidance on “danger to self” – enforcement impact?
  - Professional education – shift in deference to institutions in setting requirements
  
- 6) Note questions to be considered, which include:
  - What are today’s hot legal issues for higher education and students with mental health concerns?
  - What are likely areas of litigation?
  - What are courts and the Office for Civil Rights likely to do?
  - What is the impact of recent judicial settlements?
  - How did the Trump administration and Congress change the landscape and how has it changed since January 2021?
  - How can higher education administrators, legal counsel involved in these issues, and disability service providers proactively ensure that Section 504 and ADA requirements are followed with a minimum of litigation and confrontation?
  - And how can they do so proactively and positively and in the spirit of the intent of these laws in a time of shrinking resources and growing numbers of students, staff, and faculty members with disabilities?

- 7) Provide frameworks for procedures to address disability issues on campus in a way that is
  - Proactive – including anticipating training for various stakeholders on campus and information to provide to those who may require disability accommodations or services and creating a position for an ADA coordinator on campus whose responsibility involves all stakeholders, not just students and employees
  - Responsive as “reactive” as situations arise
  - Interactive – demonstrating flexibility to individualized types of issues
  - How to make training and awareness “sustainable” – so that “cultural competence” on disability issues is increased across the board
  
- 8) Provide a framework for the creation of an ADA Coordinator position on campus to facilitate a holistic approach to addressing all disability issues on campus not just those directly affecting students, staff, and faculty

### **Presentation References**

Section 504 of the 1973 Rehabilitation Act required that programs receiving federal financial assistance not discriminate on the basis of “handicap” (later disability). The enormous impact of this law (and later the Americans with Disabilities Act, enacted in 1990) on higher education was probably not foreseen in 1973. Before 1980, very little response to the Rehabilitation Act occurred. Since then, however, disability issues on campus have evolved. The challenges and complexities of technology, shrinking resources, increasing mental health concerns, and other issues make it critical to understand and appreciate the requirements of disability discrimination law for those who make and implement policy at the macro and micro levels as well as those who enforce and defend these issues in litigation, compliance reviews, and Department of Education Office for Civil Rights (OCR) interventions.

Hot topics that will be given focus include documentation requirements for accommodations (including how to respond to concerns about stigma); how to determine what are essential requirements and fundamental alterations; and service and comfort animals as accommodations in settings ranging from housing to the classroom to employment on campus and focusing on documentation related to those different settings.

While undue burden has rarely been raised as a defense in judicial decisions, shrinking resources in higher education and the increasing population of students with disabilities on campus may change that. This is in a state of flux due to the change from the Trump to the Biden administration and unclear path for Congress due to uncertainty in the balance of power that will affect budgeting priorities. The probability of “undue burden” as a defense and issues that arise in such cases will be addressed. The issue of financial costs, however, should be a consideration in setting a tone of proactive and positive approach to ensuring access on campus. Dispute resolution has financial costs, time and morale costs for personnel, and public relations costs that can often be avoided.

The approach of the presentation/article is to address what the areas of litigation or complaints to OCR are likely to be (and why); how disputes about whether the requirements

have been violated are likely to be resolved; how campus service providers, administrators, policymakers, and faculty members (and the students themselves) can be proactive in addressing what is required, what is not required, and how to best accomplish the goals of current law; and how a model of implementing an ADA coordinator position can be most effective about addressing these issues.

## **The Statutory and Regulatory Framework**

The primary statutes relevant to these issues are Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.<sup>2</sup> These statutes are intended to be interpreted consistently. Section 504 applies to higher education institutions receiving federal financial assistance (which is almost all colleges and universities). The ADA applies to employment (Title I) and programs and services provided by state and local governmental entities (Title II), and programs and services provided by twelve categories of private entities (Title III) (education is one of the twelve categories). Many programs operated privately or in collaboration with other entities are also covered, and the obligation of each organization can be challenging to determine. Although Section 504 is relatively short in terms of language, the ADA (which is intended to be read consistently with Section 504) has extensive language that incorporates much of the judicial interpretation from the cases decided before 1990. The 2008 amendments added even greater clarification to the requirements of the statute. Congress intended that the ADA be given a broad interpretation.

## **WHO IS PROTECTED**

- Must be *substantially* limited in one or more major life activities; be regarded as so impaired or have a record of such an impairment.
- Must be *otherwise qualified* – able to carry out the *essential functions* of the program with or without reasonable accommodation. Undue hardship, fundamental alteration, lowering standards – not required.
- Individual must not pose a *direct threat* to self (not clear whether this applies outside of the employment context), property, or others.
- Individual must make “known” the disability and have appropriate documentation and must do so in a timely manner, in order to demonstrate that program discriminated or failed to provide a reasonable accommodation.

The ADA Amendments Act of 2008 clarifies and amends the definition of “disability”, see 42 U.S.C. § 12102. The EEOC regulations pursuant to the amendments were promulgated on March 25, 2011, effective May 24, 2011. They can be found at 29 C.F.R. Part 1630 and are available through the website at [www.eeoc.gov](http://www.eeoc.gov).

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<sup>2</sup> Reference to the Fair Housing Act is not included in this document.

The amendments respond to 1999 and 2002 Supreme Court decisions that had narrowed the definition of disability. They provide for a broad interpretation of the definition of disability under the ADA. Under the revisions, whether an individual is substantially limited is to be determined without reference to mitigating measures, with an exception for ordinary eyeglasses and contact lenses. 42 U.S.C. § 12102(4)(E).

The amendments also add an illustrative list of *major life activities*, and by doing so codify the existing regulatory definitions and add to them. The amendments specifically provide that concentrating, thinking, and communicating are major life activities. This amendment may make it more likely that an individual with certain mental impairments will fall under the definition.

The amendments clarify that major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. 42 U.S.C. § 12102(2). [A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. § 12102(2).

To meet the requirement of “being regarded as having such an impairment” the individual must establish “that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. § 12102(3).

The definition of disability does not apply to impairments that are transitory and minor. A transitory impairment is one with an actual or expected duration of six months or less. 42 U.S.C. § 12102(4)(D).

The 2008 amendments further clarify that the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures. There is an exception for eyeglasses or contact lenses, but covered entities are prohibited from using qualification standards or selection criteria that are based on uncorrected vision unless these are job-related and consistent with business necessity. 42 U.S.C. § 12102(4)(E).

The Amendments also provide that “Nothing in this Act alters the provision..., specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations involved.” 42 U.S.C. § 12201(f).

The ADA Amendments of 2008 (42 U.S.C. § 12103(1)) codify the basic provisions of the ADA and Rehabilitation Act regulations by providing that auxiliary aids and services are to include

- qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- acquisition or modification of equipment or devices; and
- other similar services and actions.

Many of the conditions found not to be disabilities in judicial decisions before 2008 may prospectively be determined to fall within the definition, so long as the condition substantially limits one or more of those major life activities.

The Amendments state that the definitions are also to be applied to the Rehabilitation Act. 29 U.S.C. § 705(9)(B), incorporating 42 U.S.C. §12102.

## **Regulatory Guidance**

Federal agencies were initially slow in promulgating regulations under disability discrimination law (it was not until 1978 that model regulations for Section 504 were finalized). In the 30 years since the first set of regulations, the agencies responsible for various aspects of disability discrimination law have provided not only many sets of regulations, but substantial regulatory “guidance” in the form of frequently asked questions answers, OCR opinions, and other useful information. Statutes that are related to Section 504 and the ADA are also important to incorporate for overall policy. These agencies include the Department of Justice (for Title II and Title III of the ADA), the Department of Education (for Title II and Title III of the ADA and for the Individuals with Disabilities Education Act, EEOC (for Title I of the ADA and Section 504), Health and Human Services, and Housing and Urban Development.

The Trump administration significantly changed some regulatory guidance. Regulations promulgated shortly before the change in presidency are subject to “repeal” without the usual notice and public comment. Many agency websites that provided substantial guidance were taken down after President Trump took office, and much guidance that does not have the weight of official regulations now remains uncertain in terms of its impact. The Biden administration has had almost two years to adjust the federal regulatory role on a wide range of issues.

Major regulatory changes for Title II and Title III were issued by the Department of Justice in 2010, and there are several significant aspects of those changes that affect higher education. These include stadiums and swimming pools. There is also change defining housing on campus.

<http://www.ada.gov/regs2010/ADAregs2010.htm>

In 2016, DOJ issued additional regulatory clarifications regarding documentation of disabilities for testing purposes. See 81 Fed. Reg. at 53,225-53,240 (August 11, 2016).

DOJ regulatory assessment issued February 10, 2016, on ADA Titles II and III regulations on additional time at postsecondary institutions and national exams are accommodations most likely to have significant, measurable costs which include staff training, processing requests, and proctoring. Societal cost estimated between \$31.4 and \$47.1 million. [https://www.ada.gov/regs2016/final\\_ra\\_adaaa.html](https://www.ada.gov/regs2016/final_ra_adaaa.html)

Provision of resources to provide mental health supports on campus. (May 19, 2022)  
<https://www.ed.gov/news/press-releases/building-president-bidens-unity-agenda-education-department-urges-colleges-use-american-rescue-plan-funds-provide-mental-health-supports-students> (May 19, 2022)

<https://www.ed.gov/news/press-releases/education-justice-departments-issue-fact-sheet-supporting-students-risk-self-harm-during-covid-19-era> (October 23, 2021)

<https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-students-self-harm-covid-19.pdf> (October 2021) This document provides several common scenarios related to higher education students with mental health concerns ranging from depression exacerbated by COVID and suicidal behavior observed by the academic dean in a college department.

The following link provides what this presenter believes to be sound general guidance on how to address students who are self harming. How Disability Law Impacts Voluntary and Involuntary Student Leaves Related to Harm-to-Self and Harm-to-Others (June 11, 2021). <https://www.jdsupra.com/legalnews/how-disability-law-impacts-voluntary-9325706/> Prepared by Strategic Risk Management Solutions provided as tip to the National Association for Behavioral Intervention and Threat Assessment (NATIBA). The “tip sheet” recognizes the lack of a cohesive due process roadmap by courts and government agencies. The following provides an overview of what judicial guidance is in place.

## **Judicial Interpretation**

It was not until the mid-1980s that much judicial guidance was provided to interpret disability discrimination law in the higher education (or any) context. That is because Section 504 only applied to recipients of federal financial assistance. While institutions of higher education were such programs, because the special education statutes (Individuals with Disabilities Education Act of 1975 as amended) it took some time to implement. Students did not start to be prepared for college work for several years after 1975, perhaps around the mid-1980s. As the number of students with disabilities entered higher education, the courts gave increasing attention to interpreting the statutory coverage in the higher education context. The following are the key cases, and recent interpretations relating to student mental health issues. Additional citations can be found in *DISABILITIES AND THE LAW*, by Laura Rothstein and Julia Irzyk (published by Thomson Reuters (4<sup>th</sup> edition) which is updated twice a year).

### **Key Cases**

The first Supreme Court decision to address any Section 504 issue was in the context of higher education.

*Southeastern Community College v. Davis*, 442 U.S. 397 (1979) This decision establishes the definition of “otherwise qualified” in the context of a deaf nursing student. It set out the basic requirement that to be otherwise qualified one must meet the essential requirements of the program with or without reasonable accommodation.

Although it is not a Supreme Court case, the following decision is important because it has the weight of a Supreme Court decision and is frequently cited by courts as the standard for determining whether an institution must provide a requested accommodation.

*Wynne v. Tufts University School of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991). In cases involving modifications and accommodations, the burden is on the institution to demonstrate that

- relevant officials within the institution
- considered alternative means, their feasibility, cost and effect on the program,
- and came to a rationally justifiable conclusion
- that the alternatives would either lower academic standards or require substantial program alteration.

### **Cases Below Are Arranged Alphabetically Within Each Topic Heading**

The following case citations represent some of the most significant decisions (particularly recent cases) on a range of key issues. Additional cases citations can be found in *DISABILITIES AND THE LAW*, referenced previously.

## Procedural and Enforcement Issues

Individuals seeking protection against discrimination generally have the option of making an administrative complaint to the appropriate agency or seeking relief in court. Of particular interest are the following decisions. The *McNeese* decision demonstrates the high cost to an institution of prolonging disputes. The *Schneider* holding reflects a growing number of decisions that expect all parties to engage in interactive process to resolve disagreements about accommodation issues.

*Covington v. McNeese State University*, 118 So.2d 343 (S. Ct. La. 2013) The court reversed some of the attorney fee awards and held that district court decisions on the amounts was not an abuse of discretion, but it did not overrule any of the substantive issues. For the facts in this case that lead to the decision, see *Covington v. McNeese State University*, 98 So.3d 414, 2011-1077 (La.App. 3 Cir.) The court ordered substantial award in attorneys' fees and costs in case involving 15,000 architectural barriers resulting from several years of litigation.

*Doe v. Skidmore College*, 2018 WL 3979588 (N.D. N.Y. 2018) The college may not have engaged in **interactive process** in addressed requested accommodations for ADD including notifying parents about assignments, evaluations, and other matters.

*Schneider v. Shah*, 2012 WL 1161584 (D.N.J. 2012) The obligation to engage in an **interactive process** in accommodations ends on day student sues university. The case involved a student in paralegal program who had excess absences. *Schneider v. Shah*, 507 Fed. Appx. 132, 292 Ed. Law Rep. 626 (3d Cir. 2012) The court affirmed the summary judgment to university and found that the university had acted promptly to remedy grievances and provide accommodations to student with back injuries in paralegal program. The plaintiff must show defendant did not engage in a **good faith effort** at an interactive process regarding accommodations.

## Definition/Documentation Issues and Relationship to Accommodations

Until the 2008 ADA amendments (which clarified the definition of who is protected), an increasing number of decisions (primarily in the context of employment) had focused on whether the individual was "disabled" within the statutory definition. In higher education, while that was not as frequently an issue, cases involving learning disabilities and mental health issues did raise that question. The following decisions reflect some of the post-2008 amendment decisions in higher education. Cases decided since the amendments tend to focus more on whether the individual is otherwise qualified and on reasonable accommodation issues.

### Definition of Disability

*Cordova v. University of Notre Dame Du Lac*, 936 F. Supp. 2d 1003, 2013 WL 1332268 (N.D. Inc. 2013) A student with **learning disability and psychological disability** claimed numerous denials of requested accommodations. The case was dismissed due to statute of limitations for ADA, Rehab Act and state tort law. The court held that **isolated bouts of depression** did not constitute disabilities under the pre-2008 interpretation of the ADA when the complained of actions occurred. It is uncertain whether the student would meet the amended definition today. [An example of a situation where a university may not be REQUIRED under ADA/504 to provide supports, but where it might want to consider doing so depending on other factors.]

*Doe v. Samuel Merritt University*, 921 F. Supp. 2d 958 (N.D. Cal. 2013) A student with **anxiety disorders** claimed the right for additional opportunities to take medical licensing exam. The case was allowed to go forward on issues of whether **test-taking is a major life activity** and whether limit on taking exams was entitled to deference.

*Forbes v. St. Thomas University, Inc.*, 2010 WL 6755458, 768 F. Supp. 2d 1222 (S.D. Fla. 2010) Issues of material fact remain regarding a law student as to whether **post-traumatic stress disorder** was a disability and if so whether the student had received reasonable accommodations. The court required some evidence that denial of requests was based on rational belief that no further accommodation could be made without imposing a hardship on the program.

*Ladwig v. Board of Supervisors of Louisiana State University*, 842 F. Supp. 2d 1003 (M.D. La. 2012) Doctoral student with **recurrent depression and head injury** was not substantially limited in a major life activity; accommodation of attendance exceptions was contingent on her providing accommodation letter to professors. The court denied retroactive withdrawal or assigning grade of “incomplete” doctoral student.

*North v. Widener University*, 869 F. Supp. 2d 630, 2013 WL 3479504 (E.D. Pa. 2013) Disclosing disability after dismissal is not sufficient to give protection. Admission essay about **medications for behavior** was not sufficient to demonstrate that faculty members knew of his **ADHD**.

*Shurb v. University of Texas Health Science Center at Houston-School of Medicine*, 63 F. Supp. 3d 700 (S.D. Tex. 2014) A medical student who had been academically withdrawn after hospitalization for **anxiety related problems** and who had refused to provide medical documentation required for his return had been provided reasonable accommodations. The university had engaged in interactive process. The court granted the university’s motion for summary judgment.

## **Documentation of Disability and Connection to Accommodation Requests**

Before the 2008 ADA amendments, many disputes in higher education and testing contexts raised a range of issues involving what documentation would be required for an individual to demonstrate that he or she had a disability and or that the requested accommodation related to that disability. Cases in this context also highlight the issue about whether the institution must “know” of the disability (or at least “should know”) in taking action to be found to have violated discrimination law. This can arise in the context of whether there is an obligation to give a second chance to a student (or faculty members) whose performance or conduct has not met the requisite standards. Where a disability is discovered *after* the deficiency, should a second chance be given?

Some clarifications to documentation requirements for examinations under Title II and Title III were issued in 2016. See 81 Fed. Reg. at 53,225-53,240 (August 11, 2016).

Department of Justice regulatory assessment issued February 10, 2016, on ADA Titles II and III regulations on additional time at postsecondary institutions and national exams are accommodations most likely to have significant, measurable costs which include staff training, processing requests, and proctoring. Societal cost is estimated between \$31.4 and \$47.1 million.

[https://www.ada.gov/regs2016/final\\_ra\\_adaaa.html](https://www.ada.gov/regs2016/final_ra_adaaa.html)

For some institutions, it is the concern about staffing costs that has resulted in what are sometimes viewed as burdensome documentation requirements by students.

*Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 8 A.D. Cas. (BNA) 996, 8 A.D. Cas. (BNA) 1004 (2d Cir. 1998), cert. granted, judgment vacated on other grounds, 527 U.S. 1031, 119 S. Ct. 2388, 144 L. Ed. 2d 790, 9 A.D. Cas. (BNA) 768 (1999) This case discusses the deference to be given to individual's versus Board of Law Examiners' experts.

*Buescher v. Baldwin Wallace University*, 86 F. Supp. 3d 789 (N.D. Ohio 2015) The court found no violation of the ADA when a student in a nursing program failed to request accommodations for learning disability. The court cited *Johnson v. Washington County Career Center*, 470 Fed. Appx. 433 (6<sup>th</sup> Cir. 2012) (“A publicly funded academic institution is not obligated to accommodate under the ADA until receiving a proper diagnosis and request for specific accommodation.”)

*Choi v. University of Texas Health Science Center at San Antonio*, (5<sup>th</sup> Cir. 2015) A dental student with ADD was dismissed after failures in clinical courses. The student informed the university after diagnosis. The court held that it was not the case that the university should have known of his disabilities. The student had duty to timely inform and request accommodation and did not do so.

*D'Amico v. New York State Bd. of Law Examiners*, 813 F. Supp. 217, 1 A.D.D. 499, 2 A.D. Cas. (BNA) 534 (W.D. N.Y. 1993) The court found that the treating physician's opinion should be given “great weight” because the accommodations issue is essentially a medical issue.

*Dixon v. University of Cincinnati*, 31 Nat'l Disability L. Rep. ¶123, 2005 WL 2709628 (S.D. Ohio 2005) A graduate student must establish that conditions of **bipolar disorder**, dyslexia, and attention deficit disorder substantially limit major life activities. The student's history of academic success worked against demonstrating these limitations.

*Doe v. Samuel Merritt University*, 921 F. Supp. 2d 958 (N.D. Cal. 2013) A student with **anxiety disorders** claimed the right for additional opportunities to take medical licensing exam. The case was allowed to go forward on issues of whether test-taking is a major life activity and whether limit on taking exams was entitled to deference.

*Edmunds v. Board of Control of Eastern Michigan University*, 40 Nat'l Disability L. Rep. ¶ 117, 2009 WL 5171794 (E.D. Mich. 2009) The court granted a summary judgment against a student seeking accommodations because student did not allow good faith **interactive** process. Although the process was lengthy, it was necessary to resolve the request for accommodations to clinical off-campus program.

*Forbes v. St. Thomas University, Inc.*, 2010 WL 6755458, 768 F. Supp. 2d 1222 (S.D. Fla. 2010) Issues of material fact remain regarding law student as to whether **post-traumatic stress disorder** was a disability and if so if student had received reasonable accommodations. The court required some evidence that denial of requests was based on rational belief that no further accommodation could be made without imposing a hardship on the program.

*Guckenberger v. Boston University*, 974 F. Supp. 106, 7 A.D. Cas. (BNA) 484, 121 Ed. Law Rep. 541 (D. Mass. 1997) The court discussed the credentials of evaluators and found that the university's policy of requiring **re-evaluations by certified experts every three years was impermissible**. [Important not to have rigid timeframes for documentation – especially in light of the cost and burden to the individual.]

*In re Reasonable Testing Accommodations of LaFleur*, 2006 SD 86, 722 N.W.2d 559, 18 A.D. Cas. (BNA) 1487 (S.D. 2006) The court discounted the expertise of psychologist testifying on extra time for individual with **ADD** when expertise was not on bar exam accommodations.

*Ladwig v. Board of Supervisors of Louisiana State University*, 842 F. Supp. 2d 1003 (M.D. La. 2012) Doctoral student with recurrent **depression** and head injury was not substantially limited in a major life activity. The court held that accommodation of attendance exceptions was contingent on her providing accommodation letter to professors and the court denied retroactive withdrawal or assigning grade of “incomplete” for the doctoral student; *Ladwig v. Board of Sup'rs of Louisiana State University and Agr. and Mechanical College*, 481 Fed. Appx. 239 (5th Cir. 2012) A doctoral student with **depression and anxiety** did not make out Title I or Title II case. The student did not make out case that she was qualified to perform essential functions of graduate assistantship and did not adequately request accommodations for head injury excusing her from attendance and allowing additional time to turn in assignments. The university had provided accommodations by providing letters supporting absences and extra time.

*Letter to Central New Mexico Community College*, 37 Nat'l Disability L. Rep. ¶ 186 (OCR 2007) Community college documentation requirements should not be overly burdensome and should seek minimum amount of information needed to establish disability or support accommodation request.

*Mucci v. Rutgers*, 42 Nat'l Disability L. Rep. ¶ 250, 2011 WL 831967 (D.N.J. 2011) A law student with diabetes and **stress induced anxiety** did not provide sufficient documentation to justify requested accommodations for take home exam. The documentation was not from a physician and did not include a formal diagnosis.

*North v. Widener University*, 869 F. Supp. 2d 630, 2013 WL 3479504 (E.D. Pa. 2013) Disclosing disability after dismissal is not sufficient to give protection. Admission essay about medications for behavior was not sufficient to demonstrate that faculty members knew of his **ADHD**.

*Rivera Concepcion v. Puerto Rico*, 682 F. Supp. 2d 164, 255 Ed. Law Rep. 619 (D.P.R. 2010) A student's erratic behavior resulting from previously **undiagnosed bipolar disorder** should have alerted internship program of a possible disability requiring accommodation, Fact issues remained on whether expulsion was based on disability.

*Shurb v. University of Texas Health Science Center at Houston-School of Medicine*, 63 F. Supp. 3d 700 (S.D. Tex. 2014) A medical student who had been academically withdrawn after hospitalization for **anxiety related problems** and who had refused to provide medical documentation required for his return had been provided reasonable accommodations. University had engaged in interactive process. The court granted the university's motion for summary judgment.

## **Otherwise Qualified and Direct Threat**

As noted previously, the 1979 *Southeastern Community College v. Davis* Supreme Court decision sets the standard for what it means to be otherwise qualified. Included in the standard for some situations is whether the individual poses a direct threat to others. Unresolved is whether a student whose threat is to “self” only can be treated differently based on that threat. While Department of Education opinion is that it would be impermissible to do so, this advisory guidance has been considered by many institutions of higher education to be problematic and presents difficulty in how to deal with students who are self-injurious or suicidal. Department of Education guidance is still (as of September 9, 2022) not entirely clear on what is permissible in such situations. The high profile shootings on campuses (particularly Virginia Tech) have highlighted the challenges this question presents.

## Otherwise Qualified

*Chenari v. George Washington University*, 172 F. Supp. 3d 38 (D.D.C. 2016) affirmed 2017 WL 541012 (D.C. Cir. 2017). The court dismissed a suit by a medical student terminated from the program for academic dishonesty. The student did not make known the need for accommodations for attention span, **depression and anxiety** resulting in diagnosis of ADHD. The misconduct involved continuing to fill in bubble in answers after time was called.

*Doe v. Board of Regents of the University of Nebraska*, 846 N.W.2d 126 (S. Ct. Neb. 2014) A medical student with **recurrent depressive disorder** was terminated from enrollment. His lack of professionalism was the reason for dismissal and was not a pretext.

*Driscoll v. Bryant University*, 393 F. Supp. 3d 153(D.R.I. 2019) A student with **ADHD** in a physician's assistant program that required intensively rigorous exam schedule was "held back" after failing to meet grade point average and required to retake courses. Judicial deference is generally granted to educational institutions on matters of academic judgment. The court found no breach of student contract; no violation of ADA/Rehab Act. The student had been provided with reasonable accommodations. Some requests for accommodated were communicated after academic deficiencies.

*Halpern v. Wake Forest University Health Sciences*, 669 F.3d 454, 2012 WL 627788 (4<sup>th</sup> Cir. 2012) A medical student with **ADHD and anxiety disorder** did not request accommodations until several years after engaging in unprofessional acts, including abusive treatment of staff and multiple unexcused absences. The accommodation proposed by the student (allowing psychiatric treatment, participating in program for distressed physicians, and continuing on strict probation) was not reasonable.

*Herrerra v. Community Coll. Of Allegheny County*, 55 Nat'l Disability L. Rep. ¶ 95 (W.D. Pa. 2017) In a case involving a student with **ADHD** who was dismissed for not meeting the minimum academic requirements, the court granted summary judgment to college in Title II and 504 claims. The student had been given exam accommodations and had not fully used the remediation resources made available to him.

*Horton v. Methodist University, Inc.*, 58 Nat'l Disability L. Rep. ¶ 129 (E.D.N.C. 2019) A student with **anxiety** in a graduate physician assistant program did not request accommodations before failing courses.

*Ladwig v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 2012 WL 292508 (M.D. La. 2012) A doctoral student with **depression and anxiety** did not make out Title I or Title II case. The student did not make out case that she was qualified to perform essential functions of graduate assistantship. She did not adequately request accommodations for head injury excusing her from attendance and allowing additional time to turn in assignments. The university had provided accommodations by providing letters supporting absences and extra time.

*Neal v. University of North Carolina*, 57 Nat'l Disability L. Rep. ¶ 44 (E.D.N.C. 2018) The court denied a motion to dismiss social work student claim of discrimination for dismissing her from university after episodes relating to **mental illness**.

*Novak v. Board of Trustees of Southern Illinois University*, 777 F.3d 966 (7<sup>th</sup> Cir. 2015) The lapses of time in assessment of take-home assignment for student with **PTSD** in doctoral program did not make out Title II or Rehab Act cases when student was terminated. This opinion affirmed the lower court. The university had attempted to work with student on examination accommodations, including allowing several attempts to pass. The grade of the student with PTSD was well below passing and not based on discrimination.

*Novak v. Southern Illinois University*, 50 Nat'l Disability L. Rep. ¶ 7 (S.D. Ill 2014) The court granted summary judgment to the university on ADA and Section 504 claims. The student with **PTSD** could not show that disability was the "but for" cause of exclusion from PhD program or show disparate treatment by being denied additional opportunities to take preliminary exams after four attempts.

*Peters v. University of Cincinnati College of Medicine*, 45 Nat'l Disability L. Rep. ¶ 236 (S.D. Ohio 2012) A medical student with **depression**, learning disability, and ADD was placed on academic probation. The medical school refused to allow her to retake exams after medication regimen had stabilized because it decided her history of depression and mood swings would prevent her from being a good physician. The court found that evidence that dismissal was because of pattern of psychiatric difficulties might establish a Title II case.

*Rivera-Concepcion v. Commonwealth of Puerto Rico*, 786 F. Supp. 2d 489, 2011 WL 1938239 (D. Puerto Rico 2011) A student with **bipolar disorder** was expelled from a government internship program. The student did not make out case of ADA/504 discrimination. The expulsion was based on manic episode, and the program was not aware of mental condition, but based the expulsion on behavior.

*R. W. v. Board of Regents of University System of Georgia*, 2015 WL 4306858 (N.D. Ga. 2015) The court denied summary judgment on the issue of whether student with **schizophrenia** was otherwise qualified. The student had been excluded from on-campus housing and enrollment was conditioned on continuing psychiatric treatment. Fact issues remained about the claim that the student was a direct threat.

*Schuler v. University of Denver*, 50 Nat'l Disability L. Rep. ¶ 110 (D. Colo. 2014) The court granted summary judgement to the university in a Section 504 claim by a student with **insomnia, anxiety, depression and ADD** who claimed that leave of absence for health reasons was basis for discriminatory treatment. The student claimed retaliation in handling financial aid status. The student had been advised of steps to return to class and return to student housing, but the student did not follow through.

*Shah v. University of Texas Southwestern Medical School*, 54 F. Supp. 3d 681 (N.D. Tex. 2014) A medical student with **ADHD** was dismissed because of lack of professionalism during clinical rotations. Title II claims were dismissed on procedural grounds of immunity. The court determined that the Section 504 claim should be dismissed because student did not demonstrate discrimination solely on basis of disability; motivation was by other considerations.

*Slaughter v. Des Moines University College of Osteopathic Medicine*, 925 N.W.2d 793 (S.Ct. Iowa 2019) The Court affirmed the lower court's decision that the medical school did not violate the ADA in responding to a medical student's performance and **depression**. Knowledge of the condition by school psychologist should not be imputed to institution. No accommodations would have allowed student to meet academic standards. Three judges dissented from the decision.

*Toma v. University of Hawaii*, 304 F. Supp. 3d 956 (D. Hawaii 2018) The court issued preliminary rulings in a claim a that medical student with **depression** and hypothyroidism was dismissed for academic deficiencies.

*Yennard v. Boces*, 2019 WL 569242 (N.D.N.Y. 2019) A nursing student with **bipolar disorder** was not able to meet the essential requirements for the program even with reasonable accommodation. Clinical deficiencies were repeated. The court found that the discharge from the program was not discriminatory.

*Zimmeck v. Marshall University*, 106 F. Supp. 3d 776 (S.D. W. Va. 2015) Granting summary judgment to the university. Medical student removal from the program was based on lack of professionalism (being consistently late and disruptive and failing to sit for a required exam) not her *depression*.

### **Direct threat –**

Title II regulations provide the following regarding direct threat:

Direct threat means a significant risk to the health or safety of *others* that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139. 28 C.F.R. §35.104 (definitions).

The determination of direct threat is to be based on an individualized assessment

based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk. 28 C.F.R. §35.139(b).

Title I regulations applicable to employment, however, allow direct threat as a defense when the individual poses a direct threat to the health or safety of *the individual* or others in the workplace. See 29 §§1630.2(4) &1630.15(b)(2).

The statutory language of the ADA does not define direct threat. The EEOC regulation has been upheld by the Supreme Court as being valid and within the scope of the statute. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002). The Title II regulation (which is part of the regulations issued in 2010) has not been subjected to judicial review.

Many in higher education have raised concerns about how the Title II interpretation (not considering threat to “self”) will be applied to actions towards students who are suicidal or who have other self-destructive behaviors such as severe depression or eating disorders.

In October 2021, OCR/ED issued a fact sheet about this issue.

<https://www.ed.gov/news/press-releases/education-justice-departments-issue-fact-sheet-supporting-students-risk-self-harm-during-covid-19-era>

*Joseph M. v. Becker College*, 531 F. Supp. 3d 383 (D. Mass. 2021) A college student with *Asperger’s* received academic accommodations, but had not made known any need for accommodations to his behavior. After violations of conduct requirements, he was expelled. The court granted the college motion to dismiss case claims that 504/ADA had been violated by not addressing his behavior issues in other contexts.

*Estate of Schultz v. Board of Regents of University System of Georgia*, 2021 WL 3513890 (N.D. Ga. 2021) After a student with a mental health crisis was fatally shot by campus police, claim that this was a result of failure to train did not meet 504/ADA liability standards.

*Schurb v. University of Texas Health Sciences Center*, 2014 WL 5429307 (S.D. Tex. 2014) It did not violate Section 504 to remove a medical school student who had intentionally tried to harm himself by drinking antifreeze. The student did not provide treating psychiatrist certification that he was not a danger to self or others.

*Stebbins v. University of Arkansas*, 2012 WL 6737743 (W.D. Ark. 2013), the court addressed accommodation of a student with “*intermittent explosive disorder*” who had engaged in tactless behavior with a faculty member. The court discusses the student’s repeated incidents of misconduct applying the “direct threat” analysis and determined that the student did not have to be readmitted because he was not otherwise qualified.

A settlement in 2015 between the Department of Justice and Quinnipiac University involved a student who was dismissed because of mental health issues. The settlement can be found at [http://www.ada.gov/quinnipiac\\_sa.htm](http://www.ada.gov/quinnipiac_sa.htm).

## **Architectural Barriers [omitted from the 9/22 outline]**

### **Accommodations**

Reasonable accommodations fall under two major categories. These are *auxiliary aids and services* and *modification of policies, practices, and procedures*. Both continue to receive judicial attention.

**Auxiliary Aids and Services** *[Most references from the original version are omitted because they relate primarily to mobility and sensory impairments.]*

Auxiliary aids and services can include interpreters, provision of materials in alternate formats, and note takers. Recent cases on this issue have addressed a wide range of fact specific settings and highlight the importance of having a process in place for requesting such accommodations not only for students, faculty, and staff, but also for those attending public events and using services of professional education programs such as health clinics.

### **Modification of Policies, Practices, and Procedures**

Auxiliary aids and services generally require direct financial resource commitments, and while some modifications of policies, practices, and procedures may not require a financial cost, they may raise issues of fundamental alteration. Others, such as additional testing time, may require planning for resources such as separate rooms and paying proctors and monitors, and these costs have become an increasing topic of attention for institutional planners. Some requests are unusual and require particularly creative approaches and attention to the interactive process.

Accommodations can also include

- additional time for exams
- other exam modifications (separate room; extra rest time)
- reduction, waiver, substitution, or adaptation of course work
- extensions on assignments
- extension of time for degree completion
- preference in registration
- permission to tape record classes

Cases related to modifications for individuals with mental health impairments

*Doe v. Samuel Merritt University*, 921 F. Supp. 2d 958 (N.D. Cal. 2013) A student with **anxiety disorders** claimed the right to additional opportunities to take the medical licensing exam. The court allowed the case to go forward on issues of whether test-taking is a major life activity and whether the decision to limit the number of times one can take exams was entitled to deference.

*Doe v. Skidmore College*, 57 Nat'l Disability L. Rep. ¶ 168 (N.D. N.Y. 2018) A student with major **depression** and ADD requested accommodations of notifying parents about assignments, evaluations, and other matters; college may not have engaged in interactive process.

*Halpern v. Wake Forest University Health Sciences*, 669 F.3d 454, 2012 WL 627788 (4<sup>th</sup> Cir. 2012) Medical student with ADHD and **anxiety disorder** did not request accommodations until several years after engaging in unprofessional acts, including abusive treatment of staff and multiple unexcused absences; proposed accommodation (allowing psychiatric treatment, participating in program for distressed physicians, and continuing on strict probation) was not reasonable.

*Healy v. National Board of Osteopathic Medical Examiners*, 2012 WL 1574783 (S.D. Ind. 2012) Case involved taking exams with accommodations for student with **ADHD**.

*Herschman v. Muhlenberg College*, 17 F. Supp. 3d 454 (E.D. Pa. 2014) The court allowed a case by a former college student with **depression** to proceed. Student claimed ADA violations and negligent infliction of emotional distress. There was an issue of whether requested class substitution is a fundamental alteration. It was not appropriate to dismiss case of student seeking to substitute a class when facts had not been considered regarding fundamental alteration including major and nature of courses involved.

*Hoppe v. College of Notre Dame of Maryland*, 835 F. Supp. 2d 26 (D. Md. 2011) Reasonable accommodations for comprehensive examinations for student with **ADD** had been provided. It was not required that she be given an additional opportunity to pass the exam.

*Mikhail v. Manchester University, Inc.*, 59 Nat'l Disability L. Rep. ¶ 60 (N.D. Ind. 2019) A pharmacy student with **ADD** resulting from a car accident sought accommodation of being allowed to report absences on the day of the exam. After missing exams, she was not allowed to do make-up exams. Court found that the student's failure to contact professors was not caused by disability. University was granted summary judgment after student was dismissed the student for academic deficiencies.

*Reichert v. Elizabethtown College*, 2012 WL 1205158 (E.D. Pa. 2012) A student with **ADHD** had been given numerous modifications. The student requested and was granted medical withdrawal after disciplinary issues. Student could not make out a claim for "constructive discharge" from the academic program.

### **Testing accommodations – "best ensures"**

One type of accommodation that has receive substantial judicial attention is test accommodations for admissions tests and professional licensing type exams that are often a conduit from a professional education program (such as law or medical field). *[Decisions listed in original outline have all involved sensory impairments and examinations, which is what the regulations provide for. These cases are omitted on this outline]*

## Service and Support Animals

One of the issues receiving ongoing attention on campus is that of allowing animals on campus and at university events. While substantial regulatory guidance has been provided on that issue, new issues not completely answered by this guidance are arising. These include how to address allergies and phobias of others in proximity to an assistance or emotional support animal. For a discussion of this issue, see Laura Rothstein, *Puppies, Ponies, Pigs, and Parrots; Policies, Practices and Procedures in Pads: Pubs, Pads, Planes and Professions: Where We Live, Work, and Play, and How We Get There: Animals Accommodations in Public Places, Housing, Employment, and Transportation*, 24 LEWIS & CLARK ANIMAL LAW REVIEW 13-18 (2018). [Relevant portion of the article is provided below for this presentation purpose.]

While there is less recent judicial attention to this issue in campus settings than in other contexts (housing, airlines, other public places and spaces), those who provide student services are resolving these issues and developing policies as these new questions arise. In particular, the application of the federal requirements in campus housing settings can be confusing because of the overlap between the ADA and the Fair Housing Act.

Department of Justice regulations for Title II and Title III only require inclusion of dogs (and miniature horses) as *service* animals but only allow an entity to request minimal documentation – asking two questions:

- Is the dog a service animal required for a disability?
- What work or task has the dog been trained to perform?

The entity cannot ask for official “documentation” or require the animal to wear a special coat.

The animal must be under control.

*Alejandro v. Palm Beach State College*, 2011 WL 7400018 (S.D. Fla. 2011) The court granted a temporary injunction to a student seeking to bring psychiatric service dog to campus and classes. The dog was trained to alert her to impending panic attack.

Rebecca J. Hussal, *Canines on Campus: Companion Animals at Postsecondary Educational Institutions*, 77 Mo. L. Rev. 417 (2012)

See also [http://www.nytimes.com/2015/10/05/us/four-legged-roommates-help-with-the-stresses-of-campus-life.html?emc=eta1&\\_r=0](http://www.nytimes.com/2015/10/05/us/four-legged-roommates-help-with-the-stresses-of-campus-life.html?emc=eta1&_r=0)

## **Campus Housing – Implications re: animals**

How is university housing to be treated? The 2010 Department of Justice regulations seem to indicate that campus housing as being subject to Titles II and III. 28 C.F.R. § 35.151 (f) (Title II) and § 36.406(f) (Title III). It is not clear whether fraternity and sorority housing falls under the Private Club Exception, 42 U.S.C. § 12187, and the implications if Greek housing is subject to the ADA/FHA. The courts have not yet tested the validity of the DOJ regulations on this issue, nor have they clarified how the overlap of the FHA and the ADA on campus housing is to be applied regarding what animals are to be allowed and what documentation can be required.

The following case by the Department of Justice against Kent State University denied dismissal federal court and focuses on applicability of FHA to campus housing, recognizing that some issues are not resolved) <http://www.justice.gov/crt/file/777336/download>.

*Entine v. Lissner*, 56 Nat'l Disability L. Rep. ¶ 73 (S.D. Ohio 2017) The court granted a preliminary injunction against university seeking to remove service dog from sorority.

*United States v. University of Nebraska*, 4:11CV 3209. 2013 WL 2146049 (D. Neb. 2013) The court decision determines that student housing at University of Nebraska is subject to the Fair Housing Act. This makes the university subject to HUD guidance related to support and service animals. A settlement was reached in 2015 setting up a policy for emotional support animals in university housing. <http://www.justice.gov/opa/pr/justice-department-and-university-nebraska-kearney-settle-lawsuit-over-rights-students>

*Velzen & Fair Housing Center v. Grand Valley State*, 902 F. Supp. 2d 1038, 2012 WL 4809930 (W.D. Mich. 2012) The court addressed the applicability of FHA and Section 504 to residential settings on campus. The case involved a student who had been prohibited from living with her guinea pig as a comfort animal to control *stress*. Although she had moved off campus, she was still enrolled and might still want to live on campus. The policy about animals had not changed so the case was not moot.

FHA case law in other contexts recognizes that animals that provide *emotional support* might be required as accommodations, but the programs might be allowed to require greater documentation.

### **Technology Issues** [omitted from this presentation outline]

Note, however, that COVID resulted in many classes being offered remotely in the early months. What is unsettled at this point is to what extent universities must continue to provide some remote learning, which could be requested as a result of stress. Most of the cases relate to individuals with sensory impairments.

## **Mental Health Issues**

Past incidents of shootings and violence on campus, such as Virginia Tech, have raised questions about how to respond to students with mental health challenges. Much attention has been devoted by a range of stakeholders on these issues. Those discussions are beyond the scope of this article. The issue requires attention to the following issues.

- Is the individual otherwise qualified?
- Are issues of direct threat and threat to self being raised?
- What are the FERPA implications and how is the duty to inform balanced with privacy rights?
- Are mental health services available on campus?
- What is the process for withdrawing a student based on mental health concerns?

Settlement with Northern Michigan University involving Title II claim that it took adverse actions against students with mental health disabilities (threatened to involuntarily withdraw a student and require her to sign a behavioral agreement after she sent a chat message to fellow student re: major depressive disorder and doctor concern that she was a suicide risk) (payment of \$173,000 to four students) agreed to revise its voluntary psychological withdrawal policy. October 17, 2018 [https://www.ada.gov/nmu\\_sa.html](https://www.ada.gov/nmu_sa.html)

## **Returning Veterans**

Veterans with a range of health impairments including mental and physical impairments raise a unique issue in terms of documentation. For some requested accommodations – an emotional support animal for example – documentation of a mental health issue might be necessary. Unfortunately, obtaining such documentation quickly from military services can be a challenge. Institutions should anticipate this and decide whether to grant certain accommodations without the documentation at least for a short time.

**Food Sensitivities and Allergies** *[omitted from this presentation]*

**Eating Disorders -- relates to “threat to self” issue**

Students (and others) with eating disorders raise questions about an institution’s obligation to respond or to address proactively. There is not clear guidance from either the Department of Education or the courts on this issue.

**Faculty, Staff and Student Employment Issues** *[omitted from this presentation]*

**Shrinking Resources -- Undue burden as a defense?**

As university budgets become increasingly challenged, it is probable that more litigation will raise the defense of undue financial burden.

## **Legislative, Judicial, and Administrative Changes Since 2017**

The Trump administration policy of reducing regulation and enforcement has shifted in the Biden administration, but it is important to keep an eye on the following aspects of federal policy.

- Legislation -- Will the ADA, Section 504, or the FHA be amended, repealed? Does not seem likely but many federal courts and the Supreme Court are indicating less favor towards a range of regulations.
- Appropriations – How will federal budgets directly and indirectly affect financial resources available for accommodations?
- Regulations and Guidance – Several sets of regulations are being re-evaluated and guidance documents were withdrawn during the Trump administration and all are not yet reinstated.
- Enforcement -- How much priority will be given to staffing and focusing on accessibility issues on campus within in the Department of Justice and the Department of Education.
- Research and grant funding – The development of sound policies depends on high quality research. How is that being prioritized within relevant agencies?

## Proactive Approach to ADA Implementation

### 1) General Principles

Having effective policies, practices, and procedures (and personnel) for addressing proactively, reactively, and interactively the implementation of disability law on campus may benefit from ensuring that there are personnel who are in a position to facilitate such policies. A thoughtful approach to this may be of value before federal agencies (Office for Civil Rights) contacts a campus about a complaint. The value is not only to avoid liability, but also to gain positive public relations and to avoid unnecessary negative media attention.

Issues that should be considered in this regard include the following:

Personnel – to whom should disability questions be referred?

Policies and Procedures – is something already in place that addresses the issue? What areas should be prioritized for preparing such policies and procedures.

Preparation – Training – to avoid the conflict or issue attention in the first place

### 2) ADA Coordinator<sup>3</sup>

Universities are somewhat unique in at least two ways. First, they have had longer experience with disability rights issues because most were covered by Section 504 since 1973 and have addressed these issues in a range of settings for decades. Second, a campus setting usually includes a range of affected individuals -- students (and applicants), faculty and staff, and visitors -- in a very wide range of settings (housing, transportation, sports and performance venues, classrooms, libraries, clinics, labs, programs abroad, hospitals and other health care settings). This makes it challenging to develop policies, practices, and procedures that take into account those different settings and to ensure a means of communicating access issues to the wide range of constituents and to train those who are on the front lines of serving students and visitors. For that reason, many universities have implemented a position of an **ADA coordinator**, someone who is not a compliance officer, but someone with knowledge of both ADA/504 requirements in various settings and a familiarity with the campus and how to work across silos. ADA Coordinator – A point person for all constituents to serve as a resource in resolve disability issues – and having knowledgeable and culturally competent professional staff within ALL academic departments and ALL higher education programs (housing, athletics, alumni affairs, parking and transportation, events, library).

While most higher education institutions have a student services coordinator for disability issues and a “504”/HR person to address faculty and staff employment issues, many (most?) do not have a single person responsible for coordinating and addressing ALL of the ADA/504 issues that might arise on campus. Models exist for this on many campuses. Some of them are part of a joint position as

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<sup>3</sup> A national organization of ADA coordinators has existed since 1992. The unique nature of university and college settings, however, has resulted in a refocus about how such coordinators might operate in a campus setting. <https://adacoordinators.org/about-us/>. See <https://www.ahead.org/about-ahead/about-overview/knowledge-and-practice-communities/ada-coordinators>. See <https://www.ahead.org/about-ahead/about-overview/knowledge-and-practice-communities/ada-coordinators> (for information on ADA coordinators in campus settings).

ADA/Title IX coordinator. Others are responsible only for ADA/504 issues. There are many benefits of having such a coordinator. These include avoiding the personal and financial costs of litigation and formal dispute resolution and negative publicity when an incident receives media or other attention.

- 1) Benefits
- 2) Responsibilities
- 3) Authority (coordination and communication with University Counsel)
- 4) Coordinating training of others
- 5) Communication to affected individuals about how to seek assistance of the coordinator
- 6) Expectation that ADA Coordinator be included in “meet and greets” in interview and/or on-boarding for all department heads and new faculty

The following provides issues to be addressed in creating or changing such a position.

To whom does person report?

- Provost
- President
- Human Resources
- Other

Lines of coordination to key administrators

- Athletics directors
- Housing
- Student services
- Parking
- Physical Plant
- Technology
- Alumni/ae activities
- Campus security

What is the authority? It is essential that this be coordinated with university counsel.

- Dispute resolution
- Ombudsperson
- Coordinator
- Policy development
- Decisionmaker

Who are the individuals involved in possible oversight/coordination?

- Students
- Faculty
- Staff
- Alums
- Visitors to campus
- Physical plant (including parking and sidewalks)
- Food services

- Health services (including mental health services)
- Housing
- Access areas (libraries, sports and performance arenas, student centers)
- Alumni events
- Transportation systems on campus
- Programs abroad
- Athletics
- Health care programs
- Technology
- Fraternities and sororities (special issues of “private clubs” require attention)
- Campus and community law enforcement/security offices
- Purchasing (teaching materials; technology)

The following are some additional areas for consideration that do not necessarily fall into various topic areas.

- Facilities
- Websites
- Events (on and off campus)
- Faculty awareness
- Does checking every box guarantee “compliance”
- Consider doing regular “self-evaluation” updates
- Does having training potentially create more liability if training procedures are not followed?

What skills and characteristics are key for an ADA Coordinator?

- Knowledge of law
- Knowledge of disability issues
- Communications skills
- Ability to multitask
- Ability to work across departmental silos

The concept of an ADA coordinator advisory committee includes the following issues for consideration:

- Benefits of having such a committee
- Who should be members?
- Responsibilities
- Meetings
- Reports and records of meetings?

What are some areas where proactive policy should be considered (whether through an ADA coordinator or other mechanism)?

- Animals on campus (including all settings – housing, classrooms, employment settings, eating areas, etc.)
- Documentation for students receiving accommodations
- Dispute resolution – students; staff; faculty
- Technology (particularly website issues)
- Housing
- Faculty evaluation and appointment

- Mental health issues

Issues of training are challenging because of the various individuals who might benefit from training, limited time, changing personnel, and other factors. Issue of “cultural competence” on disability issues should become infused through job descriptions for many administrative and leadership positions asking applicants to describe their knowledge of ADA/504 issues. They need not be experts, but they should be aware and raise issues at key points.

The following should be considered in developing the range of training programs valuable to proactive approach.

- Student services
- Faculty (deans, associate deans, department chairs)
- Heads of key areas – housing, libraries, athletics, campus security, purchasing, etc.

How often (recognizing limited time and change of personnel) (and change in leadership in key positions)

In what format? On line? In person? Content?

Distribution of policies to key personnel – by whom, avoiding information overload

In implementing policies, practices, and procedures for ALL areas, the following are guiding principles:

- Be interactive
- Be proactive
- Be consistent
- Individualized approach
- Access to procedures (websites, etc.)
- Avoid “over-accommodation” (to ensure that policies can be implemented fairly and consistently), but consider what “CAN” be done without setting precedents and overpromising
- Basic principles for this discussion include the following:
- Holistic approach – avoiding silos
- Good communication to all stakeholders

## ANIMAL ACCOMMODATIONS IN UNIVERSITY SETTING

During the period of time when campuses shut down due to COVID (March 2020 through early 2021), the animals on campus issue was in the background. During that same time period, many students adopted animals to provide emotional support and comfort during that challenging time. The re-emergence of in person presence on campus and the number of students who may now want to have these comforting friends in housing, in classes, in eating areas, in the library, on campus generally -- highlights the importance of being proactive in re-establishing animals on campus policies and procedures.

The following is an adapted excerpt from Laura Rothstein, *Puppies, Ponies, Pigs, and Parrots -- Policies, Practices and Procedures in Pads, Pubs, Planes, and Professions -- Where We Live, Work, and Play, and How We Get There -- Animals in Public Places, Housing, Employment, and Transportation,*<sup>24</sup> ANIMAL LAW REVIEW 13-38 (2018)

Higher education is the setting in which there has been the greatest institutional policy and judicial attention to issues of animals as accommodations.<sup>4</sup> Several key cases have resulted in settlements.<sup>5</sup>

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<sup>4</sup> See Rebecca Hussal, *Canines on Campus: Companion Animals at Postsecondary Educational Institutions*, 77 MO. L. REV. 417 (2012); Field, *These Student Requests Are A Different Animal*, CHRONICLE OF HIGHER EDUCATION, 2006 WLNR 18107846 (Oct. 13, 2006). See also *Alejandro v. Palm Beach State College*, 2011 WL 7400018 (S.D. Fla. 2011) (granting temporary injunction to allow student to bring psychiatric service dog to campus and class; dog trained to alert her to impending panic attack); *Velzen v. Grand Valley State University*, 902 F. Supp. 2d 1038 (W.D. Mich. 2012) (student allowed to proceed in Fair Housing Act, Section 504, and state law claims; university prohibited student from being allowed to have her guinea pig, a comfort animal, to control stress for cardiac arrhythmia; university had policy not allowing accommodations for emotional support assistance animals); Letter to: Northwest Missouri State University, 37 Nat'l Disability Law Rep. ¶ 78 (OCR 2007) (establishment of conditions, limitations, and procedural prerequisites to use of service animals, including requirements about vaccinations, reasonable and neutral, not a violation of 504/ADA).

<sup>5</sup> There are two high profile settlements that have addressed this issue. In a case brought by the Justice Department against Kent State University, (<http://www.justice.gov/crt/file/777336/download>) filed in 2014, the applicability of the Fair Housing Act to campus housing was at issue. Because the case was settled, judicial precedent does not exist. The Department of Justice had alleged that Kent State's policies did not permit students with psychological disabilities to have emotional support animals in university housing. The settlement is found at Case: 5:14-cv-01992-JRA Doc #: 53 Filed: 01/04/16 <http://www.justice.gov/opa/file/809811/download> In the settlement, Kent State agreed to pay \$100,000 to two former students, to pay \$30,000 to a fair housing organization that advocated on behalf of the students, to pay \$15,000 to the United States, and to adopt a housing policy allowing emotional support animals.

The other major settlement involved the University of Nebraska at Kearney. Although the applicability of the Fair Housing Act was addressed in a judicial opinion, (see e.g., *United States v. University of Nebraska at Kearney*, 2013 WL 2146049 (D. Neb. 2013) the case was settled before a judicial determination of liability was reached. The case involved the university asking for details of a student's treatment, medications, and doctor visit schedules. The Department of Justice position was that university requirements for detailed information went beyond what was needed to review the accommodation request in a housing setting. The settlement provided for payment of \$140,000 to two students denied assistance animals in university apartments and a change in policies to allow emotional assistance animals in university housing for students with psychological disabilities where animals provide necessary therapeutic benefits. <http://www.justice.gov/opa/pr/justice-department-and-university-nebraska->

The 2010 regulations under the ADA provide some guidance about some types of campus housing, but the guidance is not entirely clarifying. These regulations differentiate between types of housing at places of education.<sup>6</sup> \*\*\*

Even more complicating is the issue of fraternities and sororities and their housing and how that might be an issue for a student wanting to have an animal (often an emotional support animal) in the Greek housing setting.<sup>7</sup> A detailed discussion of this issue is beyond the scope of this article, but some of the issues relevant to determining whether and how the private club exemption of Title III of the ADA<sup>8</sup> or the Fair Housing Act might apply to these programs may depend on whether the university owns and operates the housing or whether it is entirely separate from any involvement of the university. Living in fraternity and sorority housing is often more like transient housing (such as hotels and motels) than leasing settings, so it is not clearly settled whether the ADA, Section 504, or the FHA applies in a particular situation. This can also impact architectural barrier issues and membership discrimination, but for purposes of this article the issue is a student requesting an animal accommodation in a living situation. It can matter whether the FHA applies because often these requests may be for emotional support animals. Documentation of the relationship of an ESA to a disability allows greater inquiry under FHA. This can raise concerns of privacy in settings where other members of the Greek organization's board are involved in reviewing requests for exceptions.

Greek housing and traditional dormitory settings often involve right to access living space beyond what might be expected in a landlord tenant situation. For example, custodial and cleaning staff or other members of the fraternal organization might have a regular privilege to enter sleeping space of a student. This raises potential issues about safety. The ADA requires that the animal be under control of the individual, which makes sense in a public setting. The FHA would involve similar expectations, but control within one's sleeping room is different than control in a public space such as a restaurant or shopping mall. Does the emotional support animal have to be caged when the student leaves the room? Related to these issues is the amenities that go with campus housing. Often there are spaces for social interaction, food service, and other "public" areas such as a laundry room or lobby area that students would expect to be able to use in the building in which they live. Can an ESA accompany them to those spaces or only be allowed in the "private" sleeping space? These questions are not clearly resolved, and

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[kearney-settle-lawsuit-over-rights-students](#). The case does not resolve, but does raise the issue of differing documentation requirements that might be allowed under the ADA and FHA. For a recent story about service dogs on campus in a classroom setting, see <https://www.clarionledger.com/story/news/2018/09/13/ole-miss-banning-ptsd-service-dog-classroom-prompts-outcry/1255406002/>. At the time of this update, there has not been an update on the issue, which was in the process of being addressed by the university.

<sup>6</sup> 28 C.F.R. 35.151(f) provides "Housing at a place of education that is subject to this section shall comply with the 2010 Standards applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806 subject to the following exceptions. Under Title III regulations, 28 C.F.R. § 36.104 definitions provide that a public accommodation includes places of lodging which would be primarily lodging for short term (such as hotels, short term guest rooms or sleeping rooms). "Housing at a *place of education* means housing operated by or on behalf of an...undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments or other places of residence."

<sup>7</sup> Claudine McCarthy, <http://www.disabilitycomplianceforhighereducation.com/m-article-detail/limit-liability-related-to-students-with-disabilities-in-fraternity-sorority-houses.aspx>, DISABILITY COMPLIANCE FOR HIGHER EDUCATION, Jossey-Bass (February 18, 2015). See also *Entine v. Lissner*, 56 Nat'l Disability L. Rep. ¶ 73 (S.D. Ohio 2017) (granting preliminary injunction against university seeking to remove service dog from sorority).

<sup>8</sup> 42 U.S.C. § 12187.

would benefit from official guidance. How would that work for campus settings where students living in one building can apply food service access to one or more other buildings?

Because of the increase in requests for animals on campus, several organizations have provided guidance.<sup>9</sup> While this guidance is often very helpful, it does not provide the definitive answers to some of these issues that official federal regulations could. \*\*\*

There is nothing within the regulations that addresses whether an institution of higher education can require or can encourage students to “register” in any way when there is an animal on campus where the presence involves classrooms, libraries, and laboratories. While it may be permissible to require registration in some housing settings, that is not completely resolved. It is almost certain, however, that registration in other settings cannot be *required* but campus policies might establish policies that encourage registration or at least advance notification to avoid complications in the classroom and other settings once a semester has begun. The purpose of having animals registered in housing would be to know in emergency situations, such as a fire, if an animal is in a housing unit. The purpose for other on campus settings, especially in classrooms and labs, would be engage in an interactive process in advance where others might have phobias or allergies.

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<sup>9</sup> The Association of Higher Education and Disabilities (AHEAD) is a valuable source of guidance (the organization specifically notes that it does not give legal advice), and a 2013 article by Scott Lissner provides an excellent overview of the issues. The document was published before some of the cases were resolved and settled in higher education situations. [https://www.google.com/?gws\\_rd=ssl#q=ahead+animals+on+campus+policies](https://www.google.com/?gws_rd=ssl#q=ahead+animals+on+campus+policies).

The National Association of College & University Attorneys (NACUA) is also an important resource for guidance on issues such as this. Elizabeth Brody Guck & Josh Dermott, *Accommodating Service and Assistance Animals on Campus Making Heads of Tails of the ADA, FHA, and Section 504* NACUA NOTES, Vol. 9, No 8, April 14, 2011 (although written before the recent settlements, it provides some useful perspectives on proactive planning <http://www.nacua.org/nacualert/docs/ServiceAnimals/ServiceAnimals.pdf> . An update to the piece was written by Josh Dermott on March 16, 2012 (NACUA NOTES, Vol. 10, no. 6). See also Judge David L. Bazelon Center for Mental Health Law (organization founded in 1972 with mission to advocate for individuals with mental disabilities) Fair Housing Information Sheet #6, Right to Emotional Support Animals in “No Pet” Housing <http://www.bazelon.org/LinkClick.aspx?fileticket=mHq8GV0FI4c%3D&tabid> .

## Scholarship by Laura Rothstein

DISABILITIES AND THE LAW Chapter 3 (Higher Education) and Chapter 10 (Health Care) (Thomson Reuters 4<sup>th</sup> edition which is published in cumulative editions twice a year (with Julia Irzyk)

*Medical Education and Individuals with Disabilities: Revisiting Policies, Practices, and Procedures in Light of Lessons Learned from Litigation*, 44 J. COLL. & U.L. 258-359 (2021)

*Would the ADA Pass Today? Disability Rights in an Age of Partisan Politics,*” 12 ST. LOUIS UNIVERSITY HEALTH L.J. 271-330 (2019). This article appears in a symposium issue on the ADA.

*Puppies, Ponies, Pigs, and Parrots; Policies, Practices and Procedures in Pads: Pubs, Pads, Planes and Professions: Where We Live, Work, and Play, and How We Get There: Animals Accommodations in Public Places, Housing, Employment, and Transportation*, 24 LEWIS & CLARK ANIMAL LAW REVIEW 13-18 (2018).

*Preserving Access for People with Disabilities*, 378 NEW ENGLAND JOURNAL OF MEDICINE 2056 (May 31, 2018)

*The Americans with Disabilities Act and Higher Education 25 Years Later: An Update on the History and Current Disability Discrimination Issues for Higher Education*, 41 J. COLL. & U.L. 531 (2015) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2629306](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629306)

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*Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment*, 75 Ohio St. L. 1263 (2014)

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*Litigation over Dismissal of Faculty with Disabilities*, Appendix C of AAUP Report on Accommodating Faculty Members Who Have Disabilities (January 2012)

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*Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J. COLL. & U.L. 843 (2010) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1653466](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653466)

*Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J. COLL. & U.L. 101 (2009)

*Strategic Advocacy in Fulfilling the Goals of Disability Policy: Is the Only Question How Full the Glass Is?* 13 TEX. J. CIV. LIBERTIES & CIV. RIGHTS 403 (2008)

*Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual,*” 69 U. PITT. L. REV. 531 (2008)

*Southeastern Community College v. Davis*, chapter in EDUCATION STORIES, Michael Olivas & Ronna Schneider eds. (Foundation Press 2007)

*Millennials and Disability Law: Revisiting Southeastern Community College v. Davis: Emerging Issues for Students with Disabilities*, 34 J. COLL. & U.L. 167 (2007)

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*Don't Roll in My Parade: Sports and Entertainment Cases and the ADA*, 19 U. TEX. L. REV. OF LITIGATION 400 (2000)

*Higher Education and the Future of Disability Policy*, 52 U ALABAMA L. REV. 241-270 (2000)

*Reflections on Disability Discrimination Policy: 25 Years*, 22 U. ARK. L. REV. U.147-160 (2000)

*Higher Education and Disabilities: Trends and Developments*, 27 STETSON L. REV. 1 (Fall 1997)

*Higher Education and Disabilities: An Overview of 1995 Cases*, 23 J. COLL. & U.L. 475 (1997)

*The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Law,*” 47 SYRACUSE L. REV. (1997) SSRN Reference – <http://ssrn.com/author=37905>

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*College Students with Disabilities: Litigation Trends*, 13 REV. OF LITIGATION (University of Texas) 425 (1994)

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Laura Rothstein has been involved in disability discrimination issues since 1979, when she represented clients with disabilities while a faculty member at the University of Pittsburgh School of Law in its Developments Disabilities Law Project clinical program. Since 1980, she has written three books (all in numerous and recently updated editions) and dozens of book chapters, articles, and other works on disability discrimination, covering a broad range of issues, with an emphasis on disability discrimination in higher education and special education.

She has applied her knowledge through service to and presentations for conferences in several national organizations – National Association of College and University Attorneys, ABA Section of Legal Education and Admission to the Bar, Law School Admission Council, Association of American Law Schools, Association of Higher Education and Disabilities, and others. She has also served in administrative positions – Associate Dean for Student Services (University of Houston Law Center from 1986 to 1993), Associate Dean for Graduate Studies (University of Houston Law Center 1999 to 2000), and Dean (University of Louisville Brandeis School of Law 2000 to 2005) that allowed her to put into practice her scholarship. From 1980 to 1986, she served as the Faculty Editor of the Journal of College and University Law (co-published at that time by the National Association of College & University Attorneys and West Virginia University College of Law). She currently is a member of the JCUL Editorial Advisory Board. The presentation draws on the speaker’s 46 years as a law professor at five law schools, her twelve years in administrative leadership within law schools, her teaching/publication/service work in disability law generally, and in higher education and disability law, since 1980. Her expertise has been a source of service to central office administrators at both University of Houston and the University of Louisville. She has been a regular presenter at major higher education policy conferences (Stetson, Vermont, Mississippi, Mississippi State). The philosophy of the presenter is one of *proactive* approach to issues – having in place policies, practices and procedures that are reasonable, transparent, and fair to all, and approaching disputes initially to resolve them without formal litigation or dispute resolution if possible.

She is frequently consulted by advocates, government agencies, university administrators, and university counsel about these issues, and her perspective is one of an “advocate through education.” Her goal is to influence policy and practice by increasing awareness and understanding of legal requirements and how they can be implemented before disputes arise. After retiring from full time teaching at the University of Louisville in December 2022, Professor Rothstein will be living in San Diego and plan to engage in consulting on higher education and disability discrimination issues.

She received the William A. Kaplin Award for Excellence in Higher Education Law and Policy Scholarship from the Center for Excellence in Higher Education Law and Policy 2011, and an award for Outstanding Research and Creative Activity from the University of Louisville in 2012 and Brandeis School of Law Outstanding Teacher in 2015. In 2020 she received a University Award for Outstanding Service to the Community. In 2021 she received the Louisville Bar Association Trailblazer Award for her leadership in establishing and sustaining the pipeline program between the Brandeis School of Law and Central High School’s Law and Government Magnet program.

9/15/22