

## Stetson 32<sup>nd</sup> Annual Conference for Law and Higher Education

### Recent Developments in Disability Law: Students and Disability Law

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**Introductory Notes:** This set of materials is designed to complement the wonderful 50-year retrospective of my co-presenter, Laura Rothstein, by providing some useful resources at the confluence of students, disability, and the academy.

I'm going to cover primarily three issues: early communication, classroom communication, and electronic communication. I will also include a set of ten scenarios we might use for our Stetson session and that you can use on your campus to provoke colloquy.

**I. Half the Battle:** The source of many disability-related disputes between students and their postsecondary institutions arise from dashed expectations. That is not to say that there are not other causes—there are, among them prejudice, money, miscommunication, control, and ego. But, all too frequently, students and their colleges do not begin to discuss disability-related issues until it is too late.

Of course, one barrier to early discussions about disability is that postsecondary institutions are prohibited from asking applicants whether or not they have disabilities. While applicants are free to disclose their disabilities on their own initiative, colleges cannot solicit information from applicants about their disability status.

As you may be thinking, there is a great deal more leeway—and in some cases an obligation—to query prospective students about a variety of other protected statuses. It is not uncommon for a college's admissions materials to ask prospective students about a broad range of immutable characteristics but disability will, typically, not be among them. The vagaries of law often do not graft well on to the pragmatics of accommodating disability.

This is a particularly vexing problem when students first enter college, because they are, often unbeknownst to them, transitioning from one regime to another. Ninety-percent of school educated students attend public schools. And K-12 public schools are governed

in part by obligations in the Individuals with Disabilities in Education Act (IDEA). IDEA, which was most recently reauthorized in 2004, puts an affirmative obligation on public schools to seek out and accommodate disabilities. Students accustomed to an environment shaped by IDEA are used to the institution reaching out proactively to identify students who have disabilities and to begin accommodating them. The transition, as far as accommodations go, from one public K-12 school to another can be rather seamless for the student.

When students come to college, however, they have no IDEA. The Americans with Disabilities Act, the Rehabilitation Act, and a variety of other federal and state laws apply. And in almost no cases do the laws in this new regime require the college or university to affirmatively seek out and proactively apply targeted accommodations or anything resembling an individualized education plan, which is what the student could expect in high school. In fact, under the new regime, the postsecondary institution is not supposed to presume that students who have disabilities want accommodations or want to disclose their disabilities. There is an obligation to reasonably accommodate students, but only AFTER the student has come forward to request accommodations.

Despite all this, all evidence suggests that the sooner our institutions have substantive conversations with students who have disabilities, the greater the likelihood that students get the accommodations they need and the better we are able to provide them. There are things we can lawfully do to encourage and facilitate early communications.

1. We can be sure that our admissions and financial aid materials (and other communications with prospective students) are available in format that are accessible and in ways that do not require the prospective student to disclose her disability status to the admissions process. On this last point, what I mean is that it is best practice not to merely have a way for a prospective student to request an accessible format, but, rather, to have accessible formats available so the prospective student does not have to have her name associated with having to ask for a specialized format. In some circumstances this cannot be avoided, but with the possibilities afforded by digital technology it is becoming easier to, as a default, make materials available.

2. We can include in our materials language that invites people who have disabilities and who are wondering about accommodations to contact Disability Services Offices, ADA coordinators, and the like to get information about accessibility and accommodations on the

campus—even before the prospective student applies. Here is some sample language.

As you are considering the University of Michigan, if you would like more information about our services for students who have disabilities, accessibility on campus, our campus adaptive technology resources, or the other types of accommodations we can provide, please do not hesitate to contact our Services for Students who have Disabilities Office: [email@university.edu](mailto:email@university.edu), (123) 456-7890, and [www.university.edu/disabilitywebpage](http://www.university.edu/disabilitywebpage).

3. We can also include in our offers of admission more direct encouragement to reach out. Once we have offered admission, and the choice of whether or not to attend rests with the student, we have an opportunity to help the student see whether the fit, from an accommodations standpoint, is good. A great approach is to put a sentence in all letters offering admission. Here is some sample language.

If you would like more information about our services and resources for students who have disabilities, please do not hesitate to contact our Services for Students who have Disabilities Office: [email@university.edu](mailto:email@university.edu), (123) 456-7890, and [www.university.edu/disabilitywebpage](http://www.university.edu/disabilitywebpage)

Students who have a better understanding of the type of accommodations experience they will have when they arrive on campus are better able to judge whether a particular school is a good fit for them. With early opportunities to explain their needs, students who require substantial accommodations can let us know early enough so that we aren't scrambling in the fall after the student has already arrived. Because some accommodations might, for instance, affect which classrooms we use, having information early can give us the opportunity to address some concerns before they require a lot after the fact logistical manipulation.

In the end, the sooner our prospective students who have disabilities get to know us and the sooner we get to know them, the greater the likelihood that we are able to create a good fit for both student and institution.

**II. In The Classroom:** Although the institution may (or may not) work hard to make the campus accessible to students who have disabilities, the student's experience in the classroom may be quite

different. Many students feel uncomfortable talking with their professors about their disabilities, especially because they don't have a sense of how they are likely to react. Some faculty feel uncomfortable addressing these kinds of concerns as well, or at least knowing how to start the discussion in an appropriate way.

With this in mind Council for Disability Concerns at the University of Michigan sought to determine the sources of the obstacles to this type of communication as well as other issues that surround providing appropriate accommodation to students in the classroom. It discovered a number of conditions that contribute to the difficulties here, for instance: many students and faculty *do* have a difficult time discussing disability; some students struggle with how to raise a request for accommodation with their faculty; many faculty wish to invite students who seek accommodations to come forward, but they feel inhibited by how to talk about this with their classes (both legally and interpersonally); many faculty wish students would disclose their request for an accommodation earlier in the semester; and many faculty and students do not realize that the Services for Students with Disabilities can assist in determining appropriate accommodations.

With all this in mind, the Council sought to draft language that faculty (who wished) could use in their syllabi to help address these obstacles. The Council drafted language with a set of concrete goals.

#### Goals for Syllabus Paragraph

- To increase appropriate accommodations for students who have disabilities
- To facilitate communication between students and faculty about disability and accommodation
- To help students and faculty feel more comfortable discussing disability and accommodation by providing a starting point
- To encourage students to bring requests for accommodation forward sooner, rather than later
- To remind faculty and students that it is ordinarily the student's responsibility to initiate requests for accommodation
- To enable faculty to feel comfortable including language about accommodation—especially because some faculty are concerned about saying something that is legally problematic or that is somehow insensitive
- To assure faculty and students that it is standard practice to provide appropriate accommodation for students with disabilities

- To suggest that there are a variety of ways in which courses may be appropriately modified to accommodate students with disabilities
- To assure faculty and students that the challenge of determining appropriate accommodations does not fall on them alone
- To recommend the Services for Students with Disabilities as a resource for both students and faculty
- To remind faculty that information about a student's disability is sensitive and should be treated with discretion
- To assure students that faculty will treat information about a student's disability with discretion
- To increase the likelihood that faculty will actually use the language in their syllabi
- To accomplish all this in short, clear prose

Here is a template syllabus paragraph that tries to address the above goals for you to consider.

**Accommodations For Students Who Have Disabilities**

If you think you need an accommodation for a disability, please let me know at your earliest convenience. Some aspects of this course, the assignments, the in-class activities, and the way that I teach may be modified to facilitate your participation and progress. As soon as you make me aware of your needs, we can work with the Services for Students who have Disabilities Office to help us determine appropriate accommodations. Of course, I will treat any information you provide discretely.

Of course this paragraph can be modified if, say, your program prefers all disability disclosures to start with a particular office or individual. The idea, however, is to address the goals listed above, or at least as many of them as you can.

**III. Adapting to the Electronic Era:** As we migrate from a society that does much of its communicating in hardcopy to one that uses virtual communication, there are new opportunities and obstacles for people who have disabilities.

There is unprecedented and extraordinary potential for virtual/digital/whatever-comes-next technology to make accessible what was previously impenetrable to people who have all sorts of disabilities. Whether it is that Google Book Search will take the number of digitized books from tens of thousands to tens of millions or that auto transcription technology will make instantaneous closed

captioning possible, we are on the forefront of unprecedented access for persons who have disabilities.

Because this is the case, that is, because there are new opportunities to make the world much more accessible, we should expect disability rights organizations and individuals who have disabilities to want to “lock in” accessibility up front, at the cusp of the migration to technologies that can facilitate accessibility. Although the Rehabilitation Act was enacted in 1973 and the Americans with Disabilities Act in 1990, most colleges and universities are still non-compliant and remain inaccessible in many ways (despite many, many improvements).

The vigilance of disability rights organizations in the digital era is very real. Take for instance, the National Federation of the Blind (NFB), which has been very active in the last couple of years. NFB brought suit, for instance, against Arizona State University (ASU), because ASU began using Kindle technology—a technology that, while innovative, is not yet accessible—as part of its curriculum. Even though NFB sued ASU, its real target was Amazon, the company that makes the Kindle. NFB also brought suit against a number of law schools that use the Law School Admissions Council’s inaccessible web application services. In this case, NFB made brought complaints to the Department of Justice as well. Again, the postsecondary institutions were more tools than targets. And, perhaps most significantly, NFB just filed suit against Pennsylvania State University (PSU), alleging that its basic services—many of them virtual services—were not accessible to people with vision impairments. This, unlike the other two cases, has the postsecondary institution at the heart of the complaint. PSU will likely not be the last postsecondary institution that NFB brings under the scrutiny of the courts.

Why this sudden interest in colleges and universities? Because now is the time for disability rights organizations to establish proactive practices that can persist into the future. And postsecondary institutions will be embroiled in this transformation either directly (like PSU), or as a means to manipulate companies that sell to postsecondary institutions (like ASU).

Although statutes like the Rehabilitation Act and the Americans with Disability Act were written with the non-virtual world in mind, they (particularly the ADA) are beginning to be interpreted to apply to the virtual world. A little before the virtual world began to take hold, in *Martin v. MARTA* (Atlanta’s mass transit system), a 2001 case (225 F. Supp.2d. 1362), the plaintiffs alleged, in part, that when MARTA wasn’t making information available about public transportation

schedules and routs in a similar manner and in a similar time frame, it violated the Title II of the ADA. This case serves as a hallmark in that communications, their format, and timeliness are important factors in compliance with disability law.

In 2002, the Eleventh Circuit, in *Rendon v. Valleycrest* (294 F.3rd 1279), found that Title II of the ADA applies to both tangible and intangible places. In *NFB v. Target Corporation* (582 F. Supp.2d 1185, (2007)), Judge Patel similarly finds a nexus between target.com and a place of public accommodation as identified in Title III of the ADA.

I am not going into much detail about these cases, because the details are, for the moment, less important than the overarching trajectory. As it becomes easier to make virtual/web-based/technology-based services accessible, courts are going to find it much easier to enforce the reasonableness of making these services and devices accessible. If a court will compel a college to put a one million dollar elevator in a building, it is not a stretch to suspect that the same court will have no compunction about asking the college to spend \$10,000 to retrofit its course registration website. As we begin to move our most basic services—services that used to be performed by people—to virtual/web-based services, we can expect to have to make those services accessible. And it is best to do when we create those services, rather than trying to graft on an after-the-fact fix.

In July of 2010, the Department of Justice issued proposed rules about “Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations” for consideration. Based on the proposed language, DoJ’s interest is clear. There is a fundamental expectation that Web Information must be accessible.

Because this is a much more detailed discussion than I have space for here, I am attaching to this presentation the response to the DoJ authored collectively by the Committee on Institutional Cooperation (CIC, <http://www.cic.net/Home.aspx>). It is worth perusing to get a sense of the complexity of what will likely be expected of postsecondary institutions with respect to their websites and web services.

**IV. 10 Scenarios For Your Consideration:** Below are some scenarios that raise a variety of disability related issues within the academy that involve students. They do not cover the broad array of possible issues, but you will find many old and emergent issues within them.

**A.** Ann has been a very good student (top 3% of her class) and is now half way through her junior year. It's January and she has just learned that she failed the required Quantitative Research Methods course for her major. She contacts the faculty member, who tells her that she *was* doing quite well in the course—her mid-term paper, oral presentation, and research critique “were all excellent.” Unfortunately, he said, “the final is worth sixty percent of the grade and you had the lowest score in the class, by a lot.” With this information, Ann contacts the dean to explain that she has a disability, which she can document, and she requests that she be allowed to take the re-exam with some accommodations. Ann indicates that this is the first time that her diligence and determination have not been able to make up for her disability and she feels that the quantitative, chart-based, diagram-based aspects of the timed test worked against her in ways that were more substantial for her than for the other students. She indicates that she had not felt the need to disclose her disability previously because she had always been able to cope, and even excel, in the past without special accommodations and because she did not want to be labeled or to create the opportunity for discrimination. Now she is interested in being able to take the exam with accommodations that the Disability Services Offices would recommend.

**B.** Seth arrived at the law school with appropriate documentation for his disability. He had been requesting accommodations since he was a kid, so he “knew the drill.” He knew how to accurately describe his disability, how to request accommodations, how to explain his needs and his abilities, and how to navigate the infelicities of getting the accommodations he needed. He was a delight to work with for both the Disability Services staff and the law school staff. Things could not have gone more smoothly in Seth’s transition to the institution. Based on his documentation and his requests, the Disability Services Office recommended that Seth receive double time on his exams as well as a variety of other—but for our purposes not relevant—accommodations. From Seth’s perspective, the accommodations were a success. He received three “A+” grades and one “A” grade for his first semester. All four of his faculty graded his exam anonymously—that is, they did not know that it was his exam or that the exam had been taken with accommodations. Three of the four faculty independently came forward to the academic dean marveling at the output of this particular student. They noted that the student had been able to produce more than twice the number of pages of the next closest student; he stood apart not only because of his exposition, which was clear and thoughtful, but because he covered so much more than the other students. His work, they all felt, was truly remarkable. The academic dean, who knew of Seth’s accommodation,

followed up with the Disability Services Office about the circumstances. Together they agreed that, they had over accommodated Seth for the type of exams given in this program. The academic dean wrote Seth explaining that they needed to make some adjustments to his accommodations going forward and that next term he would receive 1.25 time on exams. Seth, no longer happy, threatens to sue.

**C.** During her second term of college, Cindy was diagnosed with a debilitating chronic illness. While she could still think and reason as well as she ever could, many aspects of her life had been significantly disrupted by her illness. Her affect and her ability to concentrate had been severely impaired by constant pain and intermittent bouts of nausea. The illness had also affected her ability to get good sleep. As a result, she had been missing more classes, arriving late to classes, and having more difficulty “being present” during class. Not surprisingly, her grades really suffered, even though her professors had been lenient with her absences and tardiness. Cindy’s rural university is in a state that had recently passed a referendum legalizing medical marijuana within the state and during the first week of sophomore year, one of Cindy’s health care providers prescribed it to address her symptoms. Much to Cindy’s pleasure, this treatment has been exceptionally effective. In fact, things are going so well that the old Cindy is almost back. In the middle of the term, however, Cindy’s dorm-roommate filed a complaint with the residence advisor that Cindy is using marijuana in violation of residence hall policy, the university code of conduct, and federal law. Cindy does not think it’s fair under the circumstances to treat her as other students who use marijuana. Moreover, she does not want to move off campus both because she prefers the ease of living on campus and eating in the dining hall and because it would cost her significantly more to find a place to live near campus now that all the most economical housing has been taken.

**D.** David is a sophomore at a small academically rigorous college, Quintessential College. Like everyone else at QC, he studied hard in high school, did well on standardized tests, participated in extracurricular activities, and was academically inclined. Unlike almost anyone else at his college, he received an elite scholarship (funded by a trust to QC) that covered the cost of his tuition, housing, food, and books, and even gave him a monthly stipend for four years. This scholarship was designed to attract the best and brightest to QC and one student each year was bestowed with this honor. Unlike any other student to ever attend QC, David has profound hearing loss, a fact he did not disclose to QC until a month before he arrived. In many ways, this surprise information about David posed serious challenges

to QC. It costs QC almost \$45,000 each year to adequately accommodate David, he requires a great deal of staff time, and the presence of CART operators, sign interpreters, and the like has been a big adjustment for QC. Moreover, QC lost much of its savings in the Madoff scandal and enrollment is down due to declining population in the state. David told his advisor that he was considering an operation that would almost certainly enable him to hear again but has decided against it until after college. QC's CFO is wondering why QC has to provide accommodations to someone who has at his disposal a means of no longer being a person who has a disability but is choosing not to use it.

**E.** Professor Elkins, a distinguished alumnus who came to the dental school from private practice, is seeking to bring some practicality to the dental school's politically correct ways. Elkins, now having two years under his belt on the faculty at East Southern Florida University, has "seen enough." Yesterday, he sent the following, in a message to the curriculum committee. "While we can be very proud of the disabled students who attend our great school, we should not be a party to a deception our practices propagate to future employers, to the public, and to posterity. Trust me, I know first hand that not all our graduates are equal. Moreover, not even all our students who receive academic honors are of superior quality. I have hired many of our graduates over the years and can attest to the substantial consternation our—I'm sure unintentionally—deceptive practices has on the profession. Each year, we provide the so-called 'reasonable accommodations' to our students with disabilities. I understand that this is required by law and so, of course, it is fine to do this. However, we grade students competitively in this school and it is a falsehood to represent, on the transcript, that the final exam scores of a standardized exam are the same for students who received an accommodation as they are for those who did not. It wholly undermines the sanctity of the evaluation system, if we avert our eyes to an overtly fallacious documentation of outcomes. We must remember that we unleashing dental professionals and not fashion designers on the world. Our misrepresentations could actually cause harm if whoever hires our students expects something that our student cannot give because the accommodation we provided in school is not available in the real world. Right now, our practice is to wrap our students who took accommodated exams in East Southern Florida University Dental School paper so they look just like everyone else, only, potentially, to disappoint those who unwrap the gift. Therefore, we should flag the grades of students who took accommodated examinations so that will present the products of our curriculum with integrity."

**F.** Fran discovered what she calls “her demons” early in high school. The mood swings associated with her psychiatric disabilities have been a vexation to her, her doctors, her family, and her friends since they began to emerge in adolescence. Fran, a gifted painter, cellist, and soccer player, has declared math as her major. She has had nothing but success in the substance of her academic and non-academic pursuits during college. But magnificence of all her gifts have been sullied and even overshadowed by her abrupt and volatile outbursts, tirades, and tantrums. Her doctors have been uniform in their assertions that Fran’s disruptions are not a function of her volition. Fran has tried dozens of pharmaceutical regimens, cognitive-behavioral stratagems, and alternative therapies—all with the hope of exorcising her demons; she even underwent electro-shock therapy. It often takes weeks to get a sense of how the latest therapeutic approach is working and sometimes the “remedies” actually make things worse. Fran has already gone through three roommates and the residence hall has given her a single to avoid any more problems. Unfortunately, Fran’s rants, taunts, and obstreperous moments have ostracized her from many of her classmates, professors, and other campus staff. While she continues to do well in school her presence is disruptive in the classroom, in the orchestra, at the art studio, and on the soccer field. While she is never physically violent, her eruptions have frightened and intimidated many people. She has been asked to leave many venues and has been escorted from campus buildings and events on more than a dozen occasions. The dean of students has been asked to do something.

**G.** Gus has always been large; he came from large stock. Now a college student, Gus stands at 6’9” and weighs almost 400 lbs. He is an imposing figure to behold and is large enough that he has difficulty fitting into many spaces designed for the majority of the population. Because he is totally blind, it is not uncommon for him to hit his head on doorways or to select seats that are too narrow for his frame. Although he is exceptionally strong, he has substantial difficulty with his knees, which means Gus requires physical assistance to rise from a seated position. This combination of conditions has lead Gus to work with his service animal, Walter. Walter is a 220 lb. Old English Mastiff who serves not only to help Gus navigate the world, but he is able to assist Gus in getting to a standing position. Although Walter is always well behaved, his massive size (perhaps in combination with Gus’s) makes many of Gus’s classmates and faculty uncomfortable. (For instance, one of Gus’s TAs reports feeling intimidated when Gus asked if it would be possible for her to hold office hours in a larger space.) Gus and Walter also tend to take up a lot of room in virtually any setting. Beyond this, Walter has a distinctive odor, which while not offensive, per se, is omnipresent in any enclosed space; Gus, of course,

is completely desensitized to Walter's aroma. It seems that one of Gus's classmates is highly allergic to dogs, which has made it impossible for her to attend class when Walter is present. Of course, they are both sophomores in a regimented curriculum that will require them to take at least 5 more classes together.

**H.** Harriet writes on her facebook page that "A-not-so-broad broad goes abroad: Going to Peru is just the jumpstart I need to bring new focus to my sense of self and well-being. I can feel Machu Picchu calling and I have begun training vigorously every day (no, not in a bad way) to prepare for living in the mountains. Escaping from my life here will be like a rebirth." Harriet has been struggling with her eating disorder since she was 14. Things had really improved during her senior year of high school and during her first year of college. She actually began to put on weight—healthy weight—after she started dating Howard during her first year of college. Unfortunately, after the summer, when Howard broke up with her early in the first semester, her self-doubt began to return and she spiraled out of anorexic control. She had to be hospitalized and has since been using both counseling and pharmaceutical therapies. She began to make some progress toward stability during second semester and she applied (and was accepted) to an anthropology study abroad program in Peru. During one of the study-abroad pre-meetings, someone who knew of her condition noticed her in the room and followed up with the study-abroad program leader to express his concerns about Harriet's well-being and readiness for study-abroad. The program leader reviewed her application; Harriet had checked the box that said "I do not have any mental or physical issues that would prevent my full participation in my program" and she had passed her physical, according to the campus health service. The program leader had already lost two good host sites recently because he had sent students with complications to those sites. He had genuine concerns both for Harriet and for the relationship with host site in Peru.

**I.** Isaac had been viewed as odd ever since arriving at Rural University in the fall. He dressed in peculiar clothing, often wearing getups that, while not necessarily "inappropriate," were clearly out of synch with the given context—for instance, one week, he dressed as a different one of the Village People each day. (Though, when he dressed as the "Indian Chief" it did not sit well with the Native American community and there were some taunting and threats made against him; in response he merely sang Village People songs, both popular and obscure.) His roommate asked to transfer out of their room within the first week. He said that Isaac gave him the creeps because he talked to himself incessantly, had huge posters of hamsters, and spent hours and hours playing with Star Wars Lego,

which he would talk about as if what he had created with it were real. The roommate reported that Isaac only seemed to sleep about 4 hours each night and that he seemed fixated on the moon, which he referred to as the “Death Star.” After the roommate left, some of Isaac’s residence hall neighbors reported that would occasionally open his window and sing to the moon. Despite being peculiar, Isaac was an outstanding student, brilliant. His faculty reported that Isaac possessed a rare genius and insight that was, unfortunately, festooned with an unnerving quirkiness. During his sophomore year, Isaac returned from the shower, late one Saturday evening, to find some of his drunk floor mates dismantling his Lego creations. Isaac removed the towel from around his waist and began to wield it, totally naked, as if it were a “lightsaber.” He engaged in an expressive array of acrobatics all the while singing the music from Star Wars interspersed with imitative lines from the movies. Although he never touched any of the men who had invaded his room, he “freaked them out” as he did the RA who came along to find a nude Isaac shouting like Darth Vader and doing back flips in front of a group of cowering drunk men. She—the RA—called the residence hall director who escorted Isaac to remote guest housing, where they have asked Isaac to stay for the duration of the weekend, “for the safety of the community” and until they can call a specialist in from the city to analyze him.

**J.** Junji discovered his dyslexia in the 2<sup>nd</sup> grade; actually it was the school specialist who diagnosed it. But, ever since that time, Junji had been committed to a deliberate and conscious approach to his learning. His approach was remarkably effective; he became a master of time management. And while some things took him longer, he just learned to plan around how long things would take him and manage around it. With the appropriate accommodations, he excelled in school. Both his parents were college professors, and Junji wanted that life for himself. With a firm trajectory, a digital Franklin planner, and constant access to adaptive technology, he almost sailed through high school and college. Now in graduate school, he was adapting to life as a doctoral student. As a teaching assistant in his program (which is what paid for his program, housing, and spending money), he was a member of the Student Teaching Union. The STU contract had strict rules about the number of hours teaching assistants could work in a week and the University would be in breach of the contract if it gave teaching assistants more work than could be completed in 15 hours. The week that the department found out that Junji was spending about 25 hours a week between his teaching and grading papers, so did the STU.