

**CURRENT DISABILITY LAW ISSUES AFFECTING
THE ADMISSION AND INSTRUCTION OF STUDENTS**

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February 14, 1995

16th LAW AND HIGHER EDUCATION CONFERENCE

(c) Laura F. Rothstein
University of Houston Law Center
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I. LEGAL REQUIREMENTS

A. Americans with Disabilities Act, 42 U.S.C. §§12101 et seq. prohibits discrimination on basis of disability in employment (Title I), by state and local agencies (Title II), and by public accommodations (Title III).

B. Regulations for major areas are as follows:
(It is highly recommended that commentary found in the Federal Register be reviewed as it provides guidance into interpretation of the regulations.)

State & Local Government Services -- 28 CFR Part 35
56 Fed. Reg. 35694-723 (July 26, 1991)

Public Accommodations -- 28 CFR Part 36
56 Fed. Reg. 35544-691 (July 26, 1991)
Includes ADA Accessibility Guidelines

Transportation (Mass Transit) -- 49 CFR Parts 27, 37, and 38
56 Fed. Reg. 45584-778 (September 6, 1991)

Accessibility Guidelines for Buildings & Facilities
36 CFR Part 1192
56 Fed. Reg. 35408-456 (July 26, 1991)

C. Section 504 of the Rehabilitation Act, 29 U.S.C. §794 prohibits discrimination on basis of disability by programs receiving federal financial assistance. §504 will provide precedent for ADA judicial interpretation.

1. Most university have been subject to Section 504 for some time.
2. Model regulations for Section 504 are found at 46 Fed. Reg. 40686 (August 11, 1981). See also 34 CFR §§104.41-.47 (Postsecondary Education)
3. Many states also provide for nondiscrimination on the basis of disability in programs controlled by state governmental agencies. These are not preempted by the ADA.

II. KEY CONCEPTS

- A. Equal opportunity - not just equal treatment
- B. Integration - most integrated appropriate setting - 42 U.S.C. §§12182(b)(1)(A)(ii), (B)
- C. Reasonable accommodation required - 42 U.S.C. §§12102(a), 12111(8), 12112(5)(A), 12131(2), 12183(b)(2)(A)(ii)

- D. Undue burden is a defense - 42 U.S.C. §§12111(a), 12143(c)(4), 12181(9), 12182(b)(2)(A)(ii)-(iv)
- E. Student must be "otherwise qualified"

III. WHO IS PROTECTED

- A. Both ADA/504 apply to those with physical or mental impairments that substantially affect major life activities, those with records of such impairments and those who are regarded as so impaired. 42 U.S.C. §12102(2); 29 U.S.C. §706(8)(B)
- B. ADA also protects those with "associational disabilities", i.e., those who are associated with someone protected under the definition; ADA and §504 also specifically exempt several categories of individuals including transvestites, homosexuals, bisexuals, transsexuals, pedophiles, exhibitionists, voyeurists, those with gender identify disorders not resulting from physical impairments, compulsive gamblers, kleptomaniacs, and pyromaniacs. 42 U.S.C. §§12114, 12208, 12211; 29 U.S.C. §706(8)(E)&(F)
- C. Individuals with **contagious or infectious diseases** (such as AIDS or HIV infection) are covered under both statutes, but to be otherwise qualified the individual must not pose a direct threat to the health or safety of others. 42 U.S.C. §12113(d)(2); 29 U.S.C. §706(8)(D)
- D. With respect to **alcoholics or drug abusers**, §504 does not protect those whose current use prevents them from performing the job duties or who are a direct threat to others. Although this refers to employment, the same standard probably applies to students. 29 U.S.C. §§706(7)(C)
- E. The ADA applies a similar definition and clarifies that one currently engaging in the use of illegal drugs is not protected. 42 U.S.C. §12113(a)

IV. ENFORCEMENT AND REMEDIES

- A. Immunity -- States are not immune from actions under either the ADA or Section 504.
- B. Enforcing Entities -- ADA and Section 504 provide for both governmental and private enforcement. The Justice Department is the lead agency for enforcement, but there are eight other federal agencies with jurisdiction.
- C. Remedies -- Both ADA and Section 504 can include equitable damages, injunctive relief, reinstatement, Civil Rights Act of 1991 remedies will apply for employment depending on workforce size (including compensatory and punitive damages), and attorneys' fees. "Good faith" efforts will probably be a defense in most cases involving monetary claims.
Title II incorporates §504 remedies.

V. AFFECTED ACTIVITIES FOR STUDENTS

- A. Admissions
 - 1. Colleges must be sure that they do not discriminate in admissions in the recruiting, application, testing, interviewing, and decisionmaking processes.
29 U.S.C. §794; 34 C.F.R. §104.42; 42 U.S.C. §§12101 -et seq.

2. Admissions criteria

Should watch out for use of standardized and other eligibility criteria that tend to screen out individuals with disabilities.

OCR indicates that "flagged" scores from standardized testing services are permissible so long as they are not the sole criteria for admission.

OCR indicates that it is impermissible to discount standardized test scores taken under accommodated circumstances.

OCR has been astute at evaluating complaints by applicants and determining that they were not otherwise qualified.

3. Recruiting activities should be in barrier free locations.
4. Should not make preadmissions inquiries on application questions.
5. Designate person and/or title of individual responsible for disability matters.

Doe v. Washington U., D'Amico, Halasz, Morse, Pandazides, Wynne,
(case against Case Western Medical School)

B. Programs and services for enrolled students

1. Academic programs, athletics, counseling & placement, financial aid, health and insurance activities, extracurricular activities.
2. Accommodations such as exam modifications, courseload modifications, course waiver, auxiliary aids & services, barrier removal, adjustment of policies and procedures may be required in order to meet the nondiscrimination mandate in providing these services.
3. Not required to make fundamental alterations. Probably in most cases colleges will not be required to provide tests in formats other than multiple choice and will probably not be required to waive courses. Burden will initially be on institution to justify the requirement.

D'Amico, Indiana Dept. of Human Services, McGregor, Morse, Pandazides, Wood, Wynne

C. Physical facilities

1. Housing, transportation, off campus programming.
2. Both Title II & III of ADA require barrier removal. Title II requires that a self evaluation and making program as a whole accessible; Title III requires barrier removal to the extent it is readily achievable.
3. Care must be taken that off campus events (such as rental of sports arenas, etc.) as well as allowing outside vendors (such as a bookstore or fastfood chain) on campus take into account accessibility issues.

4. Students with disabilities should be included in random roommate assignments

Coleman, Madsen, (Complaint against George Washington)

D. Student records

In light of the sensitive nature of disability issues (AIDS, substance abuse problems, epilepsy, etc.), it is particularly important that confidentiality requirements are strictly adhered to.

VI. AREAS OF PARTICULAR CONCERN

A. Admissions and Accommodation of Learning Disabled Students

1. The number of LD students in higher education is increasing significantly.
2. Can they be required to take standardized admissions tests? Probably in most cases.
3. How can it be determined that they are otherwise qualified? It is acceptable to require appropriate documentation and make student pay in cases such as learning disabilities and health impairments where disability is at issue.
4. Can documentation be required? Yes. Who pays? Usually the student.
5. Procedure for accommodating the enrolled LD student. Campus policies should make clear the process for requesting accommodations and resolving disputes. Expert documentation should clarify what accommodations are appropriate. Whether colleges can mandate special programming and make students pay who are conditionally admitted is up for debate. (See Justin Fruth v. NYU litigation)
6. What about student who "flunks out", then discovers a learning disability? No clear judicial guidance. May depend on whether student knew of disability, failed to request accommodations, etc. Riedel
7. What if student's behavior results in disciplinary action, must student be given a second chance?

May depend on seriousness of behavior, how many times it occurred, was damage to property, to safety of others, unduly disruptive.

B. Cost Issues Related to Auxiliary Services

1. Who pays? School pays or facilitates unless it can show undue burden. Recent developments relating to state voc rehab and graduate school may be helpful.
2. What procedure for evaluating eligibility? Whatever procedure is used, it should be communicated to the student.
3. State voc rehab and other resources -- recent litigation may provide support for state voc rehab funding
4. Can cost be a defense? Probably, the real question is whether a college wants to have its discretionary budget examined by the courts and opposing counsel (and the media and the public)

5. Personal services not required -- i.e., assistant to push wheelchair, individual tutors.

C. Preadmissions Inquiries

1. Can applicants be asked if they have a disability? Not unless applicant is applying for special program for students with disabilities.
2. Are any other types of questions impermissible? Questions that tend to relate to disabilities are problematic, such as "have you ever had psychological counseling?"

Questions relating to conduct, behavior, and discipline are appropriate and relate to the issue of concern. Mental health history questions may be a deterrent to treatment.

See mental health questions by medical boards and boards of bar examiners.

D. Confidentiality Issues

1. To whom can the disability disclosed? Those with need to know. Questions about how records should be kept are somewhat unresolved by the courts.
2. Transcript notations? No. Not unless all adjustments are noted on transcripts, otherwise it is discriminatory. Reasonable accommodation should not provide unfair advantage, thus the notation should be unnecessary.
3. Sensitivity of faculty access to records. There is a need to educate faculty members about the concerns in this area.
4. Certification to licensing boards. Programs such as law schools, medical schools, etc. face unique concerns about verifying character and fitness and may have special problems with records indicating disability concerns, such as mental impairments, substance abuse, etc.

Rothman

E. Physical Barriers - Academic Programming; Housing; Transportation; Off Campus Activities

1. Self evaluation requirements - should have been done by now AND a plan for implementation. A good faith effort in this regard may be helpful in litigation.
2. Must accessible housing be provided? If housing is provided to other students, a choice of types of housing (accessible) would be required.
3. What is required for campus bus systems under the ADA? New vehicles must be accessible to and usable by individuals with disabilities under the ADA and colleges contracting with outside providers need to ensure that these providers comply with the ADA. 42 U.S.C. §§12141-12155; 27 C.F.R. §37.25.
4. Where can activities such as externship placements, social events, athletic events, etc. be scheduled? It is unlikely that all outside placements must be accessible, but those placements should be in compliance with the ADA, and college should ensure reasonable access in program as whole.

Colleges are at serious risk of liability if they schedule social and athletic events at inaccessible locations.

F. Students with Mental Impairments Including Alcohol and Substance Abuse

1. Is there any way to know there is a problem student in the application process? Application questions should probably only go to behavior and conduct, not to status or treatment or history. Should there be? This is for Congress to debate.
2. Procedural safeguards and balancing with safety issues? Those dealing with students need to be educated on the ADA/504 obligations involving expulsion and other disciplinary measures relating to individuals with disabilities (including mental disabilities and contagious diseases). Park
3. Importance of confidentiality
4. Reasonable accommodation requirements
5. Certification to licensing boards
6. Are certain conditions even covered? Chronic lateness, post traumatic stress disorders, obesity, temporary disabilities, pregnancy?

G. Students with Contagious and Infectious Diseases

1. Issues of being "otherwise qualified"
2. Direct threat to others/duty to warn?

Doe v. Washington University

H. Burden of Proof and Deference to Higher Education Issues

1. Standard of deference to colleges still stands -- particularly w/ re: academic standards
2. Colleges must demonstrate effort in evaluating the issues

VII. RECENT CASES OF INTEREST (cases reported in 1991, 1992 and 1993, - alphabetical order)

Coleman v. Zatechka, 824 F. Supp. 1360 (D. Neb. 1993) - Orthopedic impairment/ADA & §504/housing

Student with an attendant who visited three times a day and needed more than half the room did not make her ineligible for random roommate assignment in dorms; ADA violation found; compensatory damages of \$1,000 ordered under §504 for compensatory damages for feelings of isolation and segregation, court noting it is unclear whether such damages are available under ADA; costs & attorneys fees awarded under §504 & ADA policy must be amended

D'Amico v. New York State Board of Law Examiners, 813 F. Supp. 217 (W.D.N.Y. 1993) - Visual/§504/test accommodations

Preliminary injunction requiring that bar exam be given over four days, six hours/day plus one hour for lunch, plus original accommodations, for individual with several visual impairment.

Doe v. Washington University, 780 F. Supp. 537 (N.D. Ill. 1993)

No §504 violation by college that disenrolled an HIV positive dental student, decision was academic, not medical. Deference to institution.

Fischer v. Case Western Reserve University Medical School,

Case Western University Medical School ordered by court to admit blind woman to medical school. Case brought under both Ohio State law and federal law. Appeal is likely. See Jaschik, "Case Western U. Told to Admit Blind Woman to Its Medical School," Chronicle of Higher Education (Jan. 5, 1994)

Halasz v. University of New England, 816 F. Supp. 37 (D. Me. 1993)

- Learning disability & Tourette's syndrome / §504 / accommodations, preadmissions inquiry, otherwise qualified

Student with learning disability and Tourette's Syndrome was denied admission as a transfer student because he was not academically qualified; special separate program for those below required GPA was available for L/D students as a first year option "qualifier" program; students regularly admitted who were L/D received support services, but "special" students in FYO program had to pay for each service used.

HELD: No §504 violation in denying him admission initially; no §504 violation to consider SAT scores (student chose to submit unaccommodated test score); school's record showed it did not discriminate against L/D students; they accommodated in admissions process by considering untimed tests and performance in other special L/D programs; special FYO programs are not required by §504; rational academic reason for higher standard for FYO than regular program (lighter loads and differences in level of courses taken); no harm by failure to designate coordinator and to provide nondiscrimination statement); no violation based on preadmissions inquiry because of nature of program requiring it).

Indiana Department of Human Services v. Firth, 590 N.E.2d 154 (Ct. App. Ind. 1992) deaf/Rehabilitation Act/eligibility for services

Deaf law student seeking voc rehab services for interpreter had attempted job search after college without success.

Voc rehab evaluated him and provided him with interpreter who was not satisfactory; more highly qualified interpreter would be too costly for them to pay; he sought higher cost interpreter, books, tuition, etc.

Voc rehab eligibility requires that support be needed for "employability"

The handicap must impede occupational performance by "preventing from obtaining, retaining, or preparing for employment consistent with [one's] capacities and abilities."

HELD: He is eligible for voc rehab services; remanded for determination on reimbursement for expenses already incurred.

Madsen v. Boise State University, 970 F.2d 1219 (9th Cir. 1992) - orth/\$1983/Parking and standing to sue

Student who had never actually applied for free handicap parking permit lacked standing to challenge university's policy -- there were not free handicap spaces; but there were free spaces for non-handicapped; requiring application would have allowed university opportunities to adjust policies; no evidence that application for waiver would have been futile.

McGregor v. Louisiana State University Law Center, 3 F.3d 850 (5th Cir. 1993)

Fifth Circuit, while finding that LSU Law School's policy of not allowing part-time enrollment as an accommodation for someone with a disability is strict, found the policy to be legal, holding that this was an academic decision that universities are entitled to make. Suit brought under §504.

See also Chronicle of Higher Education, October 13, 1993, p. A24.

Morse v. University of Vermont, 973 F.2d 122 (2d Cir. 1992) - hypothyroidism/\$504/academic qualification

Student did not complete Master's Program in counseling within required five years and was dismissed. Statute of limitations (based on state personal injury statute) began to run at latest when university withdrew its offer of readmission when she declined stating that the conditions were unacceptable. She waited six years to begin her suit, and three year statute had run.

Pandazides v. Virginia Board of Education, 804 F. Supp 794 (E.D. Va. 1992) - L/D/\$504/exam waiver & accommodations

Claimed mental condition and learning disability (ADD in auditory modality)

Teacher who could not pass national teacher competency exam was not handicapped; no evidence of L/D; alleged L/D was not in nationally recognized directory of mental illnesses; she was not otherwise qualified (ETS had made reasonable accommodations; unlimited time not a reasonable accommodation because similar modifications could not be expected in the job of teaching; listening skill important to classroom; poor teaching evaluations; core teacher tests had been evaluated and validated; she had requested exemption from one of the competencies (communication related to listening to tape)

Park v. University of North Carolina, No. 93-750-CIV-5-D (E.D.N.C. 1993)

Preliminary order to readmit student who was diagnosed as having bipolar manic disorder after she was suspended for disruptive behavior.

Riedel v. Board of Regents, No. 93-2117-GTV, 1993 U.S. Dist. W.L. 500892 (D. Kan. 1993)

Former medical student could not challenge academic dismissal two years after failing the National Board Exam when she was diagnosed with a learning disability.

Rothman v. Emory University, 828 F. Supp. 537 (N.D. Ill. 1993)

Denial of motion to dismiss law school graduate's claim under ADA and §504 that law school's reporting of his behavior and conduct to the state board of bar examiners was discriminatory because he attributed his difficulties to "chronic epilepsy." Merits of claim not yet decided.

Wood v. President & Trustees of Spring Hill College, 978 F.2d 1214 (11th Cir. 1992) - schizophrenic/§504/discrimination by hostile treatment claim

Student who was schizophrenic was erroneously admitted to college (did not meet GPA); she withdrew claiming hostile treatment; college suggested she take remedial courses, but had not withdrawn its acceptance; no §504 claim; if there were, damages would only be available for intentional discrimination

Wynne v. Tufts University School of Medicine, 976 F.2d 791 (1st Cir. 1992) & 932 F.2d 19 (1st Cir. 1991) - L/D/ §504/test accommodations and otherwise qualified

Not providing standardized test in different format did not violate §504; standard for determinint reasonable accommodations:

If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program lateration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.

Bad faith or pretext could justify further fact finding.

EARLIER CASES AND FULL DISCUSSION OF THE ADA AND SECTION 504 ARE FOUND IN:

DISABILITIES AND THE LAW, by Laura F. Rothstein, published by Shepard's/McGraw-Hill (1992 and cumulative supplements). This is a revised edition of RIGHTS OF PHYSICALLY HANDICAPPED PERSONS (1984 and cumulative supplements), and includes a comprehensive and annually updated overview of all disability rights requirements. It includes a comprehensive citation to §504 caselaw which will be the basis for ADA interpretation. Chapter 7 discusses higher education. Separate chapters address issues of substance use and abuse (Chapter 15) and contagious and infectious diseases (Chapter 16).

See also

Rothstein, Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities, 17 JOURNAL OF COLLEGE & UNIVERSITY LAW (1991)

Rothstein, Section 504 of the Rehabilitation Act: Emerging Issues for Colleges and Universities, 13 JOURNAL OF COLLEGE & UNIVERSITY LAW 229 (1986)

Rothstein, College Students with Disabilities: Litigation Trends, 13 REVIEW OF LITIGATION (published by University of Texas Law School) (1994)

Most important earlier cases are (in alphabetical order):

Anderson v. University of Wisconsin, 841 F.2d 737 (7th Cir. 1988) - alcoholism and accommodation of law student

Doe v. New York University, 666 F.2d 761 (2d Cir. 1981) - mental impairment and medical student

Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988) - qualification of optometry student with retinitis pigmentosa

Pushkin v. Regents of University of Colorado, 658 F.2d 1372 (10th Cir. 1981) - person with multiple sclerosis should not be presumed unqualified based on incorrect assumptions or inadequate factual grounds

Schuler v. University of Minnesota, 788 F.2d 510 (8th Cir. 1986) (test phobia; not otherwise qualified)

Southeastern Community College v. Davis, 442 U.S. 397 (1979) - definition of "otherwise qualified"

United States v. Board of Trustees of University of Alabama, 908 F.2d 740 (11th Cir. 1990) - cannot charge on ability to pay basis for auxiliary services

TECHNICAL ASSISTANCE

Higher Education and Training of the Handicapped (HEATH), a program of the American Council on Education, clearinghouse for information on individuals with disabilities in higher education
One Dupont Circle, NW Suite 800
Washington, DC 20036
(800)544-3284 (Voice/TDD)

Association on Higher Education and Disability (AHEAD)
P.O. Box 21192
Columbus, Ohio 43221-0192
(614)488-4972 (Voice/TDD)

Task Force on AIDS, American College Health Association
15879 Crabbs Way
Rockville, MD 20855
(301)963-1100



APPENDIX A

ADA COMPLIANCE
Tasks for University Administrators

prepared by Laura F. Rothstein

(c) 1993

- 1) General
 - a) Do a self evaluation and prioritization plan (this was to have been done by January 26, 1993) (whether you're required to or not)
 - b) Involve disabled students, faculty, and staff in completing the self evaluation if it has not been done.
 - c) Share relevant self evaluation information with appropriate staff and with the faculty
 - d) Learn who in the university has been designated to coordinate ADA compliance and who on campus handles services for disabled students - make contact with those individuals and consider training sessions

- 2) Faculty
 - a) Essential requirements for appointment, retention, promotion, and tenure should be evaluated for validity and clearly designated in initial appointment letter and subsequent communications with each faculty member
 - b) Reasonable accommodations must be provided; procedure for obtaining reasonable accommodations should be clearly made known to faculty via Faculty Handbook, etc.
 - c) Grievance procedure to resolve disputes should be in place and communicated to faculty members
 - d) Questionnaire/memorandum could be sent to faculty members each year "opening the door" to request reasonable accommodations (Note that faculty members who were not disabled when hired may have become disabled; keep in mind health impairments and substance abuse problems)

- 3) Students
 - a) Faculty and staff should be provided a sensitivity training session along with information about legal requirements by university counsel and/or campus administrators with expertise in this area
 - b) Request faculty to indicate on their syllabus and orally how to go about obtaining reasonable accommodations
 - c) Admissions materials should indicate nondiscrimination policy and where to obtain information for applicants with disabilities
 - d) Application forms should not ask impermissible questions about disabilities
 - e) Admissions professionals should have awareness about nondiscrimination on the basis of disability

- f) Student services/affairs administrators should have policies in place regarding accommodations for coursework, exams, auxiliary services, etc.; grievance procedures for disabled students; communication via student handbooks, etc. about these policies
 - g) Policies to ensure appropriate confidentiality protection for students with disabilities who wish to have these remain confidential should be in place and made known to the appropriate staff and faculty as well as to students
 - h) Process to encourage students to self identify as early as possible when accommodations are required should be developed and put in place
 - i) Record of accommodations for students should be kept to demonstrate compliance
- 4) Staff
- a) Departments and Programs should coordinate with central campus re: job definitions and accommodations for professional and support staff
 - b) Departments and programs should determine process for requesting accommodations and grievance process for resolving disputes and should communicate these policies
- 5) Architectural Barriers
- a) Ensure that individuals involved in renovations or new building projects are aware of architectural barrier requirements
 - b) Check on signage requirements
 - c) If not already done as part of a self evaluation - consult disabled students, staff and faculty about barriers and develop a plan to remedy problems
- 6) Programmatic
- a) Ensure that libraries, athletics programs, and other special programs are aware of ADA requirements and have policies for complying, providing reasonable accommodations, etc.
 - b) Ensure that on continuing education, public forums programming, alumni & development functions comply with ADA
 - c) Ensure that appropriate publications (including admissions applications materials, continuing education and other public program announcements, etc.) provide information on how to obtain reasonable accommodations -- consider developing a handbook for applicants and students