

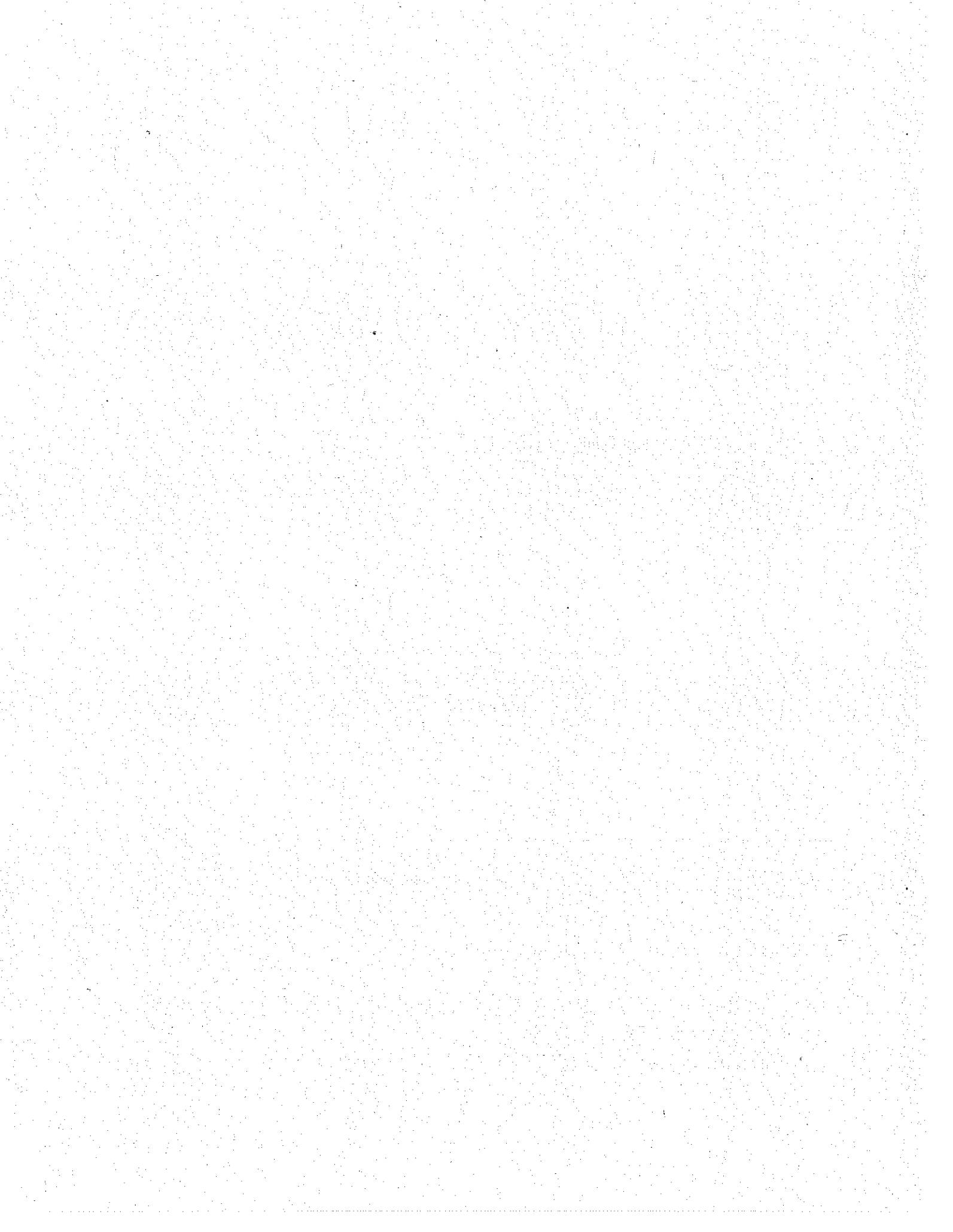
DISABILITY LAW UPDATE

Presenter:

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Stetson University College of Law:

18th ANNUAL LAW & HIGHER EDUCATION CONFERENCE
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DISABILITY LAW UPDATE

February 14, 1997

18th LAW AND HIGHER EDUCATION CONFERENCE
Stetson College of Law

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I. LEARNING DISABILITIES

A. Admission issues

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.

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

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.

Betts v. Rector & Visitors of the University of Virginia, 8 NDLR ¶309 (W.D. Va. 1996) Applicant to medical school with learning disability did not successfully complete special admission program; was accommodated during program; no ADA or §504 violation to refuse to admit him; he was not academically qualified.

University of Minnesota, 6 NDLR ¶295 (OCR 1995)

Law student was not denied admission in violation of ADA/§504. Learning disabled applicant had GPA and LSAT score considerably lower than other applicants. No applicant with both GPA and LSAT comparable to complainant was admitted. No violation to refuse to waive LSAT requirement or to refuse to upwardly adjust applicant's GPA.

B. Documentation issues

Can documentation be required? Yes. Who pays? Usually the student.

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.

C. Accommodations

Doe v. Harvard University, 5 NDLR ¶367 (1st Cir. 1994) Student did not rebut university's evidence that his learning disability had been adequately accommodated.

D. Boston University litigation

E. Readmission

What about student who "flunks out", then discovers a learning disability? Or does not make learning disability known? No clear judicial guidance. May depend on whether student knew of disability, failed to request accommodations, etc.

DePaul University, 4 NDLR ¶157 (1993) Institution must at least consider effects of disability in evaluating student for readmission.

Ellis v. Morehouse School of Medicine, 925 F. Supp. 1529 (N.D. Ga. 1996) Medical student with dyslexia was not qualified to continue. He had been given double time to take exams during his first two years, but performance deficiencies during his third and fourth year could not be accommodated. No violation of the ADA or the Rehabilitation Act.

Tips v. Regents of Texas Tech University, 921 F. Supp. 1515 (N.D. Tex. 1996). Learning disabled graduate psychology student did not make her learning disability known nor request accommodations. No violation of ADA or Rehabilitation Act in the dismissal.

II. AUXILIARY AIDS AND SERVICES

A. 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)

B. Programs abroad, off campus programs and noncredit courses

Rubin, *Students with Disabilities Press Colleges to Help Them Take Part in Foreign Study*, Chronicle of Higher Education A47 (Sept. 27, 1996)

University of California, Los Angeles, 8 NDLR ¶314 (OCR 1996)

No §504/ADA violation when student did not provide adequate notice of need for accommodation of learning disabilities for field placement work in social work program; field supervisor had not been informed of need for accommodations.

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.

C. Other issues

Murdy v. Blindness & Visual Services, 677 A.2d 1280 (Pa. Cmwlth. 1996) No violation of §504 to send blind student materials about tuition payment in print rather than in Braille. State funding agency's policy of requiring blind student to complete undergraduate studies in eight semesters not unreasonable.

Whittier College (CA), 7 NDLR ¶187 (OCR 1995)
No §504 violation where college delayed in providing auxiliary aids (notetaker and computer with spell check, etc.) to aspiring law student.

Bennett College (NC), 7 NDLR ¶26 (OCR 1995)
Waiver of math requirement not required for learning disabled student seeking BA in political science. No ADA or §504 violation.

Columbia Basin College (WA), 7 NDLR ¶188 (OCR 1995)
Title II (ADA) & §504 violated when college instructor (in good faith) went overboard in ensuring LD student understood classroom instructions. No violation in asking student to confirm in writing a decision to decline accommodations; violation by repeatedly and publicly asking student for reassurance of understanding of instructions.

Wheaton College (MA), 7 NDLR ¶330 (OCR 1995)
Requests for accommodations in course she had dropped were premature. Student sought course substitution and unlimited time.

York v. Technical College, 8 NDLR ¶60 (OCR 1995)
No §504/ADA violation when student with hearing impairment did not formally notify the college that she needed accommodations.

Temple University (PA), 8 NDLR ¶125 (OCR 1995)
No §504/ADA violation when student did not seek academic modifications for economics class until well into the semester.

III. MENTAL AND SUBSTANCE ABUSE IMPAIRMENTS

- A. 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.
- B. 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).

Importance of confidentiality

C. Conduct and behavior issues

Bolstein v. Reich, 3 AD Cases (BNA) 1761 (D.D.C. 1995) Rehabilitation Act not violated by downgrading staff attorney to GS-13 because of disability of mental depression. His disability made it impossible for him to perform the higher level analytical skills in the GS-14 position. Judge Kessler noted that

plaintiff asks that the agency free him from the precise duties--independent work and complex assignments--which justify his GS-14 grade and salary and benefits of a GS-14.

Judice v. Hospital Service District No. 1, 919 F. Supp. 978 (E.D. La. 1996) Physician who had had relapses after treatment for alcoholism was not otherwise qualified for staff privilege reinstatement.

Linson v. Trustees of the University of Pennsylvania, 8 NDLR ¶299 (E.D. Pa. 1996) (University did not perceive former graduate student as having mental disability although counseling was suggested by university officials because of unusual behavior.

Northern Michigan University, 7 NDLR ¶244 (OCR 1995) No §504 or ADA violation to place observers in classroom of student with Tourette's Syndrome to evaluate whether placement was for benefit of student.

Dixie College (UT) 8 NDLR ¶31 (OCR 1995) No ADA/§504 violation in expelling a student because of stalking and harassing a professor. Expulsion was not because of perceived mental disability but because she posed a threat.

D. Second chances

Carlin v. Trustees, 907 F. Supp. 509 (D. Mass. 1995) Genuine issue of fact regarding whether university was motivated to deny readmission based on mental disability.

Esmail v. SUNY Health Science Center, 633 N.Y.S.2d 117 (AD 1st 1995) Student's dismissal premature for failure to comply with administrative procedures; dismissal was because of drug addiction.

*Gill v. Franklin Pierce Law Center, 899 F. Supp. 850 (D.N.H. 1995) Law student was not otherwise qualified under §504. Student had not requested any accommodations. Claim that law school should have known he needed accommodations because of post-traumatic stress

syndrome resulting from being the child of alcoholic parents.

Lewin v. Medical College of Hampton Roads, 910 F. Supp. 1161 (E.D. Va. 1996). Dismissal of medical student did not violate FERPA or §504. Student failed to show dismissal was based on perceived mental disability; student had substantial academic and clinical performance weaknesses.

Sherman v. State, 905 P.2d 355 (Wash. 1995) Physician terminated from university hospital for chemical dependency.

IV. ATHLETICS

- A. NCAA Waiver of Rules
- B. Athletes with health impairments

Knapp v. Northwestern University, 8 NDLR ¶343 (N.D.Ill. 1996) Basketball player with heart condition seeking to require Northwestern to allow him to play.

Pahulu v. University of Kansas, 897 F. Supp. 1387 (D. Kan. 1995) High risk for permanent and severe neurological injury rendered college student unqualified for intercollegiate football.

V. HEALTH PROFESSIONAL PROGRAMS

- A. Admission and physical attributes

Ohio Civil Rights Commission v. Case Western Reserve University Medical School, 76 Ohio St. 3d 168 (S.Ct. 1996) Fundamental alterations to the program would be required to accommodate blind medical school applicant; admission denial not a violation of ADA).

Boyle v. Brown University, 881 F. Supp. 747 (D.R.I. 1995) No state law claim for breach of confidentiality and libel and slander in claim by medical student with chronic fatigue syndrome.

Stafford v. Radford Community Hospital, Inc., 908 F. Supp. 1369 (W.D. Va. 1995) Nurse who had suffered back injury was unable to lift; no reassignment available to accommodate her lifting restrictions.

Zevator v. Methodist Hospital of Houston, 7 NDLR ¶255 (S.D. Tex. 1995) Staff nurse with leg injury was not qualified because the physical aspects of the position

could not be eliminated.

See also Betts, *supra* Section I(A).

B. Medical students with learning disabilities

See Ellis, *supra* Section I(E).

C. Transition to the profession

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.

Alexander v. Margolis 921 F. Supp. 482 (W.D. Mich. 1995) Doctor whose license was suspended for distributing illegal drugs was not qualified because of criminal activities even if they related to his bipolar disorder.

Altsman v. New York City Health & Hospitals Corp., 903 F. Supp. 503 (S.D.N.Y. 1995) Doctor with alcohol problems not granted preliminary injunction restraining hospital from filling his position as department head.

Moran v. Chassin, 638 N.Y.S.2d 835 (N.Y. App. Div. 1996) No ADA violation when medical review board permanently barred physician with epilepsy and emotional disorder from direct patient contact.

Rothman v. Emory University, ???, No ADA violation for college to disclose behavior problems related to epilepsy to state board of bar examiners.

See also Judice and Lewin and Sherman, *supra* Section III.

VI. FACULTY ISSUES

- A. What does reasonable accommodation mean
- 1) Architectural and facility issues
 - 2) Job restructuring and similar accommodations (duty to assign to another position)
 - 3) Undue hardship -- (Administrative and Financial)
Factors: nature & cost; overall resources of program; type of program
 - 4) Safety concerns
 - 5) Must meet requirements -- misconduct and excessive absences and tardiness need not be excused (some issues of reasonable accommodation)
 - 6) Need only accommodate "known" disabilities

B. Important general practices to consider

- 1) Job descriptions at hiring stage
- 2) Documenting inadequate performance, misconduct, etc.
- 3) Process for accommodation should be clear
- 4) Grievance procedures should be clear
- 5) Family Medical Leave Act

C. Alcoholism

Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995) Football coach discharged because of egregious and criminal conduct while driving under the influence of alcohol, not because of his alcoholism.

McDaniel v. Mississippi Baptist Medical Center, 877 F. Supp. 321 (S.D. Miss. 1995) Employee not qualified when he was fired during relapse because he was no longer engaging in drug use means being in recovery long enough to have become stable.

See also Altsman, *supra* Section V(C).

D. Health problems

Horton v. Board of Trustees, 8 NDLR ¶89 (N.D. Ill. 1996). A community college professor who did not return to work after several absences due to chronic muscular headaches and stress was not qualified to perform the essential functions of the job.

Lewis v. Board of Trustees of Alabama State University, 874 F. Supp. 1299 (N.D. Ala. 1995) Librarian with kidney problems wanted schedule changed; pain and sleeplessness due to kidneys caused chronic lateness; condition covered by ADA: motion to dismiss denied)

Mobley v. Board of Regents of University System of Georgia, 924 F. Supp. 1179 (S.D. Ga. 1996) College professor wanted office moved because of air quality which aggravated her asthma.

Nedder v. Rivier College, 908 F. Supp. 66 (D.N.H. 1995) Termination of faculty member; claimed because of morbid obesity.

Redlich v. Albany Law School, 899 F. Supp. 100 (N.D.N.Y. 1995) Law professor who suffered stroke and lost all use of left hand, arm, and leg was not disabled within the Rehabilitation Act.

BIBLIOGRAPHY OF REFERENCES

I. STATUTES AND REGULATIONS

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (prohibits discrimination against otherwise qualified individuals with disabilities in programs receiving federal financial assistance). 29 U.S.C. 706(8)(C)(i) clarifies that individuals whose alcohol or drug use does not interfere with performance of the duties of the program and who do not present a danger to property or others are protected. 29 U.S.C. §706(8)(B) provides similar coverage to individuals with contagious diseases. The implementing regulations for Section 504 as it applies to higher education are found at 34 CFR part 104.

Americans with Disabilities Act of 1990, 42 U.S.C. §§12101 et seq. (expands coverage similar to that of Section 504 to much of the private sector)

Title I	Prohibits employment discrimination on the basis of disability
Title II	Prohibits discrimination on the basis of disability by state and local public entities (applies to public law schools and the boards of bar examiners)
Title III	Prohibits discrimination on the basis of disability by privately operated public accommodations in 12 categories (including places of education); would thus apply to private schools

Regulations for major areas of ADA 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.)

Employment -- 29 CFR Part 1630
56 Fed. Reg. 35726-35756 (July 26, 1991)

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

Fair Housing Act Amendments of 1988, 42 U.S.C. §§3601 et seq. (prohibits discrimination in housing based on handicapping conditions; may require new university housing to ensure reasonable access to disabled students)

Family Educational Rights and Privacy Act of 1974 (FERPA/Buckley Amendment), 20 U.S.C. §§1232g(a)-(i) (privacy protection statute, which may be of particular importance to students with AIDS or other stigmatizing disabilities)

Age Discrimination in Employment Act of 1986, 29 U.S.C. §623(a) (makes it impermissible to apply mandatory retirement to faculty members)

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.

Most university have been subject to Section 504 for some time.

Model regulations for Section 504 are found at 46 Fed. Reg. 40686 (August 11, 1981). See also 34 CFR §§104.41-.47 (Postsecondary Education)

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.

KEY CONCEPTS OF DISABILITY DISCRIMINATION STATUTES

- 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. Individual must be "otherwise qualified"

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)

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.

EEOC enforcement for Title I (employment).
- 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.

II. BOOKS AND ARTICLES

Gary Pavela, THE DISMISSAL OF STUDENTS WITH MENTAL DISORDERS: LEGAL ISSUES, POLICY CONSIDERATIONS AND ALTERNATIVE RESPONSES (1985) (discusses the issues involved with dealing with students with emotional, psychiatric, and similar problems)

Laura F. Rothstein, DISABILITIES AND THE LAW (Lawyers Coop, 1992 and semiannual cumulative supplements) (Chapter 7, Higher Education, provides a current update on the legal issues surrounding disabled students in higher education; Chapter 8, Employment, discusses issues that could relate to disabled faculty; Chapter 9, Architectural Barriers; and Chapter 10, Public Accommodations and Services)

COLLEGE FRESHMEN WITH DISABILITIES: A STATISTICAL PROFILE, by Cathy Henderson (August 1992) (published by HEATH Resource Center, a Program of the American Counsel on Education.

Ford & Strobe, The Law and AIDS on the College Campus, 87 Education Law Reporter [West] 689 (February 24, 1994)

McCusker, The Americans with Disabilities Act: Its Potential for Expanding the Scope of Reasonable Academic Accommodations, 21 Journal of College & University Law 619 (1995)

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Rothstein, College Students with Disabilities: Litigation Trends, 13 Review of Litigation 425 (published by University of Texas Law School (1994)

Ruebhausen, The Age Discrimination in Employment Act Amendments of 1986: Implications for Tenure and Retirement, 14 Journal of College & University Law (1988)

Note, AIDS: A University's Liability for Failure to Protect Its Students, 14 Journal of College & University Law 529 (1988);

TECHNICAL ASSISTANCE

Office of the Americans with Disabilities Act
Civil Rights Division
Department of Justice
P.O. Box 66118
Washington, D.C. 20036-6118
(202)514-0301; (202)514-0381 (TT); (202)514-0383 (TT)

Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20507
(800) 669-3362 (800)872-3362 (TT)

Architectural and Transportation Barriers Compliance Board
1331 F Street, NW, Suite 1000
Washington, DC 20004-1111
(800)USA-ABLE (Voice/TT)

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)

Job Accommodation Network (JAN)
West Virginia University, 809 Allen Hall
Morgantown WV 26506
304-293-7186
1-800-527-7234
Network and consulting resource about accommodations in the
workplace.

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

