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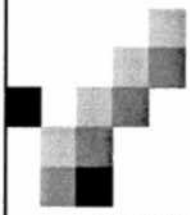

ADA & Section 504 Update: Private Post-Secondary Educational Institutions

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Americans with Disabilities Act

- Three Titles
  - Title I Employment
  - Title II State and Local Governmental Entities
  - Title III Private "Places of Public Accommodation"

ADA Title III

- "Place of public accommodation" includes:
  - Any "nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education."

ADA Title III: General Prohibition

- ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations" offered by the university.

ADA Title III: Denial of Participation

- May not deny a person with a disability "the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations" offered by the University.

ADA Title III: Participation in Unequal Benefit

- May not provide person with a disability with a benefit "that is not equal to that afforded to other individuals."

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ADA Title III: Separate Benefit

- May not provide a person with a disability a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless it is "as effective as that provided to others."

ADA Title III: Accessibility

- Must design and construction new University facilities to provide accessibility to persons with disabilities.
- Must remove barriers from existing University facilities to provide accessibility to persons with disabilities.

ADA Title III: Maintenance of Accessible Features

- Must maintain features that are required to be accessible to persons with disabilities in operable condition.
- Isolated or temporary interruptions in service due to maintenance or repairs is allowed.

ADA Title III: Reasonable Modification

- Must make reasonable modifications in policies, practices, or procedures, when necessary for a person with a disabilities, unless if making modification is a fundamental alteration.

ADA Title III: Auxiliary aids and services

- Must provide auxiliary aids and services and provide effective communication to students
- takes steps that are necessary to ensure that no individual with a sensory disability a disability is excluded because of the absence of auxiliary aids and services, unless:
  - It would result in a fundamental alteration; or
  - Impose an undue burden *i.e.*, significant difficulty or expense.

ADA Title III: Auxiliary aids and services

- This applies to students and their companions (e.g. parents)
- Can not require a family member or other individuals provided by student to provide interpreter services

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Section 504 of Rehabilitation Act

- Applies to any educational institution that receives federal financial assistance
- U.S. Department of Education has adopted regulations implementing Section 504 and is responsible for administrative enforcement
- Similar requirements to those imposed by ADA

Pre-Admission Inquiries

- May not make disability related inquiries of applicants during admissions process
  - Applications
  - Interview questions
- Self-disclosure
  - An applicant may self-disclose a disability or medical condition, but university may not make admission decision based upon information received through self-disclosure

Pre-Admission Inquiries

- **West Georgia College**, Case No. 04-94-2192 (OCR Region IV 1995) (nursing program unlawfully required completion of pre-admission health form)
- **Loma Linda University (CA)**, Case No. 09-97-2012, 11 NDLR ¶ 367 (OCR Region IX 1997) (committee impermissibly discussed applicant's hearing impairment during interview; permissible only when applicant initiates discussion)
- **Arkansas Baptist College (AR)**, Case No. 06-99-2090, 19 NDLR ¶ 61 (OCR Region VI 1999) (neither the Rehabilitation Act or the ADA prohibits preadmission inquiries about an applicant's illegal use of drugs or excessive use of alcohol)
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- **University of North Carolina at Greensboro**, Case No. 04-94-2143 (OCR Region IV 1995)(upholding applicant's rejection for failing to provide psychiatric documentation of disability-related criminal misconduct)

Post-Admission Inquiries

- University may make limited disability related inquiries after student admission for legitimate non-discriminatory reasons
  - Requests for accommodation/modification
  - Emergency health information
  - Conduct which demonstrates an inability to meet educational criteria or direct threat to the health and safety of others

- **Three Rivers Community College (MO)**, Case No. 07-99-2085, 19 NDLR ¶ 60 (OCR Region VII 1999) (upholding use of form requesting health information for emergency purposes since it was not part of the application process)
- **Ohio State Schools of Cosmetology and T.H.E. Barber School**, Case No. 05-94-2158, 7 NDLR ¶ 95 (OCR Region V 1995) (upholding post-admission use of medical questionnaire to ensure safety working with public; but application contained impermissible inquiries pertaining to applicant's conditions affecting ability to graduate or employability)

Reasonable Accommodation/Modification

- Equally applicable policy, practice, or procedure
- Disability
- Necessity
- Fundamental Alteration

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Reasonable Accommodation/Modification

- Policy, practice, or procedure
  - Course instruction
  - Examinations
  - Extracurricular activities
  - Intercollegiate athletics
  - Student Housing
  - Student employment

Reasonable Accommodation/Modification

- Obligation of student to request a reasonable accommodation/modification
  - Written
  - Verbal
  - Other means to put university on notice of need for accommodation/modification

Notice Cases

- **Smith v. University of the State of N.Y.**, 1997 WL 800882, 11 NDLR ¶ 234 (W.D.N.Y. 1997) (student's notice to academic dean late in the semester that he has clinical depression was sufficient notice to trigger right to accommodation of incomplete; student's failure to register with disability services office no bar to relief)
- **Hanlon v. Board of Regents of the University of Wisconsin System**, No. 03-2119, 27 NDLR 274 (Wis. Ct. App. 2004) (opinion unpublished) (university did not discriminate against student since it did not know or have reason to know of her asthmatic condition and need for accommodation until her second dismissal)
- **Rosenthal v. Webster University**, 230 F.3d 1363, 102 LRP 33039 (8th Cir. 2000) (university's suspension of student with bipolar disorder did not violate § 504/ADA as university had no knowledge he was disabled at time of action)

Reasonable Accommodation/Modification

- Disability
  - Physical or mental impairment which substantially limits major life activity as compared to most people in general population

Reasonable Accommodation/Modification

- Necessity
  - With accommodation/modification student is deprived equal opportunity to participate in and enjoy programs and services offered by university
  - Continuum
    - Marginal benefit v. absolute necessity

Reasonable Accommodation/Modification

- Verification/Documentation
  - University is entitled to make limited inquiry to obtain sufficient information to determine if student has a qualifying disability and actual need for the accommodation/modification
  - Student must cooperate and provide supporting documentation
  - While verification is normally provided by physician other means may be sufficient

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Verification Cases

- **Kaltenberger v. Ohio College of Podiatric Medicine,** 162 F. 3d 432, 14 NDLR ¶ 71 (6th Cir. 1998) (physician's note diagnosing student as having ADHD insufficient; independent evaluation justified when conflict in documentation; no duty to accommodate absent authoritative diagnosis)
- **LaMarca v. Capella University**, No. 05-00642 (C.D. Calif. 2007) (court rejects former student's assertion that the university was barred from requiring him to produce documentation of his alleged disability)
- **Colombini v. Members of Bd. of Directors of Empire College School of Law**, 2001 WL 1006785 (N.D. Cal. 2001) (dismissing discrimination claim for failure to produce evidence of disability; vague letters from psychiatrist insufficient)
- **Western Nebraska Community College (NE)**, Case No. 07-99-2027 (OCR Region VII 2000) (resolution agreement – if college disputes existence of disability or necessity of course substitution it may conduct own assessment at its cost)

Fundamental Alteration/Unreasonable

- **Northern Va. Community College,** Case No. 11-06-2036, 107 LRP 36680 (OCR 2006) (upholding college's determination that providing a reader for an automobile emissions inspection course final exam would fundamentally alter course objectives; exam is perquisite for becoming DEQ inspector where ability to read independently is essential function of position)
- **Florida Atlantic University**, Case No. 04-97-2032 (OCR Region IV 1997) (holding that providing assistance to help student complete essay exam constituted a personal service not required by Section 504/ADA)
- **University of Akron (OH)**, 103 LRP 11607, Case No. 15-02-2049 (OCR Region XV 2003) (upholding sociology department's refusal to honor student's request for open book, take home exam; memory and recall are essential course objectives that accommodation would defeat)

Fundamental Alteration/Unreasonable

- **Wingate University (NC)**, Case No. 04-96-2051 (OCR Region IV 1996) (upholding university general education requirement that all students take foreign language courses, regardless of disability-related difficulties)
- **Parkland College (IL)**, Case No. 05-01-2034 (OCR Region V 2001) (upholding two year college's requirement that all students seeking to transfer to four year institutions take mathematics coursework, despite student's documented learning disability in math)
- **Maczaczyj v. New York**, 956 F.Supp. 403, 11 NDLR ¶ 59 (W.D.N.Y. 1997) (upholding requirement of in-person residency; participation by phone constituted fundamental alteration of program)

Service Animals

ADA Update: "Service Animals"

- Under the ADA, a "service animal" is any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.
- Other species of animals, whether wild or domestic, trained or untrained, are not service animals.
  - * Reasonable Modification/Miniature Horses

ADA Update: "Service Animals"

- Emotional support dogs are not "service animals.
  - The provision of emotional support, well-being, comfort, or companionship is not the type of "work or tasks" considered in the ADA's definition of service animal.

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ADA Update: "Service Animals"

- Permissible Inquiries:
  - (1) whether an animal is required because of a disability, and (2) what task or work the animal has been trained to perform.
- Impermissible Inquiries:
  - The nature or extent of an individual's disability.
  - No inquiry if it is "readily apparent that an animal is trained to do work or perform tasks for an individual with a disability."
  - Proof of certification, training, or licensure

ADA Update: "Service Animals"

- A public accommodation may ask an individual to remove a service animal from the premises if the animal is out of control and the animal's handler does not take effective action to control it; or the animal is not housebroken.
- The individual must still be permitted to obtain goods, services or accommodations without the service animal.
- "Direct Threat"

ADA Update: Pools

- 2010 Revised ADA Standards set minimum requirements for making swimming pools, wading pools, and spa (pools) accessible.
- The Revised Standards were to become effective on March 12, 2012, but were postponed by sixty days for further public comment

ADA Update: Pools

- Only applies to places of public accommodation
- Does not apply to multifamily housing pools that serve only residents and their guests

Fair Housing Act

- Does it apply?
- HUD and DOJ say yes.

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