Disability Compliance for Higher Education

Successful Strategies for Accommodating Students and Staff with Disabilities

VOLUME 23, ISSUE 9 APRIL 2018

HIGHLIGHTS

OF COUNSEL

Expect courts to determine national policy on web accessibility

By Michael R. Masinter, Esq.

What obligations do schools have to make public-facing noncurricular websites with audio or visual content, including third-party content provided to the public at no cost, accessible? Past columns have noted the decision by the University of California, Berkeley, then threatened with litigation by the Department of Justice, to withdraw public access to its archived course lectures rather than spend substantial sums to closed-caption them. Past columns have also noted still-pending litigation by the National Association of the Deaf against Harvard University and the Massachusetts Institute of Technology, challenging their failure to make their similar public-facing websites accessible.

In recent months, the DoJ has added to uncertainty over the application of the Americans with Disabilities Act and Section 504 to schools' public-facing websites even as private litigation goes forward. Neither the original

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STUDENT SUPPORT

Help students in their career search

By Elizabeth C. Hamblet

Our students use our accommodations and services to be successful in the classroom. It makes sense that they can benefit from our collaboration with career services and other departments, too.

As Spencer Scruggs, disability specialist at Florida State University, notes, there is increasing pressure on many institutions to improve career outcomes for graduates. This could be a great "in" for disability services staffers to approach career services and offer to help — to everyone's benefit!

One way to do this is to suggest how career services can make its materials and programs accessible. Cherise Frost, disability specialist at Wayne State University; Margaret Camp, director of student accessibility services at Clemson University; and Scruggs offer their ideas, including:

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DOI: 10.1002/dhe

Help students transition to college

By Joan Hope, Ph.D., Editor

Getting students off to a good start can be key to retaining them. Andrew Zeisler, director of the J. Scott and Susan MacDonald Miller Center for Student Disability Services at Miami University in Ohio, explained strategies his office uses to help students make the transition.

Q How do you help prospective students understand what to expect at Miami?

A We recently redid our website with a focus on user-friendliness. It includes a student spotlight and helps prospective students be aware the center is here for them.

The Office of Admissions is in the same building as we are, and we have a strong partnership, so it's easy for them to refer students to us. We have an open-door policy, which means someone is available to speak with prospective students.

We attend Make It Miami days, one of the main pushes for accepted students, to speak with students and families. We tell students that when deciding where to enroll, they should consider whether it's clear that disability services is an important part of the institution.

We also attend the 16 orientation sessions for entering students where we are available at the resource fair and show students how to register with our office. We offer an orientation session for students and parents, and there's information in the backpack every student receives that explains what the center does, how to register, and more.

Q Once students arrive on campus, how do you help them get off to a good start?

A During the first week of classes, we have welcome sessions and walk-in hours, and students can include their parents. We introduce Students Accessing Miami, our online system where students can apply for accommodations, upload documentation, and perform other tasks.

The Student Disability Advisory Committee provides a mentoring program. First-year students can be paired with more advanced students. S-DAC also sponsors coffee and conversations that faculty members are invited to attend.

We partner closely with the Rinella Learning Center, which has academic coaches and learning specialists.

Even the physical space the Miller Center occupies is designed to make students feel welcome. The lobby is decorated with art provided by local associations that serve people with disabilities. There is a hot beverage station where students can get coffee. Water and a free printing station are also available.

And it's important to have a sense of humor and enjoy what you do. When students see you are having fun, they don't feel like a burden.

For more information, you may email Andrew Zeisler at andrew.zeisler@miamioh.edu. ■

Disability Compliance for Higher Education

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ADA nor its 2009 amendments, nor ADA or Section 504 regulations specifically, address website accessibility. Although the Obama administration DoJ first proposed developing website accessibility regulations in July 2010, it repeatedly postponed rulemaking proceedings, and last fall, the Trump administration DoJ canceled the years-long effort. Thus, for the foreseeable future, neither the ADA nor Section 504 regulations will provide any specific guidance respecting website access.

In the absence of legally binding regulations, schools and the DoJ formerly looked to informal guidance documents, FAQs, and "Dear Colleague Letters" issued by the DoJ or the Office for Civil Rights even though, unlike regulations, those documents were not issued through notice and comment rulemaking proceedings. However, on Nov. 16, 2017, Attorney General Jeff Sessions issued a memorandum forbidding the DoJ from issuing, or from relying in enforcement proceedings, guidance documents that have not gone through notice and comment rulemaking proceedings. On Jan. 25, then Associate Attorney General Rachel Brand followed up with a memorandum forbidding the department from relying in enforcement litigation, specifically including civil rights litigation, on guidance documents issued by all other federal agencies that did not go through notice and comment rulemaking proceedings (*see* http://bit.ly/2FkHdJU). Because no OCR or DoJ guidance documents have gone through formal rulemaking proceedings, the DoJ can no longer rely on those documents when it seeks to enforce Section 504, the ADA, or other civil rights laws.

About the author

Michael R. Masinter, Esq., is a professor of law at Nova Southeastern University and member of the legal panel of the American Civil Liberties Union of Florida. He teaches, writes about, and litigates disability rights, civil rights, and employment law cases. ■

With the DoJ now confining itself to the sidelines, private litigation will likely shape the future of the law governing web accessibility. Under the Obama administration, the DoJ filed a statement of interest in the NAD litigation against Harvard and MIT that relied on Education Department guidance documents to argue for website accessibility, but has not since intervened in the litigation. Court filings suggest the schools and the NAD may agree on a settlement in the coming months, but even should they do so, that settlement will not bind other schools.

Surprisingly, no federal appellate court has yet decided a web access case, and what little guidance can be found from federal trial courts is inconsistent, creating no guiding precedent. But that may change later this year. The U.S. Court of Appeals for the 11th Circuit has scheduled arguments for May in *Gil v. Winn-Dixie Stores, Inc.*, an appeal from a trial court judgment holding Winn-Dixie liable for failing to make its website accessible to patrons with disabilities and ordering it to revise it to comply with Web Content Accessibility Guidelines 2.0. Although the DoJ, then under the direction of the Obama administration, had filed a statement of interest in the trial court in support of the plaintiff, under the direction of the Trump administration, it has not filed a brief in the appeal, leaving to the court the determination of the principal issues Winn-Dixie has raised on appeal:

1. Is a website itself a place of public accommodation subject to the ADA?
2. If not, does a nexus between a website and a physical place that is a public accommodation subject the website to the ADA even if the public accommodation itself is otherwise fully accessible?
3. Can a court impose WCAG 2.0 as legal standards for ADA website compliance even though they were not issued or adopted by any government agency?

Because courts treat the substantive requirements of Section 504 and the ADA as identical, the forthcoming Winn-Dixie appeal may shed more light on accessibility requirements than a potential settlement in the Harvard and MIT litigation. With no prospect of congressional or regulatory action, courts will determine national policy on web accessibility. ■

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➢ Asking all students to RSVP for career services events and ask if they have any accommodation needs, to be sure that everything they need will be in place.

➢ Making sure there are handouts available at events for those with memory, attention, and processing issues — and that questions asked during sessions are repeated for those who have missed them.

➢ Getting PowerPoint presentations up online after a workshop so that those who need more time to go over them can access them on their own timeline.

➢ Connecting with the assistive technology department for assistance in making materials accessible (e.g., captioning videos and checking that printed materials are accessible to screen readers).

You can offer ideas to career services to make sure everyone has a positive experience at job fairs, Camp says. She suggests that career services professionals pay attention to the physical environment, making sure there is room for students using wheelchairs to roll up to employer tables, that signage is not in the path of travel for blind students, etc. She also recommends that employers receive some direction about how to make students comfortable, such as making sure to look at students who use a sign language interpreter (instead of at the interpreter).

The environment of the career services office itself can be a topic to discuss. Camp says her school's career services office holds events in the campus's large library where, even though students work with counselors individually, there are numerous such meetings going on simultaneously, which can be distracting and overwhelming. She advises training career services staff to notice which students seem to have tuned out (e.g., look around the room instead of at the iPad, answer "I don't know" when questioned) and to offer them a follow-up appointment in a setting that is more conducive to focusing and more comfortable.

Camp suggests looking at the intake process with your career services colleagues, too, to see what might be helpful. Instead of having to access a counselor on a drop-in basis, could students registered with disability services instead make an appointment? This way, the assigned counselor could email them ahead of time to let them know what to expect, what questions they might get asked, etc. (knowing what to expect is important for students on the spectrum and those who process information slowly). This can decrease students' anxiety and make meetings more productive.

For some students, even a career services office that addresses the needs of students with disabilities may not be sufficiently persuasive. Scruggs notes his school's career services office has not had great luck in getting students with disabilities to attend workshops. He says that his students tend to see his office as a "one-stop shop" and need encouragement to connect with resources on campus who have different expertise. They also prefer one-on-one help to group experiences. For these reasons, his office offers space where career services staff can help students work on their résumés. This both helps students to feel comfortable (by allowing them to work in a familiar environment) and helps career services staff connect with students who might not otherwise approach them.

Remember: You don't have to take over any processes for career services. Just try to find a receptive ally there and emphasize that the ideas you can offer will help that office be more effective in reaching more students and in creating better outcomes for those students.

Brianna Blaser, a counselor at the DO-IT Center at the University of Washington, notes that the center offers an online resource, "Equal Access: Universal Design of Career Services," which also offers suggestions across a range of issues career services offices should consider, such as planning and physical environment. You can see it at http://bit.ly/2GADOGz. ■

About the author

Elizabeth C. Hamblet is a learning consultant in Columbia University's disability services office. She also writes and presents regularly on the topic of transition to college for students with learning disabilities. *Contact her at* echamblet@gmail.com. ■

Submit an article

What initiatives have you developed to support students with disabilities on your campus? How do you engage the community in making the campus fully accessible and understanding disability as diversity? What challenges have you faced providing accommodations, and how did you solve them? What leadership strategies work best for you?

For submission guidelines, please contact Editor Joan Hope at *jhope@wiley.com*. ■

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Web accessibility: Not just for tech experts anymore

By Zachary W. Taylor

As many disability services providers and others in higher education already know, as of Jan. 18, 2018, Section 508 of the Rehabilitation Act of 1973 requires institutional websites to be Level AA–compliant with Web Content Accessibility Guidelines 2.0. But practitioners may feel that web accessibility is an overly difficult technological concept to understand, leaving much of the work to the web development and programming teams at their respective institutions.

About the author

Zachary W. Taylor is a graduate research assistant at the University of Texas at Austin. His work has been published by numerous education journals, with his research agenda focusing on the linguistics of higher education. *Email him* at zt@utexas.edu. ■

And although many practitioners who work regularly with students with disabilities have web accessibility at the front and center of everything they do, practitioners in other institutional departments may not be as familiar with web accessibility or might be unsure what they can do to make true web accessibility a reality. On the contrary, my recent work with the University of Texas at San Antonio's Auditing and Consulting Department has left me feeling confident that the issue of web accessibility can be solved through institutionwide teamwork, collaboration, and, yes, even more technology.

Although web accessibility has long been problematic, web accessibility software has become simpler and more user-friendly. UT San Antonio's web development team frequently uses Deque Systems' free web accessibility software tool called aXe (*https://www.deque.com/products/axe/*). Unlike other web accessibility software programs, this tool is a Google Chrome and Firefox browser add-on, meaning that once the tool is downloaded, it is embedded directly into the user's internet browser.

To analyze the web accessibility of any institutional webpage, practitioners simply need to download the browser add-on, navigate to a webpage on their website, open the add-on, click "analyze," and learn which web accessibility errors they need to address with their web development team. Even if practitioners are unsure how to fix the error, at the very least, aXe can make practitioners aware of their webpage's inaccessibility and the need to make changes.

Another option available, Tenon's web accessibility software (*www.tenon.io*) is simple to use and does not require much knowledge of web programming language. To use Tenon, practitioners need only to cut and paste the hyperlink of their webpage into Tenon's fillable form and click "analyze your webpage." After mere seconds, Tenon's software generates a downloadable Excel file of web accessibility errors that practitioners can evaluate to offer suggestions for improvement to their web development team. What makes Tenon's software especially appealing is that Tenon's error report explains — in plain English — what each error means, how to correct the error, and which WCAG standard the error is violating. However, Tenon's technology is freemium, which means practitioners need to purchase a license to regularly use the software.

As many higher education–related documents are legal in nature and thus need to be uploaded as edit-proof PDFs on institutional websites, practitioners should be aware that Adobe Acrobat Pro XI features built-in web accessibility tools to ensure that PDFs are accessible (*https://adobe.ly/2G0HTTV*). Acrobat Pro requires the PDF to be open within the program, and then the user needs only to open the "Action Wizard" under the "Tools" menu and click "Make Accessible." Without any further user input, Acrobat Pro identifies many web accessibility errors and can help produce a Level AA–compliant PDF within minutes, depending on the size of the PDF file. Practitioners across all institutional departments can fix many web accessibility errors in PDFs by running this simple check, and all without any web programming knowledge whatsoever.

Luckily for practitioners working in disability compliance, many WCAG errors are easy to fix. Many Level A and Level AA errors involve simple tasks such as adding text to an image on a website to ensure that assistive technologies, such as screen readers, can dictate what an image means for a student with a vision impairment. For this reason, coupled with the increasing simplicity of web accessibility software, disability compliance practitioners should feel empowered to share these simple, widely available technologies and encourage their use across all departments at their institution. Disability compliance is an institutional issue, not a department or office issue, and practitioners from all backgrounds can easily become "tech experts" thanks to these emergent, simple technologies. ■

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Flip, don't flop: Ensuring accessibility of the flipped classroom

By Linda Sullivan, M.A.

Health science students need solid foundational knowledge to be successful in their chosen profession. However, knowledge alone does not make a health care professional successful; there is an art to medicine as well. Artistry takes practice. In health science programs, this practice is conducted using the application of knowledge in simulated or clinical settings. In an effort to provide learners with more application time, many health science programs have begun using flipped classrooms.

About the author

Linda Sullivan, M.A., is the director of the Accessibility Services Office at Harvard University's Division of Continuing Education and ADA coordinator for the division. Her background in counseling, developmental psychology, and cognitive/education psychology informs her work in the field of disability services. ■

Within the flipped model, learners are responsible for independent content acquisition prior to their arrival at class. Learners then spend class time engaged in active learning or problem-solving. The flipped classroom model adds to existing time constraints for learners with disabilities. For learners with disabilities, additional time is often the proposed solution to exam preparation, study time, and test-taking — but extra time is not a viable solution for a flipped classroom model. For health science learners, the rapidity of information combined with the density of material makes time a precious commodity and can leave learners with disabilities struggling to keep pace.

Accessibility

For flipped classrooms, faculty work with instructional designers to develop content that captures the critical elements in the lecture. However, some course-design elements present unique barriers for learners with disabilities. For example, didactic materials are often presented online using presentation software with a vocal component embedded in the slides. If these lectures are not accessible to adaptive software, then students with learning, visual, or auditory processing disabilities may not be able to fully engage with the online component of the lesson, leaving them equally unprepared for the active learning in class.

Although this model typically includes a Universal Design component, UD is not a catch-all for all learners. In fact, disability services providers need to consider how the change in content delivery impacts the barriers to access. For example, students with chronic illnesses that wax and wane may have attendance accommodations. In didactic settings, accommodating attendance needs is challenging but often workable. In the flipped classroom model, attendance is critical, as the learning that occurs in the classroom is experiential and not easily replicated.

To best support learners in the flipped classroom space, it is critical to separate the needs of the individual in the online component compared to the physical classroom component of the course. Some general adjustments for each component are presented in the table on page 7 "Consider adjustments for flipped classrooms."

Qualified health science learners have the same potential to succeed as their peers in programs that use flipped classroom models. However, disability services providers must work with faculty to ensure barriers are removed in the online and applied components of the learning. Flipped classrooms enable future medical personnel to practice the science and hone the art of medicine in academic and experiential ways. When designed with UD in mind, cognizant of the differing needs of learners with disabilities, flipped models promote better student outcomes, strengthen skills, and improve student satisfaction with their programs. ■

About this column

Disability Compliance for Higher Education has partnered with The Coalition for Disability Access in Health Science and Medical Education to bring the readers a monthly column, which addresses the nuanced and specialized practices in this area. Each month, a guest writer from the Coalition brings tested and sage advice to the readers from some of the most experienced disability services providers in the country.

Learn more at https://www.hsmcoalition.org/ *and on Twitter:* @hsmcoalition. ■

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Consider adjustments for flipped classrooms

To best support learners in a flipped classroom, adjustments need to be made to both the online and experiential learning components of the course to accommodate students with disabilities.

Condition	Online module	Experiential learning
Reading disabilities	Check fonts Text to Voice Tech friendly Background/foreground Extended time for reading/writing Early access to materials	Check fonts Colored paper Spacing of materials Extended time for reading/writing Preview of activities
Other specific learning disabilities	Assistive tech to support student based upon functional impairment Advance access to online lecture for review	Assistive tech to support student based upon functional impairment
Attentional disabilities	Apps to control third-party sites Sitting on a yoga ball while viewing lecture Breaking large lecture into component parts	Chewing gum, fidgets
Chronic health disabilities	Multiple reviews of materials Allow multiple views of lecture Shared notes	Provide independent activities to reinforce learning Partners/groups working together Shared notes
Vision disabilities	Ensure compatibility with screen readers Tag all pictures and graphics Video description available Shared notes	In-class reader Zoom technology if warranted Post class review online to discuss visual elements Shared notes
Hearing disabilities	Captioning prior to release of video Shared notes Communication access real-time translation — if live discussion	Communication access real-time translation/assistive listening devices for classroom presentations Shared notes Assistive technology to support student based on activity

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Empower employees to step away, with the greater goal of enhancing leadership

By Stan Skipworth

News, sports scores, documents, music, television, and movies — all are instantly available. The descriptions of the very devices we choose to access these various information sources and systems highlight their speed: A computer with significantly greater memory and an enhanced processor and faster internet service create the expectation we are capable of handling greater amounts of data, will have a more enjoyable online experience, and will be more effective at work.

But these "enhancements" have a very real and compromising ulterior life. Most of us know all too well that today's tech makes it all too easy for people to contact us on a weekend and even a vacation. Our idea of needing "only a minute" to respond to a text, email, or call has an aggregating, lasting, and lingering effect. We expect to solve that inquiry from the office quickly while we're away with the family. But that immediate response reinforces (a) our availability at any time and (b) their ability to contact us. In turn, everyone at the office begins to lower the bar for what will become worthy reasons to call or email someone on vacation. As that standard slips, the vacationing employee feels it is necessary to respond to an unexpected (and typically unimportant) message that becomes detrimental to the vacation the family has waited months (sometimes longer) for. Basically, we're teaching our team the wrong thing.

And it should not be that way.

One reason this is the wrong message for the team — the best reason, actually — is that your family deserves your time, attention, and focus. You've earned that time away to be with those you love, and you owe it to them to give them your full attention while driving across the Midwest on an underused interstate highway in an overpacked SUV with a couple of kids in late July. (Let's be honest here — we're not all going to Hawaii for the next vacation, right?)

There's another important reason the expectation that vacationing employees should quickly answer emails is the wrong message, and it's about what we're supposed to be doing while we are at the office. Our responsibility as leaders is to develop, prepare, and allow our colleagues to perform at a high level when we are not there and (gasp!) *we are not accessible*.

We accomplish this process not once, but as an ongoing cycle of learning, experience, reflection, and review — and then repeating it all again every time we step away — or when *they step away*.

Consider that last point once again: Your employees deserve to be focused on their families when they are on vacation too. If we are truly investing in them the attributes of leadership, then we must be equally dedicated to providing them an illustrative and consistent model of how to purposely leave work behind so that they can enjoy time away from work.

Allowing employees to disconnect on weekends and during vacations can have a far-reaching impact. As our managers and supervisors are awarded responsibility and the expectation to succeed without us as an immediate resource, we will see those leaders demonstrate significantly new levels of trust, confidence, and an expectation of success that their direct reports will respond quite favorably to.

But it all comes back to slowing things down, not speeding them up. The slowing comes in the form of leaders taking the time to explain their vision and purpose with their managers and supervisors. In short, succession planning isn't for the end of your journey with an organization; it's for the entire journey.

What can we glean from a living expectation that employees take responsibility without our constant input? We can see organizational and personal values begin to coalesce. We can see team members seeking new standards in effort, performance, and the quality of their work. And we can see groups, units, teams, and entire organizations begin to define unprecedented value that cannot be accomplished by simply working harder. ■

About the author

Stan Skipworth is the director of campus safety at The Claremont Colleges in Claremont, California, and also serves as the legislative liaison for the California College & University Police Chiefs Association. A past president of the California Association of Councils of Governments, and former mayor and council member of the city of Corona (Calif.), he is also police chief emeritus of California State University, Long Beach. ■

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Most campuses don't track student suicides, despite increase in resources

By Halley Sutton, Assistant Editor

Most large public research institutions in the United States do not track student suicides, according to a research report issued by The Associated Press. The AP asked the 100 largest public research institutions in the country for their annual statistics on student suicide. Of those 100 institutions, only 46 reported tracking annual student suicides. Of the remaining 54 institutions, 43 did not track student suicides at all, nine were able to provide limited or incomplete data, and two did not respond to the survey.

Researchers report that this is problematic, as more and more institutions are investing in mental health resources for students, but without data about actual numbers of student suicide, it's impossible to measure how effective these new resources actually are. "If you don't collect the data, you're doing half the job. We need information in mental health if we're actually going to be able to better tailor health and healing," said Gordon Smith, a former U.S. senator from Oregon, to the AP. Smith became a suicide prevention advocate after his son, Garrett, committed suicide while in college in 2003.

Although the U.S. Department of Education asks colleges and universities to collect information on student deaths, it has no specific guidelines about the collection of information and statistics on student suicides.

Study finds tracking student suicide leads to targeting of mental health resources

Other findings and recommendations from the study include:

➢ Some of the nation's largest institutions, including Arizona State University and the University of Wisconsin, do not currently track student suicides. However, UW has committed to work on a database that would track the causes of all student deaths.

➢ While young adults in college are less likely than their peers not in college to commit suicide, they're at the age when symptoms of schizophrenia and bipolar disorder begin to appear, increasing the likelihood of suicide.

➢ Of the institutions that collect information on student suicides, 59 percent have been consistently collecting data on student suicides since 2007.

➢ Institutions that collect data on student suicides have differing policies regarding whether to count suicides that occur off campus or during breaks in instruction.

➢ Three states — New Jersey, Pennsylvania, and Washington — have pushed for formal legislation requiring institutions to collect data on student suicides, but so far, no such legislation has passed.

➢ Suicide rates nationwide are on the rise across demographics, including those aged 15 to 24.

➢ Institutions that track suicide rates are often able to use that information as a way to tailor prevention efforts. For example, Clemson University officials noticed, based on their suicide-tracking efforts, that there was an increased rate of suicide in transfer students. The institution is now redoubling efforts to connect those students with on-campus mental health services and resources.

➢ Other ways institutions have used suicide-tracking information have been to target specific areas on campus that see increased suicidal activity, for example, blocking off access to certain roofs or high-risk areas.

The Associated Press did not release the suicide rates of institutions that reported tracking them. ■

BEYOND ACCOMMODATION

New restrictions for traveling emotional support animals

Delta Airlines has announced it is tightening the regulations for emotional support animals on its flights, according to *Condé Nast Traveler*. Starting March 1, emotional support animals will have to be well-trained and properly documented in order to board flights.

At least 48 hours before boarding, passengers must provide a letter signed by a doctor or licensed mental health professional stating the need for the animal, vaccination or veterinary health records for the animal, and a signed letter stating the animal is trained to behave without a kennel.

Delta will also restrict the animals that can be brought on-board. "Customers have attempted to fly with comfort turkeys, gliding possums known as sugar gliders, snakes, spiders, and more," Delta said in a statement. ■

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AT A GLANCE

A review of this month's OCR letters

The Department of Education's Office for Civil Rights investigates complaints under Title II of the ADA and Section 504. These letters represent its findings.

OCR rulings are summarized by Aileen Gelpi, Esq.

ACCESSIBILITY

Automatic door openers must function properly, OCR says

Case name: *Letter to: Mesa Community College*, No. 08-16-2012 (OCR 04/07/16).

Ruling: A site visit by the Office for Civil Rights found various compliance issues related to dysfunctional automatic door openers and the amount of maneuvering space between one door equipped with an automatic opener and a nearby sink and paper towel dispenser.

What it means: Institutions must provide operable electronic door openers to allow students with mobility impairments access to buildings and portions of buildings with heavy doors.

Summary: The Office for Civil Rights received a complaint that entryways in Mesa Community College's art building were not fully accessible. The building was originally erected in 1982 and did not undergo any alteration to its construction related to the doors. The Ceramics Studio was added in 1987 and has undergone no renovations. Both the doors to the studio and the building must comply with the 2010 Standards for Accessible Design.

Three doors in the building are equipped with electronic door openers, one of which is an interior door. All the doors are recessed when accessed from outside, are flush with the walls, and use a closer mechanism. The outside electronic opener button of one door was not functioning during OCR's site visit. A paper towel dispenser and sink just past the door did not provide the required space of maneuvering clearance. Another door did not have a functioning electronic opener. On the third door, the electronic opener button worked from the outside, but the interior button did not function properly, OCR found.

The college agreed to voluntarily resolve the violations found during the course of OCR's investigation through a resolution agreement, and OCR advised the college that it would monitor the agreement's implementation. ■

POLICIES AND PROCEDURES

OCR identifies concerns with school's discrimination policy

Case name: *Letter to: James Madison University*, No. 11-16-2148 (OCR 10/14/16).

Ruling: Before the Office for Civil Rights could issue a decision, James Madison University entered into a resolution agreement to resolve the concerns identified by the agency with its policy and procedures for handling disability-discrimination and harassment complaints.

What it means: Providing parties in disability-discrimination complaints the ability to present evident, timely investigations and written notice to all parties are some of the essential hallmarks of a good disability-discrimination policy.

Summary: A student claimed James Madison University discriminated on the basis of her disability by failing to investigate her complaints of disability discrimination. The student, who has post-traumatic stress disorder, head trauma, and a mood disorder, filed two discrimination/harassment complaints with the Office of Equal Opportunity and Title IX, first in April 2015 and then in October of the same year.

In the first complaint, she alleged that an instructor who refused to follow her accommodation letter kicked her out of class and teased her about her grades, and that she was unable to get the needed assistance from disability services. Her second complaint alleged that a professor made fun of her disabilities in class, accused her of being dangerous, and discussed her disabilities with other students. That complaint also alleged that another professor called her "stupid" during class.

During its investigation, the Office for Civil Rights identified some concerns related to the institution's discrimination and harassment policy, including that: (1) it failed to mention that parties in a complaint would be given the chance to present witnesses and other evidence, (2) it did not provide a timeframe for the decision from the appropriate office or vice president to determine whether disciplinary action would be taken, (3) it did not specify that notice be provided in writing if a complaint is dismissed or referred to further investigation after a preliminary inquiry, and (4) it did not require that equal notice of an investigation's outcome be given to the parties in a complaint if the complaint was referred to another office for further proceedings.

The director of the Office of Equal Opportunity and Title IX told OCR that he had launched an investigation into the student's initial complaint, interviewing numerous people regarding her allegations and dismissing some. However, he did not notify the student regarding which ones had been dismissed. He also said that he treated the second complaint as a continuation of the first, and found that no discrimination or harassment had occurred. While he told OCR that he wrote a report on his findings, he could not remember to whom he provided the report, and acknowledged that he failed to give the complainant written notice of the disposition of her complaints.

In addition to the concerns with the institution's policy, OCR expressed concerns over the promptness of the institution's response, since the director issued a report of his findings a full seven months after the initial complaint had been filed. The agency also noted that the institution failed to provide it with notes from the investigation. However, prior to the completion of OCR's investigation, the university entered into a resolution agreement to resolve the issues identified during the course of the investigation. ■

HARASSMENT

OCR investigates, finds issues unrelated to complaints

Case name: *Letter to: Pontifical Catholic University of Puerto Rico*, No. 02-16-2165 (OCR 09/10/16).

Ruling: While finding insufficient evidence to substantiate a student's allegations of disability discrimination and harassment, the Office for Civil Rights' investigation found various unrelated violations.

What it means: Resolving OCR complaints early and voluntarily can help prevent findings of noncompliance, even if there is insufficient evidence to support specific allegations of noncompliance.

Summary: A complainant claimed that the Pontifical Catholic University of Puerto Rico discriminated on the basis of his disability when it failed to respond to his request for accommodations for the fall of 2015 in a timely manner, and that a professor wrongly refused to deny him the ability to record class lectures, even though he was approved to do so as an accommodation. Additionally, the student claimed the same professor made derogatory comments about his disability, and that the institution failed to respond appropriately to complaints he made to the dean and director of the College of Business Administration.

Regarding the allegation that he was not provided with accommodations in a timely manner, the Office for Civil Rights disagreed. The documentation provided by the complainant showed that he did not contact disability services until at least Oct. 14, 2015, and the office approved his request the next day.

The student provided OCR a copy of his reasonable accommodation plan, which contained a note from the professor stating that the course "is not suitable for the use of a table recorder," and that "the student must draw on the computer." However, the professor asserted that the comment was meant for disability services, not the student, and did not mean that he would not allow lectures to be tape-recorded, and a case manager told the student, after speaking with the professor, that he was entitled to use a tape recorder. Since the student was never expressly prohibited from using a recorder in the course, OCR found insufficient evidence to support the student's allegation.

As far as the harassment allegation, the professor denied ever making the comments alleged, and no witnesses could be found to corroborate the student's allegation. Thus, OCR found insufficient evidence to side with the student on this claim.

With regard to the allegation that the institution failed to respond to the student's complaints in a timely manner, OCR determined that had not been the case. It found that the university took swift action once it was notified that a problem might exist.

However, OCR did find some compliance issues. For instance, it determined that the institution did not have a designated Section 504 coordinator, that the nondiscrimination statement in the undergraduate catalog did not mention nondiscrimination on the basis of disability and did not identify the Section 504 coordinator, and that the institution lacked grievance procedures for the prompt and equitable resolution of disability-discrimination

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complaints. The university entered into a resolution agreement to remedy the violations identified by the agency during its investigation. ■

WEB ACCESSIBILITY

Preliminary investigation leads to agreement on web accessibility

Case name: *Letter to: Michigan Virtual University*, No. 15-16-2146 (OCR 10/13/16).

Ruling: The Michigan Virtual University entered into an agreement with the Office for Civil Rights to address web accessibility concerns identified during the agency's preliminary investigation into a complaint concerning its webpages.

What it means: No qualified person with a disability may be excluded from participation in, or be denied the benefits of, the services, programs, or activities offered by a public entity, or be discriminated on the basis of disability in the provision of any aid, benefit, or service, including those offered electronically online.

Summary: A complainant claimed that Michigan Virtual University discriminated because some of its webpages were not accessible to individuals with disabilities like visual impairments. The specific pages named in his complaint included the institution's homepage, help resources, contact page, a toolkit, and a consumer awareness section. This conclusion was drawn using an accessibility checker and accessibility tool.

The Office for Civil Rights conducted a preliminary accessibility review of those pages, resulting in various accessibility alerts, which pointed to issues with the skip navigation, keyboard controls, nontrivial graphics' alternate text, link labeling, and visual contrast.

Before OCR could complete its investigation, the institution expressed an interest in resolving the complaint voluntarily, even though OCR's preliminary investigation, while pointing to areas of concern, did not determine that sufficient evidence existed that a violation of Title II has occurred.

As part of the agreement, the institution stated its intention to:

- Draft and submit to OCR for review and approval a policy and/or procedure to ensure that the institution's online content is fully accessible by established accessibility standards.
- Designate at least one individual as a web accessibility coordinator and provide that person with the resources and authority needed to implement the accessibility policy.
- Develop a policy to ensure that content obtained through the web or developed by third parties for consumption by members of the campus community is accessible.
- Provide annual training on web accessibility for faculty and staff responsible for distributing online content.
- Commit to conducting accessibility audits at regular intervals under the direction of the web accessibility coordinator. ■

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AT A GLANCE

A review of this month's lawsuits and rulings

Lawsuit court records are summarized by Richard H. Willits, Esq.

DAMAGES

Judge prohibits disabled employee from recovering money damages

Case name: *Robinson v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, No. 17-6956 (E.D. La. 09/13/17).

Ruling: The U.S. District Court, Eastern District of Louisiana dismissed a suit for money damages that had been filed against Louisiana State University.

What it means: The 11th Amendment to the U.S. Constitution prevents plaintiffs from seeking money damages in suits filed against state universities pursuant to the Americans with Disabilities Act. However, such plaintiffs can sue for injunctive relief where appropriate.

Summary: In May 2011, Louisiana State University employee Clarence Robinson sustained severe permanent injury to both legs when he fell at work.

Robinson took several weeks off in medical leave pursuant to the Family and Medical Leave Act. According to Robinson, he made unsuccessful inquiries while he was at home about his medical leave status and what accommodations might work when he did return.

On July 27, Robinson submitted documentation to LSU indicating he could return to work on Aug. 1 if he were allowed to use a wheelchair.

Two days later, Chief Administrative Officer Adler Voltair gave Robinson notice that LSU was considering terminating him because all usable sick leave and FMLA leave had been exhausted.

Robinson was fired on Aug. 1, and he filed a suit for money damages that alleged LSU violated the Americans with Disabilities Act by: (1) failing to engage in an interactive discussion with him regarding reasonable accommodations, (2) discriminating against him because of his disability, and (3) retaliating against him for asking to use a wheelchair at work. He also sought an order requiring the university to engage in the interactive process.

LSU filed a motion to dismiss, arguing that the suit was barred by the doctrine of sovereign immunity.

The district judge said the 11th Amendment to the U.S. Constitution prevented a state from being sued for money damages in federal court by its own citizens, and Congress never validly abrogated that immunity with respect to ADA suits.

However, she said there was an exception to the doctrine of sovereign immunity when a plaintiff: (1) sued an individual in his or her official capacity as a state agent and (2) sought only injunctive relief.

The judge dismissed the suit. However, because Robinson had requested LSU be compelled to engage in the interactive process, she allowed him the opportunity to preserve that claim for injunctive relief by adding a state agent as a defendant. ■

RETALIATION

Court decides former prof may have suffered disability bias

Case name: *Texas State University v. Quinn*, No. 03-16-00548 (Texas Ct. App. 11/29/17).

Ruling: A Texas Court of Appeal affirmed a ruling against Texas State University.

What it means: An employee's request for an accommodation should be heeded.

Summary: In 2011, Kathleen Quinn applied to be an associate professor at Texas State University in its newly developed graduate nursing program. Her qualifications included being a licensed counselor, a registered nurse, and an advanced practice nurse. She accepted the university's offer of two one-year contracts as an "emergency hire" to teach as a clinical associate professor.

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Quinn had progressive and severe nerve damage to her hands and feet. The pain in her feet made walking difficult. She requested an accommodation, but nothing was done.

Quinn claimed she endured demeaning harassment and derogatory comments because of her disability. Although she allegedly complained to her supervisor, nothing was done.

When Texas State made the clinical associate professorship permanent in 2014, Quinn applied for the job. However, it hired a younger person who did not have any disabilities, and refused to renew Quinn's contract.

Quinn filed a suit claiming disability discrimination and retaliation. Quinn alleged that after she requested an accommodation, and applied for the permanent position, her supervisor and the nursing school dean agreed they would not allow her to teach in the nursing program under any circumstances.

The trial judge refused to dismiss the case.

Texas State filed an appeal.

Quinn argued that she engaged in protected activity when she: (1) complained to her supervisor of disability discrimination, (2) requested an accommodation, and (3) filed a charge of discrimination.

Noting that the university's decisions about Quinn were made after her complaint about disability discrimination, the court affirmed the ruling of the trial judge. ■

TERMINATION

Judge decides disability wasn't reason for termination

Case name: *Bogart v. University of Kentucky*, No. 16-cv-00255 (E.D. Ky. 12/05/17).

Ruling: The U.S. District Court, Eastern District of Kentucky granted a summary judgment in favor of the University of Kentucky.

What it means: A plaintiff suing a university for disability discrimination cannot rely on mere supposition.

Summary: Even though he took medication for his Tourette's syndrome, Adam Bogart's head shook from left to right every minute or so.

In June 2014, Bogart became a medical research lab technician for Dr. Ai-Ling Lin at the University of Kentucky. His duties included statistical analysis for a project studying the effects of calorie restriction on the brains of mice.

Shortly before August, Lin asked Bogart why his head regularly shook back and forth. Bogart responded that he had Tourette's syndrome. According to Bogart, Lin became angry and questioned why she had not been told about it during the job interview.

According to the university, Bogart: (1) erroneously mislabeled data on at least three occasions, (2) allegedly attended medical appointments without properly clocking in and out, (3) was found sleeping in the lab, (4) socially chatted during work hours, (5) communicated with a sales representative about a matter outside his job description, and (6) was not timely completing tasks even after extensions were granted.

At a meeting with Lin and two administrators in August, Bogart was informed of the areas in which he needed to improve, and was given a letter summarizing that information.

According to Lin, Bogart's performance did not improve after the meeting. She claimed he ignored specific instructions, failed to complete tasks with no explanation, ignored her when she addressed him, and spoke to her in a rude and derogatory manner.

After Bogart was fired in September, he filed a suit claiming disability discrimination.

Bogart asserted that his Tourette's must have been the only reason he was fired because: (1) Lin had become very angry when Bogart revealed his condition and (2) any dissatisfaction about his performance had been blown out of proportion.

The university filed a motion for summary judgment, arguing Bogart was fired for poor performance.

The district judge noted that after Bogart was presented with a list of several infractions in August, he failed to improve and exhibited further insubordinate behavior.

He ruled that the mere fact that Bogart and Lin had discussed his Tourette's was immaterial, even when coupled with Bogart's efforts to downplay the seriousness of his errors.

The judge ruled there was no showing that the reason given for firing Bogart was pretextual, and granted summary judgment in favor of the university. ■

ADVERSE EMPLOYMENT ACTION

Judge decides university's actions did not adversely affect employee

Case name: *Marsh-Godreau v. State University of New York College at Potsdam, et al.*, No. 8:15-CV-437 (N.D. N.Y. 11/28/17).

Ruling: The U.S. District Court, Northern District of New York dismissed a suit against the State University of New York — Potsdam.

What it means: A plaintiff suing an institution of higher learning for disability discrimination must show she suffered an action that negatively affected the conditions of her employment.

Summary: Bonnie Marsh-Godreau started working at the State University of New York — Potsdam in 1980.

She was diagnosed with depression in 2001, fibromyalgia in 2009, and bipolar disorder in 2011.

Marsh-Godreau was working as a data-entry specialist when she went on sick leave in June 2011.

Shortly after Marsh-Godreau returned in December, a supervisor required her to attend weekly meetings to review her work.

In March 2012, she discovered a memo titled "Physical and Behavioral Observation of Bonnie Marsh-Godreau" in her personnel file that had been written by SUNY's Career Planning Department in July 2011. It stated that Marsh-Godreau had exhibited "physical signs" like vacant staring and crying, and that she had difficulty completing routine tasks.

A few weeks later, her data-entry responsibilities were significantly diminished.

Marsh-Godreau filed a suit asserting violations of the Rehabilitation Act.

SUNY filed a motion for summary judgment, arguing that Marsh-Godreau had not suffered an adverse employment action.

Marsh-Godreau argued that the adverse employment actions were (1) requiring her to attend weekly meetings after returning from medical leave, (2) diminishing her data-entry responsibilities, and (3) placing a memo detailing her behavior in her personnel file.

The district judge acknowledged that Marsh-Godreau considered the weekly meetings to be unwarranted or excessive. However, he explained that excessive scrutiny did not constitute an adverse employment action.

The judge ruled that the diminishing of Marsh-Godreau's data-entry responsibilities was immaterial because the record did not reflect that it negatively impacted her work responsibilities.

The judge also ruled that the "behavior" memo was not an adverse employment action because there was no evidence it had a deleterious effect on conditions of her employment.

He granted summary judgment in favor of SUNY. ■

ACCOMMODATION

Judge decides former employee's disability claim has to go

Case name: *Watson v. Shenandoah University*, No. 17-1588 (4th Cir. 10/26/17).

Ruling: The U.S. Court of Appeals, 4th Circuit affirmed a judgment in favor of Shenandoah University.

What it means: A plaintiff who alleges a failure to accommodate must show: (1) she was an individual who had a "disability" as defined by the Americans with Disabilities Act, (2) the employer had notice of her disability, (3) she could perform the essential functions of the position with a reasonable accommodation, and (4) the employer refused to make that accommodation.

Summary: In June 2009, Shenandoah University administrator Kriesta Watson sustained a concussion, facial muscle weakness, and injuries to her back in an auto accident. However, she did not request any accommodations upon returning to work in August.

After she was terminated in 2010, Watson filed a suit that asserted several claims. One of them was a failure to accommodate in violation of the Americans with Disabilities Act.

The university filed a motion to dismiss.

The trial judge said Watson was required to show: (1) she was an individual who had a "disability" as defined by the statute, (2) the university had notice of it, (3) she could perform the essential functions of the position with a reasonable accommodation, and (4) Shenandoah refused to make that accommodation.

The trial judge ruled Watson had not shown an ADA "disability." He explained that a disability under the ADA was: (1) a physical or mental impairment that substantially limited one or more of the major life activities, (2) a record of such an impairment, or (3) being regarded as having such an impairment.

The trial judge dismissed the suit, stating there was nothing in the pleadings to suggest Watson's injuries substantially limited a major life activity. He also said there were no allegations of: a request for an accommodation, her identification of any reasonable accommodation, or Shenandoah ever regarding her as having a limitation.

Watson appealed the dismissal, and the appellate court affirmed the ruling of the trial judge. ■

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DISABILITY COMPLIANCE FOR HIGHER EDUCATION

QUICK STUDY

An overview of the key topics faced by disability services providers with citations to noteworthy cases, statutes, regulations, and additional sources.

Faculty actions toward students

Overview

Faculty members play an important role in providing accommodations to students with disabilities and providing them with support that helps them succeed. Review recent court and Office for Civil Rights rulings regarding faculty actions under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and Title II.

Key Rulings

❑ Charles Mapp, a legally blind student at City Colleges of Chicago, claimed that after asking about his visual abilities, the professor said he didn't think Mapp would be able to complete the course. Mapp dropped the course and later passed it at another institution. Mapp filed a suit claiming violations of the ADA. Stating a juror could reasonably conclude that Mapp's exclusion from the class he dropped was because of his blindness, the juror refused to grant summary judgment in favor of City Colleges. *Mapp v. Board of Trustees of Community College District No. 508*, No. 15 C 3800 (N.D. Ill. 08/25/16).

❑ Because Michael Sweeney, a graduate student at Texas State University, was legally blind in one eye, he was granted several accommodations. After Sweeney was prohibited from entering a professor's class after not completing an assignment, he filed a suit claiming disability discrimination. The judge ruled that even if an alleged incident involving the professor placing his hand over his eye really happened, it was insufficient to demonstrate that disability was a motivating factor in his exclusion from admission into the course, because it was clear that Sweeney did not respond to the professor's questions about his assignment. *Sweeney v. Texas State University*, No. 1:14-CV-910 (W.D. Texas 08/15/16).

❑ San Jose State University student Mark Ticer claimed he occasionally had difficulty delivering homework assignments on time because of a fear of people caused by his schizophrenia. Professor Gregory Young required that all homework be submitted during the first five minutes of class, and refused Ticer's request for the accommodation of delivering it by email. After taking leave, Ticer tried to re-enroll and returned to Young to request certain records. According to Ticer, Young publicly scolded him. Ticer filed a suit claiming violations of the ADA. The university argued that Ticer did not have a disability as defined by the ADA. The judge refused to dismiss the claim, stating that dealing with other people had specifically been recognized by the courts as a major life activity. *Ticer v. Young*, No. 16-cv-02198 (N.D. Cal. 09/09/16).

❑ A complainant alleged she was harassed on the basis of her disability by faculty and staff members at Weber State University. While the Office for Civil Rights waited for the university to furnish requested records, the institution expressed an interest in voluntarily resolving the allegation. As part of the resolution agreement, the university agreed to train the faculty and staff in its College of Health Professions on the requirements of Section 504 of the Rehabilitation Act and Title II. *Letter to: Weber State University,* No. 08-16-2180 (OCR 10/20/16). ■

What You Should Know

• Faculty members should not judge a student's likelihood of success based on a disability.

• Students with disabilities are expected to meet the same academic requirements as nondisabled students.

• An individual with medical condition that causes difficulty interacting with others is recognized as having a disability under the ADA.

• Staff and faculty members should be trained on their responsibilities with regard to disability laws. ■

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