

Chapter I

IDENTIFYING THE DISABLED

Overview

The number of disabled students entering postsecondary educational institutions is on the rise. A survey of first-time freshmen enrolling in 1998 found that 9% reported having at least one disability, with 41% claiming a learning disability. By contrast, a similar survey in 1978 found that only 3% of the freshmen surveyed claimed a disability, with the most common disability being “partially sighted or blind.” Not only is the number of students with disabilities increasing, the nature of the disabilities claimed has changed significantly. Therefore, it is imperative for colleges and universities to be sensitive to needs of those whose disabilities are not visible to the untrained eye. Identifying the disabled is made more difficult by the fact that the parents of the 41% claiming a learning disability in the survey mentioned above had, on average, higher income than the parents of the other students who claimed a disability. Risk factors for learning disabilities are usually associated with poverty, not affluence, leading some commentators to question the validity of a significant portion of learning disability claims.

Today’s disabled students are very aware of their legal rights, and this awareness has led to increasing levels of litigation in

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higher education. Institutions expend significant assets in accommodating disabled students. To assure that these resources are used to benefit the disabled, it is essential that college and university administrators understand the rights and the responsibilities of both the student claiming a disability and the institution. This chapter will discuss the legal environment in which postsecondary educational institutions operate with regard to students claiming a disability.

Application

DISABILITY LAWS

Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act (IDEA), formerly known as the Education for All Handicapped Children Act, requires states to provide disabled children “a free and appropriate public education.” Under the IDEA, states must ensure that all disabled students between ages 3 and 21 are located and evaluated. Schools must then develop an individualized education plan specifically tailored to each child’s particular disability.

As a result of the IDEA, however, disabled students entering postsecondary educational institutions are very aware of their legal rights and do not hesitate to demand accommodations similar to those they were granted under IDEA. This awareness has led to increasing levels of litigation in higher education.

Rehabilitation Act of 1973

Congress placed federally funded programs at the forefront of its effort to extend civil rights protections to disabled individuals when it enacted the Rehabilitation Act of 1973. Section 504 of the Rehabilitation Act contains the nondiscrimination provisions, and states that:

No otherwise qualified individual with a disability...shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...

Since nearly all postsecondary institutions, public and private, receive federal funding, they are brought within the ambit of Section 504.

Americans with Disabilities Act of 1990

The Americans with Disabilities Act of 1990 (ADA) extends the prohibition against disabilities discrimination of Section 504 to a broad range of entities that do not receive federal financial assistance. Title II of the ADA prohibits discrimination against the disabled in the provision of “public services” by state and local governments, including public educational institutions. Title III applies to “public accommodations,” which includes private educational institutions and private entities that conduct courses or provide examinations related to obtaining a professional license or certification. Religious organizations and colleges, universities and other entities controlled by religious organizations may have specific exemptions for employment and decisions and public accommodation requirements. Since nearly all religiously-affiliated colleges receive federal funding, however, they must comply with the terms of Section 504; thus the ADA exemption is of very little practical significance, except in the area of employment.

The language of Title II closely parallels that of Section 504. Title II states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” Title III differs somewhat, in that it provides that “no individual shall be discriminated against on the basis of disability in the full

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and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”

The “Otherwise Qualified” Standard

Clearly, the ADA and Section 504 provide similar protections for disabled students. In fact, a provision in the ADA prohibits courts from applying a standard that is less rigorous than standards applied under Section 504. Most courts and commentators agree that since the ADA reflects judicial interpretation of Section 504, courts will interpret the ADA in the same manner as Section 504.

Early on, in a Section 504 case, *Southeastern Community College v. Davis* (1979), the U.S. Supreme Court defined an “otherwise qualified individual” as “one who is able to meet all of the program’s requirements in spite of his handicap.” See Chapter III for a complete discussion of this case. While subsequent court decisions have added steps to the “otherwise qualified” analysis, the *Davis* definition remains the initial standard that administrators should apply in making admission and retention decisions.

Scope of Protection

One difference between the ADA and Section 504 concerns the scope of individuals protected by the statutes. The ADA protects not only the disabled persons, but also those individuals who are discriminated against because they are closely associated with or related to a disabled person. All such persons protected by the law may bring a suit based on alleged violations of the ADA. Section 504 is more limited; only the disabled person is protected and, therefore, only the disabled person may bring a discrimination suit.

“BARRIER-FREE” ENVIRONMENT

Probably the most significant difference between the ADA and Section 504 concerns what access must be given to disabled individuals. Section 504 proscribed an analysis focused on “reasonable accommodation” that was designed to give a disabled

person access to a program or activity when that program or activity was viewed in its entirety. For example, if a college offered six Creative Writing classes, the college would only have to ensure that enough of those classes were accessible so that all interested disabled students could enroll in a Creative Writing class. Five of the classes could be unaccessible as long as one class was accessible to the disabled students. Of course, this one class must offer enough seats so that all interested disabled students could enroll, and the time it was offered must not conflict with required classes so that the disabled student could never, in the course of obtaining a degree, enroll in Creative Writing.

The ADA takes a different approach that is, conceivably, both narrower and wider in scope. The ADA requires that covered entities remove barriers if removal is “readily achievable.” Whether removal of a barrier is “readily achievable” depends, primarily, on two factors: (1) the nature and the cost of the action needed to remove the barrier and (2) the overall financial resources of the entity that will have to remove the barriers.

The “readily achievable” standard creates two situations. The Creative Writing classes example illustrates these two situations. If the changes that are necessary to make the six classes accessible to disabled students are inexpensive, or if their expense is a relatively small part of the overall amount of financial resources available to the entity, then the ADA might require that all six classes be accessible to disabled students. However, if the cost is extremely high, or the cost is large relative to the financial resources of the entity in question, then the ADA may require only one or, in extreme cases, none of the barriers to the classes be removed.

Even though over ten years have passed since the enactment of the ADA, it does not necessarily follow that all U.S. educational institutions have created “barrier-free environments” on campus. A recent example demonstrates that colleges and universities have not yet achieved this goal.

A 1997 graduate of Duke University (Duke) who uses a wheelchair filed a complaint with the U.S. Department of Justice

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(DOJ) alleging that Duke had violated the ADA by failing to make its campus accessible to the disabled. As a result, and without admitting to a violation of the ADA, Duke entered into a settlement agreement with the DOJ, effective February 23, 2000.

The far-reaching agreement defined “minimally accessible building” as a building which an individual using a wheelchair can readily enter and can “navigate all or nearly all of the first floor, although other floors and elements (such as restrooms) may not be accessible. The agreement required Duke, within ten days of the effective date, to, among other things, locate all classes and other programs in which disabled students were enrolled in a minimally accessible building, unless such a move would result in a fundamental alteration of the class or program.

The agreement required Duke to complete a survey of its facilities within six months of the effective date of the agreement. Duke has agreed to implement modifications that will ensure the campus is nearly completely accessible. The time frames for completion of the modifications ranged from sixty days to five years after the DOJ’s approval of the facilities survey. The modifications contemplated by the agreement include such things as signage for the visually impaired, accessible shuttle buses, ramps, handrails, accessible gym lockers, showers and restrooms, accessible vending machines and food counters, and accessible residence halls. In addition, Duke paid \$25,000 in civil penalties and \$7,500 to the complainant.

Program Accessibility and New Construction

In addition to requiring covered entities to take the necessary action to render existing facilities accessible to persons with disabilities, Section 504 and the ADA both also contain standards for new construction. Under Section 504, buildings and other facilities constructed or altered on or after June 3, 1977 must meet accessibility standards. The ADA requires facilities constructed or altered on or after January 26, 1992 to meet the applicable accessibility standards. The standards in place for Section 504 compliance is the *Uniform Federal Accessibility Standards*

(UFAS). The applicable ADA standards are the Americans with Disabilities Act Accessibility Guidelines for Building and Facilities.

An institution that fails to distinguish between program accessibility; i.e., ensuring that existing facilities are accessible, and the standards for new construction is making a costly error. As the Office for Civil Rights stated in *California State University - L.A.* (OCR, 1997), “Buildings in existence at the time the new architectural standards were promulgated are governed by ‘program access’ standards. However, buildings erected after the enactment of the new architectural standards are strictly held to the new standards on the premise that the builder is on-notice that such standards apply. One who builds in disregard of those standards is ordinarily liable for the subsequent high cost of retrofitting.” The following case highlights that principle.

In 1997, Grand Valley State University in Allendale, Michigan, completed construction of a student housing development, Townhouse I. A complaint was filed with the OCR alleging that Townhouse I was not accessible to individuals with a mobility disability (*Grand Valley State University (MI)*, OCR, 1997). OCR found that all the entrances in Townhouse I had steps leading up to the entrance and all bedrooms were on the second floor with no elevators, ramps or other means of access for mobility-impaired students.

The University responded that Townhouse I was not required to be accessible because the University had 59 beds available for students with a mobility disability and only 1 student in its residence halls that had a mobility impairment. Confusing program accessibility standards and new construction standards, the “University asserted that it could meet the needs of potential mobility impaired students with its present dormitory rooms that were accessible to mobility impaired individuals.”

After discussing the relevant architectural standards, OCR stated, “OCR has determined that all newly constructed facilities must meet the appropriate accessibility standards.” As a result, OCR and the University entered into a settlement agreement, which required the University to construct additional townhouses

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as part of the Laker Village housing complex. The University agreed to ensure that Laker Village, which includes Townhouse I, would have an appropriate number of accessible units.

DISABILITY HARASSMENT

The Office for Civil Rights (OCR) of the Department of Education and the Office of Special Education and Rehabilitative Services marked the tenth anniversary of the ADA by sending a “dear colleague” letter to educational institutions to highlight their concerns over disability harassment. In the letter, which is reprinted in Appendix A, OCR points out that, under the ADA and Section 504, colleges and universities have a responsibility to “ensure equal educational opportunities for all students, including students with disabilities.” Disability harassment can create a “hostile learning environment” that interferes with the ability of disabled students to receive an education. A recent court decision, however, has set a high standard for a disabled student who tries to prove the existence of a hostile learning environment.

During the 1995-1996 academic year, Boston University substantially revised its policy regarding academic accommodations. Under the new policy, the provost of BU reviewed applications for accommodations. Of the twenty-eight files reviewed by the provost’s office, nearly all requests for accommodations were denied. Also, the provost, Jon Westling, in speeches delivered in Australia and Washington, D.C., referred to students with learning disabilities as “a plague” and a sign of a “silent genetic catastrophe.” Westling’s assistant also referred to students with learning disabilities as “draft dodgers.”

In 1997, Elizabeth Guckenberger and a group of students sued BU, alleging, among other things, that BU engaged in discriminatory practices against the disabled. This litigation produced four published opinions. The court addressed the allegations of disability harassment in *Guckenberger I* (1997).

The court first addressed the issue of whether a cause of action for hostile learning environment based upon disability

harassment exists under federal discrimination laws. The court held that such a cause of action does exist under the ADA and Section 504 when “harassment based on a student’s disability has ‘the purpose or effect of unreasonably interfering with [the] individual’s performance or [of] creating an intimidating, hostile, or offensive environment.’” The court also held that the standards of Title VII of the Civil Rights Act of 1964 for establishing claims for a hostile work environment apply to hostile learning environment claims based on disability harassment.

Therefore, to state a valid claim for hostile learning environment, a student must allege the following: (1) that the student is a member of a protected group; (2) that the student has been subjected to unwelcome harassment; (3) that the harassment is based upon the student’s disability; (4) “that the harassment is sufficiently severe or pervasive that it alters the conditions” of the student’s education and “creates an abusive educational environment;” and (5) that there is a basis for the liability of the educational institution. Since the court was evaluating the claim of hostile learning environment in light of BU’s motion to dismiss, the court stated that a proper evaluation of such a claim should include the “totality of the circumstances, “ including such criteria as the frequency and severity of the harassment, whether the conduct was “physically threatening or humiliating rather than a mere offensive utterance,” and whether the conduct interfered with the performance of the complaining student.

Applying this criteria to the facts of the case, the court held that the “allegations of the complaint fall short of describing an objectively ‘hostile’ educational environment for students with learning disabilities.” The court pointed out that Westling’s remarks were made off-campus and were “critiques of the learning disabilities ‘movement’ that [were] not focused on or addressed to particular BU students.” While noting that the remarks might be offensive to disabled students, the court found Westling’s remarks to be insufficiently severe, threatening or humiliating to establish a hostile learning environment.

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Following the *Guckenberger* analysis, in order to establish a hostile learning environment based on disability harassment, the alleged harassment must be severe, physically threatening or humiliating and must be specifically directed at the student or students making the allegation. In addition, the harassment must be sufficiently pervasive to alter the learning environment.

WHO IS DISABLED?

Under both the ADA and Section 504, students must demonstrate that they are a member of a protected class in order to obtain the benefits of these laws. Both laws define disability as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

While courts have determined that this list is not exhaustive, the implementing regulations for both Section 504 and the ADA have defined “major life activities” to mean functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

For what could be called easily recognizable disabilities, such as blindness or conditions that require confinement to a wheelchair, the institution’s decision to accept a student’s claim of disability is an easy one. However, it is more problematic when a student claims to have a disability that is not readily discernible. These “less visible” disabilities include such conditions as Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder (ADD/ADHD), learning disabilities, psychological disorders and chronic illnesses. Regardless of the type of disability claimed, when a student claims to have a disability and requests accommodations, it is entirely appropriate for the institution to require the student to present documentation that demonstrates that the student does indeed possess the claimed disability. The key question in reviewing a request for accommodations is whether the student