



## Technical Report: Overview of Disability Law for Higher Education

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This reference gives a brief summary of the development, and key features, of disability legislation in the United States as applied to higher education settings.

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**Section 504 of the Rehabilitation Act of 1973** was the first legislation instituted addressing individuals with disabilities' access to postsecondary education. Section 504 of the Rehabilitation Act of 1973 prohibits programs that receive federal financial assistance from discriminating against individuals with disabilities who are otherwise qualified for participation and employment in said programs (Rothstein, 2004, pp. 131-132; 29 U.S.C. § 794, 2000; 34 C.F.R. § 104(3)(1)(3)). Section 504 did not come to have a significant impact on higher education until the 1980s because of the lack of regulations before 1978, suboptimal federal enforcement, and a lack of awareness of the aforementioned regulations (Rothstein, 2004, p. 132).

The **Individuals with Disabilities Education Act** (20 U.S.C. §§ 1400-1461, 2000), or **IDEA**, was established in 1975 as the Education for All Handicapped Children Act. It was most recently amended in 2004 (Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446). The IDEA requires states that want federal funding for special education to craft and implement a comprehensive program to provide free special education and related services to all eligible students with disabilities (i.e., a free and appropriate public education, or FAPE). Under the IDEA students with physical, psychological, and learning disabilities in elementary and secondary schools are entitled to accommodations (Kaplin & Lee, 2014, p. 519).

The **Americans with Disabilities Act (ADA)**, passed in 1990, prohibits discrimination against otherwise qualified individuals with disabilities because of disability (Americans with Disabilities Act, 42 U.S.C. §§ 12101-12189 (2000), Rothstein, 2004, pp. 132-133). However, the ADA extends these protections to a larger portion of American society than Section 504 (42 U.S.C. § 12101(a)(8); Rothstein, 2004, pp. 132-133). Before the ADA, the standing definition for disability in discrimination cases came from Section 504, which defines individuals with disabilities as people who are substantially impaired in one or more major life activities, are regarded as being such, or have records of impairments in major life activities (Rothstein, 2004, p. 132; 29 U.S.C. § 706(8)(B), 2000).

The ADA updated that definition, and defines disability as a physical or mental impairment substantially limiting at least one major life activity, a history or record of such an impairment, or being perceived as having an impairment of this nature (42 U.S.C.

§ 12102(1); Grossman, 2014, p. 6; U.S. Department of Justice, Civil Rights Division, Disability Rights Section, 2009).

Whereas Section 504 only applies to federal employers and contractors and organizations and programs that receive federal financial assistances, the ADA applies to most private employers through Title I, state and local government agencies through Title II, and private providers of twelve categories of public accommodation through Title III (42 U.S.C. §§ 12111-12117, 12131-12165, 12181-12189; Rothstein, 2004, p. 133). Public colleges and universities fall under Title II, and Title III includes private colleges and universities. Private colleges and universities owned and operated by religious groups and organizations (i.e., religious colleges and universities) are not covered by the ADA, but are still subject to Section 504 if students attending are receiving federal financial aid or if the institutions receive federal financial assistance in some other form (Disability Rights California, 2013, p. 6).

Although the ADA itself did not drastically alter legal protections available to people with disabilities in higher education contexts this round of legislative action led to significant growth in judicial attention and complaints submitted to the Department of Education, likely due in part to the media attention and resulting raised awareness of individuals' legal protections and in part to the growth of students entering higher education used to special education protections in primary and secondary educational environments (Rothstein, 2004, p. 133). All of this in turn meant that institutional administrators and legal counsel devoted more attention and interest in developing policies, procedures, and practices that satisfied requirements set forth for them in both Section 504 and the ADA (Rothstein, 2004, p. 133).

Neither Section 504 nor the ADA require institutions to change academic criteria for disabled students but simply to provide reasonable accommodations for students with disabilities in order to allow them equitable opportunities to learn and demonstrate what they have learned (29 U.S.C. §§ 706(8)(D), 794, 2000; Kaplin & Lee, 2014, pp. 119, 521; Rothstein, 2004, p. 132).

### Twenty-First Century Developments

Higher education institutions are required under Section 504 and the ADA to provide accommodations and services to students with disabilities, requirements that spurred the initial growth of the population of college students with disabilities (Thompson, 2014). Since then, colleges and universities generally have increased services and supports to provide general accommodations such as extended testing time, note takers, and sign language interpreters, though they are not legally required to provide much beyond that (Cheatham et al., 2013; Kelley & Joseph, 2012). Institutions began to move from concerning themselves with “compliance, nondiscrimination, and access to a broader focus on participation, engagement, and inclusion” (Thompson, 2014, p. 98).

Yet these issues were still very much at issue with regard to the experiences of students with “invisible” disabilities (e.g., ASD, mental illness, other intellectual disabilities) (Thompson, 2014). Students with disabilities that are not obvious or are not easily demonstrable have often found the process of seeking accommodations to be more

difficult as they could often not readily demonstrate their need for supports (Grossman, 2014, p. 4). Federal courts complicated matters, preventing some students from acquiring accommodations, because “one could not be an individual with a disability if one had a record of academic success” (Grossman, 2014, p. 5). These circumstances were partially remediated by the **ADA Amendments Act** of 2008 (or ADAAA). [Footnote: Although this work refers to the ADA and ADAAA separately, they are usually just both referred to as the ADA since in law they are essentially the same thing (i.e., the ADAAA being updates to the ADA).]

The ADA now clearly states that having a disability should not affect an individual’s right to be actively involved in all aspects of society but are often hindered or barred from doing so due to arcane and outdated attitudes and biases and the continued presence of barriers in the institutions and activities that comprise American society (Grossman, 2014, pp. 5-6). The revisions to the ADA also reversed courts’ outdated stance, set forth in *Wong v. Regents of the University of California* (1999), that maintained students with mental or cognitive disabilities were not legally students with disabilities entitled to services and accommodations if they had records of academic success (Grossman, 2014, p. 5; Kaplin & Lee, 2014, p. 529). Regulations subsequently created and instituted by the U.S. Department of Justice (DOJ) reinforced this change (Grossman, 2014, p. 6; 28 C.F.R §§ 35-36).

The updated ADA and resulting Equal Employment Opportunity Commission (EEOC) maintain the original ADA definition of disability but require courts and institutions subject to the ADA (such as colleges and universities) to interpret the definition in a more particular manner, following nine rules of construction now underlying the definition of disability, all of which are presented in more detail in Grossman (2014):

- The term “substantially limits” requires a lower degree of functional limitation than the standard applied by the courts before the passage of the ADAAA (29 C.F.R. § 1630.2(j)(1)(iv), 2011; ADAAA § 12102(4)). An impairment must present a material degree of limitation but no longer must “prevent or severely or significantly restrict” a major life activity in order to be considered substantially limiting (29 C.F.R. § 1630.2(j)(1)(i), 2011; 29 C.F.R. 1630(i)(2), 2011).
- To determine if an impairment substantially limits a major life activity, the effects of mitigating measures like medication and hearing aids can no longer be considered (though ordinary eyeglasses and contact lenses are an exception to this). (ADAAA § 12102(4)(E); 29 C.F.R. § 1630.2(j)(1)(vi), 2011; 29 C.F.R. § 1630.2(j)(5)(i) – (v), 2011).
- An impairment that is episodic or in remission is still a disability if, when active, it substantially limits a major life activity (ADAAA § 12102(4)(D); 29 C.F.R. § 1630.2(j)(1)(vii), 2011).
- The determination of a disability should not require extensive analysis, such as onerous documentation requirements (29 C.F.R § 1630.2(j)(1)(iii), 2011).
- The effects of an impairment that lasts or is expect to last fewer than six months can be considered substantially limiting (e.g., broken bones).

- Major life activities that can be limited now include reading, writing, concentrating, and thinking (ADAAA § 12102(2)(A); 29 C.F.R. § 1630.2(i)(1)(i)).
- “The operation of major bodily functions” such as the immune, endocrine, hemic, lymphatic, and reproductive systems are now a type of major life activity to be considered (ADAAA § 12102(2)(B); 29 C.F.R. § 1630.2(i)(1)(ii), 2011; Grossman, 2014, p. 9).
- The EEOC now has explicitly outlined a class of impairments that are expected to meet the definition of disability under the ADA and Section 504 (29 C.F.R. §1630.2(j)(3), 2011), though the disability alone is not inherently sufficient to support particular accommodation requests students with EEOC-designated disabilities may make (Grossman, 2014, p. 9).
- To receive coverage under the ADA and Section 504 as having a disability if regarded by others as having a physical or mental impairment substantially limiting one or more major life activities, individuals must simply demonstrate that they were perceived as having such an impairment by an employer, school, or college (ADAAA § 12102(3); 29 C.F.R. § 1630.2(k), 2011).

Students with learning disabilities still have some difficulty in obtaining services college and university disability resource centers, but it will still be easier for them to do so than before the ADAAA was passed to update the ADA (Grossman, 2014, p. 10). EEOC regulations require institutions to consider “time, manner, and duration” necessary to perform major life activities in question (29 C.F.R. § 1630.2(j)(4)) in juxtaposition to the “time, manner, and duration” of “most people in the general population” (29 C.F.R. § 1630.2(j)(1)(ii)).

As before, no changes in the regulations require that institutions fundamentally alter programs of instruction, lower academic standards, or provide accommodations not needed to ensure an equal education opportunity for students with disabilities (28 C.F.R. § 35.130(b)(vii), 2010; 34 C.F.R. § 104.44, 2000; Grossman, p. 11; *Southeastern Community College v. Davis*, 1979).

#### Also of note

In 2010 the DOJ issued regulations regarding test accommodations, issued under Title III of the ADA but also applicable to entities subject to Title II (Grossman, p. 11; 75 Fed. Reg. 56236, Sept 15, 2010). The regulations state that colleges and universities’ documentation requirements for test accommodations must be reasonable and limited only to the need for the modification, accommodation, or auxiliary aid or service that a student requests (28 C.F.R. § 36.309(b)(1)(iv), 2010). Furthermore, in considering such requests institutions must give considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations of provided in response to a student’s Individualized Education Program (IEP) or Section 504 plan (28 C.F.R. § 36.309(b)(1)(v), 2010).

Wheelchairs and other power-driven mobility devices (OPMDs) that institutions authorize (e.g., Segways) must be permitted in all pedestrian areas on campuses, and

unauthorized OPMDs must be permitted as well unless the institution can show the device cannot be operated in a fashion following legitimate safety requirements (28 C.F.R. § 35.137 [Title II], 2010; 28 C.F.R. § 36.331 [Title III], 2010; Grossman, 2014, p. 13).

Employees at higher education institutions responsible for campus athletic and performance facilities should be aware that there are intricate standards underlying the sale of tickets for accessible seating (28 C.F.R. § 35.138 [Title II]; 28 C.F.R. § 36.302(f) [Title III], 2010; Grossman, 2014, p. 15)

Interpreters are a required auxiliary aid for students with visual, hearing, and some speaking impairments, but must be able to meet students' communication needs and be familiar with the content and setting of students' courses (Grossman, 2014, pp. 13-14). Regulations consistent with this currently define a qualified interpreter as someone who, either on-site or through a video remote interpreting (VRI) service, can interpret "effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary" (28 C.F.R. § 35.104 [Title II], 2010; 28 C.F.R. § 36.104 [Title III], 2010).

VRI services are defined as unique accommodations that may be used to provide effective communication for hearing-impaired students (28 C.F.R. §§ 35.160-35.161 [Title II], 2010; 28 C.F.R. § 36.303 [Title III], 2010). The Office for Civil Rights advises that consideration between using VRI or onsite interpreting (whenever onsite interpreting is a realistic option, which is dependent on geography) must be an interactive process that is conducted on a case-by-case basis for each individual and for each class (Grossman, 2014, p. 14).

### Accessible design

The updated 2010 ADA standards for accessible design were expanded to cover "housing at a place of education" (28 C.F.R. § 36.406(e), 2010). "Housing at a place of education" is defined as "housing operated by or on behalf on an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other place of residence" (28 C.F.R. § 36.104, 2010).

Dormitories and student housing must now exceed the less demanding standards that traditionally apply to residential facilities under the ADA standards and meet more comprehensive **Fair Housing Act** (or **FHA**) standards of transient lodging (28 C.F.R. § 35.151(f), 2010; Grossman, 2014, p. 15). These standards dictate mandated requirements for clear floorspaces for students with mobility impairments, rooms equipped for students with communications-related impairments, and roll-in showers, which vary depending on the size of the housing facility (Luskin, 2012). Other requirements for rooms or units for students with disabilities include accessible sleeping areas, accessible kitchens in rooms that include kitchens with sufficient turning space for wheelchairs, and an accessible route throughout the entire room or unit (Luskin, 2012).

These higher standards do not apply to apartment or townhouse facilities “provided by or on behalf of a place of education, which are leased on a year-round basis exclusively to graduate students or faculty, and do not contain any public use or common use areas available for educational programming” (28 C.F.R. § 35.151(f), 2010; Luskin, 2012). These housing facilities are still subject to the less stringent revised 2010 ADA standards.

There is also potential for the U.S. Department of Housing and Urban Development (HUD) and the DOJ to assert themselves in litigation between students with disabilities and higher education institutions beyond the issue of service animals, as evidenced by a judge’s refusal to throw out charges of violations of the FHA in a case where a wheelchair-bound student was unable to fully maneuver in his assigned dormitory room or use the room’s bathroom or shower (*Kuchmas et al., v. Towson University, et al.*, 2008).

### Service animals

The majority of well-publicized legal cases regarding housing and living environments for students with disabilities on college campuses that have been filed since 2004 have centered on service animals (*Alejandro v. Palm Beach State College*, 2012; *United States of America v. Millikin University*, 2009; *United States of America v. University of Nebraska Kearney*, 2013; *Velzen et al. v. Grand Valley State University*, 2012). Institutional policies and practices regarding service animals on campuses are, like policies and practices pertaining to other aspects of students with disabilities’ living environments on college campuses, subject to the 2010 revised ADA standards for accessible design. However, past litigation has made it necessary for housing offices to also consider the FHA when it comes to service animal requests.

The ADAAA narrowed guidelines for what animals qualify as “service animals” under the ADA. Now, a “service animal” under the ADA can now only be a dog that has been individually trained to perform specific tasks on behalf of an individual with a disability, though any size or breed of dog may qualify (28 C.F.R. §§ 35.104, 35.136 [Title II]; 36.104 [Title III], 2010). Miniature horses can also be “service animals” under the ADA and must also be allowed unless a higher education institution can compellingly demonstrate that covering the miniature horse’s expenses places an undue burden on the institution or if characteristics of the horse and its relationship with its guardian negatively impact the college or university’s operations (28 C.F.R. § 36.302(c)(9) [Title III], 2010). This more restricted definition of “service animal” does not extend to the FHA, however, which requires students colleges and universities to make reasonable accommodations for students who require assistance or companion animals and is enforced by the HUD and the DOJ (Coolbaugh II, 2014, pp. 161-162; Grieve, 2014; Grossman, 2014, pp. 12-13; 73 Fed. Reg. 63835-63836). Under the FHA regulations an assistance or companion animal may be of any species and the tasks the animal performs can include comforting students in a passive manner (Grossman, 2014, pp. 12-13).

Institutions with residence halls and housing for fraternities and sororities are subject to the FHA and HUD Section 504 rules (24 C.F.R. §§ 8, 9, 1994). Enforcement actions and

lawsuits filed by the HUD and the DOJ since 2004 make it clear that these government agencies consider that, at least with regard to service animals, college and university campuses fall under the auspices of both the ADA and the FHA (Coolbaugh II, 2014, p. 161; Grieve, 2014).

### Other legislation worth nothing: the HEOA and the GI Bill

#### The HEOA

The **Higher Education Opportunity Act** of 2008, or **HEOA**, was a reauthorization (with some changes) of the Higher Education Act of 1965. This act facilitated access to federal financial aid for students with intellectual disabilities in higher education unable to obtain aid because of requirements that aid recipients be enrolled on a full-time basis (Cheatham, Smith, Elliot, & Friedline, 2013, p. 1081). The HEOA promotes the application of principles of universal design and the creation of resources for faculty and administrators to help make their courses and programs more accessible to students with disabilities (Burgstahler, 2014, pp. 41-42). Additionally, the HEOA allocates funds for higher education institutions to create and operate comprehensive training programs through the Transition and Postsecondary Programs for Students with Intellectual Disabilities (TPSID) grant program, which allows high school graduates with intellectual disabilities to participate in degree, certificate, or non-degree programs that specifically support them, enabling them to continue their education or pursue vocational training, to develop independent living and executive functioning skills, and participate in campus life alongside same-age peers without intellectual disabilities (Thompson, 2014, pp. 99-100; Cheatham et al., 2013, p. 1081; 20 U.S.C. § 1140(1)).

#### The GI Bill

College students with disabilities who are also veterans also benefit from the **G.I. Bill**, the original iteration of which was passed in during World War II. Millions of veterans have used educational benefits provided under the G.I. Bill to return to school and build their lives post-service (Mikelson, 2014, p. 89). Twenty-first century conflicts, in conjunction with the Post-9/11 G.I. Bill, foreshadowed a likely increase in the number of veterans with disabilities on college campuses, especially at the community college level (Mikelson, 2014, p. 88).

The Post-9/11 G.I. Bill provided individuals with 90 or more total days of military service after September 10, 2001 and left active duty before January 1, 2013 with financial support for education and housing (Mikelson, 2014, p. 88). Education benefits could be used to pay for tuition and related fees for vocational or technical training and for undergraduate and graduate degrees for up to 36 months (Mikelson, 2014, p. 88; U.S. Department of Veterans Affairs, Veterans Benefit Administration, 2016). The newest iteration of the G.I. Bill, known colloquially as the Forever G.I. Bill, expands veterans' access to education and workforce training further.

The Forever G.I. Bill extends the education benefits granted to veterans, spouses, and dependents, and removing the fifteen-year time restriction to allow service members who left active duty on or after January 1, 2013, to use their benefits at any point in their lives (Pub. L. No. 115-48, 2017; U.S. Department of Veterans Affairs, Veterans Benefit Administration, 2017; U.S. House Committee on Veterans Affairs, 2017).



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