Baylor University
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ADA TRENDS & COMPLIANCE

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Introduction

• These are civil rights laws.
• Fundamental principles have not changed in over 40 years.
• Reasonable accommodations are intended to level the playing field, not provide an unfair advantage.
• The major disability issues facing colleges and universities involve students with mental health issues.
Cultural Context

- The return of in loco parentis in higher education.
  - Treating adults as children
  - Increased demand from students-- and their parents-- that institutions must take care of students
- A stressed out generation with helicopter parents.
- Students who lack skills in self-advocacy, or communicating with adults.
- Technology
- A backlash against “civil rights” including disability rights.
A Brief Synopsis of the ADA and Section 504
Section 504

- Compliance issues are just as serious as Title IX (sex discrimination) or Title VI (race or national origin).
- If any portion of the school receives federal financial assistance (including student loans), all programs and services are covered. Same as Title VI and Title IX.
- OCR has the power to withhold all federal financial assistance.
- Also a limited private right of action.
Americans With Disabilities Act of 1990

- Goal was a broad civil rights act with expanded coverage, new enforcement regime and remedies.
- Passed with broad bi-partisan support, signed into law by President George H.W. Bush.
- Drew on many Section 504 concepts, but also expanded and amended Section 504.
- Enforced by U.S. Dept. of Justice, which can seek civil penalties, and both individual and class damages.
Examples of Disability Discrimination

- Refusing to provide services to persons with disabilities.
- Imposing requirements on persons with disabilities that are not imposed on others.
- Providing services in a segregated manner.
- Harassment or bullying based upon a person’s disability.
- Treating individuals with one type of disability differently than others.
- The ADA and Section 504 seek to ensure that all individuals have an equal opportunity, but does not guarantee equal outcomes.
Who is Protected Under the ADA and Section 504?
Many People are Protected

• Basic definition of “disability” has not changed since 1990—a physical or mental impairment that substantially limits one or more major life activities.

• But in the ADA Amendments Act Congress provided new rules on what these mean, and wanted to shift the focus from whether the individual is protected by the ADA to whether a requested accommodation was reasonable.

• The advocates wanted the ADA to be the “Americans with Medical Impairments Act”—and got most of that.
Many People are Protected

• The definition of “physical impairment” and “mental impairment” are broad and cover most medical conditions.

• Seeing, hearing, speaking, walking, speaking, thinking, learning, communicating, working and some other activities were always considered “major life activities”. Congress added as examples:
  ▪ impairments of bodily systems
  ▪ a range of cognitive impairments
  ▪ caring for oneself, performing manual tasks, eating, sleeping, walking, standing, lifting, bending, breathing, reading, concentrating, writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and fine motor coordination.
Examples of the Change

As one example of one rule of interpretation, Congress said that in deciding whether someone has an ADA-covered disability, you cannot consider the effects of mitigating measures, such as medication or assistive devices.

- A person who uses a hearing aid or glasses may not be substantially limited in hearing or vision when using the device, but still has a disability.

- A student with depression that is controlled with medication, but who would be substantially limited in learning without the medication, has a disability.
Temporary Impairments under the ADAAA

• *Summers v. Altarum Institute, Corp.*, No. 13-1645 (4th Cir. Jan. 23, 2014)

• The first federal Circuit Court to apply the ADAAA expanded definition of disability

• Held that a temporary impairment can be a disability if it is “sufficiently severe”
What Percentage?

• Only 8% of students are registered with OALA. Best guess is that more than 50% of all students have diagnosable conditions (temporary or long term) that qualify as "disabilities".

• The percentage of faculty is probably much higher than 50%. 
The Need is Increasing

• The number of students registered with OALA has doubled in the past 10 years.

• In the 2013 National College Health Assessment 1/3 of college students reported difficulties in function due to depression and 50% felt overwhelming anxiety.

• 2015 CCMH Report of students receiving counseling-49% had mental health concerns, 10% had been hospitalized and 9.5% had made one suicide attempt.
Implications for Students

- Most medical and psychological issues are going to be ADA and Section 504 issues.
- This broad definition affects
  - Who can qualify for disability services
  - Who can seek accommodations in class and in other programs and services
  - Who can assert rights under the ADA and Section 504 in discipline, suspension, medical leave and other issues.
Academic Accommodations
Reasonable Accommodations

- Must provide “reasonable accommodations” to students or other program participants that are needed to enable an otherwise qualified individual with a disability to participate in the programs and services, e.g.
  - Modify policies, procedures and practices
  - Provide auxiliary aids and services needed for effective communication
  - Provide specialized tools, equipment or services
  - Remove physical barriers to accessibility
Procedures for Accommodation Requests

• You *can* establish procedures for making requests, but cannot ignore verbal requests
• You *can* require documentation of the disability and the need for a particular accommodation
• You should engage in an interactive process with the individual making the request to determine an appropriate, effective accommodation
• You do not have to provide what is requested or the best accommodation, but you do need to provide an *effective* accommodation
Defenses

• The individual cannot perform the essential requirements of the program or satisfy legitimate minimum standards.

• Providing the accommodation or modifying a policy would result in a “fundamental alteration” of the nature of the program or service.

• The “accommodation” imposes an “undue financial or administrative burden.”

• Direct threat to the individual or others.
Step 1—
OALA Confirms Eligibility and Need for Accommodations

• Application and request for documentation (must be reasonable)
• Confirmation the student has a disability and a need for accommodations
• The school must give deference to receipt of accommodations in the past (IEP, Section 504 plan, on standardized tests)
• Under the DOJ regulations for standardized tests and professional boards, far less documentation can be required than is common.
Step 1

- If the disability is temporary, there will be periodic review of the documentation
- Many schools, including Baylor, require that the student re-request accommodations each year to ensure that they still want and need them
- Determination that student may need certain accommodations to meet expectations at their academic level
- Initial determination that an accommodation is reasonable (e.g. has been provided in the past and is not per se unreasonable).
Step 2—Communication to Instructor

- Procedures vary. Sometimes a letter is sent to the instructor, as OALA does; sometimes it is given to the student.
- Goal is a conversation between student and instructor over whether those accommodations are needed in, and how to implement them, in that particular course.
- Example—a student may have an approved accommodation for extra time on tests, but that is not needed if all tests are done on-line with no time limits.
Step 3-Interactive Process

• If there are questions or issues that arise at the start of or during the course, that the student and instructor cannot resolve, OALA gets involved.

• Sometimes they facilitate resolution, other times they explain rights and duties to both the student and instructor.
Step 4—Higher Level Review

• The Department Chair, Dean or Provost will get involved if
  ▪ A requested accommodation involves course waivers or other changes that affect more than one course; or
  ▪ The instructor objects to an accommodation.

• This is not an “appeal” of a denial, but part of the interactive process.
Step 4—Higher Level Review

• Under Section 504 and ADA, the decision of whether an accommodations is a “fundamental alteration”, an undue burden or direct threat must be made by the President or designee. This is typically the Provost or Chancellor for academic issues.
Step 5-Discrimination Complaint

• If a student’s requested accommodation is denied, or the student challenges the instructor’s implementation, and this is not resolved during the interactive process, typically the only other internal option is a complaint of disability discrimination.

• It would be reviewed at a level above the one that made the decision.
What About Direct Requests to Instructors?

• Instructors routinely receive requests from students due to medical issues, such as make-up work for a missed class. They have discretion over their classrooms to grant or deny, so long as they do not discriminate. Sometimes they will go beyond what is required.

• Policies and procedures need to be clear that such informal “accommodations” are not being done by the school, and that ADA and Section 504 rights may not apply.
Confidentiality

- Strict confidentiality protections. No sharing medical information with faculty and staff unless necessary.
- Students may disclose, but faculty and staff must keep medical and similar personal information confidential.
Testing Accommodations
Case Study-Paper Chase

• Andrew, a first year law student, has a visual processing disorder that affects the speed of his reading and other effects (e.g. difficulty spotting mistakes such as transposed letters or numbers). He had a 504 Plan in High School and is registered with Disability Services. He informs each of his professors that he will need time and a half on written tests, and that while he makes every effort to proofread written work, some mistakes may slip through. Professor Kingsfield tells Andrew that if he can’t complete his tests on time, he will never succeed in Law School or as a lawyer, and he should just call his parents to take him home.
Questions

• What ADA/Section 504 issues are raised by Professor Kingsfield’s response?
• Are Andrew’s requests reasonable?
• Would the analysis be any different if he wanted extra time on papers?
Harassment=Discrimination

• Harassment or bullying on the basis of disability is a form of discrimination prohibited by the ADA.
• Such harassment should be viewed with the same seriousness as sexual harassment or harassment based on any other protected characteristic. It is a violation of federal law when it rises to the level of creating a hostile environment.
• Harassment can take many forms, including negative remarks or jokes about disability, stereotypes, and unreasonable requirements to receive accommodations.
• Anything you say can and will be used against you.
DOJ Testing Rules

• Technically apply only to private entities offering exams or courses (College Board, LSAC, Medical boards, etc.)
• The principles expressed on documentation and what are reasonable accommodations in testing apply equally to schools
• AHEAD and others have been taking into consideration
DOJ and Exam Design

• Tests must accurately reflect the individual’s “aptitude or achievement level or whatever other factor the exam purports to measure, rather than the impaired sensory, manual or speaking skills”, “except where those skills are the factors that the examination purports to measure”
Wynne v. Tufts Univ. Sch. of Med

- Medical student sued for failure to provide alternative testing option to multiple-choice examinations. The federal appeals court required the lower court to re-consider whether Tufts had met its burden that its determination was a “reasoned, professional, academic judgment” that considered alternatives, and to show that alternatives would either lower academic standards or require a substantial alteration of the medical school program.

- Tufts eventually won based on evidence of alternative exam formats it had considered and why multiple-choice exams represented the most appropriate method for a medical school environment.
Communication Accommodations
Effective Communication

• In 2010 regulations the DOJ found that many public accommodations had not been meeting their obligation to provide *effective* communication to individuals with hearing and vision disabilities.

• What is sufficient depends on the context, but DOJ concluded that in many situations involving complex communications (e.g. medical and legal), public accommodations were relying either on insufficient means (e.g. notes) or a companion to provide translation.
Implications

• DOJ’s view is that you must be prepared to offer accommodations, not wait until the request to start investigating (e.g. medical services, public events)

• DOJ and OCR have both been critical of the timeliness of accommodations on campuses

• These concerns are best seen in the approach to on-line courses
Routine Communication Issues

• For students who are deaf or have hearing impairments: ASL interpreters for lectures or any audio in class; open or closed captioning of audio portion of media

• For students who are blind or have vision impairments: Providing all written materials is alternative formats (accessible digital that can be used with screen reader on a computer; braille; large print) or visual interpreters
Routine Communication Issues

• For individuals with various learning or cognitive issues: Readers; note-takers or taping lectures

• Instructor concerns about intellectual property are a reason to deny.

• Some of these pose logistic and cost concerns for disability services, such as scheduling interpreters

• Volunteer (usually student) note-takers may or may not be providing effective communication
Faculty Cooperation

• A key logistics issue is getting materials far enough in advance to provide alternative formats.

• Instructors sometimes claim this infringes on their academic freedom and flexibility in teaching methods. That is not a defense to refuse to provide accommodations--need to show undue burden or fundamental alteration.


**Dudley v. Miami University**

- Blind student, represented by Disability Rights Ohio, sued in 2014 alleging discrimination under ADA Title II. DOJ intervened in May 2015 as a Plaintiff.

- Vendor products alleged to be inaccessible include PowerPoint, Google Docs, YouTube and coursework management software from Pearson, LearnSmart, Sapling, Turnitin, Vista Higher Learning and WebAssign.
Other Alleged Violations

• Website pages that do not work with screen readers, included untagged PDF documents

• Failing to convert books and docs in a timely manner with barriers and doing so inaccurately (e.g. errors in OCR conversion, no translation of symbols and images); limiting conversion to materials students purchased

• Using PPT’s and web videos in classes without simultaneous translation or captioning for blind or deaf students

• Advertising of events by school groups, including homecoming, that was not accessible
Website and On-line Course Accessibility

- DOJ and OCR take the position that all University websites must be accessible under current law
- DOJ and OCR were actively investigating and enforcing these principles
- DOJ has not issued final regulations on which standard must be met, and may not do so for many years, but *that is not a defense.*
- There has been an explosion in website accessibility lawsuits.
Drive-Bys on the Information Highway

• The explosion of demand letter and lawsuits from firms that used to focus on brick & mortar, parking or other ADA claims

• Currently focusing on websites, but this won’t last. On-lines course offerings will be next

• There are not many defenses
Louisiana Tech University

- Settlement with DOJ over charges that LTU used online learning software that was inaccessible to blind students. LTU agreed to changes to its policies, procedures, and training regarding its web materials and to pay more than $20,000 in damages to the student who had originally brought the complaint.
Key Operations Issues in Compliance

- Prioritizing this with other IT initiatives and priorities
- Controlling changes and updates
  - Who can post?
  - Requires centralization
- Student Group sites
- Faculty site – what is part of the School’s programs, and what is “personal”? 
Attendance and Deadline Accommodations
**Attendance Accommodations**

- Most instructors have procedures for missed classes and making up missed work that apply to all students.
- Many instructors consider class attendance and participation and limit the number of absences before it affects grades.
- “Attendance” accommodations typically involve students with medical conditions that result in intermittent, incapacitating, often unpredictable episodes or flare-ups.
Key Issues

• Lab or other work that cannot be “made up”.
• Group participation and discussion.
• Instructor’s uniform, no-fault attendance policies.
• How much attendance is “essential” to the course, how to you address variations among instructors.
• Who decides? Ultimately the Provost.
Deadline Extensions

• In addition to a limited period to make-up missed work from an absence, it is common for instructors to agree to extend deadlines when a student has a short-term injury or illness near a deadline.

• Most schools do not offer as accommodations extended time on projects—the student is expected to juggle priorities to get work done, regardless of the disability.
Conduct and Behavior
Case Study-Loud Larry

• Larry is a graduate student seeking a PsyD. He has Asperger’s Syndrome, which is part of the autism spectrum disorder. He is extremely intelligent, but is dismissive of those who he thinks are less so. He has poor social skills and habits; he can never keep his shirt tucked in. His research skills are excellent. In interpersonal communication he will often stand too close and can become upset or argumentative if you do not understand his point or disagree with him. During his first semester a number of classmates and professors complained about these behaviors, and sometime had trouble containing his classroom comments. His final grades were all above average.

• Several professors have concerns whether Larry can ever successfully counsel patients, and think he should switch to a non-clinical program.
Questions

• Would Larry’s behavior violate any of the rules for your school? If so, is the School required to accept his behavior?

• Some students report that Larry’s behavior is disturbing and they are concerned. Is that a basis for any action?

• Is Larry capable of meeting the essential requirements of the PsyD program?
Conduct and Behavior

• “Disability” is not an excuse for violating conduct rules, poor performance or attendance, etc. Examples:
  ▪ Sexualized behavior by a student with prior history of abuse and a diagnosis of PTSD
  ▪ Verbal or physical assaults brought on by uncontrolled manic disorder

• A University does not have to excuse conduct that has already occurred (e.g. remove discipline or a bad grade) or give another chance, if all similar cases have been treated the same
Conduct and Behavior

- However—if the “behavior” is normative for that disability and objectively is not disruptive or interfering, you cannot exclude the student.
Defenses and Limits
Undue Hardship/Undue Burden

• On issues of cost, there is no relationship between the student’s tuition and the cost of the accommodation. Rather, the defense of economic hardship takes into account all of the resources of the Institution.

• But there may be non-economic impacts on the school or others in providing the requested accommodation that impose an undue burden.
When *Can* Disability or Medical Conditions be Considered?

- When the individual *cannot meet minimum requirements* for a particular program or service even if reasonable accommodations are provided
- When the individual’s needs or requests *would result in a fundamental alteration* of the programs or services or impose undue burdens on the institution or others
- When the individual would pose a “direct threat” to the health and safety of others
Fundamental Alteration of the Program

- In *Southeastern Community College v. Davis*, the Supreme Court rejected a request by a deaf nursing student to waive a requirement that everyone participate in a rotation in an emergency room, finding that this was fundamental to the way the college designed its nursing program.

- In *Casey Martin v. PGA*, the Supreme Court found that the PGA’s refusal to allow a disabled pro golfer to use a cart violated the ADA, finding that Martin would not receive an advantage over other players and this rule was not fundamental to the game.
Case Study-Math

• Lucy always hated math, and struggled throughout school. It was not until High School that she was diagnosed with dyscalculia, a math learning disability. She can understand most math concepts, but has difficulty applying them. Lucy wants to get a marketing degree, with an emphasis on non-profits. Her concern is the two Business core math courses, Pre-calculus and Calculus for Business students. She wants to know if there is an alternative class, or a way to modify the requirements of that class.
Questions

• How should the Business Department approach this request?
• What are the “essential” aspects of this required course? Why?
Guckenberger v. Boston Univ.

• Students with various learning disorders brought an ADA and Section 504 class action challenging refusal to allow course substitutions for foreign language and mathematics requirements represented violated the ADA and Section 504.

• The court held that the students had proven that substituting the foreign language requirement, though not the math requirement, was a potentially reasonable accommodation, and ordered BU to execute a deliberative procedure to consider whether modification of this requirement would fundamentally alter its liberal arts program.
Guckenberger v. Boston Univ.

- BU set up a committee to study the issue, which concluded that the course substitution was not possible. In a later ruling, the court conducted a detailed review of the committee’s findings and concluded that they represented a “reasoned deliberation” on the part of the institution.
Case Study-The Storyteller

• Amy is legally deaf; she lost most of her hearing as a child due to an illness. She can do some speech reading, but uses an ASL interpreter for classes. Her speech can be difficult for many people to understand. Amy is taking a Creative Writing class where students write and present original stories. They are graded on oral presentations and storytelling skills. Amy says that she will need an ASL interpreter for those presentations.
Questions

• Would Amy’s requests pose an undue financial or administrative burden on the University?
• Are these requests a fundamental alteration of the requirements for that class?
• Would the analysis change if Amy’s disability was a severe speech impairment, and she needed to type everything out for someone else to read?
Safety Issues

- A College *can* apply neutral, non-discriminatory safety requirements that apply to *all* students, regardless of disability.

- A College cannot exclude students with disabilities from participating in a particular program or activity, based upon the risk of injury to *others* unless this rises to the level of a “direct threat”.

- This is a high standard to meet.
Non-Academic Accommodations
All Programs and Services are Covered

- Events open to the public (sports, theater) or invited guests (parents, alumni, day camps and summer camps)
- Extracurricular activities
- Housing
- Activities off-campus
- Campus transportation
- NCAA Athletics
All Programs and Services are Covered

- Work-study programs
- Internships
- Medical care, insurance
- On-campus vendors
- Food service
- And the list goes on ...
All of the Same Obligations as in Academic Programs

• Reasonable modifications of policies, procedures and practices
• Physical accessibility
• Auxiliary aids and services for effective communication
• Non-discrimination
Procedures Tend to be Decentralized

• Process for making requests
• Often does not go through OALA
• Different decision makers
• Student issues usually get to Dean of Students; visitor issues vary
• Key issues are capturing the requests, not giving a dumb response or denial, and getting them to the right person.
Case Study

• Abbie is a freshman living in the dorm. During the Fall other students have reported signs of anorexia and that she is exercising obsessively. Abbie met with a counselor but claims to be fine. After spring break Abbie’s mom called very concerned, and wants Abbie barred from using the gym or club sports.
Questions

• What can a school legally do in these and similar circumstances?
• What should the school do?
Critters on Campus
The News Reports Keep Coming: Critters on Planes

'Emotional support peacock' barred from United Airlines plane

Airline: 'Emotional support' pig kicked off flight for being disruptive

Passenger Robert Phipps took a picture after this passenger was asked to leave a US Airways flight with her "disruptive" pig.
Trains

Ontario woman says her therapy rabbit was barred from train

Autumn Evoy holds her therapy rabbit Thumper in Paris, Ont. (CTV Kitchener)
1. Bonnet Macaque: Debby Rose from Missouri suffers from agoraphobia, the fear of places and situations that causes panic, helplessness, or embarrassment. She brings her monkey everywhere and will even drive with him in the front seat.
And Campus

More college students are turning to emotional support animals, even amid the punchlines

by Anna Orso, Updated: January 21, 2019
Fraudulent Credentials are Easy to Get (but students may not realize they are fake)
Schools are Overwhelmed

- May 31, 2019 Inside Higher Ed
  - Requests for ESA’s at Washington State Univ. increased from 3 in 2011 to 60-75 per year
  - About 175 ESAs live in campus housing at Ohio State
- Some schools are setting-up pet friendly dorms to try to control issues
Claims Can be Costly

• After DOJ won summary judgement in the University of Nebraska Kearny (UNK) lawsuit, UNK’s settlement included $140,000 in damages to two students denied assistance animals in dorms.

• Kent State settled a case in 2016 for $100,000 involving a couple in university housing who wanted a dog to accommodate anxiety.
Service Animals Under the ADA
Trained Dogs Only

- DOJ regulations under both ADA Title II and Title III codify earlier DOJ guidance
- Service animals may be used by persons who are blind, have vision or hearing disabilities, people who use wheelchairs, and some people with other disabilities you cannot see
Access by Service Animals

- Access to all areas “where members of the public, participants in services, programs or activities, or invitees, are allowed”.

[Image of signs indicating service animals allowed]
Limited Inquires Under the ADA

• The public entity or accommodation is “prohibited from asking about the nature or extent of a person’s disability”
• May only make two inquiries to determine if an animal is a service animal:
  ▪ “Is this animal required because of a disability?” and
  ▪ “What work or task is the animal trained to perform?”
• Intent is protections for customers, patients, visitors
• Rules were adopted prior to rise of fake credentials
Section 504 on Campus

• ED OCR is the primary agency, since most financial assistance to colleges and universities flows through ED.

• Section 504 requires reasonable accommodations (e.g. reasonable modifications or policies and practices and auxiliary aides and services).

• OCR has said in recent resolution agreements that Emotional Support Animals (ESAs) *may be a necessary accommodation under Section 504, or a necessary modification under Title II.* (Penn State, OCR Compl 03-18-2103, 8/28/18 letter).

• Therefore, the school would have an obligation to engage in a reasonable process to assess the individual’s need, reviewing in the same way it would other reasonable accommodation requests.
ESAs as a Reasonable Accommodation

• In the PSU Resolution Agreement, the school agreed that the reasonable accommodation process for ESA’s would apply to requests anywhere on campus, and could not be limited to campus housing.

• The reasonable accommodation analysis triggers other ADA/Section 504 defenses, including:
  ▪ Fundamental alteration of the nature of the program, goods or services,
  ▪ Under financial or administrative burden on the school or others
  ▪ Direct threat to the health or safety of others
See the Difference?

- Wild animal. May be protected under law
- Potential ESA

In October 2018, a woman was escorted off her Frontier Airlines flight after bringing her emotional support squirrel on board. Cindy Torok told FOX 8 News that she called the airline ahead of time to get clearance and even made it through TSA with her 11-week-old squirrel, Daisy, before the airline forced her to leave the plane. Jonathan Freed, director of corporate communications at Frontier Airlines, said "rodents, including squirrels, are not allowed on Frontier flights."

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