



Webinar

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Back to School: Challenging Disability Issues in a Return to Campus

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Agenda

- Overarching Focus: interrelationship and collaboration between general counsel and accessibility services
- Updates and Important Topics
 - Title IX updates & disability issues
 - Pregnancy and lactation issues (that could be Title IX or disability)
 - Digital accessibility updates (very high level, see separate June 6th session)
- The Value of Strong Accessibility and Legal Relationship
 - Example 1: Students and Documentation Issues
 - Example 2: Faculty says the Student Must Be In Class
 - Example 3: Vendor Challenges
 - Example 4: The End of the Road (deciding "not otherwise qualified")
- Audience Q&A

Key Relationships: Accessibility & Legal Staff

- A critical relationship, but often ignored until challenges arise.
- Accessibility staff commonly make technical, individualized decisions that can implicate several federal and state laws.
- OCR and state agencies not shy about exercising enforcement authority; many advocacy groups in the disability space.
- Litigation can be detail and document focused because of individualized analysis.
- One approach: Abra Francois and Kirsten Behling!!!

Disability & Title IX Regulations?

- 2024 Title IX regulatory updates live for some; enjoined for others.
- Regulations do not specifically address ADA or Section 504 (“redundant” and requiring fact-specific, case-by-case decisions).
- Disability not a defense to conduct , but think about access & training
- Preamble focused on effective communications (remember, these apply to K-12, too), auxiliary aids and services, accessible materials, but also consider more common examples:
 - Extra time to review
 - Breaks during hearing/interview processes
 - *"Wait, wait, wait – does that mean I must provide 1.5 time to both parties?"*

Disability & Title IX Regulations, cont.

- While any additional provisions a recipient adopts in its grievance procedures must be applied equally to the parties, identical treatment of both parties is not always required in implementation of those provisions.
- The fact that the parties had an equal opportunity to receive an accommodation or an interpreter as needed is enough to satisfy Title IX.

Potential Process Challenges

- Documentation not requested/considered in a timely way
 - For example, what sort of documentation makes sense for an individual who states that they have a "processing disorder"?
 - Wrong answers only: "please provide your entire medical record..."
- When requested, documentation often shared with people who don't understand purpose or how to consider
 - How is information secured? As part of the Title IX file? Discoverable?
- Interactive process: what does it look like? When does it end?
- Execution is key: Internal miscommunications around services common

Key Questions

- Who makes final determinations on accommodations in a Title IX process? Appeal options?
- Does the team doing this know the answer – or how to get the answer – to questions like:
 - What types of accommodations are available? Are they feasible?
 - How does technology work?
 - How to communicate a difference to another party without disclosing disability?
- Training re: notice of disability and process. Note that Title IX Coordinator, advisor, or investigator may receive first notice. Do they know who to take that to?
 - Train role players not to make assurances in the moment.

Pregnancy & Parenting

- Typical pregnancy issues fall under Title IX but could also fall under ADA/Section 504 in certain situations, as well as Title VII.
- When pregnancy-related issues arise, that is commonly where disability law becomes important.
 - “Although a normal, healthy pregnancy is generally not considered a disability, a pregnant student may become temporarily disabled and thus entitled to the same right and protections of other students with a temporary disability.” *Salt Lake Community College*, June 2022
- Common for there to be coordination between Title IX and HR (for employees) and accessibility services groups (for students).
- Examples:
 - ✓ Clear policies and procedures
 - ✓ Consideration for how pregnancy may create complications for pre-existing disability-related accommodations
 - ✓ Creating a streamlined process for requests so student/employee aren't having the same conversations repeatedly and – even worse – getting different answers from different people/units

Common Pregnancy Accommodations?

- Excused absences/leave
- Extended time
- Frequent breaks
- Change in seating assignments (to allow access to bathrooms or, later, lactation rooms (see next slide for lactation))
- Remote participation
 - ✓ Challenge: institution has pushed to move classes back to in-person classes, generally.
 - ✓ This may be an exceptional circumstance and, because of timing, may not align with prior fundamental alteration requirements, e.g., requesting remote participation for one semester may be different than requesting remote participation for an entire year.

Common Lactation Accommodations?

- Lactation is a pregnancy-related condition that must be accommodated
- Best practice to have a Pregnancy Accommodations Policy and should include a space that is:
 - Clean and relatively convenient
 - Shielded from view
 - Free from intrusion from others
 - May be used by a student for expressing milk or breastfeeding as needed

Make sure faculty/staff understand privacy of accommodations. This is an area where some faculty/staff feel comfortable sharing that a student is breastfeeding. This should be treated as confidentially as any disability related accommodation.

OCR Cases on Point

- Institutions should not have rules that limit rights or provide different treatment based on parental, family, or marital status. See *Rivertown School of Beauty*, September 2019
- Institutions should not exclude students from an education program or activity, including any class or extracurricular activity, on the basis of a student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient. See *Salt Lake Community College*, June 2022; *Northeastern University*, January 2020; *Fresno City College*, April 2018.
 - Common challenges surround certain study abroad activities, athletics, and other physical challenges
 - Process should be individualized for all

OCR Cases on Point

- If a unit does not have a clear leave policy, institutions should treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student or employees' physician, at the conclusion of which the person should be reinstated to the status which she held when the leave began. See *Salt Lake Community College*, June 2022; *Chicago State University*, March 2018; *Fresno City College*, April 2018.
- Common challenges:
 - Repeated requests for additional leave
 - Unclear documentation
 - Role itself needs to be filled and leave continuously extended
- No automatic answers; conduct individualized assessments.

Digital Access Updates to Title II of the ADA

- Published April 24, 2024; applicable to public institutions.
- Institutional requirement that institutions make accessible services, programs, and activities through websites and mobile apps.
 - Services, programs, and activities considered broadly.
- Institutions must make sure that their web content and mobile apps meet WCAG 2.1, Level AA within two or three years of when the rule was published on April 24, 2024, depending on their population.
- NACUA June 6 session: *"The DOJ's Final Rule on Digital Accessibility: Practical Considerations for Public Institutions and Changes on the Horizon for Private Institutions"*

Key to Title II Updates are Exceptions

Title II provides a required technical standard, as well as very specific exceptions:

- Archived materials
- Pre-existing conventional electronic documents
- Third party content
- Password protected documents
- Pre-existing social media

Note that "conforming alternate versions" are allowed, but are they a good decision?

Digital Accessibility Strategy

- Policies & procedures to support a digital accessibility program
 - Identify standards, definitions, scope, exceptions
- Establish committees, working groups, resources
 - Expensive endeavor, but issue here to stay – firm foundation can be critical
- Determine roles & responsibilities: not just an accessibility issue
- Provide/Obtain Professional Development Opportunities
 - Train content creators
 - Provide resources for content creators
- Acquire/develop tools to monitor and sustain compliance, including reporting and remediating access barriers
 - Consider additional technology, platforms, outside vendors carefully
 - Procurement policies are central

Example One: Students & Documentation

An incoming first year requested a series of accommodations that extend from housing, to dining, transportation and academic situations. The student presents as having a physical disability that is not apparent and shared that they also have a learning-based disability for which they will need accommodations. When asked for documentation of their diagnoses, the DS office received a pamphlet from a third-party organization outlining common accommodations for their purported issues. They also received a letter from an Emotional Support Animal clearinghouse.

Documentation received was not specific to the student and the second was outdated. Student and their parent adamantly refused to provide more, citing the ADA and arguing the law permits decisions to be made based on a regarded impairment and that gathering additional documentation is burdensome.

- Should the institution proceed without documentation? If so, in what manner?
- What laws are at issue?
- How can accessibility and legal work together?

Documentation

- Institutions have unique approaches; critical to have written documentation guidelines, as well as additional resources to understand the process
- Commonly seeking:
 - Clinical documentation of diagnosis
 - The way that the disability is currently presenting
 - Medical caregivers opinions on what is appropriate to accommodate? Pros and cons?
- Consideration: Institutional template for medical providers
- In many cases, it is appropriate to follow up with providers to better understand the issue and how it presents but still individualize:
 - Example: documentation required for a physical disability that is apparent versus a chronic "invisible" disability that is evolving in how it presents

Example Two: Faculty Says You Have to Be There

The accessibility services office determined a student has a disability that may present an access barrier to attending class when the disability flairs. An accommodation for “flexibility with absences” was approved. When the student shared their approved accommodation letter with the instructor, the instructor told them that attendance is mandatory in their class. The student circled back to the DSP distraught. The DSP spoke with the instructor who shared that their class has a mandatory attendance requirement (though not noted anywhere). The instructor argued that the student could not learn all the information pertinent to the class and ultimately the profession if they missed any classes.

- What legal issues may arise?
- How can accessibility and legal work together?

Fundamental Alteration & Undue Burden

Institutions not required to grant a modification that would fundamentally alter the nature of the service, program, or activity or impose an undue financial or administrative burden...BUT:

- Fundamental alteration and undue burden justifications are complicated and should not be made independently. For example:
 - Determining whether something constitutes a fundamental alteration requires conversation with other departmental and institutional staff
 - Undue burden analysis is based on the burden for the institution, not an individual

Helpful OCR Language

Univ. of Mass.-Boston (2018): a determination that a specific standard or requirement is an essential program requirement that could not be modified must be “educationally justifiable” and decision must be made “by a group of people who are trained, knowledgeable and experienced in the area; through a careful, thoughtful and rational review of the academic program and its requirements; and that the decision-makers consider a series of alternatives for the essential requirements, as well as whether the essential requirement in question can be modified for a specific student with a disability ... **[W]hile [p]rofessors may be an integral part of the interactive process, e.g., [provide] input into what constitutes a fundamental alteration or essential requirements for a course, they are not qualified to solely determine what the requesting student may be entitled to under Section 504 and Title II, as they “do not necessarily have specialized training in the law or disability issues to make informed decisions about what is legally required by Section 504 or Title II.”**

Example Three: Vendor Challenges

An incoming transfer student has asked for a sign language interpreter in all their courses as well as at their student club meetings. They had this accommodation at their previous institution. The accessibility office has reached out to the interpreting firm that they usually use and been told that there is a shortage of interpreters, though they can offer computer generated interpreters, and the cost of interpreting has gone up. The institution reached out to other state-suggested providers and have been ghosted twice at important meetings. This has significantly upset the student to the point they now involved an outside advocacy agency. Other institutions in the region are in the same situation.

- What legal issues may arise?
- How can accessibility and legal work together?
- How do you navigate the lack of vendors?

Example Four: The End of the Road?

A graduate student experienced significant mental health challenges their first year. Halfway through the year, they went on medical leave to focus on their mental health. They sought to return a year later, and no one – including their own caregivers – thought they were ready. They tried to return again after another year. Same result. Finally, in year four their caregiver said they may be ready to return and they received appropriate accommodations. Once returned, the student immediately fell behind in classes, they are not using the accommodations provided, and they are reported to be acting out in several different classes. They have a 2.0 GPA that fall and are placed on academic probation, which means they must maintain a 2.0 GPA. The spring is largely the same as the fall and they are on track to receive a 1.8 GPA.

- Imagine the dean of the graduate school wants to separate the student, pointing out that their program is very small and the student is not engaging, diluting the experience for others.
- They receive a fellowship that covers tuition and housing, but they must teach an undergraduate course. They have been unable to do so.
- Accessibility services says they do not have other ideas to accommodate the student.
- What do you do?

Considerations

- Often cases where many campus units are involved, e.g., counseling, academics, behavioral intervention, public safety and, of course, accessibility services.
 - *"But, what if there is no disability involved?"*
 - Possibility that if a student is leaving for medical or psychological reasons they will return seeking accommodations
- Helpful to incorporate accessibility services at the beginning of a process to consult and share information; harder to do so when a student/employee is returning in two weeks. Why?
 - Accessibility services may be able to help map out departure if disability issues already raised.
 - Accessibility services offices can assist in transition back upon end of leave, e.g., collecting documentation, mapping out return.

Not Otherwise Qualified

- Typically, only for extremely challenging circumstances.
- Clear justification and a clear record of accommodations considered.
- Critical to have accessibility services at the table to determine if anything else is possible or have options been exhausted.
 - When determining if a student is otherwise qualified, “it is necessary to take into account the extent to which reasonable accommodations that will satisfy the legitimate interests of both the school and the student are (or are not) available and, if such accommodations exist, the extent to which the institution explored those alternatives.” Wynne v. Tufts Univ. Sch. of Med. (Wynne II), 976 F.2d at 792 (1st Cir. 1992); see Driscoll v. Bryant College, 393 F.Supp.3d 153 (D. R.I., 2019)

A blurred background image of a group of five diverse students sitting around a table in a library. One student is in a wheelchair. The word "Questions?" is overlaid in large white text.

Questions?

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