

**Why We Do What We Do:
A bit of background for a Disability
Services Office**

AHEAD in Texas Spring 2025

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Marilyn-Bio

M.S. in Disability Services in Higher Education, Licensed Social Worker, Certified Special Education Teacher, and now retired.

NOTE: I am not an attorney, and this is not legal advice, just interesting information.

Learning Outcomes

Attendees will understand the laws and procedures which affect the workings in a Disability Services Office (DSO).

Recent 504 lawsuit by Texas and 16 other states will be reviewed.

Know what laws affect procedures followed in the DSO.

Evolution of Disability Law

Case Law (Sutton Trilogy and Toyota)

The Amendments Act of 2008

Documentation

Cases of Interest to Disability Office

Grievance, OCR information, and Southwest Regional ADA Center

Evolution of disability discrimination and rights seen
in about 142 years:

Concerned where we are now, but a bit of history
might be of help.

1883-Eugenics Movement (Lead to rise to the Nazi party)

1927-Buck v. Bell-Compulsory Sterilization. 1968-last state
repealed

1972-Hubert Humphrey-proposed amendment to Civil Rights
Act of 1964 recognizing disability as a protected class.

1972-1973-Legislation to benefit individuals with disabilities
was enacted with Section 504 of the Rehabilitation Act.
Nixon vetoed, passed 1973.

Photo Break-Panda Q&A?



Sources of Disability Law #1

-The main source of law that govern how colleges deal with persons with disabilities is the federal statute, **the Americans with Disabilities Act (1988)** introduced in 1986 by National Council on Disability. The final version of the bill was **signed into law on July 26, 1990**, by President George H. W. Bush.

Since this is a federal statute, most complaints of disability discrimination will be heard in federal courts.

-Section 504 of The Rehabilitation Act of 1973

A note about Section 504 follows these sources.

Sources of Disability Law #2

-Not our job, but...

-Section 508 of the Rehabilitation Act of 1973-

Anything posted online must be accessible.

We (DSOs) pay attention to this, but this is a **requirement of the institutions.**

Updates on 504 as of March 1, 2025

“Texas and 16 other states filed a lawsuit against the updated Section 504 regulations which were to be implemented summer 2024 under Biden administration. A lawsuit, Texas v. Becerra (5:24-CV-00225 (N.D. Texas, September 26, 2024, Judge K).

An injunction against extending the protections of Section 504 to transgender persons. Note: the issue of gender affirming care was in the preamble only”.

Updates provided on 2/28/25 with AHEAD National Presentation by OCR retired attorney, Paul Grossman

Updates on 504 as of March 1, 2025 #2

”A permanent injunctive preventing HHS from enforcing its new Final Rule, 89 Fed. Reg. 40,066, 40,068–69 (May 9, 2024), implementing Section 504 of the Rehab. Act. of 1973.

A Federal court ruling holding that Section 504, 29 U.S.C. § 794, is unconstitutional to the extent it pertains to programs not funded by the Vocational Rehab Act”.

Updates provided on 2/28/25 with AHEAD National Presentation by OCR retired attorney, Paul Grossman

Reasons not to Panic on 504 lawsuit

“The power of the Federal Government to set the terms of its contracts (colleges are contractors) is squarely set in the Constitution, Art. 1, Section 10.

In the past, there have been very similar efforts to narrow, contract clause based civil rights legislation, **Grove City v. Bell, 465 U.S. 555 (1984)**, which were successful, but they were effectively turned back through restorative legislation that was adopted by Congress in the **Civil Rights Restoration Act of 1987**”.

Updates provided on 2/28/25 with AHEAD National Presentation by OCR retired attorney, Paul Grossman.

Reasons not to Panic on 504 lawsuit #2

“At its heart, this suit is driven by an opposition to transgender rights, and for reasons that are bad, this motivating issue is likely to be resolved in other forums, hence the plaintiffs have asked for a “pause” *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, White House (Jan. 20,2025).

Even if Section 504 were to be curtailed or eliminated, your mission as a disability staff would remain under Title II and III of the ADA”.

Updates provided on 2/28/25 with AHEAD National Presentation by OCR retired attorney, Paul Grossman.

Breathe



Section 504 and ADA

-Section 504 of the Rehabilitation Act of 1973, prohibited discrimination against, “handicapped people” in

- a. Any federal program or activity
- b. Any program or activity receiving federal funds

-Both the Rehabilitation Act of 1973, amended in 1992 and 1998, and the ADA of 1990 are civil rights laws that protect individuals with disabilities from discrimination.

-The Rehabilitation Act goes beyond providing legal protections. It provides for direct services to people with disabilities which help them to become qualified for employment.

ADA Titles I-III

Title I: Employment

Title II: Public Entities (Colleges and Universities)

Title III: Private Entities

Title I: Employment

Title I of the ADA prohibits discrimination in all phases of employment hiring, advancement, termination, compensation or other terms of employment.

Title I ADA definition of disability includes:

A. Otherwise Qualified

B. Able to perform the essential functions of the job with or without reasonable accommodations.

Title II: Public Entities

-Title II- all programs, activities, and services of public entities; this includes public elementary and secondary education systems and institutions, institutions of higher education and vocational education and public libraries.

-The Department of Justice (DOJ) is responsible for oversight of Title II. It has rules and regulations which can be found at 28 C.F.R. 36 (Code of Federal Regulations). The Office of Civil Rights is the entity under the DOJ that investigates complaints under Title II and Title III.

Title II: Public Entities Pg. 2
ADA Obligations of Public Entities

- Cannot use eligibility criteria which screen out or tend to screen out individuals with disabilities unless based on actual safety risks.
- Cannot set discriminatory requirements for participation.
- Modifications in Policies, Practices and Procedures -28 CFR 36.302

Title II: Public Entities Pg. 3

Auxiliary Aids and Services, 28 CFR 36.303

Requires public entities provide auxiliary aids and services to the disabled to allow them to participate. Applies particularly to communication with disabled persons and includes: 1) aids for hearing impaired like interpreters, amplifiers for telephones, TDD's open and closed captioning, 2) aids for visually impaired like readers, taped texts, braille materials, large print, and 3) use of the most advanced equipment is not required so long as effective communication is insured.

Title III: Private Entities

Applies civil rights protections for people with disabilities to the private sector. Under the ADA, private businesses and nonprofits cannot discriminate against people with disabilities in how they provide their goods and services and must make themselves accessible when they can afford to do so.

Sources: Karen Nielson, JD/MSW, UC Berkeley, City University of New York, Spring 2017; AHEAD statement 2018.

Photo Break-Sunset on the beach Q&A?



Case Law

Let's move into some case law that might be of assistance.

The first case is probably one you have heard of:

Southeastern Community College v. Davis

Decided- Jun 11, 1979

Southeastern Community College v. Davis

Decided- Jun 11, 1979

Still considered “Granddaddy” case regarding discrimination under 504 Rehabilitation Act in terms of “otherwise qualified” status.

An otherwise qualified person is one who is able to meet all of a program's requirements in spite of “his handicap”.

Southeastern Community College v. Davis

Question

Did Southeastern Community College violate Section 504 of the Rehabilitation Act of 1973 in denying Davis admission to its nursing program?

No.

Justice Lewis F. Powell, Jr. wrote for a unanimous court that an "otherwise qualified handicapped individual" specified by the Act meant one who meets all the program's requirements "in spite of his handicap" as opposed to "in every respect except as to limitations imposed by their handicap." Even with an improved hearing aid, Davis still required lip-reading to understand speech, and therefore was not "otherwise qualified." Since Davis could not be admitted to Southeastern's program without substantial changes to admission requirements, Davis' rejection did not constitute unlawful discrimination.

Southeastern (Continued)

-“Legitimate physical qualifications may be essential to participation in particular programs.” “Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person”.

Southeastern Community College v. Davis,
442 US 397 (1979).

Source: Karen Nielson, JD/MSW, UC Berkeley, City University of New York, Spring 2017.

Southeastern (Technology)

When Southeastern was decided in 1979, technology issues and their effects were not in anyone's thoughts. But the decision did recognize that evolving technology should be considered in determining whether someone was "otherwise qualified".

As noted by Laura Rothstein in "Section 504 at Fifty", technology has received little judicial attention, but the evolution of technology has had an impact on a range of issues, including teaching materials and communications within and outside a campus and might affect course materials and issues of "otherwise qualified".

Otherwise Qualified Status #1

-The otherwise qualified status extends beyond academic requirements and includes behavioral, professional, health and safety and other technical standards. California State University, 27 NDLR 95 (May 2003).

- Source: Karen Nielson, JD/MSW, UC Berkeley, City University of New York, Spring 2017.

Otherwise Qualified Status #2

“To qualify for postsecondary educational program or maintain good standing, an individual with a disability must be capable of fulfilling the essential requirements of a program, **with or without reasonable accommodations**. A disability does not entitle a student to waive an essential program requirement” (Colker and Grossman, p. 171).

Photo Break-Basket of Kittens Q&A?



Employment law

What does employment law have to do with what is provided in a disability office?

The following employment cases were the impetus to the Amendments Act to the ADA.

Why the Amendments Act 2008? (ADAAA)

Since the enactment of the ADA (1990), decisions of the U.S. Supreme Court in four cases had a major impact on ADA enforcement.

These cases are known as “the Sutton Trilogy” and Toyota.

Cases:

Sutton v. United Airlines, Inc. 527 U.S. 471 (1999)

Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999)

Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999)

Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002)

How employment cases impact us...

As seen with the Sutton Trilogy and Toyota, decisions from the court narrowly defined disability and employees lost in court...

Congress stepped in.

Photo break: Purple Ground flowers Q&A?



Why the Amendments Act 2008? (ADAAA)

When the ADA was passed in 1990, Congress appeared to see it as broadly construed, but the 1999 Court decisions and the Supreme Court interpreted the ADA narrowly, reducing the number of people protected from discrimination.

The passage of the Amendments Act in 2008, effective in 2009, and then clarified by the EEOC regulations effective in 2011, greatly expanded who is protected by the laws.

In 2010, the U.S. Department of Justice (DOJ) published regulations implementing Title II (28 C.F.R. 35) and Title III (28 C.F.R. Part 35) of the ADA.

Sources: Rothstein, Laura; Texas Journal on Civil Liberties & Rights (2008); Karen Nielson, JD/MSW, UC Berkeley, City University of New York, Spring 2017

ADAAA Effects-Slide 1

- Rejected the Supreme Court's interpretations of the definitions of "Disability".
- Overruled the U.S. Supreme Court cases that unduly restricted the definition of who is a person with a disability in Toyota and Sutton Trilogy.
- Amendments will make it easier for an individual to:
 - a. meet the definition of disability
 - b. be protected from discrimination
 - c. be entitled to reasonable accommodations.

ADAAA Effects-Slide 2

Broad interpretation of “disability”

Expansive definition of “major life activity”

Limited role of mitigating factors

Lower standard for “regarded as” disabled

Congress explicitly directed that the definition of disability is to be construed broadly. The language: “The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act”.

The expanded definition and list of “major life activities” is non-exhaustive.

Source: Karen Nielson, JD/MSW, UC Berkeley, City University of New York, Spring 2017

ADAAA Effects-Slide 3

The expanded definition and list of “major life activities” is non-exhaustive. Here are a few noted:

Caring for oneself, working, sitting, sleeping,
Standing, walking, lifting, reaching, eating,
Bending, breathing, interacting with others,
Seeing, hearing, speaking,
Learning, concentrating, thinking,
communicating*

***This is a non-exhaustive list.**

Photo Break-Ocean view Q&A?



Sources of Documentation

Primary-student is the vital source regarding how he/she is limited by impairment. A structured interview or questionnaire interpreted through professional judgment may be sufficient for establishing disability and need for accommodation.

Secondary-Observation, Interaction, and professional conclusion of all information by disability professional.

Tertiary-Educational records, medical records, psychoeducational evaluations, IEPs, 504 plans, SOP, may be needed if student unable to clearly describe how the disability is connected to a barrier and how the accommodation would provide access.

Documentation Continued

Your professional opinion matters and is required in conversations with students, reviewing documentation, and developing accommodations with each individual student.

Great Resource From National AHEAD:

<https://www.ahead.org/professional-resources/accommodations/documentation>

But they have asked for...

A basic accommodation of extended time could provide more flexibility in terms of documentation maybe even none. But what if someone asks....

to park in the President's parking spot due to their disability, figure much more documentation would be needed.

Could be a relationship of the request to the documentation needed.

The greater the accommodation request, the more documentation that might be needed.

Photo Break, Yellow Lab Q&A?



Cases of Interest to a Disability Office

Wynne v. Tufts University School of Medicine
932 F.2d 19, 26 (1st Cir. 1991)-FA

Guckenberger v. Boston University-Class
Substitution

974 F. Supp. 106 (D. Mass. 1997)

8 F. Supp. 2d 82 (D. Mass. 1998)

Cutrera v. Board of Supervisors of LSU, F.3d
(5th Cir. 2006)

Cases of Interest to a Disability Office #2

Gill v. Franklin Pierce Law Center 899 F. Supp. 850 (D.N.H. 1995)

Best Practice Cases:

Grabin v. Marymount Manhattan College,
No. 12 Civ. 3591 (S.D.N.Y. 6/10/14)

Dudley v. Miami University

Wynne v. Tufts University School of Medicine
932 F.2d 19, 26 (1st Cir. 1991)

In cases involving modifications and accommodations the burden is on the institution to demonstrate that relevant officials within the institution considered alternative means, their feasibility, cost and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower academic standards or require substantial program alteration.

Sources: Karen Nielson, JD/MSW, UC Berkeley, City University of New York, Spring 2017; Rothstein, Laura, Center for Excellence in Higher Education Law and Policy, Feb. 2012; Colker, Ruth & Grossman, Paul "The Law of Disability Discrimination in Higher Education".

Wynne v. Tufts Process

Develop and/or understand your “Wynne v. Tufts” Fundamental Alteration Process at your institution. This will assist you to know and understand whether a request for an accommodation could be a fundamental alteration.

More information on this is available in, “Hum, I am not Sure About This Request” (Technical Standards and Essential Elements) session.

Photo Break-Black Lab-Q&As?



FERPA-(20 U.S.C. § 1232; 34 CFR Part 99)

The offices of disability services will be unable to discuss a specific student circumstances or record with anyone (including parents or guardians) without that student's express permission.

FERPA however allows schools to disclose education records, without consent, to the following parties or under the following conditions (34 CFR § 99.31):

School officials with legitimate educational interest

Other schools to which a student is transferring

Specified officials for audit or evaluation purposes

Appropriate parties in connection with financial aid to a student,

Organizations conducting certain studies for or on behalf of the school, Accrediting organizations, Parties identified in a judicial order or lawfully issued subpoena, Appropriate officials in cases of health and safety emergencies, State and local authorities, within a juvenile justice system, pursuant to specific State law

General issues noted by Salome Heyward #1

Confidentiality: (as noted in the previous slide)

There is no right to confidentiality conferred to students either under Section 504 or the ADAAA. When a student requests an accommodation, an institution is entitled to disclose information to persons who have a need to know as a part of the accommodation process.

General issues noted by Salome Heyward #2

Timeliness of requests for accommodations:

The standard in the law is reasonableness. The institution is entitled to a reasonable amount of time to review the request and request, of whether a what accommodations might be provided. Whenever the student chooses to make the request, he/she will have to accept any adverse consequences, if any that the timing of the requests bring into play.

Photo Break-Two Zebras Q&A?



Other Issues To be Aware Of

Food Services:

As noted, A disability as defined by the ADA is a mental or physical impairment that substantially limits a major life activity. Eating is covered based on a 2012 agreement with Lesley University.

Have a process in place for accommodations for meal plan and food services for students with food allergies.

Reference: U.S. Department of Justice Civil Rights Division.
www.ada.gov/q&a_Lesley_University.htm

Grievance Procedures

Make sure you have a grievance procedure in place and published, working with your legal department.

Office for Civil Rights

In the distant past, a suggestion would be to download a copy of the Case Processing Manual (CPM) which was updated July 2022. It was a helpful resource.

It has been updated as of February 19, 2025. Find it as the link below. Know that the CPM is very different than the 2022 CPM. (Warning Posted)

<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

New Warning went on the OCR website

Warning

You are accessing a U.S. Federal Government computer system intended to be solely accessed by individual users expressly authorized to access the system by the U.S. Department of Education. Usage may be monitored, recorded, and/or subject to audit. For security purposes and in order to ensure that the system remains available to all expressly authorized users, the U.S. Department of Education monitors the system to identify unauthorized users. Anyone using this system expressly consents to such monitoring and recording. Unauthorized use of this information system is prohibited and subject to criminal and civil penalties. Except as expressly authorized by the U.S. Department of Education, unauthorized attempts to access, obtain, upload, modify, change, and/or delete information on this system are strictly prohibited and are subject to criminal prosecution under 18 U.S.C § 1030, and other applicable statutes, which may result in fines and imprisonment. For purposes of this system, unauthorized access includes, but is not limited to:

Any access by an employee or agent of a commercial entity, or other third party, who is not the individual user, for purposes of commercial advantage or private financial gain (regardless of whether the commercial entity or third party is providing a service to an authorized user of the system); and Any access in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or any State.

If system monitoring reveals information indicating possible criminal activity, such evidence may be provided to law enforcement personnel.

A “Regional” Resource

Southwest ADA Center-Houston

<http://www.southwestada.org/>

“The Southwest ADA Center is the Southwest's leading resource on the Americans with Disabilities Act and related disability rights laws. The Center is part of the ADA National Network funded by the National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR).

The Southwest ADA Center serves a wide range of audiences who are interested in or impacted by these laws, including employers, businesses, government agencies, schools and people with disabilities. Expert staff members are available to provide training and publications and to respond to your inquiries via the toll-free hotline 800-949-4232”

Other Issues To Think About

Faculty and Staff:

COVID and aging professors who are not subject to mandatory retirement.

What process(es) are in place at your institution for addressing accommodations for these folks?

Final Thoughts

“The 2008 Amendments Act and the regulatory guidance have proven to make it much less likely that institutions will focus on whether the student or faculty member has a disability. The focus will be on whether the individual is otherwise qualified and whether the requested accommodations are reasonable.

The issue of cost may begin to receive more attention because of shrinking resources”.

Questions???

Reach me at
marilyn@CollegeADA.com
if needed.

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