

***The Law of Disability Discrimination  
For Higher Education Professionals***  
**2015 Update**  
**Court Decisions, Settlements, and Guidance<sup>1</sup>**

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<sup>1</sup> This document is indexed to Colker and Grossman, *The Law of Disability Discrimination for Higher Education Professionals*. This book, written for AHEAD members, Disabled Students Service Directors, and their legal advisors is published by Lexis-Nexis. It provides a comprehensive overview of disability anti-discrimination law including legal history, definition of disability, employment discrimination, and an extended chapter on the rights of students with disabilities in higher education. This book is available through Lexis-Nexis at the following link:

<http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=prod20900324>

<sup>2</sup> The information set forth in this document is presented for informational purposes only and should not be construed as legal advice. For any legal questions you may have, please consult with counsel for your institution.

## **Documentation and Definition of Disability**

**In 2014 DOJ issued an NPRM:** DEPARTMENT OF JUSTICE, Office of the Attorney General, 28 CFR Parts 35 and 36, CRT Docket No. 124; AG Order No., RIN 1190-AA59, proposed application of ADAA to individuals with learning disabilities and AD/HD under titles II & III. Dept. of Justice, Amendment of Americans with Disabilities Act title II and Title III Regulations to Implement ADA Amendments Act of 2008 (Jan. 22, 2014), *available at* [http://www.ada.gov/nprm\\_adaaa/nprm\\_adaaa.htm](http://www.ada.gov/nprm_adaaa/nprm_adaaa.htm). The regulation in question has not been issued and it is not on the published regulation calendar for issuance in the near future.

***Rawdin v. American Board of Pediatrics***, 985 F. Supp. 2d 636, 2013 U.S. Dist. LEXIS 159458, 2013 WL 5948074 (E.D. Pa. 2013)

The Summer Reading List for last year reported that the District court had concluded that an acquired learning disability following treatment for brain cancer is not a disability, when the individual is academically and professionally successful, and has both IQ and performance scores higher than the average individual in the general population.

Subsequent to the last Reading List, the Third Circuit affirmed the judgment of the district court in favor of the ABP. ***Rawdin v. American Bd. of Pediatrics***, 582 Fed. Appx. 114, 2014 U.S. App. LEXIS 17002 (3d Cir. Pa. 2014). However, the Circuit Court assumed without deciding that Dr. Rawdin was an individual with a disability. Consequently, the Circuit Court's opinion focused on whether Dr. Rawdin was entitled to accommodations that he was denied either on the examination or in an alternative to the examination. This issue is discussed below.

Insert Colker and Grossman, ***Higher Education*** at p. 46 as first **NOTE**.

***Consent Decree, Department of Fair Employment and Housing (DFEH) and the United States v. LSAC***, No. CV 12-1830-EMC (N.D. Cal. May 20, 2014), available at [http://www.ada.gov/defh\\_v\\_lsac/lsac\\_consentdecree.htm](http://www.ada.gov/defh_v_lsac/lsac_consentdecree.htm). [Lexis cite is as follows: but it is not to the pertinent documents. Dep't of Fair Empl. & Hous. v. Law Sch. Admission Counsel, 2013 U.S. Dist. LEXIS 84205 (N.D. Cal. June 14, 2013)]

Last year's Reading List reported that on May 20, the parties to this matter, the LSAC, the California Department of Fair Employment and Housing, and the United States entered into a court-approved consent decree providing an end to flagging LSAT score reports of individuals who received extended time on the test, to establish a compensation fund of \$7.73 million for the 6000 individuals (nation-wide) who applied for accommodations in the past five years, to "streamline" the process for evaluating accommodation requests including automatically approving accommodations that an applicant can show previously had been received on standardized tests related to post-secondary admissions, and implementing the DOJ title III "best ensure" accommodation standard for individuals with sensory, manual, or speaking skills. For persons who are required to submit documentation (for example, persons who were not previously accommodated on standardized exams), documentation developed within the past five years will be considered reliable. A claims administrator will administer the compensation fund.

The federal court approved the consent decree on May 29, 2014. Pursuant to the decree, a panel of five experts was assembled to develop "best practices" guidance for LSAC to follow prospectively, unless any of the parties objected to recommendations of the panel and convinced the court that the recommendations were inconsistent with or outside the scope of the decree.

The decree assigned the panel 10 specific questions to answer. On January 31, 2015, the panel filed its report. See <http://www.justice.gov/opa/pr/2014/May/14-crt-536.html> (last viewed on May 22, 2014). Included in the panel's recommendation are less burdensome documentation requirements and review practices that are more likely to result in accommodation eligibility; a greater

number of documentation reviewers with a wider range of knowledge; training for all reviewers to ensure consistency; and a quicker, more responsive appeal process.

On February 26, the LSAC filed a response to the panel's recommendations, challenging most of them. On July 31st, the matter will be heard before the district court magistrate judge that was involved with the entry of the consent decree. A ruling is supposed to result expeditiously.

Insert Colker and Grossman, *Higher Education* at p. 57 before box and p. 204 before the first **NOTE**.

## **Academic Deference and Qualification**

*Walsh v. University of Pittsburgh*, Civil Action No. 13-00189, (W.D. Penn. 2015), 2015 U.S. Dist. LEXIS 2563, 2015 WL 128104  
<http://law.justia.com/cases/federal/district-courts/pennsylvania/pawdce/2:2013cv00189/208081/63> (last viewed, June 22, 2015).

Although only a district court opinion, this decision is helpful for laying out the analytical structure for several types of allegations.

Amy Walsh is an individual with a BS in nursing. She enrolled in a Masters degree program in anesthesia. While in the program, she performed well in the classroom but encountered difficulties in the clinical rotation stages. The student alleged that in her first rotation it became necessary to tell one of her instructors that breast cancer surgery had resulted in weakness, reduced range of motion, and stiffness in one of her arms. According to Walsh, her instructors subsequently began stating that she would be unable to perform essential skills because of her limitations. Her complaints about this treatment got little response. At the second site for rotation, Walsh was placed on a performance improvement plan (PIP).

The student alleged that this PIP was required because staff from the first rotation site had told the second site that she was incompetent. She complained again about her treatment without receiving an effective response. In the third rotation, on the same day, Walsh made two “dangerous or potentially dangerous,” errors in administering medication. Following three levels of due process review, she was dismissed from the anesthesia program.

Subsequent to her dismissal the student sued the University. The Federal District court considered three claims: disparate treatment and a hostile environment on the basis of disability under Section 504 of the Rehabilitation Act and Title II of the ADA, as well as breach of contract.

The University of Pittsburgh did not contest that the student was an individual with a disability but moved for summary judgment on the grounds that she was not qualified to complete the program. Of interest is the distinction drawn by the court with regard to the question of academic deference. Much deference was accorded on the breach of contract claim, little on the disability discrimination claims.

With regard to the breach of contract claim, the court articulated the question before it as, “[Whether] the decision to dismiss [the student] was rational and had a reasonable basis in fact.” The court stated:

[W]hen judges are asked to review the substance of a genuinely *academic decision* ... they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Applying this standard to the plaintiff's contract claims, the court granted the University's motion for summary judgment.

In analyzing the disability discrimination claim, the court declined the University of Pittsburgh's invitation to apply a similar degree of deference.

While the purely academic decisions of universities deserve deference in a due process context, if such deference were extended to situations requiring a separate discrimination analysis, universities could insulate even actions taken for discriminatory reasons by claiming that the student was not otherwise academically qualified. Instead, when a student claims she was discriminated against, courts must independently evaluate whether the student has shown she is otherwise qualified to participate in the academic program.

With regard to the disparate treatment claim, the court followed the same analytical test as would be applied in a race discrimination claim. Although it concluded that the student had made out a *prima facie* discrimination, based on comparative treatment information, the high level of due process which she had received, and the potential seriousness of her errors, the court granted the University's motion for summary judgment, concluding that the student had failed to establish that her dismissal was a pretext for disability discrimination.

It is rare to see a student litigate a claim that he or she has been subject to a hostile environment on the basis of disability. This case is an exception. As to this allegation, the court followed the same analytical test as would be applied to a sex discrimination claim under Title IX of the Education Amendment of 1972. Based on this analysis, the court granted the University's motion for summary judgment, concluding that the Walsh had failed to establish that her treatment during rotation was sufficiently severe or pervasive to constitute a hostile environment.

At best, [the student] has described a series of isolated comments relative to performance that took place intermittently over a period of several months in the Program that neither threatened nor humiliated Walsh nor prevented her from participating in the Program. This is inadequate to support a jury's reasonable finding that Walsh endured sufficiently severe harassment.

Insert Colker and Grossman, *Higher Education* at p.210 before **NOTE 3**.

## **Notice**

***Grabin v. Marymount Manhattan College***, 2014 U.S. Dist. LEXIS 79014, 2014 WL 2592416 (S.D.N.Y. June 10, 2014).

<http://www.leagle.com/decision/In%20FDCO%2020140611E99/GRABIN%20v.%20MARYMOUNT%20MANHATTAN%20COLLEGE>

Heather Grabin, a communications major, was given a failing grade in group-work oriented, web-design, communications course (Comm 225) at Marymount Manhattan College. Grabin's attendance exceeded a rule in the syllabus that allowed for a maximum of two unexcused absences. The student contends that all her absences were due to doctors' visits and hospitalizations for serious infections related to her, disability, thalassemia, which is a blood disorder.

When in the hospital, the student sent several emails to her Comm. 225 professor, explaining her situation and asking for ways to make up the missed classes. These requests either went unanswered or she was told it would be very hard to make up the missed classes and exercises. The professor declined to identify any way for her to make up the missed work and recommended to her that she drop the class. At about the same time, a Marymount administrator gave her a different message, telling her, "everything would be taken care of."

Grabin also sought assistance from the Dean of Students. The Dean made some suggestions and encouraged her to meet again with the professor. But the Dean deferred to the authority of the professor to enforce attendance rules. The record does not reflect any direction from either the professor or the dean that the student should take her concerns to the disabled student services office.

Following receipt of the failing grade, Grabin made multiple unsuccessful informal efforts to receive reconsideration of her grade, subsequently filing a formal grade appeal. The College denied her request to meet directly with the appeal committee, which twice upheld her grade in the communication class. As

a result of the failing grade, the student failed to receive her degree or diploma.

Grabin sued the College under Section 504 of the Rehabilitation Act of 1973 for disability discrimination on the grounds that it failed to accommodate her disability. The College responded with a motion for summary judgment on the grounds that Grabin was not an individual with a disability, was not qualified, and that she had not requested an accommodation and, even if she had, what she wanted would constitute a fundamental alteration.

The College's motion failed. One basic reason was that the court found both sides had not submitted as much evidence as they should have, leaving several material questions unresolved. In this vein, the court declined to find that Grabin was an individual with a disability, only that she had placed enough into evidence to raise a question for further resolution at trial. Similarly, as to qualification, the court noted that "Plaintiff's testimony indicates that, if she had been permitted extra time, or additional instruction, she could have made up the in-class work she had missed while absent." This was sufficient to survive a motion for summary judgment. (Grabin was only one course short of her degree.)

The most notable issue in this dispute is whether Grabin had ever requested an accommodation. It appears that the student did not register with the College's disabled student services office or provide it with documentation necessary to support an accommodation request. This is particularly significant as the student handbook states that, students who want accommodations should register with its disabled student services office and that "[i]nforming other College offices, faculty, or staff does not constitute registering with the office."

The court's analysis of this question begins by stating that, "a defendant is not liable for failure to provide a reasonable accommodation under the ADA if the plaintiff does not ask for an accommodation, or fails to provide information necessary to assess the request for an accommodation." The court points out



however that the student identified her disability on her transfer and housing registration forms and that a reasonable fact-finder could determine that:

[P]laintiff notified Marymount “repeatedly and clearly regarding her disability.... More specifically, Plaintiff repeatedly requested accommodations in order to complete Comm 225. It is also conceivable that a jury could determine that the statements of Marymount’s senior administrators—telling Plaintiff, among other things, that “everything would be taken care of”—reasonably conveyed to Plaintiff that she had properly notified Marymount of her disability and had requested an accommodation of that disability.

As to the argument that Grabin’s requested accommodation(s) would constitute a fundamental alteration(s), the court both noted that academic decisions are entitled to deference but, as in several other recent cases, these are fact intensive case-by-case determinations. The court’s opinion further suggests that some differences may also exist given the kind and scope of accommodation requested and the field of study. The court stated, in pertinent part:

[The precedents concerning medical students cited by College] are qualitatively different from the instant case, not least of which because they were rendered upon more completely developed records than has been presented to this Court. Yet most importantly, these cases are factually distinct from the instant case. Here, Plaintiff sought an accommodation for several assignments in one course—a web design seminar—towards her communications degree, not to be excused from passing her first year of medical school.

Also pertinent to the court’s determination was that in every other course the teacher was able to figure out a way to accommodate Grabin and with these accommodations she was able to pass the courses.

If ever a case justified disability training for all faculty, it is this one.

Insert Colker and Grossman, *Higher Education* at p. 196 before **Documentation.**

## **Reasonable Accommodations/Auxiliary** **Aids/Academic Adjustments**

### ***Testing accommodations***

The Summer Reading List for last year reported that the District court in *Rawdin v. ABP*, had concluded that an acquired learning disability following treatment for brain cancer is not a disability, when the individual is academically and professionally successful, and has both IQ and performance scores higher than the average individual in the general population. *Rawdin v. American Board of Pediatrics*, 985 F. Supp. 2d 636 (E.D. Pa. 2013):

Subsequent to circulation of the Summer Reading List, the Third Circuit affirmed the judgment of the district court in favor of the ABP. *Rawdin v. American Bd. of Pediatrics*, 582 Fed. Appx. 114 (3d Cir. Pa. 2014). However, the Third Circuit assumed, without deciding, that, Dr. Rawdin was an individual with a disability. Consequently, the Third Circuit's opinion focused on whether Dr. Rawdin was entitled to accommodations that he was denied either on the examination or as an alternative to the examination. The Court stated that under Title III regulation 28 C.F.R. § 36.309, Dr. Rawdin was entitled to an exam that "best ensured" that it was measuring his knowledge and aptitude and not his disability. The Court concluded that the exam offered to Dr. Rawdin, with accommodations like extra time, met this standard. The testimony of the ABP witnesses at the District Court level, demonstrated to the Court's satisfaction that the exam is not context free, requiring test-takers to dredge up facts from memory, a format that would be very

challenging for someone with Dr. Rawdin's impairments. Rather, the Court concluded that the exam is context-based requiring responses to scenarios. Moreover the accommodations proposed by Dr. Rawdin, an open book exam, an essay rather than multiple-choice exam, direct observation or a portfolio review by the ABP instead of any exam, or a waiver of the exam, all constituted an undue burden or a fundamental alteration.

Insert Colker and Grossman, *Higher Education* at p. 316 before **NOTE 2**.

### **Individuals with mobility impairments**

*Murillo v. Citrus College*, 2014 Cal. App. Unpub. LEXIS 6111 (Cal. App. 2d Dist. Aug. 28, 2014). <http://www.courts.ca.gov/opinions/nonpub/B248201.PDF> This is an unpublished opinion (that is not citable) by a state court. It is included nonetheless for its potential for use in the classroom and other teaching settings.

Ricardo Murillo is an individual with quadriplegia who attended Citrus College. While at the College the student experienced the sudden onset of autonomic dysreflexia, a common side effect of quadriplegia entailing excessively high blood pressure. The student asked a nurse at the campus health center to help him take three medications by lifting the pills to his mouth. The Health Center's staff would not provide this assistance and explained to the student that it was their policy not to administer medications to students.

On the grounds that the College was refusing to provide a reasonable modification, the student sued the College in state court under the authority of both California antidiscrimination law and Title II of the ADA. The College filed a motion for summary judgment on the grounds that to provide medication services would constitute a fundamental alternation of its program as it provided such services to no one. The district court agreed and granted the motion for summary judgment.

The student appealed the determination of the district court. On a number of grounds, the appellate court concluded that the district court determination was in error. As has been recently noted in other reversals of summary judgment, citing to *PGA v. Martin*, the appellate court stated, “[T]he determination of what constitutes [a] reasonable modification is highly fact-specific, requiring case-by-case inquiry.” .... “[M]ere speculat[ion] that a suggested accommodation is not feasible’ falls short of the ‘reasonable accommodation’ requirement.” Further, fundamental alteration is an affirmative defense with the burden on the College and the record had not yet been developed enough to decide this issue. For example, the court wondered about the hours and staffing at the health center. Moreover, it was not clear on the record whether this modification could be implemented elsewhere by the College such as the DSS office.

The appellate court also found unpersuasive the not uncommon argument of, “if we do it for this student, we will have to do it for all (or too many) students.”

This argument ignores the fact that the plaintiff is seeking an “accommodation” and not a change to the Health Center’s general policies with respect to other students. Discrimination may be shown precisely where the defendant treated plaintiff *the same* as everyone around her, despite her need for reasonable accommodation. Accordingly, a person with a disability may be the victim of discrimination precisely because she did not receive disparate treatment when [the individual] needed accommodation. [citations omitted]

Finally, the appellate court acknowledged that the College raised health and safety concerns that must be considered. But again, the court did not consider appropriate to do so on a motion for summary judgment.

The defendants are entitled, under the ADA’s implementing regulations, to “impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities[,]” so long

as such “safety requirements are based on actual risks, not mere speculation, stereotypes, or generalizations about individuals with disabilities.” (28 C.F.R. 35.130(h).) However, here, there are triable issues of fact as to whether the defendants’ safety concerns could be alleviated by giving the Health Center copies of the plaintiff’s prescriptions or requiring the plaintiff to execute a waiver with respect to claims that could arise as a result of the Health Center’s assisting with administering his medication.

For the above reasons, the appellate court reversed and vacated the district courts order granting summary judgment to the College and the student was awarded his costs on appeal.

Insert Grossman and Colker, *Higher Education* at p. 223 before **Burden and Order of Proof**.

### **Individuals with sensory impairments**

As reported last year, on January 10, 2014, the National Federation for the Blind filed a complaint, in *Dudley v. Miami University* (S.D. Ohio 2014) (1:14-CV-00038). See <https://nfb.org/images/nfb/documents/pdf/miami%20teach.pdf> (last viewed on May 22, 2014).

The complaint in this matter alleged that, a blind student pursuing a degree in zoology for the objective of attending veterinary school at Miami University, a public entity, violated title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 “with deliberate indifference” by failing to provide necessary auxiliary aids or modifications in the student’s classes and labs. According to her complaint, the University sent a letter to her instructors suggesting that only two modifications were necessary: offering all classroom material in Rich Text Format and allowing double-time for exams and quizzes. The letter to the faculty made no mention of Braille textbooks, tactile graphics, human assistants, timely course materials or accessible learning management

software -- all accommodations she stated were necessary. Her lecture instructors used LearnSmart to manage homework assignments, which she states was not accessible to her. She also was not permitted to participate fully in lab activities.

The student, some teachers, and a graduate assistant brought a number of the identified deficiencies to the attention of the University. In several instances, the student proposed solutions, but the University allegedly failed to act on this notice or advice. She also alleged that Miami University made technology procurement decisions with indifference to the accessibility of the technology in question, even though accessible technology existed and was being used at other universities.

The student sought to have her grades expunged, receive a refund of tuition and costs, and an award of compensatory damages, attorneys' fees, and prospective injunctive relief in the form of effective and timely modifications and adjustments in all classes and labs.

On April 7, 2014, the United States initiated an investigation of the above issues as well as broader issues. On April 23, 2014, the Federal District Court tolled the proceedings, allowing the parties and the United States an opportunity to resolve this matter without further litigation. Consequently, at this time, the University has not filed an answer to the NFB complaint nor has it exhausted its opportunity to file for a motion to dismiss the NFB complaint.

On June 25, 2014, DOJ advised the parties that it had found violations of Title II of the ADA at Miami University. Among the violations, DOJ found that Miami University:

- Used technologies that are inaccessible to individuals with disabilities, including those with learning, hearing, and vision disabilities
- Failed to ensure, through the provision of appropriate auxiliary aids and services, that communications with individuals with disabilities are as effective as communications with others.

- Failed to reasonably modify its policies, practices, and procedures where necessary to avoid discrimination on the basis of disability.

To date, the parties and DOJ have not reached a settlement and on May 12, 2015, with the consent of counsel for the plaintiff, the United States filed with the Federal District court a motion for intervention.

<http://www.justice.gov/opa/pr/justice-department-moves-intervene-disability-discrimination-lawsuit-alleging-miami>

The motion for intervention rests on a number of arguments including that:

- Due to the tolling, the litigation is still at its very earliest procedural stages
- The disposition of this case impacts the United States' interest in eliminating disability discrimination effected through the use of inaccessible technologies in higher education. This is an area of great public importance because educational institutions are increasingly using various technologies in their educational programs.
- The NFB represents the interests of persons with vision impairments but a broader range of disabilities is implicated in this matter including hearing and learning disabilities.
- The Department of Justice plays a central role in interpreting, enforcing, and implementing the ADA and the Department's Title II regulation and the outcome of this litigation may adversely impact that responsibility.

At this time, some observers are predicting a settlement agreement under the supervision of the court. The plaintiff has withdrawn from Miami University and enrolled at another university.

Insert, Colker and Grossman, *Higher Education* at p. 260 after NOTE 3.

### ***Argenyi v. Creighton University***

Last year's Reading List reported, in a case involving accommodations for a student with a hearing impairment, that summary judgment for Creighton

University had been reversed and the matter was to be set for trial. ***Argenyi v. Creighton Univ.***, 703 F.3d 441 (8th Cir. Neb. 2013).

Following a jury verdict that Creighton University had denied a deaf student auxiliary aids and academic adjustments the federal district court considered Argenyi's request for declaratory, equitable, and injunctive relief. At the end of 2013, the court ordered the University to provide Argenyi with auxiliary aids and services for the remainder of his medical school education at Creighton including CART in didactic settings and sign-supported oral interpreters in small-group and clinical settings. The court denied Argenyi's request for reimbursement for the over \$130,000 he had spent on CART and other interpreting services.

In May of 2014, the question of fees for the “prevailing party” was decided by the district court. Creighton was ordered to pay Argenyi and his team of eight lawyers \$487,000 for attorney fees, expert fees, and costs. The court ruled that the jury’s verdict that the University had discriminated against Argenyi was sufficient to establish that he was the “prevailing party.” ***Argenyi v. Creighton Univ.***, 2014 U.S. Dist. LEXIS 63726, 2014 WL 1838980 (D.Neb.)(D. Neb. May 8, 2014)

After taking a leave of absence, Argenyi returned to the University this past July to begin his last two years of medical school. In the meantime, Creighton filed a notice of appeal in the Eighth Circuit, focusing on the question of undue burden. Subsequently the parties announced a confidential settlement. It is known that Creighton withdrew its appeal and that Argenyi is reported to be happy with the terms of the settlement.

Insert Colker and Grossman, ***Higher Education*** at p.280 after **NOTE 1**.

### **Food allergy accommodation**

According to the Food Allergy Research and Education (FARE) foundation, “food allergy reactions send someone to the emergency department every three minutes, resulting in more than 200,000 emergency department visits in the U.S. per year. The increasing number of people with food allergies, coupled with the



fact that teenagers and young adults are at the highest risk for fatal food-induced anaphylaxis, makes this a critical issue for colleges and universities.” In response to these urgent circumstances, FARE has issued 53 pages of ***Pilot [draft] Guidelines for Managing Food Allergies in Higher Education***, including checklists and model policies. <http://www.foodallergy.org/document.doc?id=382>  
The topics covered in the pilot guidelines include:

- A clear process for requesting accommodations/modifications
- Documentation required to establish an individual’s food allergy as a disability
- A process for determining appropriate accommodations
- Strategies for implementing accommodations
- Outreach and marketing so that students and others know of food allergy/ceeliac disease accommodation services
- Assessment of services, assuring compliance and remedying mistakes
- Emergency response plans, training and signage including how to respond to anaphylaxis and promptly administer epinephrine
- Training including who should receive it
- Food preparation, production, avoiding cross-contact or using separate equipment, sanitizing, labeling, and serving
- Student responsibilities
- Confidentiality of student documentation and records

Insert Colker and Grossman, ***Higher Education*** at p. 317 before **Safety**.

## **Students with Psychological Disabilities**

***Settlement with Quinnipiac University*** - [http://www.ada.gov/quinnipiac\\_sa.htm](http://www.ada.gov/quinnipiac_sa.htm)

University counselor, possibly “over-reacting,” concluded that a student was self-destructive or suicidal, called ambulance and had student hospitalized. Before Student left hospital she was handed papers by Quinnipiac which placed her on

“mandatory medical leave” with return contingent upon “assess[ment] by a university-designated psychiatrist.” Perspective of DOJ is that college violated Title III of the ADA because it failed to engage in an individualized interactive process or even consider modifications to its dismissal policies including housing student with her parents and taking classes on-line. Analysis does not suggest that emergency response or even decision to dismiss Student from the dorm was part of the violation. The settlement agreement provides that Quinnipiac will conduct an individualized assessment and case-by-case determination as to whether and what modification(s) can be made to allow students with mental health disabilities participate in the educational programs at Quinnipiac, and to continue to attend their classes while seeking treatment for mental health conditions and to pay the student \$17K for emotional distress, pain and suffering, and other consequential injury and another \$15K to student loan provider to reimburse for lost tuition.

Insert Colker and Grossman, *Higher Education* at p.319 following the third paragraph.

***Hershman v. Muhlenberg College, 17 F. Supp.3d 454 (E.D. Pa. 2014).***

Student at Muhlenburg College, close to graduation, missed an unspecified number of classes due to his depression, and as a result, he did not satisfy the attendance requirement for one class. The professor refused to make any accommodation to allow the plaintiff to pass the class. Since successful completion of the class was a graduation requirement, the Student sought to substitute credit from another course to satisfy the prerequisite, but the department chair denied plaintiff's request. Student and his parents met with the College and were informed that he would fail the class unless he obtained a medical withdrawal.

It appears that the Student took a medical withdrawal with regard to the class in question. At the College's invitation, he and his family attended ceremony but the program for the ceremony listed an asterisk next to his name indicating a later

graduation date. A semester later, the Student satisfied the graduation requirements and received his diploma.

The student subsequently sued the College under Title III of the ADA on grounds that it failed to accommodate him and for “intentional infliction of emotional harm,” a state law tort claim. The latter claim was based on the “emotional distress” he experienced due to the asterisk in the graduation program.

The College filed a motion for dismissal of the Student’s complaint on the grounds that he was not a qualified individual with a disability as the accommodations he sought were not “reasonable.” Their implementation, the College argued, would require a fundamental alteration to the College’s program.

The College’s motion for dismissal failed. (There does not appear to have been a dispute over whether the Student was an individual with a disability.) The district court concluded that the Student was a qualified individual as he completed his course of study and graduated. Most importantly, the court concluded that it did not yet have sufficient information to determine whether the Student’s requested accommodations were reasonable or unreasonable because the determination of what is a fundamental alteration is “a fact specific question,” as the Supreme Court explained in *PGA v. Martin*. The court was concerned that it did not know about certain facts it considered relevant, including the Student’s major, the nature of the course in question, the nature of the course the student proposed to substitute, and why both the professor and the dean refused to make *any* form of accommodation. Consequently, the court ordered discovery to proceed on the Student’s ADA claim.

Based on state law precedents, the College’s motion to dismiss was granted on the tort claim.

Insert Colker and Grossman, *Higher Education* at p.211 after **Note 2**.

***Quinones v. University of Puerto Rico, et al.***, No. 14-1331, 2015 WL 631327, 2015 U.S. Dist. LEXIS 18319, 31 Am. Disabilities Cas. (BNA) 471 (D. P.R. Feb. 13, 2015).

Karina Quinones, MD, entered an ophthalmology residency program at the University of Puerto Rico in July of 2011. At approximately the same time, she became addicted to a number of drugs prescribed to support sobriety and to help her concentrate in school, including Adderall. To support the fact that her impairment substantially interfered with major life functions, she averred that her addiction to Adderall caused her visual disturbances, speech problems, and dizziness. The court also noted that as a result of her addiction she had problems in complying with certain requirements of the Residency Program. In September of 2012, Dr. Quinones was dismissed from the program. Pursuant to a settlement agreement, she was permitted to apply for readmission in November of 2012. At that time, Dr. Quinones asked for an “accommodation” in the form of readmission and she provided evidence to the University that she had been sober for approximately 20 months, clean for “a little over three months,” and was actively participating in Alcoholics Anonymous. In April of 2013, the University denied her request for readmission. Shortly thereafter she filed suit for disability discrimination under Title II of the ADA and Section 504 of Rehabilitation Act. The University responded with a motion to dismiss.

In the mix of issues before the court, the most important one was whether Dr. Quinones was drug-free long enough to qualify for the “safe-harbor” provision of these laws that pertains to the disability of drug-addiction. Under the ADA (and Section 504) if a person is a “currently engaging in the illegal use of drugs,” including abuse of prescription drugs, a covered entity may take adverse action on the basis of such use. However the ADA protects “[i]ndividuals who are recovering from an addiction to drugs, as the statute aims to protect them from the stigma associated with their addiction” To achieve this objective the ADA contains a “safe harbor” that extends ADA coverage to an individual who:

- (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or

has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use . . . .

Relying largely upon employment discrimination precedents, in the opinion of the court, the University did not violate the ADA or Section 504 in treating Dr. Quinones without regard to the protections of the safe harbor provision. According to the court, there is no “bright line” for how long an individual must be clean to no longer be a “current drug user.” This determination is to be made on a “case by case” basis. “[T]he ‘safe harbor’ provision applies only to [individuals] who have refrained from using drugs for a significant period of time.” The courts also agree that a significant period of time must pass for an individual to not be considered a current user. This is because this “safe harbor” provision “exclude[s] from statutory protection an employee who illegally uses drugs *during the weeks and months* prior to her discharge, even if the employee is participating in a drug rehabilitation program and is drug-free on the day she is fired.” A “current drug user” is one whose illegal use “occurred recently enough to justify a reasonable belief that a person’s drug use is current.”

In addition to basing its decision in favor of the University on the short duration of the time Dr. Quinones had refrained from illegal drug use, the court also noted that the duration of the addiction is pertinent and that certain fields may justify greater caution than others. “[A] short period of abstinence, particularly following such a severe drug problem, does not remove from the employer’s mind a reasonable belief that the drug use remains a problem.” A court may examine “the level of responsibility entrusted to the employee; the employer’s applicable job and performance requirements; the level of competence ordinarily required to adequately perform the task in question; and the [individual’s] past performance record.”

Insert Colker and Grossman, *Higher Education* at p.126 after **Note 1**.

## **The Intersection of Race, National Origin and Disability**

*Salmeron v. Regents of the University of California*, No. C 13-5606, 2014 U.S. Dist. LEXIS 80344, 2014 WL 2582712 (N.D. Cal.06/09/14).

A claim of discrimination in dismissal from medical school filed under Section 504, the ADA, and Title VI of the Civil Rights Act of 1964 is sufficient to withstand a motion for summary judgment by alleging that the individual's minority group status (Mexican American) and disability (LD) status were known to the institution, the university engages in interactive communications and provides accommodations to white and other "non-Mexican American" individuals with disabilities but refuses to engage in the interactive process and denied accommodations to the plaintiff. Such a claim is further supported when it is alleged that following dismissal, the Dean of the School refused to follow a grievance panel's recommendation of reinstatement and the institution used the student's image as part of diversity-related recruitment efforts, even after the student was dismissed. "Although it is a close call, the court finds these allegations sufficient to plausibly allege discriminatory intent."

## **Retaliation**

*Cottrell v. Norman*, 2014 U.S. Dist. LEXIS 101645, 2014 WL 3729215 (D.N.J. July 25, 2014). <http://law.justia.com/cases/federal/district-courts/new-jersey/njdce/1:2012cv01986/272545/66/>

Making use of disability parking spaces, parent (Cottrell), her companion, and daughter with severe disability visit and participate in programs open to the public at Rowan University, a private school. Cottrell and her companion "are self-described longtime 'advocates for the disabled' and often challenge parking violations of individuals who illegally park in handicap parking spaces." In March 2010, parent's companion videotaped a vehicle with an expired placard parked in a designated disability space at the University.

In April, Cottrell drove her daughter to the campus to participate in a “Get Fit” class. Cottrell noticed the same car with an expired placard in a disability space. This time, she got in a verbal confrontation with the driver, got into her car, and took the placard. Following a complaint by the driver, campus and local police arrested Cottrell at her home for criminal charges resulting from the event. She was also given a no-trespass order from the college, which stayed in effect even after the criminal charges were dropped.

Cottrell and her companion sued under Title III the ADA for discrimination and retaliation. Defendant filed a motion for summary judgment. Plaintiffs’ Title III discrimination claim was dismissed, because neither individual was disabled. However, the court found that plaintiffs did have standing to assert a retaliation claim as “[t]he ADA ... makes it unlawful to retaliate against or intimidate ***any individual*** because he or she has opposed any act or practice made unlawful by the ADA ...” [emphasis added]

Although the plaintiffs had standing to assert retaliation, their claim failed on its merits as the defendants convinced the court that the adverse action was causally connected to impermissible conduct by the plaintiffs, not their protected activities. The University had not taken any adverse action when the plaintiffs taped unlawfully parked cars. The action was taken only following harassment of and theft from a driver. “[E]ven if plaintiffs had come onto campus to protect disabled persons’ parking rights, [it] does not mean they can conduct themselves in any manner without consequence. The cloak of the ADA does not extend its protections that far.”

***Widomski v. State Univ. of N.Y. (SUNY) at Orange***, 933 F. Supp. 2d 534 (S.D.N.Y. 2013)

Second Circuit found that the convening of a disciplinary/dismissal hearing following a letter from student’s attorney alleging that the student was

misperceived as having a disability and unlawfully excluded from phlebotomy clinics, did not establish retaliation where the convener of the hearing had “a good faith belief “that the student had falsified required clinical reports and the student failed to establish that this belief that was a pretext for discrimination.

***Sjöstrand v. Ohio State Univ.***, 750 F.3d 596 (6th Cir. 2014)

University’s articulated legitimate nondiscriminatory reasons for not admitting applicant to its graduate school of psychology were sufficient for federal district court to order summary judgment for University. However, as reported in last year’s Summer Reading List, applying a classic disparate treatment analysis (***McDonnell Douglas v. Green***, 414 U.S. 811 (1973)), the Sixth Circuit reversed in light of the fact that the applicant’s disability, Crohn’s disease, was known by the admissions committee and discussed in the admissions interview, the applicant had very strong paper qualifications in comparison to other admitted applicants, and, when she asked, she was not given by the school prompt, clear, or consistent reasons for her rejection.

Subsequent to the publication of last year’s Summer Reading List, a jury trial was held and the jury found for the University. Case: 2:11-cv-00462-MRA Doc #: 103 Filed: 09/29/14

***See also McKee v. Madison Area Tech. College***, 2014 U.S. Dist. LEXIS 70967, 2014 WL 2159257 (W.D. Wis. May 22, 2014).

<http://leagle.com/decision/In%20FDCO%2020140527G48/McKEE%20v.%20MADISON%20AREA%20TECHNICAL%20COLLEGE>

In a decision contrary to law, Federal District Court concludes that ADA covers disability-related retaliation claim by students, but Section 504 does not. Due to absence of evidence of discriminatory intent, court grants defendant’s motion for summary judgment on all federal claims and remands plaintiff’s state law claims for breach of contract and negligent infliction of emotional distress to state court.



## **Facilities Access**

*Williams v. Southern Univ. & Agric. & Mech. College*, 2012 U.S. Dist. LEXIS 145852, 2012 WL 4829488 (M.D. La. Oct. 10, 2012)

[This is a citation to a discovery motion. **I can't find either the complaint or the consent decree on Lexis.** Correct links to the complaint and the settlement are provided below and even then I may not have a link to the final amended complaint]

### **Lawsuit:**

[http://theadvocate.com/csp/mediapool/sites/dt.common.streams.StreamServer.cls?STREAMOID=miL3Pu8Yv\\$M\\$aME5\\$ZQguJM5tm0Zxrvol3sywaAHBAnivlp5nxSJnEO0Mfd4eDSfE0\\$uXvBjavslACLNR6VhLEUIm2tympBeeq1Fwi7sIigrCfKm\\_F3DhYfWov3omce\\$8CAqP1xDAFoSAgEcS6kSQ--&CONTENTTYPE=application/pdf&CONTENTDISPOSITION=Southern%20Williams%20Lawsuit.pdf](http://theadvocate.com/csp/mediapool/sites/dt.common.streams.StreamServer.cls?STREAMOID=miL3Pu8Yv$M$aME5$ZQguJM5tm0Zxrvol3sywaAHBAnivlp5nxSJnEO0Mfd4eDSfE0$uXvBjavslACLNR6VhLEUIm2tympBeeq1Fwi7sIigrCfKm_F3DhYfWov3omce$8CAqP1xDAFoSAgEcS6kSQ--&CONTENTTYPE=application/pdf&CONTENTDISPOSITION=Southern%20Williams%20Lawsuit.pdf)

### **Settlement:**

[http://theadvocate.com/csp/mediapool/sites/dt.common.streams.StreamServer.cls?STREAMOID=jQQKWnilRvICOWv3Ez02v5M5tm0Zxrvol3sywaAHBAmtauUdzj2jhKYG34RyvxpFE0\\$uXvBjavslACLNR6VhLEUIm2tympBeeq1Fwi7sIigrCfKm\\_F3DhYfWov3omce\\$8CAqP1xDAFoSAgEcS6kSQ--&CONTENTTYPE=application/pdf&CONTENTDISPOSITION=Southern%20Settlement.pdf](http://theadvocate.com/csp/mediapool/sites/dt.common.streams.StreamServer.cls?STREAMOID=jQQKWnilRvICOWv3Ez02v5M5tm0Zxrvol3sywaAHBAmtauUdzj2jhKYG34RyvxpFE0$uXvBjavslACLNR6VhLEUIm2tympBeeq1Fwi7sIigrCfKm_F3DhYfWov3omce$8CAqP1xDAFoSAgEcS6kSQ--&CONTENTTYPE=application/pdf&CONTENTDISPOSITION=Southern%20Settlement.pdf)

As the result of a gunshot that severed her spine, Kayla Williams uses a wheelchair for mobility and a catheter and bag for toileting. In her complaint against Southern University, as amended, Williams alleged that Southern violated Title II of the ADA and Section 504 of the Rehabilitation Act by maintaining and refusing to remove multiple barriers to accessing the academic, athletic and social programs and facilities of the University. In her complaint, Williams cites to inaccessible paths of travel, ramps, entrances, bathrooms, classrooms, as well as work tables and desks in the building in which her MBA program was held. She

also provides detailed examples of inaccessible features in the athletic and public event venues of the University.

Most significant to this complaint are the insights it provides as to the burdens such an individual may face as the result of inaccessible restroom facilities. She alleged that because she could not access the restrooms at the MBA program site, she suffered “feelings of humiliation, embarrassment and indignity” when her catheter bag overflowed, often in public, leaving her to sit in her own urine, while waiting for a ride home to change her clothes. Moreover, in some instances, these conditions also created or exacerbated serious medical conditions. As to the absence of appropriate desks for tables, Williams alleged that she was required to “sit at a contorted and uncomfortable angle in order to use classroom desks” because they weren’t tall enough to accommodate her wheelchair. “It is especially difficult for her when she needs to use a computer, because she cannot slide under the desk to reach the computer keyboard.”

In 2014, the University and Williams entered into a consent decree agreement. This agreement includes many provisions that are logically-related to her complaint including correction of steep ramps; additional wheelchair and companion seating at sports and other venues; accessible washrooms in both classroom buildings and sports venues, and provision of accessible desks in academic settings.

Of note are several provisions not regularly found in similar agreements, including:

- A transition plan with a schedule that spreads implementation over a period of five years based on logical priorities.
- To ensure that the option of moving a program from an inaccessible site to an accessible one is not merely a theoretical solution, the plan provides that the University “will designate one individual ... with authority to move classes or other events to accessible locations ... and will publicize the identity and contact of that person ....

- University is required to “employ an ADA Coordinator who shall have the responsibility and authority to review all renovations, new construction, or modifications to facilities to ensure that the requirements of the ADA shall be met. This person shall also have the responsibility and authority to relocate academic classes, programs or events to accessible facilities to ensure that all programs meet the requirements of the ADA.”
- When making a program accessible requires structural changes, “[t]he changes shall be made as expeditiously as possible, and must be completed within two years of the approval of [the] Consent Decree.”
- To ensure that once a barrier is removed, it will not reemerge due to lack of maintenance, the University is required to “maintain in operable working condition those features of facilities and equipment that are required to provide access to individuals with disabilities.’ This responsibility extends to night-time programs, as well.
- In the event of any temporary interruptions in services or access, the University “will evaluate the impact of the interruption in services or access on accessibility of [its] programs to individuals with disabilities. ... [T]he [University] will plan and implement such measures as are necessary to make its programs ... accessible to persons with disabilities .... Such measures may include the designation, with appropriate signage, or alternate accessible routes, or relocation of programs or services to accessible locations.”

Another important concern addressed under the decree is fire safety. For example, the decree provides that the University will create “a place of refuge” in its sports stadium. It also provides for fire safety and training for emergency evacuation for persons with mobility impairments “on each floor of each building on campus, and will train all personnel with responsibility for carrying out this procedure, and will drill them at least once each semester on carrying it out.” In addition, all faculty and staff are to be informed as to how to evacuate persons with mobility impairments in case of an emergency. The decree also provides for unspecified damages, attorney’s fees and costs for Williams.

*Fortyune v. City of Lomita*, 766 F.3d 1098 (9th Cir. Cal. 2014); cert. denied \_\_\_ U.S. \_\_\_ (June 29, 2015).

<http://cdn.ca9.uscourts.gov/datastore/opinions/2014/09/05/12-56280.pdf>

[http://www.supremecourt.gov/orders/courtorders/062915zor\\_4g25.pdf](http://www.supremecourt.gov/orders/courtorders/062915zor_4g25.pdf)

Robin Fortyune is a paraplegic who uses a wheelchair for mobility. In his ADA Title II complaint against the City of Lomita, he alleged that, “he experiences ‘great difficulty, discomfort and, even fear for his safety’ when frequenting facilities in the City because none of the City’s public on-street [diagonal] parking is accessible to people with disabilities.” The City of Lomita had the matter removed from state to federal district court. The City argued that, “absent the adoption of ADA implementing regulations specifically targeted toward on-street parking, it is not required to provide accessible on-street parking.” The district court denied the motion to dismiss, concluding that “the broad language of the ADA requires public entities to ensure that all services, including on-street parking, are reasonably accessible to and usable by individuals with disabilities.”

The City appealed the district court decision to the Ninth Circuit. Relying on the general regulatory language governing all Title II activities, such as 28 C.F.R. § 35.150 and 35.150(a), and U.S. Department of Justice published technical assistance guidance, the Ninth Circuit ruled that the program accessibility rules require the provision of on-street public parking even if there is no specific regulation requiring the installation of on-street public parking. “[A]t bottom, the regulation [28 C.F.R. § 35.150] mandates program accessibility for all normal governmental functions, including the provision of on-street public parking.” “T]he 2010 Standards contain detailed specifications for a range of different facilities, but none of them address on-street parking. However, nothing in 28 C.F.R. § 35.151 suggests that when technical specifications do not exist for a particular type of facility, public entities have no accessibility obligations.”

Further, in 1994, the Justice Department issued a technical assistance manual. In pertinent part, that manual states: “If no standard exists for particular features, those

features need not comply with a particular design standard. However, the facility must still be designed and operated to meet other title II requirements, including program accessibility.” The Ninth Circuit accorded this guidance considerable weight, presuming it to be correct.. “An agency's interpretation of its own regulations is entitled to deference.” ..... “[E]ven if we had doubts about the applicability of 28 C.F.R. § 35.151 to facilities for which no technical specifications exist, we would be bound to defer to the DOJ's interpretation of the regulation because it is not "plainly erroneous or inconsistent with the regulation."

Relying on two broad Title II regulations and DOJ technical assistance, the Ninth Circuit concludes: “The text of the ADA, the relevant implementing regulations, and the DOJ's interpretation of its own regulations all lead us to conclude that public entities must ensure that all normal governmental functions are reasonably accessible to disabled persons, irrespective of whether the DOJ has adopted technical specifications for the particular types of facilities involved.”

## **Digital Access and Equality**

The Department of Justice has published its spring 2015 regulatory agenda pursuant to Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735, and the Regulatory Flexibility Act, 5 U.S.C. 601 to 612 (1988). The agenda reveals that DOJ has separated the web access rule-making process for public entities from that of public accommodations. The notice provides a schedule for the final comment period for the regulations for public entities (closing August 2015). It also has information about rule making for captioning of movies at movie theatres, with a publication date of December 2015. See <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1190-AA65> (split from RIN 1190-AA61).

Insert Colker and Grossman, *Higher Education* at p. 289.

The U.S. Department of Justice and the U.S. Department of Education, Office for Civil Rights, have become even more active than last year in taking enforcement actions against universities whose web sites and services are not accessible to students who use adaptive technology like JAWS software (or other screen readers) to read text. These actions are usually taken under Title II but the same principles would apply to a Title III entity.

Two OCR letters, Youngstown State University and University of Cincinnati, issued at virtually the same time, are particularly noteworthy because they go further than in the past in explicitly stating how the regulations implementing Section 504 and Title II of the ADA apply to the virtual world.

### **Digital access in academia**

*University of Cincinnati*, OCR compliance review #15-13-6001 (December 2014) <http://www2.ed.gov/documents/press-releases/university-cincinnati-agreement.pdf>

The University of Cincinnati is a public institution subject to Section 504 and Title II of the ADA. According to data analyzed by OCR, it has approximately 43,000 students. Approximately 31% of its undergraduate students participate online for some part of their course work; 9% exclusively on line; while 29% of graduate students participated solely on line. 3-5% of all students are registered with DSS.

The OCR letter in this matter is exceptionally instructive as it lays out the legal standards; applies the standards to concrete examples; and, provides a narrative with insights on how persons who use adaptive technology are challenged by in accessible electronic information technology (EIT).

The scope of OCR's review of EIT was quite comprehensive, including: general websites, such as admissions, academic program descriptions, athletics programs, library services, health services, faculty and student directories, research tools; and resources; academic courseware, in this case Blackboard; and distance

learning. The letter is also noteworthy for the fact that it considers the impact of inaccessible EIT on more than just students.

OCR found numerous violations including ones that did not pertain to EIT. For example, OCR found multiple shortcomings with regard to notice of nondiscriminatory practices and procedures. With regard to EIT, OCR found that the University lacked adequate tools and procedures for ensuring that its websites were accessible, that the content it posted on Blackboard was accessible, or that the content of its on-line learning programs was accessible. Consistent with a growing theme in many areas of disability compliance, OCR explicitly rejected the use of a system that only addresses compatibility problems when a complaint is received. This letter also addressed the duty to caption videos.

The remedial agreement with OCR has four basic components:

- Develop for OCR review a policy to ensure that information communicated through University websites, on-line or e-learning systems, course management systems or EIT are accessible to students, prospective students, employees, guests, and visitors with visual, hearing, and manual impairments.
- Develop and implement a plan for accessibility audits by the access coordinator with audit accounting
- Develop and implement a plan for acquisition and contracting that ensure purchases are accessible
- Annual training on EIT access for faculty, staff, administrators, support staff, and student employees and a qualified individual available to assist them on complying with technical standards

The agreement also contains some significant quality control and monitoring provisions which will be in effect at least through 2018.

Insert Colker and Grossman, *Higher Education* at p.290 before **Notes**.

*Youngstown State University*, OCR compliance review #15-13-6002 (December 2014) <http://www2.ed.gov/documents/press-releases/youngstown-state-university-letter.pdf>

Youngstown State University is a public institution subject to Section 504 and Title II of the ADA. It has a total undergraduate and graduate enrollment of 14,000 students; with 13% of undergraduates and 5% of graduate students receiving some part of their education on-line.

It appears that Youngstown State had fewer compliance challenges than did the University of Cincinnati. For one thing, Youngstown had published guidance and standards for making many of its EIT activities accessible. The basis for finding noncompliance at Youngstown was largely that it lacked active implementation procedures, training, and monitoring procedures necessary to implement its guidance and standards.

The remedies negotiated with Youngstown are very similar to those negotiated with the University of Cincinnati; albeit, the period of monitoring by OCR is presumed to be of a shorter duration.

Insert Colker and Grossman, *Higher Education* at p. 290 before **NOTES**.

*The National Federation of the Blind, Anthony Lanzilotti and Mitchell Cossaboon v Atlantic Cape Community College*, consent decree, D.N.J. Case No. 1:33-av-00001 (2015). <https://nfb.org/national-federation-blind-and-two-blind-students-resolve-complaint-against-atlantic-cape-community>

Atlantic Cape Community College (ACCC) is a public two year institution with approximately 7,000 students. The consent decree resolves two students' allegations of discrimination on the basis of disability. The College denies the allegations of discrimination and has admitted no wrongdoing. The agreement requires the College to work with a third-party consultant and the National Federation of the Blind to take steps to improve the educational experience of students with disabilities and to prevent discrimination against these students, including:



- Conducting a technology audit and, based on the audit results, developing a plan to make all student-facing electronic and information technology used by ACCC accessible to students with disabilities no later than three years from the completion of the technology accessibility audit;
- Making ACCC's websites accessible to blind students within 240 days of the execution of the consent decree;
- Making ACCC's integrated library system and its website fully accessible to blind students;
- Developing a plan to provide accessible instructional materials, including textbooks, course materials, and tactile graphics, to blind students and to other students with disabilities at the same time that these materials are made available to students without disabilities, and to implement this plan no later than three years from the effective date of the consent decree;
- Requiring cooperation among faculty, staff, and ACCC's Disability Support Services office to handle accommodation requests made by students with disabilities;
- Reviewing and revising ACCC's policies and procedures for accommodating students with disabilities and for processing and resolving grievances brought by students with disabilities, including requiring ACCC's Disability Support Services office to self-report any failure to resolve a student's complaint or accommodation request, triggering an automatic grievance procedure; and
- Requiring training of all personnel on the Americans with Disabilities Act and on ACCC's policies for accommodating students with disabilities, as well as training for such students on their rights and the procedures available to them to enforce those rights.

Insert Colker and Grossman, *Higher Education* at p. 290 before **Notes**.

**DOJ edX settlement - [http://www.ada.gov/edx\\_sa.htm](http://www.ada.gov/edx_sa.htm)** Litigation not filed

A settlement agreement between the Department of Justice and edX, resolves allegations by DOJ that edX's website, [www.edx.org](http://www.edx.org), and its platform for providing massive open online courses (MOOCs), were not fully accessible to

individuals with disabilities, including individuals who are blind or have low vision, individuals who are deaf or hard of hearing and individuals who have physical disabilities affecting manual dexterity, in violation of Title III of the ADA.

According to DOJ, edX was created in 2012 as a nonprofit platform for universities to offer MOOCs. Today, edX has approximately 60 university and institutional members providing over 450 courses to over 3,000,000 learners. The courses are offered largely for free in subject matters as varied as business, computer sciences, hard sciences, food and nutrition and social sciences.

Of note is the deference paid in this agreement to the Web Content Accessibility Guidelines (WCAG) 2.0 AA. The agreement specifically requires edX to make significant modifications to its website, platform and mobile applications to conform to these guidelines.

The four-year agreement requires edX to:

- make the edX website, its mobile applications, and learning management system software, through which online courses are offered, fully accessible within 18 months;
- ensure that its content management system is fully accessible and supports authoring and publishing of accessible content within an additional 18 months;
- provide guidance to course creators at its member universities and other institutions on best practices for making online courses fully accessible;
- appoint a Web Accessibility Coordinator;
- adopt a Web Accessibility Policy;
- solicit feedback from learners on the accessibility of the courses;
- conduct Web Accessibility Training for employees responsible for the website, platform, and mobile applications; and
- retain a consultant to evaluate conformance of the website, platform, and mobile applications

Insert Colker and Grossman, *Higher Education* at p. 290 before **Service Animals**.

*National Association of the Deaf, et al., v. Harvard University, et al.*, US Department of Justice statement of Interest, Civil Action No. 3:15-cv-30023-MGM, D. Mass (June 23, 2015). [http://www.ada.gov/briefs/harvard\\_soi.pdf](http://www.ada.gov/briefs/harvard_soi.pdf)

*National Association of the Deaf, et al., v. Massachusetts Institute of Technology*, US Department of Justice statement of Interest, Civil Action No. 3:15-cv-300024-MGM. [http://www.ada.gov/briefs/mit\\_soi.pdf](http://www.ada.gov/briefs/mit_soi.pdf)

The Justice Department has announced that it has filed Statements of Interest in these two matters. Plaintiffs allege that Harvard and MIT violated the ADA and Section 504 by denying equal access to free online courses and lectures to individuals who are deaf or hard of hearing because they fail to provide appropriate auxiliary aids, benefits and services, including captioning.

Both Universities argue that the complaints should be stayed or dismissed until the Department of Justice issues regulations under the ADA on website accessibility. They further argue that neither the ADA nor Section 504 of the Rehabilitation Act require the provision of captions on their online programming. In its Statements of Interest, DOJ responds to the first argument by asserting that the Plaintiffs' claims do not require the Court to "unravel intricate, technical facts,' but rather involves consideration of facts within the conventional competence of the courts ...." "And because the title III rulemaking on website accessibility is not imminent, dismissal or stay of this case ... would not materially aid this Court and would significantly prejudice the Plaintiffs ..."

With regard to the second argument of the Universities, DOJ states that a public accommodation includes an "undergraduate, postgraduate private school, or other place of education," such as MIT and Harvard. 42 U.S.C. § 12181 (7)(J). Under Title III, public accommodations must ensure that persons with disabilities are not denied services "because of the absence of auxiliary aids and

services.” Further, public accommodations must furnish appropriate “auxiliary aids and services” where necessary for “effective communication.” Auxiliary aids and services include,” open and closed captioning and accessible electronic and information technology,” among other methods. 28 C.F.R. § 36.303(b). A similar duty exists under Section 504. 34 C.F.R. § 104.4(b). See also 34 CFR 104.44(d).

Insert Colker and Grossman, *Higher Education* at p. 290 before **Service Animals**.

### **Are sales and service websites “public accommodations” under Title III of the ADA?**

*National Federation of the Blind v. Scribd, Inc.*, Case No. 2:14-cv-162, 2015 U.S. Dist. LEXIS 34213, 2015 WL 1263336 (D. Vt. Mar. 19, 2015) <http://the-digital-reader.com/wp-content/uploads/2015/03/30-Opinion-denying-Motion-to-Dismiss.pdf>

This opinion is worth reading for its comprehensive overview of the question of whether an entity that conducts business only by the Internet is a “public accommodation” subject to the anti-discrimination protections of Title III of the ADA

Scribd is a California-based digital library that operates reading subscription services on its website and on apps for mobile phones and tablets. Scribd's customers pay a monthly fee to gain access to its collection of over forty million titles, including e-books, academic papers, legal filings, and other user-uploaded digital documents.

Because its websites are picture-based, they are not accessible to the adaptive technologies commonly used by visually impaired individuals. These inaccessible conditions formed the basis of a claim by Plaintiffs National Federation of the Blind ("NFB") and Heidi Viens.

Among the required elements of a claim for disability discrimination under Title III of the ADA is that the defendant “owns, leases, or operates a place of public accommodation” Scribd in a motion to dismiss the NFB complaint argued that, because the services and products of Scribd are accessed, selected, and purchased exclusively on the Internet, the NFB had not sufficiently alleged this required claim element.

This dispute was a matter of statutory construction. Because the district court concluded that the statute (Title III) was “ambiguous” as to the question before it, it needed to consult other sources, including the statute's legislative history and DOJ guidance, focusing on the “broader context and primary purpose of the statute,” reaching an interpretation that “avoids absurd results.”

The court denied Scribd’s motion to dismiss. Quoting from the *Netflix* decision of Judge Posner [see last year’s Summer Reading list], the court held that

The Internet is central to every aspect of the “economic and social mainstream of American life.” In such a society, “excluding businesses that sell services through the Internet from the ADA would ‘run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges, and advantages available indiscriminately to other members of the general public.”

When the motion to dismiss by Scribd was denied, it asked the lower court to stay the action pending an appeal to the Second Circuit. This would have put discovery and proceedings on the merits of the NFB’s claim in abeyance until the above jurisdictional question was addressed by the Court of Appeals. This motion failed and discovery was ordered to proceed. *Nat’l Fed’n of the Blind v. Scribd Inc.*, 2015 U.S. Dist. LEXIS 69440 (D. Vt. May 29, 2015).

*Cullen v. Netflix, Inc.*, 600 Fed. Appx. 508, 2015 U.S. App. LEXIS 5257 (9th Cir. Cal. 2015); *Earll v. Ebay, Inc.*, 599 Fed. Appx. 695, 2015 U.S. App. LEXIS 5256 (9th Cir. Cal. 2015). Respectively, <http://law.justia.com/cases/>

[federal/appellate-courts/ca9/13-15092/13-15092-2015-04-01.html](http://federal/appellate-courts/ca9/13-15092/13-15092-2015-04-01.html);  
<http://cdn.ca9.uscourts.gov/datastore/memoranda/2015/04/01/13-15134.pdf>

Within one week of the decision in *Scribd*, the Ninth Circuit issued two very brief, nearly identical, unpublished decisions following earlier Ninth Circuit decisions holding that a website is not a “public accommodation” absent some kind of connection to a brick and mortar facility. For example, in *Cullen*, the Ninth Circuit stated, “We have previously interpreted the statutory term “place of public accommodation” to require “some connection between the good or service complained of and an actual physical place.” *See Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000). Because Netflix’s services are not connected to any “actual, physical place,” Netflix is not subject to the ADA.” *See also National Federation of the Blind v. Target Corporation*, 452 F.Supp.2d 946 (ND Cal., 2006).

*National Federation of the Blind of California, Kelly, Hingson, and Pederson v. Uber Technologies, Inc.*, Case No. 14-cv-04086 NC, N.D. Cal (2015)  
<http://law.justia.com/cases/federal/district-courts/california/candce/3:2014cv04086/280572/37/>

UberX is a widely available transportation service that uses mobile software applications to arrange rides between passengers and Uber’s fleet of UberX drivers. The National Federation of the Blind of California and several individuals who are blind alleged that Uber drivers, in violation of Title III of the ADA and California disability rights laws, refused them transportation services because they were accompanied by their guide dogs.

Uber filed a motion to dismiss in Federal District Court. The ADA lists twelve categories of entities that are public accommodations. Uber raised multiple defenses, of interest here, that it was a technology company, not a transportation company, falling outside any of the any of Congress’s examples of a “public accommodation.”

The plaintiffs alleged that Uber’s operations fall under the listed category of “travel service” category, so Uber qualifies as a public accommodation. 42

U.S.C. § 12181(7)(f).

The ADA does not define travel services. Without much discussion, the court accepted the plaintiffs' argument. Quoting from *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 13 (1st Cir. 1994), the court stated, "Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure."

An appeal in this matter may be expected.

See also *Reyazuddin v. Montgomery County*, No. 14-1299, 2015 U.S. App. LEXIS 10032, 2015 WL 3651710 4<sup>th</sup> Cir. (June 15, 2015). Yasmin Reyazuddin, who is blind, worked successfully for Montgomery County as a 311 operator prior to a workplace consolidation that included the adoption of new software that was not accessible to persons with visual impairments. The County concluded that she was no longer qualified to perform the essential functions of her position and did not transfer her or hire her into a position at the consolidated call center. Instead, the County retained her salary level and reassigned her to other public contact positions which plaintiff described as "make-work" positions with limited daily tasks and no opportunity for advancement. She alleged disability discrimination in employment under Section 504 of the Rehabilitation Act and Title II of the ADA on the grounds that, with accommodation, she was qualified to work in the new 311 service setting and that the reassignments provided to her were to "make-work" positions only.

As part of an \$80 million upgrade, the County opened a new, consolidated call center using new software. The software selected by the County can be operated in two "modes," one of which was accessible to individuals with vision impairments and one of which was not, at least not without a significant work-around. The County's software license allows it to run the software in either mode. The County, however, chose to run only the inaccessible ("high-interactivity") version which makes some useful but not necessarily essential functions available to operators including: scripts to read to callers; a "solutions

button” with a “short, concise paragraph about how the [C]ounty handles” the caller’s particular concern and instructions for employees on how to handle the call; a field for notetaking; a “service request template” with fields that automatically populate; and, a function for transferring calls to 911.

The District Court issued a summary judgment decision in favor of the County concluding that Reyazuddin, even with accommodation, was not qualified to perform the essential functions of a 311 operator at the new call center, that the accommodations she proposed were not reasonable as the County had demonstrated that they would entail an undue burden on the County, and that the County’s reassignment of the Plaintiff had satisfied its reasonable accommodation duties under Section 504.

The Fourth Circuit reversed the lower court finding that several issues remained in genuine dispute: 1) whether Reyazuddin could perform the essential job functions of a call center employee; (2) whether the County reasonably accommodated her; and (3), if the County did not, whether its failure to do so may be excused because the County had proven that her requested accommodations would impose an undue burden on the County.

This decision is rich with a range of employment discrimination issues, particularly ones pertaining to the implementation of emerging technologies. It is the last issue -- how to prove, measure, or calculate what is an undue burden -- that may be of most interest to DSS professionals, as the arguments made by the County, accepted by the lower court and, rejected by the Fourth Circuit, are frequently heard in the post-secondary setting.

The Fourth Circuit concluded that the lower court had made several errors in its determination of undue burden. The lower court found relevant that the County had only budgeted \$15,500 for accommodations. The Fourth Circuit rejected this reasoning, stating in pertinent part, “Allowing the County to prevail on its undue hardship defense based on its own budgeting decisions would effectively cede the legal determination on this issue [undue burden] to the employer .... Taken to its logical extreme, the employer could budget \$0 for reasonable accommodation and thereby avoid liability. The County’s overall budget (\$3.73 billion in fiscal



year 2010) and the [new system] operating budget (about \$4 million) are relevant factors. But the County’s line-item budget for reasonable accommodations is not.” (citations omitted).

The Fourth Circuit further faulted the lower court for not giving nearly enough weight to the fact that four other cities in the U.S., using the same software, are accessible to individuals who are blind by operating in both modes and by providing other modifications. The Fourth Circuit also concluded that savings gained by the new 311 system and the availability of in-house computer personnel to address accessibility challenges also should be included in the consideration of undue burden. Finally, the Fourth Circuit found it inappropriate to issue a summary judgment for the County on the issue of undue burden when affidavits of experts provided hugely different estimates as to the effect or cost of running a 311 system using both modes and making the highly interactive mode partially or fully accessible. The Fourth Circuit reasoned that these differences could only be resolved through further proceedings.

Of note, relying on EEOC guidance, the Fourth Circuit also concluded that the duty to provide accommodation in the workplace through reassignment to a new position means transfer to a “meaningful equal employment opportunity ... to attain the same level of performance as is available to nondisabled employees having similar skills and abilities.” Whether the opportunities provided to Reyazuddin met this standard was also a question that needed to be resolved in further proceedings .

Finally, the Fourth Circuit concluded that Title II of the ADA does not confer on public employees the right to sue public employers for employment discrimination. This is not a unique conclusion. The same interpretation of Title II has been reached in four other circuits and is the “majority view.” This conclusion does not impair the claims Reyazuddin has made under Section 504.

Stay tuned. Reyazuddin has been languishing in “make-work” positions since 2009.

Insert Colker and Grossman, *Higher Education* at p. 87 before **NOTE 2**.

## **Disparate Impact Analysis**

*Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, \_\_ U.S. \_\_, 2014 U.S. LEXIS 4912, 135 S. Ct. 46 (U.S. 2014).

In the introductory chapter to *The Law of Disability Discrimination for Higher Professionals* at page 6, Colker and Grossman present the thesis that a principle step in the legal history of the Section 504 of the Rehabilitation and the ADA was development and adoption of two judicial insights. The first was that an intention to discriminate was not necessary to a policy or practice having a discriminatory impact on a prohibited basis and that the identical treatment of individuals was not necessarily equal treatment.

The legal tool for attacking policies and practices that are designed without a discriminatory purpose or intent but in fact have a discriminatory effect is called disparate impact analysis. This tool was first used to implement Title VII of the Civil Rights Act of 1964, addressing certain instances of employment discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In 1985, in *Alexander v. Choate*, the Supreme Court concluded that, under certain circumstances, disparate impact analysis also could be used to challenge disability discrimination where a neutral policy had the effect of denying individuals with disabilities “meaningful access” to a state benefit. 469 U.S. 287, 303.

Historically, statistics have been used as an element of proof in class-wide disparate impact cases. Just how much persuasive power will be accorded to those statistics has been a matter of dispute, with conservative and liberal judges reaching different perspectives. Generally, class-wide disparate impact cases that rely heavily on statistics have become more difficult to win.

This issue was front and center before the Supreme Court in a recent race discrimination case concerning interpretation of Title VIII of the Civil Rights Act of 1968, the Fair Housing Act (FHA), *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* The FHA makes it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3604(a). The FHA further prohibits discrimination “against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith,” based on those same protected characteristics. *Id.* § 3604(b).

The Low-Income Housing Tax Credit Program (LIHTC), 26 U.S.C. § 42(g)(1), provides tax credits to developers who build low-income housing. Federal law requires that credits be distributed through a state agency. In this matter, the plaintiffs case relied largely on statistical proof in asserting that the Texas LIHTC agency disproportionately allocated tax credits for housing construction in minority neighborhoods rather than for predominantly Caucasian neighborhoods.

With a number of cautionary notes, five Justices agreed that the FHA prohibited disparate impact discrimination in a race discrimination case and that a *prima facie* case of disparate impact discrimination could be established relying largely on statistical proof. Among the cautionary notes:

- To make a *prima facie* case, plaintiffs must not only present statistic evidence of disparate impact but also be able to identify the specific policies and practices of the defendant that caused these disparities.
- Defendants must be given an opportunity to defend the policies or practices put into question by the statistical showing with any valid interests their policies serve.
- Disparate impact discrimination does not exist unless the policies or practices in question are “artificial, arbitrary, and unnecessary barriers.”

Finally, the majority recognized that, in some situation, a race conscious remedy may be necessary to rectify disparate impact discrimination based on race.

The ruling in favor of the plaintiffs in this case “saved” the disparate impact theory under various race-based civil rights statutes. In his dissent, Justice Thomas questioned the correctness of the *Griggs* decision. Disability, disparate impact cases are brought under the FHAA, Section 504, or the ADA. It is possible that the courts might cite this precedent to sustain disparate impact theories if challenged by defendants in disability-related cases.

Insert Colker and Grossman, *Higher Education* at p. 6.

### **Transit**

Transit is not often a higher education issue. An accessible transit system is nonetheless key to students and graduates with mobility impairments becoming productive members of the American workforce. Last year’s Summer Reading List reported on developments in New York regarding accessible taxi service.

On June 6, 2015, the Department of Justice issued its findings based on its investigation under Title II of the Americans with Disabilities Act (ADA) of AMTRAK (the National Railroad Passenger Corporation). (DJ No. 204-16-128) The investigation was also conducted under the U.S. Department of Transportation's regulations implementing the ADA, 42 U.S.C. § 12134. . DOJ found that Amtrak discriminated against persons with disabilities in violation of the ADA by failing to make existing station facilities in its intercity rail transportation system accessible. Amtrak also violated the ADA by incorrectly classifying stations as “flag stop” stations, thereby avoiding responsibility to make those station facilities accessible. DOJ determined that Amtrak is responsible for ADA compliance at 376 stations but only 18 stations are currently compliant. DOJ relied upon Amtrak's own reports, including a projection that it would make only 19 stations accessible by 2013. Amtrak’s plan to make stations accessible extended to 2028, and even then, not all the stations would be

accessible. DOJ is requiring Amtrak to take a wide variety of remedial measures by changing its operations, including making its stations accessible, ensuring independent monitoring and verification, and notice to responsible parties. Other requirements include training and education of staff. An additional remedy requires Amtrak to pay compensatory damages to persons aggrieved in an appropriate amount for injuries caused by Amtrak's failure to comply with the ADA and its regulations.

See discussion above of *National Federation of the Blind of California, Kelly, Hingson, and Pederson v. Uber Technologies, Inc.*, Case No. 14-cv-04086 NC, N.D. Cal (2015). <http://law.justia.com/cases/federal/district-courts/california/candce/3:2014cv04086/280572/37h>.