

THE LAW OF DISABILITY
DISCRIMINATION FOR
HIGHER EDUCATION
PROFESSIONALS

THE LAW OF DISABILITY DISCRIMINATION FOR HIGHER EDUCATION PROFESSIONALS

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PREFACE

Few American institutions are more important than its colleges and universities. They help prepare our current and future citizens to participate in our democracy. They produce the research that keeps America the worlds' technological leader. Post-secondary institutions, at all levels, offer their participants the best chance in their lives for upward mobility, economic security, self-sufficiency and independence.

No discrete group benefits more from the post-secondary experience than individuals with disabilities. A good education is a prerequisite to many areas of employment. For a job candidate with a known disability, nothing can remove the cobwebs of prejudices and stereotypes more quickly than a good GPA from a respected college or technical program. Even if higher education does not lead to conventional forms of employment, it can be the most affirming and rewarding experience in an individual's life.

The United States Supreme Court has repeatedly recognized the "compelling interest" America has in maintaining diversity in its post-secondary classrooms. Ethnic and gender diversity benefits all students in the classroom and subsequently furthers diversity in the professions. This truth is no less compelling for individuals with disabilities, who can broaden the perspectives of their classmates by speaking authentically to their experiences growing up and living with disabilities. Moreover, the presence of individuals with disabilities in the classroom can spur innovation. At some institutions, provision of class-recordings, distributing PowerPoints, and exams that emphasize content over speed — once reserved for students with disabilities — are now universal practices.

Children with disabilities have the same needs as all other children to see successful individuals, like themselves, with their disabilities, employed in a wide variety of professions. The illustrative story of Bonnie Tucker, a deaf inhalation therapist (who later became a lawyer and an early co-author of this casebook), who had the unique ability to read the lips of her patients with laryngectomies, is featured in Chapter 1. Our society needs mechanics with disabilities because they are the individuals most likely to take the additional training necessary to learn how to prepare an adaptive van. We want teachers who "get" why accommodations are necessary because they benefitted from them while in elementary and secondary school as well as in college. Similarly, doctors' offices and hospitals need deaf nurses and doctors because they can often sign to deaf patients.

Nothing guarantees that government, even a democracy, will respect the interests of individuals with disabilities. Sometimes out of animus, often out of ill-informed paternalism, the United States has engaged in systemic discrimination against individuals with disabilities. As explained in Chapter 1, for many years, the law was not used to protect individuals with disabilities, but to segregate them and exclude them from effective participation in our governance. Given this history, it comes as no surprise that the moniker of the disability rights movement has been, "nothing about us without us." Access to higher education is essential to the ability of individuals with disabilities to ensure that government policy develops in a manner consistent with their interests.

Only when the number of individuals with disabilities who had earned college degrees achieved a critical mass were these individuals able to build upon the race, national origin and gender civil rights lessons of the recent past (lessons many of them had learned first-

PREFACE

hand as participants in those movements) to organize and speak for themselves. It is not an exaggeration to say that the modern American disability rights revolution had at its heart a group of discontented UC Berkeley graduate students with disabilities. These individuals, whose story is mentioned in Chapter One, had no intention of living out their futures isolated, at the margins of American society. We watch with anticipation as more individuals with disabilities, including wounded warriors, directly enter the political process no longer just as protesters, but as political office holders and high-level policymakers. Individuals with disabilities in America have come a long way; they have a long way to go.

The law can achieve little, and advance no further, without its application in an insightful, knowledgeable and authoritative manner. The objective of this publication is to provide to all those persons who are responsible for implementing federal disability, anti-discrimination laws on our campuses, the support and guidance necessary to achieving these goals.

In 2013, LexisNexis published Colker and Grossman, *The Law of Disability Discrimination, Eighth Edition* (ISBN 978-0-7698-8201-7). This edition is a “remix” of that popular law school textbook, updated in several important respects, and refocused to address more specifically the needs of the many individuals who are responsible for disability equality in higher education: disabled student services directors, ADA officers, house and contract counsel, human resource directors, college grievances officers, ombudspersons, federal and state compliance agents, organizational advocates, health and counseling service personnel, deans and faculty, etc.

The unemployment rate for individuals with disabilities is several times that of nondisabled individuals. According to the United States Department of Labor, as of May 2014, the labor force participation of people with disabilities is 19.5% as compared to 68.7% for people without disabilities. Students of disability law and those responsible for its implementation are now watching with much interest to see whether the scale of this inequity will diminish in light of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). As discussed at some length in Chapter Two, the demanding definition of disability that has so long made it nearly impossible for individuals with disabilities to bring suits that addressed the merits of their claims is no longer the law. More recent employment decisions, reported in Chapter Three, are now focusing on the contours of what are essential job functions and effective job accommodations. Similarly, post-secondary decisions, as discussed in Chapter Four, are getting beyond the question of disability, and addressing how to determine if a student is “otherwise qualified,” and which academic adjustments and auxiliary aids must be provided to such students as necessary, effective, and neither a fundamental alteration nor an undue burden.

The authors of this textbook recognize the importance and complexity of your mission. We sincerely hope this text will make your position more effective and your career more rewarding.

A DAISY-accessible version of this casebook will be made available upon request to individuals with disabilities.

Ruth Colker
Paul Grossman
June 2014

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