



Association of
Title IX Administrators

504/ADA Coordinator

Higher Education Training & Certification Course

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TNG

Strategic Risk
Management Solutions

The logo for ATIXA, featuring the letters 'A', 'T', 'I', 'X', and 'A' in a stylized font. The 'A's are red, the 'T' is blue, and the 'I', 'X', and 'A' are dark blue.The logo for TNG, featuring the letters 'T', 'N', and 'G' in a stylized font. The 'T' and 'N' are blue, and the 'G' is yellow.The logo for NABITA, featuring the letters 'N', 'A', 'B', 'I', and 'T', and 'A' in a stylized font. The 'N' and 'A' are green, the 'B', 'I', and 'T' are blue, and the final 'A' is green.

Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

AGENDA

- 1 Section 504 & Other Disability Laws Overview
- 2 Disability Overview
- 3 Standards for Disability Response
- 4 Accommodation Process
- 5 Section 504, the ADA, & Academics
- 6 Pregnant & Parenting Students

AGENDA

7 The ADA, Section 504, & Mental Health Issues

8 Service Animals

9 Emotional Support, Therapy, & Companion Animals

10 Assistance Animals in the Workplace

11 Q & A

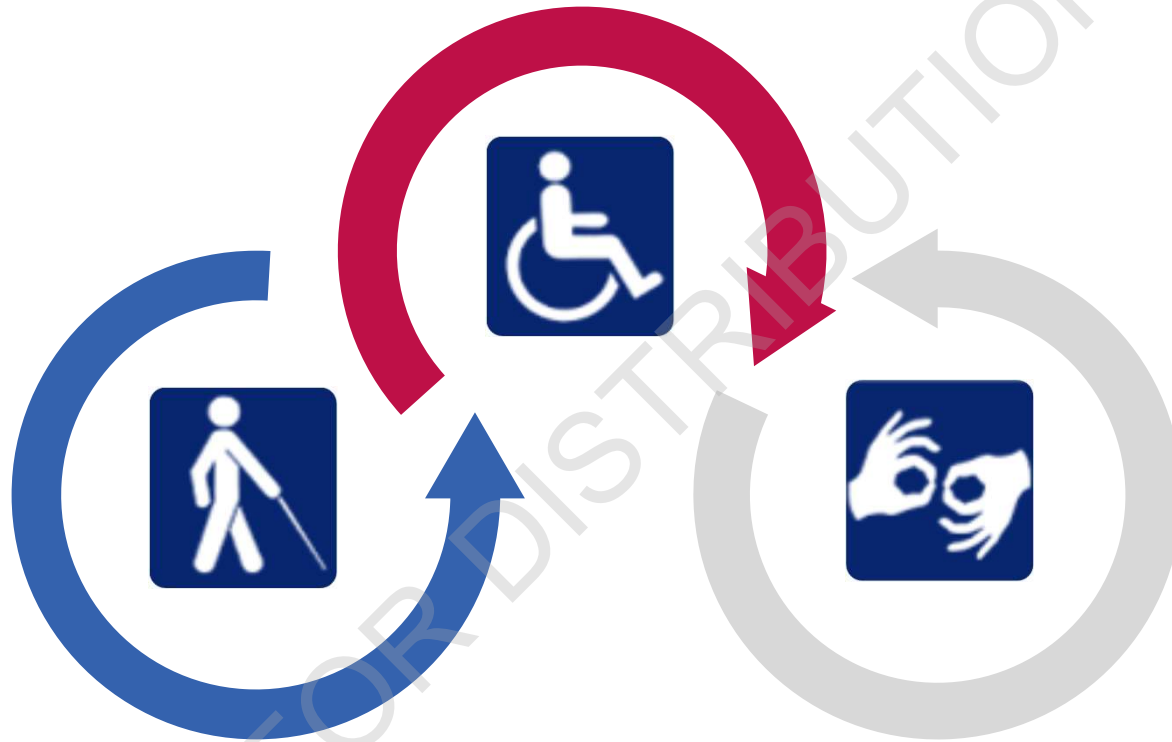
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Section 504 & Other Disability Laws Overview

- Section 504 of the Rehabilitation Act
- The Americans with Disabilities Act
- Fair Housing Act

SECTION 504 & THE ADA



Section 504 and the ADA are not designed to ensure equal results...

but to create a “just result” and to provide **equal opportunities** for success.

KEY ISSUE

- All individuals with a qualifying disability must be provided with aids, benefits, or services that provide an equal opportunity to achieve the same result or level of achievement as others
- Institutions may provide a different or separate aid, benefit, or service only if doing so is necessary to ensure that the aid, benefit or service is as effective as others

CONSIDERATIONS FOR PROVIDING “EQUALITY” IN OPPORTUNITIES

- What can the institution do to provide students or employees with disabilities equal access to the educational benefits or work opportunities?
- How do the educational or work opportunities and benefits provided to individuals with disabilities compare to those provided to individuals without disabilities?
 - Are they equally available?
 - Are they available in a timely manner, similar to those provided to individuals without disabilities?
 - Will it be more difficult for students or employees with disabilities to obtain the educational/work opportunities than for non-disabled students or employees?

DISABILITY LAWS

Section 504 of the
Rehabilitation Act

Fair Housing Act

Americans with
Disabilities Act

State Laws

UNDERSTANDING DIFFERENT LAWS

- Laws apply differently to housing than to the campus in general, including classrooms and dining facilities
- Laws apply different definitions and standards related to service vs. assistance/emotional support animals (ESAs)
- Laws may impose different standards or response protocols

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SECTION 504 OF THE REHABILITATION ACT (1973)

- **Prohibits discrimination** on the basis of disability in **all programs or activities** that receive federal financial assistance
- Forbids institutions from excluding or denying individuals with disabilities an **equal opportunity** to receive program benefits and services
- Enforced by the U.S. Dept. of Education, Office for Civil Rights
- Codified at 29 U.S.C. § 701

SECTION 504

“No otherwise qualified individual with a disability in the United States, as defined in Sec. 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

Section 704(a) Promulgation of nondiscriminatory rules and regulations

TITLE I, TITLE II & TITLE III OF THE ADA (1990)

Title I

Prohibits discrimination on the basis of disability in **employment**

Enforced by the EEOC.

Title II

Prohibits discrimination on the basis of disability by **public entities, including state colleges and universities**, regardless of whether they receive federal financial assistance

Enforced by DOJ and OCR.

Title III

Prohibits discrimination on the basis of disability in **private education facilities and in the activities of places of public accommodation**

The language of the ADA tracks Section 504 and explains that the remedies, procedures, and rights under the ADA are the same as under the Rehabilitation Act.

HOW IS SEC. 504 DIFFERENT FROM THE ADA?

Section 504 and the ADA are both civil rights laws; however:

- Section 504 was created to protect individuals with disabilities from discrimination for reasons related to their disabilities
 - 504 protections are applied to programs or businesses that receive federal funds
- The ADA Titles I, II, & III add to the strength of Section 504 by extending it to private institutions, workplaces, and to state and local government-funded programs
- Between the two laws, all government-funded programs are covered

FAIR HOUSING ACT (1968)

- FHA **applies to residential “dwellings,”** a term that likely encompasses campus housing, including residence halls
- FHA makes it unlawful to “discriminate 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 with such a dwelling because of a handicap...**”
- FHA requires allowance for “**assistance animals**” for a qualified individual with a disability in all dwellings
- Enforced by the U.S. Department of Housing and Urban Development



DISABILITY OVERVIEW

- Qualified Individual with a Disability
- Impairment vs. Disability
- “Record of” vs. “Regarded as” Having an Impairment

WHO IS PROTECTED UNDER SEC. 504 & THE ADA?

Under these laws, qualified individuals with disabilities are defined as:

- Persons **with a physical or mental impairment** which substantially limits one or more major life activities;
- Persons who have a **record of having a physical or mental impairment**; or
- Persons who are **regarded as having a physical or mental impairment** that substantially limits one or more major life activities.

WHO IS A “QUALIFIED INDIVIDUAL WITH A DISABILITY”?

- Someone who, with or without reasonable modifications to rules, policies, or practices or provision of auxiliary aids and services:
 - meets the academic and technical standards required for admission or to participate in programs or activities of the educational entity
 - is able to perform the essential functions of the job
- All qualified individuals with a disability must be provided with aids, benefits, or services that provide an equal opportunity to achieve the same result or level of achievement as others

WHO IS A “QUALIFIED INDIVIDUAL WITH A DISABILITY”? (CONT.)

- Institutions may provide a different or separate aid, benefit, or service than requested by the qualified individual with a disability only if doing so is necessary and ensures that the aid, benefit, or service is as effective as the one requested

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DIFFERENCE BETWEEN IMPAIRMENT AND DISABILITY

- The law draws a distinction between an impairment and a disability
- There are more people with impairments than with disabilities
- The difference lies in the **effect** the impairment has on the person
- If the impairment causes a “**substantial limitation**” of a “**major life activity**” then the person has a disability

WHAT DO “RECORD OF” AND “REGARDED AS” HAVING AN IMPAIRMENT MEAN?

Record of Having an Impairment

Individual has a history of having a mental or physical impairment that substantially limits one or more major life activities

Regarded as Having an Impairment

Person may or may not have a qualifying impairment but is treated as having an impairment that qualifies as a disability



**HOW IS THE SEC. 504 COORDINATOR
DIFFERENT FROM THE DISABILITY
SERVICES COORDINATOR?**

504 COORDINATOR OR DISABILITY SERVICES COORDINATOR

Accessibility/Disability Services Coordinator

- Verification of the intake of requests for accommodations
- Engaging in the interactive process
- Identifying with the student or employee appropriate accommodations
- Serving as liaison with faculty and supervisors

504/ADA Coordinator

- Publication of non-discrimination notice
- Oversight of the grievance process
- Investigation of grievances

Can it be the same person? Should it be the same person?



STANDARDS OF DISABILITY RESPONSE

- Compliance Requirements
- Administrative Requirements
- Grievance Policy
- Grievance Process

SECTION 504/ADA GENERAL COMPLIANCE REQUIREMENTS

If the institution accepts federal funds or employs more than 15 people, the institution must designate an employee to coordinate all efforts to comply with and carry out its responsibilities, including:

- Ensuring dissemination of notice of the institution's non-discrimination policy
- Adopting civil rights grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of discrimination

SECTION 504/ADA GENERAL COMPLIANCE REQUIREMENTS (CONT.)

If the institution accepts federal funds or employs more than 15 people, the institution must designate an employee to coordinate all efforts to comply with and carry out its responsibilities, including:

- Conducting investigations of complaints regarding noncompliance with the legal mandates of the ADA or Sec. 504
- Providing notice of the name, office address, and telephone number of the employee or employees designated to oversee Sec. 504/ADA compliance

TYPICAL 504/ADA COORDINATOR ADMINISTRATIVE REQUIREMENTS

The Section 504/ADA Coordinator is, at a minimum, responsible for:

- Coordinating and monitoring compliance with Section 504 and Titles I, II, or Title III of the ADA
- Overseeing state civil rights requirements regarding discrimination and harassment based on disability
- Overseeing prevention efforts to avoid Section 504 and ADA violations from occurring
- Implementing the institution's discrimination complaint procedures with respect to allegations of Section 504/ADA violations, discrimination based on disability, and disability harassment

REQUIRED STANDARD NOTICE

In accordance with the requirement of 504 of the Rehabilitation Act of 1973 and Titles I and II [or Title III if a private school] of the Americans with Disabilities Act of 1990 (ADA) the [name of your institution] will not discriminate against qualified individuals with disabilities on the basis of disability in its services, programs, or activities. The [name of institution] does not discriminate on the basis of disability in its hiring or employment practices and complies with all regulations promulgated by the U.S. Dept. of Education, the U.S. Dept. of Justice, and the U.S. Equal Employment Opportunity Commission.

SUGGESTIONS FOR THE GRIEVANCE PROCESS

- All grievances related to disability discrimination or harassment should be directed to the Sec. 504/ADA Coordinator
- The complaint should be in writing, clearly stating the issue presented
- The Sec. 504/ADA Coordinator should conduct an investigation of the complaint (could be formal or informal)
 - The Sec. 504/ADA Coordinator shall issue a written report and decision
 - Must have a time limit; recommend 30 days

ELEMENTS OF THE GRIEVANCE POLICY – THE COMPLAINT

Should include:

- A description of how and where a complaint (grievance) or appeal of an accommodation may be filed
- If a written complaint is required, a statement notifying potential complainants that alternative means of filing will be available to people with disabilities who require such an alternative
- A description of the time frames and processes to be followed by the complainant and the institution
- A statement of how long complaint files will be retained and where they are retained

ELEMENTS OF THE GRIEVANCE POLICY – THE APPEAL

- Information on how to appeal the grievance decision or accommodation appeal made by the 504 Coordinator following the investigation.
- Establish a time limit for making the appeal of an accommodation or a grievance.
- Identify to whom the Appeal should be filed
- A statement that the decision by the Appeal Officer is a final decision
- Note: the availability and use of the grievance procedure does not prevent a person from filing a complaint with the state Civil Rights Commission or the U.S. Dept. of Education, Office for Civil Rights.



ACCOMMODATION PROCESS: HIGHER EDUCATION

- Notification
- Review of Claim
- Interactive Process
- Temporary Disabilities

ACCOMMODATION PROCESS: NOTIFICATION

A COLLEGE HAS NO OBLIGATION TO ACT OR TO PROVIDE ACCOMMODATIONS UNTIL A REQUEST IS MADE.

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ACCOMMODATION PROCESS: NOTIFICATION

Step One:

- Student or employee notifies the appropriate office within the institution that addresses accommodations for disabilities
- Student or employee claims disability and seeks accommodation
- In order to be eligible for academic adjustments, auxiliary aids, services and/or authorized instruction, a student or employee must have a verified disability

ACCOMMODATION PROCESS: REVIEW OF CLAIM

Step Two:

- The student's educational limitations must be identified by certificated staff and described in the Academic Accommodation Plan
- Eligibility for each service provided must be directly related to an educational limitation
- In unusual cases where agreement cannot be reached between the student and the institution's staff, additional documentation of the impact of the disability on the student may be required
- What about using a student's high school IEP/504 Plan?

ACCOMMODATION PROCESS: REVIEW OF CLAIM (CONT.)

Step Two:

- Once a disability has been verified, the certified accessibility/disability services staff will need to utilize the interactive process to work with the student to identify the functional limitations of the educational environment and determine the needed auxiliary aids, services, academic adjustments, and educational assistance classes

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ACCOMMODATION PROCESS: THE INTERACTIVE PROCESS

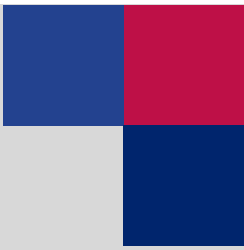
Step Three:

- Institutions should engage in an “interactive process” to determine appropriate accommodations that meet an individual’s needs.
 - Although the program as a whole must be accessible, and services provided in the most integrated setting possible, law does not require an institution to lower its standards to accommodate a disabled student or employee.
 - Determining what form of accommodation is appropriate is an important task. Discouraging students from defining themselves by what they can’t do is critical.
 - All aids and adjustments must be provided in a timely manner.

TEMPORARY DISABILITIES

- Under both the ADA & the ADAAA* (2008) the institution must recognize and accommodate temporary disabilities
 - Examples include a broken leg, recovery from surgery, or a pregnancy-related disability condition
- If a temporary disability is very short-term (e.g., 2-3 weeks) the student may be given permission to discuss temporary adjustments with their professor
- In cases of longer-term disabilities such as a pregnancy-related disability spanning six months, the accessibility/disability services office should be the coordinating entity for academic adjustments

*Americans with Disabilities Act Amendments Act



ADDRESSING COVID

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LONG COVID UNDER SEC. 504 & THE ADA

OCR GUIDANCE, JULY 26, 2021

- Individuals experiencing long-term adverse effects of COVID-19 may create a disability under both Sec. 504 and the ADA requiring accommodations
- Individuals already receiving accommodations may need new or different ones
- All determinations of the impact of long COVID on a student must be made on an individual basis based on determination from among the many symptoms possible under long COVID
- Under Sec. 504, higher education institutions are not required to identify students with disabilities. The student must request accommodations.
- In K-12, the school must work to identify students who may be impacted by COVID and provide necessary support to ensure a Free and Appropriate Public Education (FAPE)



ACCOMMODATION PROCESS: EXCEPTIONS

- Fundamental Alteration Guidelines
- Undue Hardship

SOME IMPORTANT THINGS TO KNOW

An institution is not required to provide:

- Personal devices such as wheelchairs
- Individually prescribed devices such as prescription eyeglasses or hearing aids
- E-readers for personal use or study
- Services of a personal nature including assistance in eating, toileting, or dressing

ACCOMMODATION PROCESS EXCEPTIONS

- Accommodations should be made on a case-by-case basis
- An institution is not required to provide an accommodation in circumstance in which the individual would pose a “direct threat” to the health or safety of others, and that a less restrictive option is not feasible. (28 C.F.R. § 36.208)
- A “direct threat” is defined as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.” (28 C.F.R. § 36.104)

THE ACCOMMODATION PROCESS EXCEPTIONS

- An accommodation or modification is **not required when it would:**
 - **Result in a fundamental alteration** of the nature of the program, service, or job function (28 C.F.R. § 35.130(b)(7))
 - **Create an undue financial or administrative burden**
 - Whether a particular accommodation will be an undue financial or administrative burden will depend on the facts and circumstances of the individual situation

WHAT IS A FUNDAMENTAL ALTERATION?

- A **fundamental alteration** means any change to a course curriculum or course of study or an approved job description that is so significant that it alters the essential nature or content of the curriculum in the approved course outline or the approved job description
- When a faculty member refuses to provide an accommodation identified by the accessibility/disability services office, that refusal will be given substantial weight if the faculty member can demonstrate that providing the academic adjustment or accommodation would fundamentally alter the learning objectives or goals for the course

FUNDAMENTAL ALTERATION GUIDELINES

Guidelines in Assessing Essential Standards and Fundamental Alteration:

- The faculty member (often in collaboration with the accessibility/disability services office) should identify the essential academic and technical standards of the course, the learning outcomes, and the goals for reaching those outcomes
- Determine if there are any options to the fundamental requirements that can be modified
- Understand why an essential standard cannot be altered (e.g., would an alteration lower the academic standards of the course or program?)

FUNDAMENTAL ALTERATION GUIDELINES (CONT.)

- Determine if a different method or requirement that will not be altered by the accommodation will achieve the required academic result
- Note that a decision to assert a refusal to provide a recommended accommodation because it would create a fundamental alteration should not be taken lightly
 - OCR and DOJ, as well as courts of law, will frequently uphold a challenge to failure to provide an accommodation because it's asserted that the accommodation would create a fundamental alteration

FUNDAMENTAL ALTERATION GUIDELINES (CONT.)

- Although failure to provide a reasonable accommodation to a student with a disability is a violation of law, putting the institution in jeopardy of losing federal funding or a lawsuit, the laws also require that students with disabilities meet the essential academic and technical standards of the class with appropriate accommodations

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OCR GUIDANCE REGARDING FUNDAMENTAL ALTERATION

Every program is different, but factors to be considered in determining whether a standard is essential include:

- The nature and purpose of the program;
- The relationship of the standard to the functional elements of the program;
- Whether exceptions or alternatives are permitted;
- Whether the standard is required in similar programs at other institutions;
- Whether the standard is essential to a given vocation for which the program is preparing students; and
- Whether the standard is required for licensure or certification in a related occupation or profession

UNDUE HARDSHIP

- An undue hardship is created when a specific accommodation would cause significant difficulty or expense to provide.
- Factors to consider include the:
 - Nature and cost of the accommodation needed;
 - Overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
 - Overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);

UNDUE HARDSHIP (CONT.)

- Factors to consider include the:
 - Type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
 - Impact of the accommodation on the operation of the facility

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FUNDAMENTAL ALTERATIONS EXERCISES

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SITUATION

An employee has diabetes and has recently been having substantial difficulty with neuropathy in their arms and hands. Their job is data entry and some paper file organizing and filing in the student financial aid office. They have asked to hire a work study student or administrative assistant to do the data entry and filing for them, or to create a new position for them that doesn't require using their hands.

Fundamental Alteration?

FUNDAMENTAL ALTERATION ANALYSIS

- Probably. We need more information regarding their job responsibilities, but if it is substantially the data entry and filing, and they cannot do it with an accommodation, they likely are not otherwise qualified for the position.
- The institution is not under obligation to hire new staff to do their job.
- However, ethically the institution should consider if there are other jobs in the financial aid area for which they would be suitable.

SITUATION

A student tells you they cannot complete writing assignments, with or without accommodations. The student requests that writing assignments not be included in their grade.

Fundamental Alteration?

FUNDAMENTAL ALTERATION ANALYSIS

- Probably. If submitting writing assignments is an essential academic or technical requirement of the class and assignments are articulated on the syllabus, there would be no legal mandate to comply with the student's request to exclude those assignments from the grade.
- If, however, writing assignments were not essential to mastering the learning objectives and the student's achievement in the course could be evaluated in other ways, such as in a conversation-based setting, then the accommodation may be acceptable.

SITUATION

A student with a learning disability requests the use of a calculator and a multiplication table in a beginning arithmetic class. The instructor of the class is adamant that the accommodation should not be allowed. In the instructor's opinion, the ability to perform the actual calculations is a basic requirement of the class. The student asserts that they can do the analytical work, but that sheer memorization is a disability-related problem for them.

Fundamental Alteration?

FUNDAMENTAL ALTERATION ANALYSIS

- Yes, IF the ability to perform the arithmetic calculations without the stated accommodations is an essential academic or technical requirement of the course.
- The institution should consider:
 - Is the learning outcome for the course, which is the ability to perform the actual calculations, clearly stated in the course description and the course syllabus?
 - Do all the sections of the same course disallow the use of calculators or multiplication tables?

WHAT DOES THIS MEAN FOR STUDENTS, FACULTY, & STAFF?

- For students, this means that a qualified student with a disability will be “**otherwise qualified**” for admission to a specific academic program **if they can meet all the necessary and articulated essential academic and technical standards** of the college program with reasonable accommodations.
- For employees, it means that if the employee meets the essential elements to perform a job, the institution must provide appropriate accommodations.
- Students and employees with disabilities are also protected from discriminatory harassment directed at them because of their disabilities.



SEC. 504, the ADA, & ACADEMICS

- Guidelines for Academic Accommodations
- *Campbell v. Lamar Institute of Technology*
- Accommodation Examples

GUIDELINES FOR ACADEMIC ACCOMMODATIONS

Academic requirements should not discriminate against qualified students with disabilities.

However, if colleges can demonstrate that certain academic or technical requirements are essential to the program, then the requirement is not regarded as discriminatory.

104 C.F.R. § 104.44(a)

CASE EXAMPLE: THE ADA & ACADEMICS

Russell Campbell v. Lamar Institute of Technology, **842 F.3d 375 (5th Cir. 2016)**

- Campbell was a student at Lamar Institute of Technology (LIT) and was provided accommodations for his learning disability.
 - Campbell had a brain injury impacting his ability to retain and process information.
 - LIT provided extended time for all exams, and a laptop and a voice recorder to help him with note-taking.
 - A faculty member even gave him two different final exams two weeks apart – the faculty member created a second exam.

CASE EXAMPLE: THE ADA & ACADEMICS (CONT.)

- Campbell asked for two extra weeks of study time after the other students took the final for all his exams
 - Campbell provided a doctor's note that stated, "He needs a week to two weeks to retain new information prior to testing over that material"
- LIT refused the two extra weeks' request, as they considered it:
 - Unreasonable because all faculty would have to create two exams
 - The accommodation would give Campbell an unfair advantage over other students
 - Could require faculty to lower the standards of their class

CASE EXAMPLE: THE ADA & ACADEMICS (CONT.)

- LIT met with Campbell and his wife and said he could ask individual instructors to accommodate him.
- Campbell met with instructors, who denied his request for two extra weeks to study, indicating it was not reasonable.
- LIT offered to “provide reasonable accommodations supported by medical documentation and would waive tuition and fees for the next semester.” Campbell refused.
- Campbell filed a lawsuit alleging denial of accommodations.
- The 5th Circuit held in favor of LIT, stating their denial of the requested accommodations was not discriminatory.

ACCOMMODATION EXAMPLES

- Additional time to complete tests or coursework
- Substitution of nonessential courses for degree requirements
- Adaptation of course instruction
- Recording of classes or being provided PowerPoints or lecture notes
- Modification of test taking/performance evaluations so as not to discriminate against students with sensory, manual, or speaking impairments (unless such skills are the factors the test purports to measure)

ACCOMMODATION EXAMPLES (CONT.)

- Qualified interpreters
- Note takers
- Computer-aided transcription services
- Written materials, assistive listening systems
- Closed caption decoders
- Open and closed captioning, TDDs
- Readers, taped texts, audio recordings
- Large print and Brailled materials
- Acquisition or modification of equipment



SECTION 504, the ADA, & ACADEMICS: HIGHER EDUCATION CASE DISCUSSION

The Case of Elyce

THE CASE OF ELYCE

Elyce provided documentation to the Accessibility/Disability Services Office that she frequently experienced panic attacks, especially when she was under pressure or stress. The Office reviewed her documentation and determined that she was entitled to request extended deadlines for completion of her academic work.

She met with her professor, who taught psychology, in a large lecture class (the course was required for Elyce's major) and presented the accommodation letter from the Accessibility/Disability Services Office.

THE CASE OF ELYCE

Elyce told the professor that she read the syllabus and noted that the professor does not give make-up exams in the course. Elyce told the professor, “What if I have a panic attack during the exam? You have to give me a make-up exam. This letter says so.”

The Professor has now come to you to explain that the course in question is required of all psychology majors and is the core course of Elyce's program. The professor stated, there are exams, lab reports, presentations, and papers in a tightly choreographed sequence that barely fits into the term.

THE CASE OF ELYCE

Falling behind in one assignment could cause a cascading problem for Elyce and leave her at risk for failure in the rest of her program. The Professor stated, “I simply cannot provide or allow for make-up exams, given the rigor of this program.”

How will you advise the professor and Elyce?



PREGNANT & PARENTING STUDENTS

- 2013 Dear Colleague Letter
- Regulatory Language
- OCR Guidance
- Athletics and Pregnancy

PREGNANCY, SEC. 504, & TITLE IX: 2013 DCL*

June 25, 2013 DCL on pregnancy and parenting students:

- Educators must ensure pregnant and parenting students are **not discriminated against**
- Educators must ensure that pregnant and parenting students are **fully supported in preparation for graduation and careers**
- Secondary school administrators, teachers, counselors, and parents must be well-educated on the rights of pregnant and parenting students as provided under Title IX

*Dear Colleague Letter from the U.S. Department of Education's Office for Civil Rights

PREGNANCY, SEC. 504, & TITLE IX: REGULATORY LANGUAGE

Pregnancy defined:

- “Pregnancy and related conditions”:
 - A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's **pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom**, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.” (34 C.F.R. 106.40)

PREGNANCY, SEC. 504, & TITLE IX: OCR GUIDANCE

Doctor's Note to Participate

- **“Schools cannot require a pregnant student to produce a doctor’s note in order to stay in school or participate in activities,** including interscholastic sports, unless the same requirement to obtain a doctor’s note applies to all students being treated by a doctor.”
- “That is, schools cannot treat a pregnant student differently from other students being cared for by a doctor, even when a student is in the later stages of pregnancy; **schools should not presume that a pregnant student is unable to attend school or participate in school activities.**”

Source: U.S. Department of Education (June 2013),
Supporting the Academic Success of Pregnant and Parenting Students, p. 8.

PREGNANCY, SEC. 504, & TITLE IX: REGULATORY LANGUAGE

Physician Certification

- A recipient **may require** such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation in the normal education program or activity **so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.**”
- “Thus, for example, a student who has been hospitalized for childbirth must not be required to submit a medical certificate to return to school if a certificate is not required of students who have been hospitalized for other conditions.”

Source: 34 C.F.R. § 106.40

PREGNANCY, SEC. 504, & TITLE IX: REGULATORY LANGUAGE

Pregnancy as Temporary Disability

- A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom **in the same manner and under the same policies as any other temporary disability** with respect to any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.”

Source: 34 C.F.R. § 106.40

PREGNANCY, SEC. 504, & TITLE IX: REGULATORY LANGUAGE

Leave Policies

- In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as **a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.**”

Source: 34 C.F.R. § 106.40

PREGNANCY, SEC. 504, & TITLE IX: OCR GUIDANCE

- “When the student returns to school, she must be reinstated to the status she held when the leave began, which should include giving her the opportunity to make up any work missed.”
- “A school may offer the student alternatives to making up missed work, such as:
 - Retaking a semester,
 - Taking part in an online course credit recovery program, or
 - Allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave.”
- “The student should be allowed to choose how to make up the work.”

Source: U.S. Department of Education (June 2013),
Supporting the Academic Success of Pregnant and Parenting Students, p. 8.

ATHLETICS, PREGNANCY, SEC 504, & TITLE IX

NCAA Guidance

- A pregnant student-athlete's physician should make medical decisions regarding sports participation
- A student-athlete with a pregnancy-related condition must be provided with the same types of modifications provided to other student-athletes to allow continued team participation
- Pregnant student-athletes cannot be harassed due to pregnancy
- A student-athlete whose athletic career is interrupted due to a pregnancy-related condition will typically be entitled to a waiver to extend her athletic career

Source: NCAA, Pregnant and Parenting Student-Athletes

ADDITIONAL SPECIAL ISSUES TO ADDRESS

- Nursing rooms, mothers' lounges, etc.
- Children at school and in the classroom...No
- Residence halls
 - Cannot remove prior to birth of child
 - Refund
- Labs, chemicals, exposure to diseases, etc.
 - Reasonable restrictions for health and safety (as deemed by a physician) are permitted
- Cohort programs
- Licensure requirements



PREGNANCY & SECTION 504 CASE DISCUSSION

The Case of Janet

PREGNANCY & SEC. 504

CASE DISCUSSION: HIGHER EDUCATION

Janet is seven months pregnant and has had an easy pregnancy. She's in the Allied Health Program for EMT. In this cohort program, clinical/experiential placements only occur during the spring term. Janet is scheduled to graduate next December. The paramedic program to which she's been assigned won't allow her to participate on their ambulance runs because of her pregnancy. She needs to complete this program this term.

What will you suggest?



ADA, SECTION 504, & MENTAL HEALTH ISSUES

- Guidelines Regarding Mental Illness
- Involuntary Withdrawals
- “Direct Threat” Test

SEC. 504/ADA GUIDELINES REGARDING MENTAL ILLNESS

- A student with a documented mental disorder has a qualifying disability even if they are on medication to control the disability
- Both the ADA and Section 504 apply
 - Section 504 gives recourse to students who are discriminated against on the basis of a recognized disability
 - The ADA entitles students who are otherwise qualified to participate in the programs and activities of the college to reasonable accommodations once they seek qualification with the campus disability/accessibility services office
 - Neither law requires that a suicidal student engage the disability services office to qualify as disabled

EXAMPLES OF A MENTAL DISABILITY

- A mental impairment that substantially limits one or more major life activities
- Examples of mental disabilities include:
 - Major depression
 - Bipolar disorder
 - Schizophrenia
 - Anxiety disorders
 - Post-traumatic stress disorders
 - Autism Spectrum Disorders

ADDRESSING INVOLUNTARY WITHDRAWAL

Engaging in involuntarily removing a student or employee with a disability is complex

- As of 2011, the law no longer applies “harm to self” as a basis for involuntary withdrawal, only “harm to others”
- OCR says **due process** is necessary to challenge assumptions that behavior is a threat that would support involuntarily removing a student or employee
- The institution must either:
 - Follow appropriate disciplinary procedures for students or employees who engage in conduct that would violate the codes of conduct; or
 - Engage in applying the ADA-created “Direct Threat” Test prior to removing an individual from school or work, **UNLESS** there is an immediacy of harm

“DIRECT THREAT” TEST

- “Direct Threat” means a significant risk to the health or safety of self or others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.
- OCR says DUE PROCESS is necessary to challenge factual assumptions that behavior being exhibited represents is “Direct Threat” of harm to others that would support involuntarily removing a student or employee from the institution
- A “Direct Threat” analysis applies to any individual who poses a “significant risk” of substantial harm or safety to others that cannot be eliminated or reduced by reasonable accommodation.

APPLICATION OF THE DIRECT THREAT TEST

1. To rise to the level of a direct threat, there must be a **high probability of substantial harm and not just a slightly increased, speculative, or remote risk.**
2. Then there must be an Individualized **and** objective assessment of the student's ability to safely participate in the college's program
3. This assessment must be based on a reasonable medical judgment relying on the most current medical knowledge **or** the best available objective (non-medical) evidence

APPLICATION OF THE DIRECT THREAT TEST (CONT.)

4. The assessment must determine:
 - The nature, duration, and severity of the risk;
 - The probability that the potentially threatening injury will actually occur; and
 - Whether reasonable modifications of policies, practices, or procedures (accommodations) would sufficiently mitigate the risk.

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POLICY IMPLICATIONS

- The Direct Threat Test (as proscribed by the ADA) may only be applied when a student's conduct represents an "unreasonable threat of harm to others"
- The student conduct process should be applied when the student's conduct creates a disruption to the education environment or violates other behavior standards
- Both approaches provide due process before involuntary removal from the institution
- Thus, offer appropriate due process and follow your process.

RESPONSE CONSIDERATIONS

- Involve your accessibility/disability services office
- Offer appropriate due process and follow your process if you plan to involuntarily remove from school or job
- Use clearly written policies and referrals based on **behaviors**, not disabilities or conditions
- Address **actual** significant disruptions to the institution, not simply **risk** of disruption
- Be consistent in referrals – the same disruptive behavior should warrant a conduct process regardless of the individual. Sanctioning should also be consistent

RESPONSE CONSIDERATIONS (CONT.)

- Do not treat students or employees with disabilities differently than other students or employees other than providing reasonable accommodations under the law

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ADA/SEC. 504 & MENTAL HEALTH: HIGHER EDUCATION CASE DISCUSSION

The Case of Dennis

MENTAL HEALTH & ADA/SEC. 504: THE CASE OF DENNIS

Dennis is a first-year student at your institution. He enrolled as an honors student and had outstanding credentials in high school. He wants to go to law school and be a legal advocate for people with disabilities. Dennis has been diagnosed with Asperger's Syndrome. Dennis provided his documentation to your accessibility/disability services office and shared that he receives ongoing therapy to help him control his impulsive conduct.

When Dennis is aggravated, challenged, or simply strongly disagrees with another person, he will often engage in arm flapping, make loud guttural sounds, and sometimes he will run around the room or out of the room or the building.

MENTAL HEALTH & ADA/SEC. 504: THE CASE OF DENNIS

Dennis works hard to control his impulses, but sometimes he just loses control. This term he is enrolled in a course called “Controversies in Politics,” and since the foundation for the course is to challenge assumptions and to defend your position, there is high tension in the class as students debate various political positions. Dennis has frequently lost control in this class and has created significant disruption and frightened many of the students.

The faculty member and his Dean have come to you to determine what can be done. Dennis must take this class for his major and this is the only section offered. This course is a pre-requisite for the other courses in political science. The Dean feels strongly that Dennis is not qualified to be a student at your institution.

MENTAL HEALTH & ADA/SEC. 504: THE CASE OF DENNIS

Dennis is also having trouble in the residence hall. If there is noise in the hall while he is trying to sleep or study, Dennis will often confront the people talking in the hallways or playing music. He is a large young man and will yell and become very aggressive when confronting someone about making noise. Many residents have made complaints or expressed a fear of Dennis. Dennis's therapist is aware of these situations and has been working with Dennis on behavior modification techniques, but he still has impulse control issues.

The Director of Residential Life has also come to you for some solutions. She feels that Dennis should not be allowed to live in the residence hall although all first-year students are required to live on campus.

MENTAL HEALTH & ADA/504: THE CASE OF DENNIS

Dennis is academically gifted and is a very nice young man when not provoked, but his conduct is creating a disruption in class and in his residence hall. Students and parents have called your President and the Political Science Department wants him removed from the Department, as does the Department of Residential Life.

What are some possible solutions to this issue?

Should Dennis be removed from school?

WELCOME TO ANIMAL HOUSE



THE ISSUE

- Colleges and universities frequently receive requests to bring service animals (as defined by the ADA) and assistance animals, which can be service animals, but also therapy, comfort, or emotional support animals (as defined by HUD) to class or their living environment as an accommodation
- Service and/or assistance animals may make institutions more accessible for the students and enrich the educational environment by allowing the institution to be more accessible to students with a wide range of disabilities
- BUT there is a confusing backdrop of disability-based laws that impose differing obligations and apply differently based on locations on campus



SERVICE ANIMALS

- ADA Guidelines
- Inquiries About Service Animals
- Rights of Individuals with a Disability and Service Animals

ADA GUIDELINES REGARDING SERVICE ANIMALS

- Titles II & III of the ADA state that a service animal may only be a dog or miniature horse that has been individually trained to do work or perform tasks for the benefit of an individual with a disability.
- Title I of the ADA, which applies to the employment context, does not define “service animals,” nor require institutions to automatically permit a specific type of animal in the workplace. Rather, animals in the workplace should be treated as a “reasonable accommodation” and the employer may ask for appropriate documentation.





WAIT! A HORSE? WHY?

- Miniature horses are as trainable as dogs
- Miniature horses are hypo-allergenic
- Miniature horses have a longer life span than a dog
- Miniature horses are generally no larger than a big dog

BUT...THERE ARE GUIDELINES TO CONSIDER:

- Whether the facility can accommodate the type, size, and weight of the horse
- Whether the handler has sufficient control of the horse.
- Whether the horse is housebroken.
- Whether the horse's presence compromises legitimate safety requirements.

ADA GUIDELINES REGARDING SERVICE ANIMALS

- “Service animals are working animals, not pets. The work or task a dog has been trained to provide must be directly related to the person’s disability.
- The service animal does not need to be professionally trained but cannot just be a ‘service animal-in training’ unless required by state law.
- You cannot require documentation that the animal has been certified, trained, or licensed as a service animal.
- Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals under the ADA.”

Source: U.S. Department of Justice (February 2020), *ADA Requirements: Service Animals*.

INQUIRIES ABOUT SERVICE ANIMALS AND THEIR OWNERS

- You may not ask about the nature or the extent of a person's disability.
- A qualified person with a disability using a service animal does not need to register with the accessibility/disability services office, nor produce documentation of the disability because a service animal is not an accommodation. They are an extension of their handler.
- You may only ask:
 - If the animal is required because of a disability and/or
 - What work or task the animal has been trained to perform.

INQUIRIES ABOUT SERVICE ANIMALS AND THEIR OWNERS (CONT.)

- You may not require documentation of training.
- There is no special certification or licensing required for a service dog or miniature horse.

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EXAMPLES OF WORK OR TASK OF SERVICE ANIMALS

- Guiding people who are blind
- Alerting people who are deaf
- Pulling a wheelchair
- Alerting and protecting a person who is having a seizure
- Reminding a person with mental illness to take prescribed medications
- Preventing or interrupting impulsive or destructive behavior for those with a psychiatric disability
 - For example, for autistic students, service animals can be trained to interrupt inappropriate repetitive behavior.



Source: U.S. Department of Justice (February 2020), *ADA Requirements: Service Animals*.

RIGHTS OF INDIVIDUALS WITH A DISABILITY & SERVICE ANIMALS

- An institution must **modify policies, practices, or procedures** to permit the use of a service animal
- Unless:
 - The animal is out of control
 - The animal isn't housebroken
- Service animals must be permitted to accompany their handler in all areas of the institution unless their presence poses a health or safety risk
- You may not charge a fee for a service animal even if others accompanied by a pet are required to pay a fee
- Service animals don't have to wear a vest, ID Tag, or specific harness to identify them as a service animal

TO REVIEW: GUIDELINES FOR SERVICE ANIMALS

- Only dogs or miniature horses that perform work or a task for an individual with a qualifying disability are considered service animals
- Must be individually trained to do the work or task
- Must be housebroken
- Must remain under the care and supervision of the owner at all times via a leash or harness unless it would interfere with their work
- May not create a disruption to the environment
- May not pose a direct threat to the health or safety of the campus



EMOTIONAL SUPPORT, THERAPY, & COMPANION ANIMALS

- HUD Fair Housing Act
- Documentation for Emotional Support Animals
- Owner Obligations for Emotional Support Animals

EMOTIONAL SUPPORT, THERAPY, & COMPANION ANIMALS

- May be an animal other than a dog
- They are usually the personal pets of their handlers and provide comfort or emotional support
- Federal laws have no provisions requiring people to be accompanied by therapy or comfort animals in places of public accommodation that have "no pets" policies other than dwellings under the FHA
- Therapy animals, often hosted at campus counseling centers events during high stress times, are usually not service animals

HUD: FAIR HOUSING ACT CHANGES THE LANDSCAPE

- The Office of Housing and Urban Development (HUD) applies a broader definition, using the term “assistance animal” when enforcing Sec. 504 in the housing context.
- Assistance animals, which includes untrained emotional support (ESA), comfort, therapy, as well as service animals, **must be allowed as an accommodation** for any qualified individual with a disability in any “dwelling which is occupied as a residence by one or more families.”

HUD: FAIR HOUSING ACT & ASSISTANCE ANIMALS

- Institutions must accommodate a qualified individual with a disability by making provisions for an assistance/comfort/ESA in a residence hall or campus apartment
- The institution is not required to allow the individual to bring that animal into the work environment, classroom, or other areas or buildings on campus unless the animal qualifies as a service animal.
- An individual requesting an assistance animal, as defined by HUD/FHA, is required to produce documentation of a disability, and demonstrate the nexus of the disability to the support or comfort that the assistance animal provides in order to have that animal in campus housing.
- There is no documentation required for service animals.

HUD GUIDELINES REGARDING ASSISTANCE ANIMALS

- As long as the **animals alleviate the “effects” of the disability** and the animals are reasonably supported, they are acceptable.
- Species other than dogs, with or without training, and animals that provide emotional support are recognized as “assistance animals.”
- Courts have also upheld that animals need not be trained, nor do they need to be dogs to qualify as “reasonable accommodations.”
- Animals who pose a direct threat to the health and safety of others; who cause substantial physical damage to the property of others; who pose an undue financial and/or administrative burden; or would fundamentally alter the nature of the provider’s operations may be excluded.

WHAT TO EXPECT FOR DOCUMENTATION FOR AN ESA

- Confirmation the individual has a mental health diagnosis
- The documentation should be from a medical professional, trained to diagnose mental health conditions
- Request an explanation of how the animal helps alleviate the condition
- Have them address the potential negative effects of the person not having the animal with them
- Ask if the animal has any training to do what is needed to alleviate the disability

OWNER OBLIGATIONS RE: ESAs

- The animal cannot interfere with the reasonable use and enjoyment of others living in the same dwelling
- The animal must be caged when the owner is not in the room
- The animal must always be under the control of the owner, either on a leash or harness, or in a crate or carrier
- The owner may not leave the animal for extended periods of time or overnight
- The owner may not leave the animal in the care of another resident overnight



ASSISTANCE ANIMALS IN THE WORKPLACE CASE DISCUSSION

The Case of Jack

THE CASE OF JACK

Jack works as a proctor in the microbiology lab. He has missed a great deal of work lately and reported that he is experiencing a great deal of stress as a result of his recent divorce and child custody issues. Jack was diagnosed as suffering from depression, insomnia, anxiety, and panic disorder. He has asked to bring his Collie dog to work with him as his emotional support animal.

- Is Jack a qualified person with a disability?
- If yes, can he bring his Collie dog to work with him?
- What other alternatives might you suggest?

FINAL ADVICE: REQUIREMENTS FOR BOTH SERVICE ANIMALS & ESAs

- Must be in good health and well cared for by the owner
- Must meet all state requirements for vaccinations and licensing
- The owner must clean up after the animal and must appropriately dispose of all animal waste
- The animal may not disturb, annoy, or cause any nuisance to other members of the campus community
- They may not pose an undue threat or fear to the residence environment

FINAL ADVICE: REQUIREMENTS FOR BOTH SERVICE ANIMALS & ESAs (CONT.)

- They may not cause undue financial or administrative burden to the institution in order to provide the accommodation
- May not fundamentally alter the nature of the institution's operations

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ADDITIONAL THINGS TO CONSIDER

- What about roommates or neighbors with allergies?
 - Not all allergies create a disability, and you need to apply common sense to addressing
- Allergies or fear of dogs are not valid reasons for denying access or refusing service to people using service animals.
- Decisions about acceptability of the dog may not be based on the breed of the dog.
- A person with a disability does not have superior rights to the person without a disability.



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Questions?

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Thanks for joining us today.



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