
Section 2

From Law to Practice: Using the Law to Set Policies and Procedures That Keep Us Compliant

L. Scott Lissner

Overview

Attorneys, acting as legal counsel for institutions, will read the statutes, case law, and guidance for jurisdiction, precedent, fact patterns, ambiguities, and legal theory in the context of the client institution's needs and obligations. However, disability resource staff should read the law as a foundation for policy and procedure in the context of their office and institutional missions. Generally the statutes provide a rationale and goals that set the scope of policies; regulations add the details that shape it.

The broad mandate in the ADA—to assure equality of opportunity, full participation, independent living, and economic self-sufficiency by eliminating discrimination, including intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers—sets the stage for policy¹. The regulations for Section 504 and the ADA provide the details of the scene, requiring effective access to programs, benefits, and services for qualified individuals with disabilities in the most integrated manner possible. To furnish this scene, regulations identify specific elements (notice, reasonable accommodation, auxiliary aids and services, equally effective communications, grievance process...) that should be included in policy. Finally, guidance and case law provide interpretation, insight into enforcement issues, and models for application in different contexts.

Developing a sound process

A sound process is necessary to guide institutions in determining if a requirement is essential and if a requested accommodation would be a fundamental alteration. In the resolution of cases³⁴, courts have looked for an objective and conscientious process to review the impact of the requested accommodations on the curriculum. The process is expected to include experts on both the curriculum and accommodations and to explore alternative accommodations if the requested accommodations were denied.

The Department of Education's Office for Civil Rights (OCR) modeled this process using the common factors weighed by the courts as mentioned to craft its letters to Mt. San Antonio College⁵ and SUNY Albany.⁶ A read of these cases suggests the following pointers for an institutional process to address questions of fundamental alteration:

- Institutions cannot merely rely on their past practices and decisions, including those involving similar disabilities.
- Decisions of fundamental alteration related to academics must include input from individuals knowledgeable and experienced in the discipline and pedagogy as well as disability and the accommodation process.

- A timely, thorough, and rational review of the academic program, its requirements, potential accommodations, and alternative experiences that might substantially approximate essential elements for the student making the request must be conducted and approved by the President of the institution or their designee.

Guidance from recent case law

In *Argenyi v. Creighton University*, the court provided some further guidance that highlights an additional requirement of the process.

*"...it is especially important to consider the complainant's [student's] testimony carefully because 'the individual with a disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective.'"*⁷

This statement reflects not just the facts of the one case but the court's broader understanding that the regulations and existing case law give deference to the auxiliary aid or service requested by deaf and hard of hearing individuals.

It is these general principles and common elements in resolutions, rather than the facts and simple outcomes, which make reading cases useful to the day-to-day work of ensuring access and compliance.

Public or private: Undue burden, readily achievable, and other differences

Public post-secondary institutions are covered by Title II of the ADA; private post-secondary institutions, including for-profit schools, are covered by Title III of the ADA. Both are covered by Section 504 of the Rehabilitation Act if they receive any federal funding. The overlapping regulations can be confusing but fortunately in the higher education context there are really only two areas where institutions need to be aware of the differences. If the institution is controlled by a religious organization **and** receives no federal dollars (including student financial aid), then it is not covered by Section 504. Because Section 504 and the ADA have the same core mandates on a practical level, most of the distinctions based on Title II and III disappear. Post-secondary institutions cannot discriminate on the basis of disability and must provide reasonable accommodations (modifications to policy and practice, modifications to the environment, and the provision of auxiliary aids and services such as assistive listening devices, interpreters and captioning).

Who decides what auxiliary aid or services should be provided? The answer is different for private and public post-secondary institutions because of differences in Titles II and III of the ADA.

Private post-secondary institutions

*"...should consult with individuals with disabilities wherever possible to determine what type of auxiliary aid is needed to ensure effective communication. In many cases, more than one type of auxiliary aid or service may make effective communication possible. While consultation is strongly encouraged, the ultimate decision as to what measures to take to ensure effective communication rests in the hands of the public accommodation, provided that the method chosen results in effective communication."*⁸

Public post-secondary institutions

*“...must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice and must give primary consideration to the choice expressed by the individual. ‘Primary consideration’ means that the public entity must honor the choice, unless it can demonstrate that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the service, program, or activity or in undue financial and administrative burdens”.*⁹

As you can see, public post-secondary institutions must defer to the individual’s preference unless they can show that an alternative is equally effective or it poses a burden. Private post-secondary institutions can give more consideration to the cost and administrative ease of alternative, but still effective, communication services.

When does the cost and difficulty of implementing an auxiliary aid or service become prohibitive, providing a reason to reject a particular request? For auxiliary aids and services like interpreting and captioning, Titles II and III of the ADA require institutions to demonstrate “undue financial or administrative burden”. Undue burden is a very high standard. Determining that a request would result in such a hardship must be made by the president of the post-secondary institution or his or her designee after considering all of the resources available to the institution as a whole (not the specific academic department or disability resource office). A written statement summarizing the process and providing the rationale must be available for review. Under either standard, if the college or university proves a hardship related to a particular request, they must seek an alternative that would not create a hardship and would, to the maximum extent possible, provide effective communication.¹⁰

Endnotes

¹ 42 U.S.C. §§ 12101 et seq., <http://www.ada.gov/pubs/adastatute08.htm>

² 28 C.F.R. part 35 (title II), http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm; 28 C.F.R. part 36 (title III), http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm; Section 504 Regulations, U.S. Dept. of Education - 34 C.F.R. § 104, http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title34/34cfr104_main_02.tpl

³ Southeastern Community College v. Davis, 442 U.S. 397 (99 S.Ct. 2361, 60 L.Ed.2d 980)

⁴ Wynne v. Tufts University School of Medicine, 976 F.2d 791, <http://openjurist.org/976/f2d/791>

⁵ Mt. San Antonio College Docket Number 09-96-2151-I (Office for Civil Rights)

⁶ University at Albany, State University of New York, No. 02-06-2027 (Office for Civil Rights 11/16/2006)

⁷ Argenyi v. Creighton University, 703 F.3d 441 (8th Cir. 2013).

⁸ The Americans With Disabilities Act Title III Technical Assistance Manual, <http://www.ada.gov/taman3.html>

- ⁹ The Americans With Disabilities Act Title II Technical Assistance Manual, <http://www.ada.gov/taman2.html>
- ¹⁰ Letter to Bakersfield College, No. 09-10-2048 (Office for Civil Rights 11/14/2011) http://www.galvin-group.com/media/171299/09_10_2048_bakersfield_ocr.pdf. The Americans with Disabilities Act Title II Technical Assistance Manual, <http://www.ada.gov/taman2.html>. The Americans with Disabilities Act Title III Technical Assistance Manual, <http://www.ada.gov/taman3.html>.

