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The Americans with Disabilities Act Amendments create compelling legal compliance issues, requiring campuswide protocols and coordination.

Legal Challenges and Opportunities

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For legal issues in the field of disability compliance, this is an exciting time in postsecondary education. The twentieth anniversary of the Americans with Disabilities Act (ADA) signals a reawakening of the commitment to provide equal access to individuals with disabilities. This chapter explores three of the compliance issues that will be of significant importance to colleges and universities for the foreseeable future: the Americans with Disabilities Act Amendments; a call for the adoption of a new service model for individuals with psychiatric disabilities; and the federal government's new emphasis on access to technology.

The ADA Amendments

The Americans with Disabilities Act Amendments Act (ADAAA) resolves the serious problem with the legal interpretation of the definition of disability[1]; however, because of a period of uncertainty regarding agency and judicial interpretations of the new statutory mandates, and the raised expectations of those who anticipate renewed energy devoted to providing access for individuals with disabilities, it will also create some interesting challenges for professionals determining who are "qualified individuals with disabilities" and providing accommodations. There will be a tough battle for the high ground in terms of just how far the obligation to accommodate will be expanded under the redefined definition of *disability,* and postsecondary institutions that do not pay close attention may quickly lose control over their disability services programs with respect to meeting their compliance obligations.

Institutions that wish to avoid becoming participants or casualties in this battle must review and incorporate Amendment mandates from the perspective of what's changed, what remains the same, and the strategies necessary

to ensure that their accommodation practices and procedures are in line with the new compliance dynamics.

For example, the definition of *disability* in the Amendments still reads, in pertinent part: "a physical or mental impairment that substantially limits a major life activity." Further, courts that have already considered the impact of the Amendments have ruled that case-by-case determinations must still be made, and individuals seeking the protection of the law must still offer "evidence that the extent of the limitations in terms of their own experience . . . is substantial" (see, e.g., *Gil v. Vortex* 2010; *Jenkins v. National Board of Medical Examiners* 2009). Thus, institutions have not lost the right to make disability determinations following examination of information or evidence (i.e., medical documentation) supplied by the individual regarding the disability question.

Another consideration is the mandated broader interpretation of the definition of *disability,* which lowers the threshold for individuals with respect to the amount of proof or evidence that they must offer to establish that they have a disability. The previous restrictive interpretation of the definition has been replaced by a more inclusive presumption of coverage that shifts the focus to the responsibility of institutions to provide meaningful access. Thus, while individuals still must present something more than a diagnosis, the failure to present an exhaustive listing of a condition's manifestations will no longer defeat a disability claim (*Brodsky v. New England School of Law* 2009; *Rohr v. Salt River Project Agricultural Improvement and Power District* 2009).

The proposed Equal Employment Opportunity Commission (EEOC) regulations provide that determinations concerning the definition of *disability* must distinguish between impairments that are consistently considered disabilities and those that may be substantially limiting for some individuals but not others with the same disability. In theory, impairments consistently considered disabilities would require little more than a diagnosis and minimal verification of the functional limitations (e.g., deafness, blindness, cerebral palsy, epilepsy), while the others would require more analysis to determine whether they are substantially limiting for a particular student (e.g., asthma, learning disabilities, back impairments). Thus, what are contemplated are different levels of documentation and scrutiny based on the nature or classification of the impairment.

The Office for Civil Rights (OCR) has ruled that the amount of disability-related information or documentation that is permissible for institutions to obtain is the "minimum information necessary to establish a disability and/or support an accommodation request" (*Central New Mexico Community College* 2007). Thus, there are two legitimate uses for documentation: establishing the existence of a disability, and supporting the need for requested accommodations (e.g., interpreters, extended time on tests, notetakers). Further, the Amendments do not change the definition of *reasonable accommodations*. The amount of information, documentation,

and analysis involved in making reasonable accommodation determinations will frequently be greater than that necessary for making a disability determination. Additionally, while the positive impact of disability-related mitigating measures may not be used in making the disability determination, the impact of the measures (both positive and negative) may be used to determine whether the individual is entitled to a reasonable accommodation. (For example, see *Garcia v. State University of New York Health Sciences Center* [2000], a case involving a student who took Ritalin as medication to combat the effects of his attention deficit disorder [ADD]).

The Amendments have not altered the responsibility of individuals to provide documentation supporting the need for all accommodations requested; the right of institutions to refuse to provide accommodations that would fundamentally alter programs and services, or that would impose an undue administrative or financial burden; and/or the right of institutions to provide "equally effective" accommodations to those proposed by the student.

The most important information to use from these facts is that:

1. The burden of proof regarding disability determinations has clearly shifted to the institution (i.e., in order to establish that an individual does not meet the definition of disability, an individualized assessment must demonstrate compelling evidence establishing either that there is no impairment, or that the impairment does not substantially limit a major life activity).
2. If evidence concerning the existence of a disability is mixed, it is best to resolve the question in favor of the individual.
3. The disability determination and the reasonable accommodation determination are separate and distinct determinations.

From a legal standpoint, it is important not to succumb to voices that argue that the best approach would be to primarily follow the lead of individuals with disabilities regarding the existence of the disability, and that all requested accommodations must be provided. This is an important pitfall to avoid. Abdicating responsibility to individuals with disabilities and their advocates is not the solution to meeting the compliance obligations of the ADAAA. The obligation of any campus is to provide meaningful access—not to give individuals whatever they think they need or ask for. As many disability service providers know from experience, situations may arise in which what an individual requests and wants is neither reasonable nor the proper accommodation under the circumstances. Therefore, while postsecondary institutions are certainly obligated to consider the preferences or wishes of individuals with disabilities in making these decisions, it is important to remember that, ultimately, the compliance obligation belongs to the institution.

In a related matter, it is important to note that the past practices of licensure boards and testing/certification agencies narrowly and strictly

interpreting the definition of disability will present an interesting dilemma for professional and graduate programs. One can anticipate that there will be a significant amount of litigation in this area now that the Amendments are viewed as having leveled the playing field (see, e.g., *Jenkins v. National Board of Medical Examiners* 2009). Previously, professional and graduate schools stood at arm's length and allowed students to fight it out with the boards and agencies. Should the boards and agencies continue to adhere to their past practices, professional schools and graduate programs will need to ask themselves how to respond if students are likely to be denied reasonable accommodations when sitting for professional examinations.

Psychiatric Disabilities

There is growing frustration being expressed by college and university administrators regarding the proper methods to use in managing situations involving individuals with psychiatric disabilities (e.g., depression, schizophrenia, bipolar disorder). Many of these situations are extremely complex and confusing, and as a consequence there are a number of common mistakes that may be made in attempts to balance the competing interests of all parties. This is particularly true concerning students with psychiatric disabilities, who may exhibit behaviors viewed as potentially harmful to themselves or others or incompatible with a learning environment. The following sections consider four specific issues for campuses to consider.

1. *Ignoring Other Pertinent Unique Compliance Issues*. These cases are rarely resolved by answering a straightforward question of compliance. They frequently require that other significant issues be addressed before or at the same time as reasonable accommodation questions. The type of issues that often arise include: health and safety considerations; Family Educational Rights and Privacy Act (FERPA) or ADA confidentiality concerns related to medical inquiries and disclosures; qualified status determinations; and potential disciplinary sanctions. Proper consideration of these issues is necessary to ensure that compliance mandates are satisfied, that individuals receive equitable treatment, and that inadvertent violations of the law are avoided. It generally spells the difference between success and failure in resolving these cases. It is imperative to identify and properly resolve all relevant issues. Examples of questions that consistently arise include:
   - Is this a circumstance where emergency action is warranted?
   - Does the individual's behavior represent a direct threat to the health or safety of self or others?
   - Is there prior evidence of potentially problematic behavior that was not addressed?

- Is the individual's behavior so disruptive that it interferes with the institution's ability to provide educational services and/or the ability of others to benefit from those services?
- Are there reasonable accommodations that would enable the student to meet essential educational or job requirements?

The preceding questions are those that are important to address in these cases, with problems of imminent risk to be considered first. The prevailing standard is that decisions must be supported by objective medical evidence and/or a clear pattern of behavior, and be logical, reasonable, and free from bias and discrimination.

2. *Treating Psychiatric Conditions or Disabilities Differently from Other Disabilities.* It is not uncommon for individuals with psychiatric disabilities to argue that the manifestations of the disability that are troubling or disruptive should be excused, ignored, or worked around as an accommodation itself. Further, there are many examples of institutional administrators who have not acted under circumstances that clearly call for action because they believed that doing so would violate statutory rights and protections provided to individuals with disabilities. Each of these opinions is representative of the mistaken belief that disability status trumps all other considerations. The fact that an individual has a disability does not shield him or her from the consequences of inappropriate and/or dangerous conduct or behavior (see, e.g., *Concepcion v. Commonwealth of Puerto Rico* 2010; *DeSales University* 2005). The EEOC, OCR, and the courts have consistently ruled that postsecondary institutions are entitled to take appropriate action under circumstances where (a) a significant imminent risk exists; (b) the individual's behavior is a direct threat to the health and safety of self or other and/or is so disruptive that it interferes with the institution's ability to provide educational services; (c) the individual is judged not to be a qualified individual (e.g., is not able to meet core requirements of the college or degree program, even with accommodations); and (d) the standards applied are equal to those applied to other similarly situated individuals.
3. *Basing Decisions on Generalizations Regarding the Psychiatric Condition.* It is not uncommon for the mere existence of the psychiatric condition or disability to influence the decision making of institution officials, rather than the actual circumstances that give rise to a situation demanding action. For example, such generalizations may arise from (a) the use of experts who have not evaluated the individual and/or reviewed his or her medical records; (b) discussion about the limitations and/or behavioral symptoms that most people with the condition have rather than the individual's specific functional limitations; and (c) speculation concerning how or whether the particular psychiatric condition would impact success without consideration of the individual's actual circumstances. What is required is an individualized assessment, instead

of generalized stereotypes regarding the impairment/disability (*Mastrolillo v. State of Connecticut* 2009; *University of Cincinnati* 2006). An individualized objective assessment must focus on all circumstances relevant to the individual's ability to participate in an educational program. Proper determinations involve consideration of objective medical evidence concerning the individual's impairment, as well as reliable information concerning the impact of the individual's functional limitations relative to pertinent requirements of the program or job, the individual's performance and behavior in the environment, and the availability of reasonable accommodations.

4. *Failing to Involve Necessary Experts and/or to Provide Due Process.* Many of these cases involve students in academic crisis, or students subject to disciplinary sanctions, where faculty members or students are called upon to make decisions concerning whether the student should be suspended or dismissed. Frequently (and this is a particular problem for graduate and professional programs), decisions are made without participation or input from disability experts, as well as a full understanding of the institution's compliance obligations through consultation with general counsel and/or the campus ADA/504 coordinator. Making and enforcing unilateral actions or decisions that have an adverse impact on the participation of students with disabilities is not a wise way to do business. Final decisions that deprive, or have a substantial impact on, the rights or opportunities of students with disabilities must include proper due process procedures (*Marietta College* 2005; *Mastrolillo v. State of Connecticut* 2009; *University of Cincinnati* 2006). Essential due process provisions include notice of the information and evidence that is being considered, an opportunity for the student to be heard and to present evidence, notice of decisions and explanations regarding the proposed or recommended actions, and an opportunity to appeal. Further, the institution must be able to demonstrate that the standards or requirements being enforced, as well as any sanctions being applied, are the same as those applicable to similarly situated nondisabled students.

While the procedural mistakes discussed above certainly reflect a basic lack of understanding regarding the compliance obligations that must be met, on a broader scale they are symptomatic of a much larger problem and a substantially greater challenge facing postsecondary institutions. They signal a compelling need for colleges and universities to adopt a new service model for interacting with individuals with psychiatric disabilities. The traditional model employed by many institutions primarily consists of offering counseling for minor to moderate academic stress–related situations, typically focused on changing student behaviors. However, on the accommodation side, the approach tends to fluctuate between two extremes: providing any and all

accommodations requested, or using the mere existence of the disability to justify a determination that the individual is not qualified. Additionally, the most serious psychiatric issues tend to be referred out, ignored until they reach crisis portions, and/or left to campus security to manage (see, e.g., *College of Marin* 2006; *Shin v. University of Maryland Medical System* 2010; *Toledo v. University of Puerto Rico* 2008; *University of Cincinnati* 2006). These approaches are best characterized as passive, reactionary, and ineffectual.

Clearly, the traditional service model is broken. The educational landscape has significantly changed, and institutions have failed to update their administrative approach to keep pace with the realities of this new landscape. These realties include substantial increase in the number of students with documented serious psychiatric disabilities enrolling in colleges and universities, and a student profile that increasingly looks less like the traditional 18- to 22-year-old student with limited life experience. The average student population today includes employees who have been downsized, military veterans on the GI Bill, empty nesters, mid-twenties GED recipients, first-generation college enrollees, high school graduates who received special education services, and individuals who have been primarily home schooled. Tragedies including those at Virginia Tech and the University of Alabama raise serious questions regarding the ability of institutions to address significant health and safety challenges in academic environments.

These are realities that require more than the passive, reactionary, and ineffectual strategies of the past, making a compelling argument for the adoption of a new model of service delivery for students with psychiatric disabilities. While reasonable people will engage in spirited debates about what the new model should look like, professional experience and respected organizations (see, e.g., JED Foundation 2008) tells us that important key strategies are:

- Use of an intervention team that includes qualified mental health professionals (those capable of diagnosing and treating serious psychiatric conditions), as well as disability, security, and legal experts, to take the lead in complex cases (e.g., emergency situations, cases of direct threat, situations where conditions are imposed on the individual's participation based on his or her disability). The team would be charged with the responsibility to take the lead in managing such cases.
- Developing methods of administration to ensure that those making decisions that potentially have an adverse impact on individuals with disabilities (academic standing committees, disciplinary proceedings, etc.) have access to appropriate experts to ensure that proper standards are applied. For example, a FERPA expert would provide guidance if medical inquiries and disclosures are at issue, an ADA/504 coordinator might answer questions regarding the standards for establishing a "direct threat," and a mental health expert would evaluate the medical information and provide input concerning the manifestations of the individual's condition.

- Develop proper protocols for clinical rotations, internships, and externships that address potential health and safety issues and the circumstances under which a student's participation may be restricted or denied. The protocols should incorporate the compliance standard identified by OCR (i.e., valid evidence that the student's conduct has the reasonably foreseeable potential to harm clients in clinical, medical, counseling, or other similar programs [*North Central Technical College* 1997]).
- Modify disability accommodation procedures to ensure that the input of mental health experts is sought when requested accommodations raise issues of academic integrity and qualified status.
- Identify the circumstances in which individuals with disabilities are entitled to due process, and ensure that proper procedures are in place and adequate notice is provided about their rights to appeal decisions.

Access to Technology

There was considerable regulatory activity in 2010 that indicates that the federal government has shifted compliance attention to ensuring that postsecondary institutions and businesses provide equal access to technology for individuals with disabilities. For example, when a pilot program between Amazon.com and a number of postsecondary institutions involved the use of the Kindle DX (an electronic book reader) in place of textbooks, this resulted in Justice Department settlement agreements and a lawsuit being filed (U.S. Department of Justice [DOJ] 2010a, 2010b). The controversy was that the Kindle DX was not fully accessible to students who were blind and had low vision, with no adaptive technology access to the menu and navigational controls of the device. Following the settlement on June 29, 2010, the DOJ and the U.S. Department of Education (DOE) issued a joint letter to all college and university presidents in which the agencies reminded them of their obligations to provide equal opportunity to technology and to ensure that emerging technology includes access to individuals with disabilities.

Three other key pieces of legislation have also passed. On July 26, 2010, the House of Representatives approved legislation to ensure full access for individuals with disabilities to the Internet and television, and the DOJ issued advance notice regarding proposed rulemaking concerning accessibility of Web information and services. In addition, the final regulations revising Title II and Title III of the ADA were published on September 15, 2010. The regulations will take effect six months after they are published in the *Federal Register.* A significant portion of the regulations addresses the obligation to ensure that individuals with disabilities are provided effective communication, including an expanded list of auxiliary aids and services with emphasis on the use of adaptive technology. Finally, the Higher Education Opportunity Act of 2008 includes a number of provisions concerning access to technology (e.g., the establishment of advisory commissions

on adaptive technology and on accessible instructional materials in postsecondary education for students with disabilities).

These developments make it imperative that postsecondary institutions review their program accessibility standards to ensure that they are adequate for meeting the obligation to provide access to technology. The standard in the law is that individuals with disabilities must be provided aids, services, and benefits equally effective to those provided nondisabled individuals (34 C.F.R. Section 104.4(b)(iii) and 28 C.F.R. Section 35.150(a)). "An important indicator regarding the extent to which a public [entity] is obligated to utilize adaptive technology is the degree to which it is relying on technology to serve its nondisabled patrons" (*California State University* 1997). It is significant that in the Kindle DX situation, the institutions were not permitted to use technology under circumstances in which access was restricted for individuals with disabilities. This makes it clear that adopting and using technology advances without thought or consideration of the limited access afforded individuals with disabilities is unacceptable.

In keeping with these new developments, institutions should ensure that they have effective accessibility standards and guidelines in place to address access to technology for the full range of programs and services offered. This would include institutional websites, library resources and services, instructional services, and computer labs and workstations. Further, appropriate standards in the field, such as the Section 508 Accessibility Standards and Web Content Accessibility Guidelines (WCAG) should be consulted for checkpoints for eliminating absolute and substantial barriers to access.

Summary

Going forward, the challenge for postsecondary institutions will be to understand the compliance imperatives that are a necessary consequence of the developments discussed in this chapter. Specifically, the expanded definition of *disability* will require a willingness to consider any and all information available to answer the question of whether a student's claim of the existence of a disability is valid as well as an awareness that there must be a compelling reason to seek additional documentation where a student has provided evidence of a diagnosis by a qualified professional and a consistent history of having been accommodated with respect to the disability in question. In addition, the increasing numbers of individuals with psychiatric disabilities in the postsecondary environment have created a need for a new service model that focuses on (a) provision of effective mental health services; (b) proper management of issues of disclosure, privacy, and confidentiality; (c) protocols for addressing health and safety concerns; and (d) offering effective accommodations for individuals with psychiatric disabilities. Finally, technology will increasingly become the primary vehicle for delivery of educational services and, as such, colleges and universities

must adopt a proactive approach to providing equal and meaningful access to individuals with disabilities.

Note

1. Individuals who are entitled to protection from discrimination under the Americans with Disabilities Act (ADA) are "qualified individuals with a disability" (42 U.S.C. 12112(a)). The ADA defines *disability,* in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual" (42 U.S.C. 12102(2)). After more than 20 years of enforcement, the legal interpretation of the term *disability* by federal courts, including the Supreme Court, had "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect" (Pub. L. No. 110-325, 122 Stat. 3553 (2008)). Thus, the Americans with Disabilities Act Amendments Act (ADAAA) was passed to clarify congressional intent to: broadly construe the term *disability;* to expand the categories of individuals entitled to protection under the act; and to eliminate the "inappropriately high level of limitation necessary to obtain coverage under the ADA" imposed by previous court decisions (122 Stat. at 3553–56).

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