




FACULTY



SAUNDRA K. SCHUSTER, Esq.

Partner, The NCHERM Group, LLC
ATIXA Advisory Board Member

AGENDA

- Group Discussion
- 504 Overview
 - 504 & ADA
 - 504 Coordinator Role
 - 504 Grievance Process
- Other Disability Laws
 - ADA, Title II, Title III
 - Fair Housing Act
- Standards for Disability Response
- Accommodation Process
- Special Cases
 - ADA & Academics
 - Pregnant & Parenting Students
 - ADA & Mental Health
 - Service & Emotional Support Animals
- Q & A

TO GET US STARTED:

- Gather in small groups (6-8), ideally from different institutions
- Share the following information:
 - Your role in regards to Title IX
 - Are you the Disability Services Coordinator as well as the 504/ADA Coordinator?
- Discuss your knowledge/responsibility regarding disability services, accommodations, and grievance processes.
- As a group, list your issues/concerns (to be shared with the larger group)

4

© 2018 Association of Title IX Administrators

504 AND ADA

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

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

5

© 2018 Association of Title IX Administrators

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 job 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 students without disabilities?
 - Will it be **more difficult** for students or employees with disabilities to obtain the educational opportunities than for non-disabled students or employees?

6

© 2018 Association of Title IX Administrators

DISABILITY LAWS

504 OF THE REHABILITATION ACT

FAIR HOUSING ACT

AMERICANS WITH DISABILITIES ACT

STATE LAWS

WHY IS IT IMPORTANT TO UNDERSTAND DIFFERENT LAWS?

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

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 of Civil Rights.
- Codified at 29 U.S.C. § 701.

SECTION 504 STATES:

- “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.”

704(a) Promulgation of nondiscriminatory rules and regulations

10

© 2018 Association of Title IX Administrators

TITLE II & III ADA

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.

Title III:

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

Both Title II & Title III are enforced by the Dept. of Justice.

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

11

© 2018 Association of Title IX Administrators

HOW IS 504 DIFFERENT FROM ADA?

- Section 504 (1973) and the ADA (1990) 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**.
- ADA, Sec II & III adds 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.

12

© 2018 Association of Title IX Administrators

FAIR HOUSING ACT



- FHA **applies to residential "dwellings,"** a term that likely encompasses campus housing, including residence halls and dormitories.
- 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 Department of Housing and Urban Development, Fair Housing Act.

13

© 2018 Association of Title IX Administrators

DISABILITY OVERVIEW

WHO IS PROTECTED UNDER SEC 504 & ADA?



- Under this law, **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.

13

© 2018 Association of Title IX Administrators

WHAT DOES IT MEAN TO BE A “QUALIFIED INDIVIDUAL WITH A DISABILITY”?



- A qualified individual with a disability is someone who, with or without **reasonable modifications** to rules, policies or practices or provision of auxiliary aids and services, meets the **essential eligibility requirements** to be able to receive the receipt of services or to participate in programs or activities of the educational entity.
- 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.**
 - 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.**

16

© 2018 Association of Title IX Administrators

WHAT IS THE DIFFERENCE BETWEEN AN IMPAIRMENT AND A 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.

17

© 2018 Association of Title IX Administrators

WHAT IS A “PHYSICAL OR MENTAL IMPAIRMENT”?



A “Physical Impairment”

- Is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss that affects one or more of the body systems:

Neurological
Musculoskeletal
Special sense organs
Respiratory (including speech)
Cardiovascular

Reproductive
Digestive
Genitourinary
Lymphatic
Skin & Endocrine

A “Mental Impairment”

- Is a mental or psychological disorder including mental retardation, emotional or mental illness, and specific learning disorders.

18

© 2018 Association of Title IX Administrators

WHAT IS A “MAJOR LIFE ACTIVITY”?



Major Life Activity

- Major life activities include caring for one’s self, performing manual tasks such as:
 - Walking
 - Seeing
 - Hearing
 - Speaking
 - Breathing
 - Working
 - Learning

19

© 2018 Association of Title IX Administrators

WHAT IS A “MAJOR LIFE ACTIVITY”?



Major Life Activity

- Examples of impairments which may substantially limit major life activities, even with the help of medication or aids/devices, are:

- | | |
|----------------------------------|-----------------------|
| – AIDS | – Diabetes |
| – Alcoholism | – Drug addiction |
| – Blindness or visual impairment | – Heart disease |
| – Deafness or hearing impairment | – Mental illness |
| – Cancer | – Learning disability |

20

© 2018 Association of Title IX Administrators

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



- A **Record of having an impairment** means that an individual has a history of having a mental or physical impairment that limits one or more major life activities.
- **Regarded as having an impairment** means a person may or may not have a qualifying impairment, but is treated as having an impairment that qualifies as a disability.

21

© 2018 Association of Title IX Administrators

HOW IS THE 504 COORDINATOR DIFFERENT FROM THE DISABILITY SERVICES COORDINATOR?

504 COORDINATOR v. ACCESSIBILITY/DISABILITY SERVICES COORDINATOR



- Accessibility/Disability Services Coordinator is responsible for 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.
- The 504/ADA Coordinator is responsible for 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?

23

© 2018 Association of Title IX Administrators

504 COMPLIANCE AND ROLE OF 504/ADA COORDINATOR

SECTION 504/ADA GENERAL COMPLIANCE REQUIREMENTS



- If the institution accepts federal funds or employs more than 50 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.
 - Conducting investigations of complaints regarding noncompliance with the legal mandates of ADA or 504.
 - Providing notice of the name, office address, and telephone number of the employee or employees designated to oversee 504/ADA compliance.

25

© 2018 Association of Title IX Administrators

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 Title 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; and
 - Investigating complaints alleging violations of Section 504/ADA, discrimination based on disability, and disability harassment.

26

© 2018 Association of Title IX Administrators

REQUIRED STANDARD NOTICE



- In accordance with the requirement of 504 of the Rehabilitation Act of 1973 and Title 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.

27

© 2018 Association of Title IX Administrators

GRIEVANCE POLICY SHOULD INCLUDE



- A description of how and where a complaint under 504/ADA 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.
- Information on how to appeal an adverse decision.
- A statement of how long complaint files will be retained and where they are retained.

28

© 2018 Association of Title IX Administrators

ELEMENTS OF A GRIEVANCE PROCESS



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

29

© 2018 Association of Title IX Administrators

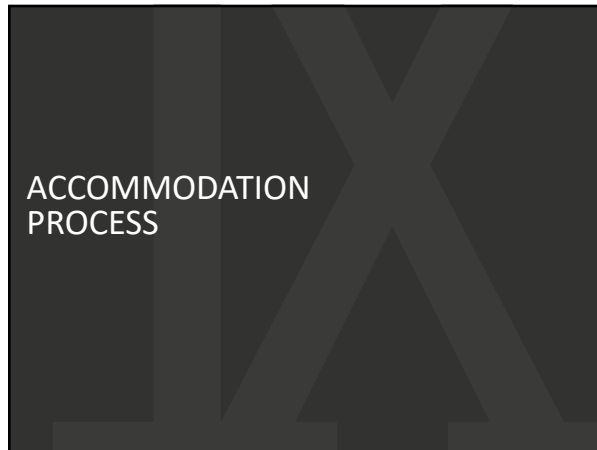
ELEMENTS OF A GRIEVANCE PROCESS (CONT)




- The Individual filing the Complaint may appeal the decision by providing a written appeal to (insert appropriate person) within 10 days of the decision by the 504 Coordinator.
- The decision by the Appeal Officer is a final decision.
- 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.

30

© 2018 Association of Title IX Administrators



THE ACCOMMODATION PROCESS




- Accommodations should be made on a case by case basis.
- 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 CFR 35.130(b)(7).
 - Neither Section 504 nor the Fair Housing Act requires accommodations that are an undue financial and administrative burden. Whether a particular accommodation will be an undue financial and administrative burden will depend on the facts and circumstances of the individual case.

12

© 2018 Association of Title IX Administrators

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 he/she can meet all the necessary and articulated “essential functions” of the college program with reasonable accommodations.
- For employees, it means that if the employee meets the qualifying 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.

13

© 2018 Association of Title IX Administrators

PROGRAM STANDARDS FOR STUDENTS




- Creation of **well-articulated program standards** are essential to address circumstances when students with a disability cannot complete a program or benefit from it, such as:
 - Identify graduation competencies.
 - Ensure any licensure/certification requirements are identified and programs appropriately aligned.
 - Ensure program requirements are consistent with accreditation requirements.
 - Ensure all field requirements are identified (both in clinical assignments and in the profession).
 - Look at each course to determine what the outcomes are and how students with disabilities may be able to accomplish these with accommodations.

34

© 2018 Association of Title IX Administrators

STANDARDS FOR THE WORK ENVIRONMENT




- The determination of whether an individual with a disability is “qualified” for a job begins with deciding whether the individual satisfies the prerequisites for the position, such as possessing the appropriate education, experience, skills, licenses, etc.
- The next step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation.
- Essential functions are the fundamental job duties of the employment position the individual with a disability holds or desires. They do not include the marginal functions of the position.

35

© 2018 Association of Title IX Administrators


STANDARDS FOR THE WORK ENVIRONMENT



- A job function may be considered essential for any of several reasons, such as:
 - The reason the position exists is to perform that function;
 - There are a limited number of employees available among whom the performance of that job function can be distributed;
 - And/or the function is highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.


36

© 2018 Association of Title IX Administrators

ACCOMMODATION PROCESS: NOTIFICATION


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


17
© 2018 Association of Title IX Administrators

ACCOMMODATION PROCESS: NOTIFICATION


Step One:

- Student or employee notifies the appropriate office on campus that addresses accommodations for disabilities.
- Student or employee claims disability and seeks accommodation.

18
© 2018 Association of Title IX Administrators

ACCOMMODATION PROCESS: REVIEW OF CLAIM


Step Two:

- Student or employee provides documentation supporting disability claim and the professional recommendation for accommodation(s).
- Disability Services Coordinator reviews disability claim and documentation.
- Note: The institution is not bound to honor IEP's from the student's high school, although the IEP may be instructional.

19
© 2018 Association of Title IX Administrators

ACCOMMODATION PROCESS: DOCUMENTATION



- Colleges may establish reasonable standards for documentation.
- Source should be from an appropriately trained individual.
- A person with a master's degree in education or developmental psychology may be appropriate to evaluate a learning disability.
- A medically trained person is necessary to diagnose medical or psychological matters or pregnancy-related matters.
- If the claim or supporting documentation is in question the institution may request a second opinion, but the institution must pay.

40

© 2018 Association of Title IX Administrators

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, the law does not require a college 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.

41

© 2018 Association of Title IX Administrators

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

42

© 2018 Association of Title IX Administrators





ADA & ACADEMICS

- “Higher Education Institutions are only required to provide effective and reasonable accommodations, not necessarily what the students ask for.”

Southeastern Community College v. Davis
U.S. Supreme Court, 1979

45© 2018 Association of Title IX Administrators

SOUTHEASTERN COMMUNITY COLLEGE V. DAVIS

- **Facts:** Frances Davis sought admission to the nursing program at Southeastern Community College. She suffered from a hearing disability and was unable to understand speech without lip reading.
- Her application for admission was denied. She appealed and was again denied. She filed a lawsuit.
- The District Court (E. Div. North Carolina) ruled against her, the U.S. Court of Appeals for the 4th Circuit overturned the trial court's decision and the College appealed.

46

© 2018 Association of Title IX Administrators

SOUTHEASTERN COMMUNITY COLLEGE V. DAVIS

- The U.S. Supreme Court ruled in favor of the College, stating, "An otherwise qualified individual with a disability is one who meets all the program requirements in spite of his handicap."
- The court stated, "Even with an improved hearing aid, Davis still required lip-reading to understand speech and therefore was not 'otherwise qualified' and could not be admitted to Southeastern's program without substantial changes to the admission requirements. The College did not discriminate against her in rejecting her admission."

47

© 2018 Association of Title IX Administrators

CASE EXAMPLE: ADA & ACADEMICS

Russell Campbell v. Lamar Institute of Technology, (5th Cir., 11/23/2016)

- 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.

48

© 2018 Association of Title IX Administrators

CASE EXAMPLE: ADA & ACADEMICS



- Campbell asked for two extra weeks of study time after the other students took the final for all his exams.
 - Campbell provided a Dr.'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.

49

© 2018 Association of Title IX Administrators

CASE EXAMPLE: ADA & ACADEMICS



- 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 weeks to study, indicating it was not reasonable.
- Campbell had missed some classes and exams and dropped his classes to preserve his GPA.
- Campbell filed a grievance RE: denial of accommodations.
- LIT offered to "provide reasonable accommodations supported by medical documentation and would waive tuition and fees for the next semester."
 - Campbell rejected the offer because he said he no longer felt welcome at LIT.

50

© 2018 Association of Title IX Administrators

EXAMPLES OF ACCOMMODATIONS



- Additional time to complete tests, coursework, or graduation;
- Substitution of nonessential courses for degree requirements;
- Adaptation of course instruction;
- Tape recording of classes; and
- 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).




51

© 2018 Association of Title IX Administrators

EXAMPLES OF ACCOMMODATIONS

- 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




12

© 2018 Association of Title IX Administrators

ACADEMICS AND ADA

The Case of Elyce




THE CASE OF ELYCE

Elyce provided documentation to the 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 additional 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 Office of Disability Services.

14


© 2018 Association of Title IX Administrators

THE CASE OF ELYCE


She 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 get 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.


15
© 2018 Association of Title IX Administrators

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."

What will you advise the Professor and Elyce?

16
© 2018 Association of Title IX Administrators

ACADEMICS & ADA:
THE CASE OF JOEL


Joel is a first year student at your institution. He enrolled as an honors student and had outstanding credentials in high school. Your Journalism program is nationally recognized and very competitive. Joel was highly sought after and your school awarded him a prestigious scholarship.

Joel has a life-long dream of being a journalist and has even won several contests and recognitions for his writing.

17
© 2018 Association of Title IX Administrators

**ACADEMICS & ADA:
THE CASE OF JOEL**



Your curriculum for a degree in Journalism requires three courses in public speaking. One on addressing a political issue, one on dealing with a controversial topic and one on persuasion.

Joel has never spoken in front of a group and the first time he got up in front of the class he stammered and could not speak. He ran out of the room. He was so upset about this that he went to a counselor to talk about what was going on. The counselor encouraged him to return to class and do his best.

18

© 2018 Association of Title IX Administrators

**ACADEMICS & ADA:
THE CASE OF JOEL**



Joel did return to class and did his best to perform well but his grades for this first public speaking course were bad. Falling below a 3.0 could cost Joel his scholarship.

He became distraught to see his dream slip away and became increasingly anxious and depressed. He withdrew from campus organizations and events, seldom left his room and was clearly losing a lot of weight. His concerned parents took him to a physician who diagnosed him with depression and anxiety disorder and prescribed several medications.

19

© 2018 Association of Title IX Administrators

**ACADEMICS & ADA:
THE CASE OF JOEL**



The medications helped his overall mood, but he still froze up every time he had to give a speech.

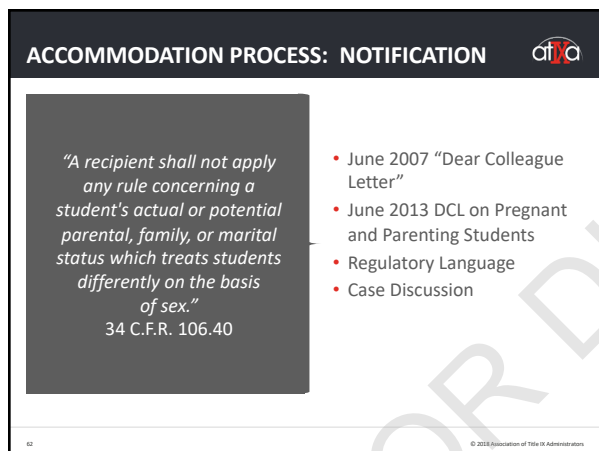
He went to your DSS office, who is perplexed about what to suggest. His faculty members are not being helpful. Their response is that "he just needs to get over it".

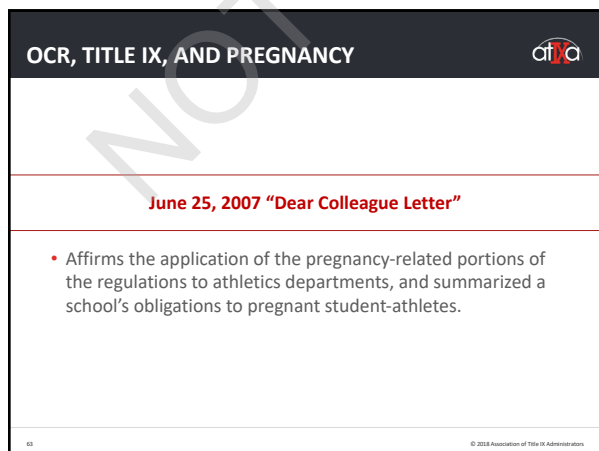
What are some possible solutions to this issue?


20

© 2018 Association of Title IX Administrators








PREGNANCY & TITLE IX



- The June 25, 2007 DCL also includes:
 - Information on how to develop programs to support these students;
 - An overview of students’ rights under Title IX; and
 - Guidance on how to share your complaint if you feel your rights are not being met.
- While the pamphlet is focused on secondary education, the DCL states that “legal principles apply to all recipients of federal financial assistance, including postsecondary education.”

64
© 2018 Association of Title IX Administrators

PREGNANCY & TITLE IX


- 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.

65
© 2018 Association of Title IX Administrators

PREGNANCY & TITLE IX:
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

66
© 2018 Association of Title IX Administrators

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

67

© 2018 Association of Title IX Administrators

PREGNANCY & TITLE IX:
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.”

34 C.F.R. 106.40

68

© 2018 Association of Title IX Administrators

PREGNANCY & TITLE IX:
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.”

34 C.F.R. 106.40

69

© 2018 Association of Title IX Administrators

PREGNANCY & TITLE IX: BUT NOTE



- You probably don't have a "temporary disability" policy.
- That's because neither 504, nor the ADA recognizes a temporary impairment as a disability unless its severity is such that it results in a substantial limitation of one or more major life activities.
- The issue of whether a temporary impairment is substantial enough to be considered a disability must be resolved on a case-by-case basis, taking into consideration the duration of the impairment and the extent to which it limits a major life activity.
- Documentation is critical. DO NOT ASSUME!

70

© 2018 Association of Title IX Administrators

PREGNANCY & TITLE IX: 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.**"

34 C.F.R. 106.40

71

© 2018 Association of Title IX Administrators

PREGNANCY & 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: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 10.

72


© 2018 Association of Title IX Administrators

ATHLETICS, PREGNANCY & 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-athlete 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

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
 - Help
- Labs, chemicals, exposure to diseases, etc.
 - Reasonable restrictions for health and safety (as deemed by a physician) are permitted.
- Cohort programs
- Licensure requirements

PREGNANCY & TITLE IX CASE DISCUSSION



Janet is 7 months pregnant and has had an easy pregnancy. She’s in the Allied Health Program for ENT. 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?

**PREGNANCY & TITLE IX
CASE DISCUSSION**


Sasha is an elementary education teacher who has fulfilled all of her course requirements and is one-third of the way through her required student teaching experience when she has a baby. She faced medical complications with the birth and her doctor tells her she will miss at least a month of her student-teaching. If her graduation date is delayed, she will miss that year's hiring cycle.



What are some possible approaches?


76

© 2018 Association of Title IX Administrators

**ADA & MENTAL HEALTH
ISSUES**

77

© 2018 Association of Title IX Administrators

**504/ADA GUIDELINES REGARDING MENTAL
ILLNESS**


- A greater percentage of students arrive at college these days with a history of emotional or mental health problems, and even more will be diagnosed during their period of enrollment at your institution.
- A student or employee with a documented mental disorder is a qualified person with a disability.
- A suicidal student or employee may reasonably be regarded as having a psychiatric disability.
- As the DSS or 504 Coordinator, you must take individual needs into account but also to uphold educational standards and well-functioning work environments.

78

© 2018 Association of Title IX Administrators

A PSYCHIATRIC DISABILITY IS....



- Defined as 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

79

© 2018 Association of Title IX Administrators

SOME IMPORTANT CASES

Spring Arbor University Decision



81

© 2018 Association of Title IX Administrators

SPRING ARBOR UNIVERSITY DECISION (DECEMBER 2010)



Facts

- A student told admissions representative that he had a disability (anxiety and depression).
- The student later reported that the admissions representative did not refer him to the school's Disability Services Office.
- The student did not independently seek accommodation from Disability Services, nor identify himself to Disability Services as an individual with a disability.
- The summer following the student's first term of enrollment, he experienced increased emotional symptoms and was diagnosed as bipolar. At school, the student engaged in cutting behaviors, uncontrolled crying, and persistently discussed his problems with other students.

82

© 2018 Association of Title IX Administrators

SPRING ARBOR



Facts (continued)

- During this period of time, however, the student remained in good academic standing.
- In the fall term following his diagnosis, as a result of his behavior on campus, the Vice President and other university officials requested a meeting with the student, under the guise of a meeting with him about his "academic success."
- The student was assured that this was not a disciplinary meeting, but immediately was confronted with "complaints" about his behaviors. The student became very upset and stated his intent to withdraw from school immediately based on medical necessity.

83

© 2018 Association of Title IX Administrators

SPRING ARBOR



- The following spring, the student applied for re-admission to the university. He was informed that before he could return he was required to provide medical documentation, a release of medical treatment records, a student agreement form, and other standard elements for re-admission. The university did not require 504 plans or medical treatment documentation of other students seeking re-admission, and was not informed of these conditions when he "voluntarily" withdrew.
- The student was denied re-admission and subsequently filed a complaint with OCR based on disability discrimination under Section 504 of the Rehabilitation Act.

84

© 2018 Association of Title IX Administrators

SPRING ARBOR

OCR Determination

- The OCR initially determined that although the student voluntarily withdrew from school, the institution's actions in presenting him with a behavior contract that had many elements related to mental health treatment resulted in the student being "regarded" as having a disability.
- The OCR further determined that the university then discriminated against the student, based on his disability, by imposing requirements on the student's re-admission that were not required of other students seeking re-admission to the university.

65
© 2018 Association of Title IX Administrators

SPRING ARBOR

OCR Determination

- The university argued that they were trying to ensure that the student could be successful upon re-admission.
- However, the student had never demonstrated that he couldn't be successful academically and, at the time of his voluntary withdrawal, he was in good academic standing and had never been disciplined.
- Thus, OCR determined that the university's reason was not a legitimate non-discriminatory one and was instead a pretext for disability discrimination.

66
© 2018 Association of Title IX Administrators

SPRING ARBOR

OCR Determination (continued)

- The OCR stated that a university may remove a student with a disability or deny admission to that student if the university applied a "direct threat test."
- This test may be applied only when an individual poses a significant risk to the health and safety of others. The significant risk must represent a high probability of substantial harm and not just a slightly increased, speculative, or remote risk. In this matter, the university stated that it believed the student was a threat to himself, but not to others.

67
© 2018 Association of Title IX Administrators

**CASE EXAMPLE:
HALPERN v WAKE FOREST**



Halpern v. Wake Forest University

U.S. Ct. of Appeals, 4th Cir., (March 14, 2012)

Facts & Holding: Halpern, a medical student at Wake Forest, diagnosed with ADHD and anxiety disorder, treated with prescription medication. He did not disclose his disability, nor request any accommodations. In his program, he demonstrated seriously abusive and unprofessional conduct and frequently missed class or clinicals. His behavior continued through his two years of study and although he did not seek accommodation from the university, he was often provided an accommodation by individual professors.

88

© 2018 Association of Title IX Administrators

HALPERN v. WAKE FOREST UNIVERSITY



Facts & Holding: He failed his internal medicine rotation and was placed on probation. He was subsequently dismissed based on a pattern of unprofessional behavior. Halpern brought suit, alleging his dismissal violated Sec. 504 and ADA because the school failed to make reasonable accommodations for his disability.

Wake Forest prevailed in this case based on the grounds that Halpern was not “otherwise qualified” as a medical student because demonstrating professionalism was a fundamental aspect of the medical school’s program. The Court of Appeals, reviewing the information de novo (in its entirety), upheld the decision.

89

© 2018 Association of Title IX Administrators


HALPERN v. WAKE FOREST UNIVERSITY



Significance Of The Case: This case is significant because addressing disability and accommodations is a three part process, first the person must have a qualifying disability (or be regarded as having a disability); next the individual must be “otherwise qualified” to perform the essential functions of the job or educational program; finally, the institution must show good faith in providing appropriate accommodations.

90

© 2018 Association of Title IX Administrators

HALPERN v. WAKE FOREST UNIVERSITY



Significance Of The Case: In this case, the courts analyzed the “qualified individual” standard and stated that, “an otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his/her handicap”. A plaintiff who asserts an ADA violation bears the burden to establish that he/she is qualified to perform the essential elements of a program. This is an important lesson for institutions to insure that programs of study identify essential elements for participation. Many residence hall programs are moving in the direction of identifying essential elements to be a member of the residence hall community.

11
© 2018 Association of Title IX Administrators

ST. JOSEPH’S COLLEGE (NY) DECISION




12
© 2018 Association of Title IX Administrators

ST. JOSEPH’S COLLEGE (NY) DECISION


Facts (January 2011):

- A female student enrolled at St. Joseph’s College (SJC) in Brooklyn, NY, was suspended in November of 2009 until she was medically cleared after she grabbed and tried to kiss a male student, would not let go of him, insisted she was in love with him and that they were married and had to be forcibly removed by a security guard.
- She returned a week later with a letter from her psychiatrist. She repeated the first incident a week later, and was transported to the hospital by ambulance.
- During both instances, she appeared delusional and incoherent to witnesses and admitted she was not taking her medications.

13
© 2018 Association of Title IX Administrators

ST. JOSEPH'S COLLEGE (NY) DECISION

Facts:

- The college's BAC (their version of a BIT) met and placed the student on emergency suspension without notice to her or an opportunity to meet with any member of the BAC.
- The student wrote to the Dean of Students in January of 2010, seeking to return.
- It was determined by the BAC on the basis of the evidence it used to suspend her in December of 2009, that she was not fit to return.
- She filed a complaint with the OCR.

94

© 2018 Association of Title IX Administrators

ST. JOSEPH'S COLLEGE (NY) DECISION

Facts:

- The OCR investigation found that SJC regarded the student as an individual with a disability, based on its knowledge of her psychiatric conditions at the time of her delusions, its decision to subject her to an unpublished BAC process rather than the traditional conduct process and its insistence on psychiatric clearance to return after the first incident.

95

© 2018 Association of Title IX Administrators

ST. JOSEPH'S COLLEGE (NY) DECISION

Facts:

- The OCR found further that SJC had subjected the student to differential treatment on the basis of that disability by diverting from the traditional conduct process that would have been used for similar behaviors by students who were not disabled, and that it had failed to provide the due process and additional procedural protections that the traditional process would have afforded.
- The OCR and SJC then entered into a voluntary resolution agreement.

96

© 2018 Association of Title IX Administrators

ADDRESSING INVOLUNTARY WITHDRAWAL

- Engaging in involuntarily removing a student or employee with a disability is complex
 - The law changed in 2011 – no longer applies to “harm to self” as a basis for involuntary withdrawal.
 - If a student is suicidal, no documentation is needed to assume a disability.
 - Students and employees with disabilities have specific rights set forth by law.
 - The institution must engage in the “Direct Threat” Test.

97

© 2018 Association of Title IX Administrators

“DIRECT THREAT” TEST

- OCR says DUE PROCESS is necessary to challenge factual assumptions that behavior is a “Direct Threat” 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.
- 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.**

98

© 2018 Association of Title IX Administrators

“DIRECT THREAT” TEST

Significant risk determination must be made by considering:

- the duration of the risk,
- the nature and severity of risk,
- the likelihood that the potential harm will occur,
- the proximity of the potential harm.

OCR is, by practice, deferential to our determination of direct threat, but they insist that we make one.

99

© 2018 Association of Title IX Administrators

IDEATION, NON-SPECIFIC THREATS, GESTURES



- The Direct Threat Test can tell us if a student who is ideating, threatening, or who is making non-specific gestures without a plan or means to carry through may or may not represent a high probability of substantial harm sufficient to involuntarily remove them from school.

100

© 2018 Association of Title IX Administrators

RESPONSE CONSIDERATIONS



- Involve your Accessibility/Disability Services Coordinator!
- Offer appropriate due process and follow your process if your plan to remove from school involuntarily.
- Use clearly written codes and referrals based on *behaviors*, not disabilities or conditions.
- Address *actual* significant disruption to campus, 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.
- Do not treat students with disabilities differently than other students, other than providing reasonable accommodations under the law.

101

© 2018 Association of Title IX Administrators

MENTAL HEALTH & ADA

The Case of Dennis



**MENTAL HEALTH & ADA:
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 the disabled. Dennis has also been diagnosed with Asperger's Syndrome. Dennis provided his documentation to your Accessibility 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 will run around the room or out of the room or the building.

103

© 2018 Association of Title IX Administrators

**MENTAL HEALTH & ADA:
THE CASE OF DENNIS**



Dennis works hard to control his impulses but sometimes he just loses control. He is enrolled this term 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 strongly feels Dennis is not qualified to be a student at your institution.

104

© 2018 Association of Title IX Administrators

**MENTAL HEALTH & ADA:
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' 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 in spite of the fact that all first-year students are required to live in the hall.

105

© 2018 Association of Title IX Administrators


**MENTAL HEALTH & ADA:
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?*

105
© 2018 Association of Title IX Administrators

**SERVICE v
EMOTIONAL SUPPORT ANIMALS**


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 campus as an accommodation.
- They 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.


108
© 2018 Association of Title IX Administrators



ADA GUIDELINES RE: SERVICE ANIMALS




- Title II & III state that a service animal is 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.



110

© 2018 Association of Title IX Administrators

ADA GUIDELINES RE: 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.’
- 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.”

111

© 2018 Association of Title IX Administrators

ADA GUIDELINES RE: SERVICE ANIMALS




- Other animals, whether wild or domestic, do not qualify as service animals, except the use of trained miniature horses as alternatives to dogs, subject to certain limitations.
- This definition does not affect or limit the broader definition of “assistance animal” under the **Fair Housing Act** or the broader definition of “service animal” under the **Air Carrier Access Act**.

112

© 2018 Association of Title IX Administrators



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:


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

114

© 2018 Association of Title IX Administrators


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 psychiatric disability.
- For example, for autistic students, service animals can be trained to interrupt inappropriate repetitive behavior.



115


© 2018 Association of Title IX Administrators

IMPORTANT INFO ABOUT 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.
- 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.

116

© 2018 Association of Title IX Administrators

IMPORTANT INFORMATION REGARDING INQUIRIES ABOUT SERVICE ANIMALS


- 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 SAS, nor produce documentation of the disability.
- 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.
- You may not require documentation of training.
- There is no special certification or licensing required for a service dog.
- A legitimate service animal may also be a miniature horse.

117

© 2018 Association of Title IX Administrators

ADVICE MOVING FORWARD: GUIDELINES FOR SERVICE ANIMALS



- Only dogs or miniature horses who 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.
- Must be under the owner's control 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.

118

© 2018 Association of Title IX Administrators

EMOTIONAL SUPPORT, THERAPY, COMPANION ANIMALS



THERAPY, COMPANION, AND EMOTIONAL SUPPORT ANIMALS




- May be an animal other than a dog.
- Are generally not legally defined by federal law, but some states have laws defining **therapy animals**.
- 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 usually are not service animals.

119

© 2018 Association of Title IX Administrators

HUD: FAIR HOUSING ACT




- The Office of Housing and Urban Development (HUD) applies a broader definition of “assistance animal” when enforcing Sec 504 in the housing context.
- Under HUD the Fair Housing Act (FHA) requires that “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”.

121

© 2018 Association of Title IX Administrators

HUD: FAIR HOUSING ACT




- Although 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.

122

© 2018 Association of Title IX Administrators

HUD ASSISTANCE ANIMAL REQUIREMENTS



- Those seeking to have their emotional support animal must have a qualifying disability.
- There must be an identifiable relationship or nexus between the disability and the assistance the animal provides.
- The animal that individual with a disability wish to accompany them must be necessary to afford those persons with an equal opportunity to use and enjoy a dwelling.
- The assistance animal must meet reasonable standards for the housing environment.

123

© 2018 Association of Title IX Administrators

HUD GUIDELINES



- 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.

124

© 2018 Association of Title IX Administrators

ADVICE REGARDING SERVICE v. ESA’S



- There is a difference between “therapeutic support” provided by ESAs and “psychiatric service animals”.
- A **psychiatric service dog** (for example) might be specifically trained to remind someone to take his or her medication, check a room, or turn on lights for someone with PTSD or anxiety disorder.
- An **ESA** is not specifically trained for a specific task to address a disability, rather they provide (important) emotional support.

125

© 2018 Association of Title IX Administrators

SOME IMPORTANT CASES:

U. Nebraska-Kearney



CASE LAW

Sec. of U.S. Dept. of Housing & Urban Development v. University of Nebraska at Kearney
Office of Administrative Law Judge (Sept. 30, 2011)

Brittany Hamilton was diagnosed with depression and anxiety sufficient to limit a major life activity of breathing and sleeping. She took medications for the symptoms and also relied on a comfort animal...her miniature pinscher named Butch. Through repeated conversations and provision of documentation to the University, the Director of Housing determined that Brittany did not meet the University's standards to allow her to bring her dog in housing because Butch was not certified.

127
© 2018 Association of Title IX Administrators

KEARNEY CASE

Brittany moved into housing without Butch and soon reported that her anxiety was out of control, causing her to miss class, only sleep 2 hours a night, and suffer severe anxiety attacks. She again requested to have Butch join her, and the University responded again that he was not certified and only certified animals could be in University housing.

She filed a complaint with the U.S. Dept. of Housing and Urban Development, under the Fair Housing Act, alleging discrimination based on her disability.

128
© 2018 Association of Title IX Administrators

KEARNEY CASE

An Administrative Law judge, under HUD, found that the University engaged in discriminatory housing practices under the FHA (who defines a dwelling to be "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families").

The judge issued an injunction against the University for discrimination against a person based on disability in any aspect of occupancy, use or enjoyment of a dwelling; awarded her damages sufficient to fully compensate her for her damages; awarded attorney fees; and issued a \$16,000.00 civil penalty against the University for each violation of the act.

129
© 2018 Association of Title IX Administrators

BUT THERE IS MORE

United States of America v. University of Nebraska at Kearney, et. al,
April 9, 2013

Following the decision by the HUD Administrative Law judge, the Justice Department sued UNK, alleging that by refusing Hamilton to use her therapy dog in University housing the University was denying Hamilton an accommodation in violation of the FHA and 504.

The District Court ruled in favor of Ms. Hamilton. The Court's ruling considered only the threshold issue of whether student housing at UNK is a "dwelling" within the meaning of the FHA .

130
© 2018 Association of Title IX Administrators

UNITED STATES OF AMERICA v. UNIVERSITY OF NEBRASKA AT KEARNEY, ET. AL

Arguments Advanced #1:

UNK argued that the FHA should not apply because student housing is temporary and since the FHA does not apply to hotels or other lodging for transient guests it should not apply there.

The Court disagreed, stating that the FHA has applied in a wide-variety of temporary housing contexts, including boarding schools and halfway houses. Student housing has common living areas, such as kitchens and living rooms where residents can socialize like a family. Simply put, students live in University housing for a significant time period and while they do, they treat it like home.

131
© 2018 Association of Title IX Administrators

UNITED STATES OF AMERICA v. UNIVERSITY OF NEBRASKA AT KEARNEY, ET. AL


Arguments Advanced #2 & #3:

UNK then argued that University housing should be exempt from the FHA because it is (for these limited purposes) comparable to jail, which does not constitute a dwelling. UNK argued that like jail, University housing is mandatory, that students are assigned roommates and are subject to more rules and restrictions than normally associated with residential housing.

Additionally, UNK argued that the purpose of University housing is not primarily to provide a residence, but is educational.

132
© 2018 Association of Title IX Administrators

UNITED STATES OF AMERICA v. UNIVERSITY OF NEBRASKA
AT KEARNEY, ET. AL



Court Response #2 & #3:


The Court rejected UNK’s argument about comparing student housing to jail (although many students may). The Court also said that just because a goal of student housing is educational, that would not exempt them from the FHA.

Additionally, the Court noted that HUD specifically uses “dormitory room” as an example of a “dwelling” in the FHA implementing regulations (24 C.F.R. § 100.201). The Court deferred to HUD’s interpretation and determined that UNK’s student housing constituted a “dwelling” under the FHA.

133

© 2018 Association of Title IX Administrators

UNITED STATES OF AMERICA v. UNIVERSITY OF NEBRASKA
AT KEARNEY, ET. AL




- The parties to the litigation agreed that in order to avoid more costly and protracted litigation they would settle the case. Some of the significant elements of the settlement include:
 - The University will adopt a “University Housing Reasonable Accommodation Policy” and an “Assistance Animal Policy and Agreement.”
 - The University will provide broad training to all individuals with responsibility for disability issues.
 - The University will pay Ms. Hamilton \$140,000.


134

© 2018 Association of Title IX Administrators

ANOTHER IMPORTANT
CASE:

Grand Valley




GRAND VALLEY STATE UNIVERSITY


Kendra Velzen & Fair Housing Center v. Grand Valley State University
U.S. Dist. Ct., W. Dist. Michigan (2012)

Ms. Velzen was diagnosed with depression and cardiac arrhythmia and had a pacemaker implanted. She relied on her attachment to animals as emotional support and was formally prescribed an emotional support animal....a guinea pig, Blanca.

The prescribing physician prescribed Blanca as a means of controlling Velzen's stress and managing her symptoms by reducing her depression, decreasing her heart rate and increasing oxytocin levels which impacted her sense of "life satisfaction".


116
© 2018 Association of Title IX Administrators

GRAND VALLEY STATE UNIVERSITY


When she moved into a residence apartment she came with her guinea pig (Blanca) and a letter from her doctor supporting Bianca's presence in the residence hall. The doctor explained that Blanca provided emotional support and attachment, thereby helping Velzen to control stress and manage her symptoms.

The housing office informed her that her request to live with the guinea pig was denied because it was not a trained service animal. Velzen and the Fair Housing Center bought suit against Grand Valley State University and named individuals in their official capacities for violation of her ADA rights as conferred by the Fair Housing Act.

117
© 2018 Association of Title IX Administrators

GRAND VALLEY STATE UNIVERSITY


In January 2013, the University settled the case for \$40,000. Additionally, the settlement requires that if Velzen chooses to live on campus and requests to live with a guinea pig or another animal similar in size or nature, the request will be approved by the University.

The University also agreed to create a "Support Animal Accommodation Policy" within 90 days and train their staff within 90 days of creation of the policy.

118
© 2018 Association of Title IX Administrators

BUT BEWARE: THERE ARE SCAMMERS



- In 2015, the National Service Animal Registry signed up eleven thousand users.
 - They are a commercial enterprise that sells certificates, vests and badges for “helper animals”.
- Some pet owners purchase “emotional-support cards.”
 - Having an emotional-support card means that your pet is registered in a database of animal owners who paid between \$70-\$200 to one of several organizations, none whom are recognized by the government.

139

© 2018 Association of Title IX Administrators

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 him/her.
- Ask if the animal has any training to do what is needed to alleviate the disability.

140

© 2018 Association of Title IX Administrators

ADVICE MOVING FORWARD: ESA'S



- May be limited to campus housing only.
- Should be considered on a case-by-case basis.
- The individual seeking to have a comfort animal must provide documentation of a qualifying disability.
- There must be a nexus between the disability and the role of the comfort animal.
- May be an animal other than a dog or horse.
- The institution may engage in the interactive process in determining the acceptance of the comfort animal, balancing the need for accommodation of the individual with the impact on the environment.

141

© 2018 Association of Title IX Administrators

ADVICE MOVING FORWARD: ESA'S



- 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 for overnight.

142

© 2018 Association of Title IX Administrators

FINAL ADVICE: REQUIREMENTS FOR BOTH SERVICE ANIMALS & ESA'S



- 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.
- 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.

143

© 2018 Association of Title IX Administrators

SOME ADDITIONAL THINGS TO KNOW ABOUT ASSISTANCE ANIMALS



- Although HUD says that assistance animals can go anywhere within the housing unit, both the DOJ and the Kearney and Kent State Conciliation agreements permit the colleges to contain the animal to the student's personal room, suite or apartment, except to take the animal out for natural relief.
- This will be a frustrating element for you, but there is not a limit on how many assistance animals may be allowed in a residence as long as there is sufficient documentation that all the animals are necessary to alleviate the disability and the facility can accommodate them.

144

© 2018 Association of Title IX Administrators

SOME MORE THINGS YOU MAY WANT TO KNOW

- 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.

145

© 2018 Association of Title IX Administrators

GROUP DISCUSSION

What are your biggest challenges regarding 504/ADA issues moving forward?

What resources would be most helpful in doing your job?

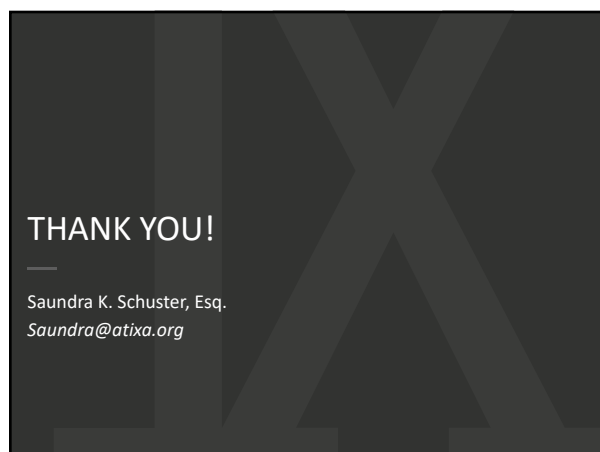
What other 504/ADA challenges are you addressing on your campus?

146

© 2018 Association of Title IX Administrators

QUESTIONS?





NOT FOR DISTRIBUTION