

¹ Making Accommodations: The Legal World of Students with Disabilities

Everybody benefits when colleges serve students with disabilities

The law requires colleges and universities to make special arrangements for students with disabilities, but not by lowering academic standards.

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BY PAUL D. GROSSMAN

My brother sat in the wheelchair he had used for the past five years, ever since cancer had reached his spine in 1991. As a teacher and a disability lawyer, I was curious to find out whether he regretted entering and persevering through law school well after he understood that his cancer would never remit. His response to my query was remarkably clear. Attending law school had been one of the wisest choices in his life. As his body gradually lost the physical indicia of life—eating, sex, and mobility—he remained a human being, affirmed by his ability to think, learn, and persuade. Only his deep faith matched the opportunity to learn in sustaining his spirit through an otherwise terrible journey to the end of his life.

My brother entered Rutgers School of Law in 1992 and died shortly after his 1996 admission to the New Jersey Bar. Had he wasted a seat at a fine, competitive law school, or had he exemplified for students and faculty alike the most inherent and fundamental value of engaging in higher learning? Had his exclusive reliance on the Internet and computers to conduct legal research, without being able physically to bring a book down from a shelf, demonstrated the irrelevance of paper media or merely lowered academic standards? In the competitive environment of law school, was it unfair that he got extra time to complete his examinations? Had his class discussed whether the law was an effective tool for addressing the biggest barrier he faced to completing his internship: snow?

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Before adoption of America's antidiscrimination statutes related to disability, most institutions of higher education were conforming participants in a society that, by indifference, prejudice, or structure, excluded individuals with disabilities from nearly every aspect of human endeavor. The questions raised by my brother's circumstances were not even available for observation or discussion in the classroom.

Equal Access

Several federal laws protect students with disabilities from discrimination by institutions of postsecondary education; the primary ones are Section 504 of the Rehabilitation Act of 1973 (Section 504), which applies to all colleges that receive federal financial assistance, and the Americans with Disabilities Act (ADA) of 1990, which applies to three primary groups: employers; government entities, such as state universities; and private entities that serve the public. Those who see the connection between disability law and federal civil rights laws will find the path to understanding disability law a great deal easier to follow. We desegregate our schools to remove the stigma that comes from enforced separation and to bring to all students the advantages of diversity in the classroom.

“Academic adjustments and reasonable modifications” and the provision of “auxiliary aides and services” are important tools for desegregating institutions and extending equal educational opportunity to the disability community. These devices, commonly called “reasonable accommodations,” have had a considerable impact on who participates in higher education. Academic adjustments include classroom and testing modifications, such as extra time on examinations. Auxiliary aids and services include practices that create access to information for persons with sensory impairments, such as providing signers for students who are deaf and readers for students who are blind. Students may not be charged for accommodations to which they are entitled by law.

Section 504 and the ADA require that students with disabilities have equal access to information and to the avenues of communication, including Web sites operated by colleges, other Internet resources, distance education programs, and the like. When the educational institution involved is a government entity, the ADA requires that the students with disabilities are to be provided communication “as effective as” that provided to nondisabled students. “Communication” has been defined as the “transfer of information.”

In construing the conditions under which communication is as effective as that provided to nondisabled persons, the U.S. Department of Education's Office of Civil Rights has held that the three basic components of effectiveness are timeliness of delivery, accuracy of the translation, and provision in a manner and medium appropriate to the significance of the message and the abilities of the individual with the disability.

Under certain circumstances, the failure to provide a reasonable accommodation to a student with a disability is a violation of law, putting in jeopardy, among other things, an institution's receipt of federal financial assistance. On the other hand, misunderstanding what the duty to provide reasonable accommodations means is a source of suspicion and

fear. Some, for example, worry that providing accommodations will force colleges and universities to lower academic standards and foist onto society a generation of unqualified professionals, or simply compel faculty to violate their own concepts of fair treatment of all students.

Properly understood and implemented, however, disability laws will lead to none of these feared outcomes. In fact, students with disabilities are required to meet the “essential” “academic” and “technical” standards of the college or university, with or without reasonable accommodation.

The term “essential” serves to ensure that colleges and universities need never “fundamentally alter” their programs of instruction to accommodate students with disabilities. Federal courts have readily upheld insistence that such students meet “academic” standards (for example, a requirement for all students to maintain a certain GPA) and “technical” standards (for example, a requirement that all dental students demonstrate fine motor dexterity). Moreover, persons whose disabilities manifest a “direct threat” to the health and safety of themselves or others may be excluded from an educational program. On the other hand, a student with a disability may be permitted a year longer to earn a degree than is accorded to students under the published rules of the college. By instructing colleges to distinguish carefully between what is essential and what is tangential, the courts have used Section 504 and the ADA to create equal educational opportunity for the disability community without lowering academic standards.

Degree of Deference

A college may deny a student’s accommodation request for several reasons. First, an institution can decline requests that represent a fundamental alteration in the nature of an academic program, such as excusing a premed student from laboratory classes. Second, a college may offer less costly but effective alternatives to the accommodations proposed by students. Third, an institution need not incur an undue economic or administrative burden in accommodating students with disabilities. Fourth, it need not bear the expense of personal services. But, when needed, postsecondary colleges must allow individuals to use “personal attendants” for activities such as feeding, dressing, or bathing. The courts and the Office of Civil Rights accord colleges considerable deference in determining which accommodations will or will not entail a fundamental alteration in the nature of a program. Several factors affect the degree of deference accorded a college in any given instance. Courts are unlikely to accord any deference to a college’s decisions when there is prevailing evidence of overt bias or retaliation. Similarly, little deference is accorded individuals in academia who reach conclusions they are not qualified to reach, such as a mathematics teacher deciding that an individual is not really disabled.

On the other hand, considerable deference is accorded to institutions that promulgate well-developed procedures for considering and implementing requests for accommodations. Such a procedure should define responsibilities, draw on appropriate

expertise, and make careful and deliberate distinctions as to when accommodations constitute a fundamental program alteration and when they do not. The Office of Civil Rights encourages ongoing communication between student and college at every step of the accommodation process. This “interactive process” is consistent with the duties the courts and the Equal Employment Opportunity Commission have widely required of employers.

Colleges that automatically, without analysis, implement every documented request for an accommodation may contribute to prejudices, lower academic standards, and fuel backlash by students and faculty that cannot be easily dispelled. The decision to deny an accommodation should not, however, be taken lightly. Highly respected institutions have found themselves in serious legal straits for devoting insufficient thought to the conclusion that a requested accommodation should be denied.

On several occasions, the courts and the Office of Civil Rights have offered guidance on what the accommodation process should entail. In a lawsuit under Section 504, a medical student sought, as an accommodation, substitution of essay for multiple-choice examinations. Defending itself in court for having denied the student’s request, the college was required to demonstrate to the court that “the relevant officials of the institution considered alternative means [of examining the student], their feasibility, cost and effect on the academic program and came to a rationally justifiable conclusion that available alternatives would result either in lowering academic standards or requir[ing] substantial program alteration.” In effect, the court concluded that colleges were entitled to deference in academic decisions, but only after such deference was earned by engaging in an affirmative and thorough consideration process. The court’s reference to “relevant officials” is also important. The court used this term to highlight its expectation that both faculty and academic administrators would be involved in this process.

I am unaware of any case in which a postsecondary institution lost in court for failing to implement a particular requested accommodation after it had engaged in the interactive process, provided the plaintiff several other accommodations, and denied the contested accommodation(s) on the basis of thoughtful deliberations by qualified individuals.

Accommodation Process

Legally, the accommodation process begins when a student identifies himself or herself as an individual with a disability and asks for assistance. As long as the college or university gives reasonable notice of how to request help, the courts and the Office of Civil Rights have been fairly consistent in placing the responsibility on the student to initiate the accommodation process. Only under very limited circumstances is there retroactive consideration of how a student was treated prior to requesting accommodation. Thus, students are generally “stuck” with the grades they received before asking for an accommodation.

An effective accommodation process begins at a central point, usually the disabled student services office or provider. The college or university should clearly identify in

student handbooks and similar publications the location and title of the person whom students should contact. All faculty, adjunct teachers, counselors, and administrators should be able to recognize a request for accommodation and know where to refer students for consideration of their concerns. It is not unlawful for faculty members to informally accommodate students without involving a disabled student services office. But such professors run a risk of learning the true meaning of the phrase “no good deed goes unpunished.” Faculty members are well advised at least to inform their disabled student services providers of whatever arrangements have been established.

Students need not use “magic words,” like reference to the ADA, to commence the accommodation process. Revelation of a disability and concern about its relationship to academic performance is the most common way in which students raise issue that need to be referred to a disabled student services office. Faculty members are not required to discover or point out to a student that academic deficiencies may reflect the impact of a disability. Students should be treated as adults with concomitant privacy rights. They should never be coerced into engaging in the accommodation process. No laws are violated, however, when a faculty member suggests to a student that he or she consider engaging in the disability assessment and accommodation process.

Documentation

The next step in the accommodation process ordinarily is for the student to document that he or she has a disability and needs an accommodation. This leads to the single most complex and litigated question in disability law: who is an individual with a disability? Since this subject is best left to the disabled student services providers and diagnosticians, I will not cover it extensively here.

Although this article focuses on students whose disabilities make them eligible for accommodations, it is important to know that Section 504 and the ADA are antidiscrimination statutes and provide protection even to students who may not be eligible for accommodations. Specifically, Section 504 and the ADA cover individuals believed by the college to be disabled and individuals with a record of a disability. A student meeting either of these definitions, as well as a student with a current disability who may be eligible for an accommodation, is protected from intentional discrimination, such as a hostile environment on the basis of disability, and from exclusion from a program on the basis of stereotypes.

For the purposes of obtaining an accommodation, the regulations implementing Section 504 and the language of the ADA contain the same definition of an individual with a disability. These laws provide that a “disability” is a physical or mental impairment that substantially limits a major life activity. “Impairment,” “major life activity,” and “substantial” are all terms of art, and each must be documented.

Colleges may require a student seeking accommodation to provide sound documentation for each element of the definition of disability as well as for the need for any proposed

accommodation. Documentation can be test results, clinical observations, psychoeducational histories, standard medical diagnostic reports, or any other written materials provided by someone with pertinent expertise. With the consent of the students, a telephone call from a disabled student services officer to a diagnostician may also be a quick and productive way to resolve conflicts, ambiguities, and shortcomings in written data. The evidence of disability and the need for a specific accommodation should be logically connected. (For example, it is not self-evident why an individual with lower-body mobility impairment needs double time on an examination.)

Qualified professionals should prepare the documentation, whose age should be appropriate to the disability. Persons with disabilities that change frequently may have to update their documentation every few years. Persons whose disabilities are relatively stable would not be expected to update it as often.

Arbitrary, unnecessarily costly, poorly explained, or last-minute changes in the documentation required raise concerns for the courts. Further, privacy interests must be respected. Although meeting the standards of Section 504 and the ADA may demand considerable documentation, care must be taken not to seek documentation beyond the scope of what is necessary to make an accommodation determination. For example, to establish the impairment of depression, it is not necessary for the college to know that the depression was originally induced by child abuse.

Obtaining documentation, the costs of which the student must almost always bear, can be expensive. Institutions can help by providing students and their diagnosticians with reasonable notice of what documentation is expected. When the institution rejects documentation, the student should be told why so that he or she can determine whether it makes sense to seek further testing and additional documentation.

Unfortunately, many secondary schools do not explain to their students that the documentation that established their eligibility for services from elementary and secondary schools may be insufficient to establish a disability with a postsecondary institution. Faculty should therefore respond to the initial expectations of new students with some flexibility and promptly refer them to the disabled student services office.

With regard to effective accommodation, the expertise of both faculty members and the disabled student services office should be made available to the student. Accommodation expertise is not easy to come by. In academia, the classroom teacher or department chair will often be uniquely in control of information essential to identifying an accommodation that will not fundamentally alter the nature of an academic program, reduce academic standards, or place an undue burden on the college.

Types of Accommodation

Most students who document their disability and need for an accommodation will receive one without conflict or dispute. But no absolutely accurate statement can be made about whether a particular accommodation is required by law. The best I can do is provide what are admittedly broad generalizations based on considerable experience in the field. For students who have given notice and provided sufficient documentation, the following

accommodations are likely to be sustained: time and a half to double time on examinations; moderately reduced course loads; extra time to complete a degree program to the extent curricular continuity is not unreasonably impaired; limited leaves of absence for medical treatment and recovery; registration assistance; assistance in applying for financial aid; classroom modifications, such as preferential seating, taping, and note-taking assistance; priority in housing for students who need a single or a large room; and priority in parking for students with mobility impairments and certain psychological disabilities.

Accommodations less likely to be sustained, but within the range of accommodations that may be required in a particular set of circumstances, are more than double time on examinations, long-term leaves of absence, course substitution or waiver, and reduced participation and attendance in the classroom. Accommodations unlikely to be sustained are unlimited time for examinations, unlimited time for degree completion, unlimited leaves of absence, permission to entirely avoid attendance expectations applied to students in general, reassignment to another teacher, provision of examinations or instructional services off campus except when generally provided to students, individualized instruction or tutoring except when commonly provided to students, and restructuring of the curriculum to address the student's individual learning style.

In my experience, modifications to examinations, particularly extra time to complete them, rank first in triggering faculty concerns about treating all students fairly. The objective of providing individuals extra time on examinations is to measure what students have learned rather than the impact of their disability. When a student's performance speed is a skill a professor intends to measure, extra time on an examination would not be an appropriate accommodation. Thus one federal court held that a medical student with a disability may be required to demonstrate emergency room skills under the same rigorous timed conditions as anyone else.

A recent federal district court decision concerning an individual with a learning disability who was denied extra time on a bar examination, has faced up to the issue of fairness more directly than any preceding opinion. The court wrote:

[M]uch of the [Bar's] bias appears to arise from the assumption that giving extra time to applicants with learning disabilities gives them an unfair advantage over other applicants. . . . [T]his assumption is belied by research showing that extra time does not have a significant impact on the performance of individuals who do not have learning disabilities. . . . Further, as [the Bar] concedes, the bar [examination] is not a reading rate test. [The court is] convinced that extra time provided to learning disabled applicants merely levels the playing field and allows these individuals to be tested on their knowledge; it does not provide them with an unfair advantage.

It is instructive to look at how the Supreme Court recently approached the subject of fairness and accommodation when the issue arose in one of the most high-stakes,

competitive, and prestigious events in the public eye: a golf championship. Professional golfer Casey Martin, who has a debilitating mobility impairment, challenged a long-standing rule of the Professional Golfer's Association (PGA) prohibiting the use of carts in championship tournaments. After reviewing expert testimony, the Court concluded that the essence of golf was "shot-making," not walking, and that providing Martin with a cart did not give him a competitive advantage. The Court was particularly troubled by the fact that the PGA had rejected Martin's request out of hand, failing to take an individualized look at the impact of his disability on endurance and mobility in comparison to other players.

Benefits to the Academic Community

No doubt, Martin's case has served as the source of lively discussion in law schools, but more important is its coverage in the popular press. His presence on the fairway juxtaposes the condition of disability with the achievement of athletic excellence. He is a "stereotype buster." In so many instances, we need only give the disability community an opportunity to cross the threshold, and disabled individuals will teach us ways we never envisioned to accomplish critical tasks and professional responsibilities. My brother taught me how to use the computer as a "virtual" law library. A student, whose speaking facility was limited by advanced multiple sclerosis, showed me how he could "speak" by using a keyboard and a scrolling electronic sign board placed in the front of the classroom.

Section 504 and the ADA should be welcomed for the opportunities they offer to postsecondary education for rewarding self-examination. No other set of laws so entreats academia to take its own temperature, examine its traditions, and thoughtfully deliberate about which of its standards are essential and which are merely unexamined habits.

Whether from the insights we achieve from integration or from self-reflection, the unconventional, nontraditional, innovative ways in which individuals with disabilities accomplish tasks place us on new paths that benefit us all. The term "universal design" signifies inclusive planning, structures, tools, and methods of teaching that take into account the range of physical and mental characteristics that spans human diversity. Because flexibility and pro-vision of alternative approaches to the same objective are an inherent element of universal design, it gives all individuals, disabled or not, the freedom to choose the paths that best serve them without marginalizing them through "special" or segregated treatment.

In architecture, universal design yields ramps that help every person pushing a stroller or pulling a suitcase on wheels. Universal design has also fostered Web authoring tools that allow us simultaneously to communicate on the Internet through the visual, auditory, and tactile senses. More universal benefits are on the horizon. In instruction, universal design unsettles the assumption that every-one who is qualified to attend a particular college is identically and evenly endowed across all of their intellectual domains. Our colleges are composed of auditory, visual, linear, and intuitive thinkers. Some students are most adept at accessing and retaining information, while others' greatest strength is in how they

process information, however it is acquired. How many of us can say that our teaching methodologies are sufficiently broad to address these forms of human variation? Inclusion of individuals with disabilities crystallizes these issues and entreats us to revisit time-honored teaching methodologies. For example, facing attrition by bright students with learning disabilities, some mathematics professors were inspired to develop new ways to teach mathematics that benefit all students.

And there is more with regard to the content of our curricula. The rich literature, art, and history of the disability community are ripe for addition to academia's exploration of the human condition. Creating equal educational opportunity by providing reasonable accommodations to students with disabilities is a journey we need not fear. Indeed, it may be embraced for the opportunities it presents to us all.