Disability Law for Higher Education

Cosponsored by the Disability Law Section

Friday, March 11, 2016
9 a.m.–11:30 a.m.

2 General CLE or Access to Justice credits
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## TABLE OF CONTENTS

**Schedule**  .......................................................................................................................... v

**Faculty** .............................................................................................................................. vii

1. **The Legal Perspective.** ................................................................................................. 1–i  
   — Kevin Brague, *Kivel & Howard LLP, Portland, Oregon*  
   — Kathryn Kammer, *Miller Nash Graham & Dunn LLP, Portland, Oregon*

2. **The Educational Institution Perspective.** ..................................................................... 2–i  
   — Kaela Parks, *Director of Disability Services, Portland Community College, Portland, Oregon*
<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Speaker(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:30</td>
<td>Registration</td>
<td></td>
</tr>
<tr>
<td>9:00</td>
<td>The Legal Perspective</td>
<td>Kevin Brague, <em>Kivel &amp; Howard LLP, Portland</em></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Kathryn Kammer, <em>Miller Nash Graham &amp; Dunn LLP, Portland</em></td>
</tr>
<tr>
<td>9:45</td>
<td>Break</td>
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<tr>
<td>10:00</td>
<td>The Educational Institution Perspective</td>
<td>Kaela Parks, <em>Director of Disability Services, Portland Community College, Portland</em></td>
</tr>
<tr>
<td>10:45</td>
<td>Break</td>
<td></td>
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<tr>
<td>11:00</td>
<td>The Student Perspective</td>
<td>Adrienne Lattin, <em>Portland</em></td>
</tr>
<tr>
<td>11:30</td>
<td>Adjourn</td>
<td></td>
</tr>
</tbody>
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FACULTY

Kevin Brague, Kivel & Howard LLP, Portland. Mr. Brague primarily represents individuals who have been harmed by others, whether personally (such as in an automobile accident) or an institution (for example, abuse cases, violations of civil rights), as well as those persons who require accommodations, individualized education programs, or other special services related to their schooling. He has litigated cases against businesses, insurance companies, colleges, universities, trade schools, and schools on behalf of his clients.

Kathryn Kammer, Miller Nash Graham & Dunn LLP, Portland. Ms. Kammer specializes in employment and education law. She represents both public and private employers with claims before Oregon’s Bureau of Labor and Industries and the U.S. Equal Employment Opportunity Commission. She also regularly advises employers on personnel issues such as family and medical leave and disability accommodation and works with employers to ensure compliance with employment laws and revise their employee handbooks. Ms. Kammer has additional expertise in representing both K–12 and higher education institutions and advises on a range of regulatory compliance issues ranging from personnel matters to student rights and discipline. She is a member of the American Bar Association, Multnomah Bar Association, Oregon Women Lawyers, Oregon State Bar Disability Law Section Executive Committee, Society of Human Resource Management, Portland Human Resources Management Association, and National Association of College and University Attorneys. She also conducts trainings on various employment law issues.

Kaela Parks, Director of Disability Services, Portland Community College, Portland. Ms. Parks has served as national chair of the Disability Knowledge Community with NASPA, cochair of the Association on Higher Education and Disability Standing Committee on Technology, and president of ORAHEAD. She is coeditor of the recent publication titled Beyond the ADA: Proactive Policy and Practice for Higher Education and is a frequent presenter at both regional and national conferences.

Adrienne Lattin, Portland. After attending Lewis and Clark Law School, Ms. Lattin worked at Oregon Health and Science University in the Office of Integrity doing compliance work. She sat for the Oregon bar exam in February 2016 and is now actively seeking full-time employment.
Chapter 1
The Legal Perspective

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Contents

Presentation Slides .......................................................... 1–1
Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities (obtained from http://www2.ed.gov/print/about/offices/list/ocr/transition.html) .......................................................... 1–19
Auxiliary Aids and Services for Postsecondary Students with Disabilities (obtained from http://www2.ed.gov/print/about/offices/list/ocr/docs/auxaids.html) .......................................................... 1–23
The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973 (obtained from http://www2.ed.gov/print/about/offices/list/ocr/docs/hq5269.html) .......................................................... 1–27
Settlement Agreement Between the United States of America and Lesley University (obtained from https://www.justice.gov/iso/opa/resources/75920121220161432503826.pdf) .......................................................... 1–41
Institutions of higher education must comply with:

- Americans with Disabilities Act
- Section 504 of the Rehabilitation Act of 1973
- ORS 659.850
› Title II of the ADA
  ◦ state funded schools such as universities, community colleges and vocational schools

› Title III of the ADA
  ◦ private colleges

› Section 504 of the Rehabilitation Act
  ◦ If a school receives federal dollars regardless of whether it is private or public

Who is covered?

› Qualified students with disabilities. Must be determined to: (1) have a physical or mental impairment that substantially limits one or more major life activities; or (2) have a record of such an impairment; or (3) be regarded as having such an impairment.
Prohibition against Discrimination

- A school may not discriminate on the basis of disability.
  - Cannot exclude from participation
  - Deny benefits
  - Or otherwise subject to discrimination in any program or activity
- It must ensure that the programs it offers, including extracurricular activities, are accessible to students with disabilities.

What is required of Institutions

- Provide students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford an individual with a disability an equal opportunity to participate in a school's program or activity.

- Postsecondary schools can do this in a number of ways...
Academic Adjustments & Auxiliary Aids

- Admissions
- Housing
- Aids and Services
- Policy Modifications

Accommodations/Modifications

- Accommodations and/or modifications must be provided unless doing so would result in a fundamental alteration of the program or would result in undue financial or administrative burdens.
### Disputes and Enforcement

- **Internal Grievance Procedure**
  - Students also have the right to file an ADA or 504 complaint with the Office of Civil Rights (OCR) of the U.S. Department of Education.
    - Statute of Limitation: 180 day timeline after the date of a discriminatory action to file a complaint.
  - Student may also file a private lawsuit in federal court.
    - Damages – for intentional discrimination
    - Injunctive relief
    - Attorney fees.

### Providing Accommodations through the Interactive Process
Chapter 1—The Legal Perspective

Threat to Self Issues

Regulations

- Employment law expressly recognizes threat to self
- Section 504 education regulations do not

OCR History

- Findings Letter recognized “threat to self”
- Then, 2010
Chapter 1—The Legal Perspective

Threat to Self Issues

Spring Arbor University, December 16, 2010

- Student disclosed medical information in application process, but did not request accommodations
- Other student complained student was disruptive
- Institution required “behavior contract” that required mandatory therapy, maintain composure in class, and avoid stressful situations
- Student withdrew – no restrictions placed on return
- When student returned, institution required same conditions as in proposed behavioral contract

OCR finding:
By conditioning student’s ability to remain in school on behavior contract and requiring the contract for readmission, Spring Arbor violated Section 504.
Threat to Self Issues

Princeton University, January 18, 2013
- Student attempted suicide by an overdose of medication and was hospitalized
- Institution determined student needed to be removed from campus for two months
- Institution acted according to a conduct code applicable to all students

Princeton University, January 18, 2013
- Institution conducted an individualized risk assessment with two clinical medical recommendations, which indicated student was a high risk of another suicide attempt – OCR approved process because assessment applied to any student believed was a risk
- Institution then determined full year withdrawal was appropriate; and student withdrew asserting he had no choice;
Threat to Self Issues

Princeton University, January 18, 2013

- Institution had policy for involuntary withdrawal when conduct was “a serious and imminent health or safety risk to him/herself or to other,” which included any life threatening behavior
- Institution again considered individualized assessment
- Institution applied readmission requirements, which included need to follow treatment recommendations, demonstrate ability to handle stresses arising from being a student, and undergo readmission evaluation by the health center
Policy Issues

Type of policy
- Decision makers/authority
- Emergency/Interim measures

Individualized assessment
- Nature, duration, and severity of any risk
- Probability that potential injury will actually occur
- Nature, duration, and severity of potentially reoccurring behaviors that substantially disrupt University activities
- The probability that substantially disruptive injuries will occur;
- Whether reasonable modification of policies, practices, or procedures, or other reasonable accommodation, will sufficiently mitigate risk or disruption
Policy Issues

Individualized assessment (cont’d)
- Reenrollment requirements
- Appeal

Practical Considerations

- Lowest level of restriction necessary to protect health and safety of the student or other students
- Focus on conduct and risk, not the disability
- Enforce conduct codes and policies applicable to all students
Food Allergies

ADA Accessibility for Educational Institutions

One component of obligations under ADA, Section 504, and state disability laws:

- Make the educational environment, including technology, equally accessible to all students.
What Does that Mean?
In educational context, "accessible" means that individuals with disabilities are enabled to:
- independently acquire the same information,
- engage in the same interactions, and
- enjoy the same services
- within the same time frame as individuals without disabilities, with substantially equivalent ease of use.

What Does that Mean?
If a particular educational component is not equally accessible to all students, the institution must either:
- refrain from using the inaccessible component 
or
- be able to provide reasonable accommodations or modifications that permit individuals with disabilities to receive all the educational benefits provided by the component in an equally effective and equally integrated manner.
What Does that Mean?

"Equally effective" means that the alternative formal or medium communicates the same information in as timely a fashion as does the original format or medium.

Think about Accessibility in the Way the Material is Presented

- Media
- Software
- Material design
- Font size and style, colors, contrast, etc.
OCR Guidance

- OCR Resolution
  - Accessibility policies and procedures
  - Training
  - Specific accessibility website

Issues to Consider

- Policy development
- Who is responsible for accessibility in online courses?
- Opportunity for training
- Testing and vetting components for accessibility
- Vendor and procurement issues
Frequently Asked Questions

- Do all courses have to be accessible? Can we just have one accessible section?
- Timing of developing accessible materials

All Kinds of Emerging Technology Are Covered

- Textbooks and other course materials
- Electronic readers
- Online classrooms
- Learning management systems
- Other campus resources
Questions??

Thank you!
More and more high school students with disabilities are planning to continue their education in postsecondary schools, including vocational and career schools, two- and four-year colleges, and universities. As a student with a disability, you need to be well informed about your rights and responsibilities as well as the responsibilities postsecondary schools have toward you. Being well informed will help ensure you have a full opportunity to enjoy the benefits of the postsecondary education experience without confusion or delay.

The information in this pamphlet, provided by the Office for Civil Rights (OCR) in the U.S. Department of Education, explains the rights and responsibilities of students with disabilities who are preparing to attend postsecondary schools. This pamphlet also explains the obligations of a postsecondary school to provide academic adjustments, including auxiliary aids and services, to ensure the school does not discriminate on the basis of disability.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II), which prohibit discrimination on the basis of disability. Practically every school district and postsecondary school in the United States is subject to one or both of these laws, which have similar requirements.¹

Although Section 504 and Title II apply to both school districts and postsecondary schools, the responsibilities of postsecondary schools differ significantly from those of school districts.

Moreover, you will have responsibilities as a postsecondary student that you do not have as a high school student. OCR strongly encourages you to know your responsibilities and those of postsecondary schools under Section 504 and Title II. Doing so will improve your opportunity to succeed as you enter postsecondary education.

The following questions and answers provide more specific information to help you succeed.

**As a student with a disability leaving high school and entering postsecondary education, will I see differences in my rights and how they are addressed?**

Yes. Section 504 and Title II protect elementary, secondary, and postsecondary students from discrimination. Nevertheless, several of the requirements that apply through high school are different from the requirements that apply beyond high school. For instance, Section 504 requires a school district to provide a free appropriate public education (FAPE) to each child with a disability in the district's jurisdiction. Whatever the disability, a school district must identify an individual's educational needs and provide any regular or special education and related aids and services necessary to meet those needs as well as it is meeting the needs of students without disabilities.

Unlike your high school, however, your postsecondary school is not required to provide FAPE. Rather, your postsecondary school is required to provide appropriate academic adjustments as necessary to ensure that it does not discriminate on the basis of disability. In addition, if your postsecondary school provides housing to nondisabled students, it must provide comparable, convenient, and accessible housing to students with disabilities at the same cost.

Other important differences that you need to know, even before you arrive at your postsecondary school, are addressed in the remaining questions.

**May a postsecondary school deny my admission because I have a disability?**
Chapter 1—The Legal Perspective

No. If you meet the essential requirements for admission, a postsecondary school may not deny your admission simply because you have a disability.

**Do I have to inform a postsecondary school that I have a disability?**

No. But if you want the school to provide an academic adjustment, you must identify yourself as having a disability. Likewise, you should let the school know about your disability if you want to ensure that you are assigned to accessible facilities. In any event, your disclosure of a disability is always voluntary.

**What academic adjustments must a postsecondary school provide?**

The appropriate academic adjustment must be determined based on your disability and individual needs. Academic adjustments may include auxiliary aids and services, as well as modifications to academic requirements as necessary to ensure equal educational opportunity. Examples of adjustments are: arranging for priority registration; reducing a course load; substituting one course for another; providing note takers, recording devices, sign language interpreters, extended time for testing, and, if telephones are provided in dorm rooms, a TTY in your dorm room; and equipping school computers with screen-reading, voice recognition, or other adaptive software or hardware.

In providing an academic adjustment, your postsecondary school is not required to lower or substantially modify essential requirements. For example, although your school may be required to provide extended testing time, it is not required to change the substantive content of the test. In addition, your postsecondary school does not have to make adjustments that would fundamentally alter the nature of a service, program, or activity, or that would result in an undue financial or administrative burden. Finally, your postsecondary school does not have to provide personal attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature, such as tutoring and typing.

**If I want an academic adjustment, what must I do?**

You must inform the school that you have a disability and need an academic adjustment. Unlike your school district, your postsecondary school is not required to identify you as having a disability or to assess your needs.

Your postsecondary school may require you to follow reasonable procedures to request an academic adjustment. You are responsible for knowing and following those procedures. In their publications providing general information, postsecondary schools usually include information on the procedures and contacts for requesting an academic adjustment. Such publications include recruitment materials, catalogs, and student handbooks, and are often available on school websites. Many schools also have staff whose purpose is to assist students with disabilities. If you are unable to locate the procedures, ask a school official, such as an admissions officer or counselor.

**When should I request an academic adjustment?**

Although you may request an academic adjustment from your postsecondary school at any time, you should request it as early as possible. Some academic adjustments may take more time to provide than others. You should follow your school's procedures to ensure that the school has enough time to review your request and provide an appropriate academic adjustment.

**Do I have to prove that I have a disability to obtain an academic adjustment?**

Generally, yes. Your school will probably require you to provide documentation showing that you have a current disability and need an academic adjustment.

**What documentation should I provide?**

Schools may set reasonable standards for documentation. Some schools require more documentation than others. They may require you to provide documentation prepared by an appropriate professional, such as a medical doctor, psychologist, or other qualified diagnostician. The required documentation may include one or more of the following: a diagnosis of your current disability, as well as supporting information, such as the date of the diagnosis, how that diagnosis was reached, and the credentials of the diagnosing professional; information on how your disability affects a major life activity; and information on how the disability affects your academic performance. The documentation should provide enough information for you and your school to decide what is an appropriate academic adjustment.

An individualized education program (IEP) or Section 504 plan, if you have one, may help identify services that have been effective for you. This is generally not sufficient documentation, however, because of the differences between postsecondary education and high school education. What you need to meet the new demands of postsecondary education may be different from what worked for you in high school. Also, in some cases, the nature of a disability may change.

If the documentation that you have does not meet the postsecondary school's requirements, a school official should tell you in a timely manner what additional documentation you need to provide. You may need a new evaluation in order to provide the required documentation.

**Who has to pay for a new evaluation?**

Neither your high school nor your postsecondary school is required to conduct or pay for a new evaluation to document your disability and need for an academic adjustment. You may, therefore, have to pay or find funding to pay an appropriate professional for an evaluation. If you are eligible for services through your state vocational rehabilitation agency, you may qualify for an evaluation at no cost to you. You may locate your state vocational rehabilitation agency at http://rsa.ed.gov (http://rsa.ed.gov) by clicking on “Info about RSA,” then “People and Offices,” and then “State Agencies/Contacts.”

**Once the school has received the necessary documentation from me, what should I expect?**

To determine an appropriate academic adjustment, the school will review your request in light of the essential requirements for the relevant program. It is important to remember that the school is not required to lower or waive essential requirements. If you have requested a specific academic adjustment, the school may offer that academic adjustment, or it may offer an effective alternative. The school may also conduct its own evaluation of your disability and needs at its own expense.

You should expect your school to work with you in an interactive process to identify an appropriate academic adjustment. Unlike the experience you may have had in high school, however, do not expect your postsecondary school to invite your parents to participate in the process or to develop an IEP for you.

**What if the academic adjustment we identified is not working?**

Let the school know as soon as you become aware that the results are not what you expected. It may be too late to correct the problem if you wait until the course or activity is completed. You and your school should work together to resolve the problem.

**May a postsecondary school charge me for providing an academic adjustment?**
Chapter 1—The Legal Perspective

No. Nor may it charge students with disabilities more for participating in its programs or activities than it charges students who do not have disabilities.

What can I do if I believe the school is discriminating against me?

Practically every postsecondary school must have a person—frequently called the Section 504 Coordinator, ADA Coordinator, or Disability Services Coordinator—who coordinates the school's compliance with Section 504, Title II, or both laws. You may contact that person for information about how to address your concerns.

The school must also have grievance procedures. These procedures are not the same as the due process procedures with which you may be familiar from high school. But the postsecondary school's grievance procedures must include steps to ensure that you may raise your concerns fully and fairly, and must provide for the prompt and equitable resolution of complaints.

School publications, such as student handbooks and catalogs, usually describe the steps that you must take to start the grievance process. Often, schools have both formal and informal processes. If you decide to use a grievance process, you should be prepared to present all the reasons that support your request.

If you are dissatisfied with the outcome of the school's grievance procedures or wish to pursue an alternative to using those procedures, you may file a complaint against the school with OCR or in a court. You may learn more about the OCR complaint process from the brochure How to File a Discrimination Complaint with the Office for Civil Rights, which you may obtain by contacting us at the addresses and phone numbers below, or at http://www.ed.gov/ocr/docs/howto.html.

If you would like more information about the responsibilities of postsecondary schools to students with disabilities, read the OCR brochure Auxiliary Aids and Services for Postsecondary Students with Disabilities: Higher Education's Obligations Under Section 504 and Title II of the ADA. You may obtain a copy by contacting us at the address and phone numbers below, or at http://www.ed.gov/ocr/docs/auxaids.html.

Students with disabilities who know their rights and responsibilities are much better equipped to succeed in postsecondary school. We encourage you to work with the staff at your school because they, too, want you to succeed. Seek the support of family, friends, and fellow students, including those with disabilities. Know your talents and capitalize on them, and believe in yourself as you embrace new challenges in your education.

To receive more information about the civil rights of students with disabilities in education institutions, you may contact us at:

Customer Service Team
Office for Civil Rights
U.S. Department of Education
Washington, D.C. 20202-1100

Phone: 1-800-421-3481
TDD: 1-877-521-2172
Email: ocr@ed.gov
Web site: www.ed.gov/ocr

*You may be familiar with another federal law that applies to the education of students with disabilities—the Individuals with Disabilities Education Act (IDEA). That law is administered by the Office of Special Education Programs in the Office of Special Education and Rehabilitative Services in the U.S. Department of Education. The IDEA and its individualized education program (IEP) provisions do not apply to postsecondary schools. This pamphlet does not discuss the IDEA or state and local laws that may apply.

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Chapter 1—The Legal Perspective

U.S. Department of Education

Auxiliary Aids and Services for Postsecondary Students with Disabilities

Higher Education's Obligations Under Section 504 and Title II of the ADA

U.S. Department of Education
Office for Civil Rights
Washington, D.C.
Revised September 1998

Section 504 of the Rehabilitation Act of 1973

In 1973, Congress passed Section 504 of the Rehabilitation Act of 1973 (Section 504), a law that prohibits discrimination on the basis of physical or mental disability (29 U.S.C. Section 794). It states:

No otherwise qualified individual with a disability in the United States . . . 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 . . .

The Office for Civil Rights in the U.S. Department of Education enforces regulations implementing Section 504 with respect to programs and activities that receive funding from the Department. The Section 504 regulation applies to all recipients of this funding, including colleges, universities, and postsecondary vocational education and adult education programs. Failure by these higher education schools to provide auxiliary aids to students with disabilities that results in a denial of a program benefit is discriminatory and prohibited by Section 504.

Title II of the Americans with Disabilities Act of 1990 (ADA) prohibits state and local governments from discriminating on the basis of disability. The Department enforces Title II in public colleges, universities, and graduate and professional schools. The requirements regarding the provision of auxiliary aids and services in higher education institutions described in the Section 504 regulation are generally included in the general nondiscrimination provisions of the Title II regulation.

Postsecondary School Provision of Auxiliary Aids

The Section 504 regulation contains the following requirement relating to a postsecondary school's obligation to provide auxiliary aids to qualified students who have disabilities:

A recipient . . . shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

The Title II regulation states:

A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

It is, therefore, the school's responsibility to provide these auxiliary aids and services in a timely manner to ensure effective participation by students with disabilities. If students are being evaluated to determine their eligibility under Section 504 or the ADA, the recipient must provide auxiliary aids in the interim.

Postsecondary Student Responsibilities

A postsecondary student with a disability who is in need of auxiliary aids is obligated to provide notice of the nature of the disabling condition to the college and to assist it in identifying appropriate and effective auxiliary aids. In elementary and secondary schools, teachers and school specialists may have arranged support services for students with disabilities. However, in postsecondary schools, the students themselves must identify the need for an auxiliary aid and give adequate notice of the need. The student's notification should be provided to the appropriate representative of the college who, depending upon the nature and scope of the request, could be the school's Section 504 or ADA coordinator, an appropriate dean, a faculty advisor, or a professor. Unlike elementary or secondary schools, colleges may ask the student, in response to a request for auxiliary aids, to provide supporting diagnostic test results and professional prescriptions for auxiliary aids. A college may also obtain its own professional determination of whether specific requested auxiliary aids are necessary.
Examples of Auxiliary Aids

Some of the various types of auxiliary aids and services may include:

- taped texts
- notetakers
- interpreters
- readers
- videotext displays
- television enlargers
- talking calculators
- electronic readers
- Braille calculators, printers, or typewriters
- telephone handset amplifiers
- closed caption decoders
- open and closed captioning
- voice synthesizers
- specialized gym equipment
- calculators or keyboards with large buttons
- reaching device for library use
- raised-line drawing kits
- assistive listening devices
- assistive listening systems
- telecommunications devices for deaf persons.

Technological advances in electronics have improved vastly participation by students with disabilities in educational activities. Colleges are not required to provide the most sophisticated auxiliary aids available; however, the aids provided must effectively meet the needs of a student with a disability. An institution has flexibility in choosing the specific aid or service it provides to the student, as long as the aid or service selected is effective. These aids should be selected after consultation with the student who will use them.

Effectiveness of Auxiliary Aids

No aid or service will be useful unless it is successful in equalizing the opportunity for a particular student with a disability to participate in the education program or activity. Not all students with a similar disability benefit equally from an identical auxiliary aid or service. The regulation refers to this complex issue of effectiveness in several sections, including:

Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions.

There are other references to effectiveness in the general provisions of the Section 504 regulation which state, in part, that a recipient may not:

Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others; or
Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others.

The Title II regulation contains comparable provisions.

The Section 504 regulation also states:

[A]ids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

The institution must analyze the appropriateness of an aid or service in its specific context. For example, the type of assistance needed in a classroom by a student who is hearing-impaired may vary, depending upon whether the format is a large lecture hall or a seminar. With the one-way communication of a lecture, the service of a notetaker may be adequate, but in the two-way communication of a seminar, an interpreter may be needed. College officials also should be aware that in determining what types of auxiliary aids and services are necessary under Title II of the ADA, the institution must give primary consideration to the requests of individuals with disabilities.

Cost of Auxiliary Aids

Postsecondary schools receiving federal financial assistance must provide effective auxiliary aids to students who are disabled. If an aid is necessary for classroom or other appropriate (nonpersonal) use, the institution must make it available, unless provision of the aid would cause undue burden. A student with a disability may not be required to pay part or all of the costs of that aid or service. An institution may not limit what it spends for auxiliary aids or services or refuse to provide auxiliary aids because it believes that other providers of these services exist, or condition its provision of auxiliary aids on availability of funds. In many cases, an institution may meet its obligation to provide auxiliary aids by assisting the student in obtaining the aid or obtaining reimbursement for the cost of an aid from an outside agency or organization, such as a state rehabilitation agency or a private charitable organization. However, the institution remains responsible for providing the aid.

Personal Aids and Services

An issue that is often misunderstood by postsecondary officials and students is the provision of personal aids and services. Personal aids and services, including help in bathing, dressing, or other personal care, are not required to be provided by postsecondary institutions. The Section 504 regulation states:
Recipient need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

Title II of the ADA similarly states that personal services are not required.

In order to ensure that students with disabilities are given a free appropriate public education, local education agencies are required to provide many services and aids of a personal nature to students with disabilities when they are enrolled in elementary and secondary schools. However, once students with disabilities graduate from a high school program or its equivalent, education institutions are no longer required to provide aids, devices, or services of a personal nature.

Postsecondary schools do not have to provide personal services relating to certain individual academic activities. Personal attendants and individually prescribed devices are the responsibility of the student who has a disability and not of the institution. For example, readers may be provided for classroom use but institutions are not required to provide readers for personal use or for help during individual study time.

Questions Commonly Asked by Postsecondary Schools and Their Students

Q: What are a college's obligations to provide auxiliary aids for library study?
A: Libraries and some of their significant and basic materials must be made accessible by the recipient to students with disabilities. Students with disabilities must have the appropriate auxiliary aids needed to locate and obtain library resources. The college library's basic index of holdings (whether formatted on-line or on index cards) must be accessible. For example, a screen and keyboard (or card file) must be placed within reach of a student using a wheelchair. If a Braille index of holdings is not available for blind students, readers must be provided for necessary assistance.

Articles and materials that are library holdings and are required for course work must be accessible to all students enrolled in that course. This means that if a material is required for the class, then its text must be read for a blind student or provided in Braille or on tape. A student's actual study time and use of these articles are considered personal study time and the institution has no further obligation to provide additional auxiliary aids.

Q: What if an instructor objects to the use of an auxiliary or personal aid?
A: Sometimes postsecondary instructors may not be familiar with Section 504 or ADA requirements regarding the use of an auxiliary or personal aid in their classrooms. Most often, questions arise when a student uses a tape recorder. College teachers may believe recording lectures is an infringement upon their own or other students' academic freedom, or constitutes copyright violation.

The instructor may not forbid a student's use of an aid if that prohibition limits the student's participation in the school program. The Section 504 regulation states:

A recipient may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

In order to allow a student with a disability the use of an effective aid and, at the same time, protect the instructor, the institution may require the student to sign an agreement so as not to infringe on a potential copyright or to limit freedom of speech.

Q: What if students with disabilities require auxiliary aids during an examination?
A: A student may need an auxiliary aid or service in order to successfully complete a course exam. This may mean that a student be allowed to give oral rather than written answers. It also may be possible for a student to present a tape containing the oral examination response. A test should ultimately measure a student's achievements and not the extent of the disability.

Q: Can postsecondary institutions treat a foreign student with disabilities who needs auxiliary aids differently than American students?
A: No, an institution may not treat a foreign student who needs auxiliary aids differently than an American student. A postsecondary institution must provide to a foreign student with a disability the same type of auxiliary aids and services it would provide to an American student with a disability. Section 504 and the ADA require that the provision of services be based on a student's disability and not on such other criteria as nationality.

Q: Are institutions responsible for providing auxiliary services to disabled students in filling out financial aid and student employment applications, or other forms of necessary paperwork?
A: Yes, an institution must provide services to disabled students who may need assistance in filling out aid applications or other forms. If the student requesting assistance is still in the process of being evaluated to determine eligibility for an auxiliary aid or service, help with this paperwork by the institution is mandated in the interim.

Q: Does a postsecondary institution have to provide auxiliary aids and services for a nondegree student?
A: Yes, students with disabilities who are auditing classes or who otherwise are not working for a degree must be provided auxiliary aids and services to the same extent as students who are in a degree-granting program.

For More Information

For more information on Section 504 and the ADA and their application to auxiliary aids and services for disabled students in postsecondary schools, or to obtain additional assistance, see the list of OCR's 12 enforcement offices containing the address and telephone number for the office that serves your area, or call 1-800-421-3481.

Top
Chapter 1—The Legal Perspective

The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973

INTRODUCTION

If you are a student with a hidden disability or would like to know more about how students with hidden disabilities are protected against discrimination by Federal law, this pamphlet is for you.

Section 504 of the Rehabilitation Act of 1973 protects the rights of persons with handicaps in programs and activities that receive Federal financial assistance. Section 504 protects the rights not only of individuals with visible disabilities but also those with disabilities that may not be apparent.

Section 504 provides that: “No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, 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....”

The U.S. Department of Education (ED) enforces Section 504 in programs and activities that receive financial assistance from ED. Recipients of this assistance include public school districts, institutions of higher education, and other state and local education agencies. ED maintains an Office for Civil Rights (OCR), with ten regional offices and a headquarters office in Washington, D.C., to enforce Section 504 and other civil rights laws that pertain to recipients of ED funds. (The addresses and telephone numbers of the OCR regional offices are included at the back of this pamphlet.)

This pamphlet answers the following questions about the civil rights of students with hidden disabilities and the responsibilities of ED recipients:

- What disabilities are covered under Section 504?
- What are hidden disabilities?
- What are the responsibilities of ED recipients in preschool, elementary, secondary, and adult education?
- What are the responsibilities of ED recipients in postsecondary education?
- How can the needs of students with hidden disabilities be addressed?

DISABILITIES COVERED UNDER SECTION 504

The ED Section 504 regulation defines an "individual with handicaps" as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. The regulation further defines a physical or mental impairment as (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list.

The key factor in determining whether a person is considered an "individual with handicaps" covered by Section 504 is whether the physical or mental impairment results in a substantial limitation of one or more major life activities. Major life activities, as defined in the regulation, include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The impairment must have a material effect on one's ability to perform a major life activity. For example, an individual who has a physical or mental impairment would not be considered a person with handicaps if the condition does not in any way limit the individual, or only results in some minor limitation. However, in some cases Section 504 also protects individuals who do not have a handicapping condition but are treated as though they do because they have a history of, or have been classified as having, a mental or physical impairment that substantially limits one or more major life activities. For example, if you have a history of a handicapping condition but no longer have the condition, or have been incorrectly classified as having such a condition, you too are protected from discrimination under Section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded. Persons who are not disabled may be covered by Section 504 also if they are treated as if they are handicapped, for example, if they are infected with the human immunodeficiency virus.

WHAT ARE HIDDEN DISABILITIES?

Hidden disabilities are physical or mental impairments that are not readily apparent to others. They include such conditions and diseases as specific learning disabilities, diabetes, epilepsy, and allergy. A disability such as a limp, paralysis, total blindness or deafness is usually obvious to others. But hidden disabilities such as low vision, poor hearing, heart disease, or chronic illness may not be obvious. A chronic illness involves a recurring and long-term disability such as diabetes, heart disease, kidney and liver disease, high blood pressure, or ulcers.
Approximately four million students with disabilities are enrolled in public elementary and secondary schools in the United States. Of these 43 percent are students classified as learning disabled, 8 percent as emotionally disturbed, and 1 percent as other health impaired. These hidden disabilities often cannot be readily known without the administration of appropriate diagnostic tests.

THE RESPONSIBILITIES OF ED RECIPIENTS IN PRESCHOOL, ELEMENTARY, SECONDARY, AND ADULT EDUCATION

For coverage under Section 504, an individual with handicaps must be “qualified” for service by the school or institution receiving ED funds. For example, the ED Section 504 regulation defines a “qualified handicapped person” with respect to public preschool, elementary, secondary, or adult education services, as a person with a handicap who is:

- of an age during which persons without handicaps are provided such services;
- of any age during which it is mandatory under state law to provide such services to persons with handicaps; or
- a person for whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act.

Under the Section 504 regulation, a recipient that operates a public elementary or secondary education program has a number of responsibilities toward qualified handicapped persons in its jurisdiction. These recipients must:

- Undertake annually to identify and locate all unserved handicapped children;
- Provide a “free appropriate public education” to each student with handicaps, regardless of the nature or severity of the handicap. This means providing regular or special education and related aids and services designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met;
- Ensure that each student with handicaps is educated with nonhandicapped students to the maximum extent appropriate to the needs of the handicapped person;
- Establish nondiscriminatory evaluation and placement procedures to avoid the inappropriate education that may result from the misclassification or misplacement of students;
- Establish procedural safeguards to enable parents and guardians to participate meaningfully in decisions regarding the evaluation and placement of their children; and
- Afford handicapped children an equal opportunity to participate in nonacademic and extracurricular services and activities.

A recipient that operates a preschool education or day care program, or an adult education program may not exclude qualified handicapped persons and must take into account their needs of qualified handicapped persons in determining the aid, benefits, or services to be provided under those programs and activities.

Students with hidden disabilities frequently are not properly diagnosed. For example, a student with an undiagnosed hearing impairment may be unable to understand much of what a teacher says; a student with a learning disability may be unable to process oral or written information routinely; or a student with an emotional problem may be unable to concentrate in a regular classroom setting. As a result, these students, regardless of their intelligence, will be unable to fully demonstrate their ability or attain educational benefits equal to that of nonhandicapped students. They may be perceived by teachers and fellow students as slow, lazy, or as discipline problems.

Whether a child is already in school or not, if his/her parents feel the child needs special education or related services, they should get in touch with the local superintendent of schools. For example, a parent who believes his or her child has a hearing impairment or is having difficulty understanding a teacher, may request to have the child evaluated so that the child may receive appropriate education. A child with behavior problems, or one who is doing poorly academically, may have an undiagnosed hidden disability. A parent has the right to request that the school determine whether the child is handicapped and whether special educational services are needed to provide the child an appropriate education. Once it is determined that a child needs special education or related services, the recipient school system must arrange to provide appropriate services.

THE RESPONSIBILITIES OF ED RECIPIENTS IN POSTSECONDARY EDUCATION

The ED Section 504 regulation defines a qualified individual with handicaps for postsecondary education programs as a person with a handicap who meets the academic and technical standards requisite for admission to, or participation in, the college’s education program or activity.

A college has no obligation to identify students with handicaps. In fact, Section 504 prohibits a postsecondary education recipient from making a predisclosure inquiry as to whether an applicant for admission is a handicapped person. However, a postsecondary institution is required to inform applicants and other interested parties of the availability of auxiliary aids, services, and academic adjustments, and the name of the person designated to coordinate the college’s efforts to carry out the requirements of Section 504.

After admission (including the period between admission and enrollment), the college may make confidential inquiries as to whether a person has a handicap for the purpose of determining whether certain academic adjustments or auxiliary aids or services may be needed.

Many students with hidden disabilities, seeking college degrees, were provided with special education services during their elementary and secondary school years. It is especially important for these students to understand that postsecondary institutions also have responsibilities to protect the rights of students with disabilities. In elementary and secondary school, their school district was responsible for identifying, evaluating, and providing individualized special education and related services to meet their needs. At the postsecondary level, however, there are some important differences. The key provisions of Section 504 at the postsecondary level are highlighted below.

At the postsecondary level it is the student’s responsibility to make his or her handicap condition known and to request academic adjustments. This should be done in a timely manner. A student may choose to make his or her needs known to the Section 504 Coordinator, to an appropriate dean, to a faculty advisor, or to each professor on an individual basis.

A student who requests academic adjustments or auxiliary aids because of a handicap condition may be requested by the institution to provide documentation of the handicap and the need for the services requested. This may be especially important to an institution attempting to understand the nature and extent of a hidden disability.

The requested documentation may include the results of medical, psychological, or emotional diagnostic tests, or other professional evaluations to verify the need for academic adjustments or auxiliary aids.

HOW CAN THE NEEDS OF STUDENTS WITH HIDDEN DISABILITIES BE ADDRESSED?

The following examples illustrate how schools can address the needs of their students with hidden disabilities.
A student with a long-term, debilitating medical problem such as cancer, kidney disease, or diabetes may be given special consideration to accommodate the student's needs. For example, a student with cancer may need a class schedule that allows for rest and recuperation following chemotherapy.

A student with a learning disability that affects the ability to demonstrate knowledge on a standardized test or in certain testing situations may require modified test arrangements, such as oral testing or different testing formats.

A student with a learning disability or impaired vision that affects the ability to take notes in class may need a notetaker or tape recorder.

A student with a chronic medical problem such as kidney or liver disease may have difficulty in walking distances or climbing stairs. Under Section 504, this student may require special parking space, sufficient time between classes, or other considerations, to conserve the student's energy for academic pursuits.

A student with diabetes, which adversely affects the body's ability to manufacture insulin, may need a class schedule that will accommodate the student's special needs.

An emotionally or mentally ill student may need an adjusted class schedule to allow time for regular counseling or therapy.

A student with epilepsy who has no control over seizures, and whose seizures are stimulated by stress or tension, may need accommodation for such stressful activities as lengthy academic testing or competitive endeavors in physical education.

A student with arthritis may have persistent pain, tenderness or swelling in one or more joints. A student experiencing arthritic pain may require a modified physical education program.

These are just a few examples of how the needs of students with hidden disabilities may be addressed. If you are a student (or a parent or guardian of a student) with a hidden disability, or represent an institution seeking to address the needs of such students, you may wish to seek further information from OCR.
ANNA MARIE PHILLIPS, Plaintiff,
v.
P.F. CHANG’S CHINA BISTRO, INC., Defendant.

Case No. 5:15-cv-00344-RMW

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

August 6, 2015

ORDERS ON: (1) MOTION TO STRIKE; (2) REQUESTS FOR JUDICIAL NOTICE; AND (3) MOTION TO DISMISS

RE: DKT. NOS. 10, 14

Before the court is defendant P.F. Chang's China Bistro Inc.'s ("P.F. Chang's") motion to dismiss the complaint of plaintiff Anna Marie Phillips for failure to state a claim. Dkt. No. 10 ("MTD"). In connection with the motion to dismiss, each party filed a request for judicial notice, and plaintiff filed a motion to strike. See Dkt. No. 10-2 ("Def. RJN"); Dkt. No. 13-1 ("Pl. RJN"); Dkt. No. 14 ("MTS"). For the reasons explained below, the court GRANTS IN PART and DENIES IN PART the requests for judicial notice, DENIES the motion to strike, and GRANTS the motion to dismiss with leave to amend.

I. BACKGROUND

Plaintiff alleges that P.F. Chang's discriminated against her, and other guests with celiac disease or a gluten allergy or intolerance, by charging $1.00 more for some gluten-free menu items than for comparable non-gluten-free menu items. Dkt. No. 1 ("Compl.") at ¶¶ 13-14. Plaintiff claims that P.F. Chang's adds the additional charge to gluten-free items despite the fact that the difference in cost it incurs between providing regular menu items and their gluten-free counterparts is negligible. Id. ¶ 16. P.F. Chang's allegedly accommodates customers’ other dietary requests at no additional charge. Plaintiff proposes to represent a class of “[a]ll persons who (1) have been diagnosed with celiac disease, or an intolerance or allergy to gluten, and (2) who purchased items from P.F. Chang's gluten-free menu in California within four years prior to the filing of the Complaint and continuing to the present.” Id. ¶ 18. Plaintiff alleges that she suffers from celiac disease and “must eat a diet of foods not containing gluten and that have not been exposed to gluten” and therefore must order from the gluten-free menu in order to eat at P.F. Chang's. Id. ¶ 9.


II. ANALYSIS

Before the court are plaintiff's motion to strike, two requests for judicial notice, and defendant's motion to dismiss. The court considers each motion in turn.
A. Motion to Strike

Plaintiff filed a motion to strike “immaterial, impertinent, or scandalous matter from Defendant’s motion to dismiss and/or memorandum of points and authorities in support thereof under Federal Rule of Civil Procedure 12(f). MTS at 1. Rule 12(f) only authorizes a motion to strike material from a pleading. A motion and supporting memorandum do not constitute pleadings. Fed. R. Civ. P. 7(a). Accordingly, the motion to strike is DENIED. The court does note that, for the most part, the information plaintiff seeks to strike is information that is not relevant to evaluating a motion to dismiss.

B. Requests for Judicial Notice

In general, a court may take judicial notice of matters that are either “generally known within the trial court’s territorial jurisdiction” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Matters which are appropriate subjects of judicial notice include “matters of public record.” Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

Defendant requests judicial notice of four documents: two menus from different P.F. Chang’s locations and two news articles. Def. RJN. Plaintiff opposes. Dkt. No. 13-3. As to the menus, defendant requests judicial notice because the complaint “necessarily relies” on the menus and the information contained therein, i.e., that defendant charges $1.00 more for gluten-free menu items. Plaintiff opposes because the menus that defendant submits “are print-outs from defendant’s website, not copies of the actual menus customers see when dining at defendant’s restaurants. These print-outs do not graphically notate vegetarian and spicy items using symbols of plants or flames.” Dkt. No. 13-3 at 4. However, plaintiff does not dispute the accuracy of the information contained in the menus. Id. The website versions of the menu do indicate through words, rather than symbols, which items are spicy or vegetarian. See, e.g., Dkt. No. 10-2 at 9. Accordingly, the court takes judicial notice of the contents of the menus. Furthermore, the court is entitled to rely on the menus in ruling on the motion to dismiss because the complaint “refers extensively to the [menus] or the [the menu] forms the basis of the plaintiff’s claim.” See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

As to the news articles, defendant requests that the court take judicial notice of the fact that defendant “is listed as one of the most allergy-friendly restaurant chains in the country for its size.” Dkt. No. 10-2 at 3. The contents of websites generally are not a proper subject of judicial notice. Furthermore, the court does not rely on the news articles or their contents in ruling on the pending motion to dismiss, and accordingly declines to take judicial notice. See City of Royal Oak Ret. Sys. v. Juniper Networks, Inc., 880 F. Supp. 2d 1045, 1059 (N.D. Cal. 2012).

Plaintiff requests judicial notice of six documents related to celiac sprue or celiac disease, a definition of celiac disease from the Merriam-Webster dictionary, and an information sheet from the Disability Rights Division of the U.S. Department of Justice entitled “Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies” (“Information Sheet”). Pl. RJN. Defendant does not oppose the court’s taking of judicial notice of these items, and, therefore, the court will consider the materials to the extent relevant to defendant’s motion to dismiss.
C. Motion to Dismiss

1. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Such a motion tests the legal sufficiency of a complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). In considering whether the complaint is sufficient, the court must accept as true all of the factual allegations contained in the complaint. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). However, the court need not accept as true “allegations that contradict matters properly subject to judicial notice or by exhibit” or “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” In re Gilead Secs. Secs. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). While a complaint need not contain detailed factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal, 556 U.S. at 678 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” Iqbal, 556 U.S. at 678 (internal citation omitted).

2. Claims under the Unruh Civil Rights Act

Plaintiff’s first claim is brought under California’s Unruh Civil Rights Act (Cal. Civil Code § 51 et seq.) and is based upon two theories: (1) intentional discrimination and (2) a violation of the Americans with Disabilities Act (“ADA”), which constitutes a violation of the Unruh Act. See Cal. Civ. Code § 51(f).

The Unruh Act provides that: “All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” Cal. Civ. Code § 51(b)(emphasis added). It further provides that a violation of the right of any individual under the ADA constitutes a violation of the Unruh Act. Cal. Civ. Code § 51(f).

a. Threshold Issue of Disability or Medical Condition

A threshold issue to plaintiff’s claims is whether plaintiff, or anyone who suffers from celiac disease or has been diagnosed with an intolerance or allergy to gluten, has a “disability” or “medical condition” as defined under the Unruh Act. Both terms are specifically defined in California Government Code § 12926, to which the Unruh Act refers.

The definition of a disability under the Unruh Act is:

Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
(B) Limits a major life activity. For purposes of this section:

(i) “Limits” shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) “Major life activities” shall be broadly construed and includes physical, mental, and social activities and working.

See Cal. Civ. Code § 51(e)(1); Cal. Gov’t Code § 12926(m).

Plaintiff alleges that she “must eat a diet of foods not containing gluten and that has not been exposed to gluten. Plaintiff will suffer adverse health consequences if she ingests gluten.” Compl. ¶ 9. Plaintiff further alleges that “[c]eliac disease affects a major life activity of eating and impacts the digestive system.” Id. ¶ 44. Plaintiff thus argues that she has sufficiently alleged that she is disabled. Dkt. No. 13 (“Opp.”) at 4.

Defendant disagrees with plaintiff’s contention that she is disabled and supports its position with cases applying the ADA’s definition of disability. The court “may look to the cases from the Americans with Disabilities Act when interpreting the [Unruh Act’s definition of a disability].” Hanson v. Lucky Stores, Inc., 74 Cal. App. 4th 215, 224 n.7 (1999). However, the Unruh Act covers conditions that merely “limit” a major life activity (Cal. Govt. Code §12926(m)), whereas the ADA requires that the condition “substantially” limit a major life activity. 42 U.S.C. 12102 (1)(a)(o)(emphasis added). In other words, the Unruh Act is more liberal in defining disability. See Colmenares v. Bramar Country Club, Inc., 29 Cal. 4th 1019, 1028 (2003).

Despite the distinction between the wording of Unruh Act and the ADA, the court has found no case directly dealing with the question of whether having celiac disease qualifies as a disability under either act. A number of cases do consider the extent to which the symptoms or consequences of a disease or allergy can be easily avoided in determining whether an alleged disability “limits a major life activity.” See, e.g., Land v. Baptist Medical Center, 164 F.3d 423, 425 (8th Cir. 1999) (peanut allergy was not a disability); Slade v. Hershey Co., 2011 WL 3159164 (M.D. Pa. Jul. 26, 2011) (same, where plaintiff was required to “strictly avoid ingestion, handling, and exposure to nuts or airborne nut particles”).

The only case involving dietary restrictions under the ADA plaintiff cites is Fraser v. Goodale, 342 F.3d 1032, 1045 (9th Cir. 2003). Fraser, which has been distinguished by many courts, involved a “brittle” diabetic employee, whose diabetes involved much more than dietary restrictions, and required her to “monitor carefully her day’s diet, activities, and other similar factors,” because, “[i]f she fails, she will find herself in a life-threatening situation.” Id. at 1035. The court further noted that:

Though we hold that eating is a major life activity, we do not thereby invite all those on a diet to bring claims of disability. Not every impediment to the copious and tasty diets our waistlines and hearts cannot endure is a substantial limitation of the major life activity of
eating. We must carefully separate those who have simple dietary restrictions from those who are truly disabled. At the same time, we must permit those who are disabled because of severe dietary restrictions to enjoy the protections of the ADA.

*Id.* at 1041. The limitations considered in *Fraser* were far more severe than what plaintiff has alleged here. More importantly, plaintiff does not explain how a major life activity is impacted since she can avoid the consequences of her alleged disability by avoiding the ingestion of gluten. Plaintiff’s pleading that she suffers a digestive problem that impacts the major life activity of eating is lacking facts that show that plaintiff’s major life activity of eating is sufficiently impacted to constitute a disability under either act.

Plaintiff also argues that she meets the definition of a “medical condition” under the Unruh Act. A medical condition is defined as “[a]ny health impairment related to or associated with a diagnosis of cancer or a record or history of cancer” or “genetic conditions.” Cal. Gov’t Code § 12926(i). Although plaintiff is not required to set forth all of her evidence supporting a claim of discrimination based on medical condition, she has failed to allege any facts showing that celiac disease meets the Unruh Act’s definition of a medical condition. Accordingly, plaintiff has not pled a condition that constitutes a “medical condition” under the Unruh Act.

b. Discrimination Based on Surcharge

Plaintiff alleges that “defendants practiced price discrimination against customers with celiac disease” and thereby denied plaintiff equal accommodations. Compl. ¶ 31. Plaintiff must show that defendant denied full and equal accommodations to patrons such as plaintiff who have celiac disease. Defendant contends that plaintiff cannot do so because P.F. Chang’s “gluten-free menu and its related pricing is offered to all guests on an equal basis—anyone who wants gluten-free items can order them” and pay the same as anyone else who orders them. Mot. at 9.

Plaintiff responds that P.F. Chang’s discriminate by imposing a surcharge for gluten-free menu items, which targets those having celiac disease, whereas other customers with dietary requests are accommodated. Thus, plaintiff’s theory of discrimination is a subtle one: P.F. Chang’s will alter its menu items for free for certain customers, but not for persons suffering from celiac disease; therefore, P.F. Chang’s does not provide “full and equal” accommodations or services to those suffering from celiac disease. Opp. at 8-9. Specifically, “[p]laintiff alleges that while dining at defendant’s restaurant she ordered items from defendant’s gluten-free menu because she has celiac disease and was forced to pay more for them.” *Id.* at 9 (citing Compl. at ¶¶ 5, 13-17). In contrast, “P.F. Chang’s does not impose a surcharge for making dietary accommodations to its regular menu items,” such as making items spicier or vegetarian. Compl. ¶ 4.

There is a dearth of authority discussing whether a restaurant, if requested, must accommodate a customer’s food allergy by serving a comparable substitute meal that has the offending ingredients omitted, let alone whether the restaurant must provide the substitute meal at the same price. The Ninth Circuit has explained in construing the ADA, which served as a model for the Unruh Act, that:

Title III [of the ADA] prohibits discrimination in the enjoyment of the “goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” The ordinary meaning of this language is that whatever goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment

Disability Law for Higher Education 1-35
of those goods and services. This language does not require provision of different goods or services, just nondiscriminatory enjoyment of those that are provided. Thus, a bookstore cannot discriminate against disabled people in granting access, but need not assure that the books are available in Braille as well as print. Likewise, an insurance office must be physically accessible to the disabled but need not provide insurance that treats the disabled equally with the non-disabled.

_Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc._, 603 F.3d 666, 671 (9th Cir. 2010) quoting _Weyer v. Twentieth Century Fox Films Corp._, 198 F.3d 1104, 1115 (9th Cir. 1999)(emphasis added); see also _Doe v. Mutual of Omaha Ins. Co._, 179 F.3d 557, 560 (7th Cir. 1999); _Ford v. Schering-Plough Corp._, 145 F.3d 601, 613 (3d Cir. 1998).

The Disability Rights Section of the Civil Rights Division of the U.S. Department of Justice issued an Information Sheet in January 2013 (Dkt. 13-1 at 66-67) following its settlement with Lesley University on a claim that the school’s mandatory meal plan violated the ADA by not providing for accommodation of students with celiac or other food allergies.\(^1\) Lesley University provided a mandatory meal program to a defined group of students. Because its meal plan was mandatory for all students living on campus, the ADA required that the University make reasonable modifications to the plan to accommodate students with celiac disease and other food allergies. However, the Information Sheet explained that Lesley’s obligation “is different than the ADA’s obligation for restaurants that serve the general public.” Information Sheet at 67 (emphasis added). A restaurant “does not have to make a fundamental alteration of its operations to accommodate a disability such as alter its menu or provide different foods to meet a patron’s particular dietary needs.” _Id._ (emphasis added). However, a restaurant may be required to omit or substitute certain ingredients upon request of a patron if the restaurant does this for other customers. _Id._

_Harkins Amusement_ and Information Sheet suggest that the critical question is whether defendant is providing a different product with its gluten-free meals or whether gluten-free meals are in essence the same meals as their corresponding non-gluten free meals. Plaintiff maintains that “[t]he gluten free items mirror their non-gluten free counterparts in name, content and ingredients, with only small changes to make them gluten free.” Compl. ¶ 3.

P.F. Chang’s argues that it does not discriminate against its celiac customers by charging them more because gluten-free meals and non-gluten-free meals are different items requiring different preparation and ingredients. All patrons who order gluten-free meals are charged the same amount whether or not they suffer from celiac disease. Therefore, P.F. Chang’s is in the position of the bookstore in _Harkins Amusement_: requiring P.F. Chang’s to provide gluten-free meals at the same price as regular meals is like requiring the bookstore to provide books in Braille at the same price as it charges for its non-Braille counterparts.

The Information Sheet also supports the conclusion that P.F. Chang’s does not have to supply gluten-free meals at no extra charge. Although plaintiff makes the conclusory allegation that P.F. Chang’s can provide gluten-free meals by making “only small changes [to regular meals] to make them gluten free,” this allegation appears to be contradicted by the fact that gluten free meals cannot contain wheat, rye, and barley which are commonly used in commercial soups and sauces. _See Dkt. 13-1, p. 59-60_. A restaurant that provides gluten-free meals has a fundamentally different operation than one that

\(^1\)As noted _supra_, the court takes judicial notice of the Information Sheet per plaintiff’s request.
Chapter 1—The Legal Perspective

Disability Law for Higher Education

1–37

does not. As stated in the Information Sheet “a restaurant is not required to alter its menu or provide different foods to meet particular dietary needs.” Dkt. No. 13-1 at 67.

Plaintiff’s allegation that P.F. Chang’s accommodates other dietary requests of patrons without charge, even if true, does not support a conclusion that those dietary requests involve alterations to menu items similar to what is required to provide gluten-free meals. For example, adjusting the degree of spiciness of a meal can be easily done. If plaintiff could establish that P.F. Chang’s voluntarily and at no charge provided gluten free meals to patrons who did not have celiac disease or an allergy to gluten but did not do so for those who suffer from the disease, that would constitute intentional discrimination. However, there is no indication that plaintiff could make such an allegation. Accordingly, plaintiff’s allegations fail to state a claim of discrimination under the Unruh Act.

c. Intentional Discrimination Under the Unruh Act

Even assuming that plaintiff has a disability and was discriminated against, plaintiff must also allege that P.F. Chang’s intentionally discriminated against persons with celiac disease. To prevail on a disability discrimination claim under the Unruh Civil Rights Act other than one that involves a violation of the ADA, a plaintiff must establish that (1) she was denied the full and equal accommodations, advantages, facilities, privileges, or services in a business establishment; (2) her disability was a motivating factor for this denial; (3) defendants denied plaintiff the full and equal accommodations, advantages, facilities, privileges, or services; and (4) defendants’ wrongful conduct caused plaintiff to suffer injury, damage, loss or harm. Wilkins-Jones v. Cnty. of Alameda, 859 F. Supp. 2d 1039, 1048 (N.D. Cal. 2012). Intentional discrimination is required for an independent violation of the Unruh Act but not for a violation of the Unruh Act that is based upon a violation of the ADA. See Munson v. Del Taco, Inc., 46 Cal. 4th 661, 665 (2009). “[A] plaintiff seeking to establish a case under the Unruh Act must plead and prove intentional discrimination in public accommodations in violation of the terms of the Act.” Hankins v. El Torito Rests. Trsts, 63 Cal. App. 4th, 510, 517-18. “A disparate impact analysis or test does not apply to Unruh Act claims.” Koebke v. Bernardo Heights Country Club, 36 Cal. 4th 824, 854 (2005). Evidence of disparate impact, however, may be probative of intentional discrimination in some cases. Id.

Here, plaintiff does not adequately allege any intentional discrimination. Although the complaint is limited to the allegation that “[d]efendants’ practice of surcharging gluten-free menu items purchased by consumers with celiac disease (or gluten sensitivities) constitutes price discrimination in violation of the Unruh Act,” Compl. ¶ 32, in her opposition plaintiff asks the court to make the “reasonable inference” that P.F. Chang’s “expressly created the gluten-free menu—including the elevated prices—specifically to attract customers with celiac disease to its restaurants and pay a premium for its gluten-free food.” Opp. at 11. To the extent that the court accepts the inference that P.F. Chang’s marketed its gluten-free menu to persons with celiac disease, P.F. Chang’s did not discriminate against its customers by charging them an improper premium for the food, as explained above.

Plaintiff’s argument suggests that advertising products to persons with disabilities evidences an intent to discriminate against those persons. Plaintiff cites no law and provides no analysis in support of such a claim. Accordingly, plaintiff has not pled sufficient facts to support a plausible inference that P.F. Chang’s intended to discriminate against patrons with celiac disease.
d. Unruh Act Violation Based on an ADA Violation

As a separate theory for a violation of the Unruh Act, plaintiff alleges a violation of the ADA. A violation of the ADA constitutes a violation of the Unruh Act and does not require a showing of intentional discrimination. Cal. Civ. Code § 51(f); Munson v. Del Taco, Inc., 46 Cal.4th 661, 692 (2009). A plaintiff states a cause of action for violation of the ADA where she alleges that (1) she is disabled, (2) defendant is a private entity that owns, leases, or operates a place of public accommodation, and (3) she was denied public accommodation by the defendant because of her disability. See Dunlap v. Association of Bay Area Governments, 996 F. Supp. 962, 965 (N.D. Cal. 1998). As discussed above, plaintiff’s complaint is deficient in its pleading of facts showing that plaintiff suffers from a disability, or assuming she has a disability, that she was denied accommodation because P.F. Chang’s failed to provide her with a gluten-free meal at the same price as a comparable regular meal. Accordingly, the court GRANTS the motion to dismiss the Unruh Act claim based on an ADA violation.

3. Disabled Persons Act

Plaintiff’s second claim is for a violation of California’s Disabled Persons Act, California Civil Code § 54 et seq. The DPA guarantees “[i]ndividuals with disabilities . . . full and equal access, as other members of the general public, to accommodations, advantages, facilities, . . . privileges of all . . . hotels, lodging places, places of public accommodation, amusement, resort, and other places to which the general public is invited[.]” Id. § 54.1(a)(1). A violation of the ADA also constitutes a violation of the DPA. Id. § 54.1(d). Plaintiff’s only DPA theory is that the surcharge for gluten-free items constitutes a violation of the ADA. Compl. ¶ 39-48. Because the court finds that plaintiff has not pled an ADA violation, she has also not pled a DPA claim. Accordingly, the court GRANTS the motion to dismiss the DPA claim.

4. Unfair Business Practices

Plaintiff’s third claim is for a violation of California’s Unfair Competition Law. See Cal. Bus. & Prof. Code § 17200 et seq. The UCL prohibits “any unlawful, unfair or fraudulent business act or practice.” Id. Under the “unfair” prong, plaintiff alleges that “defendants discriminated against customers with celiac disease and gluten sensitivities by surcharging them for purchasing gluten-free items.” Compl. ¶ 55. The UCL prohibits unfair business practices, which includes those practices that are “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.” Drum v. San Fernando Valley Bar Ass’n, 182 Cal. App. 4th 247, 257 (2010).

Plaintiff argues that P.F. Chang’s conduct is “equivalent to charging a handicapped person for using a building ramp” and that “substantial injury exists not only because consumers with celiac disease have to pay more money but precisely because they have to pay more money for the same thing.” Opp. at 21.

First, to the extent that plaintiff argues that the gluten-free menu items “are the same thing” as the non-gluten-free items, her complaint belies that assertion. Plaintiff specifically alleges that gluten-free items must not “have been exposed to gluten.” Compl. ¶ 2; see also Opp. at 12 n.20. Thus, according to plaintiff’s own allegations, even if two menu items contain the same naturally gluten-free ingredients, they may not be prepared in the same way. Accordingly, defendant is not charging its customers two different prices for the same goods.
Second, P.F. Chang’s does not charge a different price based on disability. P.F. Chang’s charges a different price for different menu items. That is not the equivalent of discrimination, even if plaintiff’s alleged disability forces her to make a more expensive selection. The cases plaintiff cites in support of her unfairness claim are readily distinguishable. In Evenchik v. Avis Rent A Car System, LLC, 2012 WL 4111382 (S.D. Cal.) the court found that a policy providing discounted rates to patrons of a specific sexual orientation stated a claim for violation of the UCL. Here, defendant is not providing discounted rates to any group, or imposing a surcharge on any group, for the same product—defendant is charging different prices for different items. In Dare v. California, 191 F. 1167 (9th Cir. 1999), the court held that surcharging the disabled for parking placards violated the ADA. Here, P.F. Chang’s charges the same amount to all patrons for a gluten free meal and a different price for a regular meal. Defendant is not charging different rates based on disability or membership in a specific group, but rather based on menu choices. That is not unlawful discrimination or an unfair business practice.

Accordingly, because plaintiff has not alleged any “immoral, unethical, oppressive, unscrupulous or substantially injurious” practice, the court GRANTS the motion to dismiss the UCL unfairness claim. See Drum v. San Fernando Valley Bar Assn., 182 Cal. App. 4th 247, 257 (2010).

5. Unlawful Business Practices

Plaintiff’s fourth claim is for a violation of California’s Unfair Competition Law, California Business & Professions Code § 17200 et seq. Under the “unlawful” prong of the UCL, plaintiff alleges that defendant’s surcharge was unlawful because it violated the Unruh Act or the Disabled Persons Act. Compl. ¶ 62. As explained above, plaintiff has not pleaded a claim for violation of the Unruh Act or Disabled Persons Act. The court therefore GRANTS the motion to dismiss the UCL unlawful claim.

6. Restitution Based on Quasi-Contract/Unjust Enrichment

Plaintiff’s fifth claim is for restitution based on quasi-contract or unjust enrichment. Plaintiff alleges that “[d]efendants’ [sic] took additional monies from plaintiff and members of the putative class for gluten-free menu items that were substantially identical to non-gluten free menu items except for the presence of gluten based solely on the fact that plaintiff and the putative class cannot consume foods with gluten and had no choice but to pay a surcharge for gluten-free foods.” Compl. ¶ 65.

The elements of a claim for unjust enrichment or restitution based on quasi-contract are not well settled in California. See, e.g., Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 762 (9th Cir. 2015) (“[U]njust enrichment and restitution are not irrelevant in California law. Rather, they describe the theory underlying a claim that a defendant has been unjustly conferred a benefit ‘through mistake, fraud, coercion, or request.’”). Nonetheless, “it is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter.” See Lance Camper Mfg. Corp. v. Republic Indem. Co., 44 Cal. App. 4th 194, 203 (1996).

P.F. Chang’s argues that plaintiff cannot recover under an unjust enrichment theory because plaintiff and defendant entered into a contract regarding the meal. Plaintiff does plead that “Plaintiff has visited P.F. Chang’s in Santa Clara County during the past four years before the filing of this action. She ordered items from P.F. Chang’s gluten free menu. Plaintiff paid a $1 surcharge for each item she purchased on the gluten free menu on each of her visits.” Compl. ¶ 9. Thus, P.F. Chang’s concludes that a valid contract existed between the parties over the meal, and plaintiff cannot allege an unjust
Chapter 1—The Legal Perspective


First, plaintiff has not identified any basis for finding that a contract between P.F. Chang’s and its customer was “procured by fraud or is unenforceable or ineffective for some reason.” *Id.* Thus, to the extent that P.F. Chang’s and plaintiff entered into a contract, plaintiff cannot bring an unjust enrichment claim.

Second, even if there were no contract, plaintiff has not sufficiently alleged that defendant unjustly retained a benefit from plaintiff. As explained above, plaintiff has pled, and repeatedly argued, that gluten-free foods are materially different from other foods, either in ingredients, method of preparation, or both. It is not “unjust” for P.F. Chang’s to charge a different price for different products. Accordingly, the court GRANTS the motion to dismiss the unjust enrichment claim.

7. Leave to Amend

Since all of plaintiff’s claims are being dismissed, the court must decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend “should be freely granted when justice so requires,” bearing in mind that “the underlying purpose of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks omitted). Nonetheless, a court “may exercise its discretion to deny leave to amend due to ‘undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . , [and] futility of amendment.’” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892-93 (9th Cir. 2010) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)) (alterations in original).

Here, although the court has reservations about whether plaintiff can state a viable claim, the plaintiff should be given an opportunity to do so. Therefore, plaintiff is given until August 28, 2015 to file an amended complaint.

III. ORDER

For the reasons explained above, the court GRANTS IN PART AND DENIES IN PART defendant’s request for judicial notice; GRANTS AS UNOPPOSED plaintiff’s request for judicial notice; DENIES the motion to strike; and GRANTS the motion to dismiss with leave until August 28, 2015 to file an amended complaint.

**IT IS SO ORDERED.**

Dated: August 6, 2015

/\s/  
Ronald M. Whyte  
United States District Judge
SETTLEMENT AGREEMENT
BETWEEN
THE UNITED STATES OF AMERICA
AND
LESLEY UNIVERSITY
DJ 202-36-231

Background

In or around October 2009, the United States Department of Justice (“United States”) received a complaint alleging that Lesley University (“Lesley” or the “University”) violated Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189 (“ADA”) by failing to make necessary reasonable modifications in policies, practices, and procedures to permit students with celiac disease and/or food allergies (collectively “food allergies”) to fully and equally enjoy the privileges, advantages, and accommodations of its food service and meal plan system. The United States initiated an investigation of these claims and the University has cooperated. The United States alleges that the University’s policies and practices concerning students with food allergies did not comply with Title III of the ADA. The University maintains that it has taken and will continue to take positive, good faith steps to make reasonable modifications to its food service policies, practices, and procedures and to work with students on a case-by-case basis to address the needs of individual students with food allergies.

In consideration of the terms set out in this document, the University and the United States (the “Parties”) agree to enter voluntarily into this Settlement Agreement (the “Agreement”). Nothing herein shall be deemed to be an admission or acknowledgment by the University that it has violated the ADA, its accompanying regulations, or any other federal or state law.

Lesley University is a private nonprofit university with approximately 8,000 students, located in Cambridge, Massachusetts, and is a public accommodation within the meaning of 42 U.S.C. § 12181(7)(J) and 28 C.F.R. § 36.104. As a public accommodation, Lesley is subject to the nondiscrimination requirements of Title III of the ADA, 42 U.S.C. § 12182, and its implementing regulation. Title III prohibits a private university from discriminating against any individual on the basis of disability in the full and equal enjoyment of the university’s goods, services, facilities, privileges, advantages, or accommodations. 42 U.S.C. § 12182 and 28 C.F.R. §§ 36.201, 36.202. As a public accommodation, Lesley acknowledges that it must also make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations. 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302

Food allergies may constitute a disability under the ADA, 42 U.S.C. § 12102. Individuals with food allergies may have an autoimmune response to certain foods, the symptoms of which may include difficulty swallowing and breathing, asthma, and anaphylaxis. For example, celiac disease is an autoimmune disorder that affects the major life activity of eating and the major bodily functions of the immune, digestive, bowel, and neurological systems. Celiac disease is
triggered by consumption of the protein gluten (found in foods containing wheat, barley, or rye), which can cause permanent damage to the surface of the small intestines and an inability to absorb certain nutrients, leading to vitamin deficiencies that deprive the brain, peripheral nervous system, bones, liver and other organs of vital nourishment. See, e.g., Celiac Disease Definition, U.S. Nat’l Library of Medicine, Nat’l Inst. of Health, A.D.A.M. Medical Encyclopedia (Jan. 20, 2010), available at http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001280/. The Parties agree that it is in the Parties’ best interests, and the United States believes that it is in the public interest, to resolve this dispute amicably and without litigation. The Parties have therefore voluntarily entered into this Agreement, agreeing as follows:

Resolution Terms

1. Compliance with the ADA

The University, its officers, employees, successors, and assigns, agree to comply with Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181-12189, and 42 U.S.C. § 12203, and the implementing regulation, 28 C.F.R. pt. 36, including, but not limited to, the following:

(a) The University acknowledges that it has a continuing obligation, and it is the University’s policy, to make reasonable modifications in policies, practices, and procedures when the modifications are necessary to afford the University’s goods or services to students and prospective students (collectively “students”) with disabilities, 42 U.S.C. § 12182(b)(2)(A)(ii) and 28 C.F.R. § 36.302; and

(b) The University acknowledges that is has a continuing obligation, and it is the University’s policy, to refrain from engaging in retaliation, coercion, interference, intimidation, or any other action prohibited by 42 U.S.C. § 12203 and 28 C.F.R. § 36.206.

2. Disability Services for Students Policy

As of the effective date of this Agreement, the University agrees to amend its Disability Services for Students Policy (the “Amended Policy”). A copy of the Amended Policy is attached as Exhibit A. In addition,

(a) Within thirty (30) business days¹ of the effective date of this Agreement, the University agrees to provide a link on the first page of its internal website service to the Disability Services Main Page and will post the Amended Policy on the Disability Services Main Page at www.lesley.edu/services/disability.

(b) The University also agrees to separately distribute copies of the Amended Policy to employees and contractors in the Admissions, Residence Life, and Disability Services Offices who have contact with students and their families. Thereafter, the University agrees to provide a copy of the Amended Policy to all newly hired employees in the Admissions, Residence Life, and Disability Services Offices.

¹ Business days refers to days in which the University is in session.
who have contact with students and their families, within seven (7) business days of their hire date.

(c) Within thirty (30) business days of the effective date of this Agreement, the University will physically post the Amended Policy on a bulletin board in the Disability Services office and distribute the Amended Policy to all undergraduate and graduate students via e-mail. Beginning in academic year 2013-2014, the University will insert a summary of the Amended Policy, with a web address link to the full Amended Policy, in the University’s undergraduate and graduate Student Handbooks.

(d) Within forty-five (45) business days of the effective date of this Agreement, the University agrees to provide the United States with proof of the adoption of the Amended Policy and the posting of the Amended Policy on its website(s), and will provide the United States with a photograph of the posting of the Amended Policy in the Disability Services office.

(e) Within sixty (60) business days of the effective date of this Agreement, the University will amend its contract with the University’s food service provider (the “Food Service Provider”) to formalize its current practice of requiring the Food Service Provider to comply with the University’s policies and procedures on reasonable modifications. In addition, the University agrees to amend its contract with the Food Service Provider to formally include a requirement that each of the Food Service Provider’s staff be provided with the educational training program described in Paragraph 6 of this Agreement. The University agrees to enforce the Food Service Provider’s compliance with the contractual provisions referenced in this Paragraph.

3. Disability Services

(a) The University will obtain and retain a record of identifying information from persons who seek information about food-related disability services at the University throughout the term of this Agreement. Identifying information includes, but is not limited to, the following: name; address; telephone numbers (home, work, mobile); best number and best time to call; and email address.

(b) The University will advise students with food allergies (or others acting on a student’s behalf) who request reasonable modifications to contact Disability Services. As set forth in the University’s Procedures for Requesting Modifications (which is referenced in the Amended Policy), upon receiving a request or inquiry concerning reasonable modifications, Disability Services will meet with the student individually and work with the student cooperatively to fashion an individualized plan for the student. This is intended to be an interactive process in which the student and the University work together to formulate the best modification plan available for the student. Depending upon the individual circumstances, the University may allow students to be exempt from the mandatory meal plan as a possible form of a reasonable modification.
The University will ensure that any modification plan is provided in the most integrated setting appropriate to the needs of the individual with the disability. 42 U.S.C. § 12182(b)(1)(B) and 28 C.F.R. § 36.203. After engaging in this interactive process, the University will provide students with food allergies with written disability modification letters detailing the specific modification plan tailored to that student. The University recognizes that the modification process may be an ongoing one that requires additional changes throughout the student’s enrollment at the University and will work with students to update their food allergy modification plans, as necessary.

(c) Notwithstanding the process set forth in Paragraph 3(b), the University agrees to provide reasonable modifications to students with food allergies during the interactive process described above. After the student and the University engage in the interactive process, even if a student has not executed a written disability modification letter, the University agrees to provide modifications if the modification is reasonable and does not fundamentally alter the nature of the University's goods, services, facilities, privileges, advantages, or accommodations.

4. Dining Services

(a) Upon the effective date of this Agreement, the University agrees to post prominent notices concerning food allergies at each of its five student dining halls or food eatery facilities; the notices will be printed in a bold font no smaller than 40 points and will state the following, or something substantially similar to the following: “Food-Allergic Individuals: Be aware that we handle and prepare egg, milk, wheat, shellfish, fish, soy, peanut, tree nut products, and other potential allergens in our cafes and kitchens. Before placing your order, please inform your server if you or a person in your party has a food allergy. Please direct questions to the manager.”

(b) The University agrees to display the notice located at http://www.foodallergy.org/files/FoodAllergiesEnglish 2009 HR.pdf in a prominent location in the cooking areas and/or food preparation areas in each dining hall or food eatery.

(c) The University agrees that its Food Service Provider will continue to provide meals made without specific allergens to students with food allergies who have food allergy modification plans under the process described in Paragraph 3. The Food Service Provider will take reasonable steps to prevent the food from containing the specific allergens at issue for the student, to the extent possible. The food will also be nutritionally comparable to the food choices offered to other students, to the extent reasonably possible. The University’s dining hall food lines will continue to offer and identify a variety of food options made without certain allergens (e.g., wheat, dairy, nuts), and the Food Service Staff will take reasonable steps to avoid cross-contamination. To further minimize the risk of cross-contamination from meals obtained in the general dining hall food lines, the
University may also offer students with food allergies the option to pre-order their meals, consistent with the procedures outlined in Paragraph 4(d). All students with food allergies who have registered with Disability Services and engaged in the interactive process will have the choice to pre-order their meals or obtain their meals from the food lines.

(d) **Pre-Order Option:** The University agrees to continue to offer a Pre-Order Option for students with food allergies to pre-order their daily lunch and dinner in accordance with the process defined in this paragraph.

(i) As of the date of this Agreement, the Pre-Order Option will allow students to review the online daily dining hall and food eatery menus and to e-mail their requested meal choices to the University’s Food Service Manager, the Food Service Executive Chef, or the Dining Hall Manager.

(ii) The Pre-Order Option will allow students to pre-order their meals if they give at least twenty-four (24) hours advanced notice before the meal, to ensure that the Food Service Provider has or can obtain the necessary ingredients to prepare the specific meal request without the allergen(s) at issue. The Food Service Provider will make reasonable efforts to fulfill all reasonable meal requests, even if the requests are not made in a timely manner, but cannot guarantee that it will have the necessary ingredients on hand to prepare the specific meal request to be made without specific allergens if it does not have at least twenty-four (24) hours advanced notice.

(iii) If the Food Service Provider is unable to fulfill a student’s particular meal request because the request is not made in a timely manner, the Food Service Provider will make reasonable efforts to provide alternative meal options made without specific allergens for the student.

(iv) The Food Service Provider will prepare all meals made without specific allergens, including pre-ordered meals, in a designated area within the University’s cooking and food preparation areas in order to avoid cross-contamination.

(v) The Food Service Provider will provide these meals in a dedicated space at the White Hall Dining Hall, referenced in Paragraph 4(f), or transport the meals to the University’s other dining halls or food eateries, as referenced in Paragraph 4(e). Subject to review and concurrence by counsel for the United States, the University agrees to continually review and revise this process, as necessary, for the term of this Agreement.

(e) The University understands that students may be at or near different parts of campus during lunch and dinner and might prefer to have their meals delivered to these locations. Accordingly, when students order meals via the Pre-Order Option described in Paragraph 4(d), students may request that the University deliver their meals to the University’s other dining hall and food eatery facilities. Students should provide the Food Service Provider with reasonable twenty-four
(24) hours advanced notice to allow the Food Service Provider to prepare and deliver the meal to the designated location. The University will make reasonable efforts to deliver the meals to the designated location after receiving 24 hours advanced notice, but in certain circumstances may be unable to deliver meals in a timely manner due to inclement weather or other transportation impediments. Due to the limited size and capacity of the University’s dining hall kitchens, the University will prepare such meals at the White Hall kitchen facility. These meals will then be delivered to the other University kitchens, where they are kept separate to avoid cross-contamination.

(f) The University agrees to continue to provide students with food allergies a separate area to store and prepare food (the “dedicated area”) in the manner set forth below. As of the date of this Agreement, the University will continue to dedicate a restricted room adjacent to the White Hall dining room and accessible to the University’s Student Center. The University will provide identified students with food allergies, who have engaged in the interactive process as set forth in Paragraph 3(b), with card access to the dedicated area. The University will restrict access to the dedicated area to the identified students with food allergies and ensure that these students can access the dedicated area at any time during the months in which the University is in session. While neither the University nor the Food Service Provider can fully ensure that students with access to the dedicated area do not cross-contaminate the dedicated area, the University will take reasonable steps to avoid cross-contamination in the dedicated area and will develop and maintain a process for educating students with food allergies who have access to the dedicated area on how to avoid cross-contaminating the dedicated area. The University will maintain the dedicated area and ensure that it contains the following:

(i) A sink and counter area, dish rack, and other kitchen supplies, (i.e., paper towels, dish soap, sponges, etc.), refreshed as necessary;

(ii) A refrigerator and freezer for perishable items;

(iii) Cabinet space for non-perishable items;

(iv) Separate appliances, including a microwave and toaster; and

(v) A food warmer to keep pre-ordered meals warm.

(g) The University agrees to continue to allow students with access to the dedicated area to submit their individualized and specific “shopping lists” of requested food made without allergens to the Food Service Provider. The University will ensure that the Food Service Provider purchases the requested items in a timely manner (approximately once or twice per week). The University also agrees to ensure that the Food Service Provider independently monitors the food supply in the dedicated area and replenishes the food supply as necessary.
(h) The University recognizes that students with food allergies may wish to purchase food outside of the University (at local restaurants, grocery stores, and other establishments), through the use of their student CashLynx account. The University agrees to make reasonable efforts to retain and obtain vendors that offer food made without allergens to participate in the CashLynx card program. As of the date of this Agreement, there are multiple vendors that provide allergen-free food options and accept CashLynx card payments.

(i) Within thirty (30) business days of the effective date of this Agreement, the University will provide a separate link on the first page of its internal website to the Dining Service Main Page (the “DS Main Page”). The DS Main Page will advise students that the University will provide food options for students with food allergies in all Lesley University campus dining halls and food eateries. The DS Main Page will also provide a link to the Food Service Providers’ online menus of the dining halls and food eateries and include updated weekly meal options for students with food allergies. The DS Main Page will also provide a link to “Information Regarding Food Allergies” (or its equivalent). The link regarding food allergies will provide:

(i) Contact information for the dining services staff person(s) designated as the contact person(s) pursuant to Paragraph 4(d) above;

(ii) A description of and link to the Amended Policy; and

(iii) A description of and link to the Complaint Resolution Procedure described in Paragraph 5 below.

5. **Modification Appeal Process**

The University recognizes that despite its good faith and reasonable efforts to make reasonable modifications of its policies, practices, and procedures for students with food allergies, students may ultimately disagree with the University’s proposed modifications. If a student with food allergies disagrees with the determinations made by Disability Services after the student has engaged in the interactive process, the student may request a review by the Executive Director of Academic Support Services (Lesley’s ADA/Section 504 Coordinator), consistent with the Amended Policy referenced in Paragraph 2. Appeals of this review are heard by the Dean of Student Life and Academic Achievement.

6. **Complaint Resolution Procedure**

In general, students may also file complaints of discrimination pursuant to the University’s Office of Equal Opportunity and Inclusion Complaint Resolution Procedure (the “Complaint Resolution Procedure”), referenced in the Amended Policy.

7. **Educational Program**

(a) Food Service Managers
(i) Within thirty (30) business days of the effective date of this Agreement, the University will require that the Food Service Provider train its managers and employees on how to comply with the terms of this Agreement.

(ii) Within sixty (60) business days of the effective date of this Agreement, the Food Service Managers will attend a “ServSafe” food handling and food service management class offered by the National Restaurant Association Educational Foundation. The University will provide the United States with proof of completion of the course within ten (10) business days of training.

(iii) Within sixty (60) business days of the effective date of this Agreement, and at least annually thereafter, the University will ensure that the Food Service Provider’s regional nutritionist will, as it has done in the past, visit the University to discuss the nutritional needs of students with food allergies and to reevaluate the Food Service Provider’s policies and procedures. In addition, the University will ensure that the Food Service Managers receive annual training concerning the nutritional needs of students with food allergies.

(b) Food Service Staff

(i) Within thirty (30) business days of the effective date of this Agreement, the University will require that the Food Service staff is trained regarding the terms of this Agreement.

(ii) For the duration of this Agreement, to ensure that the Food Service Provider’s staff complies with the terms of this Agreement, the University will require the Food Service Provider to continue to provide educational training to all food service staff a minimum of twice per year, including at least once before the fall and spring semesters begin. This mandatory training will include the following:

1. Instruction on celiac disease and food allergies, including food products that contain allergens, cross-contamination, and proper food storage and preparation;

2. Instruction on how to handle inquiries regarding food allergies, including questions regarding ingredients and sub-ingredients in the meals;

3. Instruction that the on-site Food Service Manager should promptly notify Disability Services when a student seeks modifications to, or an exemption from, the University’s mandatory meal plan; and

4. A question and answer session to review each of the foregoing areas.
(iii) In addition to the Food Service Provider’s formal, twice yearly mandatory allergy awareness training, the University will require the Food Service Managers to conduct monthly staff meetings that address allergy awareness and food safety practices.

(c) Lesley University Employees and Contractors

(i) Within ninety (90) business days after the effective date of this Agreement and thereafter at least once per year, the University agrees to provide an educational training program regarding its obligations under Title III of the ADA to all employees and contractors in Residence Life and Disability Services who have contact with students and their families. This training can be conducted by the University via a commercially available program.

(ii) Within seven (7) business days of the completion of the training referenced in Paragraph 6(c), the University will provide the United States with proof that this training has occurred, including a dated copy of the agenda and a dated sign-in sheet with the names and titles of the employees and contract employees who received the training.

8. Reporting and Document Retention

(a) For the duration of this Agreement, the University agrees to preserve all records related to this Agreement. The University also agrees that upon ten (10) business days’ written notice, representatives of the United States are permitted to inspect and copy any of the University’s records related to this matter or inspect any premises under the University’s control bearing on compliance with this Agreement at any and all reasonable times, provided, however, that the United States will endeavor to minimize any inconvenience to the University from such inspections.

(b) Within sixty (60) business days after the effective date of this Agreement and thereafter forty-five (45) days prior to each anniversary of the effective date of this Agreement, the University agrees to submit a written report to the United States describing all actions taken relating to its compliance with this Agreement. The University’s report will include appropriate documentation, including any relating to the Policies referenced in this Agreement and summaries of all Office of Equal Opportunity and Inclusion complaints and investigatory reports relating to food allergies.

9. Monetary Payment

(a) Pursuant to 42 U.S.C. § 12188(b)(2), the University agrees to pay the sum of fifty thousand dollars ($50,000) to the individuals previously identified by the United States. The University agrees to make such payments to the previously identified individuals in an amount and manner agreed to by the Parties. The United States will deliver such payments when the identified individual has signed a Waiver

(a) Failure by the United States to enforce this Agreement with respect to any of its provisions or deadlines shall not be construed as a waiver of the right of the United States to enforce other deadlines and provisions of this Agreement.

(b) All materials sent to the United States pursuant to this Agreement shall be sent either by .pdf attachment or by overnight, prepaid delivery, to Alyse Bass, Senior Trial Attorney, and/or William Lynch, Trial Attorney, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20005, Attn: DJ #202-36-231.

(c) The effective date of this Agreement is the date of the last signature to this Agreement.

(d) This Agreement, including Exhibit A, constitutes the entire Agreement between the Parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or agents of either party, that is not contained in this written Agreement will be enforceable under its provisions.

(e) This Agreement is limited to resolving claims under the ADA related to the University’s obligations to make reasonable modifications to its meal plan and services for students with food allergies, and does not purport to remedy any other existing or potential violations of the ADA or any other federal, state, or local law. The University acknowledges that this Agreement does not limit the University’s continuing responsibility to comply with all aspects of the ADA and all other federal laws.

(f) The Parties agree that, as of the effective date of this Agreement, litigation is not “reasonably foreseeable” concerning the matters described in the introductory paragraph. To the extent that either party previously implemented a litigation hold to preserve documents, electronically stored information (ESI), or things related to the matters described in the introductory paragraph, the party is no longer required to maintain such a litigation hold. Nothing in this Paragraph relieves either party of any other obligations imposed by this Agreement.

(g) A copy of this Agreement and any information contained in it, including the Amended Policy, will be made available to any person by the University or the United States, upon request.

(h) This Agreement shall be binding on the University and its successors in interest, assigns, agents, employees, and contractors. The University has a duty to notify any and all successors in interest of this Agreement and the duties and responsibilities it imposes on the University. In the event the University seeks to
transfer or assign all or part of its obligations under its meal program, and the successor or assignee intends to carry on some or all of the University’s responsibilities, the University shall, as a condition of the transfer or assignment, obtain the written accession of the successor or assignee to any obligations remaining under this Agreement for the remaining term of this Agreement.

(i) The University and the United States recognize that the process and procedures necessary to reasonably modify the University’s meal plan and services for students with food allergies are not static, and that these issues in particular are constantly evolving. Accordingly, the University agrees to continue to evaluate the policies and procedures set forth herein, and to modify and revise such policies as necessary to remain in compliance with Title III of the ADA. Pursuant to Paragraph 7 above, the University will notify the United States of any substantive changes to the policies and procedures set forth in this Agreement.

11. **Duration of Agreement**

(a) This Agreement will remain in effect for three (3) years from its effective date.

(b) The United States may review compliance with this Agreement at any time. If the United States believes that the University has failed to comply in a timely manner with any requirement of this Agreement, the United States will so notify the University in writing and attempt to resolve the issue in good faith. If the United States is unable to reach a satisfactory resolution of the issue within sixty (60) days, after providing notice to the University and allowing the University an opportunity to cure, the United States may institute a civil action in federal district court to enforce the terms of this Agreement, or take other action to enforce Title III of the ADA.
12. **Time for Performance**

Any time limits for performance imposed by this Agreement may be extended by the mutual written consent of the United States and the University.

Executed this 20th day of December, 2012.

**For the United States of America:**

Carmen M. Ortiz  
United States Attorney  
Eve A. Piemonte Stacey  
Assistant United States Attorney  
United States Attorney’s Office  
One Courthouse Way, Suite 9200  
Boston, MA 02210

Thomas E. Perez  
Assistant Attorney General  
Eve L. Hill  
Senior Counselor to the Assistant Attorney General  
Civil Rights Division  
Gregory B. Friel, Acting Chief  
Kathleen P. Wolfe, Special Litigation Counsel  
Jana L. Erickson, Deputy Chief

**Alyse Bass**  
Alyse S. Bass, Senior Trial Attorney  
William F. Lynch, Trial Attorney  
Disability Rights Section  
Civil Rights Division  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W. - NYA  
Washington, D.C. 20530

**For Lesley University:**

Shirin Philipp, Esq.  
General Counsel  
Lesley University  
29 Everett Street  
Cambridge, MA 02138
Chapter 2

The Educational Institution Perspective

Kaela Parks
Director of Disability Services
Portland Community College
Portland, Oregon

Contents

Presentation Slides (with Graphics) .................................................. 2–1
Presentation Slides (Text) ................................................................. 2–15
Educause IT Accessibility Risk Statements and Evidence ....................... 2–23
Disability Law for Higher Education
Oregon State Bar Seminar – March 11, 2016

Why accommodation is necessary but not sufficient
- an institutional perspective -
Kaela Parks, Director of Disability Services Portland Community College

Session Overview

• Changing notions of disability

• Recognizing accommodation as necessary but not sufficient

• Acknowledging International standards

• Implementing institutional policy, support, and evaluation
A thought experiment...

“Imagine if you will, a university where women or students of color are required to self-identify, provide documentation, and be made eligible to obtain textbooks, take exams, utilize technology, or participate in field trips.

We would consider such an institution to be absurd and discriminatory in their attitudes and actions. So why, given the knowledge and technology we have available to us today, do we continue to require similar actions from disabled students?”


How hard does this have to be?

- Thought experiment – a quote from the Journal on Postsecondary Education and Technology
- Is it acceptable to ask students to navigate complex maze-like processes?
- Would we tolerate this treatment of other groups?

“This work” by vpickering is licensed under CC BY-NC-ND 2.0
Disability resource professionals set the tone for how a campus frames and responds to disability. Refocus was created as a tool for examining the role the resource office can play in challenging stereotypes and creating truly equitable environments. You are invited to explore core values that anchor us to the goal of minimizing the need for accommodations and to examine practices that will influence the campus narrative around disability.

Council for the Advancement of Standards

- Disability Resources and Services (formerly Disability Support Services)
- Major revision to mission – evident in 9th edition (post 2012)
Change in language from CAS

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>The primary mission of Disability Support Services (DSS) is to <strong>ensure equal access</strong> for students with disabilities to all curricular and co-curricular opportunities offered by the institution</td>
<td>The primary mission of DRS is to <strong>provide leadership and facilitate equal access</strong> to all institutional opportunities for disabled students.</td>
</tr>
</tbody>
</table>

*Must* Statements – From CAS

To accomplish its mission, DRS must perform three duties:

1. To advise, consult, and train on an institution-wide basis
2. To collaborate to identify and remove barriers
3. To provide individual services and accommodations
Competing Models of Disability

The Medical/Rehabilitation Model
Assumes the environment and society are normal or neutral and treats the person with a disability as a problem to be fixed

The Social/Cultural Model
Treats disability as normal or neutral and treats barriers within the environment as a problem to be addressed through societal change.

Quick Comparison - Models in Practice

<table>
<thead>
<tr>
<th>Medical/Rehabilitation Model</th>
<th>Social/Cultural Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accommodation Compliance</td>
<td>Proactive Universal Design</td>
</tr>
<tr>
<td>Individuals with disabilities document barriers, using a formal process to request auxiliary aids or services</td>
<td>Barriers are reduced at the design stage so fewer individuals need adjustments</td>
</tr>
<tr>
<td>Not all individuals are eligible to make request – only those with documentation to support request</td>
<td>Many individuals benefit from accessible design – no need for individuals to self-disclose or wait for requests to be filled</td>
</tr>
</tbody>
</table>
How we know accommodation is insufficient

- Dear Colleague Letters
- Civil rights compliance reviews
- Complaint resolution settlements

- EDUCAUSE
  - IT Constituent Group
  - Risk Statement - MUST READ

Why the definition of accessible demands action

...opportunity to acquire same information, interactions, and services...in an equally effective and equally integrated manner, with substantially equivalent ease of use.
Technology can empower – if used wisely

• There is a potential for improved access to education, employment, and daily living

• However – There is also potential for barriers if technology is deployed that is not actually usable to full population

• Enterprise deployment of access technologies helps, but – container vs content

"Robot Hand" by Richard Greenhill and Hugo Elias is licensed under CC BY 3.0

Accessibility features improve usability for all

Ex. Captioned Media

• Many students will benefit from the captions/subtitles

• All benefit from search and playback control

Image from 3Play Media Interactive Transcript
But...we need a fundamental shift

Back in the day...
WYSIWYG editors and the practice of adopting or creating inaccessible offerings...leads to epic fails

But with good design the situation improves
Aligning with standards need not feel overwhelming.

Gaining Online Learning through Self-Study

Tools for Institutional Engagement

- GOALS is a federally funded effort
- WebAIM and NCDAE
- Intent is to tie accessibility to accreditation
- Provides indicators with supporting data
- Benchmarking tool to measure progress

http://ncdae.org/goals/indicators.php
Institutional approaches

• Clear expectations from leadership
• Realistic and scalable technical support
• Evaluation that is woven into exiting culture

Disability History Exhibit
Chapter 2—The Educational Institution Perspective

Publications and Professional Associations

[Images of publication logos: AHEAD, DSQ, ORAHEAD, DSQ-SDS]

https://ahead.org/publications/jped
http://orahead.org
http://dsq-sds.org

Beyond the ADA – Student Affairs Text

Published in 2014, Beyond the Americans with Disabilities Act: Inclusive Policy and Practice for Higher Education provides a user-friendly overview of:

- Legal Obligations
- Models of Disability
- Universal Design
- Technology Accessibility
- Emerging Populations
- Best Practices

Additional Resources and Contact Information

AHEAD Documentation Guidelines
www.ahead.org/learn/resources/documentation-guidance

AHEAD “Clear Standard of Accessible”
www.ahead.org/DOJ_Louisiana_Tech_Settlement

EDUCAUSE Risk statement
www.educause.edu/library/resources/it-accessibility-risk-statements-and-evidence

Kaela Parks, Director of Disability Services at Portland Community College
Kaela.parks@pcc.edu
Slide 1
Disability Law for Higher Education
• Oregon State Bar Seminar – March 11, 2016
• An institutional perspective
• Why accommodation is necessary but not sufficient
• Kaela Parks, Director of Disability Services Portland Community College

Slide 2
Session Overview
• Changing notions of disability
• Recognizing accommodation as necessary but not sufficient
• Acknowledging International Standards
• Implementing institutional policy, support, and evaluation

Slide 3
A thought experiment
“Imagine if you will, a university where women or students of color are required to self-identify, provide documentation, and be made eligible to obtain textbooks, take exams, utilize technology, or participate in field trips. We would consider such an institution to be absurd and discriminatory in their attitudes and actions. So why, given the knowledge and technology we have available to us today, do we continue to require similar actions from disabled students?”

Slide 4
• How hard does this have to be?
• Black and white image of person in maze
• Thought experiment from the Journal on Postsecondary Education and Disability
• Is it acceptable to ask students to navigate complex maze-like processes?
• Would we tolerate this treatment of other groups?
Slide 5
Screenshot of Refocus: Viewing the work of disability services differently

Three columns,
- The first is blue and labeled Administration
- The second is purple and labeled Service
- The third is green and labeled Outreach

Slide 6
Council for the Advancement of Standards
Disability Resources and Services (formerly Disability Support Services)
Major revision to mission - evident in 9th edition (post 2012)
Image of stack of books - blue and white CAS Professional Standards of Higher Education

Slide 7
Change in language from CAS
- In the 8th edition, from 2009, the mission was described in this way:
  The primary mission of Disability Support Services (DSS) is to ensure equal access for students with disabilities to all curricular and co-curricular opportunities offered by the institution.
- In the 9th edition however, the mission is described as follows:
  The primary mission of DRS is to provide leadership and facilitate equal access to all institutional opportunities for disabled students.

Slide 8
Must Statements from CAS
To accomplish its mission, DRS must perform three duties:
- Provide institution-wide advisement, consultation, and training on disability related topics, including legal and regulatory compliance, universal design, and disability scholarship
- Collaborate with partners to identify and remove barriers to foster an all-inclusive campus
- Provide individual services and facilitate accommodations to students with disabilities
Slide 9
Competing Models of Disability

Image of cartoon with a person in a wheelchair at the bottom of a set of stairs. There is a sign that says “Way In Everyone Welcome.”

- The Medical/Rehabilitation Model
  Assumes the environment and society are normal or neutral and treats the person with a disability as a problem to be fixed.

- The Social/Cultural Model
  Treats disability as normal or neutral and treats barriers within the environment as a problem to be addressed through societal change.

Slide 10
Quick Comparison – Models in practice

A table has a header row and two columns

First column shows medical/rehabilitation model of accommodation compliance

- Individuals with disabilities document barriers, using a formal process to request auxiliary aids or services
- Not all individuals are eligible to make request – only those with documentation to support request

Second column shows social/cultural model of proactive universal design

- Barriers are reduced at the design stage so fewer individuals need adjustments
- Many individuals benefit from accessible design – no need for individuals to self-disclose or wait for requests to be filled
Slide 11
How we know accommodation is insufficient
Image of arrow that has hit short of the mark
• Dear Colleague Letters
• Civil rights compliance reviews
• Complaint resolution settlements
• EDUCAUSE
  • IT Constituent Group
  • Risk Statement - MUST READ

Slide 12
Why the definition of accessible demands action
Image of person using braille display
"A ccessible" means a person with a disability is afforded the opportunity to acquire the same information, engage in the same interactions, and enjoy the same services as a person without a disability in an equally effective and equally integrated manner, with substantially equivalent ease of use. The person with a disability must be able to obtain the information as fully, equally, and independently, as a person without a disability. Although this might not result in identical ease of use compared to that of persons without disabilities, it still must ensure equal opportunity to the educational benefits and opportunities afforded by the technology and equal treatment in the use of such technology. (Office of Civil Rights in the Resolution agreement with South Carolina Technical College System, 2/18/13).

Slide 13
Technology can empower – if used wisely
Image of robotic hand holding a lightbulb
• There is a potential for improved access to education, employment, and daily living
• However – There is also potential for barriers if technology is deployed that is not actually usable to full population
• Enterprise deployment of access technologies helps, but – container vs content
Slide 14
Accessibility features improve usability for all
Image of screenshot showing a video player with a magnification lens on the search transcript option
Ex. Captioned media
- Many students will benefit from the captions/subtitles
- All benefit from search and playback control

Slide 15
But... we need a fundamental shift
Image of path with sign that says “shared path closed”

Slide 16
Back in the day..
Image of older computer with lines of green text on screen

Slide 17
WYSIWYG editors and the practice of adopting or creating inaccessible offerings... leads to epic fails

Slide 18
But with good design the situation improves
Image of WebAIM web accessibility in mind
Image of W3C HTML5

Slide 19
Aligning with standards need not feel overwhelming
Image of green person standing beneath large wave of data
Slide 20

Gaining online learning through self-study

Tools for Institutional Engagement

- GOALS is a federally funded effort
- WebAIM and NCDAE
- Intent is to tie accessibility to accreditation
- Provides indicators with supporting data
- Benchmarking tool to measure progress

Slide 21

Institutional approaches

- Clear expectations from leadership
- Realistic and scalable technical support
- Evaluation that is woven into exiting culture

Slide 22

Disability History Exhibit

Screenshot of multimedia playlist

Image of full-color museum-quality hard copy display

Slide 23

Publications and professional associations

Image of AHEAD Association on Higher Education and Disability logo

Image of ORAHEAD logo with tree

Disability Studies Quarterly logo
Slide 24

Beyond the ADA – Student Affairs Text

Image of book cover with infinity symbol

Published in 2014, Beyond the Americans with Disabilities Act: Inclusive Policy and Practice for Higher Education provides a user-friendly overview of:

- Legal Obligations
- Models of Disability
- Universal Design
- Technology Accessibility
- Emerging Populations
- Best Practices

Slide 25

Additional Resources and Contact

- AHEAD Documentation Guidelines
  [www.ahead.org/learn/resources/documentation-guidance](www.ahead.org/learn/resources/documentation-guidance)
- AHEAD “Clear Standard of Accessible”
  [www.ahead.org/DOJ_Louisiana_Tech_Settlement](www.ahead.org/DOJ_Louisiana_Tech_Settlement)
- EDUCAUSE Risk statement
- Kaela Parks, Director of Disability Services at Portland Community College
  [Kaela.parks@pcc.edu](mailto:Kaela.parks@pcc.edu)
IT Accessibility Risk Statements and Evidence

This document was created by the EDUCAUSE IT Accessibility Constituent Group to help identify accessibility risks that IT leaders should consider in their risk management process.

Please visit http://net.educause.edu/ir/library/pdf/accessrisk15.pdf to access the original document containing active hyperlinks.

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# Table of Contents

1. Risk Statement: Failure to allocate sufficient resources and authority to coordinate and implement the Electronic and Information Technology (EIT) Accessibility Policy. .................................................................3  
2. Risk Statement: Failure to make faculty, staff, and students aware of institutional resources for accommodation and accessibility ........................................................................................................3  
3. Risk Statement: Failure to systematically and effectively monitor EIT content and services to ensure accessibility ...............................................................................................................................................3  
4. Risk Statement: Failure to provide accurate video captioning ...............................................................................................................................3  
5. Risk Statement: Failure to provide an accessibility policy that demonstrates the campus’s commitment to EIT accessibility ........................................................................................................................................3  
6. Risk Statement: Failure to define a technical standard for implementing EIT accessibility (such as WCAG 2 or Section 508) ........................................................................................................................................4  
7. Risk Statement: Failure to assign a person or entity to coordinate institution-wide accessibility ........................................................................................................................................................................4  
8. Risk Statement: Failure to implement a procedure to ensure information obtained, provided, or developed by third parties is accessible ........................................................................................................4  
9. Risk Statement: Failure to implement a procedure, which ensures procured EIT is accessible, such as including accessibility requirements in RFPs and contractual language ........................................................................................................................................5  
10. Risk Statement: Failure to provide regular ongoing training, instruction, and support at all levels (e.g., administrators, faculty, IT staff, support staff, student employees) appropriate to their roles and responsibilities, regarding the institution’s EIT Accessibility Policy and procedures, tools, resources, and techniques to ensure the policy and procedures are effectively and consistently implemented ........................................................................................................................................5  
11. Risk Statement: Failure to implement accessibility solutions for EIT other than web-based, online, or software-based technologies, such as classroom controls, copiers, ATMs, and digital signage ..................................................................................................................................................6  
12. Risk Statement: Failure to provide native EIT accessibility (e.g., relying on second-class EIT alternatives for people with disabilities) .........................................................................................................................................6  
13. Risk Statement: Failure to provide a top-level website dedicated to accessibility, which serves as a central repository and includes, but is not limited to, accessibility information, news, tools, and best practices ........................................................................................................................................6  
14. Risk Statement: Failure to provide accessible instructional materials and library resources in a timely manner ........................................................................................................................................................................6  
15. Risk Statement: Failure to create a culture where accessibility is considered a proactive need, but rather is considered a reactive accommodation need ........................................................................................................................................6  
16. Risk Statement: Failure to provide accessible websites ..................................................................................................................................................................................................................................................6  
17. Risk Statement: Failure to provide captioning of announcements and commentary made over public address systems during athletic and other public events ........................................................................................................................................8  
18. Risk Statement: Failure to thoroughly test EIT for accessibility beyond automated testing or VPAT statements ........................................................................................................................................8
Note: In this document electronic and information technology (EIT) is used instead of information technology (IT) because existing requirements, such as Section 508, use EIT in defining the scope of what needs to be accessible.

1. Risk Statement: Failure to allocate sufficient resources and authority to coordinate and implement the Electronic and Information Technology (EIT) Accessibility Policy.
   a. Note: We feel that this is one of the most important factors in successfully implementing EIT accessibility. Without sufficient resources, policies and procedures are just words.
   b. Risk source, documentation, or proof:
      i. University of Cincinnati Resolution Agreement (PDF)
      ii. Youngstown State University Resolution Agreement (PDF)

2. Risk Statement: Failure to make faculty, staff, and students aware of institutional resources for accommodation and accessibility.
   a. Risk source, documentation, or proof:
      i. University of Cincinnati Resolution Agreement (PDF)
      ii. Louisiana Tech University Settlement Agreement

3. Risk Statement: Failure to systematically and effectively monitor EIT content and services to ensure accessibility.
   a. Risk source, documentation, or proof:
      i. University of Cincinnati Resolution Agreement (PDF)
      ii. Youngstown State University Resolution Agreement (PDF)
      iii. Atlantic Cape Community College Consent Decree (PDF)
      iv. California Community Colleges State Audit Report

4. Risk Statement: Failure to provide accurate video captioning.
   a. Risk source, documentation, or proof:
      i. Complaint against Harvard (PDF)
      ii. Statement of Interest of the United States of America in the Harvard Case (PDF)
      iii. Complaint against MIT (PDF)
      iv. Statement of Interest of the United States of America in MIT Case (PDF)
      v. University of Maryland lawsuit expansion to include captioning athletic department website media
      vi. Netflix Consent Decree
      vii. Amazon accused of noncompliance with video captioning rules (PDF)

5. Risk Statement: Failure to provide an accessibility policy that demonstrates the campus’s commitment to EIT accessibility.
6. Risk Statement: Failure to define a technical standard for implementing EIT accessibility (such as WCAG 2 or Section 508).

   a. Risk source, documentation, or proof:
      i. University of Cincinnati Resolution Agreement (PDF)
      ii. Youngstown State University Resolution Agreement (PDF)
      iii. University of Montana Settlement (PDF)
      iv. Penn State Settlement
      v. Louisiana Tech University Settlement Agreement
      vi. Florida State University Settlement Agreement

7. Risk Statement: Failure to assign a person or entity to coordinate institution-wide accessibility.

   a. Risk source, documentation, or proof:
      i. University of Cincinnati Resolution Agreement (PDF)
      ii. Youngstown State University Resolution Agreement (PDF)
      iii. Chaves County, New Mexico (PDF)
      iv. H&R Block Consent Decree
      v. Nueces County, Texas, Settlement Agreement (PDF)
      vi. Charles Schwab Agreement
      vii. Bank of America Agreement
      viii. Safeway Web Accessibility Settlement Agreement
      ix. Major League Baseball Settlement Agreement (First Addendum)

8. Risk Statement: Failure to implement a procedure to ensure information obtained, provided, or developed by third parties is accessible.

   a. Risk source, documentation, or proof:
9. Risk Statement: Failure to implement a procedure, which ensures procured EIT is accessible, such as including accessibility requirements in RFPs and contractual language.

   a. Risk source, documentation, or proof:
      i. University of Cincinnati Resolution Agreement (PDF)
      ii. Youngstown State University Resolution Agreement (PDF)
      iii. Penn State Settlement

10. Risk Statement: Failure to provide regular, ongoing training, instruction, and support at all levels (e.g., administrators, faculty, IT staff, support staff, student employees) appropriate to a person's roles and responsibilities, regarding the institution's EIT Accessibility Policy and procedures, tools, resources, and techniques to ensure the policy and procedures are effectively and consistently implemented.

   a. Risk source, documentation, or proof:
      i. University of Cincinnati Resolution Agreement (PDF)
      ii. Youngstown State University Resolution Agreement (PDF)
      iii. Penn State Settlement
      iv. Louisiana Tech Agreement
11. Risk Statement: Failure to implement accessibility solutions for EIT other than web-based, online, or software-based technologies, such as classroom controls, copiers, ATMs, and digital signage.
   a. Risk source, documentation, or proof:
      i. Penn State Settlement
      ii. UC-Boulder

12. Risk Statement: Failure to provide native EIT accessibility (e.g., relying on second-class EIT alternatives for people with disabilities.)
   a. Risk source, documentation, or proof:
      i. Penn State Settlement

13. Risk Statement: Failure to provide a top-level website dedicated to accessibility, which serves as a central repository and includes, but is not limited to, accessibility information, news, tools, and best practices.
   a. Risk source, documentation, or proof:
      i. University of Montana Settlement (PDF)
      ii. Penn State Settlement

14. Risk Statement: Failure to provide accessible instructional materials and library resources in a timely manner.
   a. Risk source, documentation, or proof:
      i. Atlantic Cape Community College Consent Decree (PDF)—"Making ACCC’s integrated library system and its website fully accessible to blind students"

15. Risk Statement: Failure to create a culture where accessibility is considered a proactive need, but rather is considered a reactive accommodation need.
   a. Risk source, documentation, or proof: faculty and researcher complaints

16. Risk Statement: Failure to provide accessible websites.
   a. Note: A series of lawsuits has made it evident that accessibility of websites under Title III of the Americans with Disabilities Act (ADA) includes access for people with disabilities. Litigation, and threatened litigation, surrounding the issue is on the rise, exposing institutions to a potential claim that they are failing to comply with antidiscrimination laws. The argument, in a nutshell, is that institutions are violating Title III of the ADA prohibition on discrimination on the basis of disability because their site or app lacks
certain functionalities (such as including a text equivalent for every nontext element on
a website and ensuring that all functions can be accomplished by using a keyboard
instead of a mouse) that would make them accessible to people with disabilities.

b. Risk source, documentation, or proof:
   i. Atlantic Cape Community College Consent Decree (PDF)
   ii. Penn State Settlement
   iii. University of Montana Settlement (PDF)
   iv. Louisiana Tech Agreement
   v. University of Cincinnati Resolution Agreement (PDF)
   vi. Youngstown State University Resolution Agreement (PDF)
   vii. Florida State University Settlement (PDF)
   viii. South Carolina Technical College System Resolution Agreement (PDF)
   ix. California Community Colleges State Audit Report
   x. Florida State University Settlement Agreement
   xi. Complaint against Miami University [Ohio] (PDF)
   xii. Motion to Intervene: Miami University [Ohio] (PDF)
   xiii. McNeese State University Settlement Agreement
   xiv. Law School Admission Council Settlement Agreement
   xv. Mesa Community College and Maricopa Community Lawsuit (PDF)
   xvii. edX Settlement Agreement
   xviii. Madison County, New York, Settlement Agreement
   xix. Target Settlement Agreement (PDF)
   xx. Peapod Settlement Agreement
   xxi. H&R Block Consent Decree
   xxi. Chaves County, New Mexico (PDF)
   xxiii. Orange County Clerk of Courts [Florida] Agreement
   xxiv. Newseum
   xxv. Hilton
   xxvi. Complaint against GSA's SAM.gov
   xxvii. Olympic Games Lawsuit
   xxviii. Charles Schwab Agreement
   xxix. Amazon Agreement
   xxx. Ramada.com and Priceline.com: New York State Attorney General Settlements
   xxxi. American Cancer Society Agreement
   xxxii. Disney Lawsuit
   xxxiii. Department of Transportation Nondiscrimination on the Basis of Disability
          Regulation (websites)
   xxxiv. Bank of America Agreement
   xxxv. Safeway Web Accessibility Settlement Agreement
   xxxvi. Major League Baseball Settlement Agreement (First Addendum)
   xxxvii. Rite Aid Web Accessibility Agreement
Chapter 2—The Educational Institution Perspective

xxviii. Accessible Credit Reports Agreement

xxxix. Virtual Community School of Ohio Resolution Agreement (Word)

xl. South Carolina Charter School District Resolution Agreement (Word)

xli. City of Parowan, Utah, Settlement Agreement

xlii. Village of Ruidoso, New Mexico, Settlement Agreement

xliii. City of Fallon, Nevada, Settlement Agreement

xliv. City of Isle of Palms, South Carolina, Settlement Agreement

xlv. City of Vero Beach, Florida, Settlement Agreement

xlvi. City of DeKalb, Illinois, Settlement Agreement

xlvii. Weight Watchers Settlement Agreement

xlviii. Scribd Ruling Denying Motion to Dismiss (PDF)

17. Risk Statement: Failure to provide captioning of announcements and commentary made over public address systems during athletic and other public events

a. Risk source, documentation, or proof:
   i. National Association of the Deaf (NAD) lawsuit against the University of Maryland College Park
   ii. Ohio State Lawsuit
   iii. Ohio State University Consent Decree (PDF)—United States District Court, Southern District of Ohio
   iv. University of Kentucky Complaint (PDF)
   v. Washington Redskins Lawsuit

18. Risk Statement: Failure to thoroughly test EIT for accessibility beyond automated testing or VPAT statements

a. Risk Source, documentation, or proof
   i. Benchmarking web accessibility evaluation tools: measuring the harm of sole reliance on automated tests

19. Risk Statement: Failure to provide audio descriptions

a. Risk source, documentation, or proof