

Disability Compliance

for Higher Education

Successful Strategies for Accommodating Students and Staff with Disabilities

VOLUME 23, ISSUE 3

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Evaluate requests for exotic animals, multiple animals as ESAs

By Michael Masinter, Esq.

Schools report a rising number of requests for emotional support animal accommodations in campus housing. Increasingly, some requests propose to bring exotic animals and even multiple animals as ESAs. When the animal is a dog or a cat, schools should already have well-established documentation policies that address the claimed therapeutic need for the ESA. But what about exotic species or multiple animals? What obligations do schools have when presented with such requests?

Successful reported Fair Housing Act ESA court and administrative decisions all involve dogs (mostly) and cats (occasionally) as ESAs. That's not surprising: Dogs and cats are domesticated species that evolved from their wild ancestors to meet uniquely human needs, including our emotional needs; that's why we keep them as pets rather than eat them as food. Housing and Urban Development regulations also provide no guidance comparable to the Department of Justice's service animal rules.

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COALITION CORNER

Accommodating students on anatomy and other lab practical exams

By Lisa M. Meeks, Ph.D.; and Neera R. Jain, M.S., C.R.C.

Determining accommodations for anatomy and other lab exams (often referred to as "practicals") takes coordination, a team effort, and a commitment to full access. Faculty may believe that accommodations are not possible in complex lab environments. Logistical challenges and questions about fundamental alteration are often at the crux of these concerns.

Lab practical exams generally consist of multiple stations that students move through. At each station, students must complete a task in a set period of time, such as identifying anatomical structures or histology slides. These

Continued on page 7.

Comprehensive support for students with ASD leads to success

By David Novis

Jackie Clark is the assistant coordinator for the College Program for Students with Autism Spectrum Disorder at Marshall University, where she provides individualized support for students with ASD. We discussed how the program has managed to garner such a high rate of retention and graduation — getting students to effectively transition into college, through graduation, and out into the workforce.

Q What is the College Program for Students with Autism Spectrum Disorder and what are the key ways it supports students as they pursue college degrees?

A The program was developed in 2002 and provides individualized skill building and therapeutic support for students with autism spectrum disorder in a mentored environment. We help students navigate the college experience through focusing on three areas: academics, social communication interaction, and independent living skills.

The program offers this safe place kind of atmosphere for students to ask questions, receive help, or simply connect with others and spend time between classes.

Q How do you ensure that students are ready to enter the workplace?

A The College Program has a strong focus on providing support for the transition into and out of college. We help students connect to the

natural resource of career services on campus who help with résumé building, mock interviews, and job searching. Students with autism often struggle with knowing where resources are and how to access them. So for many years, we've partnered with career services to help students who participate in the College Program access those services in a way that is most beneficial for students with autism.

Starting in the summer of 2016, in an additional effort to help address employment readiness skills, the college program began a summer employment workshop where participants spend three days learning from various campus and community partners about how to access and maintain employment.

Q What are you most proud of regarding the program and its students' success?

A The college program has a 93 percent graduation rate, which is a huge success, as it's a much higher rate than Marshall University's overall rate for graduation or retention.

I think receiving the individualized support of the program definitely helps [with the success rate] because it provides that support for students here who can obviously attend college and do college-level work, academically, but feel challenged and struggle with the social nuances of college life. Helping students navigate the social life of college really increases the probability of graduation. ■

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But in 2013 guidance describing ESAs using the term “assistance animal,” HUD asserted: “While dogs are the most common type of assistance animal, other animals can also be assistance animals.”

HUD does not elaborate among species further.

Its guidance merely states that a housing provider can deny a request from an individual with a disability if the request would pose an undue financial and administrative burden or would fundamentally alter the nature of the housing provider’s services or if the specific animal would pose a direct threat to the health or safety of others or would cause substantial physical damage to the property of others.

In making the latter determination, HUD asserts, with an obvious eye on dogs: “Breed, size, and weight limitations may not be applied to an assistance animal.” Here, language is instructive; HUD has not asserted species limitations are forbidden. So when can a school lawfully refuse to allow an animal as an ESA because its species makes it inappropriate for campus housing?

DOJ rejected proposals to consider wild animals, monkeys, and other nonhuman primates as potential service animals in its service animal regulations for reasons equally applicable to ESA requests:

All wild animals, whether born or bred in captivity or in the wild, are eliminated from coverage as service animals. The Department believes that this approach reduces risks to health or safety attendant with wild animals. Some animals, such as certain nonhuman primates including certain monkeys, pose a direct threat; their behavior can be unpredictably aggressive and violent without notice or provocation. The American Veterinary Medical Association (AVMA) issued a position statement advising against the use of monkeys as service animals, stating that “[t]he AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, and the potential for serious injury and zoonotic [animal-to-human disease transmission] risks” (see <http://bit.ly/2w6Ww7u>).

The same public health concerns that led DOJ to exclude wild animals and monkeys as potential service animals should suffice to exclude them from consideration as ESAs. Simply stated, monkeys and wild animals have no place in cam-

pus residence halls; they pose a danger to every resident and to physical property. Accordingly, schools should be able to reject requests to keep them without fear of Fair Housing Act liability.

But what of other species? Here, the only additional guidance from DOJ and HUD is that if state or local law forbids

keeping a particular species in residential housing, then that species cannot serve as an ESA. DOJ and HUD have made clear that a student who wants to keep a species forbidden by state or local law as an ESA must, under the FHA, first seek and obtain a reasonable modifica-

tion of state or local law from the state or local government. The FHA does not require schools to disregard state or local laws restricting species.

The Notice of Proposed Rulemaking that preceded DOJ’s service animal rule proposed including as potential service animals “common domestic animals,” defined to exclude “reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, and goats), ferrets, amphibians, and rodents.” Although DOJ narrowed the definition to dogs and miniature horses, the definition of common domestic animals may be helpful in evaluating ESAs. Schools should be able to exclude horses, pigs, goats, and chickens from residential housing without fear of liability.

Whether reptiles, ferrets, amphibians, rodents, and sugar gliders should be considered appropriate ESAs remains an open question, one currently best answered by resort to local law and to public health literature. Concerns over zoonotic disease transmission have led some schools to reject reptiles and amphibians even when legal under local law, while others have readily accepted them. Absent clarity from HUD in future rulemaking or expanded guidance, schools that receive such requests should give them individualized consideration, taking into account how the student will house the animal and whether the student will reside in a single room or with roommates.

Students might ask to keep multiple animals because the species in question is a social animal. Remember that the Fair Housing Act protects individuals with disabilities; it is not an animal welfare statute. The FHA instructs schools to accommodate the emotional needs of students with disabilities, not their ESAs. If for any reason you nevertheless decide to allow multiple animals, restrict them to a single sex (or require spaying or neutering, if applicable to the species) to prevent a population explosion. ■

About the author

Michael R. Masinter, Esq., is a professor of law at Nova Southeastern University and member of the legal panel of the American Civil Liberties Union of Florida. He teaches, writes about, and litigates disability rights, civil rights, and employment law cases. ■

Know how to respond to challenges presented by animals on campus

By Joan Hope, Ph.D., Editor

If your institution is like most, you're seeing an increase in the number of animals on campus. Besides service animals in the classrooms and around campus, if your institution has housing, you're reviewing requests for emotional support animals.

Disability Compliance for Higher Education's Advisory Board members participated in a conference call to discuss issues that have arisen with service animals and ESAs and to share best practices regarding these animals.

Gray area between categories

There's a gray area between emotional support animals and service animals used by individuals with psychiatric disabilities, said Maria G. Pena, associate director of the Disability Resource Center at the University of Nevada, Las Vegas. According to the regulations, service animals are trained to complete tasks that help an individual with a disability. But a psychiatric service animal might perform its service simply through its presence, she said.

A recent Office for Civil Rights letter to Delaware Technical Community College highlights the issue. DTCC was found to be out of compliance for not allowing a student to bring her service dog to campus. The letter notes that the dog assists the student with her anxiety. It also reminds readers that a "public entity" can ask only two questions about a service animal:

1. If the animal is required because of a disability.
2. What work or task the animal has been trained to perform.

At least in the nonredacted part of the letter, there is no indication of what task the animal was trained to perform to help the student with her anxiety, Pena noted.

Although OCR sided with the student, the case has now gone to litigation, Pena said.

Find the letter at <http://bit.ly/2vhoXeS> and the resolution agreement at <http://bit.ly/2wGUuKP>.

Training across campus

With multiple campuses, the most common

Write an article

For submission guidelines, please contact Editor Joan Hope at jhope@wiley.com. ■

issue that occurs at the University of Phoenix is that campus visitors often bring animals, said Jenna Walraven, ethics and compliance manager II at the University of Phoenix. It's usually pretty easy to tell if the animal is a pet or is performing a service, but campus staff members need to know what the law says about service animals and what they can ask.

Joseph A. LoGiudice, director of The Accessibility Center and Student Disability Services at the City College of New York, works with public safety officials to make sure they understand the guidelines for service animals. If officers get combative with individuals, they are likely to respond in kind, he said.

In one situation, a visiting professor from Germany brought her dog onto campus, saying she needed it for a disability. LoGiudice explained to her that she needed to tell people it was a service animal and explained what the law says about service animals so that she could respond appropriately to questions about the dog.

Staff members in areas where people are likely to bring dogs also need to know what they can ask about service dogs and the difference between a service animal and an ESA. Some people get defiant when questioned about their animals, so staff members need to be confident about what they can say, especially if an animal is disruptive or doesn't clearly belong on campus, Pena said.

At Brandman University, there are about 1,500 adjunct professors. Loren O'Connor, assistant vice chancellor of the Office of Accessible Education and Counseling Services, sends them information about the Americans with Disabilities Act and service animals in a newsletter two or three times a year. Many veterans enroll at Brandman, and growing numbers of them use service animals, O'Connor said.

Evaluating ongoing need for ESA

Increasing numbers of students are requesting ESAs, but campus officials should realize that an ESA is a treatment, and if the student is recovered or in recovery, the treatment no longer applies, Pena said. "It's not a lifelong thing," she said.

Evaluating documentation

There are plenty of internet sites that offer some form of documentation for ESAs. Many of the sites

are clearly fraudulent, but there are also licensed clinicians providing teleservices, and documentation from them is difficult to question.

City College uses the same protocol to determine the need for an ESA as for any other accommodation, LoGiudice said. The documentation has to be from a qualified professional. The impact of the disability and why it would warrant an emotional support animal must be clear, he said. If the accommodation seems appropriate, he speaks with the director of housing.

At UNLV, if an ESA is approved, the student fills out two forms. One requests general information, and the student attaches a picture of the animal. "We have had a situation where they [the animals] have been switched," Pena said. The other is a detailed form for the veterinarian to complete. The institution has specific criteria for vaccinations, if they are appropriate for the type of animal. The veterinarian must sign off that the animal has a clean bill of health, Pena said.

If the ESA is a dog or cat, it's a good idea if the animal is spayed or neutered. But whether that can be required is a gray area, she said.

Disruptive animals

Service animals that are disruptive to the student's education or to others can be removed from campus. But sometimes creative solutions can allow them to stay. At an institution where Pena formerly worked, a student's service dog had excessive flatulence and snored during class. Another

student in the student's math class had an extreme anxiety disorder, and the dog's disruptions caused her to be unable to function in class.

Officials moved the student with the dog to another section of the course and spoke to the student about changing the dog's diet and keeping it from snoring in class, Pena said.

At Brandman, a student brought two large service dogs to class. They were aggressive and fought in the classroom. The student decided to bring just one, and that solved the problem, O'Connor said.

At City College, LoGiudice spells out in students' accommodation memo what the student should do if an emergency occurs with an animal. ■

Review resources on service, emotional support animals

For more information about service and emotional support animals, review:

- The federal regulations on service animals: <http://bit.ly/2vqIngv>.
- An overview of federal regulations on service animals: <http://bit.ly/2vZCFpi>.
- The University of Nebraska at Kearney's emotional support animal policy: <http://bit.ly/2xeA4X8>.
- The California State University's "Guidance and recommendations for university housing regarding service and assistance animals" (link leads to a Word document download): <http://bit.ly/2g7A0V6>. ■

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Help students get and keep work-study jobs

By Elizabeth C. Hamblet

One challenge students with disabilities face that doesn't often get discussed is finding (and keeping) work-study jobs, which are often part of their financial aid package. Jessica Szivos, M.A., C.R.C., assistant director of the Office of Disability Services at Worcester Polytechnic Institute, says she doesn't typically ask about work study, but it occasionally comes up when students check in with her.

Szivos starts by asking students about what kinds of positions might work for them, based on what they view as their strengths and on the characteristics of various job environments. For instance, students with attention deficit hyperactivity disorder and strong interpersonal skills might do well doing something interactive, such as signing people in at the recreation center (where they would be sitting in one place but have constant interaction), while students with social anxiety might do better in a lab, where they would have less social interaction (the activity level might be appropriate for restless students with ADHD, too).

Szivos also encourages them to do a little probing when applying or interviewing for jobs, e.g., querying whether they could work evenings if they're more alert at night or do some of their work from home if they can be more productive in a quiet environment. She recommends that students lead this conversation by discussing their strengths before asking about modifying the initial job description.

Once they're hired, Szivos encourages students to self-advocate so they can be successful. For instance, she suggests that students ask for a checklist of tasks they're expected to accomplish each time they report for work. She teaches them a strategy she learned from Laura Rosen, her office's director, to keep track of what they have to do. She encourages students to put each task on Post-it, stack the Post-its in order of importance, and go through the pile task by task.

Szivos also recommends that they ask about what they're allowed to do in any downtime. For instance, in jobs where students are simply manning a reception desk, she recommends that they ask whether it's OK to bring a textbook and laptop for quiet times. For positions that don't involve

face-to-face interaction, Szivos suggests students ask whether they can wear headphones so that they can screen out distracting noises.

Szivos says that she finds her students tend to do well as peer content tutors and as learning assistants (upperclassmen who are placed in freshman classes and available for office hours). She says that because they understand students who learn differently, they tend to be very popular in these positions.

One group of students who can find particular challenges with work-study positions are those on the spectrum because — as Szivos notes — many of the jobs involve customer service responsibilities. Szivos' recent work with such a student offers additional lessons that can be helpful with these and other students for whom job-interview preparation might require explicit instruction.

Szivos started by asking the student about any positive previous work experiences. The student had liked volunteering at the library (and was good at organization). No jobs were available, but they were seeking someone who could help make their website accessible — a very appropriate job for someone with the student's strong attention to detail and experiences as a person with a disability. Szivos helped the student understand what an appropriate interview outfit looked like (using pictures to make things clear) and suggested grooming tips (e.g., "cut your nails," "pull your hair back").

Szivos also gave the librarian tips to make things go smoothly, such as suggesting she provide steps the student should take when stuck and that she instruct the student to make a list of questions to be addressed at the end of the day so that the student learned to wait to address issues (rather than interrupting the librarian every time a question arose). Szivos says that the whole process has been a learning experience for the student and that the ability to contribute in this way has made the student's overall college experience more positive.

Helping students with their work-study positions takes time, but it can be a great way to help prepare them for future job searches and situations. ■

About the author

Elizabeth C. Hamblet is a learning consultant in Columbia University's disability services office. She also writes and presents regularly on the topic of transition to college for students with learning disabilities. *Contact her at echamblet@gmail.com.* ■

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exams are often administered in groups whereby the group size is equal to the number of stations. In most schools, multiple groups cycle through the exam in one day.

One common concern among faculty is how to provide extended time, the most commonly approved accommodation, given the already labor-intensive nature of administering these exams. They may argue that the extra time needed to proctor the exam represents an undue burden for faculty or staff. If the set time per station is five minutes, a student approved for time-and-a-half would be eligible for 7.5 minutes. This adjustment represents a relatively short overall added time; for example, a 24-station exam means 60 additional minutes of administration time. For the student who requires extended time, the additional 2.5 minutes per station is necessary to fully comprehend, process, and respond to the question.

There are two main ways extended time has been successfully provided for practical exams:

1. Students with disabilities requiring extended time rotate through the final testing group of the day with classmates who do not require extended time. At the end of the standard time, all students are dismissed and students requiring extended time receive a five-minute restroom break. This break allows all students to exit the lab together, reducing the possible identification of students receiving accommodations. Students with extended time return to the lab after the break and rotate through all stations again to receive their allotted extended time (e.g., 2.5 additional minutes per station).

2. Students with disabilities requiring extended time rotate through the exam as the final group of the day, with all stations timed on the 1.5x schedule (e.g., 7.5 min/station). For students receiving additional extended time (e.g., double time), the procedures in option 1 can be followed to allow the additional 2.5 minutes.

Another reported concern for accommodating practical exams is that the accommodation will create a fundamental alteration as the rapid identification of structures is closely related to the requirements of the clinical environment. The extremely short period of time at each station, however, is likely not a direct translation of a clinical setting.

The 2014 OCR letter to the Kent State University College of Podiatric Medicine (Case #15-14-2153) (see <http://bit.ly/2uXWN7M>) involved this question of fundamental alteration through laboratory exam accommodations. In the letter, OCR noted that in order to establish fundamental alteration, a school must be able to demonstrate that the task is “essential to the instruction being pursued by such student or to any directly related licensing require-

ment” and that an appropriate deliberative process to establish whether there was a fundamental alteration must involve a group of people “trained, knowledgeable, and experienced in the relevant area.” Programs facing this question must engage in a deliberative process and “consider a series of alternatives” before denying such requests outright.

Beyond extended time, laboratory faculty and preceptors need to ensure that the exams

are accessible for multiple disability-related needs. Some students may require assistive technology, visual aids to enhance specimen size or contrast (in the case of slides), visual time warnings for students who are deaf or hard of hearing, and stools or resting stations for students with physical disabilities. Finally, proactively offer all students gloves, ventilation masks, and earplugs for use as needed to manage noise, fumes, and allergens.

Faculty should work with disability services providers to ensure that anatomy and other lab practical exams are fully inclusive for all students with disabilities. The possibilities for anatomy and other practical lab exam accommodations listed above are not exhaustive. There are multiple ways to ensure access and protect student privacy. Ultimately, the goal is to develop a protocol that ensures access where all parties work together to realize this goal. ■

About the authors

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About this column

Disability Compliance for Higher Education has partnered with the Coalition for Disability Access in Health Science and Medical Education to bring the readers a monthly column, which addresses the nuanced and specialized practices in this area. Each month, a guest writer from the Coalition brings tested and sage advice to the readers from some of the most experienced disability services providers in the country. ■

Lead change more effectively by identifying core values, teaching staff how to innovate

By Claudine McCarthy

Higher education professionals know the challenge of leading change. But they also know that it's a challenge worth facing and easier to overcome when they can follow the guidance of another professional who has found innovative strategies for successfully bringing about change.

MANAGING YOUR OFFICE

This regular feature provides you with the guidance you need to help you sharpen your office management skills.

During a 38-year career, Patrick Love, Ph.D., has encountered many situations that called for change. Some of the biggest challenges along the way involved the need for “changing, improving, and enhancing organizational culture” and “changing outmoded and self-serving thinking,” he said.

At the end of his first year as vice president of student affairs at the New York Institute of Technology, he led his team to identify a set of six core values that would direct their thinking, actions, and use of resources. Those core values were:

- Innovation.
- Assessment.
- Professional development.
- Telling our story.
- Leading the way.
- Providing transformative and memorable experiences.

“We focused our finite resources on training, actions, programs, and products that will help us fulfill these values,” said Love, now an independent consultant. He's also the author of *Rethinking Student Affairs Practice*, published by Wiley. And he was named one of NASPA's Pillars of the Profession for the Class of 2017.

While developing and implementing these values, Love learned some important lessons that could help other professionals as they struggle to lead change in their organizations. He suggests professionals “adopt a leadership mindset and actively seek to understand the larger picture of how their work fits into their unit, the division, and the institution. That will make their job clearer and will

be very helpful to the formal leaders in the organization,” Love noted.

To make leading change more effective and successful in your unit, “recognize that every person is playing a role, even if you can't figure out what it is,” Love recommended.

As part of the process of implementing one of the core values — innovation — Love spearheaded a yearly innovation grant program within his division.

The grant program began with Love “scraping together \$5,000 ... but in the first year, only one person applied,” he recalled. Rather than giving up, Love realized people just needed guidance to learn how to develop new ideas and innovate, he said. So he scheduled an “Idea Generation Hour” where everyone in the division focused on coming up with new ideas.

A year later, that hour led to an “Innovation Pitch Day,” with each subunit in the division assigned to develop an innovative idea and pitch it to the other staff members in the division, who would provide feedback, Love explained. The first pitch day drew a dozen pitches that resulted in six innovation grant applications. The next year, those numbers grew to 21 pitches and 12 grant applications. Love hopes to see the number of grant applications continue to grow in the coming year. “The interesting thing is that many of the innovative ideas need little or no additional resources, just the will and permission to put the idea into action,” Love noted.

If you would like to implement a similar grant program, consider following Love's advice. “The most important thing is to teach people *how* to come up with new ideas, and to make it a part of their job,” he explained. And, remember not to give up. “Times of stress and challenge are also times of opportunity to shape one's organization for the future, so it's important not to just solve problems for the short term but to lay the groundwork for future growth and development,” Love advised.

Contact Patrick Love at pglove33@gmail.com. ■

About the author

Claudine McCarthy is editor of *Student Affairs Today*, a monthly publication also published by Jossey-Bass, A Wiley Brand. For more information about that publication, please go to www.wileyonlinelibrary.com/journal/say. ■

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Students prioritize mental health but can't find resources

By Halley Sutton, Assistant Editor

Students don't know where to turn for resources on mental health, according to a study by the Born This Way Foundation, which was founded by Lady Gaga in 2012. The survey, entitled "Kind Communities — A Bridge to Youth Mental Wellness," received responses from 3,015 participants aged 15 to 24, as well as more than 1,000 parents, in an online survey. More than half of the students surveyed said they believed mental health was important, but a much smaller percentage of students surveyed reported seeking help for mental health concerns.

College students report highest stress levels

"Despite prioritizing their mental health, young people are unaware whether they have access to many of the resources that would support their mental health or believe they do not have access to them," according to the report. Other findings from the report include:

- For high school students, 36 percent of students reported that they do not have access to services or resources that would support their mental health.

- Rural students and students from low-income families report even less access to mental health resources, with 40 percent of rural students and 46 percent of students from low-income families reporting little or no access to mental health resources.

- Of the three classifications studied (high school students, college students, and employed young people), college students fared the worst in terms of both reported happiness and stress levels. The percentage of college students who reported feeling happy often or most of the past month was 55 percent, versus 63 percent of high

school students and 57 percent of employed young people. College students also reported the most stress, with 68 percent of college students saying they would report themselves as stressed, versus 49 percent of high school students and 62 percent of employed young people.

- All populations surveyed reported that those institutions viewed as "kind" were key to supporting mental health. For colleges and universities, "kind" institutions were those that offered free mental health counseling for students; provided resources that offer stress release for students, such as yoga or meditation classes; and had an LGBTQIA center available for students to access on campus. Of the students surveyed, 34 percent of college or university students said their institution had all of these attributes, but 15 percent of students surveyed reported that their institution had none.

- On the parent side, parents surveyed overestimated how often their children would turn to them in the midst of a mental health crisis. For example, 75 percent of parents reported believing that their child would turn to them if they or someone they knew was hurting themselves. But only 40 percent of students surveyed said they would turn to their parents for help in this scenario.

- Parents also underestimated the amount of reported stress their children feel, with the largest discrepancy occurring for parents of college students. About 25 percent of students surveyed reported feeling anxious all or most of the time during the past month, while only 10 percent of parents reported their child being anxious or nervous during that same period.

Read the full survey at <http://bit.ly/2uFEw0m>. ■

BEYOND ACCOMMODATION

Refer students with mental health disabilities to podcast

Consider referring students with mental health disabilities to the College Student Success Podcast. Derek Malenczak, a professor at Rutgers University, created the podcast. Research shows that podcasts are effective learning tools because users have control over the listening process and because listeners retain information better when engaging in other activities such as driving or walking dogs, Malenczak said.

Access the podcast at <http://www.collegestudentsuccesspodcast.com>. ■

AT A GLANCE

A review of this month's OCR letters

The Department of Education's Office for Civil Rights investigates complaints under Title II of the ADA and Section 504. These letters represent its findings.

OCR rulings are summarized by Aileen Gelpi, Esq.

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DISCRIMINATION

Suspended student claims different treatment due to disability

Case name: *Letter re: Arkansas State University-Beebe*, No. 06142275 (OCR 04/02/15).

Ruling: The Office for Civil Rights closed a complaint alleging discriminatory treatment in sanctioning after finding insufficient evidence to support the complainant's allegations.

What it means: When the evidence presented in support of a complainant's assertions conflicts significantly with those of the college, and the Office for Civil Rights cannot reconcile those differences due to lack of evidence, the agency will generally conclude that insufficient evidence exists to establish that a violation occurred.

Summary: The Office for Civil Rights opened an investigation into whether Arkansas State University-Beebe discriminated against a student on the basis of her disability. Specifically, the complaint alleged that school officials unfairly suspended her from campus as the result of an incident involving her yoga instructor and another student in March 2014. Following the incident, she was prohibited from returning to campus without a police escort

prior to the summer of 2015.

The student told OCR that during a dispute with the instructor, another student intervened, and there was an exchange with that student, who was not suspended for his participation in the dispute. She expressed the belief that the institution was eager to suspend her, and not the other student, because of her disability.

The decision to suspend the student followed established university protocols, OCR found. It was upheld by the institution's disciplinary committee, which noted that the student was already on probation for an unrelated incident in 2013 and had a history of being disruptive. The student was also afforded access to an appeal process. And OCR found no evidence of animus against the student on the basis of her disability.

In addition, the agency found that there were no similarly situated students without disabilities for purposes of the analysis, because no students (with or without disabilities) other than this one were suspended for disruptive behavior during the spring 2014 semester. The institution had a legitimate, nondiscriminatory reason for imposing the sanction on the student, the agency next found. This was the student's pattern and practice of disruptive behavior, not a single incident.

Finally, the student believed the sanctions were discriminatory in part because they required that she undergo a mental evaluation before being allowed to re-enroll. However, OCR found no evidence that the reason for this was disability-related; rather, it was tied to her past behavior.

Accordingly, OCR was unable to find sufficient evidence that a violation occurred and closed the complaint. ■

DOCUMENTATION

Student's mom complains after documentation is denied

Case name: *Letter re: Clearfield County Career and Technology Center*, No. 03152061 (OCR 03/26/15).

Ruling: The Office for Civil Rights closed a complaint against the Clearfield County Career and Technology Center after the parties agreed to enter into an Early Complaint Resolution Agreement.

What it means: Institutions wishing to nip Office for Civil Rights investigations in the bud following complaints may do so by taking advantage of the agency's Early Complaint Resolution Agreement process to resolve complaints.

Summary: The mother of a student with

disabilities complained to the Office for Civil Rights that the Clearfield County Career and Technology Center discriminated against her daughter by refusing to consider documentation submitted while the student was a minor.

The parties entered into an Early Complaint Resolution Agreement to resolve the allegations. The terms of the agreement involved providing the center with medical documentation on the student's disability prior to the center incurring any of the other obligations outlined in the agreement, and consulting with the Office of Vocational Rehabilitation to seek a determination from that agency of disability and possible accommodations. In return, the center agreed to cooperate with the OVR to implement any reasonable accommodations suggested, and to reserve the student a seat in its next full-time Practical Nursing class. It also agreed to credit the student with \$1,800 toward tuition.

OCR advised the parties it would not monitor implementation of the agreement, but that if a breach occurred, a new complaint could be filed, at which point OCR would investigate only the allegations of discrimination, not whether the agreement had been breached. ■

RETALIATION

Student says college didn't give him needed extensions, retaliated

Case name: *Letter re: Houston Community College*, No. 06152019 (OCR 04/17/15).

Ruling: The Office for Civil Rights closed a complaint against Houston Community College after failing to find evidence that the institution discriminated against a student by denying him the accommodation of extra time, and then retaliating by cancelling his financial aid.

What it means: Having established a *prima facie* case of retaliation, the Office for Civil Rights will next consider whether an institution under investigation had one or more legitimate, non-retaliatory, non-pretextual reasons for taking an adverse action against a complainant.

Summary: A Houston Community College student with a disability was provided with an accommodation letter stating he may need additional time to complete assignments, and that the student and his instructors should discuss extending assignment deadlines. Upon receiving the letter, his English professor contacted the Americans with Disabilities Act counselor for clarification and was advised that the student would need to contact him when he needed additional

time on specific assignments. The professor was also advised that extensions of one day or less on shorter assignments, and two to three days on longer ones, would be adequate. OCR also found the complainant was advised of his duty to consult his professor when he needed extensions.

Following a hospitalization, the student requested extended time on assignments from his English professor. Emails demonstrated that the student notified the professor of his hospitalization on Oct. 6, 2014. That same day, the professor sent him an email extending due dates for three assignments. The next day, the student emailed the professor, asking for an additional 72 hours, and the professor responded by extending two of the three deadlines. The student told OCR he understood the professor's emails to state that the previously agreed-upon extensions were being retracted, making everything due earlier. He also said the professor's supervisor stated that the accommodations did not have to be granted. The supervisor denied that allegation. OCR reviewed the emails and found that the complainant was provided with extra time on all three assignments, and those extensions were never retracted; plus, he was granted two additional extensions.

The student withdrew from the class on Oct. 10, before the extended due dates arrived, so OCR could not determine whether the extensions were adequate under the circumstances. Therefore, it found insufficient evidence to support the student's discrimination complaint.

With regard to the retaliation claim, OCR found that the student engaged in a protected activity (complaining to OCR), the college had notice of the protected activity, and his financial aid was cancelled in December of that year. OCR found that the cancellation and accompanying request to repay owed funds constituted an adverse action. Because the financial aid cancellation occurred within two months of him telling the college of his intention to complain, a causal connection existed between his protected activity and the adverse action.

However, the loss of financial aid conformed with the college's policy on satisfactory academic performance because the student completed too few of the total credit hours attended. More than 5,000 students lost their financial aid at the end of the fall term for failing to meet the credit-hour requirement. Thus, OCR determined he was not subjected to different treatment than other, non-disabled students. Accordingly, the agency found insufficient evidence of retaliation and closed the complaint. ■

ACCOMMODATION

Student with narcolepsy, university hash out compromise

Case name: *Letter re: Kaplan University-Lewiston Campus*, No. 01-15-2019 (OCR 04/16/15).

Ruling: The Office for Civil Rights closed a complaint alleging disability discrimination after the parties agreed to enter into an Early Complaint Resolution Agreement.

What it means: Sometimes the side effects of medications taken by students with disabilities to mitigate the effects of their disabilities require accommodation, just as the disabilities themselves do.

Summary: A student with narcolepsy who was enrolled at Kaplan University-Lewiston Campus claimed the institution discriminated against her on the basis of her disability by denying her a requested accommodation during the fall of 2014.

After OCR notified the institution of its intention to investigate the complaint, Kaplan agreed to participate in the agency's Early Complaint Resolution process and reached an agreement that called, among other things, for:

- The student to meet the academic requirements of any program she chooses to enroll or re-enroll in at the institution.
- The student to provide the institution's Center for Disability Services with disability documentation from a qualified medical professional or other health care professional related to her disability, specifying her need to take medication at certain times, the medical consequences of not taking her medication at those times, how the side effects of the medication preclude her from attending seminars at certain times of the day, and whether she can vary the time of administration so that she is able to attend seminars early in the day or late in the evening.
- The student to complete alternate assignments for any seminar session that she cannot attend due to her disability or medication schedule.
- The student to agree that the university may require that she provide documentation from a qualified medical or health care professional to support any future accommodation requests.
- The university to waive a requirement that she must submit an academic appeal if requesting re-enrollment in the program from which she was dismissed for failure to meet satisfactory academic progress standards or to enroll in any other program at the institution.

- The university to offer the student a seat in any course with a seminar offered during the limited hours she is able to attend classes, consistent with the documentation she provides as part of this agreement.

- The university to offer the student the ability to view archived seminar sessions for sessions that, because of her disability and medication schedule, she cannot attend. In exchange, the student will sign an attestation that she viewed the seminar session.

OCR advised both parties that it would not monitor implementation of, or compliance with, the agreement, but that if the institution fails to uphold its part, the student may file a new complaint. ■

POLICIES AND PROCEDURES

Student files complaint over lack of grievance procedures

Case name: *Letter re: Maryland University of Integrative Health*, No. 03152033 (OCR 04/09/15).

Ruling: The Office for Civil Rights closed a complaint against the Maryland University of Integrative Health involving allegations of disability and racial discrimination after the parties entered into an Early Complaint Resolution Agreement.

What it means: Students who feel that they have been treated unfairly on the basis of their disabilities or race may be less likely to file complaints with the Office for Civil Rights if their institution has policies and procedures in place for them to have their grievances adequately heard and addressed.

Summary: A student who was enrolled at the Maryland University of Integrative Health complained that the institution discriminated against students with disabilities by not offering a grievance procedure for disability-related complaints, that it discriminated against her specifically by denying her a grade appeal and placing her on academic probation, and that it retaliated against her for complaining about race discrimination in her grade appeal by placing her on academic probation.

Before the Office for Civil Rights could investigate, the university and the complainant entered into an agreement to resolve the allegations. Therefore, the agency advised that it was closing the complaint. It also stated that it would not monitor implementation of the agreement, but that if a breach occurs, the student may file a new complaint, and the agency would investigate the original complaint, not the breach of the agreement. ■

AT A GLANCE

A review of this month's lawsuits and rulings

Lawsuit court records are summarized by
Richard H. Willits, Esq.

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TERMINATION

Generous New York statute language gives former employee's suit a boost

Case name: *Padilla, et al. v. Yeshiva University, et al.*, No. 16-4086-cv (2d Cir. 05/31/17).

Ruling: The U.S. Court of Appeals, 2d Circuit reversed a trial judge's ruling in favor of Yeshiva University.

What it means: The New York City Human Rights Law provides broader relief than many federal discrimination laws. A plaintiff is only required to allege enough facts to raise a right to relief above the speculative level.

Summary: Because of unspecified health issues, Yeshiva University carpenter mechanic Samuel Padilla was granted leave in March 2015 pursuant to the Family and Medical Leave Act.

On April 21, he received a notice that his position was being eliminated because of a reduction in force related to the merger of Yeshiva's medical school into Montefiore Medicine Academic Health System Inc.

After he was terminated, Padilla filed a suit that asserted violations of the New York City Human Rights Law because of disability discrimination.

Yeshiva filed a motion to dismiss.

The trial judge dismissed the suit.

On appeal, the court concluded the judge erred. It explained: (1) the NYCHRL provided broader relief than many federal discrimination laws and (2) a plaintiff was only required to allege enough facts to raise a right to relief above the speculative level. The appellate court reversed the trial judge's decision, ruling Padilla plausibly alleged his termination was caused in part by discrimination. ■

DISMISSAL

Unreasonable accommodation request vindicates university

Case name: *Sessoms v. The Trustees of the University of Pennsylvania*, No. 16-2954 (E.D. Pa. 05/24/17).

Ruling: The U.S. District Court, Eastern District of Pennsylvania granted summary judgment in favor of the University of Pennsylvania.

What it means: An employer has no obligation to provide a different supervisor.

Summary: Black female Andrea Sessoms worked in human resources for the University of Pennsylvania Health System. In 2014, white female Maria Colavita became her new supervisor. Colavita in turn reported to white female Margaret Alford.

Sessoms' work performance began to decline in April when her mother fell ill. She took two weeks of leave after her mother died in May. When Sessoms returned to work, her performance allegedly continued to decline. At that time, Sessoms unsuccessfully complained to Alford that Colavita overlooked her at meetings and verbally abused her.

In a September meeting, Sessoms received a written coaching memo from Colavita and Alford for the stated reason of poor performance. Sessoms claimed Colavita said in the meeting that her medical problems did not matter. On that same date, Sessoms obtained leave pursuant to the Family and Medical Leave Act due to acute stress disorder, major depressive disorder, and memory issues.

After her expiration of 24 weeks of leave in March 2015, Penn asked Sessoms to submit a "Certificate of Return to Work" and/or an "Employee Request for Reasonable Accommodation."

Sessoms submitted those forms a few days later, claiming she could not return to work without restrictions. She also requested: (1) a part-time schedule, (2) time upon returning to work to become reacquainted with procedures, (3) ergonomic review of her workspace, and (4) transfer to a supervisor other than Colavita.

Penn offered all of the accommodations except for

reassignment to a new supervisor.

Sessoms eventually rejected all of the offered accommodations, claiming that accepting them would be against medical advice.

Sessoms was terminated in April, and filed a suit claiming a failure to accommodate her disability. Penn filed a motion for summary judgment, arguing that the request for a new supervisor was unreasonable.

Sessoms responded that failure to accommodate started before September 2014, because she reported her health concerns and Colavita's harassment then and no one offered any accommodations.

The district judge said that even if her 2014 complaints amounted to a request for an accommodation, they all revolved around the issue of Colavita being her supervisor. He granted summary judgment in favor of Penn, ruling: (1) an employer had no obligation to provide a different supervisor as a reasonable accommodation and (2) an employee must at least show there was an open position to which she could have transferred if a new job with a different supervisor was the accommodation sought. ■

ACCOMMODATION

Granting of generous medical leave exonerates college district

Case name: *Young v. Peralta Community College District*, No. 14-cv-05351 (N.D. Cal. 06/07/17).

Ruling: The U.S. District Court, Northern District of California granted summary judgment in favor of the Peralta Community College District.

What it means: The Americans with Disabilities Act does not require an employee to get the accommodation she prefers.

Summary: In about 1995, Rona Young began working as a public information officer in the Peralta Community College District. She experienced a number of health challenges over the years, including physical injuries that resulted in several corrective surgeries and physical therapy. The district accommodated her with medical leave, modified duties, and ergonomic equipment.

Young hurt her right knee at work in 2009, and the district agreed that she could work from home as needed.

In January and March 2010, Young submitted notes from treating physician Dr. Jacob Rosenberg advising that she needed either a scooter or a motorized wheelchair to get around campus.

Young underwent knee surgery in May and submitted a doctor's note stating that she would be unable to work for up to three to four months during recovery. The district put her on leave during that time.

In August, Young submitted a doctor's note releasing her to do desk work four hours per day, but stating she would be unable to walk around campus. Young reinjured her knee a month later, and submitted a doctor's note stating that she should be off work until mid-October. The district continued her leave.

Young retired in November and filed a suit claiming a violation of the Americans with Disabilities Act because she was denied the accommodation of a wheelchair.

The district filed a motion for summary judgment.

The judge said the Americans with Disabilities Act did not entitle an employee to the accommodation she preferred, and that working from home was a reasonable accommodation when it permitted an employee to perform the essential functions of the job.

He granted summary judgment in favor of the district, ruling that the accommodations of working at home and medical leave had been reasonable. ■

RETALIATION

Failure to allege major life activity limitations dooms former student's suit

Case name: *Cain v. Mandl College of Allied Health, et al.*, No. 14 Civ. 1729 (S.D. N.Y. 06/22/17).

Ruling: The U.S. District Court, Southern District of New York dismissed a suit against the Mandl College of Allied Health.

What it means: A plaintiff suing pursuant to the Americans with Disabilities Act must allege how her mental or physical condition affects a major life activity.

Summary: Prior to enrolling in the surgical technologist program at the Mandl College of Allied Health in 2012, Ileen Cain told College President Mel Weiner that she had been diagnosed with post-traumatic stress disorder because her son had been murdered.

In June, Cain told him that other students were calling her a "kook" or "coo coo." A few weeks later, Weiner sent a letter to Cain stating that she was being terminated because there had been numerous complaints regarding her behavior. The letter also cited an excerpt from the student handbook that provided that a student could be terminated for unseemly behavior that distracted other students.

Cain filed a suit claiming the college and Weiner discriminated against her on the basis of her disability in violation of the Americans with Disabilities Act by allowing fellow students to harass her.

The defendants filed a motion to dismiss.

The district judge said the ADA required Cain to demonstrate she was a qualified individual with a disability, which meant showing her PTSD substantially limited one or more major life activities.

He noted Cain's allegations that she "experienced physical symptoms such as insomnia and loss of appetite as well as confusion, and obsessive thinking over the future." But he said there were no specific allegations connecting her symptoms to any limitation of her major life activities. The judge explained that Cain had not provided any factual support detailing the frequency, duration, or severity of any limitations on a life activity. He also said that Cain had not alleged any relationship between the name calling and any of her symptoms.

The judge dismissed the suit. ■

ADULT LEARNER

University properly accommodated disabled student

Case name: *Chin v. Rutgers, et al.*, No. 16-2737 (3d Cir. 06/22/17).

Ruling: The U.S. Circuit Court of Appeals, 3d Circuit affirmed a summary judgment in favor of Rutgers University.

What it means: Although courts have the ultimate responsibility to decide whether a student is qualified within the definition of the Americans with Disabilities Act, they show great respect for the professional judgment of faculty.

Summary: Not long after Iris Chin enrolled in Rutgers New Jersey Medical School in 2004, she was diagnosed with bipolar disorder.

Because she performed poorly in her first year, Rutgers granted her a four-month leave of absence and allowed her to start school again as a first-year

student in 2005.

Rutgers required all medical students to pass the three-part U.S. Medical Licensing Exam before graduating.

In 2007, Chin was granted a six-week extension prior to taking the first part. When that extension expired, Chin was granted an additional year of leave to prepare. Upon returning from that leave in 2008, Chin was granted a third extension for an unspecified time to study.

Chin failed the first part when she finally sat for it.

Chin was granted a four-month leave to prepare for a second attempt at taking the exam. When that expired, the dean granted her another extension for an unspecified time.

Chin again failed the first part.

Although university policy required dismissal of students who twice failed the first part of the exam, the dean: allowed her a third attempt, granted her an eight-week extension to prepare, and also arranged for tutoring.

Chin passed the first part on the third try.

On Chin's first attempt at the second part of the licensing exam, she failed both the "clinical skills" and "clinical knowledge" components. Her request for an extension before taking it again was denied.

Chin sat only for the "clinical skills" portion on her second attempt, and failed it.

Rutgers refused to allow a third attempt and dismissed her from the program.

Chin sued Rutgers, claiming violations of the Americans with Disabilities Act.

The trial judge granted summary judgment in favor of Rutgers.

The appellate court ruled that the trial judge was correct because the university had worked extensively over a period of nearly eight years to accommodate Chin. ■

Disability Compliance for Higher Education Board of Advisors

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DISABILITY COMPLIANCE FOR HIGHER EDUCATION

QUICK STUDY

An overview of the key topics faced by disability services providers with citations to noteworthy cases, statutes, regulations, and additional sources.

Student-athletes

Overview

Coaches and others who work with student-athletes should understand the rights and responsibilities of the institution with regard to those students.

Key Rulings

❑ Ariana Borreggine, a student at Messiah College, was dismissed from the women's lacrosse team. She was told she was dismissed for her bad attitude, including not wearing a walking boot for a foot injury as instructed by her doctor. Borreggine, who had dyslexia, filed a suit claiming violations of the Rehabilitation Act. The judge granted summary judgment to the defendants, ruling that no jury could reasonably conclude that Borreggine's dyslexia was the sole reason for her removal from the team. *Borreggine v. Messiah College, et al.*, No. 1:13-cv-01423 (M.D. Pa. 08/19/15).

❑ Gavin Class collapsed during practice with the Towson University football team. After he received a liver transplant and extensive rehabilitation, his doctors cleared him to play football. A divided appellate court said the institution's policy of giving the team doctor final authority in deciding whether a student-athlete is fit to play is reasonable. In addition, the majority ruled that Towson was not required to implement a monitoring system Class requested because it would constitute a fundamental alteration in the nature of the program because the team doctor would have to continuously monitor Class during both practices and games. *Class v. Towson University, et al.*, No. 15-1811 (4th Cir. 11/13/15).

❑ OCR investigated a complaint submitted by a former member of Norfolk State University's women's basketball team, claiming the coach did not renew her scholarship for the 2013–14 academic year because she was diagnosed with depression. The coach stated that the complainant was dismissed for failing to follow numerous university and team rules, including not returning or paying for the books she received from the university, receiving citations and fines for having a pet in her residence hall, and failing to maintain cleanliness standards in her room. Additionally, the coach told OCR that three or four other players without disabilities were dismissed from the team between 2010 and 2012 for failing to adhere to team rules. *Letter to: Norfolk State University*, No. 11-15-2009 (OCR 04/01/15).

❑ In spite of his learning disability, Tulane University student Brandon Purcell was able to become a kicker on the football team in 2013. He was later removed from the team but was allowed to train with the team to potentially earn a walk-on spot. Purcell filed a suit asserting several claims against Tulane and others. One was that the behavior of the coaching staff was intended to inflict severe emotional distress. The judge dismissed the claim, ruling that Purcell had not described conduct that was so severe as to justify a claim for intentional infliction of emotional distress. *Purcell, et al. v. Tulane University of Louisiana, et al.*, No. 16-1834 (E.D. La. 05/26/17). ■

What You Should Know

- For a successful rehabilitation claim after dismissal from an athletic team, a student-athlete's disability must be the sole cause for dismissal.
- An institution is not required to fundamentally alter the nature of a program to accommodate a student-athlete with a disability.
- Evidence of nondiscriminatory grounds for dismissal from a team can protect an institution in a lawsuit.
- Conduct must be extreme to qualify as intentional infliction of emotional distress. ■