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NO STUDENT LEFT BEHIND? ACCOMODATING STUDENTS WITH DISABILITIES IN HIGHER EDUCATION DURING THE TRUMP ADMINISTRATION

ANNE MARIE FRISTOE*

INTRODUCTION

Students with disabilities who attend postsecondary educational institutions in the United States are unlikely to succeed without proper assistance. A growing number of these educational institutions struggle to accommodate studies with disabilities. A study published in 2011 by the National Center for Special Education Research found that students with learning disabilities are far more likely than others to drop out of four-year colleges.¹ Additionally, only 34 percent of students with learning disabilities complete a four-year degree within eight years of finishing high school², compared to the approximately 54 percent of all students nationally who graduate within six years.³ Consequently, there has been a substantial increase in the number of lawsuits filed by students against universities for violating the Americans with Disabilities Act. While the majority of these lawsuits have resulted in out-of-court settlements, these lawsuits signal a comprehensive shift in the extent to which postsecondary schools are expected to address accessibility.⁴

* J.D. candidate, North Carolina Central University School of Law, 2019. I would like to dedicate this to Disability Rights North Carolina in recognition for all of their work fighting for the rights of people with disabilities living in North Carolina. I also wish to thank Attorney Holly Stiles, who has focused her career on advocating for the right of people with disabilities to live, learn, work, and play in the community of their choice, for all of her support and guidance.

1. Lynn Newman et al., Nat'l Ctr. For Special Educ. Research, *The Post-High School Outcomes of Young Adults With Disabilities up to 8 Years After High School* (Sep. 2011), <https://ies.ed.gov/ncser/pubs/20113005/pdf/20113005.pdf>.

2. *Id.* at 47.

3. Nat'l Student Clearinghouse Research Ctr., *Completing College: A National View of Student Attainment Rates* (Nov. 2013) <https://nscresearchcenter.org/wp-content/uploads/Signature6Extra-Completions.pdf>.

4. See Allie Grasgreen, *Dropping the Ball on Disabilities*, Inside Higher Ed (Apr. 2, 2014), <https://www.insidehighered.com/news/2014/04/02/students-disabilities-frustrated-ignorance-and-lack-services>.

However, in October 2017, the U.S. Department of Education rescinded seventy-two special education guidance documents that specifically detailed the rights of students with disabilities in schools, in an effort to “alleviate unnecessary regulatory burdens.”⁵ While the U.S. Department of Education has insisted that the removal of these guidance documents will not compromise services for students with disabilities, it remains unclear what the impact will be for students with disabilities enrolled in postsecondary institutions.⁶

BACKGROUND

A. THE REQUIREMENT THAT STUDENTS HAVE EQUITABLE ACCESS

The first disability civil rights law enacted in the United States was Section 504 of the Rehabilitation Act of 1973 (“Rehab Act”). Congress intended the Rehab Act to serve as a “comprehensive federal program” to protect individuals with disabilities from discrimination or denial of benefits under any program receiving federal funding.⁷ Specifically, Section 504 states that, “[n]o 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 . . .”⁸ Essentially, Section 504 requires schools to make their educational programs “accessible to qualified students with disabilities.”⁹

The Americans with Disabilities Act (“ADA”) was signed into law in 1990 and provides individuals with disabilities broad protection against discrimination in employment, public services, and other public accommodations, such as colleges and universities.¹⁰ However, the ADA only requires that students with disabilities have equitable access, not that they receive accommodations.¹¹ The purpose of the ADA is to provide “clear, strong, consistent, enforceable standards to remedy discrimination in employment (Title I), in

5. Michelle Diamant, *Education Department Defends Rollback of Special Ed Guidance*, Disability Scoop (Oct. 24, 2017), <https://www.disabilityscoop.com/2017/10/24/ed-department-defends-rollback/24338/>.

6. *Id.*

7. *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 626, 104 S. Ct. 1248, 1250, 79 L. Ed. 2d 568 (1984) (acknowledging that Congress enacted § 504 to improve the lives of persons with disabilities).

8. 29 U.S.C.S. § 794(a) (2016).

9. Deborah Leuchovius, Pacer Ctr., *ADA Q&A...The ADA, Section 504 & Postsecondary Education*, Pacer Center Action Information Sheets 1, (2003), <http://www.pacer.org/parent/php/PHP-c51g.pdf>.

10. Higher Educ. Compliance All., *Disabilities and Accommodations*, <http://www.higheredcompliance.org/resources/disabilities-accommodations.html> (last visited Jan. 19, 2018).

11. Grasgreen, *supra* note 3.

the services of public entities (Title II), and in places of public accommodation (Title III).¹² Accordingly, Title II of the ADA covers state funded educational institutions and Title III covers private educational institutions and vocational schools.¹³ Moreover, any public or private school that receives federal funds is also protected under Section 504.¹⁴

As required by law, postsecondary institutions may not discriminate on the basis of disability and must make certain that all programs are accessible to students with disabilities.¹⁵ Accessibility includes the need for schools to modify existing testing practices and policies, provide architectural access, or provide aids and services necessary for more effective communication between students and staff.¹⁶ Together, the ADA and Section 504 serve to protect individuals with disabilities from disparate treatment in schools, employment, and the community.¹⁷

B. REASONABLE ACCOMODATIONS

The ADA requires postsecondary institutions to provide reasonable accommodations when a student discloses a disability.¹⁸ Specifically, Title III of the ADA requires that places of public accommodation take necessary steps to “ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.”¹⁹ The only exception to this requirement is where a place of public accommodation can prove that taking such steps would “fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”²⁰

Reasonable accommodations are “modifications or adjustments to the job, the work environment, or to the way things are usually done” that provide

12. *Argenyi v. Creighton Univ.*, 703 F.3d 441, 447 (2013) (noting that a reasonable factfinder could find that student was denied the opportunity to benefit from medical school equal to his nondisabled classmates).

13. Deborah Leuchovius, Pacer Ctr., *ADA Q&A...The ADA, Section 504 & Postsecondary Education*, Pacer Center Action Information Sheets 1, (2003), <http://www.pacer.org/parent/php/PHP-c51g.pdf>.

14. *Id.*

15. Leuchovius, *supra* note 8, at 1.

16. Leuchovius, *supra* note 8, at 1-2.

17. *Section 504 of the Rehabilitation Act of 1973*, Disability Rights Educ. and Def. Fund, <https://dredf.org/legal-advocacy/laws/section-504-of-the-rehabilitation-act-of-1973/> (last visited Jan. 18, 2018).

18. 42 U.S.C. § 12182(b)(2)(A)(ii).

19. 42 U.S.C. § 12182(b)(2)(A)(iii).

20. *Id.*

qualified students with disabilities an equal opportunity to participate in academic programs.²¹ Some examples of reasonable accommodations that postsecondary institutions may be expected to implement include making existing facilities accessible to and usable by students with disabilities, modifying technology used in the classroom, installing new technology or devices, and providing interpreters.²² Accommodations provide other ways for students to successfully complete course requirements by accounting for disability-related barriers, thus creating a level playing field.

C. ACCESSIBILITY AND THE COURTS: VINDICATING STUDENT'S RIGHTS THROUGH EXPANSION

1. EXPANSION OF LIABILITY: TORTIOUS CONDUCT IN AN EDUCATIONAL SETTING

In 2015, the United States District Court for the Middle District of North Carolina recognized tortious conduct in an educational setting in an action for disability discrimination filed by a student in *Elmendorf v. Duke University*.²³ This recognition expanded the liability of postsecondary schools for misrepresentations regarding the school's ability to accommodate students in North Carolina.²⁴ The plaintiff, Bradley Elmendorf ("Elmendorf"), brought an action to challenge Duke University's ("Duke") misrepresentations regarding the school's ability to accommodate him.²⁵ Elmendorf's claims for negligent misrepresentation and unfair or deceptive trade practices were based on a regulation from the Department of Education which imposes a duty on postsecondary institutions to exercise reasonable care when communicating information about student disability accommodations.²⁶

Elmendorf, a student with dyslexia, overcame his reading difficulties by listening to books and other printed materials rather than reading.²⁷ In 2012, Elmendorf enrolled in Duke's Master of Divinity program based on the university's assurances that it would provide him with all of his textbooks and assigned readings in an audio format.²⁸ However, Duke failed to provide

21. *Disability Employment 101: Appendix IV: Reasonable accommodations and the ADA*, U.S. Dept. of Educ., <https://www2.ed.gov/about/offices/list/oseers/products/employmentguide/appendix-4.html> (last modified Sept. 25, 2007).

22. *Id.*

23. *Elmendorf v. Duke Univ.*, No. 1:14CV697, 2015 WL 4094175, at *4 (M.D.N.C. July 7, 2015).

24. *Id.* at *2.

25. *Id.* at *1-3.

26. U.S. Dept. of Ed. Program Integrity Questions and Answers – Misrepresentation, M-Q3 & M-A3, available at www2.ed.gov/policy/highered/reg/hearulemaking/2009/misrep.html. (last visited Jan. 13, 2018).

27. *Elmendorf*, 2015 WL 4094175, at *1.

28. *Id.* at *2-3.

Elmendorf with the agreed upon accommodations, and Elmendorf was forced to drop, withdraw from, or receive incompletes in most of his courses.²⁹ Elmendorf filed a grievance with Duke's Office of Institutional Equity outlining Duke's failure to provide him with equal access to its educational program.³⁰ In response, the Divinity School informed Elmendorf that, unless he abandoned his grievance and signed an agreement waiving all his rights to complain about the discrimination he experienced, he would lose his tuition scholarship.³¹

Disability Rights North Carolina filed a lawsuit in the United States District Court for the Middle District of North Carolina against Duke based on the University's failure to properly accommodate Elmendorf.³² Specifically, Elmendorf brought forth four claims for relief: (1) Section 504 of the Rehabilitation Act; (2) Title III of the Americans with Disabilities Act; (3) Unfair or Deceptive Trade Practices; and (4) Negligent Misrepresentation.³³ In response, Duke moved to dismiss Elmendorf's state law claims for negligent misrepresentation and violation of North Carolina's Unfair and Deceptive Trade Practices Act pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.³⁴ The court denied these claims, noting that other courts have "recognized potential state law claims against educational institutions related to specific promises that the educational institution allegedly failed to honor."³⁵

In May 2016, the lawsuit was resolved by an out-of-court settlement with Duke.³⁶ The settlement agreement specified that Duke would provide additional training to the disability services staff and liaisons in an effort "to enhance the effectiveness of student accommodations, to forge a connection between the disability services office and IT staff to ensure that technical issues related to the provision of accommodations are resolved quickly, and to publicize the student ombudsman's contact information on the accessibility services website."³⁷ Additionally, Duke invested in an online program called SensusAccess, which rapidly converts inaccessible reading material to an accessible format in order to provide timely access to alternative formats of educational materials.³⁸

29. *Id.* at *3.

30. *Systemic Cases – Currently and Recently Concluded*, Disability Rights North Carolina, <http://www.disabilityrightsncc.org/big-cases>. (last visited Jan. 10, 2018).

31. *Id.*

32. *Id.*

33. *Elmendorf*, 2015 WL 4094175, at *1.

34. *Id.*

35. *Id.*

36. *Systemic Cases – Currently and Recently Concluded*, *supra* note 28.

37. *Systemic Cases – Currently and Recently Concluded*, *supra* note 28.

38. *Systemic Cases – Currently and Recently Concluded*, *supra* note 28.

2. THE EXPANSION OF WHAT CONSTITUTES A “REASONABLE ACCOMMODATION”

The substantial uptick in the number of lawsuits filed by students against universities for violating the ADA and Section 504 has resulted in the expansion of the definition of a “reasonable accommodation” in many postsecondary schools. Accordingly, many hope that these cases will provide a basis upon which the liability of postsecondary schools may be expanded.

For example, in October 2017, Legal Aid of North Carolina announced that it had reached a settlement agreement with North Carolina State University (“NCSU”) regarding a complaint filed with the U.S. Department of Housing and Urban Development in 2016 against NCSU on behalf of a student with a disability.³⁹ Specifically, the student alleged that NCSU had violated the federal Fair Housing Act by denying the student’s request to keep an emotional support animal in a university-operated student housing unit as a reasonable accommodation.⁴⁰ At the time the complaint was filed, NCSU did not have a policy for emotional support animals.⁴¹ As a result of the settlement agreement, NCSU agreed to: (1) require training on the Fair Housing Act for employees, with an emphasis on reasonable accommodations; (2) display a HUD Fair Housing poster in all NCSU housing units and offices and on the websites of University Housing and the Disability Services Office; and (3) publicize the new “Assistance Animal” policy on NCSU websites.⁴² The student also filed an administrative complaint for the same alleged conduct in 2016 with the U.S. Education Department’s Office for Civil Rights, which found sufficient evidence that the NCSU had violated Title II of the ADA and Section 504 by denying the student’s request to keep her emotional support animal in her university housing as a reasonable accommodation.⁴³

Postsecondary schools have faced an increased number of lawsuits regarding the accessibility of online learning materials, further expanding the scope of accommodations in the higher education setting. In 2013, the Justice Department announced a settlement agreement with Louisiana Tech University (“LTU”) and the Board of Supervisors for the University of Louisiana System in relation to allegations that LTU violated the ADA by using an online

39. *NC State University Settles Complaint Alleging Disability Discrimination in Student Housing*, LEGAL AID OF NORTH CAROLINA (Oct. 11, 2017), <http://www.legalaidnc.org/Pages/about-us/news/nc-state-settlement-disability-discrimination.aspx>.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

learning product not accessible to a blind student.⁴⁴ Under the settlement agreement, LTU agreed to provide training on the ADA and its requirements to employees and to implement various disability-related policies focused on ensuring that learning technology is accessible to students with disabilities.⁴⁵ This lawsuit highlighted the impact of emerging technologies on education and the need to ensure that students with disabilities are not excluded from these platforms.

D. WITHDRAWAL OF SPECIAL EDUCATION GUIDANCE DOCUMENTS

Policy guidance documents are routinely issued by various departments of the federal government and serve to represent the department's "current thinking" on an issue or area of law.⁴⁶ Guidance documents are only intended to aid in the interpretation of laws; they do not create or grant any rights and do not force any requirements beyond what is required under applicable law and regulations.⁴⁷

On October 2, 2017, the U.S. Department of Education ("DOE") rescinded seventy-two special education guidance documents, marking the first mass-rescission of guidance documents for the Office of Special Education and Rehabilitative Services.⁴⁸ The DOE's action came as a direct result of Presidential Executive Order 13777, which mandated all agencies "to alleviate unnecessary regulatory burdens."⁴⁹ Of these seventy-two documents, sixty-three came from the Office of Special Education Programs ("OSEP") and nine came from the Rehabilitation Services Administration ("RSA").⁵⁰ In response to the initial backlash received over the abrupt withdrawal of guidance documents, the DOE released a revised list of rescinded guidelines along with a brief explanation beside each in an effort to provide more details

44. *Justice Department Settles with Louisiana Tech University Over Inaccessible Course Materials*, U.S. Department of Justice (Jul. 23, 2013), <https://www.justice.gov/opa/pr/justice-department-settles-louisiana-tech-university-over-inaccessible-course-materials>.

45. *Id.*

46. *Significant Guidance at the Department of Education*, U.S. Department of Education (Oct. 27, 2017), <https://www2.ed.gov/policy/gen/guid/significant-guidance.html>.

47. *Id.*

48. Sara Luterman, *Rescinded Guidance From Department Of Education Mostly Harmless (This Time)*, NOS MAG. (Oct. 25, 2017), <http://nosmag.org/rescinded-documents-from-department-of-education-mostly-harmless-osers-special-ed/>.

49. Moriah Balingit, *DeVos Rescinds 72 Guidance Documents Outlining Rights For Disabled Students*, WASH. POST (Oct. 21, 2017), https://www.washingtonpost.com/news/education/wp/2017/10/21/devos-rescinds-72-guidance-documents-outlining-rights-for-disabled-students/?utm_term=.e8bb58e35f42.

50. *Id.*

to the public.⁵¹ The list described most of the rescinded guidelines as “unnecessary” primarily because many referenced regulations or programs no longer exist or more recent guidance on the subject is now in place.⁵²

By way of background, many of the now-rescinded special education guidance documents were first issued in the 1980s and were generally used by the DOE to clarify the implementation of existing laws and regulations in schools and student’s rights under the Rehab Act and the Individuals with Disabilities Education Act (“IDEA”).⁵³ The rescinded guidance documents can be divided into three categories: (1) memos addressing specific issues submitted by states found to be no longer relevant; (2) specific guidance issued after a policy change; and (3) memos meant to alert professionals of time sensitive publications or programs.⁵⁴

Guidance documents such as these are particularly important because they explain how existing disability rights laws and regulations should be applied in schools and clarify the rights of students with disabilities in multiple areas. Specifically, parents, advocates, and attorneys depend upon this guidance to make certain that student disability accommodation guidelines are properly followed by schools and that both rights of the students and parents are not being ignored.

ANALYSIS

While the withdrawal of guidance documents does not change any mandates of the ADA, it is expected to cause great uncertainty since the guidelines served as an interpretation of the law. The DOE has stated that no policy implications will result from the rescission and that students will not see any negative impact on the services provided to them, yet many advocates worry about the impact of the confusion that will inevitably result from this action.⁵⁵

The primary concern shared by disability advocates is what the withdrawal of this special education guidance signals for enforcement efforts going forward.⁵⁶ While the federal list of rescinded guidance does contain a column titled “Reasons for Rescinding” it fails to provide where in current regulations the rescinded memo or document is now covered, which has created further ambiguity and concern.⁵⁷ This concern led many attorneys and advocates to request written documentation stating where these issues are now

51. See Diament, *supra* note 4.

52. *Id.*

53. See Balingit, *supra* note 47.

54. Luterman, *supra* note 46.

55. Luterman, *supra* note 46.

56. Luterman, *supra* note 46.

57. Luterman, *supra* note 46.

covered.⁵⁸ While it is true that some schools provide adequate services to students with disabilities, this is not the case for many students. Many advocates worry that the rescinded guidance documents will make the already onerous accommodations process even more difficult for students.⁵⁹

Moreover, many advocates predict that the DOE will announce more guidance changes in the coming months as it examines other policies related to disability rights.⁶⁰ While a change in guidance is not a policy change, guidance on a policy can be withdrawn without congressional action or public feedback, which can result in major changes to the enforcement of certain laws. For example, Title IX is a federal law that serves to protect students against discrimination based on sex, including sexual harassment, in schools and programs receiving federal funding.⁶¹ In February 2017, guidance on Title IX was rescinded and subsequently President Donald Trump rolled back an interpretation of the law that protected transgender bathroom use in schools thus, marking a significant change in the enforcement and implementation and Title IX in schools.⁶²

Without federal guidance in place, states can act to issue guidance on specific policies. For example, the Secretary of Education in Vermont, Rebecca Holcombe, stated that “the state was strongly committed to protecting the rights and opportunities of students with disabilities and state commitments have not changed.”⁶³ Additionally, Meagan Roy, the Director of Student Support Services at Champlain Valley School District and President of the Vermont Council of Special Education Administrators, declared “even if there were changes in federal guidance, educators in the state would still look to the Vermont Agency of Education for statewide guidance.”⁶⁴ While this serves to comfort those living in states like Vermont, with known progressive beliefs regarding special education, it does not serve to ease the anxiety suffered by those living in states not known for their commitment to protecting and supporting students with disabilities, such as North Carolina.

58. David M. Perry, *Assessing Betsy DeVos' Rollback On Disability Rights*, PAC. STANDARD (Oct. 24, 2017), <https://psmag.com/education/betsy-devos-rolls-back-disability-rights>.

59. *Id.*

60. *Id.*

61. 20 U.S.C. § 1681 (2018).

62. Sandhya Somashekhar, Emma Brown & Moriah Balingit, *Trump Administration Rolls Back Protections For Transgender Students*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?utm_term=.51e30b990dde.

63. See Nicole Higgins Desmet, *Vermont Educators: Initial Impact Of Special Ed Guidance Repeal Minimal*, BURLINGTON FREE PRESS (Oct. 25, 2017), <http://www.burlingtonfreepress.com/story/news/local/vermont/2017/10/25/vermont-educators-initial-impact-special-ed-guideline-repeal-minimal/798840001/>.

64. *Id.*

In the wake of the withdrawal of these guidance documents, *Elmendorf* and other cases arising out of actions for disability discrimination by postsecondary schools will serve an even more important role in the vindication of student rights. Specifically, in *Elmendorf*, by officially recognizing the possibility for tortious conduct in an educational setting, postsecondary schools are further encouraged to provide adequate accommodations to students with disabilities and monitor and address the needs of these students in order to protect against discrimination based on disability. Following *Elmendorf*, there is an expectation that an increased number of similar claims will be filed and reliance on DOE regulations will also increase. Going forward, *Elmendorf* will serve an important role in the vindication of student rights by providing a basis upon which future cases may further expand the liability of postsecondary schools for misrepresentations regarding the school's ability to accommodate students.

While the current administration's act of rescinding these special education guidance documents signals a major shift regarding their commitment to protecting the rights of students with disabilities, the nation's courts appear to be moving in the other direction. Often in these cases the school will initially respond to the student's complaint with a motion to dismiss pursuant to Rule 12(b)(6) for failure to state claim upon which relief can be granted.⁶⁵ The routine denial of these motions is reflective of the court's recognition that the claims alleged by these students have merit. As a result, most postsecondary schools facing suits based on discrimination should opt to settle the case out-of-court, rather than proceed to trial.

In sum, advocates and students will be forced to rely even more on regulations, such as which served as the basis for the tort claim in *Elmendorf*, and the changes in how schools accommodate students with disabilities prompted by recent cases in order to hold postsecondary schools accountable and ensure the right to an equal opportunity in higher education.

CONCLUSION

Overall, it remains unclear what the impact of the rescission of the seventy-two special education guidance documents will be for students with disabilities enrolled in postsecondary schools. It will likely take a long time before it is made fully apparent how much has been lost and how much students

65. See *Nat'l Ass'n of the Deaf v. Harvard Univ.*, No. 3:15-CV-30023-MGM, 2016 WL 3561622, at *6 (D. Mass. Feb. 9, 2016) (noting that the defendant's arguments were "not suitable for resolution on a motion to dismiss"); *Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.*, 2016 U.S. Dist. LEXIS 153388, *3 (noting that the "court adopts Judge Robertson's recommendation in full for the reasons set forth in the Memorandum and Order on Defendants' Motion to Stay or Dismiss in *Nat'l Ass'n of the Deaf v. Harvard Univ.*"); *Elmendorf*, 2015 WL 4094175, at *1 (noting that the defendant's contentions did not warrant dismissal of the plaintiff's claims on the pleadings).

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with disabilities stand to lose as a result of these changes in federal guidance. However, the increase in lawsuits filed by students against postsecondary schools signals a comprehensive shift in the extent to which postsecondary schools are expected to address accessibility. In the absence of any clarity and new federal guidance, these cases will serve an important role in the vindication of student rights by providing a basis upon which the liability of postsecondary schools may be expanded.