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Rights of Students with Disabilities in Post-Secondary Education: Recent Developments

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This memo provides an overview of recent changes and developments in the legal rights of students with disabilities in the post-secondary context by reviewing several recent court rulings and enforcement actions from federal administrative agencies. The cases and actions included below are not comprehensive of all changes and developments over the last few years, and the summaries only provide a limited overview of the reasoning and/or result in each situation. These focus on the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504).

During the application process, deference in admission decisions is given to a school's policy to consider a variety of objective and subjective criteria. Although some of the factors may be impacted by an applicant's disability, the Eighth Circuit held there is no discrimination if the school's consideration of those factors does not show discriminatory intent.¹ Such reasoning may not apply, however, when students are unable to access the application process due to their disability. A 2020 court ruling found that difficulty of students with disabilities obtaining accommodations or locating suitable test locations for standardized testing during the pandemic denied meaningful access to the application process.² Courts have also found that a university's online platform is a place of public accommodation, and that students with disabilities may be denied meaningful access when a university's website, databases, and online course content are not accessible.³

A recent trend seems to have expanded institutional obligations when students request accommodations. A 2020 court ruling stated that once an accommodation is requested, the school has a duty to engage in an interactive process to work with the student to identify a

¹ *Power v. University of North Dakota School of Law*, 954 F.3d 1047 (8th Cir. 2020).

² *Kawika Smith v. Regents of the University of California*, RG1904622 (Cal. Dist. August 31, 2020).

³ *National Association of the Deaf v. Harvard University*, 377 F.Supp.3d 49 (D. Mass. 2019); *Payan v. Los Angeles Community College*, 2019 WL 2185138 (C.D. Cal. May 21, 2019), *See also* *Payan v. Los Angeles Community College District*, 11 F.4th 729 (9th Cir. Aug. 24, 2021) (remanded on different grounds).

reasonable accommodation.⁴ A 2020 OCR Agreement similarly required a university's accommodation request procedure to have specific interactive features.⁵ Further, the Ninth Circuit ruled that a student may be entitled to additional accommodations even if their request is not made through the university's proper channels.⁶

When an accommodation has been requested, a university is not required to provide a student's proposed accommodations if they adequately consider the request and provide reasonable alternatives.⁷ That said, in the *Rogers* ruling mentioned above, the Ninth Circuit explained that a university's decision is only entitled to deference if it conducted a fact-specific, individualized analysis of the student's circumstances and the accommodations that might allow that student to meet the program's standards.⁸

Recent cases and complaints have also addressed more specific accommodation-related questions. OCR resolutions have required that institutions consider whether attendance policies are essential academic requirements when determining reasonable accommodations, suggesting that decreased or limited attendance may be an appropriate accommodation in some situations.⁹ Students are also entitled to meaningful access to the physical campus. Students with mobility disabilities were found to have been denied meaningful access to a college campus where, after the college ended its shuttle service, students had to drop classes and forego extracurricular activities held in buildings that were difficult to reach on foot.¹⁰ Recent settlement agreements have also included accessibility of college campuses, including sidewalks and parking facilities, recognizing that students with disabilities require these to be accessible to travel within a college or university setting.¹¹

A number of cases have also considered how requests or the need for accommodations relate to a student's enrollment/standing. A settlement agreement observed that a student may have been retaliated against where they were forced to change course of study and find a new advisor after requesting reasonable accommodations.¹² A district court concluded that a student was regarded as having a disability and plausibly alleged where the student was required to seek psychiatric counseling and clearance to return to school before eventually being expelled.¹³ Where a student was dismissed on the basis of campus safety, a district court found that an analysis of whether a student with a mental health disability represents a direct threat must be

⁴ *Newell v. Cent. Mich. Univ. Bd. of Trustees*, 2020 WL 4584050 (E.D. Mich. Aug. 10, 2020).

⁵ Resolution Agreement Between O.C.R., U.S. Dep't of Educ. & Oakland Univ., No. 15-19-2070 (May 15, 2020).

⁶ *Rogers v. Western University of Health Sciences*, 787 Fed. Appx. 932 (9th Cir. 2019).

⁷ *Newell v. Central Michigan University Board of Trustees*, 2020 WL 4584050 (E.D. Mich. Aug. 10, 2020).

⁸ *Rogers v. Western University of Health Sciences*, 787 Fed. Appx. 932 (9th Cir. 2019).

⁹ See, e.g., Resolution Agreement Between O.C.R., U.S. Dep't of Educ. & Temple Univ., No. 03-20-2244 (Aug. 20, 2020).

¹⁰ *Guerra v. West Los Angeles College*, 812 Fed.Appx. 612 (9th Cir. July 17, 2020).

¹¹ Settlement Agreement Between the United States and Central Texas College of Killeen (May 6, 2021); Settlement Agreement Between the United States and Tidewater Community College, DJ # 204-79-334 (May 6, 2021); Resolution Agreement between the United States and Central Michigan University, No. 15-18-2123 (Mar. 25, 2020).

¹² Settlement Agreement Between the United States and Old Dominion University, DJ 169-79-0 (Feb 3, 2021).

¹³ *Schimkewitsch v. New York Institute Of Technology*, 2020 WL 3000483 (E.D.N.Y. June 4, 2020).

individualized and include consideration of reasonable accommodations likely to reduce the level of risk to others.¹⁴

Conversely, a university may be justified in dismissing a student with disabilities where, after providing requested accommodations, they still determine a student is not qualified for the program.¹⁵ In *Goldberg*, the Eleventh Circuit further explained that dismissal was appropriate where the student was unable to show there was a reasonable accommodation that would have allowed him to meet the standards of the program despite his disability.¹⁶ When a student is dismissed, a university is not required to excuse past conduct as part of a reasonable accommodation if providing such an accommodation would amount to retroactive leniency.¹⁷ Finally, a student may not be entitled to retroactive accommodations for an established disability if such accommodations were not requested or related to previously established accommodations, such as where a student had academic accommodations but never requested behavioral accommodations.¹⁸

¹⁴ *R.W. v. Columbia Basin College*, 18-CV-5089-RMP (E.D. Wash. Oct. 4, 2019).

¹⁵ *Jain v. Carnegie Mellon Univ.*, 2021 WL 840928 (3d Cir. Mar. 5, 2021); *Goldberg v. Fla. International University*, 838 F. App'x 487 (11th Cir. 2020)

¹⁶ *Goldberg v. Fla. International University*, 838 F. App'x 487 (11th Cir. 2020)

¹⁷ *Qui v. University of Cincinnati*, 803 Fed.Appx. 831 (6th Cir. 2020).

¹⁸ *Joseph M. v. Becker College*, 531 F. Supp. 3d 383 (D. Mass. Mar. 31, 2021).