


HUSCHBLACKWELL

Legal Update and Compliance Considerations for Accommodations and Accessibility


March 2024

© 2024 Husch Blackwell LLP. All Rights Reserved.

1



Elizabeth Samples
Partner
Kansas City Office
Elizabeth.Samples@huschblackwell.com



Marissa Hotujac
Attorney
Kansas City Office
Marissa.Hotujac@huschblackwell.com

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

2

Agenda

- Relevant Laws
- Proposed Legislation
- Compliance Areas
 - Digital Accessibility
 - Emotional Support Animals
 - Private Room Accommodations
 - Accommodations in Clinical Programs
 - Direct Threat Assessment
- Scenario



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

3

Relevant Laws



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

4

Key Disability Laws

- Rehabilitation Act (Section 504 and Section 508)
- Americans with Disabilities Act
- Fair Housing Act
- State and Local Laws



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

5

Section 504 of the Rehabilitation Act

- The first statute to require disability accommodations (1973)
- Makes it illegal for the federal government, federal contractors, and any entity receiving federal assistance to discriminate on the basis of disability
- “No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity”

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

6

Section 508 of the Rehabilitation Act

- Requires Federal departments and agencies that develop, procure, maintain, or use Information and Communication Technology (ICT) to assure that these technologies provide access to information and data for people with disabilities
- Compliance with Section 508-based standards began in January 2018

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

7

ADA – Title I

- Title I: Prohibits private employers from discriminating against qualified individuals with a disability regarding employment
- Qualified individuals are those who can perform the essential functions of the job with or without reasonable accommodation
- Employers are required to provide reasonable accommodations to qualified individuals with a disability who can perform the essential functions of the job with or without accommodation, but not if such an accommodation would constitute an undue hardship

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

8

ADA – Title II

- Title II: Prohibits disability discrimination by public entities
- “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity”
- A public entity’s programs, activities, and services, viewed in their entirety, must be readily accessible to, and usable by, persons with disabilities

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

9

ADA – Title III

- Title III: Prohibits “places of public accommodation” from discriminating “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation”
- Colleges and universities are places of public accommodation
- Must make reasonable accommodations in policies, practices, and procedures

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

10

Fair Housing Act



HUSCHBLACKWELL

- Reasonable accommodations to afford persons with disabilities an equal opportunity to use and enjoy a dwelling
- “Dwelling” is “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families . . .”
- Department of Housing and Development and Department of Justice consider dormitories to be dwellings
- District court decisions are in agreement

© 2024 Husch Blackwell LLP

11

State and Local Laws

- Most states and major cities have anti-discrimination laws that mirror, or in some cases are more stringent than, Section 504, the ADA, and the FHA
- Statutes generally prohibit discrimination on the basis of disability or perceived disability
- Generally require some manner of reasonable accommodation
- May set a lower threshold for establishing the existence of a disability or its effect on a major life activity

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

12

General Principles of the Key Disability Laws

No disability discrimination in employment

No disability discrimination in programs and activities

No disability discrimination in places of public accommodation

Accessibility for facilities and services

Reasonable accommodations/modifications

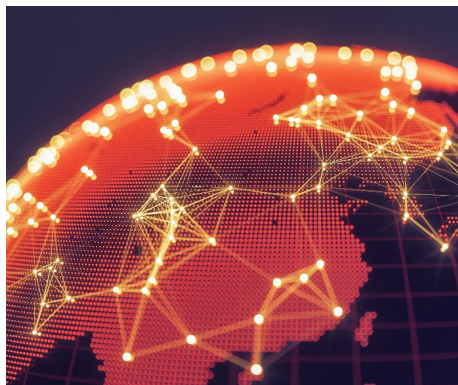
HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

13

What is Covered?

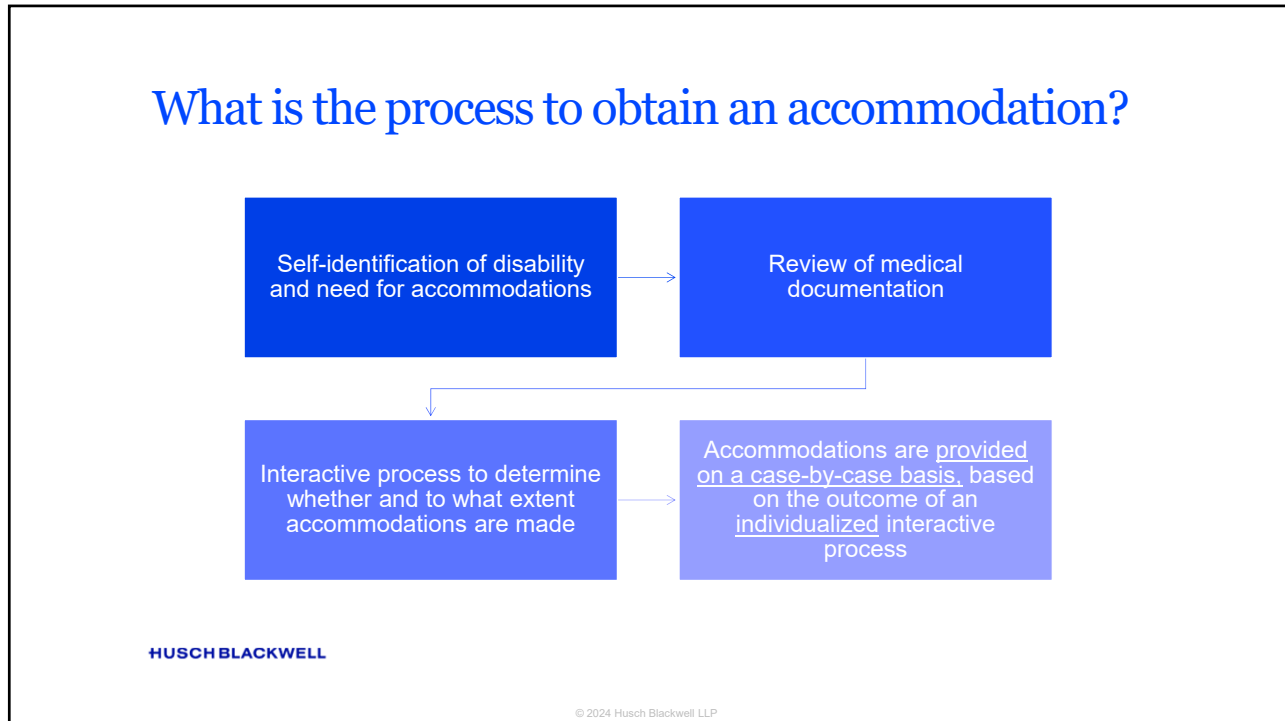
- Programs, Benefits, Services
 - Admissions/recruitment
 - Academics
 - Financial Aid
 - Housing
 - Counseling
 - Athletics
 - Transportation
 - Employment assistance
- Communications
- Facilities



HUSCHBLACKWELL


© 2024 Husch Blackwell LLP

14



15

What is a “reasonable” accommodation?



- Depends on the nature of the disability, how the disability limits the person, and the fundamental requirements of the program/activity at issue
- Common accommodations include extension of deadlines, more time for work and tests, time for medical appointments, recorded lectures, and note takers

HUSCHBLACKWELL

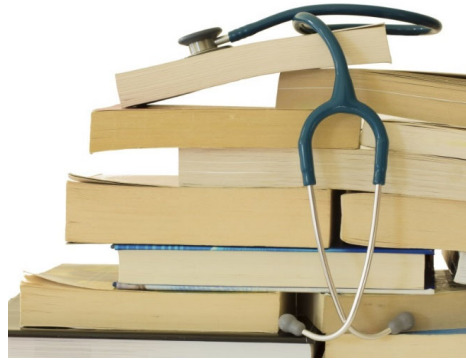
© 2024 Husch Blackwell LLP

16

What rights do students have to challenge the decision of the institution?

Students have the right to file a grievance/complaint:

1. When the student believes reasonable accommodations should be granted but were denied
2. When the student believes accommodations have not been implemented properly
3. When the student believes they have been discriminated against based on their disability



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

17

OCR Enforcement

- Department of Education's Office for Civil Rights ("OCR") investigates complaints of discrimination and noncompliance made against educational institutions
- Disability related complaints are on the rise



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

18



19

Title II of the ADA NPRM – Web Accessibility

- In August 2023, the DOJ published a NPRM for Title II of the ADA related to web accessibility
- Specifically, the NPRM “aims to improve web and mobile applications (apps) access for people with disabilities and clarify how public entities – primarily state and local governments – can meet their existing ADA obligations as many of their activities shift online.”
- The proposed rule would set the Web Content Accessibility Guidelines (WCAG) as the standard for compliance for state and local governments that are covered by Title II of the ADA
- This rule will apply to public universities and community colleges
- The final rule was anticipated in April 2024

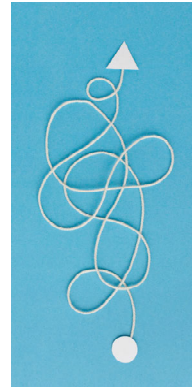
HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

20

Key Points from the Title II ADA NPRM

- WCAG Version 2.1, Level AA is the technical standard that state and local governments must follow
- Both websites and mobile apps *must* comply with the technical standard
- There are narrow exceptions for some types of content, such as web content that is archived, or content posted by a third party



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

21

Timeline to Comply with Final Rule

Proposed timeline is 2-3 years after the final rule is published, depending on the size of the state or local government

State or local government entity size	Compliance Date
0 to 49,999 persons	Three years after publication of the final rule
Special district governments	Three years after publication of the final rule
50,000 or more persons	Two years after publication of the final rule

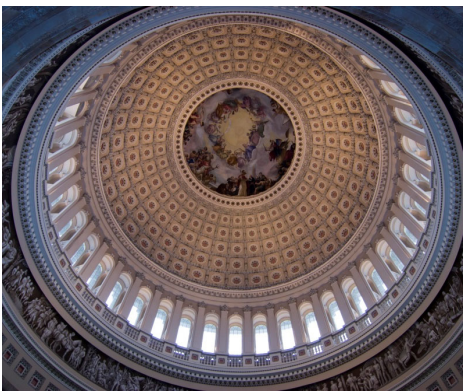
Source: <https://www.ada.gov/resources/2023-07-20-web-nprm/>

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

22

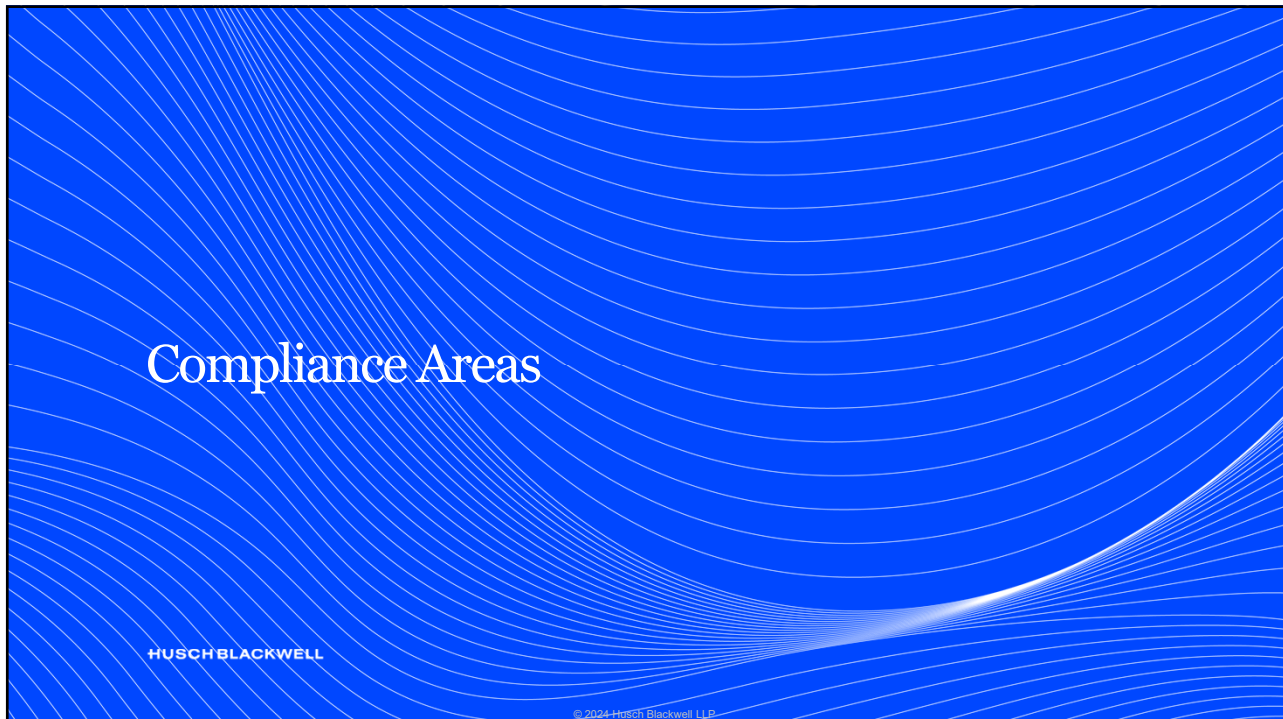
Proposed Regulations for Section 504



- In May 2022, ED announced that it would update the Section 504 rules
- The proposed rule was anticipated in August 2023, however, we are still waiting
- ED has not announced a release timeline for the rules
- No updates yet

HUSCHBLACKWELL

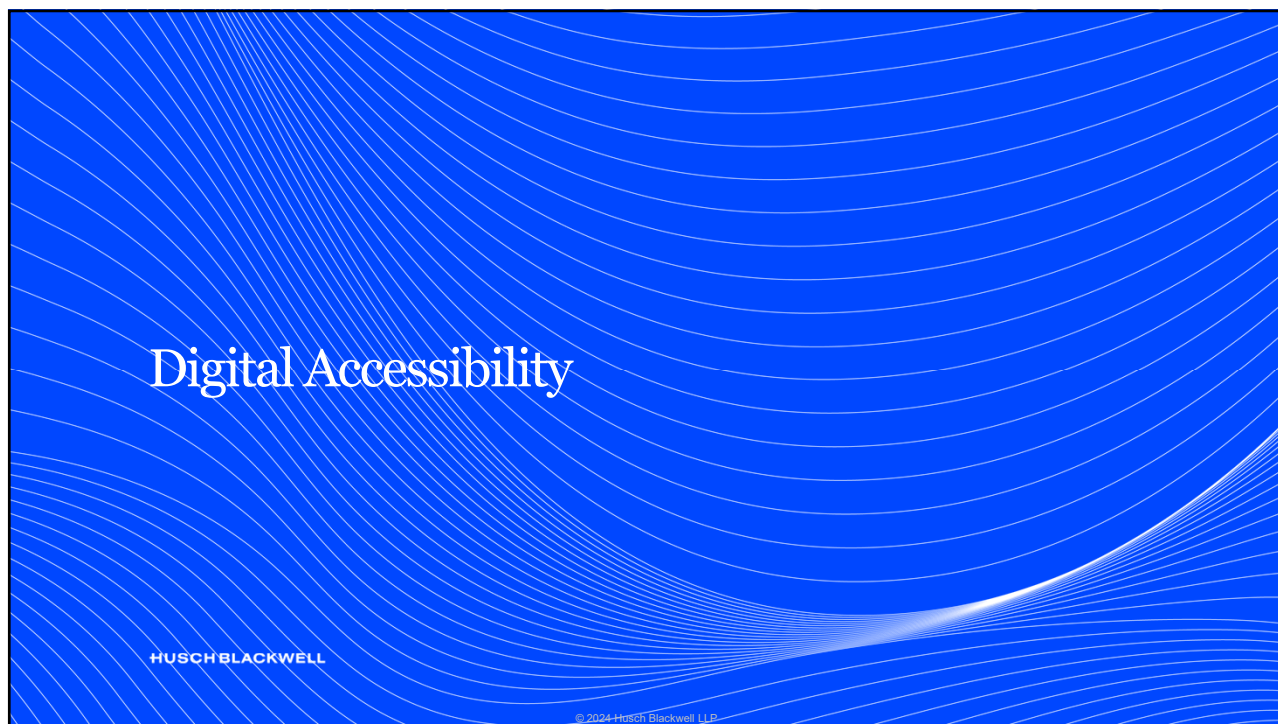
© 2024 Husch Blackwell LLP



Compliance Areas

HUSCHBLACKWELL


© 2024 Husch Blackwell LLP



25

Digital Accessibility

- Developing area of law
- Vast number of webpages and online sources that would require updating
- Can be difficult to coordinate with relevant IT staff, administrators, and faculty to implement necessary changes
- Schools are often unaware of issues related to this area until a complaint is filed with OCR

A photograph of a wooden block with "DIGITAL ACCESSIBILITY" written on it, next to four smaller wooden blocks with icons: a person with a speech bubble, a gear, a person with a speech bubble, and a thumbs up. A keyboard is visible in the background.

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

26

Digital Accessibility – OCR Enforcement

- An advocate filed mass OCR complaints against education institutions across the country
- The complaints related to website and digital accessibility
- In May 2023, DOJ and OCR issued a Joint Dear Colleague Letter regarding their enforcement activities in these areas



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

27

Digital Accessibility – OCR Enforcement cont.

- Many OCR letters in this area note the following compliance concerns:
 - Users with disabilities who use computer keyboards for navigation due to a disability did not have access to all contents and functions.
 - Users with disabilities who use computer keyboards for navigation due to a disability were unable to tell visually where they were on a page, as visual focus indicators were missing.
 - Links were not meaningfully labeled or titled, posing a barrier to people with vision disabilities who use screen readers.
 - Documents in PDF were inaccessible to people with visual disabilities who use screen readers.
- Many of these cases are resolved through Section 302 of the OCR Case Processing Manual



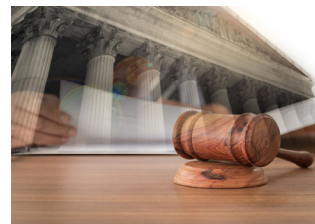
HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

28

Digital Accessibility - Litigation

- Circuit split related to places of public accommodation
- Websites are not places of public accommodation under Title III of the ADA:
 - *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1277 (11th Cir. 2021)
 - *Carroll v. Northwest Federal Credit Union*, No. 1:17-CV-01205, 2018 WL 2933407 (E.D. Va. Jan. 26, 2018)
- Websites can be places of public accommodation under Title III of the ADA:
 - *Mahoney v. Herr Foods Inc.*, No. 19-CV-5759, 2020 WL 1979153, at *2 (E.D. Pa. Apr. 24, 2020)
 - *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019) (“Robles I”)
- Websites are places of public accommodation under Title III of the ADA:
 - *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012)
 - *Mejico v. Alba Web Designs, LLC*, 515 F. Supp. 3d 424 (W.D. Va. 2021)



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

29

Compliance Points for Digital Accessibility

- Assess online presence
- Gather information from internal team and external partners
- Establish a policy and internal procedures
- Grievance procedures
- Evaluate web content
- Prioritize remedial efforts
- Train content editors
- Establish reporting mechanism



HUSCHBLACKWELL


© 2024 Husch Blackwell LLP

30



31

Emotional Support Animals



- Influx of students requesting ESAs
- Some students obtain their supporting medical documentation from websites that charge a fee for a standard certificate
- Issues arise related to animal behavior
- Competing disabilities
- Students want to bring their ESA to other areas of campus

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

32

Emotional Support Animals – OCR Enforcement

- 2018 OCR Resolution Letter
- Lesson learned:
 - Avoid blanket policies
 - Analyze accommodation requests on a case-by-case basis



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

33

Compliance Points for Emotional Support Animals

- Develop a policy
- Set standards for specific medical documentation that is permitted
- Avoid blanket bans – such as prohibiting all types of a certain animal, like snakes or tarantulas
- Always engage in the interactive process, and conduct assessments on an individualized, case-by-case basis
- Train housing staff and administration on relevant issues
- Grievance procedures



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

34



35

Private Room Accommodations

- Students are increasingly requesting private room accommodations in college or university housing
- May be limited private rooms available
- OCR enforcement in this area has largely focused on the following:
 - Charging students fees for single rooms
 - Providing auxiliary aids and services
 - Denying private rooms due to lack of availability

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

36

Private Room Accommodations – OCR Enforcement

- Charging students fees for single rooms
 - OCR Resolution Letter (2018)
 - OCR Resolution Letter (2023)
- Providing auxiliary aids and services
 - OCR Resolution Letter (2018)
- Denying private rooms due to lack of availability
 - OCR Resolution Letter (2022)



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

37

Compliance Points for Private Room Accommodations

- Establish a policy that speaks to this
- Grievance procedures
- Focus on the disability-related reason for the private room request
- Analyze each private room accommodation request on an individualized, case-by-case basis
- Ensure that existing housing policies align with any new or existing housing accommodation policy language
- Train housing staff and administration
- Implement the following practices:
 - Consider how application of rate policies might be discriminatory
 - Work with a student to identify and provide reasonable auxiliary aids and services
 - Engage in the interactive process to identify alternatives, if private rooms are not an option



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP


38



39

Accommodations in Clinical Programs

- Academic programs with clinical components, such as medicine, pharmacy, or nursing, have unique issues related to accommodations
- High demands on students, and different technical standards
- Clinical partners may not be as willing to provide accommodations
- Missing clinical dates, or making up or rescheduling assignments or tests
- Service animals in clinicals



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

40

Accommodations in Clinical Programs – OCR Enforcement

- OCR Resolution Letter (2023)
- Complainant was a student who wanted her service animal to accompany her during her clinical rotations, including in a patient's room
- OCR's findings
- The case was resolved prior to OCR completing its investigation.



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

41

Accommodations in Clinical Programs - Litigation

Bennett v. Hurley Med. Ctr. (E.D. Mich. Jan. 19, 2023)

- Student was a clinical intern at a medical center. She had a service animal that she requested to have accompany her on her rotation, but patients and other staff at the medical center had severe dog allergies. Thus, the medical center withdrew its permission for the student's service dog to accompany her on clinical rotation when she was on two floors that had the individuals with severe allergies.
- Court awarded summary judgment to the medical center

Affirmed by the Sixth Circuit in *Bennett v. Hurley Med. Ctr.*, 86 F.4th 314 (6th Cir. 2023)



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

42

Accommodations in Clinical Programs – Litigation cont.

Sholes v. Bd. of Regents of the Univ. Sys. of Ga.
(S.D. Ga. Mar. 20, 2023)

- Former resident was diagnosed with narcolepsy during a fitness for duty evaluation that was part of a remediation plan. The student's contract was not renewed following a pattern of poor performance and tardiness, both before and after his narcolepsy diagnosis.
- Resident sued the university for discrimination and failure to accommodate
- Court awarded summary judgment to the university.

Affirmed by the 11th Circuit in *Sholes v. Anesthesia Dept.*, 2024 WL 700438 (11th Cir. Feb. 21, 2024)



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

43

Compliance Points for Accommodations in Clinical Programs

- Establish a clear policy and process
- Adopt technical and academic standards for all clinical programs and apply the standards uniformly
- Periodically review and update standards
- Apply these standards consistently during the admissions process
- Confer with relevant University officials for academic and standards decisions
- Make individualized assessments and consistently document the interactive process and decision making
- Grievance procedures
- Train relevant staff, faculty, and administrators of clinical programs



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP


44



45

Direct Threat Assessment

- In some circumstances, schools must use the direct threat analysis to address health and safety risks posed by an individual, including individuals with a disability
- An individual with a disability must be able to meet academic and technical standards of the program, with or without reasonable accommodations
- When a student with a disability poses a “direct threat” to the **health and safety of others**, that student is no longer considered otherwise qualified



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

46

Direct Threat Assessment – OCR Enforcement

- OCR stated under Section 504, schools may take adverse action against student with a disability when:
 - Student poses a significant risk to the health or safety of others
 - That risk cannot be sufficiently mitigated
- Institutions must make an individualized and objective assessment of the student's ability to safely participate in programs and activities based on reasonable medical judgment, relying on the most current medical knowledge
- “Nothing in Section 504 prevents educational institutions from addressing the dangers posed by an individual who represents a direct threat to the health and safety of others, even if such an individual is a person with a disability, as that individual may no longer be qualified for a particular educational program or activity.”
OCR Letter (2023)
- Student's return



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

47

Compliance Points for Direct Threat Assessment

- Institutions should consider the following factors:
 - Make an individualized assessment
 - Nature, duration, and severity of the risk
 - Probability that the risky behavior will actually occur
 - Review medical and objective evidence
 - Whether reasonable accommodation or mitigation measures will sufficiently reduce the risk
- Focus on behavior and conduct
 - Adverse action against an individual because of perceptions about a mental or other disability could amount to discrimination under Section 504/ADA
 - Focus on determining appropriate response to behavior or conduct by conducting a fact specific inquiry
 - Decisions based on objective standards, not prejudice or stereotypes



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

48

Scenario

- Student with depression and anxiety failed two courses
- Placed on academic probation during his second year
- Resumed studies and failed a course for a third time
- Dismissed for “unsatisfactory academic performance”

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

49

Scenario cont.

- Student sought treatment and requested readmission, requesting credits earned
- University denied request, advising to reapply as first-year
- Alleged failure to “reasonably accommodate”



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

50

Scenario Questions for Consideration

- Did the University have a duty to accommodate the student?
- Is the student “otherwise qualified” at the time of his application for readmission?
- Is readmission a reasonable accommodation?

HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

51

Scenario Outcome

- Motion to dismiss granted
- Court considered request for readmission as one for “retroactive leniency” for failed courses, as opposed to a request for accommodations
- Request to excuse past academic performance is not a request for a reasonable accommodation and could not serve as basis for student’s ADA discrimination suit
- Takeaway: Cases generally indicate that institutions have more discretion in granting readmission (than in considering accommodation requests)
 - Readmission decisions seem to be treated as more “academic” decisions reflecting assessment of qualifications.



HUSCHBLACKWELL

© 2024 Husch Blackwell LLP

52



53



54