

Legal Updates

MD - AHEAD

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Housing Accommodations

Recent Activity from OCR

- Complaints filed across the country
- Allegations:
 - Class, generally not filed by individual student
 - Multi-year
 - Students with disabilities assessed a surcharge for housing accommodations



Common issues

- “Medical” singles
- Private bathrooms
- Private kitchens
- Air conditioning
- Doubles as singles
- Service animals
- Aides
- Location of residence halls

Common scenario

- First year students are all assigned to double rooms. A student with a disability-related need for a single room is approved to receive this accommodation.
 - Which room rate should the student be charged?
 - What if the student was a sophomore and chose to live in a single room in a more expensive “premium” building though she was offered a single room else where at the standard double rate?

Legal Requirements

- Section 504
 - 34 C.F.R. §104.43(a): provides that no qualified individual with a disability shall, on the basis of disability, be subjected to discrimination regarding housing.
 - 34 C.F.R. §104.45: schools that provide housing to students must provide comparable, convenient, and accessible housing to students with disabilities at the same cost as to others

Legal Requirements

- ADA
 - 28 C.F.R. §35.130(f): prohibits a public entity from imposing a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the ADA.

How OCR is Handling Current Complaints

- Requests for data
 - Policies and procedures
 - Information about housing process, lottery
 - Information about pricing
 - Multiple years of data regarding each category of housing accommodation at issue
- Investigations



Resolution options

- Early Complaint Resolution?
- Resolution prior to conclusion of investigation
- Finding
 - Violation
 - Insufficient evidence to support a violation finding

Settlement agreements

- Revise, publish policies and procedures
- Training, memorandum to relevant staff
- Individual remedies
 - Review pricing of housing accommodations for affected years
 - Offer reimbursement to affected students during time period of complaint

Public University – sample resolution

- Alleged surcharge for single rooms and apartment-style rooms with kitchens, where required as a disability-related accommodation.
- Voluntary resolution agreement:
 - Review and revise policies, procedures, practices
 - Notify relevant staff of obligations to provide comparable, convenient, accessible housing
 - Reimburse students with disabilities who were assessed a surcharge over two academic years

Private University – sample resolution

- Allegation that policies impose additional financial burden on SWDs who require housing modifications
- Voluntary resolution agreement:
 - Review policies and procedures, including specific notes that:
 - Students with documentation of disability-related need for single room will pay standard double rate
 - Students with documented need for air conditioners or kitchen facilities will not be charged for these amenities
 - Designated “ADA” rooms will not be offered at a higher rate than other rooms
 - Training for relevant staff
 - Reimbursement of students affected over two academic years

Recommendations

- Review existing policies and revise if necessary
- Review public-facing policies
- Ensure that self-selection models take into account requests for accommodations
- Recordkeeping/tracking
- Coordination with disability services offices
- Ensure relevant staff are aware of legal obligations and how students with disabilities should be charged

Accessibility of Websites and Online Content

Common Accessibility Barriers

- Websites:
 - Keyboard access
 - Text alternatives for images
 - Forms
 - Captions
 - Color Contrast
- Online content, learning management systems

Accessible Websites: The ADA

- Some applicable laws:
 - The Americans with Disabilities Act
 - DOJ activity under Titles II and III
 - Section 504 of the Rehabilitation Act
 - Significant OCR activity
 - Complaints, resolution agreements
 - Section 508 of the Rehabilitation Act
 - Air Carrier Access Act
 - State laws

DOJ Delays and Shifting Priorities

- DOJ 2010 Advanced Notice of Proposed Rulemaking
- Rulemaking for Title III delayed until fiscal year 2018
- Supplemental Advanced Notice of Proposed Rulemaking
- Change in administration
 - Website accessibility rulemaking status: inactive
 - Impact on use of WCAG 2.0 guidelines
 - Likely increase in complaints and civil actions by advocacy groups and private litigants
 - Continued activity by plaintiffs' firms

Domino's Pizza

- Central District of CA, March 2017
- Grant of defendant's motion to dismiss
- Website and mobile application reported to be inaccessible to screen reader but Domino's had staffed telephone line and option to call store to place order
- Court declined to defer to DOJ ANPRM, statements of interest, and consent decrees

Winn-Dixie

- Southern District of Florida, June 2017
- Trial of ADA website accessibility case
- Website deemed inaccessible
- Court ordered injunctive relief and attorneys' fees
 - Website accessibility policy adopting WCAG 2.0 criteria
 - Conformance by third-party vendors
 - Accessibility statement on homepage
 - Training to IT staff and ongoing monitoring/testing

Recent New York Cases

- *Blick Art (E.D.N.Y. August 2017)*
 - Websites must be ADA compliant
 - No nexus requirement
 - Covered entities should not wait for DOJ to promulgate regulations
- *Five Guys (S.D.N.Y. July 2017)*
 - Covered entities can rely on WCAG 2.0 conformance standards
 - Court's inquiry involved whether website was currently accessible, regardless of improvements underway

- *Blick Art* court:

*Today, internet technology enables individuals to participate actively in their community and engage in commerce from the comfort and convenience of their home. It would be a cruel irony to adopt the interpretation of the ADA espoused by *Blick*, which would render the legislation intended to emancipate the disabled from the bonds of isolation and segregation obsolete when its objective is increasingly within reach.*

Essential questions

- Who owns this issue?
 - Designated EIT administrator/coordinator
 - Authority, funding
- What is the plan for making websites and online content accessible?
 - Written plan, accessibility initiative/team
 - Priorities and timing
- What are you communicating to the public about accessibility?
 - External policies and procedures

Essential questions

- Do internal stakeholders understand their role in responding to accessibility barriers?
 - Internal policies and procedures
 - Trained IT staff and administrators
 - Role of faculty
- What are your vulnerabilities?
 - Audit and privileged website assessment
 - Experienced accessibility consultants

Essential questions

- Do you have procedures and third party relationships in place to provide auxiliary aids and services?
 - Vendor relationships
 - Procurement policies and procedures
- How do you monitor ongoing compliance?
 - Regular training
 - Practices re newly added content

Legal Update from OCR

OCR Philadelphia: (215) 656-8541
OCR Washington, D.C.: (202) 453-6020
OCR Customer Service: (800) 421-3481

OCR Complaint No. 09-17-2090

- Interactive process
- Policies re extended time on assignments

OCR Complaint No. 03-15-2416

- Straightforward service animal case with some cautionary lessons about not basing policies and actions on stereotypes of who should be able to use service dogs and what those dogs look like

OCR Complaint No. 02-17-2057

- Fundamental alteration discussion re: extended time for development of patient care plans in physical therapy program

OCR Complaint No. 09-14-2015

- Disability discrimination against graduate student
- Grievance procedures
- Almost went to impasse
- Comprehensive remedies

Other cases discussed at National AHEAD conference

- **11-17-2031**: 302 agreement; CART and transcripts requested by public interest community group were treated as FOIA requests instead of through effective communication provisions
- **11-16-2141**: insufficient evidence; multiple chemical sensitivity concerns raised by community member in context of community gym; college worked with complainant for years before current issue; then complainant assaulted an instructor and was banned from gym while college was deliberating

Other cases discussed at National AHEAD conference

- **11-16-2070**: adjustments during admissions interviews
- **02-17-2057**: fundamental alteration discussion re: extended time for development of patient care plans in physical therapy program
- **08-16-2082**: really interesting case where college tried to discourage woman with significant back pain from taking Biology 100, which was a prerequisite for her degree program, because the head of the Biology Department did not like to grant extensions to any people with disabilities

Other cases discussed at National AHEAD conference

- **08-16-2199**: approved academic adjustments were not consistently given; professor's assertion of fundamental alteration was followed without going through official process, depriving student of otherwise-approved academic adjustment; other adjustments made on the fly
- **11-16-2299**: insufficient evidence; gluten-free cafeteria options and meal plan; retaliation
- **15-14-2153** and **15-14-2192**: monitoring

Title IX, Section 504, and the ADA

Title IX

- “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”



Title IX

- Prohibits sex-based discrimination in educational programs and activities that receive FFA.
- Term “educational programs and activities” has been construed broadly.
- Applies to conduct by students, employees, third parties.
- Enforced by federal agencies, including OCR & DOJ.

Title IX

- Not just athletics...



- Sexual harassment and sexual assault are forms of sex discrimination prohibited by Title IX.

Title IX includes...

- Athletics
- Sexual harassment
- Sexual assault
- Sex discrimination
- Housing
- Recruitment, admissions
- Financial aid
- Pay rates
- Benefits
- Leaves of absence
- Pregnant/parenting students
- Safety
- Vocational counseling
- Awards
- Employment
- Gender identity

Common forms of covered conduct

Sex/Gender-Based Discrimination

Sexual Harassment

Sexual
Assault

Bullying, hazing

Stalking,
Interpersonal
Violence

Retaliation

OCR/ED Guidance Documents

- 2001 Revised Sexual Harassment Guidance
- April 2011 “Dear Colleague” Letter (DCL), withdrawn and replaced with September 2017 Q&A
- April 2013 DCL Letter on Retaliation
- April 2014 Title IX Questions & Answers, withdrawn and replaced with September 2017 Q&A
- April 2015 DCL on Title IX Coordinators & Title IX Resource Guide
- May 2016 DCL on Transgender Students, withdrawn and replaced with February 2017 DCL

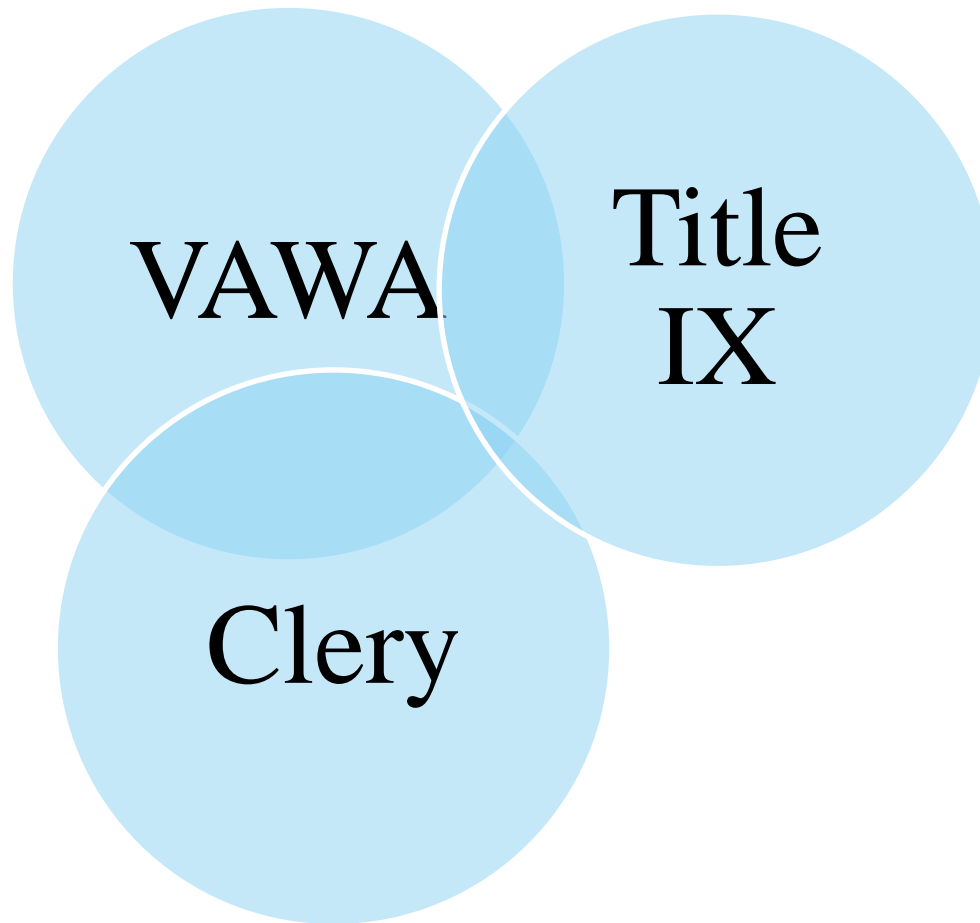
VAWA

- Violence Against Women Act
 - Does not only apply to women
- VAWA amended the Clery Act
 - Adds Dating, Domestic Violence, Stalking, Hate Crimes
- Specified crimes
- Timely reports
- Procedural protection

VAWA: Procedural Protections

- Notifications of Rights
- Information about preservation of evidence
- Statement of evidentiary standard
- Identify all sanctions, protective measures
- Advisor of choice
- Simultaneous written notifications
- Training that protects safety of victim and promotes accountability

Title IX, VAWA, Clery Act



Overview of requirements of Title IX

- Procedural requirements
 - Notice of nondiscrimination
 - Title IX coordinator
 - Prompt and equitable grievance procedure
 - Is there language in your Title IX policy about how requests for disability-related accommodations are handled during the process?
- Substantive requirements

Overview of requirements of Title IX

- Substantive requirements
 - Notice
 - Obligation to respond
 - When an institution knows or reasonably should know of possible sexual harassment, it must take immediate and appropriate steps to determine what occurred.
 - If an investigation reveals that sexual harassment created a hostile environment, the institution must take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate remedy its effects.

Interim measures

- Common examples:
 - No contact orders
 - Academic adjustments
 - Housing changes
 - Transportation assistance
- Sometimes referred to as “protective measures” or “accommodations”
- Policy or procedure should be clear as to who decides, implements, documents, how adjustments are handled

Common issues

- Student develops a disability as a result of a Title IX issue
 - Unfamiliar with the process
 - Experience difficulty navigating process
 - Coordination between Title IX and 504 coordinators
- A Title IX issue exacerbates an existing disability, necessitating a review of current accommodations
- Students with disabilities reported for disability-related conduct alleged to violate Title IX policy

Scenario

- John has been diagnosed with Asperger's and receives modifications such as extended time to complete assignments.
- John and Sarah are lab partners in their Chemistry class. After class each week, both students often go to the same dining hall for dinner. Sarah typically leaves the class before John because John takes a little extra time to pack up his belongings.

Scenario

- When he arrives in the dining hall, John looks for Sarah and waves to her to say “hi.” He always sits at the same table by himself. Sarah also sits at a nearby table with friends from her volleyball table each week. Before John leaves the dining hall, he waves goodbye to Sarah.
- John knows where Sarah lives and, on Mondays, waits for her outside her residence hall because Sarah is always friendly, smiles, and says hi to him.
- John does this for two months.

Scenario

- Last Monday, John asked Sarah if she would like to watch Star Wars with him on Netflix in his room. Sarah said she didn't like Star Wars. After Chemistry lab last Wednesday, John asked Sarah if she would like to watch Game of Thrones with him. Sarah said she did not like Game of Thrones.
- Last Friday, Sarah filed a complaint with the Sexual Misconduct Office.
- This week, John was notified of Sarah's complaint and is upset. He comes to your office to discuss this.

Scenario - questions

- What potential policy violations are at issue here?
- What do you say to John when he comes to your office?
- At your institution, would the Title IX coordinator have notified you of this complaint?
- How should Sarah's complaint be handled?

Scenario - questions

- Your institution decides to conduct an investigation. John would like you to be his support person. Should you say yes?
- Should John receive accommodations during the process?
 - Which, if any, accommodations would be appropriate? Who makes this decision? Does John's current accommodation plan cover this?
- John is found responsible for stalking and receives a sanction of a one-year suspension. Is this the right outcome? Does John have a basis for an appeal?

Scenario - questions

- What support services are available to John?
- Are there accommodations or supports that could have been provided to John to help prevent or reduce the likelihood of an incident like this occurring?
- Is John a qualified individual with a disability? Is he able to meet the requirements of the program, including the student code of conduct, with or without accommodations?

Recommendations

- Understand Title IX requirements and the Title IX process
- Be familiar with resources on- and off-campus
- Know your Title IX coordinator
- Develop a plan for coordination between disability services and sexual misconduct processes before an incident arises
- Clarify processes regarding accommodations