**The Last Word for June 10, 2022**

**Rethinking Section 504**

Last month, the Department of Education announced plans to update their implementation guidance regarding Section 504 of the Rehabilitation Act of 1973:

*"While the world has undergone enormous changes since 1977, the Department's Section 504 regulations have remained, with few exceptions, unaltered," said Assistant Secretary for Civil Rights Catherine E. Lhamon. "As we observe the 45th anniversary of these important regulations this month, it is time to start the process of updating them. Just as in 1977, the voices of people with disabilities must be heard and incorporated as we engage in that work."*

The announcement was greeted with enthusiasm from the higher education disability services community.  It is certainly time – past time! – for an update, and we are being invited to make comment on changes and additions.  My prediction, however, is that a lot of folks in our community will be disappointed with that update when it comes.  Frankly, I am hoping I am right about that!

I think many folks are looking at the updated regulations as a chance to reshape our profession by codifying adherence to a social justice approach to disability services, and requiring adoption of practice elements that are seen as helpful (such as Universal Design of Learning, single rooms, attendance leniency) rather than as necessary for compliance.  I don’t think that is going to happen.  I don’t think it SHOULD happen.  And, I don’t think that is what the Department of Education has in mind.

Remember this?

*SEC. 504. (a) No otherwise qualified individual with a disability in the United States, as defined in section 7(20), 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…*

THAT is the statute that Congress enacted (which has been amended over time to match the language and definitions of the ADA) – including the use of the term “disability” instead of the original “handicap.”  The Department of Education has no authority to alter that statute or change the definitions used within the law (regarding who is/is not a person with a disability, who is excluded from protection under the law, etc.).  The DeptED is only in a position to modify its own regulations/guidance regarding how those 49 words are to be applied to the education of people with disabilities from pre-kindergarten through higher education.

And let’s not forget this:

**Part 104 – Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance**

Subpart A – General Provisions

*Sections 104.1 – 104.10*

Subpart B – Employment Practices

*Sections 104.11 – 104.14*

Subpart C – Accessibility

*Sections 104.21 – Sections 104.23*

Subpart D – Preschool, Elementary and Secondary Education

*Sections 104.31 – 104.39*

**Subpart E – Postsecondary Education**

***Sections 104.41 – 104.47***

Subpart F – Health, Welfare, and Social Services

*Sections 104.51 – 104.54*

Subpart G – Procedures

*Section 104.61*

ALL of those Subparts and Sections are part of the DeptED’s 504 regulations.  When the Assistant Secretary speaks of updating the 504 regulations, ALL of that is under review.  Our part of that may be of overwhelming interest and importance to *us*, but it is not the only (or the most important?!?) part of the review for the Department.

Alright, then.  The focus of the review will not be solely on our little corner of the world.  But why is it that I don’t think the updated regulations will – or should – encompass a more “social justice” approach to what should be done for students with disabilities in higher education?

On Monday, I read an article in *Inside Higher Ed* that seemed to explain, better than I could, how I feel about this whole thing.  In the blog entry by Matt Reed, he was discussing his answer to his son’s question about how he felt regarding the legalization of marijuana.  His son was surprised to hear that Dad was in favor of legalization, because he didn’t think his dad smoked.

*I don’t.  And now that it’s legal in my state, I still don’t.  As I explained to him, that wasn’t the question he asked.  I make a distinction between my personal preferences and what I think should be required or forbidden under the law.  After all, I offered, there’s no law preventing me from eating nothing but KitKats at every meal.  I would oppose such a law on the grounds that it would be unduly invasive.  That’s true even though I don’t eat KitKats at every meal, and don’t want to.  The distinction between personal taste and public law shows respect for differences, and allows room for freedom.*

Like he said.

The Feds have said that they want to revisit the Section 504 guidelines put in place in 1977. It’s time for an update.  It is hard to argue with that plan.  There is much that can and should be reexamined in light of new populations, enhanced technology, and greater awareness. I am all for it.  But, as I envision what those revised and enhanced guidelines will look like – SHOULD look like – I am hoping they will continue to focus on WHAT IT MEANS not to discriminate on the basis of disability, and not get sidetracked with discussions of HOW (or why!) that mandate should be carried out.

Go back and look at the wording of the actual statute.  The legal mandate is clear and unencumbered by explanations – *you may not discriminate on the basis of disability*.  It shouldn’t matter if we adhere to that legal mandate for different reasons, so long as the result is the same for the population protected under the law.

Well, then, what kinds of things can/should be updated from our perspective?  First and foremost – language usage.  While Congress updated the Rehab Act to incorporate reference to “disability” instead of “handicap,” the Department’s regulations have yet to be updated.  More, these guidelines were created in the late 70’s when students with disabilities were largely expected to blind, deaf, or in a wheelchair (or some variation therein!).  There are numerous references in Subpart E to “persons with impaired sensory, manual, or speaking skills.”  We can do better than that – both in terminology and in coverage.

Also, as a general comment, the regulations need to be updated to reflect the technology available for use today (things that had never been dreamed up in 1977).

Let’s look at (and dissect!) some pieces of Section 104.44 that might lend themselves to update:

**104.44 Academic adjustments.**

… Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.

That statement was necessary in the guidance in 1977 because state licensure boards were not required to make accommodations for persons with disabilities in licensure testing.  NOW (under the ADA), they are.  That clause can probably be struck.

Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

I’ll bet it has been a long time since many of you have looked at the actual wording of the guidelines.  That sentence (above) is the ONLY direct reference, within the guidance to making classroom accommodations.  The only two things specifically named as necessary are reduced course load without penalty and the possibility of course substitutions.  Things that we have long provided on a regular basis – notetakers, lab assistants, priority registration or seating, are all covered in that one, general sentence… as are things like extended due dates/deadlines and attendance leniency.  The guidelines have never spelled out specifically HOW to assure nondiscrimination.  Let’s hope they keep it that way.  It allows us to make individual decisions based on the student’s circumstance, the classes involved, and the documentation of need.  Flexibility is a good thing!

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

Ouch… on two counts.  First, they obviously should update the language and the reference to make the statement about service animals, rather than dog guides.\*  More importantly, I think they are going to have to deal with the reference to tape recorders (which are no longer in use).  Replacing the reference to the TYPE of technology is easy.  The more difficult issue is going to be what gets said about what they are willing to allow/mandate in regards to recording, now that we have both easy ability to record, and easy ability to disseminate those recordings (inappropriately!) through the internet. I don’t envy whomever it is who has to wrestle with what statements to substitute here. (\*Challenge for the day!  Do you know why the current regulation refers to “dog guides” instead of “guide dogs”?)

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

Hmmm… other than cleaning up the reference to “students who have a handicap that impairs sensory, manual, or speaking skills,” is there really anything here that needs to be changed?  Doesn’t this say what we want it to say?  This is as close as the regulations EVER came to discussing extended time on tests, but it has always been enough.  Why shouldn’t it continue to be?

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

Certainly, the language in this section needs to be updated to reflect coverage for students other than those who are blind, deaf, or in a wheelchair.  But it seems to me that there should be something in THIS section (bolstered below) that speaks specifically to access to, and through, technology.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

Of all the individual paragraphs within Subpart E, it seems that this is the one that probably is going to need the most changes/additions/updating.  We very much need for the reference to auxiliary aids and services to reflect the realities of new technology and the incorporation of technology into all of higher education (and thus the need for its accessibility to/for students with disabilities).  Note, however, that logically those changes are going to reflect the need for things to be provided in accessible format for students with disabilities.  That is not the same as mandating that all things be created in accessible format.  There has never been a legal mandate requiring Universal Design of Learning, and I don’t see it being incorporated now.  We also need the regulations to clarify what “other devices or services of a personal nature” might mean in our technology-infused environment.

There are other places within Subpart E that could benefit from an update to reflect all that has changed since 1977.  For example, the Housing section (104.45) reads (in part):

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

When that regulation was written, probably 95%+ residence halls were made up as double rooms with a bathroom down the hall.  Reference to providing disabled students “comparable, convenient, and accessible housing” meant making it possible for students with disabilities to be fully integrated into those standard residence hall settings.  Discussing the scope of the students’ choice referred to making sure that there wasn’t only one residence hall on campus that was wheelchair accessible (and thus available to kids in wheelchairs) while everyone else could choose to live in any one of half a dozen halls on campus.

That is NOT the reality of Residence Life options on college campuses today.  From the availability of single rooms to anyone (for a price), to the possibility of suite or apartment-style living within the residence hall, to private or semi-private bathrooms, to kitchens… many institutions have a host of Res Life options available to all students.  Determining what it means to provide “comparable, convenient, and accessible housing” at the same cost is… daunting.  We’ve been struggling with that for some time.  It will be interesting to see how the Department of Education struggles through it, as well.  Will they step up and give us new language that provides some useful definition to the decision-making, or will they cop out and, essentially, not change the statement in hand, leaving it up to us to muddle through and make a good faith effort to follow the spirit of the law?

There are even some little things that could be changed to comfortably match what we have long practiced (but would be nice to see in writing).  For example, in the section on admissions, the guidance says:

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

We have always taken that to mean that you may not make preadmission inquiry in admission to the institution OR in admission to any program/program of study that requires separate admissions (such as the Nursing program).  But it might be nice if they said that, flat out, in the regulations.

There are lots of places to suggest changes in the existing regulations to better reflect what is and is not promised in the congressional statute.  But I see no place to update the regulations to include a discussion of the social justice approach to disability services because there is nowhere within the existing regulations that talks about the approach to disability services at all.

What do you say we suggest they keep it that way?!?

Janie

*Learning is a lifetime process, but there comes a time when we must stop adding and start updating.*

*You will either step forward into growth or step backward into safety.*

*I used to hope the things I did would work.  Now I hope they will last.*