
Section 1

Understanding Laws, Regulations, Case Law, and Guidance: What's the Difference and Why Does It Matter?

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Overview

All post-secondary institutions are “bound by the law” and should keep the law in mind when setting policy or deciding how to handle a particular situation. But how do you know what to pay the closest attention to: federal regulations and guidance, settlement agreements, court decisions, or all of these?

Some of these sources are binding, or mandatory. These include statutes and agency regulations and decisions. Other sources, including agency guidance and settlement agreements, are not binding but can provide helpful guidance about policies and factual situations.

Court cases interpret and apply the law to particular situations. Your institution is bound by decisions of the Supreme Court, federal courts of appeals in your geographic circuit, and some district court decisions.

The most useful authority is generally the one that addresses the legal issues and facts that are closest to your situation.¹

Laws, regulations, policies, and such

Think of these as a hierarchy: the first categories listed are binding, and the degree to which a particular institution is bound decreases down the list.

Laws: Congress passed the two laws (statutes or legislation) that are the focus here: Section 504² of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA).³ Section 504 applies to colleges and universities that receive federal financial assistance. Title II of the ADA covers public colleges and universities, and Title III covers private ones.

Regulations: The laws direct certain agencies to write implementing regulations (or rules or regs): the Department of Justice (DOJ) for the ADA, and the Department of Education (ED) for post-secondary institutions to which it gives federal assistance.⁴ The regulations give more details about what the law means. DOJ issued ADA regulations in 1991 and revised them in 2010.⁵ Generally, the regulations are binding and enforceable, as if they were laws.

Guidance: The agencies can give guidance or state their interpretations of the law and regulations in several ways.

- In a regulation, the “preamble,” “section-by-section analysis,” or “guidance” explains the reasons for making certain decisions, with examples of how to apply the regulations.

- The agencies develop policy guidance to assist covered entities in meeting their obligations, and to provide members of the public with information about their rights under laws and regulations that they enforce. The Department of Education, sometimes joined by DOJ, usually does this through “Dear Colleague” letters.⁶ This guidance does not add requirements to applicable law, but provides information and examples about how the agencies evaluate whether covered entities are complying with their legal obligations.
- DOJ and ED also post/publish “technical assistance” (TA) documents.⁷

DOJ briefs: The Department of Justice is the federal government’s litigator and enforcer of the ADA and Section 504. The briefs it files in lawsuits state the government’s official position, at times expressing interpretations that are not clear from the regulations.⁸

Letters of finding: The Department of Education’s Office for Civil Rights (OCR) has administrative enforcement authority under Section 504 and Title II of the ADA. Its ten federal regional offices can investigate complaints against covered entities or conduct compliance reviews. Sometimes an investigation or review will lead to a letter of finding (LOF) by an OCR regional office. An LOF of a violation sets out the factual findings, the legal analysis used in the matter, and OCR’s legal findings applying that analysis. An LOF of no violation will explain why OCR found the entity to be in compliance. Either type of LOF can be quite detailed and can clarify OCR’s interpretation of the statutes and regulations in a particular fact situation.⁹

Proposed rules: Although they do not have the force of law, proposed regulations can also offer some insight into how DOJ or ED view an area in which they have not regulated or issued guidance or rulings.¹⁰

Court decisions

The federal courts decide how the laws and regulations apply to specific facts and/or make decisions about legal principles, when they resolve disputes between opposing parties. There is also a hierarchy of federal case law.

The Supreme Court: A federal Supreme Court decision binds all lower federal courts, both courts of appeals and district courts.

Courts of appeals: The 13 courts of appeals hear appeals of district court decisions (below) and generally set legal principles. Each court of appeals covers a geographical area called a circuit, so these courts are also called circuit courts. A circuit court decision binds only those federal courts within its circuit. For example, a 6th Circuit decision binds the U.S. district courts in the four states within the 6th Circuit, but not federal courts in any other circuit.

District courts: The trial courts (the ones that make factual findings) are called United States district courts.

Even if a decision (for example, of a district court or a circuit other than yours) is not binding on your institution, it may still be viewed as persuasive authority in your jurisdiction, depending on factors such as the fact situation, the larger context, and the level of detail and quality of reasoning of the decision. Again, you or your legal counsel should locate the most relevant and persuasive cases available.

Settlement agreements and agency case resolutions

Federal agency investigations or compliance reviews can lead to findings, settlements, or federal litigation.

Sometimes OCR will resolve an investigation by a resolution agreement, before the matter gets to the stage of an LOF, or after an LOF of violation is issued. Similarly, DOJ enters into numerous settlement agreements without going to court.

- Lawsuits filed by DOJ are often resolved with consent decrees (court-approved, enforceable agreements).
- These agreements can sometimes be used as a benchmark for measuring the agencies' expectations as to the issues presented, or as a model for developing policies. This is particularly true if DOJ or OCR has entered into a number of agreements with similar provisions.
- **But** remember that each agreement results from a particular set of circumstances and is the result of compromise between the parties. As a result of a compromise with an agency, an entity may commit to doing more or less than the law requires.

Private entities and individuals can also bring court actions under the ADA and Section 504, and these actions may result in similar out-of-court settlements or in consent decrees. Again, while these will offer valuable insights and may serve as models to some extent, the same caveats apply.

Help from Pepnet 2, the government, and others

Pepnet 2 has a variety of resources available that will provide stakeholders with information about current strategies and evidence-based practices on a wealth of topics and issues.¹¹

The Association on Higher Education And Disability (AHEAD) also offers an array of resources to stakeholder groups ranging from members to the general public.¹²

Through its ten regional centers, the ADA National Network (funded by the Department of Education) provides information, guidance and training on the ADA.¹³ The centers' services are tailored to meet the needs of business, government, and individuals at local, regional and national levels.

DOJ staffs an information line that answers calls from individuals or entities five days a week at 800 - 514 - 0301 (voice) or 800 - 514 - 0383 (TTY). DOJ also posts numerous technical assistance documents on line.¹⁴

Endnotes

¹ NOTE: This guide is intended to provide basic information. It should not be relied upon as a precise or complete explanation of legal requirements.

² 29 U.S.C. § 794, <http://www.law.cornell.edu/uscode/text/29/794>.

³ 42 U.S.C. §§ 12101 et seq., <http://www.ada.gov/pubs/adastatute08.htm>.

⁴ ED's regulations are at 34 C.F.R. part 104, <http://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html>.

⁵ 28 C.F.R. part 35 (Title II), http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm; 28 C.F.R. part 36 (Title III), http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm.

⁶ For example, see DOJ and ED letter of June 29, 2010, to college and university presidents about use of emerging technology, sometimes known as the “Kindle letter,” http://www.ada.gov/kindle_ltr_eddoj.htm; DOJ and ED letter of November 12, 2014, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_ltr.htm, enclosing technical assistance document, Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.htm; PDF version, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.pdf; Fact Sheet, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_fact_sht.htm; PDF version, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_fct_sht.pdf; Dear Colleague Letter, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_ltr.htm; PDF version, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_ltr.pdf.

⁷ For example, see Revised ADA Requirements: Effective Communication, <http://www.ada.gov/effective-comm.htm>; DOJ, January 31, 2014.

⁸ For example, see appellate brief filed in *Argenyi v. Creighton University*, 703 F.3d 441 (8th Cir. 2013), <http://www.ada.gov/briefs/creighton-soi.pdf>.

⁹ For example, see letter of finding to Utah Valley University, No. 08102026 (7/16/2010). <http://www.galvin-group.com/media/89211/ocr%20letter%20utah%20valley.pdf>

¹⁰ For example, see DOJ's proposed regulation on captioning, http://www.ada.gov/regs2014/movie_nprm_index.htm, advance notice of proposed rulemaking on website accessibility, <http://www.regulations.gov/#!documentDetail;D=DOJ-CRT-2010-0005-0001>

¹¹ Pepnet 2 Resources, <http://www.pepnet.org/resources>

¹² Association on Higher Education and Disability (AHEAD) Learn, <https://www.ahead.org/learn>

¹³ Americans with Disabilities Act National Network, <http://adata.org/>

¹⁴ Information and Technical Assistance on the Americans with Disabilities Act, <http://www.ada.gov/ta-pubs-pg2.htm>

