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Paul D. Grossman

- University of Wisconsin, Madison (JDS); Oxford University, England (studies in Philosophy of Law)
- Admitted to the Wisconsin and California Bars
- 40 years with US Dept. of Education, Office for Civil Rights, HQ in DC and San Francisco
- Over 25 years as Chief Regional Attorney, US ED OCR, San Francisco, Retired 2013
- Adjunct Professor of Disability Law, Hastings College of Law, University of California (1995-present) – Universal design principles in class
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Paul Grossman

• Awarded Blosser, Lanterman and Presidential honors by AHEAD and CAPED
• Member, AHEAD Board of Directors
• Member, CHADD Public Policy Board
• Member, Disability Rights Advocates, Expert Advisors Board

Paul Grossman, *THE GREATEST CHANGE IN DISABILITY LAW IN TWENTY YEARS: WHAT YOU NEED TO KNOW*. National Association of Student Personnel Administrators (NASPA) (Chapter 1, March 2014)

Paul Grossman, *EASY WAYS TO GET INTO NONCOMPLIANCE WITH SECTION 504 AND THE ADA & 40 YEARS WITH OCR, I MUST HAVE LEARNED SOMETHING?*, Disability Compliance in Higher Education (October and November, 2014)
Sample Pertinent Publications

• Publications Pending:
  – Colker and Grossman, AHEAD remix and update, pending, four formats + Daisy
  – Paul Grossman, Five Things You Should Know About Post-Secondary Disability Law, NASPA Legal Foundation (publication pending)

• Primary Older Publications
  – Academe, MAKING ACCOMMODATIONS: The Legal World of Students with Disabilities (2001)
You’re Not an Easy Audience!

Where Is The Sweet Spot?
Together,
We Are at the Cutting Edge of the Progression of Disability Law,
Innovation in education,
and even Civil Rights Law in General
Connections
James Burke

What do the educational civil rights of a few Cantonese speaking children in Chinatown San Francisco have to do with your job?

Everything!
The Progression in Civil Rights Law that Leads to Disability Rights

Five Stages

(Maybe Six)
Stage One
Emancipation Proclamation

(A connection to wounded warriors)
Stage 2
Desegregation

Is there a connection to segregation in the digital access world?

“Integration of the user” Dear Colleague Letter 2010
Stage 3
Disparate Treatment
Identical treatment of similarly-situated individuals

Very Pertinent on Some Disability Issues,
Some Connection to Digital Access
(more later)
Stage 4
Disparate Impact
Without Regard to Intent
Removing Unnecessary Headwinds

Griggs v. Duke Power
and Alexander v. Choate
Very Pertinent,
But Removal Is Not Quite Something Affirmative
Griggs v. Duke Power

• Supreme Court 1971
• Response to CRA of 1964
• Intent free
• Disparate impact
• High school degree, score on the Otis Quick Intelligence Test
• Facial neutral selection criteria that tend to screen out individuals on the basis of race may not be maintained if they are not valid predictors of who will perform the job well
Alexander v. Choate

• 469 U.S. 287 (1985)

• Did it violate Section 504 to cut Kentucky Medicaid benefits from 20 to 14 days maximum?
  – Based on prior year statistics this would detrimentally affect 7.8% on nondisabled hospital users but 27.4% of disabled users.

• Disparate impact may be applied under Section 504
Alexander v. Choate

• “[Section 504] requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers.... [T]o assure meaningful access, reasonable accommodations in the grantee’s program or benefit may have to be made.”

• But not fundamental alteration or undue burden

• Here meaningful access shown:
  – 95% of disabled persons who enter the hospital are out in 14 days or less.
  – The cost of covering disabled persons longer “would be well beyond the accommodations

• Many, many connections to digital access law
Section 504 Disparate Impact

• 34 C.F.R. § 104.4 Discrimination prohibited.

“(b) (1) A recipient [college or university], in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of [disability]:

(iii) Provide ... an aid, benefit, or service that is not as effective as that provided to others;

“(b)(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified [individuals with disabilities] to discrimination on the basis of disability, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons ....”
Title II  Disparate Impact

• 28 C.F.R. 35.130 General prohibitions against discrimination
• (b)
  – (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—
    • (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; ****
    • (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service. ****
  – (3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration—
    • (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;
Title II: Disparate Impact
Maintenance of Access

• Also intent free
• 28 C.F.R. § 35.133
• Maintenance of accessible features.
• (a) A public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.
• (b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.
Stage 5
Identical Treatment is not Always Equal Treatment
“Equivalent Treatment” Requires Something Different or Affirmative

Lau v. Nichols
Southeastern v. Davis
Dear Colleague Letters
Section 504: Equivalent Treatment

• 34 C.F.R. § 104.44 (d)(1) “A recipient ... shall take such steps as are necessary to ensure that no [student with a disability] 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.”

  (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. .... “
Title II: Equivalent Treatment

• 28 § 35.160 General.
• (a) (1) A public entity shall take appropriate steps to ensure that communications with [individuals] with disabilities are as effective as communications with others.

*****

• (b) (1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, .... an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

  – (2) The type of auxiliary aid or service necessary to ensure effective communication will vary .... In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.
The Digital Analogy to the May 25th Memorandum:
The Emerging Technologies [“Kindle”] Dear Colleague Letter

• Kindle DX was to be as part of a pilot study
  • Kindle DX required device in classes piloting it
  • Amazon’s intention was to test the device with the hope of adopting it campus-wide

• NFB file OCR/DOJ complaints against
  – Case Western Reserve, Pace University, Princeton, and Reed College
  – Court complaint against Arizona State University and Amazon.com
  – Basic issue: text to speech and all other functions on a pull-down menu that could not be accessed by individuals who are blind/LV
The Kindle Cases

- In settlements with OCR and DOJ the universities agreed not to purchase, require, or recommend use of the Kindle DX, or any other dedicated electronic book reader, unless or until the device is fully accessible to individuals who are blind or have low vision, or the universities provide reasonable accommodation or modification “so that a student can:
  - acquire the same information
  - engage in the same interactions
  - enjoy the same services as sighted students
  - with substantially equivalent ease of use.” [reformatted]

- The above four elements became the critical new attributes or measures of equality
The Kindle Letter

- NFB/DOJ/OCR settlements lead to The Kindle Letter (6/29/10) [http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html)

  “Requiring use of an emerging technology in a classroom environment when the technology is inaccessible to an entire population of individuals with disabilities--individuals with visual disabilities--is discrimination prohibited by the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) unless those individuals are provided accommodations or modifications that permit them to receive all the educational benefits provided by the technology in an equally effective and equally integrated manner.”

- Kindle Q & A: [http://www2.ed.gov/about/offices/list/ocr/docs/504-qa-20100629.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/504-qa-20100629.pdf)
POST-SECONDARY EDUCATION IS IN A CRISIS

The Traditional Model of Service Delivery Is Falling Apart  Fareed Zakaria
Elements of the Crisis

- Education is too expensive, even the middle class is getting priced out of four year institutions
- Many schools, especially public schools, are under-budgeted with too few sections of required courses
- Many 18 year olds are not ready from school away from home
- A year abroad is essential to more and more fields
- Internship and field placements are crucial to successful transition to the world of work
- A year abroad and internship time comes at the cost of time for traditional skill acquisition
- Wounded warriors are entering in large numbers with acquired disabilities and cultural conflicts
Elements of a Solution

Fareed & Paul

• Begin college education at home with low cost on line instruction particularly in those introductory courses that are impacted

• For many students, plan on 5 years of undergraduate instruction with the first year completely on-line and some on-line instruction during internship experiences and time abroad

• Guide and accommodate abroad and in the work place through digital guidance

• Engage in “universal design instruction” where students are reached in multiple ways in multiple settings using the virtual world to connect them, stimulate thinking and reinforce instruction. -- Tom Hehir, Harvard Graduate School of Education
BUT WHAT ABOUT INDIVIDUALS WITH DISABILITIES?

That’s Up to You!
Technology Can Be the Barrier
Or the Solution

“Emerging technologies are an educational resource ... especially for students with disabilities. Technological innovations have opened a virtual world .... to many individuals with disabilities for whom access to the physical world remains challenging. Ensuring equal access to emerging technology ... is a means to the goal of full integration and equal educational opportunity for this nation’s students with disabilities. ....” The Kindle Letter (6/29/10)

http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html
Application of Legal Principles
A) Web Access:

South Carolina Technical College System (OCR, March 2013)
Louisiana Technical College System (DOJ, July 2013)
University of Montana (OCR, 2014)
DOJ Settlement with H & R Block (DOJ, 2014)
South Carolina Technical College System

• Addresses what is an accessible web-site
• A compliance review
  – OCR initiated
  – Logistically advantageous
  – Interviewed students, faculty, and administrators
  – Reviewed E-mail, course management, library resources, and over 100 web-sites
List of Website Deficiencies (1)

• Missing tags for PDFs, graphics, identification of column headers, specified reading order, critical headings and watermarks
• Videos missed labels keyboard controls and/or captioning
• Fields that required filling in missed labels for screen readers
• Tables missed headings
List of Website Deficiencies (2)

- Areas where keyboard-only users could not access information or use drop-down menus
- Content of course management tools missing captions, alt. text, and “other features”
- Campus calendars not “fully accessible” to screen readers
Louisiana State Tech University

- DOJ initiated in response to a student complaint
- A four year undergraduate institution as well as graduate programs including Ph.D. Programs
- Keep you eye on the role of the DSS officer before the agreement and after the agreement
A Student Left to “Spin in the Wind”

- A student who is blind could not access tutorials, homework, and exams, exam feedback and an opportunity to raise his grade because a course relied on use of MyOMLab, an online learning product, otherwise available 24/7
- The Complainant raised concerns about the inaccessibility of MyOMLab with the professor, who directed the Complainant to consult with the MyOMLab vendor for resolution of the issue
- Still unable to access MyOMLab, the Complainant notified University administrators without success
- Supplemental hardcopy materials were provide very late by a TA
- After a month, the complainant withdrew
Negotiated Remedial Agreement

• A change in policies
• All electronic matter will be accessible
  – All technology and content purchased will be accessible [no more ad hoc solutions]
  – All new website will meet Web Content Accessibility Guidelines (WCAG) 2, level AA
  – Over time bring old websites up to compliance
University of Montana

• OCR 2014; response to an OCR complaint
• Settled, thus the important element of this case is the remedial agreement
• Two broad definitions:
  1. Coverage: “electronic and information technology”
  2. Duty: “equal access”
First Key Definition

• “E&IT= Electronic Information and Technology”
  • The internet and intranet websites content
  • Electronic books and electronic book reading systems
  • Search engines and databases
  • Learning management systems
  • Classroom technology and multimedia
  • Personal response systems ("clickers")
  • Telecommunications products (such as telephones)
  • Information kiosks, Automated Teller Machines (ATMs) transaction machines
  • Technology support services and related resources.
Second Key Definition

• “Accessible’ means that individuals with disabilities are able to:
  – independently acquire the same information,
  – engage in the same interactions,
  – and enjoy the same services
    • within the same timeframe as individuals without disabilities,
    • with substantially equivalent ease of use.” [Reformatted from the original.]

• Is this stage 6; where independence, self-executing accommodations, and ease of use are the criteria used to measure equality?
Acquisition Standards (1)

• UM’s request for proposal process will include a requirement that bidders meet the accessibility standards of:
  – WCAG 2.0 Level AA for web-based technology (as set forth in Appendix A to this Agreement)
  – Section 508 of the Rehabilitation Act
  – and the Americans with Disabilities Act
Acquisition Standards (2)

• “The process will require or encouraging, at the University’s discretion, as part of any contract with its vendors, provisions in which the vendor warrants that any technology provided complies with these standards and any applicable current federal and state disability laws.”
Quality Control

• Hire or designate a staff member with responsibility and commensurate authority to coordinate the University’s EI &T Accessibility Policy and Procedures
• Confidential survey of students registered with DSS
• Grievance procedure
• Audit and testing process
• Corrective action strategy
  – Steps according to identified priorities
  – Assignment of responsibility
  – Deadlines
  – Separate focus on Library website and search systems to come up to WCAG 2
National Federal of the Blind (NFB) et al. v. HRB Digital LLC et al.

• D. Mass. 2014
• DOJ intervened in *NFB v. H & R Block* and obtained a settlement subject to federal district court approval **under title III of the ADA**
• NFB complained that individuals with disabilities are denied full and equal enjoyment of services that are provided through H&R Block’s **website** and **mobile applications**
National Federal of the Blind (NFB) et al. v. HRB Digital LLC et al.

• Allegation: H&R Block failed to code its website www.hrblock.com, and its mobile apps in a manner that would make it accessible to individuals who have vision, hearing and physical disabilities

• Consent agreement
  – Five year agree
  – H&R Block’s website, tax filing utility and mobile apps will conform to the Level AA Success Criteria of the WCAG 2.0.
Alternate Media
Settlement Between UCB, DRA and Three Students

Basic Provisions (1)

• With proper student notice, 90% of time required reading books converted within 10 business days

• With proper student notice, 90% of time required course readers converted within 17 business days
Basic Provisions (3)

• Personal readers provided when delays or for unconvertible material such as rare books

• The University will regularly instruct students with print disabilities in alt media request procedures and timelines, in the use of alt media self-help options

  – The webpage http://dsp.berkeley.edu/timelines.html of the University’s Disabled Students Program (“DSP”) will be amended to make clear that timeframes applicable to alternative media are governed by the Alternative Media Guidelines

• On an annual basis the University will appropriately educate staff and administrators
Basic Provisions (4)

• Faculty must put in reading lists 7 weeks before the start of the semester

• *Faculty may be sanctioned for a failure to timely submit their lists*

• Assistive technology packages distributed around campus
“Infinity and Beyond”

Is the Tail About to Wag the Dog?
“Generalizing Stage 6?”

Is the tail wagging the dog?

Voting  Access and Emergency Planning
Rejection of Ad Hoc Solutions
Building Independence & Self-Sufficiency
The Most Contested Civil Right
Since the Civil War
Voting
Disabled in Action v. Board of Elections in the City of New York

• No. 12–4412–cv, 2014 WL 1910361 (2nd Cir. May 14, 2014)
• Problem:
  – 80% of New York polling sites had some form of access barrier:
    • Inadequate signage
    • Steep ramps
    • ADA voting booths in inaccessible locations, and
    • Voting machines with adaptive technology that remained inoperable.
  – BEO showed up late or not at all. Then tried “work arounds” like personal assistance or sending voter to another location or absentee ballot but this requires voter to request this in writing in advance.
Ad Hoc is Not *Per Se* Inadequate But It’s Got to Work

• “BOE next argues that it already provides reasonable accommodations for voters with disabilities by (1) reassigning these voters from inaccessible to accessible poll sites and (2) remedying barriers to access as they are made aware of them on election days.”

• “BOE's *ad hoc* policy of remedying barriers to access as they occur is inadequate, especially as BOE does not respond to many accessibility issues even after they are brought to its attention.”
Measures of equality: Independence and Self-Sufficiency Are Not Compatible with Ad Hoc Practices

• “Although [some plaintiffs] were ultimately able to cast their vote with the fortuitous assistance of others, the purpose of the Rehabilitation Act is ‘to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.’ 29 U.S.C. § 701(b)(1) (emphasis added by the court). …. The right to vote should not be contingent on the happenstance that others are available to help. BOE's services were not ‘readily accessible’ [one plaintiff was] deterred from appearing at her poll site in subsequent elections. As we have held, ‘deterrence constitutes an injury under the ADA.’”
Alameda Council of the Blind v. Cty. of Alameda

• 985 F. Supp. 2d 1229 (N.D. Cal 2013)
• Issues:
  – Does the duty to provide meaningful access to the voting process include ensuring that the act of voting be accomplished *privately and independently* without third party assistance?
  – Does Section 504 and the ADA address technology as an auxiliary aid even when that technology was invented after the passage of these laws or their implementing regulations?
Alameda Council of the Blind v. Cty. of Alameda

- Conclusion:
  - The failure to maintain, train on, promptly service accessible voting machines violates Section 504 and Title II of the ADA so that individuals with disabilities may vote privately and independently.
Alameda Council of the Blind v. Cty. of Alameda

• **Basis of violation**
  
  – *Alexander v. Choate* requires meaningful access to government programs—this is not meaningful—
    • A shield or limit becomes a weapon
  
  – MOA regulation is violated due to county’s inability to make machines available—it’s ad hoc system does not work—2 hour waits, etc.
  
  – Effective communication regulation is violated because human assistance is not in the preferred method of the individual with a disability *KM v. Tustin* (9th Cir. 2013)
  
  – Maintenance of accessible features is violated, no testing or timely technical support
Alameda Council of the Blind v. Cty. of Alameda

– Blind persons should not be dependent on the “kindness of strangers.” Citing to *NCB v. Paulson* (DC Cir. 2008)

– “[A]ccommodations provided to individuals with disabilities must change as technology progresses.”

  • Legislative history:
   “[A]dvances [in technology] may require public accommodations to provide auxiliary aids and services in the future which today they would not be required because they would be held to impose undue burdens on such entities. Indeed, the Committee intends that the types of accommodations and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times.”

  • Court precedents:
    – *Baughman v. Disney* (9th Cir. 2012)
    – *Enyart v. Bar Examiners* (9th Cir. 2011)
Emergency Planning

The Last Place for Ad Hoc Solutions
Brooklyn Center for Independence of the Disabled v. Bloomberg

• No. 11 Civ. 6690(JMF), 2013 WL 5943995 (S.D.N.Y. Nov. 7, 2013)

• No planning for notice, transit, or sheltering

• Equal Peace of Mind

“The question is whether the City has done enough to provide people with disabilities meaningful access to its emergency preparedness program given the broad remedial purposes of the ADA [and] the Rehabilitation Act .... The answer ... is that it has not, ... depriv[ing] people with disabilities of what they are entitled to under the law, not to mention of the peace of mind that people without disabilities can have when it comes to the City’s preparedness plans.”
Summing Up

• The measures or characteristics of equality have expanded and changed:
  – Independence of the user
  – Integration of the user
  – Ease of use of the technology or adaptive technology
  – Timeliness of delivery of information
  – Completeness of accessible information
  – Maybe even equal peace of mind
• The goal of equal access to information is achieved by:
  – Making the information available in formats compatible with common adaptive technology
  – Making the adaptive technology necessary to achieve equal access readily available across campus, certainly including JAWS and Zoom Text
  – Adopting, dispersing, and monitoring policies and practices that will achieve these goals on a continuous basis (universal design)
Summing Up (3)

• The goal of equal access to information is further achieved by:
  – Making access a required element in acquisition and implementation of technology, programs, online services, and technical support
  – Training on policies and practices
  – Good prioritization
  – Effective alternatives to address delays and complications
  – Placing responsibility in specific individuals and giving them compliance authority
“Enjoy The Journey”
“The Arc of the Moral Universe is long, but it Bends Towards Justice”

DR. MARTIN LUTHER KING QUOTING
THE ABOLITIONIST THEODORE PARKER