Service, Comfort, or Emotional Support? The Evolution of Disability Law and Campus Housing

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COMPREHENSION AND APPLICATION OF LAW in campus housing settings can be a daunting task. Though challenging, a basic understanding of law and how it applies to residence life and housing environments within institutions of higher education is crucial. This article provides an historical evolution of three laws that have direct bearing on campus housing: Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990 (and the Amendments Act of 2009), and the Fair Housing Act of 1968 (and the Amendments Act of 1988). A closer examination of an emerging trend is also provided, namely the increasing number of requests for emotional support animals and how this may or may not align with applicable federal laws. This article concludes with implications for practice where we encourage residence life and housing professionals, among other things, to view these various laws only as minimum requirements and to find ways to far exceed these basic mandates.

Given the ever increasing legal-judicial activity related to our nation's campuses . . . how do practitioners and educators ensure that our good faith efforts and subsequent decisions uphold clearly important standards of law?

On June 8, 1993, the United States District Court, District of Nebraska ruled in favor of Kristy Coleman, asserting that the University of Nebraska, Lincoln (UNL), where Coleman was then a student, violated Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (*Coleman v. Zatechka*, 1993). Coleman, an undergraduate with cerebral palsy, required a "personal attendant to assist her with dressing, showering and toileting" (*Coleman v. Zatechka*, 1993, p. 1363). Like many undergraduates at UNL, Coleman sought campus housing prior to the fall 1991 term, filing the requisite paperwork to become part of a pool of eligible roommates, to be assigned a roommate from this pool, and then to be assigned a double-occupancy room in Selleck Hall. At the time, UNL policy restricted students who required personal attendant care from entering such a pool, thus requiring them to live individually. UNL, in its defense, noted that this policy was the result of "complaints from disabled students who expressed embarrassment at having

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an assigned roommate present during attendant care visits" (*Coleman v. Zatechka*, 1993, p. 1364). In what could be described as a good faith effort (Summers, 1982), UNL reserved rooms specifically for students who needed attendant care, and these students were then assigned to live individually. Coleman learned of UNL's policy after her initial application was denied and subsequent requests to be included in the roommate pool were also rejected (*Coleman v. Zatechka*, 1993). Coleman was not satisfied with this arrangement and, as a result, filed a complaint with the Office for Civil Rights (OCR). The first complaint with OCR was resolved through a "formal discussion" (*Coleman v. Zatechka*, 1993, p. 1364), and Coleman withdrew her charge when UNL agreed to locate a roommate for the fall 1992 semester (*Coleman v. Zatechka*, 1993). Poor communication, which suggested a lack of effort by UNL to locate a roommate, led to a second OCR complaint; however, "the evidence showed the university had in fact been pursuing the matter during the months following the agreement" (*Coleman v. Zatechka*, 1993, p. 1364).

Despite UNL's significant, though arguably under-communicated, efforts, a roommate was never secured. Coleman sued, asserting that UNL's "refusal to assign her a roommate because of her disability, combined with the approach taken in attempting to persuade students to agree to be her roommate ... made her feel isolated and stigmatized" (*Coleman v. Zatechka*, 1993, p. 1365). The court found that UNL violated Title II of the ADA and Section 504 of the Rehabilitation Act of 1973. As Rothstein (1993) concluded, "This case highlights one of the key principles of the ADA and the Rehabilitation Act: that programs should be provided in the most integrated setting that is feasible and appropriate" (Physical Facilities Section, para. 37).

Although nearly 20 years old, this case is important for any discussion of law related to students with disabilities and higher education. A full review of the memorandum of decision in *Coleman v. Zatechka* (1993), for example, reveals what could reasonably be considered a well-intentioned organization and its personnel making good faith efforts to work with its students, including those with and without disabilities. Given the ever increasing legal-judicial activity related to our nation's campuses (Kaplin & Lee, 1995), how do practitioners and educators ensure that our good faith efforts and subsequent decisions uphold clearly important standards of law?

This paper examines three federal laws (Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Fair Housing Act) related to students with disabilities and how they apply to departments of housing and residence life within institutions of higher education. Following a review of these laws, a recent and still pending case—*United States of America v. University of Nebraska at Kearney* (2011)—is presented. Implications for practice conclude the article.

Before reading further, it should be noted that no article of this length can comprehensively address all facets of one law and associated regulations, let alone three. Practitioners and educators should use this article as a guide and endeavor to continue the conversation on individual campuses and with appropriate personnel.

SECTION 504 OF THE REHABILITATION ACT OF 1973

In 1973, Congress passed the Rehabilitation Act which included a specific section—Section 504—that prohibited "recipients of federal financial assistance from discriminating against otherwise qualified individuals with disabilities" (Rothstein, 2010, p. 848). This was a civil rights law, whose main focus was "promoting access to individuals with disabilities" (Madaus & Shaw, 2004, p. 82), and it was essentially the first of its kind. As Mayerson (1991) noted, Section 504 was the first time the term *discrimination* was employed to describe the exclusion of people with disabilities solely because of that disability; framing the law in this fashion shifted the "focus away from the limitations imposed by a disability, and turned it towards the limitations posed by society through attitudinal and architectural barriers" (p. 2).

Section 504 included most colleges and universities, the great majority of whom received some form of federal financial assistance (Katsiyannis, Zhang, Landmark, & Reber, 2009). However, Section 504 also applied to private colleges and universities and included "an entire corporation, partnership, or other private organization ... which is principally engaged in the business of providing education" (Section 504, n.d., para. 2).

In its time, however, the impact of Section 504 was not immediately significant. Weber (1995) commented that "drafting and promulgation of Section 504's regulations took an exceedingly long time" (p. 1094) and that these regulations did not fully take effect until 1977. Even with this delay, "in 1973 there were few students with disabilities of college age with the skills and preparation to attend college" (Rothstein, 2010, p. 849). It was not until the 1975 passage of the Education for All Handicapped Children Act—which has evolved into the Individuals with Disabilities Education Act (IDEA)—that educational providers began identifying students with disabilities so that appropriate services could be provided (Ikeda, 2012). As Rothstein (2010) concluded, it was thus not until "several years later that a student with a disability would have been identified at an early age and received special education and related services throughout the years in K-12 education and thus be prepared for college" (p. 849). As the development of these laws indicates, *access* to higher education, though certainly important, did not collide with the notion of *preparation* for higher education.

AMERICANS WITH DISABILITIES ACT

While the Rehabilitation Act of 1973 provided an initial foundation, more sweeping reform did not arrive until the passage of the Americans with Disabilities Act (ADA) in 1990 (Hebel, 2001). With many similarities to

Section 504 (Weber, 1995), the ADA restated the goal of, among other things, "equal access to public services and programs" (Molesso, 2006, p. 694), which was specifically asserted in Title II of the act (LaCheen, 2001). Though the term *public* is used, it is noteworthy that Title III of the Americans with Disabilities Act also applies to *private* educational institutions (Bryan & Myers, 2006). Since the act's passage, access to higher education, both public and private, has expanded significantly for people with disabilities (Lynch & Gussel, 2011). In fact, as Newman et al. (2011) reported, "60% of young adults with disabilities . . . continued on to postsecondary education within 8 years of leaving high school" (p. xv).

The ADA includes two primary components important for institutions of higher education:

1. Whether or not a student has a qualifying disability and
2. If the student has a qualifying disability, whether or not the accommodations requested by the student are reasonable or unreasonable. (Smith & Allen, 2011, p. 768)

In the original act, disability was broadly defined as "a physical or mental impairment that substantially limits one or more major life activities; a . . . history or record of such an impairment; or being perceived by others as having such an impairment" (United States Department of Justice, 2009, ADA Section, p. 1). Various court rulings narrowed this definition, thus restricting rather than enhancing access to services (Burke, Friedl, & Rigler, 2010). In response to this constriction, and with unanimous approval from Congress, the Americans with Disabilities Act Amendments Act (ADAAA) was enacted. These amendments, implemented on January 1, 2009, were designed to address what Burke et al. (2010) asserted was an "erosion" (p. 64) of the initial ADA statute by expanding certain language, including the definition of disability. Specifically, the ADAAA "emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis" (U.S. Equal Employment Opportunity Commission, n.d., para. 1).

The burden related to providing evidence of disability and any subsequent request for accommodation must come from the student. Further, the documentation must demonstrate "that the assessment and the recommendation for accommodations are related to that disability" (Rothstein, 2010, p. 859). This responsibility—which shifts to the *student* as he or she enters postsecondary education—rests on the *school* during that same student's years of basic education (Rothstein, 2010). As a result, even though institutions of higher education must clearly communicate various policies and procedures related to students with disabilities and subsequent accommodations (Lynch & Gussel, 2011), some students may be underprepared to advocate for themselves as they move from secondary to higher education. But this ability to advocate for oneself is crucial, as it often indicates whether or not a higher education institution is even aware of a student's disability but also, and of equal importance, whether or not a particular accommodation can be made.

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When a student provides appropriate documentation of a disability, a request for reasonable accommodation can be made. As Simon (2000) asserts, "The law imposes not only a prohibition against discrimination but also, in appropriate circumstances, a positive obligation to make 'reasonable accommodation'" (p. 70). As with many features of these laws, there are intersecting points. For example, Section 504 provides that "recipients . . . shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap" (U.S. Department of Education, n.d., para. 1). The Supreme Court in *Alexander v. Choate* elaborated:

> The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made. (1985, p. 301)

As Simon (2000) concludes, "'meaningful access' requires institutions to modify their programs and services to provide accommodations to students with disabilities" (p. 70).

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FAIR HOUSING ACT

Originally codified in 1968, Title VIII of the Civil Rights Act—commonly known as the Fair Housing Act—was designed to remove segregated housing and create more integrated living patterns (Schill & Friedman, 1999). Though laws (e.g., Civil Rights Act of 1964) and case decisions (e.g., *Gautreaux v. Chicago Housing Authority*, 1967) existed affirming the illegality of segregated housing prior to 1968, the functional impact was negligible. Even with the Fair Housing Act of 1968, "housing discrimination remained endemic in the United States [and] the Federal Government was either powerless or unwilling to take major steps to enforce the Act" (Schill & Friedman, 1999, p. 58). In response, Congress passed the Fair Housing Amendments Act (1988), which was designed to broaden language related to discrimination and to strengthen enforcement avenues available to the Office of Housing and Urban Development (HUD) (Godschalk, 2012). The 1988 Fair Housing Amendments Act asserted that "making housing unavailable to persons because of race or color, religion, sex, national origin, familial status, or disability" is prohibited (United States Department of Justice, n.d., para. 1). The Fair Housing Amendments Act included the now less preferred term "handicap" as a protected class, substantially expanding rights for people with disabilities with regard to housing (Rothstein, 2010).

The question applicable to colleges and

universities is whether or not *campus* housing is governed by the Fair Housing Amendments Act. Though various interpretations have existed (Association on Higher Education and Disability [AHEAD], 2011), Kathleen Martinez, assistant secretary of labor for disability employment policy, provides clear language that "fair housing protections of persons with disabilities do not end at the University gates" (Greene, 2011, para. 1). Language in the Fair Housing Act defines dormitory rooms as examples of dwelling units (Fair Housing Amendments Act, 1988), further suggesting that application of the Fair Housing Act includes campus housing (see also *Franchi v. New Hampton School*, 2009).

Recent developments under the Fair Housing Amendments Act concern the nature of service and/or comfort animals. Effective March 15, 2011, the ADA defines a service animal as a "dog that is individually trained to do work or perform tasks for a person with a disability" (United States Department of Justice, 2011, para. 2). Readers will note that the *only* animal that may serve in the role of service animal, based on this definition, is a dog (Waller, 2011), though the revised regulations also have a separate provision for miniature horses. As Grasgreen (2011) wrote, colleges and universities have, historically, used the ADA—and the newer ADAAA—as a guide for defining service animals and thus determining whether or not a given request for a service animal would be accommodated. However, more recently, requests for therapy, assistance, or emotional support animals have emerged (Huss, 2005), and this category does not meet the definition of service animal under the ADA (Vrendenburgh & Zackowitz,

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2012). Therapy animals (hereinafter meant to include all manner of assistance animals, except for service animals as per ADA) may or may not have training and may or may not hold a relevant certification. As Vrendenburgh and Zackowitz (2012) assert, service animals and therapy animals "serve two separate and distinct roles. Therapy animals are usually personal pets that, with their owners, provide supervised, goal-directed intervention to clients" (p. 722).

The Fair Housing Act does not share the ADA's definition of service animal. In a memo to Fair Housing Equal Opportunity region directors, Sara Pratt, deputy assistant secretary for enforcement and programs for HUD, made the following clarification:

> Neither the FHAct [sic], Section 504, nor HUD's implementing regulations contain a specific definition of the term "service animal." However, species other than dogs, with or without training, and animals that provide emotional support have been recognized as necessary assistance animals under the reasonable accommodations provisions of the FHAct [sic] and Section 504. (2011, para. 3)

Huss (2005) provided a succinct summary of the difference in the FHA and ADA definitions: "The definition of an assistance animal under the FHA is broader than that of a service animal under the ADA and includes what would commonly be referred to as an emotional support animal" (p. 437). Any student therefore wishing to live with a therapy animal must "show that he or she meets the definition of having a handicap and that it is necessary to have the animal in order for the individual to use and enjoy the dwelling" (Huss, 2005, p. 437). This final statement, it should be noted, assumes that one's campus housing is defined as a dwelling under the FHA; in consultation with appropriate personnel and legal counsel, readers should first endeavor to determine if this is in fact accurate. However, both service animals (dogs or miniature horses, under the ADA) and therapy animals (a much broader category of animals, under the FHA) must be allowed under the reasonable accommodation provisions of both acts, provided that the student has a documented disability, the animal's assistance is clearly connected to serving the student as a result of his or her disability, and, for the FHA, the residence meets the definition of a dwelling.

UNITED STATES OF AMERICA V. UNIVERSITY OF NEBRASKA AT KEARNEY (2011)

Though the case between the U.S. Department of Housing and Urban Development and the University of Nebraska at Kearney (UNK) has yet to be decided, reviewing the complaint presents practitioners with a learning opportunity. Filing on behalf of student Brittany Hamilton, the U.S. Department of Housing and Urban Development, citing the Fair Housing Act, claimed that the University of Nebraska at Kearney (UNK) discriminated against Hamilton in their denial of an assistance animal in her University Heights residence. Diagnosed with depression in 2008 and anxiety in 2009, Hamilton's assistance animal—a small dog named Butch, which had been prescribed for her by an advanced practice registered nurse—helped alleviate symptoms of the illness and reduced the intensity of panic attacks by placing his paws on her shoulders when the attacks occurred (Grasgreen, 2011). In April 2010, before her enrollment, Hamilton visited the campus and completed the *Disabilities Registration Agreement* and registered herself "as a student with the disabilities of depression and anxiety" (*United States of America v. University of Nebraska at Kearney*, 2011, p. 4). As a result of this registration, Hamilton was provided with UNK's *Psychological Documentation Guidelines* which required documentation to substantiate one's disability—for example, a diagnosis based on the DSM-IV, a clinical summary of the student's limitations, and evidence that the student's symptoms are present in two or more settings (*United States of America v. University of Nebraska at Kearney*, 2011, p. 4). The first charge of discrimination filed by HUD claims that the *Psychological Documentation Guidelines* exceed what is needed to review a request for a reasonable accommodation and that this alleged transgression violates the Fair Housing Act.

The second charge of discrimination relates

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to UNK's denial of Hamilton's accommodation request. After arriving on campus in August 2010, Hamilton submitted three requests for accommodations over a 35-day period for an exception to UNK's no pet policy—a policy that prohibits animals, except fish and service animals meeting the ADA guidelines. The HUD charge notes that the university denied each of the requests, citing ADA's legal requirements for service animals—legal requirements that UNK was simply upholding. Like many colleges and universities, UNK permits service animals as defined under the ADA but had no provision for assistance or therapy animals under the Fair Housing Act. One of the respondents indicated that "UNK was not governed by HUD (and thus FHA) guidelines, but rather DOJ guidelines" (*United States of America v. University of Nebraska at Kearney*, 2011, p. 6). It should be noted that the charge clearly indicates UNK's willingness to host Butch provided Hamilton could document that he met the definition of service animal under the ADA guidelines. HUD's filing asserts that University Heights is defined as a dwelling and is thus covered under the auspices of the Fair Housing Act, which, as a result, would include a broader definition of service animal, including therapy animals.

Since the filing, Hamilton has left the school, and the case has yet to be heard in federal district court. UNK is holding to their position, and observers are interested in how the court will rule in this matter. The verdict could have widespread implications related to housing and residence life professionals who themselves grapple with not only which laws apply in which circumstances, but also how those laws are to be interpreted in any given case.

Cases such as this are emerging more frequently; readers should also review *United States of America v. Millikin University* (2011), which ultimately resulted in a settlement with no admission of wrongdoing or liability on the part of Millikin University. However, this case demonstrates that "the Department of Housing and Urban Development . . . [intends] to pursue enforcement actions in academe" (Kaplin & Lee, 2012, p. 133). See also *Alejandro v. Palm Beach State College* (2011) which, though not specific to housing and residence life, offers insight pertaining to the documentation of service animals and permitted inquiries related to those animals.

IMPLICATIONS FOR PRACTICE

Recent cases related to disability laws have challenged colleges and universities broadly, as well as housing and residence life specifically. As is true with many areas of our practice, currency with legal actions—even those that may not have reached a final conclusion—can allow housing and residence life personnel to be proactive rather than reactive. When feasible, careful advance review of applicable statutes with appropriate personnel can make it easier

to face this challenge. Though not specifically reviewed in this article, these issues may be further compounded by specific state housing and disability laws.

Implications for continued practice and proficiency in this area are suggested below. Professionals should reflect on these implications in light of nuances present at their specific campus.

Understand the Laws and Make Preparations

In preparation for becoming proactive, become reasonably proficient with appropriate laws, understanding the most relevant and applicable elements for your campus. For example, is your campus housing covered under the Fair Housing Act? Are campus housing facilities involved in major events or other activities where visitors enter the halls (e.g., family weekend, homecoming, overnight student visits, open house events)? If so, what are your requirements for those visitors under ADA? As you consider these and other questions, engage a group of campus personnel with relevant interest, training, and professional responsibility. Always endeavor to have personnel with legal training as part of any such discussion; be sure to include your campus disability services professionals wherever possible to be certain all personnel are on the same page. Rothstein (2010) argues that such advance preparation can serve to avoid charges of discrimination, legal action, and the associated negative publicity that such actions might generate.

Go Beyond What Is Legally Required

The Association on Higher Education and Disability (AHEAD) published *Supporting Accommodation Requests: Guidance on Documentation Practices* in April of 2012. While there are many elements of these guidelines that are relevant, perhaps the most insightful guidance for housing and residence life professionals is the notion that laws such as the ADA provide a floor of protection, but not a ceiling. To that end, strict interpretation of the various acts and subsequent case law might represent a floor—in other words, a strict minimum. However, there is nothing prohibiting any college or university from doing *more than* what is lawfully required. Housing and residence life professionals are therefore urged to consider accommodations and services that go beyond what is minimally required. Where appropriate and when these accommodations are financially feasible and there are available resources, colleges and universities that endeavor to exceed the minimum requirements will not only provide educational opportunities for those who are historically marginalized, but will also further enact the idea of diversity and inclusion.

Broadcast Information About Services

The burden of proof to confirm the presence of a disability rests on the student, and there

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may be difficulty in this self-advocacy. Colleges and universities should make information widely available and include discussion of accommodative services in all aspects of orientation and advising and in any offices with high student volume. The goal is to aid students to self-identify, to facilitate their self-advocacy, and to connect them with appropriate services. Remember that disclosing one's disability is likely difficult, particularly to an unknown campus official. Administrative processes such as this should be as "user friendly" (Rothstein, 1997, p. 139) as possible and should fully embrace our profession's historical emphasis on student development.

Consider Accommodations in Renovation and Construction Projects

Housing and residence life professionals are frequently part of the housing renovation or construction process. Disability law, as a minimum, should be part of any process related to the physical construction or remodeling of campus housing. However, in that these laws provide minimum requirements, housing and residence life personnel are urged to be bold in this area, to far exceed what might be considered a reasonable accommodation. In this volume, for example, there are multiple examples of higher education institutions that took these bold steps. We encourage you to read these and other such best practices, and we further encourage you to connect with professionals in different institutions. There is no reason that we can conceive of as to why we should not learn from each other.

CONCLUSION

Remember that all of our efforts should naturally funnel back to student learning. Housing and residence life professionals are also educators. If a student with a disability makes the courageous effort to initiate the conversation, be sure to embrace that student. Be thoughtful as to how you respond; ask insight-oriented questions; become a partner with your student as he or she navigates the campus and various administrative hurdles. As Evans and Reason (2001) would suggest, be an advocate for your student, ensuring that the process, though necessary, is not unnecessarily cumbersome. Ensure that any subsequent accommodations are helpful and serve the student, allowing him or her to learn and grow in a comfortable environment. Realize that the student with a disability might reside within a larger community that may or may not understand the particulars of a given situation, which requires a balanced and thoughtful approach on the part of housing and residence life professionals. But, perhaps above all, remember that *your* learning, as a professional, is part of the process. Too often we only read about these sorts of things—case law, best practices, individual student accounts, and stories. That is appropriate and important in our own development as practitioners. But such abstractions cannot replace the learning—*your* learning—that comes from thoughtful and prolonged interaction with any student for whom you advocate.

POST-SCRIPT

** As we were going to press with this special edition, the United States District Court for the District of Nebraska ruled, in part, against UNK with regard to the Fair Housing Act. Readers are reminded, however, that the Hamilton case is still yet to be heard and that the current ruling pertains strictly to the applicability of the Fair Housing Act.

On April 19, 2013, in a ruling that may eventually impact all campus housing, the court determined that Hamilton's residence meets the definition of a "dwelling" under the Fair Housing Act (Babbitt & Wetmore, 2013). Scott Moore, counsel for UNK, argued on several fronts that campus housing should not be obligated to the FHA. Moore asserted that campus housing is temporary, likening it more to a hotel, which is not covered under the FHA; similarly, Moore argued that the primary purpose of campus housing is educational rather than providing a place of residence. Moore also compared campus housing to a jail, which is not covered under the FHA. In doing so, Moore asserted that campus housing is mandatory for some students, that students are assigned roommates, and that these same students are governed by university rules and regulations, none of which parallels the conditions of traditional housing (Babbitt & Wetmore, 2013; Pilger, 2013). The Federal court rejected each of Moore's arguments and noted that HUD "uses the term 'dormitory room' as an example of a 'dwelling' in the FHA implementing regulations" (Babbitt & Wetmore, 2013, para. 7).

Though Hamilton's university-owned and operated residence is "apartment style housing a mile from campus" (Pilger, 2013, para. 4), the ruling is said to leave "very little doubt that the court would also apply the FHA to more traditional dormitories" (Babbitt & Wetmore, 2013, para. 8). The Court's ruling is the first to formally apply the FHA to higher education. Absent an appeal, further rulings, or new legislation, colleges and universities should consult with their respective legal advisors as this decision sends a clear signal that (1) the FHA does indeed apply to campus housing, and (2) colleges and universities must therefore factor associated FHA regulations into their campus housing policies and protocols.

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Discussion Questions

1. The case of *Coleman v. Zatechka* provides an instance where a university's belief that it was acting in the best interests of students culminated in the student's alienation and, ultimately, legal action. Consider how the tensions present in this case apply broadly to the work of housing professionals and how this case informs best practices.

2. Consider the following statement: Given the ever increasing legal-judicial activity related to our nation's campuses, how can practitioners and educators ensure that our good faith efforts and subsequent decisions uphold clearly important standards of law? What situations where actions made in good faith resulted in problems at your institution? Why?

3. The article states that colleges and universities have historically followed the guidelines set by the ADA, a function of the Department of Justice (DOJ), rather than FHA, which falls under Housing and Urban Development (HUD). Discuss the implications of colleges and universities balancing between multiple state and federal agencies' competing prerogatives and litigation.

4. Much stipulation arises from whether a campus residence falls under the definition of a "dwelling." What is the ideological impact of a university refusing to recognize a residence hall as a dwelling while asserting that they are communities?

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