

# Navigating in Uncertain Times

*February 28, 2025*

Katy Washington, J.D., Ph.D.

Paul Grossman, J.D.

Jo Anne Simon, J.D.

L. Scott Lissner

*AHEAD* Association on  
Higher Education  
And Disability®

Paul Grossman, J.D.  
Office for Civil Rights, Retired  
Executive Counsel, AHEAD

*AHEAD* Association on  
Higher Education  
And Disability®

# Speaking Only for Myself

Sharing law-related information, but not legal advice

**It Only Makes Sense to be Concerned**

**It Makes NO Sense to be Panicked or Frightened**

**And Even Less Sense to Surrender to Misinformation**

So, Let's Start with Some  
Law-Related Information

# There Are Two Matters Worthy of Our Concern

- A lawsuit, *Texas v. Becerra*
  - Brought by 17 Republican Attorney Generals attacking Section 504.
  - 5:24-CV-00225 (N.D. Texas, September 26, 2024).
- A J20 Executive Order, with an implementing OCR Dear Colleague Letter, attacking programs to implement Diversity, Equity, Inclusion and Access.

## What the Complainants In *Becerra* Are Seeking?

- An injunction against extending the protections of Section 504 to transgender persons.
- A permanent injunctive preventing HHS from enforcing its new Final Rule, 89 Fed. Reg. 40,066, 40,068–69 (May 9, 2024), implementing Section 504 of the Rehab. Act. of 1973.
- A Federal court ruling holding that Section 504, 29 U.S.C. § 794, is unconstitutional to the extent it pertains to programs not funded by the Vocational Rehab. Act.
  - This is narrower than in the original complaint.

# *Becerra*: Reasons Not to Panic

- The power of the Federal Government to set the terms of its contracts is squarely set in the Constitution, Art. 1, Section 10.
- In the past, there have been very similar efforts to narrow, contract clause-based civil rights legislation, ***Grove City v. Bell***, 465 U.S. 555 (1984), ***which were successful***, but they were effectively turned back through restorative legislation that was adopted by Congress in the [Civil Rights Restoration Act of 1987](#).
- At its heart, this suit is driven by an opposition to transgender rights, and for reasons that are bad, this motivating issue is likely to be resolved in other forums, hence the plaintiffs have asked for a “pause” *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, White House (Jan. 20,2025).
- Even if Section 504 were to be curtailed or eliminated, your mission would remain under Title II and III of the ADA.



# Executive Orders: Background

- The US President is in charge of the Executive Branch of Government.
- It is the Executive Branch of Government's duty to implement the laws passed by Congress.
- Executive Orders are a tool that a President may use to direct the employees of the Executive Branch in fulfilling this responsibility.
- Any President may withdraw, cancel, or modify a prior executive order.
- ***Executive orders are subject to judicial challenge*** as being beyond the authority of the President, violative of Constitutional guarantees, like free speech, or contrary to clear legislative intent.

# A Disconcerting Set of Executive Orders

Among the Executive Orders the President issued were J20 & J21 Orders that directed all executive agencies to:

- “[I]nclude in every contract or grant award” a certification, ... that the contractor ... “does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.....”
- That federal agencies require all contractors to certify they do not promote DEIA initiatives.
- There is an ambiguity in this language as this prohibition may be limited to “unlawful” DEIA initiatives.

# These E.O.s Have Been Held Unconstitutional

***National Association of Diversity Officers in Higher Education, et al. v. Donald J. Trump, et al.***, Case No. 1:25-cv-00333-ABA (D. Maryland, Feb. 21, 2025)  
[Judge Abelson]

Preliminary Injunction Granted in Part on multiple grounds:

- First Amendment Violations:
  - The Certification Provision, requiring federal contractors to certify compliance with restrictions on DEI, was determined to be an unconstitutional condition on federal funding, as it is effectively chilling of speech.
- Fifth Amendment Due Process Violation:
  - Grant recipients had no clear notice of what conduct was prohibited, permitting arbitrary enforcement.

# ED OCR Implementation of the J20& 21 Executive Orders—Dear Colleague Letter <sup>(1)</sup>

On February 14, Craig Trainor, Acting Assistant Secretary for Civil Rights, United States Department of Education, issued a Dear Colleague Letter (DCL), intended to implement the J20 & 21 Executive Order.

- This letter makes no mention whatsoever of disability or the disability office or its functions!
- This letter purports to be based on the decision of the Supreme Court in ***Students for Fair Admissions Housing v. Harvard University***, No. 20-1199 (2023)
  - This letter correctly cites this decision for prohibiting the use of race as a factor in admissions.
    - If your school does this, stop.
  - In nearly every other respect, DCL misrepresents the decision.

# The OCR Dear Colleague Letter<sup>(2)</sup>

- In pertinent part the DCL says, “DEI programs, for example, ... stigmatize students who belong to particular racial groups based on crude racial stereotypes.”
  - If this is what your office does, stop.
  - But you are not a DEI office or even analogous to a DEI office!
    - DEI offices were originally founded to expand the recruitment base of employers, colleges and universities and to retain such persons.
- Your mission might include these functions, but its primary purpose is established by the “assurance of compliance” contract that your school has signed to comply with Section 504.
  - This responsibility is affirmative -- removal of barriers, accommodations and modifications, auxiliary aids and service -- it is not “self-executing.”
  - It requires an office, a staff, a director etc.

# Some Additional Law-Related Considerations

- Section 504/the ADA/reasonable accommodation are not about “redistributive justice,” in higher ed. They are about creating a self-sufficient population, removing barriers, and validly measuring merit – all “conservative” values.
- Disability is an “ordinary scrutiny” category under the US Constitution, ***City of Cleburne v. Cleburne Living Center, Inc.***, 473 U.S. 432 (1985), thus there is no good analogy to race, national origin or sex, reverse discrimination claims.
- The DCL mentions a 14 day deadline, but in reality it is two years. *See* 34 CFR Part 100.
- Historically, Republican Asst. Secs. elevate disability resources to cover for less interest in race and national origin.
  - There is some reason to believe that the next ED OCR AS will prove to be a relatively positive development with regard to disability.
  - Kimberly Ritchey is the next ED OCR nominee

# Judy Heumann Would Tell Us To Build Alliances

- Litigating and nonlitigating advocacy organizations
  - DRA
  - DREDF
  - DRC
  - NFB
  - NAD
  - Bazelon, etc.
- Veterans on your campus
- Republicans
- Parents groups
- Student groups

Don't Underestimate the Power of Diligent Organizing and Persuasion: Four of the Five Persons in this Picture of George Bush Signing the ADA are Republicans





Jo Anne Simon, Esq.  
New York State Assembly  
General Counsel, AHEAD

*AHEAD* Association on  
Higher Education  
And Disability®

L. Scott Lissner  
The Ohio State University  
Public Policy Chair, AHEAD

*AHEAD* Association on  
Higher Education  
And Disability®

# Think Global – Act Local

## What Can You Do On Campus

### Stay Informed

- AHEAD, DREDF, NAD, ....
- ADA.GOV,  
Section508.GOV, OFCCP,  
DOJ, DOE
- State Government
- Local Advocacy  
Organizations
- Campus Resources

### Reflect

- Mission
- Values
- Policies
- Practice

# Think Global – Act Local

## What Can You Do On Campus

### Share What You Learn

- Campus leaders
- Communicators
- Constituents
  - Student Distress & Voices Matter

### Stay the Course

- The core of your work is statutory
- Consider State Law
- Focus your messaging
- Use Federal Language

# What Can You Do On Campus?

## Lessons From the Feds

2/26/2025

[What We DO](#):“.... provide individuals with disabilities meaningful access to their programs or activities in the most integrated setting appropriate. And, to provide meaningful access, modifications to the program or activity may need to be made and auxiliary aids and services may need to be provided.”

“This [guide](#) provides an overview of Federal civil rights laws that ensure equal opportunity for people with disabilities. To find out more about how these laws may apply to you, contact the agencies and organizations listed below.”

# What Can You Do On Campus?

## Lessons From the Feds

2/26/2025

[“The General Services Administration](#) (GSA) has released its second annual report on federal compliance with Section 508 of the Rehabilitation Act, as amended. While the report indicates slight improvements in the maturity of IT accessibility programs, it also highlights that the federal government continues to fall short of its legal and statutory obligations to ensure equal access for individuals with disabilities, including federal employees and members of the public”.

[“This guide includes](#) suggested steps that ADA Coordinators and others working with state and local governments may want to take as they plan to ensure that their web content and mobile apps comply with the ADA Title II rule on the accessibility of web content and mobile apps”

# What Can You Do On Campus?

## Lessons From the Feds

2/26/2025

“Requirements under Section 503 of the Rehabilitation Act, 29 U.S.C. 793, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. 4212, both enforced by [OFCCP](#), are statutory and remain in effect.”

### **One Older Lesson:**

There are similarities in current events as they are unfolding to how our checks and balances worked 37 years ago when the [Civil Rights Restoration Act](#) was passed over a presidential veto “To overturn Supreme Court’s 1984 decision in [Grove City College v. Bell](#), and to restore the effectiveness and vitality of the four major civil rights statutes [Title IX of the Education Amendments of 1972, Sections 504 of the 1973 Rehabilitation Act, Title VI of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act of 1975] that prohibit discrimination in federally assisted programs.” The Civil Rights Restoration Act is a reminder that combating discrimination is everyone's responsibility.

- “...Congress understood in shaping the ADA, it would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation.” Ruth Bader Ginsburg, *Tennessee v. Lane*





Katy Washington  
Virginia Commonwealth University  
President, AHEAD

*AHEAD* Association on  
Higher Education  
And Disability®

# AHEAD is Actively Monitoring the Situation

- AHEAD will continue to advocate on our members' behalf.
- We have partners in DC (Active Policy Solutions) who do fantastic work.
- AHEAD will partner with other organizations to advocate when it is appropriate to amplify our voices.
- We will continue to keep our members up to date as things in DC change and progress (via The Hub, online Communities, webinars, summer Conference, emails, etc).
- AHEAD will put out an immediate call to action to our members if there is a time that becomes appropriate!