

Disability Law in Higher Education

**Essential Functions
Committee**

CAPCSD

April 11, 2007

Scope of Disabilities

- **Over 50 million people in U.S.**
- **1 of 11 college freshmen**
- **LD 26 percent higher, 1988 to 1998**
- **Disability law affects:**
 - **Seven million businesses**
 - **80,000 units of state and local government**
- U.S. Department of Justice. 2006 (12 October). *Access for All: Five Years of Progress* (a Report on Enforcement of the ADA). Retrieved January 18, 2007, from the ADA Home Page, <http://www.ada.gov/>
- Rothstein (2004)

Nondiscrimination Laws Higher Education

- **The Rehabilitation Act of 1973 Section 504**
 - Entities that receive federal funding
 - U.S. Dept. of Ed.'s Office of Civil Rights
- **Americans with Disabilities Act of 1990**
 - Private and public entities
 - Title I: EMPLOYMENT (U.S. EEOC)
 - Title II: STATE AND LOCAL GOV'T (U.S. DOJ)
 - Title III: PUBLIC ACCOMMODATIONS (U.S. DOJ)
- U.S. Department of Justice, *Guide to Disability Rights Law*. (2005). Retrieved January 21, 2007, from <http://www.usdoj.gov/crt/ada/cguide.htm>

Impermissible Types of Discrimination

- **Denial of participation**
- **Participation in unequal benefit**
- **Separate benefit**
- **Nonintegrated settings**
- **Administrative methods with effect of discrimination**

28 CFR §35.130

Definition of Disability (ADA)

- (A) “a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.”

42 USC §12102(2).

Prong # 1: *Physical or mental impairment*

- “Any **physiological disorder or condition**, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs...
- “Any **mental or psychological disorder** such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities...

Prong # 2: *Major life activities*

- **“...functions such as**
 - **caring for one's self,**
 - **performing manual tasks,**
 - **walking,**
 - **seeing,**
 - **hearing,**
 - **speaking,**
 - **breathing,**
 - **learning, and**
 - **working.”**

Prong # 3: *Substantially limits*

- “An impairment substantially limits a person's major life activity when the individual's important life activities are restricted **as to the conditions, manner, or duration** under which they can be performed ***in comparison to most people in the general population.***”

Price v NBME, 1997, p. 421

Disability (Section 504 & ADA)

- 1. Impairment**
- 2. Major life activity**
- 3. Substantial limitation**

Qualified Individual with a Disability

- **An individual with a disability “who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity”** 34 CFR §104.3(l)(1).
- **Therefore, a *qualified* individual**
 - **Has a disability as legally defined (all 3 prongs),**
 - **Meets academic and technical standards, and**
 - **Can fulfill essential functions with or without accommodations.**

Mitigation Matters

- **Two individuals with visual impairments**
- **Disqualified to be pilots by United Air Lines**
- **Under the ADA...**
 - **Eyeglasses helped their vision;**
 - **They were not substantially limited in a major life activity;**
 - **They were not legally disabled;**
 - **They were not protected by the Act.**

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)

Admissions and Recruitment

- **“Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment”:**
 - **No limit on number of disabled persons;**
 - **No special tests;**
 - **No pre-admission inquiry.**

See: 34 CFR Subpart E Postsecondary Education:

<http://www.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html#E>

Responsibilities of *Students*

- **Identify** him/herself as a person with a potential disability;
- **Engage** in an evaluation by a qualified professional;
- **Provide** documentation to the program and college;
- **Request** reasonable accommodations to assure full access to, and participation in, educational opportunities.

Responsibilities of *Educational Institutions*

- **Identify** a compliance officer;
- **Create** written policies to educate and guide faculty, administrators and students;
- **Create** a set of procedures to assure a timely and fair process for:
 - **Responding** to a student's request;
 - **Acquiring** medical and/or psychological testing from professionals with appropriate credentials; and
 - **Conferring** with program faculty members;
 - **Negotiating** comprehensive and individualized accommodations.

Responsibilities of *Educational Programs*

- **Establish** a meaningful curriculum and academic standards;
- **Establish** technical requirements, and distribute them to prospective students;
- **Articulate** essential functions of the profession(s), and distribute them to matriculated students;
- **Establish** written academic progress guidelines (and follow them);

...

...Educational Programs

- **Apply** standards and progress criteria to all students, without regard to disability status;
- **Counsel** students at appropriate intervals, particularly regarding academic and clinical challenges;
- **Tailor** and revise modifications/ accommodations based on reasonableness, and suitability for the individual; and,
- **Give** students ample notice of academic progress difficulties, and provide reasonable opportunities to remediate.

Select Court Opinions

**“Disability Court Opinion
Abstracts”
(CAPCSD Website)**

Impairment vs. Disability

- Plaintiff had LD and ADHD.
- She received accommodations in high school, on the MCAT, and in medical school, but not on the SAT or while at Duke University.
- Complained that NBME did not allow extended test time.
- Court held that “**merely having an impairment does not make one disabled...claimants need to demonstrate that the impairment limits a major life activity**” (e.g., learning).
Baer v. NBME (D. Mass. 2005)

Substantially Limited

- Court found that plaintiff was **substantially limited in the major life activity of reading** “when compared to the average reader by her slow reading rate and by the fatigue caused by her inability to read with automaticity...” in the alternative, the plaintiff [was] **substantially limited in the major life activity of working** [based on failure of the bar exam].”

Bartlett v. NYS Law Examiners (S.D.N.Y. 2001)

Academic Grounds for Dismissal

- **Plaintiff**
 - Suffered from anxiety, depression and bipolar disorder;
 - Displayed “persistent offensive and disruptive behavior.”
- He was disabled, but incapable of satisfying the academic and professional standards of the MD/PhD program.
- His dismissal was **due to his lack of academic ability, not his disability.**

El Kouni v. BU (D. Mass. 2001)

Mitigation of an Impairment

- Plaintiff was monocular in one eye and had poor depth perception.
- Impaired eyesight did not substantially limit his “seeing” or “learning”; mitigated impairments are not disabilities.
- His dismissal from dental school did not violate Section 504 or the ADA.
- The Acts do “not guarantee an individual the exact educational experience he may desire, just a fair one” (citing Knapp v. Northwestern Univ (7th Cir. 1996)).

Pacella v. Tufts (D. Mass. 1999)

Pre-Admission Inquiry

- Enrolled in “First Year Option” (for individuals with LD and academic deficiencies).
- Eligible for admission if GPA 2.0 for two semesters.
- Plaintiff contended he was denied matriculation due to his disability.
- UNE did not violate the “inquiry prohibition.”
- Plaintiff was denied admission **due to academic deficiencies, not his disability.**

Halasz v. UNE (D. Me. 1993)

Academic Standards

- A disabled medical student was dismissed after Tufts refused to give him an untimed oral examination in chemistry.
- The court ruled Tufts “**came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or require substantial program alterations.**”
- Tufts had met its obligations under disability law.

Wynne v. Tufts (1st Cir. 1992)

Clinical Standards

- **Plaintiff had received many accommodations, but failed three clinical courses.**
- **He could not “synthesize data obtained in a clinical setting to perform clinical reasoning.”**
- **“The University was not required to tailor a program in which the plaintiff could graduate with a medical degree without establishing the ability to care for patients”**

Falcone v. U Minnesota (8th Cir. 2004)

Duty of Educational Institution

- Plaintiff “did not communicate effectively ...causing [patients] to react with anger or anxiety”; he failed his clinical practicum and was dismissed on academic grounds.
- Educational institutions must “**seek suitable means of reasonably accommodating a handicapped person and to submit a factual record that it conscientiously carried out this statutory obligation.**”

Wong v. Regents Univ. Cal. (9th Cir. 2005)

Reasonableness

- **An exclusively full-time law program was not required to provide part-time study as a reasonable accommodation.**

McGregor v. Louisiana State U. Law Center (5th Cir. 1993)

- **An educational institution is not required to eliminate a course requirement to accommodate an individual with a disability.**

Doherty v. Southern College of Optometry (6th Cir. 1988)

Professional Conduct

- **Plaintiff was dismissed due to unprofessional conduct, even though the Honor Council had cleared her of wrongdoing.**
- **Honor Council findings are separate and independent of academic decisions.**
- **She was given notice and opportunity to be heard (due process).**
- **Plaintiff's "interest in remaining in graduate school is unquestionably high. However, [the university's] interest in controlling the integrity of its graduate programs is also high."**

Butler v. William and Mary (4th Cir. 2004)

Unsafe Behavior

- **Plaintiff did not reveal in his medical school application that he was dismissed from another medical school due to “unsafe” patient care.**
- **Court upheld his dismissal from U. Illinois at Chicago for lack of candor in his application.**
- **Defamation complaint lacked merit because the reason for his dismissal was not false.**

Fenje v. Feld (7th Cir. 2005)

Do's and Don'ts

- **DO** understand purpose of the law: To prevent unlawful discrimination by enabling the individual *to access and participate in educational opportunities* (not merely to provide auxiliary aids).

...Do's and Don'ts

- **DO** understand the goals of “reasonable accommodations”:
 - **Same rules of the road for all, i.e., nondiscrimination;**
 - **Access and opportunity to all who are qualified;**
 - **Level the playing field;**
 - **Award degree / credentials based on merit /achievement.**

... Do's and Don'ts

- **DO** ask these questions:
 - **Purposes:** What are the defining purposes, goals and attributes of the activity(ies)?
 - **Qualifications:** Are qualifications and desired outcomes the same for all individuals?
 - **Standards:** Are the policies, practices and procedures “essential attributes” of, and “indispensable to” the activity?

... Do's and Don'ts

- **DO** explore individualized accommodations in a deliberate and conscientious manner.
- **DO** respond to disability applications in good faith.
- **DO** make modifications and accommodations *unless* such changes fundamentally alter the program, or create an undue burden.

... Do's and Don'ts

- **DO NOT** lower standards that represent essential or fundamental pedagogical and professional requirements.

**Americans With Disabilities Act of 1990,
42 USC §12182(b)(2)(A)(iii).**

Rules of Thumb

- ***Equal access and opportunity:***
Modifications that provide all qualified individuals equal access to an activity, and an equal opportunity to compete on the basis of their abilities, do not fundamentally alter the activity, and are *reasonable.*

... Rules of Thumb

- ***Nonessential purposes and attributes:***
Modifications that are peripheral to the essential purposes of the activity, whether applied to some or all, do not fundamentally alter the activity and are ***reasonable.***

... *Rules of Thumb*

- ***Essential purposes and attributes:***
Modifications that change the purposes or essential attributes or standards of the activity fundamentally alter the activity and are *unreasonable*.

... *Rules of Thumb*

- ***Undue hardship:*** A specific accommodation that would cause significant difficulty or expense, and cause an undue burden, is ***unreasonable.***

... *Rules of Thumb*

- ***Unlevel playing field:*** Modifications that lower qualifications, standards, or outcomes for some individuals but not others—in effect, giving some individuals an unfair competitive advantage—represent fundamental alterations and are ***unreasonable.***

U.S. EEOC Reasonable Accommodation
and Undue Hardship, §915.002. October 17, 2002.

<http://www.eeoc.gov/policy/docs/accommodation.html#undue>

SUMMARY:

Obligations of CSD Programs

- Programs are **not** required to lower their standards, as long as the standards represent **essential and fundamental** requirements.
- Institutions are **required** to make modifications / accommodations on a case-by-case basis, **unless** these changes would **fundamentally alter** the program's purpose or attributes, or would create an **undue hardship**.

...SUMMARY

- **The overarching goal is to provide all qualified individuals access to, and opportunities to participate in, educational programs—with or without accommodations.**

Supplemental Documents

- On the CAPCSD website (April 2007), including References and Internet Resources:
 - *FAQs Disability Law*
 - *Disability Court Opinions Abstracts*
 - *EF Roundtable Cases and Checklist*

***On behalf of the
Essential Functions Committee
(I. Schwarz, Chair)***

Thank you.

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