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Medical Students with Disabilities: A Generation of Practice

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Medical Students with Disabilities: A Generation of Practice

A Report by
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Preface

The Rehabilitation Act of 1973 and its Section 504 prohibited discrimination against individuals with disabilities. In 1979, the AAMC published a report of its *Special Advisory Panel on Technical Standards for Medical School Admission* to assist medical school faculty in determining precisely what requirements were essential for earning an M.D. degree from their school. Also in 1979, the United States Supreme Court decided the seminal case of *Southeastern Community College v. Davis*, in which the issue of whether an institution was required to modify its admission standards for a student with a physical disability was first addressed.

In 1990, Congress passed the Americans with Disabilities Act that reinforced and extended the nondiscrimination concepts of Section 504. In 1993, the AAMC published *The Disabled Student in Medical School: An Overview of Legal Requirements*, which was designed to help medical schools understand and comply with the ADA. At that time, only a handful of court decisions had been handed down to provide guidance on Section 504 in a medical school setting and virtually no court cases applying the ADA to medical schools were available.

In the twelve years since the AAMC published *The Disabled Student in Medical School*, numerous court cases applying Section 504 and the ADA to medical and other health professional schools have been decided. In the discussion that follows, the authors rely on those cases, along with written opinions from the United States Department of Education Office for Civil Rights (OCR), to provide an overview to medical schools on the state of the law today. In some instances, pertinent holdings from ADA employment cases are used to illustrate aspects of the ADA when courts have not yet decided an issue in the educational context.

Disability law is dynamic, and the opinions of the various courts and agencies reflect the continued evolution of thinking in this area. Section 504 and the ADA require fact-intensive, case-by-case analysis. As a result, some of the early OCR opinions cited by the authors might be decided differently by the OCR or the courts today. Also, as with many areas of the law, there is not complete agreement among the courts on the interpretation of certain aspects of the ADA. While the guidance provided in this document is not a substitute for case specific legal advice, it should provide the reader with a general sense of how to work through the challenging application of Section 504 and the ADA in the context of a medical school setting.

The legal issues associated with students with disabilities do not end with the conclusion of the admission process. Medical schools need to adopt policies and procedures that apply throughout the various stages of their educational continuum from admission and basic science courses through clinical rotations and graduation. A collaborative, team-oriented approach to drafting and implementing policies and procedures will serve schools well.

I would like to thank our colleagues in the Office of University Counsel for the University of Colorado for their detailed research and thoughtful analysis in writing *Medical Students with Disabilities: A Generation of Practice.*

Jordan J. Cohen, M.D.
President

I. The Applicable Law[1]

A. Section 504 of the Rehabilitation Act of 1973

The Rehabilitation Act of 1973 is widely regarded as the first United States civil rights legislation protecting persons with disabilities. Section 504 of the Rehabilitation Act ("Section 504") contains a nondiscrimination provision which provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[2] It is from the enactment of Section 504 and its corresponding regulations that the right to educational accommodations first emerged in the post-secondary school arena.

Regulations adopted by the Department of Education to implement Section 504 require post-secondary educational institutions to provide academic adjustments or accommodations for qualified students with disabilities to ensure that an institution's educational requirements "do not discriminate or have the effect of discriminating" against a qualified student.[3] Under the regulations, an institution must provide "methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills [to] ensure that the results of the evaluation represents [sic] the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills,"[4] and provide auxiliary aids, such as "taped texts, interpreters . . . readers . . . and other similar services" for students with impaired sensory, manual, or speaking skills.[5] In addition, the regulations prohibit educational providers from imposing other rules on qualified students, such as prohibiting tape recorders in classrooms or guide dogs in buildings "that have the effect of limiting participation of handicapped students."[6]

Section 504 applies to all programs or activities that receive federal financial assistance.[7] Most medical schools, both public and private, receive some type of federal funding, and, therefore, are required to comply with Section 504 and its corresponding regulations.

B. Americans With Disabilities Act

The Americans with Disabilities Act ("ADA") was enacted in 1990 to "provide clear, strong, consistent, [and] enforceable standards [for] ending discrimination against individuals with disabilities" and to bring such individuals into the economic and social mainstream of American life.[8] The ADA was intended to supplement and expand the coverage of Section 504 of the Rehabilitation Act, not to replace it. The ADA has five major sections or titles, three of which apply to post-secondary educational institutions. Title I prohibits discrimination in employment, Title II prohibits discrimination in public services, and Title III requires public places to accommodate persons with disabilities.

1. Title I

Title I of the ADA requires employers with fifteen or more employees to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment-related opportunities available to others. A "qualified individual" with a disability is defined by the ADA as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[9] This definition of "qualified individual" has been the subject of numerous litigated cases and will be discussed further below. Title I specifically prohibits discrimination in recruitment, hiring, promotion, training, pay, and social activities. In addition, Title I restricts the questions that may be asked about an applicant's disability before a job offer is made, and requires employers to make reasonable accommodations for known physical or mental limitations of otherwise qualified individuals with disabilities. An employer need not make an accommodation if doing so would impose an undue hardship on the employer or present a "direct threat to the health or safety of" others.[10]

To the extent that medical students or residents are also employees, medical schools are required to comply with Title I requirements with respect to those students/employees.

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[1] In addition to the federal laws discussed in this Article, a number of state and local laws impact an institution's obligations with respect to students with disabilities. In many cases, these state and local laws may impose requirements greater than those set forth by the Rehabilitation Act and the ADA. These state and local laws are outside the scope of this document, but institutions are cautioned to remain cognizant that they may have compliance obligations with respect to students with disabilities that exceed the laws discussed in this document.

[2] 29 U.S.C. § 794 (a) (2002).
[3] 34 C.F.R. § 104.44 (a) (2004).
[4] 34 C.F.R. § 104.44 (c).
[5] 34 C.F.R. § 104.44(d)(2).
[6] 34 C.F.R. § 104.44(b).
[7] See 29 U.S.C. § 794(a)(2002).
[8] 42 U.S.C. § 12101 et seq.
[9] 42 U.S.C. § 12132.

[10] 42 U.S.C. § § 12111(8), 12112(b)(5), 12113(b); *see also infra* notes 144 - 151 (discussing the exception to the ADA and Section 504's requirement to accommodate individuals with disabilities if the individual poses a direct threat to the health or safety of others).

2. Title II

Title II extends the provisions of Section 504 to the activities of state and local governments, regardless of whether the government entity receives federal funding.[11] Educational institutions governed by state or local governments are among the entities which are required to comply with the requirements of Title II.[12] The language of Title II of the ADA closely parallels the nondiscrimination provisions of Section 504 of the Rehabilitation Act by providing that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[13]

Title II regulations do not contain express language concerning academic accommodations. However, Title II's regulations, drafted by the Department of Justice, require covered state and local governments to "make reasonable modifications in policies, practices, or procedures" when necessary to avoid discrimination[14] and provide "auxiliary aids and services" to enable participation of disabled individuals.[15] When viewed in light of Congress' intent to expand the provisions of Section 504 to governmental activities, Title II essentially requires medical schools to comply with Section 504 Regulations. Courts uphold this legislative intent by regularly applying case law and regulations from a Section 504 claim to a Title II ADA claim.[16]

Compliance with Title II requires a medical school to extend its programs to persons with disabilities, provided that the person meets the essential eligibility requirements after any necessary reasonable modification has been made to the program, rules, or physical surroundings. The services must be provided in the most integrated setting, and an entity must be careful that its eligibility criteria do not otherwise screen out persons with disabilities. An entity may impose safety standards which exclude persons with disabilities as long as the requirements are based on actual risks, and not on stereotypes or speculation.

3. Title III

Title III provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[17] Title III prohibits private entities that are places of public accommodation from discriminating against persons with disabilities. The term "public accommodation" expressly includes "elementary, secondary, undergraduate, or postgraduate private school[s] or other place[s] of public education."[18] Thus, medical schools, both public and private, are subject to the nondiscriminatory requirements of Title III. In addition, Title III applies to private organizations that provide educational and professional "examinations or courses related to application, licensing, certification, or credentialing."[19]

To comply with Title III, a place of public accommodation must make reasonable accommodations to its policies, practices, and procedures unless doing so would "fundamentally alter the nature of the service being provided."[20] In addition, auxiliary aids and services must be provided unless doing so would fundamentally alter the nature of the services or result in an undue burden.[21] A place of public accommodation must remove architectural, communication, and structural barriers in existing facilities where removal is "readily achievable,"[22] and provide services through alternate methods if removal is not "readily achievable."[23] Title III requires that services and programs be provided in an integrated setting, unless separate or different measures are necessary to ensure an equal opportunity. Furthermore, Title III requires an entity to eliminate eligibility requirements or rules which screen out or tend to screen out those individuals with disabilities.[24]

[11] See 42 U.S.C. § 12131.
[12] *See id.*
[13] 42 U.S.C. § 12132.
[14] 28 C.F.R. § 35.108(7).
[15] See 28 C.F.R. § 35.160(b)(1).

[16] See e.g., *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045- 46 & n.11 (9th Cir. 1999) (applying case law and regulations from Section 504 to a claim alleging failure to provide accommodations under Title II of the ADA and Section 504).

[17] 42 U.S.C. § 12182(a).
[18] 42 U.S.C. § 12182(j).
[19] 42 U.S.C. §12189.

[20] See 42 U.S.C. §12182(2)(A)(ii). In the case of an educational institution, the "service" is the academic and or clinical program.

[21] See 42 U.S.C. §12182(2)(A)(iii); *see infra* notes 168-237 and accompanying text (discussing reasonable accommodations).

[22] See 42 U.S.C. §12182(2)(A)(iv).
[23] See 42 U.S.C. §12182(2)(A)(v).
[24] See 42 U.S.C. §12182(2)(A)(i).

The nondiscrimination provisions of Title III do not explicitly address academic accommodations, but its principal prohibition against discrimination closely parallels the requirements of Section 504 and Title II. Courts tend to analyze Title III claims in the same manner as Section 504 claims.[25] Despite variances in statutory language, the obligation to provide academic accommodations and the scope of such accommodations are viewed synonymously under Section 504 of the Rehabilitation Act and Titles II and III of the ADA.[26] Title II and III regulations state that neither should "be construed to apply a lesser standard than the standards applied under" the Rehabilitation Act.[27] The similarity between the two laws has resulted in the courts analyzing Section 504 and ADA issues similarly.[28]

The U.S. Department of Education Office of Civil Rights ("OCR") is responsible for enforcing Section 504 and its implementing regulations.[29] The OCR is also responsible for enforcing Title II and its implementing regulations.[30] The OCR's opinions, while not binding on the courts, provide a strong indication of how the courts would treat the issue.

Practice Tip: *Most medical schools already have in place institutional policies and procedures addressing compliance with Section 504 and the ADA. These policies should be reviewed on a regular basis to ensure compliance with federal statutes and regulations, and that advances in adaptive and assistive technology are appropriately reflected. A bad policy or a policy that is inconsistently (or never) followed may be worse than no policy at all. Medical schools should review their policies, make sure that their policies are realistic and "livable," and then consistently adhere to those policies as situations arise.*

II. Disability Defined

Under the ADA and Section 504, the threshold issue in determining whether a student is protected is whether the student has a "disability" as that term is defined by the statutes. Both the ADA and Section 504 define disability as "(1) a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) a record of such impairment; or (3) being regarded as having such a condition."[31] ADA regulations further define the three key phrases: "physical or mental impairment," "major life activities," and "substantially limiting."[32] A student's condition must meet each of these factors in order for the student to be considered disabled for purposes of the ADA or Section 504. In other words, even though a student has a condition that meets the definition of a physical or mental impairment, unless that condition also substantially limits a major life activity, the student is not disabled for the purposes of the ADA or Section 504.

In *Price v. National Board of Medical Examiners*,[33] the court addressed the issue of whether medical students with learning impairments met the ADA's definition of disabled. The court held that an impairment substantially limits a major life activity of an individual when a "person's important life activities are restricted as to conditions, manner, or duration under which they can be performed in comparison to most people in [the] general population."[34] As discussed further below,[35] the court found that the medical student plaintiffs were able to learn as well or better than the average person in the general population and therefore did not meet the ADA's definition of disabled.[36]

A. Physical or Mental Impairment

Physical or mental impairments include "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more . . . body systems," or "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[37] Impairments typically do not include environmental, cultural, or economic characteristics, such as lack of education, poverty, or an individual's criminal record.[38] In addition, pregnancy is not considered an impairment under the ADA,[39] but complications resulting from pregnancy may constitute an impairment.[40]

[25] See e.g., *Guckenberger v. Boston University*, 974 F. Supp. 106 (D. Mass.1997).

[26] See id. at 133.

[27] 28 C.F.R. § 36.103(a).

[28] See, e.g., *Betts v. Rector of the Univ. of Va.*, 191 F. 3d 447, 447 (4th Cir. 1999); *Pacella v. Tufts Univ. Sch. of Dental Med.*, 66 F. Supp. 2d 234, 237-38 (D. Mass. 1999).

[29] Section 504 regulations are codified in 34 C.F.R., Part 104.

[30] ADA Title II regulations are codified in 28 C.F.R., Part 35.

[31] 42 U.S.C. § 12102(2).

[32] See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471(1999); 29 C.F.R. § 1630.2(h), (i), (j). The Department of Justice regulations also address the interpretation of the definition of disability in 28 C.F.R. § 36.104(3)(iii).

[33] 966 F. Supp 419 (S.D. W. Va. 1997)

[34] *Id.* at 422.

[35] See *infra* notes 103 - 107 and accompanying text (discussing the Price case and what constitutes "substantially limiting").

[36] Id.

[37] 29 C.F.R. § 1630.2(h)(1)-(2).

[38] *See Appx.* to 29 C.F.R. § 1630.2(h).

[39] See *Walker v. Fred Nesbit Distrib.*, 331 F. Supp. 2d 780 (S.D. Iowa 2004); *Gover v. Speedway Super America*, 254 F. Supp. 2d 695 (S.D. Ohio 2002).

[40] *Cerrato v. Durham*, 941 F. Supp. 388 (S.D. N.Y. 1996).

Courts recognize that in making the determination of whether an impairment constitutes a disability which substantially limits a major life activity, the determination must be made on a case-by-case basis and not be based on abstract lists or categories of impairments, "as there are varying degrees of impairments as well as varied individuals who suffer from the impairments."[41] The regulations note that a finding of disability "is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals, but not for others, depending upon the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors."[42] Whether a substantial limitation of a major life activity exists depends upon an analysis of: 1) the nature and severity of the impairment, 2) the duration of the impairment, and 3) the permanent or long-term impact of the impairment.[43]

Practice Tip: *Those involved in the decision of whether an impairment constitutes a disability should be careful not to rely on general assumptions or categories of what they consider disabling. Each student's case must be evaluated on an individual basis.*

Practice Tip: *The development of policies and procedures concerning disability issues should involve all necessary parties. This should include not only the institutional ADA or compliance officer or the admissions officer, but also faculty members, school administrators, and legal counsel. Unilateral policy decision making should be avoided in favor of an interactive team-oriented approach.*

1. Physical Impairments

Physical impairments range from mobility impairments (such as the need for a wheelchair and other assistive aids) to impairments of the senses (such as hearing and sight). Applicants and students with physical impairments may present more unique challenges to health training programs than to other types of professional schools. Medical school curricula are, by their very nature, visual, as students learn anatomy and diagnostic techniques. Curricula are also very physical in nature, as students are taught hands-on medical procedures and are, during the course of their training, providing direct patient care under faculty supervision.

Courts have recognized the uniqueness of health professions training programs with respect to the physical demands these programs place on students. For example, in *Southeastern Community College v. Davis*,[44] the U.S. Supreme Court held that a hearing impaired applicant to a nursing program was not "otherwise qualified" because the applicant could not meet the physical qualifications of the program.[45] The applicant in Davis could not understand speech without lip-reading, and the Court noted that nurses needed to be able to understand what was being said, even if the speaker is wearing a mask, and that nurses also needed to be able to hear even when not looking directly at the speaker, such as when retrieving instruments in surgery.[46]

The case, *Ohio Civil Rights Commission v. Case Western Reserve University*,[47] also addressed whether an applicant with physical impairments was disabled for purposes of the ADA and Section 504. The case involved a visually impaired medical school applicant who had graduated, with honors, from undergraduate school having received assistance from lab assistants/readers, oral examinations with extended time, and a variety of visual aids.[48] The court noted that the Association of American Medical College's 1979 *Report of the Special Advisory Panel on Technical Standards for Medical School Admission* recommends that medical school candidates have the ability to observe.[49] Responding to the applicant's contention that another medical school had admitted, and graduated, a totally blind student, the court noted the substantial modifications that were made to coursework by faculty members and that additional time was spent by fellow students to assist this student.[50] The court held that the school was not required to accommodate the medical school applicant because the requested modifications "would (1) require fundamental alterations to the academic requirements essential to the program of instruction, and (2) impose an undue burden on [the school's] faculty. Finally, once [the school] confirmed [the applicant's] complete inability to observe, [the school] could deny [the applicant] based upon a bona fide standard for admission to the medical school."[51]

[41] See *Homeyer v. Stanley Tukhin Associates, Inc.*, 91 F. 3d 959,962 (7th Cir. 1996); *Deas v. River West, L.p.*, 152 F. 3d 471, 478 (5th Cir. 1998); *Forrisi v. Bowen*, 794 F. 2d 931, 933 (4th Cir. 1986); Byrne. Bd. or Education, 979 F. 2d 560, 565 (7th Cir. 1992); *Roth V. Lutheran General Hospital*, 57 F. 3d 1446, 1454 (7th Cir. 1995).

[42] 29 C.F.R. App. Sec. 1630.2(j).
[43] *See* 29 C.F.R. § 1630.2(j).

[44] *See* 442 U.S. 397 (1979). *See also infra* notes 136, 143-45, 168-70, 186-87 and accompanying text.

[45] *See id.* at 406. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Id.*

[46] *See id.* at 403.
[47] 666 N.E.2d 1376 (Ohio 1996).
[48] *See id.* at 1379.

[49] *See id.* "Specifically, the AAMC Technical Standards Report states, '[t]he candidate must be able to observe demonstrations and experiments in the basic sciences . . . . A candidate must be able to observe a patient accurately at a distance and close at hand. Observation necessitates the functional use of the sense of vision and somatic sensation.'" *Id.* (quoting AAMC Technical Standards, 1979).

[50] *See id.* at 1382.

2. Mental Impairments

Regulations promulgated by the Equal Employment Opportunity Commission ("EEOC")[52] define mental impairment as "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[53] For purposes of the ADA and Section 504, mental illnesses include bipolar disorder; major depression; anxiety disorders such as panic disorder, obsessive-compulsive disorder, and post-traumatic stress disorder; schizophrenia; and personality disorders.[54] Personality traits such as irritability, poor judgment, or irresponsible behavior do not constitute mental impairments under the ADA.[55]

a. Depressive/ Emotional Disorders

Medical school classes certainly include students with varying degrees of clinical depression, bipolar disorder, or other mental illnesses. Mental health professionals often rely on the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, Fourth Edition (DSM-IV), to aid in their diagnoses of mental impairments in individuals. While the primary objective of the DSM-IV is to provide a uniform system for identifying and diagnosing mental conditions, the DSM-IV's determination of what does and what does not constitute a disability, while recognized as persuasive authority by the courts, is not conclusive in determining whether an individual with a mental impairment qualifies for ADA protection. The DSM-IV contains a number of diagnoses that may be recognized as mental impairments, but that may not qualify as a mental disability entitled to protection under the Rehabilitation Act and/or the ADA.[56]

The court addressed whether a medical school discriminated against a student with a mental disability in the case *Amir v. St. Louis University*.[57] In that case, a medical student, following his dismissal on academic grounds, claimed that the University had discriminated against him and engaged in retaliatory acts in violation of the ADA.[58] Upon initial matriculation, the student had exhibited bizarre behavior that perplexed the school's faculty and administration. In addition, the student experienced academic difficulties as early as his first round of examinations.[59] The student and school agreed that he should take a leave of absence and then re-matriculate as a first-year medical student the following year.[60] The student continued to struggle academically after his return to school, and, by his psychiatry rotation in his third year, he had developed an obsessive-compulsive disorder which manifested itself in an overwhelming fear that his food, drink, and medicine were contaminated by poison.[61] The student notified his supervisor at the psychiatry clinic about his disorder, hoping for a more favorable review of his performance in the rotation.[62] The supervisor told other clinic physicians about the student's condition, and one of the physicians convinced the student to voluntarily admit himself for inpatient treatment.[63] When the student was discharged from the hospital, he sought re-admission to the psychiatry rotation; his request was denied on the basis of his prolonged absence.[64] The student filed a grievance against the clinic physician, and the University permitted the student to return to the rotation.[65] After the grievance was filed, but before the student returned to the rotation, the University's psychiatry department instituted a new grading policy that resulted in the student's receiving a failing grade for the rotation.[66] The failing grade prompted the University to recommend the student's dismissal, "based on a long-standing history of inappropriate behavior, misrepresentations, and difficulties in dealing with staff, and faculty . . . [and noting that the student] received failing grades in OB/GYN and Psychiatry and ranked near the bottom of his class in overall performance in Surgery."[67] After the dismissal was formalized, the student appealed, but was denied re-admission.[68]

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[51] *Id.* at 1388.

[52] The EEOC is the federal agency responsible for enforcing the ADA and the Rehabilitation Act in the employment sector. The case law and regulations from the employment sector are often applied when the same or similar issues arise in the academic setting.

[53] 29 C.F.R. §1630.2(h)(2).

[54] SECTION 504 COMPLIANCE HANDBOOK, LAWS, REGULATIONS & ORDERS, App. III, 621 (1997).

[55] See *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989).

[56] *See infra* notes 101 - 109 and accompanying text (an impairment must substantially limit a person's major life activity to be considered a disability for purposes of the statutory anti-discrimination provisions).

[57] 184 F. 3d 1017 (8th Cir. 1999).
[58] *See id.* at 1024.
[59] *See id.* at 1022.
[60] *See id.*
[61] *See id.* at 1023.
[62] *See id.*
[63] *See id.*
[64] *See id.*
[65] *See id.*
[66] *See id.* at 1023-24.
[67] *Id.* at 1024.
[68] *See id.*

The court held that none of the student's requests (completing his psychiatry rotation at another institution, receipt of a passing grade in psychiatry, or reassignment to a different supervisor) constituted a reasonable accommodation under the ADA.[69] In so holding, the court noted that to the extent that the University was acting under its own academic policy, the court would not second-guess the University's policy in the absence of evidence that the policy was a pretext for discrimination.[70] The lesson from *Amir* is that medical schools can follow their own academic policies and, to the extent that those policies are not a pretext for discrimination, courts are willing to respect the school's province concerning academic matters.[71] The problematic fact for the University in *Amir* was that the department had implemented a policy that directly affected the student after the student filed a grievance against the department.

Practice Tip: *Schools should be conscious of the timing of policy revisions and implementation and be wary of implementing policies that single out or address a specific student after a student has raised a disability-related issue.*

Although not limited to students with mental disabilities, one capability that is sometimes compromised in individuals with mental disorders is the "ability to get along with others." Many of the problematic behaviors identified by medical schools in their students fall into this category. Whether the "ability to interact or get along with others" is a major life activity (the impairment of which might be disability) is an open question. Based on the current case law, the answer appears to be "no," given the number of courts that have examined the issue and declined to find that the inability to interact with others constitutes a substantial impairment of a major life activity.[72] Only the Ninth Circuit has decided that the "ability to interact with others" "falls easily within the definition of 'major life activity'" by comparing it to "other essential regular functions, like waking and breathing."[73] Even then, the court held that for a plaintiff to demonstrate a substantial impairment of the ability to interact with others, he or she "must show that his [or her] 'relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.'"[74] Even if a student's inability to interact with others rises to the level of a substantial impairment of a major life activity, the school may be able to assert that the student's behavior constitutes a direct threat to self or others – and is therefore unable to be accommodated.[75] This may be particularly true in more extreme cases of hostility and aggression where there is a legitimate concern for the safety of other students, faculty, staff, and patients.

Practice Tip: *Including "the ability to work as an effective member of the health care team" as an essential requirement of a medical school's educational program in its Technical Standards for Admission and Graduation may aid an institution in dismissing students who consistently demonstrate the inability to get along with others without discriminating against these individuals on the basis of their disability.*

b. Learning Disabilities

The term "specific learning disability" is categorized by both the ADA and Section 504 as a covered mental or psychological impairment;[76] however, neither statute defines the term "learning disability." Several courts have borrowed the Individuals with Disabilities Education Act's ("IDEA") definition of "specific learning disability" to determine whether a student has a learning disability for purposes of the ADA or Section 504.[77] (IDEA requires states to provide children with disabilities from age birth through age twenty-one with free education and is not applicable to post-secondary institutions.) IDEA defines specific learning disabilities as "disorder[s] in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations." Specific learning disabilities include perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.[78] Learning problems that result primarily from "visual, hearing, or motor disabilities, . . .

[69] *See id.* at 1028.

[70] *See id.* at 1029. The court affirmed the University's actions with respect to denying the student's requests to complete the rotation at another institution and to be assigned to another supervisor. The court remanded the case for purposes of fact finding with respect to the departmental policy that was implemented before the student was re-admitted to the University, because the timing of the policy change raised the possibility that the policy was changed in retaliation for the student's grievance. *See id.*

[71] *See infra* notes 224-229 and accompanying text (discussing the court's willingness to grant institutions academic deference in their decision making).

[72] See *Davis v. Univ. of N. Carolina*, 263 F.3d 95,101 n.4 (4th Cir. 2001)(expressing "some doubt" as to whether 'ability to get along with others' is a major life activity); Amir v. St. Louis University, supra note 57 at 1027 (noting that "it is questionable" whether 'ability to get along with others' is a major life activity).

[73] *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999). See also Steele v. Thiokol Corp., 241 F. 3d 1248, 1255 (10th Cir. 2001) (applying McAlindin analysis and assuming, without deciding, that "ability to get along with others" is a major life activity).

[74] *Id.* at 1235 (quoting EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (March 25, 1997) at 5).

[75] *See infra* notes—144–151 and accompanying text.

[76] *See* 29 C.F.R. § 1630.2(h)(2) (2004).

[77] See *Argen v. New York State Bar Examiners*, 860 F. Supp. 84 (W.D.N.Y. 1994); Dubois v. Alderson-Broaddus College, 950 F. Supp 754, 758 (N.D. W. Va 1997).

[78] Individuals with Disabilities Education Act Amendments of 1997 § 602(26), 20 U.S.C. § 1401(26)(A) & (B) (Supp. IV 1998).

mental retardation, . . . emotional disturbance, or . . . environmental, cultural, or economic disadvantage are expressly excluded from this definition."[79]

The primary inquiry with learning-impaired students is often not whether the student is impaired, but whether the impairment is severe enough to substantially limit learning or some other major life activity. In *Wong v. Regents of the University of California*,[80] the court addressed the issue of whether a medical student's learning impairment was severe enough for the student to qualify as disabled under the ADA and Section 504. The student in Wong completed his first two years of medical school and passed the National Board of Medical Examiners' examination without requesting or receiving any accommodations.[81] The student began experiencing difficulties during his first clinical rotation and shortly thereafter was diagnosed with a learning impairment. As an accommodation for his learning impairment, the student requested extra time to study and prepare prior to the commencement of his clerkships.[82] After the student was denied extra time to prepare for his clerkship, he received a failing grade and was dismissed from the medical school.[83] The court held the student's impairment did not substantially limit his ability to learn.[84] The court stated, "[t]he relevant question for determining whether [a student] is disabled under the Acts is not whether. . . his learning impairment makes it impossible to keep up with the rigorous medical school curriculum. It is whether his impairment substantially limits his ability to learn as a whole."[85]

2. Substance Abuse/Addiction

Neither the ADA nor Section 504's definition of "individual with a disability" includes individuals who are currently engaged in the illegal use of drugs. Illegal use of drugs is defined as the use of one or more drugs, the possession or distribution of which is unlawful.[86] Illegal use of drugs does not include the use of a drug taken under the supervision of a licensed health care professional. However, the illegal use of prescribed substances is considered to be an illegal use of drugs.

Neither the ADA nor Section 504 defines what constitutes "current" illegal use of drugs, but courts have interpreted the term to encompass a period of time much broader than the exact moment a drug user faces adverse action. In general, drug use is considered current if it occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.[87]

The ADA and Section 504 distinguish between the use of an illegal substance and the status of being addicted to that substance. Addiction may be considered a disability and addicts may qualify for protection under the ADA and Section 504, as long as they are in recovery and not current users of illegal substances. In *Federov v. Board of Regents for the University of Georgia*,[88] the court addressed whether a student engaged in the illegal use of drugs was disabled. The student was dismissed from the University's dental program after the University's judicial court found the student guilty of possessing and using several controlled substances.[89] The student claimed his drug use was an impairment under the ADA and Section 504 of the Rehabilitation Act.[90] The court found the student's drug use did not substantially limit a major life activity. In fact, the student had performed quite well in dental school and was able to perform a variety of functions.[91] The court further found the student was a current drug user at the time of his dismissal and was therefore not a qualified individual to state a Rehabilitation Act claim. Although the student had enrolled in a drug rehabilitation program, he had done so only after school officials confronted him and he was faced with possible dismissal from the program.[92] Therefore, the student's drug use was considered current at the time of his dismissal.

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[79] Id. § 1401(26)(C).
[80] 379 F. 3d 1097 (9th Cir. 2004).
[81] Id. at 1100.
[82] Id.
[83] Id.
[84] Id. at 1108.

[85] Id. at 1108-09. See also infra notes 101 - 109 and accompanying text (discussing whether an impairment is substantially limiting). A Massachusetts District Court recently addressed the issue of whether a medical student's learning impairment constituted a disability in the case *Baer v. National Board of Medical Examiners*, 2005 WL 1027289(D. Mass.). In this case a medical student with a learning disability sought additional time on the United States Medical Licensing Exam. The court reinforced the principle that in order for a learning impairment to be considered a disability, the student must demonstrate that the impairment substantially limits learning generally. Id. at *5. In this case, the student acknowledged that her impairment was not substantially limiting when she was not under time pressure; however her impairment did limit her in the activity of taking timed examinations. The court held that this type of limitation is not enough to merit protection under the ADA. Id. at *4.

[86] *See* Controlled Substance Act, 21 USCA § 812.

[87] 28 C.F.R. § 35.104, 36.104.
[88] 194 F. Supp. 2d 1378 (S.D. Ga. 2002).
[89] *See id.* at 1383.

[90] The court found the individual defendant named in the lawsuit enjoyed Eleventh Amendment Immunity from claims under the ADA; therefore, the court only addressed the plaintiff's Section 504 claim. *See id.* at 1386.

[91] *See id.* at 1388.
[92] *See id.* at 1389.

Practice Tip: *Although the current illegal use of drugs is not considered a disability, current addiction to alcohol may be considered a disability. Certainly an institution may prohibit the use of alcohol on its property and require that students not be under the influence of alcohol while present at the institution. Thus, even if a student addicted to alcohol were considered to be disabled, a medical school could properly dismiss the student for violating legitimate school policies prohibiting the use of alcohol.*

B. Major Life Activity

In addition to a having a physical or mental impairment, the impairment must affect a major life activity in order for the student to be considered disabled. Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[93] The Supreme Court has held that this list of activities is "illustrative, not exhaustive."[94] Reproduction and sleeping are examples of activities that have been added to the list of major life activities.[95] Conversely, courts have held that other activities, such as attending medical school[96] and concentration,[97] are not major life activities.

In *Betts v. Rector and Visitors of the University of Virginia*,[98] the court addressed whether a student with a learning disability was disabled under the ADA and Section 504. The student was denied admission to the University's medical school because he failed to meet the GPA requirements required for admission. The student claimed the University discriminated against him in violation of the ADA and Section 504 on the basis of his learning disability. The court held that although learning is a major life activity, attending medical school is not.[99] The court concluded that the "inability to pursue one career, such as [medicine] does not constitute a severe impact on an individual's life."[100] Thus, whether the student's disability limits his ability to attend medical school is irrelevant; the student must show that his learning disability substantially limits his ability to learn.

C. Substantially Limits

Section 504 and the ADA's definition of disability requires the student's major life activity to be substantially limited. The regulations define "substantially limiting" as:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

With respect to the major life activity of working, the term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[101]

In the employment context, a court determines whether an impairment is substantially limiting by determining whether the impairment constitutes a significant barrier to employment.[102] The court examines whether an impairment is substantially limiting on a case-by-case basis and generally interprets the term quite narrowly. The court will not find an impairment substantially limiting simply because the individual is disqualified in his/her chosen field; rather, the individual's overall employability must be substantially limited. The majority of cases concerning whether an impairment is substantially limiting arise in the employment setting, which has led the courts to analyze educational cases in a similar manner.

In *Price v. National Board of Medical Examiners*,[103] the court relied on guidance from employment cases and applied the average person in the general population analysis to conclude that three medical students who were denied additional time and separate rooms for administration of the United States Medical Licensing Examination were not disabled for purposes of the ADA. The students were all diagnosed with Attention Deficit Hyperactivity Disorder, and two of the students were also diagnosed with specific learning disabilities. The court did not deny that the students were impaired; however, the court held that because the students were able to learn as well or better than the average person, the students were not substantially limited in the major life activity of learning.[104] In reaching its conclusion, the court utilized the following example involving two hypothetical students:

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[93] 28 C.F.R § 1630.2(i).
[94] *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998).

[95] *Id. See* also *Pack v. Kmart Corp.*, 166 F.3d 1300, 1306 (10th Cir. 1999) holding that sleeping is a major life activity.

[96] See *Betts v. Rector of the Univ. of Va.*, 113 F. Supp. 2d 970 (4th Cir. 2000).

[97] *See, e.g.*, Pack, 166 F.3d at 1305.
[98] 113 F. Supp. 2d (4th Cir. 2000).
[99] *Id.*. at 976.
[100] *Id.*
[101] 29 C.F.R. § 1630.2(j)(1)(i)-(ii).

[102] *U.S. v. Southern Management Company*, 955 F. 2d 914, 918 (4th Cir. 1992).

[103] 966 F.Supp. 419 (S.D.W.Va.,1997).
[104] *Id.* at 427.

> Student A has average intellectual capability and an impairment (dyslexia) that limits his ability to learn so that he can only learn as well as ten percent of the population. His ability to learn is substantially impaired because it is limited in comparison to most people. Therefore, Student A has a disability for purposes of the ADA. By contrast, Student B has superior intellectual capability, but her impairment (dyslexia) limits her ability so that she can learn as well as the average person. Her dyslexia qualifies as an impairment. However, Student B's impairment does not substantially limit the major life function of learning, because it does not restrict her ability to learn as compared with most people. Therefore, Student B is not a person with a disability for purposes of the ADA.[105]

The court in Price found the students to be similar to Student B in the above illustration. One student graduated from high school with a 3.4 grade point average, and from college with a 2.9 grade point average without having received any accommodations. The student did receive accommodations on the Medical College Admission Test (MCAT) and was subsequently admitted to medical school. The second student was a national honor student in high school, graduated from Virginia Military Institute with average grades, and maintained a 3.4 grade point average in courses required for admission to medical school. The student had not previously received any accommodations. The third student participated in a program for gifted students from elementary school through high school, graduated from high school with a 4.2 grade point average, was admitted into the United States Naval Academy, graduated from Vanderbilt University, and was admitted to medical school, all without accommodations.[106] The court ultimately concluded that although each student did have some learning difficulty, their overall history of significant scholastic achievement and the complete lack of evidence suggesting that they could not learn as well as the average person resulted in their not being entitled to accommodations under the ADA.[107]

A similar conclusion was reached in *Gonzales v. National Board of Medical Examiners.*[108] In that case, Gonzales, a second year medical student, sought extra time on the United States Medical Licensing Examination because of a learning disability. A series of cognitive tests, focusing on verbal ability, verbal expression, verbal comprehension, phonological processing, visual auditory learning, inductive reading, reading comprehension, and memory, indicated Gonzales' scores were below average when compared with those of fourth-year college students; however, when compared to the general public, his scores were in the average to superior range.[109] The court held that the term "substantially limits" is to be interpreted as significantly restricting a major life activity in relation to the average person within the population.[110]

Practice Tip: *Merely having an impairment does not result in a student being disabled for purposes of the ADA or Section 504. Students with learning impairments must be substantially limited in their learning when compared with the general population. A learning impaired student is not considered disabled solely because he or she is substantially limited in the attempt to earn the medical doctor degree.*

D. Mitigating Measures

Prior to 1999, courts followed the Equal Employment Opportunity Commission's (EEOC) guidelines under which the existence of an impairment was considered without regard to mitigating measures such as medicines or prosthetic devices. Thus, an individual with epilepsy was considered to have an impairment even if the symptoms were completely controlled by medicine. However, court opinions regarding the issue of mitigating measures have changed. Courts currently determine whether an individual's impairment substantially limits a major life activity by considering the mitigating measures he or she employs.[111] An impairment which can be controlled or mitigated is no longer considered an impairment for purposes of the ADA or Section 504. The change in the treatment of mitigating measures came about in the landmark case of *Sutton v. United Air Lines.*[112] The Sutton case involved twin sisters with severe myopia who contended that the airline's refusal to hire them as commercial pilots violated the ADA. The twins' vision without corrective measures was 20/200. However, with corrective lenses, their vision was 20/20. The airlines required uncorrected vision of at least 20/100. The Supreme Court found that myopia qualified as an impairment under the ADA, and that the impairment affected the major life activity of seeing. However, the Court determined that the twins were not substantially limited by their myopia, because corrective lenses mitigated the effects of the impairment. Consequently, the twins were not disabled for purposes of the ADA.

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[105] *Id.* at 427.
[106] *Id.* at 422-23.
[107] *Id.* at 427.
[108] 225 F. 3d 620 (6th Cir. 2000).
[109] *Id.* at 628.
[110] *Id.* at 631-32.

[111] See *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999); Sutton v. United Airlines, Inc., 119 S. Ct. 2139 (1999); Albertsons, Inc. v. Kirkinburg, 119 S. Ct. 2162 (1999).

[112] 527 U.S. 471 (1999).

The Court in Sutton interpreted the term "substantially limits" as meaning currently limiting, rather than potentially or hypothetically limiting.[113] As a result of the Court's decision, impairments that can be controlled or corrected may not amount to a substantial limitation of a major life activity. This is especially significant in cases where impairments can be well controlled with medication, such as certain cases of epilepsy. Moreover, in the educational context, many students compensate for their learning deficits by working harder or by improving their study habits. The effect of self-mitigating measures like these may eliminate or reduce the effects of the impairment to the point that it no longer substantially limits the major life activity. In these cases, the student is not considered disabled under the ADA.

In *McGuinness v. University of New Mexico School of Medicine*,[114] the Tenth Circuit considered a medical student's claim that he was disabled because he had an anxiety disorder that substantially limited his "academic functioning." His disorder manifested itself when he took chemistry and mathematics tests. The court first determined that although the anxiety disorder qualified as an impairment under the ADA, its manifestation in only two academic subjects did not amount to a limitation of a major life activity. The court stated that even if performance in chemistry and math constituted a major life activity, this student's limitation would not be substantial. The court found that the student had developed study habits that allowed him to overcome his difficulties, thus mitigating the effects of his anxiety disorder. In holding that the student was not disabled, the court stated: "Just as eyeglasses correct impaired vision, so that it does not constitute a disability under the ADA, an adjusted study regimen can mitigate the effects of test anxiety."[115]

E. A Record of Impairment

An individual may also be protected under the ADA and Section 504 if the individual has a record of impairment that substantially limits a major life activity. Pursuant to this provision, an individual with a record of an impairment is protected under the ADA when he or she has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.[116] This provision was intended to ensure that people are not discriminated against because of a history of disability or because they have been misclassified as disabled.[117] The fact that an individual has a record of being a disabled veteran, is on disability retirement, or is classified as disabled for other purposes, does not guarantee that the individual is disabled for purposes of the ADA.[118] The most significant Section 504 case relating to the "record of impairment" definition is *School Board of Nassau County v. Arline*,[119] in which the Supreme Court held that a teacher's repeated hospitalization for tuberculosis was sufficient to establish a record of impairment.[120] In the *Arline* case, an elementary school teacher's employment was terminated after she suffered a third relapse of tuberculosis within two years.[121] The Court held that the teacher's previous hospitalizations for tuberculosis were sufficient to establish that she had a record of impairment within the meaning of Section 504.[122] The court further recognized that although some persons who have contagious diseases may pose a serious health threat to others, this does not automatically exclude all persons with the disease from the protections afforded by Section 504. The record of impairment analysis has also been used in finding former psychiatric patients,[123] patients with cardiovascular disease,[124] individuals suffering from shoulder dislocations,[125] and individuals with hepatitis B[126] to be disabled under the ADA.

F. Regarded As Having An Impairment

If an individual has neither a physical nor a mental impairment that substantially limits a major life activity nor a record of such impairment, he or she may still be "regarded as" having such an impairment.[127] The Supreme Court has articulated the rationale behind this provision as follows: "[A]n impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[128] According to EEOC guidelines, one is regarded as having a substantially limiting condition if an individual has: (1) a physical or mental impairment that does not substantially limit major life activities, but is treated by one's employer as constituting

[113] *Id.* at 491.
[114] 170 F. 3d 974 (10th Cir. 1998), *cert. denied*, 526 U.S. 1051 (1999).
[115] *Id.* at 979.
[116] *Id.*
[117] 29 C.F.R. § 16.302(k).
[118] 56 Fed. Reg 35,742 (July 26, 1991).
[119] 480 U.S. 273 (1987).
[120] *See id.* at 281.
[121] *Id.* at 276.
[122] *Id.* at 285.

[123] See *Allen v. Heckler*, 780 F. 2d 64,66 (D.C. Cir. 1985) (holding that "[a]lthough plaintiffs are no longer institutionalized, the [Rehabilitation] Act recognizes that discrimination also occurs against those who at one time had a disabling condition. The handicap that these people face is the continuing stigma of being a former psychiatric patient; this disability does not disappear on discharge from the hospital.").

[124] See *Bey v. Bolger*, 540 F. Supp. 910 (E.D. Pa. 1982).
[125] See *Mahoney v. Ortiz*, 645 F. Supp. 22 (S.D.N.Y. 1986).
[126] *Kohl by Kohl v. Woodhaven Learning Center*, 672 F. Supp. 1221 (W.D. Mo. 1987).

[127] 29 C.F.R. § 1630.2(l).

[128] *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 283 (1987). The Court gave examples of individuals who may be regarded as having a disability, including a child with cerebral palsy and a woman crippled by arthritis. According to the Court, both these individuals would possess physical characteristics that an employer may perceive as limiting the individual's ability even though both persons may be qualified to perform a particular job.

such a limitation; (2) a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) no physical or mental impairment as defined in the Act [ADA], but is treated by one's employer as having a substantially limiting impairment.[129]

The key factual determination to be made under this section of the ADA's definition of disability, is whether the applicant or student is treated as disabled. The ADA makes it illegal to discriminate against individuals based on negative attitudes or perceptions. However, the mere fact that society as a whole perceives a condition as disabling is not, by itself, sufficient to support a finding of the individual as disabled; there must also be proof that the particular employer perceives the individual as disabled. Applying the EEOC guidelines to the educational arena, if an institution treats a student as having a substantially limiting impairment, the student may qualify as disabled for purposes of the ADA and Section 504. This protection is particularly important for students with stigmatizing conditions that may be viewed as impairments, but do not in fact result in a substantial limitation of a major life activity. [130]

Practice Tip: *An institution should not rely on past accommodations the student may have received to determine whether the student is currently disabled. By blindly following the accommodation practices the student received at a prior institution, the medical school may have "regarded" the student as disabled based on a "record of impairment," in which case the student is entitled to ADA protection, regardless of the student's current capabilities.*

III. Admissions

Admission practices and procedures must comply with federal regulations promulgated under Section 504 and the ADA. These regulations prohibit an institution from denying admission to or discriminating against a qualified person on the basis of disability in admission or recruitment.[131] In addition, in administering its admission policies, an institution "may not apply limitations upon the number or proportion of [disabled] persons who may be admitted. . . may not make use of any test or criterion for admission that has a disproportionate adverse effect on [disabled] persons . . . and may not make preadmission inquiry as to whether an applicant for admission is a [disabled] person."[132]

In reviewing the requirements of Section 504, one court described the following legal parameters an institution must abide by with respect to its admission process:

> [a]n institution is not required to disregard the disabilities of a handicapped applicant, provided the handicap is relevant to reasonable qualifications for acceptance, or to make substantial modifications in its reasonable standards or program to accommodate handicapped individuals but may take an applicant's handicap into consideration, along with all other relevant factors, in determining whether she is qualified for admission. The institution need not dispense with reasonable precautions or requirements which it would normally impose for safe participation by students, doctors and patients in its activities. Section 504 simply insures the institution's even-handed treatment of a handicapped applicant who meets reasonable standards so that he or she will not be discriminated against solely because of the handicap. But if the handicap could reasonably be viewed as posing a substantial risk that the applicant would be unable to meet its reasonable standards, the institution is not obligated by the Act to alter, dilute or bend them to admit the handicapped applicant.[133]

A. Otherwise Qualified

1. Essential Function or Requirement of the Program

To be qualified for a particular program, the student must be capable of fulfilling the essential functions or requirements of the academic program, with or without reasonable accommodations. The essential requirements of a medical program include the academic as well as technical requirements.[134] In *Lane v. Pena*,[135] the Federal District Court in Washington, D.C. addressed the issue of whether a student with a disability met a program's essential requirements. In that case, the United States Merchant Marine Academy expelled a student who developed insulin-dependent diabetes. The Academy claimed that the student could no longer satisfy the naval reserve service obligation due to the diabetes and, therefore, was not qualified for the program. The court disagreed with the Academy's assessment and found the Academy served two

[129] 29 C.F.R. § 1630.2(l).
[130] *See, e.g.*, *Bragdon v. Abbot*, 524 U.S. 624 (1998) (finding an individual with asymptomatic HIV to be disabled for purposes of the ADA).

[131] C.F.R. § 104.42(a)
[132] *Id.* 104.42(b)(1-3); *see infra* notes 152 - 160 and accompanying text (discussing pre-admission inquiries).

[133] *Doe v. New York University*, 666 F. 2d 761, 775 (1981). See also Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

[134] 34 C.F.R. 104.3(l)(3)(2004).
[135] 867 F. Supp. 1050 (D.D.C. 1994).

purposes, a military purpose and a training purpose. The court held that the naval reserve requirements were not essential to the training purpose. Therefore, the student could not be dismissed on grounds that his diabetes precluded him from being accepted for a naval reserve commission after graduation, and his inability to obtain that commission did not preclude the student from being qualified to complete the merchant marine academy program.

Practice Tip: *In order for a student to be denied admission because the student's disability renders the student not otherwise qualified, the functions the student is unable to fulfill must be essential to the training program. Applied to the context of medical education, the case discussed in the text above suggests that, even if it is unlikely that an applicant would be able to sustain a full-time clinical practice upon completion of his or her training, that fact alone is not a basis to deny admission.*

2. Modification of Standards

An educational institution is not required to modify its admission standards for applicants with disabilities. An applicant with a disability may lawfully be denied admission to the program if the applicant is unable to meet the program's admission requirements.[136] The United States Supreme Court first addressed the issue of whether an institution was required to modify its admission standards due to a student with a physical disability in *Davis v. Southeastern Community College.*[137] *Davis* involved an applicant with a severe hearing impairment who applied to the school's nursing program. The school denied her admission based on evidence that her hearing impairment could compromise patient safety. The Supreme Court, in upholding the decision to deny the applicant admission, stated: "[i]t is undisputed that [the applicant] could not participate in [the school's] nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[138]

The prohibition against requiring a school to modify its academic standards due to a student's disability was recently upheld by the Eighth Circuit in the case *Falcone v. University of Minnesota.*[139] That case involved a student who entered medical school with a learning disability and who received accommodations in the form of extra test time, flexible deadlines, and tutoring.[140] Despite these accommodations, the student failed several first-year courses. The student consulted with the school's disability services specialist and received additional accommodations, including double time for examinations, a private room for tests, a microscope and slides for home use, student notes, and regular meetings with his faculty mentor.[141] With these accommodations, and the allowance to retake failed examinations, the student was able to complete the required two years of classroom courses and begin clinical rotations. The student failed his first clinical rotation, but was allowed to retake it. The student successfully completed his first rotation on his second attempt, but subsequently failed his second rotation. After a hearing before a University scholastic committee, the student was dismissed from the University. The University based its decision to dismiss the student on his failure to demonstrate that he had, with or without reasonable accommodation, the ability to "synthesize data obtained in a clinical setting to perform clinical reasoning which is an essential element of functioning as a medical student and ultimately as a physician."[142] Subsequent to his dismissal, the student sued the University under the Rehabilitation Act, alleging that the University failed to provide reasonable accommodations for his disability and that the University dismissed him based solely on his disability. The court found that the University's decision to dismiss the student was not based on student's disability, but on the student's performance. The court did not believe the University was required to alter its program in such a manner that would allow the student to graduate with a medical degree without demonstrating the ability to care for patients. The court ultimately held that the student was not "otherwise qualified" for the program and that the student failed to establish how additional accommodations would render him otherwise qualified.[143]

Practice Tip: *A medical school is not required to waive the essential requirements of its program or its technical standards to accommodate students with disabilities. Therefore, a school's faculty should develop technical standards for the educational program with great care and consideration. Technical standards should include those skills and abilities that are essential to the completion of the educational program. Skills and abilities required for admission should be tied directly to those required for graduation. Any skill or ability required for admission should be tied directly to what is taught and assessed in the curriculum or it should be removed from the technical standards.*

[136]Medical school admission standards include test scores and the ability to meet the program's technical requirements.

[137]442 U.S. 397(1979).
[138]*Id.* at 398.
[139]388 F.3d 656 (8th Cir. 2004).
[140]*Id.* at 657.
[141]*Id.* at 657-58.
[142]*Id.* at 659.
[143]*Id.* at 660-61.

3. Direct Threat to Health or Safety

Both the ADA and Section 504 provide that an individual with a disability is not qualified for a postsecondary educational program if his or her participation would pose a direct threat to the health or safety of other individuals.[144] The issue of safety was one of the reasons the court found the student in *Davis v. Southeastern Community College* not qualified to participate in the school's nursing program.[145] Whether a student poses a threat to the health and safety of others must be analyzed on a case-by-case basis.[146] A student will not be considered to be an "otherwise qualified" individual with a disability where program restrictions that apply generally to a particular type of physical or mental impairment are legitimately and directly related to reasonable health and safety concerns.[147] In assessing the evidence of such a risk to others, institutions must be mindful to not unintentionally discriminate against students with disabilities. A hypothetical or presumed health or safety risk is not a sufficient basis to deny a student admission. The risk must be of a serious nature and it must pose severe and likely harms to the community that are directly associated with the operation of the relevant program.

In the case *Doe v. New York University*,[148] the court considered the issue of whether safety concerns justified the denial of a mentally ill student's request for readmission to medical school. The student was diagnosed with borderline personality disorder and had a history of psychotic episodes in which she physically harmed herself and others. The court held that the applicable question in determining whether the student was otherwise qualified to be readmitted to medical school was "the substantiality of the risk that her mental disturbances will recur, resulting in behavior harmful to herself and others."[149] Finding the risk to be substantial, the court held the school did not discriminate against the student in denying her readmission.

While a student may be denied admission or dismissed from a medical program based on concerns about health and safety, the parameters of this exception are quite narrow. The school must be able to show that the disabled individual poses a direct health or safety threat. A "direct threat" means a "significant risk" that "cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services."[150] Decisions concerning safety threats may not be made on the basis of generalizations or stereotypical beliefs about a particular disability, but must be made on a fact-specific inquiry concerning the effects of the disability at issue on the particular student or applicant. The standard for establishing that the student poses a health or safety risk is quite high and must be based on "reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk."[151]

Practice Tip: *More than a mere risk of injury is required before an institution may disqualify an applicant or student with a disability from participation in a program. Any denial of admission or decision to dismiss based on the risk of future injury to the individual or others must be examined with special attention to the requirements of the ADA and Section 504.*

B. Pre-Admission Inquiries

The regulations are clear that pre-admission inquiries as to whether a student may be disabled are prohibited. However, an inquiry into an applicant's disability is permissible if the institution is (1) taking remedial action to correct effects of past discrimination or (2) taking voluntary action to overcome effects of conditions that resulted in limited participation in the past.[152] When making an inquiry for one of these allowed purposes, the institution must make clear, either orally or on the application form, its reasons for doing so, that providing the information will not subject the applicant to any adverse treatment, and that the information will only be used for the allowed purpose.[153] Pre-admission inquiries are not permitted even if answering the inquiry is voluntary and does not affect admission. The Office of Civil Rights (OCR) found one college's application form, which asked applicants to check a box if the applicant had any disability or handicap and then requested the applicant to enter the appropriate code from a list of disabilities, violated the regulations even though the form stated that responses were voluntary and did not affect admission to the school.[154]

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[144] 28 C.F.R. § 36.208 (2004); 28 C.F.R. Part 35, App. A. (2004).

[145] *Southeastern Community College v. Davis*, 442 U.S. 397, 404 (1979).

[146] *Mendez v. Gearan*, 956 F. Supp. 1520 (N.D. Cal. 1997).

[147] *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), judgment aff'd, 865 F.2d 592 (3rd Cir. 1989).

[148] 666 F. 2d 761 (2d Cir. 1981).
[149] *Id.* at 777.

[150] 28 C.F.R. §36.208(b) (2004) (interpreting the definition of "direct threat" within the context of Title III of the ADA); see also *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 (1987) (interpreting the definition of "direct threat" within the context of Section 504).

[151] Bonnie P. Tucker, Application of the Americans With Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students, 23 J.C. & U.L 1, 35 (1996).

[152] 34 C.F.R. §§ 104.42(c), 104.6(a), (b)(2004).
[153] 34 C.F.R. § 104.42(c).

[154] Glendale Community College, 5 Nat'l Disab. L. Rep. (LRP Publications) ¶ 36 (Dec. 16, 1993).

The prohibition on disability-related pre-admission inquiries extends to inquiries concerning an applicant's known behavioral problems. In one case, an applicant to a university who identified himself as having been diagnosed with paranoid schizophrenia and who had behaved in a disruptive manner during his contacts with university personnel, was sent a letter asking for a release of information from psychiatrists and several letters of reference.[155] The letter was sent in connection with the university's "Policy on Pre-Admission Review for Applicants with Known Behavioral Problems," which was designed to protect the members of the university community by limiting the risk of disruptive or harmful activities. The university implemented the policy when known facts indicated an applicant's behavior could endanger the health, safety, or property of university community members and adversely affect the university's educational mission.

The OCR held that the university's policy violated Section 504 because the university failed to distinguish between applicants with a handicapping health condition that may pose a substantial risk of harm and applicants who merely have a history of certain handicapping health conditions. The OCR found that the university conducted pre-admission inquiries based upon undocumented indications of the existence of a condition. The university's policy, which did not require actual evidence that the applicant had engaged in harmful or disruptive behavior, was found by the OCR to violate Section 504 regulations.[156]

In a case involving North Dakota State University, the OCR held that applicants to a counseling program could be asked about past mental health treatment.[157] The counseling program's bulletin stated that as a part of the application process it reserved the right to obtain information about the student's professional competence from qualified professionals. During the course of an admission interview, the University learned that an applicant had received substantial personal counseling, which included treatment by three psychiatrists and several counselors and involved non-traditional therapies. The University requested permission from the applicant to speak to her mental health professionals in order to evaluate whether she could handle the emotional, personal, and psychological issues that were part of the counseling program. The applicant refused, and the school stated that without this information it could not complete its processing of her application. The OCR held that the University's request did not violate the prohibition on pre-admission inquiries. While the admission interview form for the counseling program included an inquiry as to the applicant's receipt of personal counseling, it made no direct inquiry regarding a "handicap." The OCR found the purpose of the inquiry was to determine whether the applicant was an appropriate candidate for the program, had the motivation and emotional stability to be a human service worker, and had adequately resolved any personal/therapeutic issues before attempting to counsel others with similar issues.[158]

Contrary to the OCR's decision in the North Dakota State University case, several court decisions have held that questions asked of medical school applicants regarding prior treatment for any mental, emotional, or nervous disorders violate the ADA. For example, in Medical Society of *New Jersey v. Jacobs*,[159] the court found that a question regarding past mental health problems on the medical license application violated the ADA because it forced applicants with mental disabilities to subject themselves to further inquiry and scrutiny not required of other applicants, and the board could not show that the question was necessary to the performance of its licensing function.[160]

Practice Tip: *Both the OCR and case law clearly state that an institution should never ask an applicant about a past "handicap" or "disability". Broad questions about past mental health history are unlikely to be allowed outside a counseling or similar educational program. Unless a medical school is able to demonstrate that pre-admission inquiries regarding an individual's disability are necessary for the determination of whether the applicant is an appropriate candidate for the program, pre-admission inquiries regarding an individual's disability should be avoided. However, an institution may ask an applicant whether he or she is able to meet the program's technical standards with or without reasonable accommodations.*

[155]Pennsylvania State Univ., 2 Nat'l Disab. L. Rep. (LRP Publications) ¶35 (May 3, 1991) at 172.

[156]*Id.*

[157]North Dakota State Univ., 2 Nat'l Disab. L. Rep. (LRP Publications) ¶174 (Sept. 6, 1991).

[158]*Id.* at 653.

[159]1993 WL 413016 (D.N.J 1993).

[160]See also *Ellen S. v. Florida Bd. of Bar Examiners*, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994) (mental health questions "discriminate against Plaintiffs by subjecting them to additional burdens based on their disability"); In re Applications of Underwood and Plano, 1993 WL 649283 at *2 (Me. Dec. 7, 1993)(requirement that applicants answer mental health questions discriminates on the basis of disability and imposes eligibility criteria that unnecessarily screen out individuals with disabilities); *Clark v. Virginia Bd. of Bar Examiners*, 880 F. Supp. 430 (E.D. Va. 1995). But see *Applicants v. Texas State Bd. of Bar Examiners*, 1994 WL 776693 (W.D. Tex. Oct. 10, 1994) (upholding inquiry into applicants' mental history where questions were addressed only to specific behavioral disorders found relevant to the practice of law, and the question used by the board before 1992 had been "revised. . . to comply with the ADA."); *McReady v. Illinois Bd. of Admissions to the Bar*, 1995 WL 29609 at *6 (N.D. Ill. Jan. 24, 1995) (holding the ADA was not violated where applicant was not asked about possible mental health problems but references were. "This inquiry is distinguishable from questions asked on the bar application itself because it is noncoercive and imposes no additional burden on the applicant. Further, such an inquiry directed at the Plaintiff's references necessarily focuses on his behavior, not his status." *Id.*

C. Admission Tests

Section 504 Regulations and Title III of the ADA prohibit a college or University from using "any test or criterion for admission that has a disproportionate, adverse effect" on applicants with disabilities, unless the test or criterion has been validated as a predictor of success in the program and alternative tests or criteria that have a less disproportionate adverse effect are not available.[161] In addition, admission tests must be selected and administered so as to ensure that when a test is administered to an applicant with impaired sensory, manual, or speaking skills, the test does not reflect those impaired skills, but actually measures the applicant's aptitude or achievement level.[162] In many situations, this will require that reasonable accommodations be provided for test-takers with disabilities.[163]

Special problems arise when outside entities that administer admission tests (such as the Medical College Admission Test, "MCAT") indicate that tests taken with accommodations were taken under non-standard conditions. When the test is "flagged," the school receiving the test results is put on notice that the applicant likely has a disability, which may then result in discriminatory treatment. The OCR has ruled that a school's practice of evaluating an applicant's medical school admission test score in a different manner because the test was taken under non-standard conditions violates Section 504.[164]

Practice Tip: *A school may consider a test score indicating the test was taken under non-standard conditions as long as the test score is not the only factor used for admission and the applicant is not denied admission because he or she took the test under non-standard conditions. The mere fact that a school has notice that an applicant's test score was achieved under non-standard conditions does not violate Section 504.*[165] *However, Section 504 would be violated if an institution were to ask the student why he or she took the test under non-standard conditions, or what accommodations were provided. It is equally discriminatory to evaluate scores from tests taken under non-standard conditions more favorably than scores from tests taken under standard conditions. The Association of American Medical Colleges recommends that less weight be given to MCAT scores earned under non-standard conditions and more weight be given to other application data.*

D. Readmission

The statutory and regulatory prohibition against discrimination in admission also applies to students seeking readmission after they have been dismissed for academic or behavioral difficulties. When considering a student's application for readmission, the school must take into consideration measures the student has taken to address his or her disability. If a student is denied readmission based on the student's academic record and there is no indication that the student was denied readmission due to his or her disability, the school may lawfully deny the student readmission. This was the case in *Rosenthal v. Webster University*,[166] in which the court found the student's suspension from the University was not based on the student's disability, but upon his disorderly and threatening actions, and that the student was denied readmission because of further inappropriate conduct which disqualified him from readmission.[167]

Practice Tip: *A student's disability is irrelevant in determining whether a student should be readmitted to a program. An institution may deny readmission to a former student with a disability if the student was dismissed based on the student's performance, behavior, or academic record. However, the institution should be careful to not base its decision not to readmit a former student with a disability on stereotypes or nonfactual information.*

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[161] 34 C.F.R. 104.42(b)(2)(2004).

[162] 34 C.F.R. 104.42 (b)(3)(2004); 42 U.S.C. §12189. Title II regulations do not address this issue, but the same principles apply.

[163] *See infra* notes 167 - 184 and accompanying text (discussing reasonable accommodations in the admissions process).

[164] Suny Health Science Center at Brooklyn-College of Medicine, 5 Nat'l Disab. L. Rep. (LPR Publications) 77 (Aug. 18 1993).

[165] *Id.*

[166] 230 F. 3d 1363 (8th Cir. 2000).

[167] *See* also Texas Chiropractic College, 2 Nat'l Disab. L. Rep. (LRP Publications) ¶252 (Oct. 18, 1991) (concluding a student with a visual impairment was not discriminated against where request for readmission was denied based upon the student's academic record); *Robinson v. Hamline Univ.*, 1994 WL 175019 (Minn. App. 1994) (holding law student with learning disability was not discriminated against where readmission was denied due to poor academic record); Cleveland State Univ. (OH), 3 Nat'l Disab. L. Rep. (LRP Publications) ¶198 (Sept. 29, 1992) (same); Golden Gate Univ. (CA), 2 Nat'l Disab. L. Rep. (LRP Publications) ¶253 (Oct. 8, 1991) (same). But see DePaul Univ. 4 Nat'l Disab. L. Rep. (LRP Publications) 157 (May 18, 1993) (OCR ruling that a school must consider the actions a student has taken to address his or her disability when considering the student's application for readmission).

IV. Reasonable Accommodations

Postsecondary educational institutions are required to provide reasonable accommodations for qualified individuals with known disabilities. Neither ADA nor Section 504 regulations require an institution to make an accommodation if it is unreasonable, if it would constitute an undue burden or hardship to provide it, or if it would require a fundamental alteration to the institution's program.[168] Determining whether a student's requested accommodation is reasonable or constitutes an undue burden can be difficult to determine. While the courts and regulations interpreting the ADA have provided some guidance, neither the courts nor the ADA has defined the precise meaning of what is reasonable. It is clear that any decision about whether a proposed modification is reasonable involves analyzing the particular facts of the case, the degree to which a modification accommodates an individual's disability, and the cost to the institution in implementing the accommodation.[169]

When analyzing whether a student's request for an accommodation is reasonable, there are a number of questions that an institution should answer before making a final determination including:

1) What reason has the student given for requesting an accommodation?

2) How difficult is it to provide the requested accommodation?

3) Are there valid reasons to deny the requested accommodation?

4) Are there alternatives that would effectively address the student's request?

Answers to these questions will aid in striking a balance between the legitimate interests of the institution and the legitimate interests of the student, which is the stated goal of reasonable accommodations.[170]

Courts have defined "reasonable accommodation" more by what it is not than by what it is. It is clear that educational institutions are not required to make fundamental or substantial modifications. The leading case in the education context addressing what constitutes a "fundamental alteration" is *Southeastern Community College v. Davis*.[171] In *Davis*, the Supreme Court held that a nursing school did not discriminate against an applicant with a hearing impairment by refusing to admit the applicant to its program. The Court held that the applicant was not otherwise qualified for the nursing program because, if the applicant were to participate in the clinical phase of the program, the applicant would have to be provided with an individual nursing instructor in order to ensure patient safety.[172] The Court concluded that if the applicant were unable to participate in clinical courses without close supervision, the nursing school could only allow her to take academic courses, a situation that would not equate with the degree of training a nursing school normally provides. The Court held that such a fundamental alteration in the nature of a program is far more than the "modification" required by Section 504.[173]

Courts have held several categories of requested accommodations as not required under the ADA or Section 504. Schools are not required to waive or eliminate an element, goal, or purpose of a program in order to accommodate students with disabilities. Schools need not create new or different programs or services for students with disabilities or offer different or lesser benefits or services to students with disabilities. In addition, schools are not required to make reasonable accommodations where doing so would create a direct health or safety risk to the student or to others.

The student requesting the accommodation is responsible for providing the institution with documentation supporting the student's need for the accommodation. The institution is not legally obligated to provide an academic adjustment until it has received documentation supporting the adjustment. Once the institution receives proper documentation, the obligation to accommodate is prospective, not retroactive.[174] The documentation must be sufficient to establish that (1) the student is disabled as defined by the ADA and Section 504 regulations, and (2) the requested accommodation is appropriate for the student's condition. The documentation must provide enough information for institutional administrators to understand the nature of the disability and determine what accommodations, if any, are necessary. Moreover, the student is responsible for any costs or fees associated with obtaining the necessary documentation to support his/her claim.

[168] *See* 28 C.F.R. § § 36.302(a), 36.303(a)(2004)(interpreting Title III of the ADA); 28 C.F.R. § 35.130(b)(7), 35.164 (2004) (interpreting Title II of the ADA).

[169] *See e.g.*, *Staron v. McDonald's Corp*, 51 F. 3d 353, 356 (2nd Cir. 1995); Crowder v. Kittagawa, 81 F. 3d 1480, 1486 (9th Cir. 1996); Tuck v. HCA Health Services of Tennessee, 7 F. 3d 465, 471 (6th Cir. 1993); Nathanson v. Medical College of Pennsylvania, 926 F. 2d 1368, 1385 (3rd Cir. 1991).

[170] *See e.g.*, *Wynne v. Tufts University*, 976 F. 2d (1st Cir. 1992).

[171] 442 U.S. 397 (1979).
[172] *Id.* at 409.
[173] *Id.* at 410.

[174] *See* Dartmouth College, 11 Nat'l Disab. L. Rep. (LRP Publications) 277 (May 1997); see infra notes 230 - 237 and accompanying text (discussing the institution's obligation of accommodating a student's disability of which the institution is unaware).

Practice Tip: *Academic administrators, faculty, and staff should be provided training, on an ongoing basis, regarding students' rights and each party's responsibilities with respect to disability accommodation. It is important that the institution's employees understand their role in assisting the institution in meeting its compliance obligations. In addition, students should be informed of their rights and responsibilities and the institution's procedures regarding disability accommodations.*

The OCR has held that an institution does not discriminate against a student by requesting supporting documentation. When a student requesting accommodations due to his dyslexia claimed that he was being discriminated against when the institution requested written documentation of his disability,[175] the OCR disagreed and found that the institution was not obligated under Section 504 or the ADA to accommodate the student if the student refused to provide proper medical documentation.[176]

Institutions are not obligated to honor accommodation requests when the diagnostic data provided by the student do not establish that the accommodation is necessary. For example, in one case investigated by the OCR,[177] a student with a learning disability requested that essay questions be substituted for multiple-choice questions on examinations. A review of the student's medical documentation revealed that the doctor who performed a neurological evaluation did not determine that the student required essay-type examinations as an educational accommodation. Nor did the student's vocational rehabilitation counselor determine that a substitution was required. In addition, the college did provide a number of other adjustments and aids, including an alternate test location, extended time on examinations, information broken down into sequential form, and use of a tape recorder for lectures. According to the OCR, the college violated neither Section 504 nor Title II of the ADA and was not obligated to provide the student with tests in essay format.[178] In addition to requiring the student to provide sufficient documentation supporting the need for an accommodation, the institution may require the student's documentation to be reasonably current.[179] In a case involving Northwestern College, a student requesting accommodations submitted a psychological report that was more than four years old in support of his need for the accommodation.[180] The OCR ruled that it was not unreasonable for the college to request the student to obtain a current psychological evaluation in order to determine the student's need for accommodations.[181]

Practice Tip: *It is possible that a medical student requesting accommodations received accommodations at the student's undergraduate institution. The medical school's accommodations officer should be careful to review the disability currently being asserted by the student before approving the accommodation to be provided. Care should be taken not to "blindly follow" the accommodations that may have been provided at an earlier stage of the student's career – as those accommodations may no longer be necessary or appropriate. Factors to be considered are the currency of testing and the student's current capabilities – what once might have been a reasonable accommodation may no longer be reasonable. (For example, consider the situation of a student with a learning disability that was diagnosed when she was 17 years old and was accommodated at her undergraduate school based on the original test results, who then enters medical school at age 22. The student may need another diagnostic assessment at that point to provide the medical school's accommodations officer with current information about the student's disability and any necessary accommodations.)*

A. Accommodations in Admission Requirements

As discussed in Section III above, an institution is not required to lower admission requirements to accommodate individuals with disabilities. The court addressed the issue of accommodations in admission requirements in *Betts v. Rectors and Visitors of the University of Virginia.*[182] The case involved an applicant who was placed on the medical school's admission wait list. As an alternative to

[175] Community College of Vermont, 4 Nat'l Disab. L. Rep. (LRP Publications) 406 (Sep. 17, 1993).

[176] *Id. See* also University of Alaska Anchorage, 5 Nat'l Disab. L. Rep. (LRP Publications) ¶39 (Dec. 28, 1993) (school was not required to give student extended time for course examinations until he provided documentation supporting the request); Lewis & Clark College (OR), 5 Nat'l Disab. L. Rep. (LRP Publications) ¶248 (Feb. 16, 1994) (school was not required to give student extended time and reschedule exams so there would be more time between them where she failed to provide documentation supporting requests); University of Kansas, 2 Nat'l Disab. L. Rep. (LRP Publications) ¶185 (Oct. 31, 1991) (school did not discriminate against a student with autism, narcolepsy, and other conditions when it requested a copy of student's certification for a support dog; the dog was in student union building and the school had valid concerns about violating its food service license if uncertified dogs were allowed in the building); University of Kansas, 1 Nat'l Disab. L. Rep. (LRP Publications) ¶ 287 (Dec. 21, 1990) (no violation of § 504 where school refused academic adjustments to medical student who failed to provide school with documentation of his disability).

[177] State University of New York, 4 Nat'l Disab. L. Rep. (LRP Publications) 432 (Sep. 20, 1993).

[178] *Id. See* also Northwestern College (OH), 6 Nat'l Disab. L. Rep. (LRP Publications) ¶261 (Jan. 5, 1995); (student's psychological examination did not support need for oral testing); Cumberland Community College (NJ), 6 Nat'l Disab. L. Rep. (LRP Publications) ¶418 (Dec. 30, 1994) (student's psychological examination showed limitations in memory and other cognitive problems, but did not show need for weekly testing); Georgia College, 3 Nat'l Disab. L. Rep. (LRP Publications) ¶304 (Dec. 9, 1992) (school did not violate § 504 where it provided student with some academic adjustments but refused others until student provided further evaluations to document the extent and nature of her learning disabilities and academic adjustments needed).

[179] *See* Northwestern College, 6 Nat'l Disab. L. Rep. 261 (LRP Publications) (Jan. 5, 1995)

[180] *Id.*

[181] *Id.*

[182] 198 F. Supp. 2d 787 (W.D. Va. 2002)

remaining on the wait list, the University offered the applicant a place in its minority admission program, which was designed to prepare minority and disadvantaged persons for future admission to the medical school. The University guaranteed admission to the medical school to program participants who, among other requirements, maintained a 2.75 grade point average (GPA) per semester, received no grade lower than a "C", and performed satisfactorily in accordance with a faculty committee's standards. The student failed to achieve the minimum GPA required by the program and was subsequently diagnosed with a learning disorder. After being diagnosed, the student was provided extra time on the remainder of his examinations. Although the student's examination scores improved with the extra time, his cumulative GPA still did not meet the minimum required and he was not admitted to the University's medical school. The court held that the applicant's failure to obtain the University's objective GPA requirement was a legitimate, non-disability based reason for the University's decision to dismiss the applicant from the pre-admission program,[183] and that the University was not required to lower its admission standards and admit the applicant.[184]

B. Accommodations in Degree Requirements

An institution is not required to waive course requirements that are an integral component of the academic program. In a case involving a student's request that her work experience be substituted for two required courses in the school's pharmacy program in order to accommodate her disability, the OCR held the college was not required to waive its required program courses. The student's request was denied by the school on the basis that the courses were "an integral component of the program in that they presented. . . critical technical information regarding drugs that was essential not only to the program but the practice of pharmacy as well."[185] Similarly, in *Guckenberger v. Boston University*,[186] the court held that the University was not required to waive the foreign language requirements of its liberal arts curriculum for students with disabilities on the basis that the foreign language requirement was an important component of the overall program.[187]

If a student with a disability is able to show that a required course is not necessary to the program in which the student is enrolled, the institution may be required to waive the course requirement as a means of accommodating the student. The OCR found that an institution violated Section 504 by refusing to allow a student with a learning disability to substitute another course for a required algebra course.[188] The institution did not demonstrate that the algebra course was essential to the program, and the student's academic advisors believed that other courses could be substituted. Perhaps the most troublesome fact weighing against the institution was the dean's denial of the course substitution without obtaining information as to whether the substitution was appropriate or necessary.

Practice Tip: *Where a required course is an essential element of the overall program, the school is not required to waive the requirement as an accommodation. Medical schools should prospectively analyze which course requirements are essential to a student's medical education and limit its requirements to those identified courses. Other course offerings should be treated as electives. With respect to the requirements of individual courses, schools should consider which elements are essential. For example, certain types of examinations may be given with additional time, while it may be essential that other examinations be taken with time limitations. To the extent that a test-taking condition is so essential that it goes to the fundamental nature of the course, that condition need not be modified, even for the purpose of disability accommodation.*

C. Accommodations in Clinical Requirements

In the same manner that schools are not required to waive course requirements that are integral to the overall program, schools are not required to waive clinical requirements when they are an integral part of the program. The Supreme Court addressed the issue of accommodations to clinical requirements in the case *Southeastern Community College v. Davis*.[189] As discussed above,[190] the court held the school did not violate Section 504 by denying admission to its nursing program to a deaf applicant because the student would only be able to participate in the academic component of the program. Waiving the clinical component of the nursing program would have resulted in a fundamental alteration to the program, and fundamental alterations are beyond the modifications required by Section 504.[191]

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[183] *Id.* at 799.
[184] *Id.*

[185] North Seattle Community College, 10 Nat'l Disab. L. Rep. (LRP Publications) 42 (August 23, 1996).

[186] 8 F. Supp. 2d 82 (D. Mass. 1998).
[187] *Id.* at 89.
[188] Complaint No. 06-90-2084 (OCR Region VI 1991).
[189] 442 U.S. 397 (1979).
[190] *See* supra notes 44–46; 137–138; 145–147; 171–173.
[191] *Id.* at 410.

A similar decision was reached by the Ohio Supreme Court in the case of *Ohio Civil Rights Commission v. Case Western Reserve University*.[192] This case involved a blind applicant who sought admission to medical school. The student's proposed accommodations included a raised line drawing board, tutors and faculty assistance, occasional assistance from sighted students, laboratory assistance, use of intermediaries to read X-rays and patient charts and perform parts of the physical examination, and waiver of portions of course requirements (such as drawing blood). The court held that these accommodations, especially the accommodations the applicant proposed for the clinical component of the program, would result in a fundamental alteration to the program and were not otherwise reasonable.[193] However, where accommodations to the clinical component of a program do not fundamentally alter the program or place an undue burden on the institution, reasonable accommodations are required by the ADA and Section 504.

D. Accommodations in Attendance Requirements

As with program requirements, courts have held that an institution need not waive attendance requirements where attendance is a fundamental requirement of the program. In *McGregor v. Louisiana State University Board of Supervisors*,[194] the court held that a request by a law student with a physical disability to attend school part-time rather than full-time would require a substantial modification in the law school's program and was not required under Section 504.[195]

In *Maczaczyj v. State of New York*,[196] a student with a mental disability in a Master's degree program requested that personal attendance in the program's residency requirement be waived and that he be allowed to participate by telephone. The court found that "excluding plaintiff's personal attendance from the residency requirement would result in lowering the academic standards and imposing a substantial modification of the program which would devalue the school's end product which would in turn substantially alter the academic program."[197] The purpose of the residency program is to "provide students with intensive academic interaction with each other and with the faculty through which they are to develop their critical thinking and communication skills."[198] Allowing a student "to participate over the phone would interfere with that individual's educational experience, it would also interfere with the educational experience of the students in the classroom."[199]

Practice Tip: *For most medical school programs, and especially clinical coursework, attendance is an essential requirement of the program and need not be waived by the institution. Each institution should consider and clearly state in admission and related materials whether attendance is essential or fundamental to the program.*

E. Auxiliary Aids

The majority of accommodations for students with disabilities come in the form of auxiliary aids. Section 504 regulations require an institution to:

> take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills. 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. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.[200]

The ADA's Title II regulations require a public entity to "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by the public entity."[201] In addition, Title III regulations require recipients of federal money to provide auxiliary aids such as interpreters unless they can show that the provision of such aids would "result in an undue burden, i.e., significant difficulty or expense."[202] To date, there are no cases where a medical school has successfully argued that financial expense results in an "undue burden" on the institution.

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[192] 666 N.E. 2d 1376 (1996).
[193] *Id.* at 1386.
[194] 3 F. 3d 850 (5th Cir. 1993).
[195] *Id.* at 859-60.
[196] 956 F. Supp 403 (W.D.N.Y. 1997).
[197] *Id.* at 409.
[198] *Id.*
[199] *Id.*
[200] 34 C.F.R. § 104.44(d)(1)(2)(2004).
[201] 28 C.F.R. 35.160.(b)(1)(2004).
[202] 28 C.F.R. § 36.303(a)(2004).

Practice Tip: *Institutions are afforded flexibility in how to provide auxiliary aids as long as students are not denied access to materials. The regulations allow an educational institution to meet its obligation to provide auxiliary aids by assisting students in using existing resources, such as state vocational rehabilitation agencies.*[203] *However, the ultimate responsibility and expense for ensuring that aids are supplied rests with the institution. Denying a student's requested accommodation on the basis that it constitutes an undue financial burden is not likely to be upheld. Whether the cost of a particular auxiliary aid is an undue financial burden is determined by taking into account the institution's total resources – not just the resources of the department or program in which the student is enrolled.*

1. Multiple Mediums of Text

Institutions are required to provide printed materials in multiple mediums, including auditory, tactile (Braille), and enlarged print.[204] Printed materials include "student handbooks, admissions applications, class schedules, financial aid information, as well as publications from other sources relied upon by the post-secondary institution in its educational program, such as textbooks."[205] When the student's preferred medium is not the medium provided by the school, the school may not categorically refuse to provide accommodations through a particular medium. Rather, the school may be required to provide access to its printed materials in all three mediums. A school may provide access to printed materials through the use of E-text (electronic text in a digital format read by a computer) in lieu of access through another medium.[206]

In determining whether to honor a student's request for a particular medium, the importance and consequences of student comprehension is a critical factor. Thus, it is presumed that examinations and other academic materials will be provided in accordance with the student's request, whereas student event materials (e.g., general campus announcements) may not. Auditory access may be accomplished through various methods, including audio-tapes, personal readers, or synthesized speech.[207] Under all circumstances, the alternative method must be timely and effective.

2. Interpreters

The OCR has ruled that schools must provide sign language interpreters at no cost to the student. However, schools need not provide interpreters when, because of difficulties in obtaining interpreters, alternative means such as note-takers and assistance from professors are provided.[208] The OCR has held that the requirement to provide interpreters extends to class-related activities that take place off campus, as well as to study aboard programs.[209] In one case investigated by the OCR, a deaf student alleged that the institution denied her auxiliary aids necessary for her to pursue her academic career. Specifically, she alleged that the institution denied her request for an interpreter for an institute-sponsored field trip. Although the field trip was voluntary, the field trip was closely related to the subject matter of the seminar and would have been educationally useful. As such, the field trip was an educational activity conducted by the institution. Moreover, despite a clear request for an interpreter, the complainant did not receive a clear response from the institution.[210] The OCR found the institution to be in violation of Section 504.

In another case investigated by the OCR,[211] a student with a hearing disability alleged that the school discriminated against her on the basis of her hearing impairment by denying her request for sign language interpreter services for use in a study abroad program. The student did not participate in the program because of the school's failure to provide the services. The OCR determined that the college had failed to take steps necessary to ensure that the student was not denied the benefits of, or excluded from participation in, the program due to the absence of effective auxiliary aids. Although the school offered to provide a portable amplification device, the school did not adequately address the student's concern regarding the effectiveness of the proposed system. In addition, the school impermissibly considered the cost of the requested interpreter services in determining which auxiliary aids were available for participation in the program. The school did not properly analyze the cost of such services before denying the request, nor did it fully endeavor to determine whether the cost could have been defrayed by funding from outside sources, or whether an interpreter could have been found at the program location.[212]

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[203] App. to 34 C.F.R. § 104.44(d)

[204] Los Rios Community College Dist. (CA), 5 Nat'l Disab. L. Rep. (LRP Publications) 423 (Apr. 21, 1994).

[205] *Id.*
[206] *Id.*
[207] *Id.*

[208] See Adam M. Milani, Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability Law, 22 J.C. & U.L. 989, 1023 (1996) (discussing school's responsibilities in providing auxiliary aids).

[209] Naropa Institute (CO), 4 Nat'l Disab. L. Rep. (LRP Publications) 335 (1993).

[210] *Id.*

[211] College of St. Scholastica (MN), 3 Nat'l Disabl. L. Rep (LPR Publications) 196 (Sept. 15, 1992).

[212] *Id.*

When a school makes a good faith effort to provide an interpreter, but is unsuccessful in doing so, the school is not in violation of Section 504 or the ADA. The OCR has held that Section 504 was not violated where a student with a hearing impairment was provided with two classmates as volunteer note-takers and given extra assistance from the professor after efforts to recruit interpreters were unsuccessful.[213]

A similar decision was reached in a case involving the University of California, Davis.[214] Due to a shortage of sign language interpreters, the school developed alternatives to interpretation for hearing-impaired students. These alternatives included real-time stenocaptioning, taped lectures and transcription by a stenocaptioner at a later date, taped lectures and interpretation at a later date, use of an oral interpreter, or two note-takers in addition to the use of a trained note-taker not enrolled in the class. The OCR held that, because the school made diligent efforts to recruit interpreters, had a legitimate non-discriminatory reason for its failure to hire adequate sign language interpreters to cover all the classroom needs of hearing-impaired students, and offered a variety of alternatives when signers were unavailable, the school was not in violation of Section 504.[215]

Just as schools may not place the burden of paying for interpreter services on the student, schools may not require students to locate requested auxiliary aids. In one case, the OCR found that it was not proper for the school to require the student to locate another student for the purpose of note-taking. In addition, the OCR found that offering to provide the student with note paper was not an effective means of making orally provided information available to the student, and the school was found to be noncompliant with Section 504 regulations.[216] However, once a program to provide accommodations and academic adjustments is put in place by the school, the school may require students to follow established procedures and policies to obtain auxiliary aids. If the student does not receive auxiliary aids due to the student's failure to properly follow the established procedures, the school will not be found in violation of Section 504.[217]

Schools may not charge a fee to students for providing auxiliary aids in the regular program.[218] However, a school may charge fees if it provides a special program for students with disabilities.[219] In *Halasz v. University of New England*, the court held that where a university decides to offer a program for students with disabilities which is not a reasonable accommodation, but a separate program for disabled individuals, Section 504 does not prohibit the university from charging a fee for the special program.[220] The requirement to provide auxiliary aids to students with disabilities does not extend to personal services such as tutors, counselors, and learning disabilities specialists.[221] However, the OCR has held that a University may not discriminate against students on the basis of disability in the provision of services, including tutoring services.[222]

Practice Tip: *Multiple mediums of text, interpreters, and classroom equipment are among the forms of auxiliary aids an institution is required to provide to students with disabilities. Institutions are not required to provide services of a personal nature to a student. The institution may establish policies and procedures concerning how to request and obtain auxiliary aids, but may not charge the student for providing aids to them.*

F. Academic Deference in Providing Accommodations

The courts tend to defer to the decisions of college and university administrators regarding whether a student's requested accommodations are reasonable. The court first addressed the issue of whether an institution should be granted deference in academic decisions made in the context of an ADA or Rehabilitation claim in *Zuckle v. Regents of the University of California*.[223] In this case, a medical student was dismissed for "failing to meet the academic standards of the school."[224] The student began experiencing academic difficulty during her first quarter of medical school. Due to her substandard grades, she was placed on academic probation, required to retake several courses, and given additional time to complete her pre-clinical coursework.[225] However, the student continued to struggle academically. In the fall of the student's second year, the student was tested for a learning disability, and it was discovered that it took the student longer than the average person to read and comprehend information.[226] Upon learning of the student's disability, the school offered the student additional accommodations.

[213]Wentworth Institute of Technology (MA), 5 Nat'l Disab. L. Rep. (LRP Publications) 190 (Dec. 20, 1993).

[214]University of California, Davis, 4 Nat'l Disab. L. Rep (LRP Publications) 108 (Apr. 16, 1993).

[215]*Id.*

[216]Jefferson Community College, 3 Nat'l Disab. L. Rep. (LPR Publications) 166 (Aug. 21, 1992).

[217]See New York University, 3 Nat'l Disab. L. Rep. (LRP Publications) 381 (Dec. 10, 1992); Northern Arizona Univ., 5 Nat'l Disab. L. Rep. (LRP Publications) 284 (Jan. 24, 1994) (finding no violation of Section 504 where student did not schedule meeting with disabled student services staff, did not request auxiliary aids until mid semester, and failed to obtain necessary information and complete relevant forms).

[218]University of Arizona, 2 Nat'l Disabl. L. Rep. (LPR Publications) 285 (Oct. 18, 1991).

[219]*Halasz v. University of New England*, 816 F. Supp. 37 (D. Me. 1993).

[220]*Id.* at 45.
[221]34 C.F.R. 104.44(d)(2).

[222]Oregon State Univ., 5 Nat'l Disab. L. Rep. (LRP Publications) 19 (Sept. 29, 1993); Hastings College of Law (CA), 4 Nat'l Disab. L. Rep. (LRP Publications) 226 (May 27, 1993).

[223]166 F. 3d 1041 (9th Cir. 1999).
[224]*Id.* at 1044.
[225]*Id.* at 1043.
[226]*Id.*

The student completed her course requirements and began her clinical clerkships. During her first clerkship, the student was allowed to take time off to study for the United States Medical Licensing Examination, which she had previously failed. She passed the examination on her second attempt, but failed her clerkship and was automatically placed on academic probation. After appearing before the school's evaluation committee, the institution's promotions board voted to dismiss the student due to her inability to meet the institution's academic standards.[227] The student subsequently filed a claim against the institution for violating the ADA and Section 504.

The court first considered the issue of whether academic decisions made by the school in the context of the ADA or Section 504 should be given deference. The court held that while the determination of whether an institution has complied with the ADA and Section 504 regulations is ultimately that of the court, deference will be given to the school's determination regarding whether a student is otherwise qualified academically. Once the institution shows that it took legitimate measures to provide reasonable accommodations, the court will give deference to the institution's academic decisions.[228] Ultimately, the court concluded that the student failed to demonstrate that she could meet the eligibility requirements of the medical school, with or without reasonable accommodation, i.e., she was not "otherwise qualified" to remain in the program.[229]

Practice Tip: *While administrative decisions regarding the granting or denial of accommodations will often be given deference by the courts, courts look closely at the institutional policies and the process used to make such decisions. It is imperative that an effective monitoring system be adopted to ensure that institutional policies are properly followed and that any policy violations are dealt with promptly. Too often, institutions rely on students to alert administrators to problems with their compliance systems. All compliance procedures should include monitoring provisions that regularly assess the effectiveness of the system and ensure that modifications are made as needed.*

G. Accommodating Student Disabilities of Which the Institution is Unaware

It is a well-settled legal principle that an institution's obligation to provide accommodations is not triggered until the disabled individual makes his or her needs known. In addition, institutions are only required to provide accommodations prospectively, not retroactively. However, neither Section 504 nor the ADA specifies what type of notification is necessary to trigger an institution's obligation to provide accommodations or what constitutes awareness of a student's disability.[230]

In *Nathanson v. Medical College of Pennsylvania*,[231] the court addressed the issue of when and whether a student made the medical college aware of her disability, whether the student had requested accommodations, and whether the student's requests were sufficiently specific to obligate the college to respond. In Nathanson, a medical student informed school officials, during her application interview, of injuries she had sustained as a result of an automobile accident. The student met with school administrators to discuss her difficulties, and, according to the student, to request appropriate seating.[232] The school administrator maintained that the student did not ask for any type of accommodation at this meeting. According to the administrator, the student explained that she was having physical difficulties and requested a leave of absence. At the end of the leave period, the student again met with school officials to request accommodations for her disability. According to the student, the school failed to respond and she subsequently withdrew.

The court addressed the issues of: (1) whether the school had reason to know the student was disabled, and (2) whether the school provided reasonable accommodations for the student's disability. According to the court, in order for the school to be liable under Section 504, the school must know or be reasonably expected to know of the student's disability. The court found that there were disputed facts as to whether and when the student made a specific request for accommodations. In addressing whether the school provided reasonable accommodations to the student, the court noted that what is considered a reasonable accommodation must be decided on a case-by-case basis.[233] The court further noted that other courts had concluded that there existed an affirmative duty to investigate an individual's needs to determine what special services would be needed and to take affirmative steps to accommodate disabled individuals.[234]

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[227] *Id.* at 1044.
[228] *Id.* at 1048.
[229] *Id.* at 1051.

[230] *Nathanson v. Medical College of PA*, 926 F. 2d 1368, 1381 (3rd Cir. 1991).

[231] 926 F. 2d 1368 (3rd Cir. 1991).
[232] *Id.* at 1372.
[233] *Id.* at 1385.
[234] *Id.*

The OCR has explicitly found that pursuant to "Section 504 a student with a disability who is in need of an academic adjustment is obligated to notify the postsecondary institution that he has a disability, identify the need for academic adjustments, and provide, upon request, documentation of the disability and the requested academic adjustments. Once a student has notified a postsecondary institution that he or she needs certain academic adjustments due to a disability, the postsecondary institution has an obligation to engage the student in an interactive process to determine the appropriate academic adjustments to be provided."[235]

With respect to the actual request, there are no specific words a student must use to request an accommodation, nor is there a particular time in which the request must be made. An institution may not require students to request accommodations by a specific date and refuse to accommodate students thereafter.[236] The OCR has provided guidance on the issue of the time and manner of the student's request in stating that "[t]here is no Section 504 requirement that such notification must be given in writing. There is also no Section 504 requirement that the notification be given at the beginning of the academic year or by a certain date during the year. However, the notification must be made within a period of time which allows the [institution] a reasonable opportunity to evaluate the request and offer necessary adjustments."[237]

Practice Tip: *The courts and the OCR have made it clear that an institution is not obligated to act unless the school has actual notice of a student's disability. Once the institution has notice of the student's disability, the school has an affirmative duty to make reasonable accommodations. What accommodations are required should be assessed on a case-by-case basis. Medical schools must maintain solid documentation of any and all accommodation discussions held with students.*

V. Accommodation Process

A. Evaluation of Documentation

While institutions may establish policies and guidelines concerning documentation submitted by students requesting accommodations, these policies and guidelines must meet certain regulatory standards. ADA regulations require that criteria used to determine the sufficiency of documentation not "screen out or tend to screen out an individual with a disability. . . unless such criteria can be shown to be necessary."[238] The need for current documentation will often be dictated by the nature of the disability at issue. For example, a three-year currency rule for students with specific learning disabilities where scientific data do not support the need for reevaluation every three years may be considered an unnecessary criterion for supporting documentation.[239] However, where current documentation is needed to make a fair assessment of the severity of the student's disability and the type of accommodations that would be appropriate, it is not unreasonable to ask the student to provide current documentation.[240]

In addition, the courts and the OCR have held that review, analysis, and assessment of the submitted documentation must be conducted by individuals who are knowledgeable and/or professional in the field.[241] In *D'Amico v. New York State Board of Medical Examiners*,[242] the court disagreed with the denial of a student's requested accommodation because there was no evidence to dispute the medical documentation submitted by the student.[243] The court found the individuals who rejected the student's requested accommodation had "no knowledge of the disability or disease, no expertise in its treatment, and no ability to make determinations about the physical capability of one afflicted with the disability or disease."[244] In another case investigated by the OCR, it found that a university discriminated against a student with a disability in denying the student's application for readmission, in part because members of the readmission committee that denied the student's petition had received no training prior to sitting on the committee and that no committee members had consulted any experts in the field of learning disabilities or contacted any representatives of a learning strategies clinic where the student had received services.[245]

Overall, the institution's evaluation of the student's documentation must be fundamentally fair. Accurate information regarding documentation standards and procedures must be communicated to students in a timely manner. An institution may request additional documentation from the student upon a finding that the student's original documentation is insufficient. The request for additional information must be reasonable under

[235]University of Cincinnati, 29 Nat'l Disab. L. Rep. (LRP Publications) 77 (June 4, 2004).

[236]*See* Nathanson at 1381-83.

[237]California State University, 4 Nat'l Disab. L. Rep. (LRP Publications) 359 (July 9, 1993).

[238]28 C.F.R. § 35.130(b)(8).

[239]Guckenberger v. Boston Univ., 957 F. Supp. 306 (D. Mass. 1997).

[240]*See* Northwestern College, 6 Nat'l Disab. L. Rep. 261 (LPR Publications)(Jan. 5, 1995) (finding four year old psychological evaluation report of a student's disability not current).

[241]Whether accommodation decisions are made by an individual or by committee, the institution should rely on appropriate expertise in its analysis of data. It is not appropriate for a faculty member to diagnose a student based on the faculty's member observance of the student's behavior.

[242]813 F. Supp 217 (W.D.N.Y. 1993).
[243]*Id.* at 222.
[244]*Id.* at 223.

[245]DePaul University, 4 Nat'l Disab. L. Rep. 157 (LPR Publications) (May18, 1993).

the circumstances.[246] The institution must avoid asking for additional documentation as a means of avoiding its statutory obligation to provide reasonable accommodations. However, if the student's documentation raises questions regarding the documentation's legitimacy, validity, conclusiveness, or relevancy, the institution may rightfully challenge the student's documentation.

An institution may choose to provide temporary accommodations while the student gathers the requested documentation.[247] Providing temporary accommodations does not create an obligation to continue providing the accommodations should the student fail to submit appropriate documentation. However, if the institution chooses to provide temporary accommodations to the student, the institution should clearly communicate to the student what specific documentation is required, the time frame for providing the required documentation, and the date the temporary accommodations will cease if sufficient documentation is not provided.

Practice Tip: *It is the student's obligation to bear the cost of additional testing and/or assessment if such testing is required in order to assess the student's impairment. However, it may be in the institution's best interest to have the student tested by experts of its choosing. Although, in this situation, the institution must bear the cost of additional testing, the institution is in a better position to evaluate the validity and accuracy of the results when the testing is conducted by persons it knows.*

B. Cost and Implementation of Accommodations

An institution must pay for the costs of providing reasonable accommodations to students with disabilities unless doing so would place an "undue burden" on the institution. In determining whether an action would result in an undue burden, the institution may consider the nature and cost of the accommodation. Whether a particular accommodation will impose an undue burden due to cost is evaluated in light of an institution's overall financial resources. Moreover, the determination of what constitutes an undue burden is based upon the net cost of the accommodation, taking into consideration the availability of tax credits and deductions, as well as outside funding.[248] If an institution can show that the cost of an accommodation would impose an undue burden, the institution would still be required to provide the accommodation if the funding were to be available from another source, e.g., a state vocational rehabilitation agency.[249]

Practice Tip: *When evaluating whether an accommodation will place an "undue burden" on a medical school, a court will consider the resources of the entire university or university system in determining the level of hardship. This creates such a large resource base that it is highly unlikely that a medical school would be able to use the "undue burden" rationale.*

In some cases, a state vocational rehabilitation agency may be obligated to provide assistance for students with disabilities in postsecondary educational programs.[250] However, to avoid imposing a burden or the possibility of a charge on the student, a postsecondary educational institution may not require students to apply to state vocational rehabilitation agencies for assistance.[251] Moreover, a university may not deny requests for accommodations from students with disabilities based on the students' ability to pay or their enrollment in specific programs. In *United States v. Board of Trustees for University of Alabama*,[252] the court held that requiring hearing-impaired students to show that they lacked the financial means to pay for their own interpreters (or other auxiliary aids) violated Section 504. The court held that the University is required to be the primary provider of auxiliary aids for students, faculty, or staff with disabilities. The implication of this decision is that universities cannot require students or employees with disabilities to request technical assistance from vocational rehabilitation agencies. The University must contact the appropriate agencies itself for assistance in providing accommodations for its students.[253]

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[246] *Argen v. New York State Board of Law Examiners*, 860 F. Supp. 84 (W.D.N.Y. 1994).

[247] *Dubois v. Alderson-Broaddus College*, 950 F. Supp. 754 (N.D.W.Va 1997).

[248] 29 C.F.R. § 1630.2(p).

[249] *Id.*

[250] *See, e.g., Schornstein v. New Jersey Div. of Vocational Rehab. Serv.*, 519 F.Supp. 773 (D.N.J. 1981), aff'd, 688 F.2d 824 (3d Cir.1982); *Jones v. Illinois Dept. of Rehab. Serv.*, 504 F.Supp. 1244 (N.D. Ill. 1981), aff'd, 689 F.2d 724 (7th Cir.1982) (holding that state departments of rehabilitation were required by Title I of the Rehabilitation Act to pay for interpreters for deaf students); see also *Firth v. Indiana Dept. of Human Serv.*, slip op. no. 49CO1-9005-MI-1583 (Cir. Ct. Marion County Ind., June 4, 1991), aff'd in part and rev'd and remanded in part, 590 N.E.2d 154 (Ind. Ct. App. 1992). In Firth, the district court held that the State Department of Vocational Rehabilitation was required under Title I of the Rehabilitation Act to provide an interpreter for a deaf law student. On appeal, the trial court's order that the student was entitled to vocational rehabilitation services was affirmed, but the Indiana Court of Appeals held that the case should be remanded to the department of vocational rehabilitation to determine exactly which services the student should be provided.

[251] *See* Bonnie P. Tucker, *Application of the Americans With Disabilities Act (ADA)* and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students, 23 J.C. & U.L. 1, 26 (1996).

[252] 908 F.2d 740 (11th Cir.1990).

[253] *See* also State Univ. of N.Y., Complaint No. 02-92-2106 (OCR Region II, 1993) (OCR held that a university violated Section 504 by requiring a student with learning disabilities to contact services and request provision of books on tape after the university provided the student with the titles of the books and the names of service organizations); Jefferson Community College (KY), 3 Nat'l Disab. L. Rep. (LRP Publications) ¶ 166 (OCR Aug. 21, 1992) (college violated Section 504 by requiring a hearing-impaired student to locate other students to take notes for him; the college improperly transferred the responsibility for providing auxiliary aids to the student); Highline Community College (WA), 3 Nat'l Disab. L. Rep. (LRP Publications) ¶ 151 (OCR Aug. 10, 1992) (college improperly placed the burden of identifying note takers on students with disabilities rather than on instructors).

C. Due Process for Denied Requests

The establishment of detailed written guidelines for the review of all accommodation requests will aid in ensuring that due process requirements are met and that students are treated fairly. An institution's written guidelines should include information on the availability of accommodations, procedures for requesting accommodations, and the types of accommodations available. These guidelines should be available to students. Forms requesting accommodations should be returned to a named administrator and reviewed in a timely manner. Due to the substantial variability among students with the same type of disability, each accommodation request must be reviewed on an individual case-by-case basis, applying previously developed written evaluation criteria. This recommendation is consistent with the "totality of the circumstances" standard often used by courts when deciding a case. Use of a case-by-case evaluation procedure is especially important in complex cases where careful consideration is required. The student should be notified, in writing, of the school's decision to grant or deny the request for accommodation.

Practice Tip: *As litigation concerning institutional compliance with the ADA and Section 504 continues to increase, it is imperative that institutions maintain complete and accurate records regarding accommodation provisions and denials. An institution can protect itself in litigation by the availability of documentation establishing that institutional procedures and policies reflect the current state of the law and were properly followed and that the action was properly reviewed and justified.*

D. Maintenance of Confidentiality

The confidentiality of student records including disability documentation is protected by a number of sources. Both the ADA and Section 504 prohibit the unlawful disclosure and use of information concerning an individual's disability.[254] In addition, a student has a constitutional right to privacy in his or her medical records.[255] In order to preserve the confidentiality of student medical and disability-related records, such records should be kept separate from the student's other academic records.

Academic institutions must also comply with the Family Educational Rights and Privacy Act ("FERPA"),[256] which forbids the disclosure of personally identifiable information contained in educational records without a student's prior written consent. "Personally identifiable information" includes a student's name, personal character traits, and any other information that would make the student's identity easily traceable, such as information regarding a student's disability. FERPA allows the disclosure of information without a student's consent when "the disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests."[257] The courts have repeatedly recognized the need for institutions to internally share a student's medical information for legitimate educational purposes. Legitimate disclosures include disclosures for the purposes of (1) determining whether a student is otherwise qualified for the program, (2) assessing the student's documentation, and (3) determining what accommodations are reasonable.

An institution may not disclose a student's personally identifiable information, including information related to a student's disability, to external entities. If an external entity is involved in the assessment or accommodation process of a student, the student's written consent must be obtained prior to the disclosure of any information to the external entity. If the student refuses to consent, and this refusal prevents the institution from determining whether a student is disabled or what acommodations are necessary, the institution will not be held liable for failing to properly accommodate the student. In other words, a student may not request an accommodation and then deny the institution the ability to share information with other institutions or agencies involved in the determination.[258]

Student medical records and disability documentation maintained by an educational institution are generally considered educational records. Educational records are exempt from the Health Insurance Portability and Accountability Act's ("HIPAA")[259] Privacy Rule.

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[254] 42 U.S.C. § 12112(d)(3) (Supp. II); 29 C.F.R. § 1630.14(b)(2), (c)(1) (2004).

[255] Whalen v. Roe, 429 U.S. 589 (1977).

[256] 20 U.S.C.A. § 1232g (2004). FERPA only applies to "educational records." "Educational records are defined by FERPA as records directly related to a student and maintained by an educational institution or by a party acting for the agency or institution. 34 C.F.R. 99.3(a). Medical records used in connection with the treatment of the student are not considered "educational records" and, therefore, are not subject to FERPA. 34 C.F.R. 99.3(b)(4)(ii). However, medical records used for remedial education activities (which in most cases would include the evaluation of student documentation) are considered "educational records" and, therefore, subject to FERPA. Even if a student's medical documentation were found exempt from FERPA, if information from the student's medical documentation were incorporated in a subsequent institutional record, this record would be considered an "educational record" subject to FERPA.

[257] 34 C.F.R. 99.31(a).

[258] *Pell v. Trustee of Columbia University*, 1998 WL 19989 (S.D.N.Y.)

[259] Pub. L. No. 104-191.

Practice Tip: *Student disability-related records should be kept separate from academic records and should be treated as confidential. Access to student-disability related information should be limited to designated institutional personnel. Institutional personnel may share disability-related information with other institutional personnel on a need-to-know basis for the purpose of assessing a student's documentation and assuring appropriate accommodations. Disability-related information shared with external entities requires the student's written consent prior to release.*

VI. Conclusion

As medical schools grapple with the challenge of maintaining an increasingly diverse student population, the segment of the student community with disabilities should be given careful consideration. The ADA, Section 504, and corresponding regulations create a framework for ensuring that students with disabilities are fairly treated. However, despite detailed regulations and a growing body of case law, analysis of disability issues remains complex. Institutions must closely evaluate the needs of applicants and students with disabilities and balance those needs against what the medical school is able to provide within the academic environment.

The area of disability law is an important area of regulatory compliance that no institution can afford to ignore. An institution that fails to properly address these issues can face severe consequences. Penalties for violations of Section 504 and the ADA include injunctive relief, damages, attorney's fees, and the withdrawal of federal funding. The area of disability law will continue to evolve; as this occurs, medical schools should maintain as their objective the implementation of fair policies and practices that enable applicants and students with disabilities to benefit from the schools' programs and services, without fundamentally altering or compromising the medical education process. The adage that "an ounce of prevention is worth a pound of cure" is perhaps nowhere more true than within the area of disability law – where the proper course of action taken in the first place can save a medical school considerable expense – not only in financial terms, but also in terms of human resources and negative publicity.

Institutional "Must Do's"

✔ Evaluate policies and procedures.

Review institutional policies on a regular basis to ensure that they are in compliance with federal statutes and regulations, reflect advances in adaptive and assistive technology, and achieve the maximum degree of compliance under the circumstances. Make sure policies are realistic and "livable," and then consistently adhere to those policies as situations arise.

Be conscious of the timing of policy revisions and implementation and be wary of implementing policies that single out or address a specific student after a student has raised a disability-related issue.

✔ Develop/refine technical standards and essential program requirements.

Develop technical standards for admission to and graduation from the educational program with great care and consideration. Include those skills and abilities that are essential to the completion of the educational program. Skills and abilities required for admission should be tied directly to those required for graduation. Any skill or ability required for admission should be tied directly to what is taught and assessed in the curriculum or it should be removed from the technical standards. Consider including "the ability to work as a member of the healthcare team" and "attendance" as essential program requirements.

Where a required course is an essential element of the overall program, the school is not required to waive the requirement as an accommodation. Prospectively analyze which course requirements are essential to a student's medical education and limit the school's requirements to those identified courses. Other course offerings should be treated as electives. With respect to the requirements of individual courses, schools should consider which elements are essential.

✔ Review application forms and interview questions.

Never ask an applicant about a past "handicap" or "disability." Broad questions about past mental health history are unlikely to be allowed outside of a counseling or similar educational program. However, an institution may ask an applicant whether he or she is able to meet the program's technical standards with or without reasonable accommodations.

A student's disability is irrelevant in determining whether a student should be readmitted to a program. An institution may deny readmission to a former student with a disability if the student was dismissed based on the student's performance, behavior, or academic record. However, the institution should be careful to not base its decision not to readmit a former student with a disability on stereotypes or nonfactual information.

✔ Train employees and inform students.

Provide training, on an ongoing basis, to academic administrators, faculty, and staff regarding students' rights and each party's responsibilities with respect to disability accommodation. The institution's employees must understand their role in assisting the institution in meeting its compliance obligations. In addition, students should be informed of their rights and responsibilities and the institution's procedures regarding disability accommodations.

✔ Be careful when determining that an impairment is a disability.

Evaluate each student's case on an individual basis, relying on recent diagnostics and evaluations. Avoid overgeneralizations, broad categorizations, or relying on past accommodations made by other educational programs. Remember that merely having an impairment does not result in a student being disabled for purposes of the ADA or Section 504.

More than a mere risk of injury is required before an institution may disqualify an applicant or student with a disability from participation in a program. Any denial of admission or decision to dismiss based on the risk of future injury to the individual or others must be examined with special attention to the requirements of the ADA and Section 504.

✔ Monitor institutional compliance.

It is imperative that an effective monitoring system be adopted to ensure that institutional policies are properly followed and that any policy violations are dealt with promptly. Too often, institutions rely on students to alert administrators to problems with their compliance systems. All compliance procedures should include monitoring provisions that regularly assess the effectiveness of the system and ensure that modifications are made as needed.

✔ Maintain records.

Protect the institution by thorough documentation that institutional procedures and policies reflect the current state of the law and were properly followed, and that the action was properly reviewed and justified.