

The articles in *Lex Collegii* are equally applicable to independent and public institutions except for a few topics where constitutional mandates and compliance with state laws are not analyzed.

Lex Collegii



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Academic
Accommodation and
Disabled Students

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Academic Accommodation and Disabled Students

Under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, all institutions of higher education must respond appropriately to the unique needs of disabled students. These federal laws ensure that disabled students are not discriminated against. More particularly, they require institutions to examine, on a case-by-case basis, requests made by disabled students for reasonable accommodation. This obligation, however, does not require colleges and universities fundamentally to alter the nature of their program. Nevertheless, the academic accommodation required by federal law can be substantial.

Examples of reasonable accommodation are diverse and range from requests to waive certain academic requirements or modify the format of examinations to the availability of auxiliary services. This article will examine a

sampling of the issues related to academic accommodation and the circumstances under which they arise. The Winter, 1997 issue of *Lex Collegii* analyzed disabled students in the nonacademic setting. Administrators should also recognize that disability laws impact the methods and standards available to colleges and universities as they conduct their admissions process.

The Obligation to Make Reasonable Accommodation

The rights of disabled students are ensured largely by Section 504 of the Rehabilitation Act of 1973 (Section 504) and the more recently enacted Americans with Disabilities Act of 1990 (ADA). These federal laws provide similar protection for disabled students. Although the language employed by the two acts varies, most courts and commentators agree that since the ADA reflects judicial interpretation of Section 504, courts will interpret the ADA in the same manner as Section 504.

Under these laws, colleges and universities must make reasonable accommodation or adjustments for qualified individuals with known disabilities. These accommodations fall within three categories: academic adjustments and waivers; modification or alteration of course

examinations; and the provision of auxiliary aids or services. A college, however, is not required to make a requested accommodation if it can demonstrate that the requirement is essential to the program of instruction, that the requested accommodation would constitute an undue burden or hardship to provide, or if the accommodation would require a fundamental alteration to the school's program.

The Obligation to Provide Notification and Documentation

In general, once students are admitted, federal regulations establish that students are responsible for notifying the school of their disability, requesting academic adjustments, and providing any necessary evidence of a disability-related need for the requested adjustment. These requirements are not a mere formality; both courts and the Office of Civil Rights (OCR) have frequently found that a college did not violate federal law where the complaining student failed to provide the required notification or documentation. It is important therefore that colleges and universities establish clear policies informing students of how they may provide the notification and documentation required to qualify for special services.

A recent federal case involving a college in West Virginia provides a useful illustration of the benefits of establishing such a policy. In 1992, Chad Dubois was admitted into the physician assistant's (P.A.) program at Alderson-Broaddus College (A-B College). Later, Dubois brought an action against the college in which he claimed that the college had failed to properly accommodate his learning disability in violation of the ADA and Section 504. The college filed a motion for summary judgment which the court ultimately granted and Dubois's complaint was dismissed. (*Dubois v. Alderson-Broaddus College, Inc., and Dr. Paul Bennett, 1997*).

The court began its analysis by noting that Dubois had the burden of showing that he suffered from a specific

learning disability. The college maintained a written policy outlining the process through which a learning disabled student must comply to obtain academic support. That policy required the student to provide documentation of a learning disability which included:

1. The results of a Wechsler Adult Intelligence Scale (WAIS); and
2. A written evaluation, including a discrepancy analysis, completed by a licensed psychologist or certified learning disability specialist, indicating the specific learning disability or disabilities. Such evaluation must be no older than three (3) years.

Dubois did not argue that this policy violated federal law or imposed undue burdens on him.

Pursuant to this policy, Dubois was referred to a specialist in March 1994. However, because he was concerned about the length of the testing, the Kaufman Brief Intelligence Test (K-BIT) was substituted for the WAIS. Ultimately, although the specialist concluded that Dubois "might suffer from a specific learning disability," he did not diagnose a specific learning disability.

In May 1994, the college's academic dean notified Dubois that the report from March 1994 was insufficient because it failed to definitively conclude that Dubois had a specific learning disability. The dean advised Dubois that he did not meet the criteria for special accommodation.

In June 1994, Dubois submitted a psychological consultant's report to the college. That report, which was based on a review of Dubois's records and previous test scores, concluded that Dubois had a learning disability and would require extra effort in the areas of reading and writing. It further suggested that Dubois should have help in reading instructions and more time for testing in college courses. As a result of this report, Dubois was declared eligible for services due to a specific learning disability. It was recommended that he be permitted to use a tape recorder; have oral testing; use tapes or audio books; and have extended testing time.

The college agreed to make certain accommodation for Dubois during the first semester of the 1994-95 academic school year. Specifically, on July 27, 1994, the college advised Dubois that it would provide oral testing and extended time for major examinations. The college also stated that it would not continue providing accommodation beyond the first semester unless Dubois submitted the results of his WAIS testing. The college specifically stated that the testing submitted to that point was not adequate to document a learning disability. The results of negotiations were summarized in a letter dated September 8, 1994. In that letter, the college agreed that examinations would be administered orally and/or under an extended time of up to an additional 30 minutes. The letter expressly stated that it was Dubois's responsibility to discuss these options with his professors. Finally, the letter again reminded Dubois that his current evaluation did not meet the standards established by the college's policy for learning disabilities and that he must take the WAIS test in order to meet those standards.

Because of his failure to demonstrate that he had taken the WAIS test during the fall semester, the court concluded that Dubois had not properly documented that he suffered from a specific learning disability which entitled him to accommodation. As a result, the college's motion for summary judgment was granted and Dubois's complaint failed. This example demonstrates that a college or university would be well served to establish a clear policy regarding the documentation needed to qualify for special services and to communicate appropriately that policy to its students.

Assuming that a student adequately satisfies the notice and documentation requirements, the student may still not be entitled to the requested modification. The following cases explore examples of frequently requested academic accommodation.



Requests for Exemptions and Waivers

Increasingly, disabled students especially those who possess learning disabilities request that they be exempted from certain requirements or be permitted to substitute one course for another. Many colleges and universities are hesitant to waive requirements they have deemed important to a program. Federal regulations, however, seem to envision the possibility that certain requirements should be waived to accommodate disabled students. Specifically, these regulations provide that colleges and universities shall make

such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory.

Naturally, courts and the OCR have struggled to find the appropriate balance between efforts to obtain reasonable accommodation and requests that will fundamentally alter a program by asking for exemptions from essential requirements. This was the question faced by the OCR when a student at Bennett College in North Carolina sought an exemption from a mathematics requirement.

In 1990, a student enrolled at Bennett College seeking a bachelor of arts degree in political science. As a component of its bachelor's degree, Bennett College requires all candidates to complete a freshman mathematics course. The student's prior history suggested that she had experienced difficulty with mathematics. Therefore, based on the results of Scholastic Aptitude Test scores, high school background, and placement test scores, the student was assigned to a remedial mathematics course in order to raise her level of profi-

ciency in mathematics. The student passed this remedial program with a grade of C.

Subsequently, the student was unsuccessful in passing the required freshman mathematics class through at least two semesters, even with the assistance of a tutor. During the 1993 fall semester, the student reported her problem meeting the mathematics requirement to her academic adviser. The academic adviser completed a screening for disabled students which resulted in the adviser's recommendation for further testing.

In November 1993, the New York Department of Vocational Rehabilitation conducted the recommended testing. That testing demonstrated that the student had a learning disability in mathematics. The examiner recommended that the student be exempted from all mathematics requirements and allowed to substitute other courses.

The student's adviser, based on the results of the evaluation, notified college administrators that the student had a disability. The adviser also requested, on behalf of the student, several academic accommodations. Specifically, the adviser requested course substitutions for mathematics, and an exemption or waiver from the mathematics final examination and future competency tests. On January 9, 1995, the vice president for academic affairs notified the student that her requests for course substitutions and exemption from the competency test were denied.

The student then filed a complaint with OCR alleging that the college's refusal to grant her requested accommodation violated Section 504 and the ADA. After investigating the complaint, OCR concluded that the evidence was insufficient to support either a violation of Section 504 or of the ADA. (*Bennett College* [OCR, 1995]). In essence, OCR accepted the college's argument that the study of mathematics was essential to the program being pursued by the student. Specifically, the school asserted that students studying political science benefit from the study of mathematics by increasing their skills in analytical reasoning and problem solving, and by

enhancing their ability to interpret quantitative data. Moreover, Bennett reported that it had never granted a waiver of mathematics as part of its general education course requirements.

OCR explained that Section 504 and the ADA "do not obligate an institution to waive courses or other academic requirements that can be demonstrated by [the college] to be essential to its program or instruction or to particular degrees." According to OCR, Bennett had successfully demonstrated that the study of mathematics was essential to the complaining student's program of instruction. Thus, the college did not violate federal law by denying the student's requests to be exempted from the mathematics requirements.

Bennett College's success demonstrates the general reluctance on the part of both courts and OCR to second-guess the decisions of college and university administrators in the area of course waivers. OCR exemplified this deference when it investigated a complaint filed by a student with dyslexia. OCR explained, "it is the educational institution's prerogative to decide what requirements are essential, so long as each requirement has a rational relationship to the program of instruction and is not a pretext for discrimination." (*University of Osteopathic Medicine and Health Sciences*, 1991).

However, this deference is not always guaranteed. In August 1984, David Dearthmont was admitted unconditionally as a candidate in agricultural economics at Texas A&M University. At the university, all doctoral candidates must pass the economic theory qualifier examination (QE). The QE is divided into two major parts: macroeconomics and microeconomics. Although both major parts must be passed, they may be passed separately. The microeconomics section is divided into two subparts which must be passed at the same time.

In June 1985, Dearthmont took the QE and passed the macroeconomics portion but failed one of the microeconomics subparts. In January 1986, Dearthmont again took the entire microeconomics test. He had four hours, the regular time allotted for that part, to answer the questions. Unfortunately, Dearthmont failed

both subparts. Concerned, Dearmont approached his faculty committee and stated that he believed the problem was in the time limitation rather than mastery of the course materials. He also expressed his suspicion that he suffered from a dyslexic disorder.

The faculty committee decided to have Dearmont tested at the Texas Rehabilitation Commission (TRC) to determine whether he had a disability that may have caused his difficulty with the QE. In March 1986, the TRC reported that Dearmont had a mixed specific developmental disorder. As a result of this disorder, Dearmont had problems processing symbols. Specifically, he would slowly and incompletely decipher and reverse or misread symbols such as letters, numbers, and signs. According to the TRC, this disorder was more pronounced in mathematical and other abstract symbolism than in language text processing. Ultimately, the head of the educational psychology department at Texas A&M told Dearmont's faculty committee that a timed test would not give an accurate picture of his actual depth of knowledge.

The faculty committee decided to allow Dearmont to take the QE a third time with, as an accommodation to his dyslexia, twice the normal time allotment. Dearmont took the QE again in June 1986 with an allotted time of eight hours. Shortly before the third examination took place, however, the scoring procedures were revised by the chairman of the testing committee. In the past, students had been given tests written and graded by the professor from whom they had taken the course; in other words the professor who taught a student a particular section of microeconomics also administered that portion of the QE. For the June 1986 QE, a committee of all the instructors who taught a microeconomics course wrote and graded that section of the test. As a result of this change, Dearmont's examination was written and graded by a professor who had not been his course instructor. Dearmont failed the first subpart of the microeconomics section, which he had passed the first time. He

passed the second subpart. After his scores were received, Dearmont's faculty committee dismissed him from the graduate program.

A federal district court in Texas concluded that Texas A&M, despite providing an extended time limit, had in fact discriminated against Dearmont in violation of federal law and ordered his readmission. (*Dearmont v. Texas A&M University*, 1991). The court believed that Dearmont's handicap hurt his ability to demonstrate what he really knew on the QE because of the shortness of time and the profusion of abstract symbols.

The test, according to the court, was a typical academic test of background knowledge. Moreover, the court continued, "no one even suggested that the test fairly represented the tasks that make up the work of an agricultural economist. In government, education, or business, Dearmont could perform the work of an agricultural economist, despite his handicap." In short, the court questioned the usefulness of the test in gauging the qualifications of a doctoral student.

Finally, the court noted that while federal law "does not require institutions to engage in the expensive, empty gesture of educating people who cannot function productively in the community," it does prevent this "kind of casual rejection of someone who is capable and qualified because of ungenerous perceptions of the effects of a non-disabling handicap."

Modifying Examination Practices and Procedures

In some situations, students do not request that they be exempted from a particular requirement, but ask instead for modifications in the way they are examined or for changes in the manner a particular course is conducted. Advocates for disabled students, particularly those suffering from learning disabilities, argue that the use of certain traditional exam formats such as multiple-choice, often act merely to reflect the disability rather than what has been learned. As a result, these advocates call for alternative testing formats.

Federal regulations address the manner in which colleges and universities must conduct examinations to comply with federal disability laws. Those regulations require colleges and universities to provide "such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represent the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills."

The leading case involving exam modifications is *Wynne v. Tufts University School of Medicine* (1992). In this case, Wynne was a medical student with dyslexia who had difficulty completing multiple-choice examinations. Wynne brought suit against Tufts claiming that the school had discriminated against him when it failed to comply with his requests for alternative forms of examination. Ultimately, the federal appellate court established a test for determining whether an institution has adequately considered a student's request for an exam or other academic modification.

If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation, . . . Only if essential facts were genuinely disputed or if there were significantly probative evidence of bad faith or pretext, would further fact finding be necessary.

As is the case for requests for exemptions from course requirements, courts and OCR generally apply at least some level of deference to colleges and universities with respect to the type of examination which should be applied



and in areas regarding the manner in which a course is conducted. The United States Fifth Circuit Court of Appeals has provided one court's reaction to a request for accommodation including a part-time program and take home examinations.

In 1988, Louisiana State University's Paul M. Herbert Law Center (the Law Center) admitted Robert McGregor as a law student. At the time he was admitted, McGregor suffered from permanently disabling head and spinal injuries causing orthopedic and neurological disabilities. By the end of 1989, he required the use of a wheelchair. Before he registered, McGregor asked that the Law Center accommodate his disability by permitting him to be a part-time student. The school refused and stated that it had made an academic decision that a full-time freshman schedule is required. The Law Center did, however, make two accommodations for the upcoming freshman year: a handicapped parking permit, and, after McGregor requested, additional time to complete his criminal law examination.

After the first semester, McGregor did not achieve the minimum grade point average to continue. The Law Center's normal policy in such situations required the student to sit out the second semester, reapply for admission, and wait a year to return. However, McGregor was permitted to audit two classes and assigned a professor with the specific task of providing concentrated and individualized tutorial instruction.

McGregor was eventually readmitted as a freshman on scholastic probation for the fall 1989 semester without waiting the additional year after reapplication. In addition to this early readmittance, he was provided with several other accommodations. Classes were moved to a newer building for easier access with a wheelchair, special tables for the classrooms were acquired, and the inner door in the first-floor bathroom was removed. Throughout the year, many of McGregor's professors assisted him with his academic work outside of class.

Exam season brought additional accommodation. McGregor was allowed to take three of his fall 1989 exams at home, and in the fourth course, was

allowed eight hours instead of the usual four. In spring 1990, McGregor requested the same arrangement for at-home examinations. The school declined but offered to provide alternative accommodation which it felt were reasonable while still maintaining the integrity of the examination process. The Law Center provided: (1) extra examination time; (2) a choice of taking the exams on the first or third floor; (3) a session to eat and drink in the room to maintain his sugar level.

McGregor once again did not meet the requirements set to remain in school. In spring 1990, McGregor petitioned for more accommodation. The Law Center and McGregor were unable to reach a suitable compromise. McGregor sued the Law Center and argued that he had been discriminated against because of his disability. McGregor asserted that he could have succeeded if the law school had accommodated him with (1) a part-time schedule and (2) at-home examinations. The question, according to the Fifth Circuit Court of Appeals, was whether the Law Center was required to make these particular accommodations. The court concluded that it was not. (*McGregor v. Louisiana State University Board of Supervisors*, 1993).

McGregor argued that his requested accommodation was reasonable because the American Bar Association accredits programs with part-time students and the Law Center's bulletin allows such deviation in exceptional circumstances. The court rejected both of these arguments. The court believed the fact that the Law Center recognized exceptional circumstances may compel them to change their full-time attendance policy, it does not mean that such a change is not substantial. Specifically, the court noted the Law Center's history and relatively easy admission standards made a full-time attendance policy critical to their program. Therefore, the court concluded that the Law Center's policy of requiring full-time attendance and in-class examinations for first-year students were reasonable academic decisions. The court further noted that these policies were effective by accepted measures such as bar passage rates.

Auxiliary Aids and Services

Federal regulations generally state that colleges and universities must provide auxiliary aids and services necessary to ensure nondiscriminatory treatment to persons with disabilities. These regulations provide a fairly extensive, but not exhaustive, list of auxiliary aids which may be required. For example, a college may be required to provide qualified interpreters, note takers, readers, taped texts, and audio recordings. However, personal aids and services, such as prescription eyeglasses, hearing aids, and readers for personal use or study, are generally not required. As with other requests for reasonable accommodation, requests for auxiliary aids and services often result in disputes between colleges and their students.

A college's failure to provide requested interpreter services was the subject of an OCR investigation in *Roosevelt University* (OCR, 1992). A student had been admitted to Roosevelt University on July 26, 1991. In August 1991, the student, accompanied by her sign language interpreter, met with the vice president for student services, the university official designated to review requests for auxiliary services. According to the student and her interpreter, the interpreter provided sign language interpretation throughout the meeting while the student simultaneously lipread the vice president's statements.

At this meeting, the student requested interpreter services for two education courses she planned to take in the fall 1991 semester. The vice president questioned the student about her reasons for wanting to receive interpreter services. The student responded that she would miss out on important questions asked by other students and statements made by the instructors when they walked around or faced away from the students.

The vice president informed the student that the university would not provide her with the services of an interpreter. Instead, he offered to provide the use of a voice amplification system (a Loop device), a tape recorder, note taker

services, special seating arrangements, additional time for taking exams, and special advising. He also offered to talk to the student's instructors to explain her need for special attention.

According to the vice president, he explained his decision to the student by stating that the university does not provide interpreter services on demand. He pointed out that interpreter services are expensive and that other hearing impaired students at the university had performed successfully without the use of an interpreter. The vice president told OCR that the possible use of interpreter services could have been reexamined after determining whether the services provided to the student were effective.

The OCR investigation concluded that the vice president did not fully endeavor to determine the extent of the student's impairment. OCR noted the vice president admitted, before making his determination, that he had only met with the student for a 20-minute interview and conducted a minimal amount of other preparation. Moreover, the vice president did not ask the student for documentation or even a description of her impairment. Finally, OCR observed that the vice president did not consult with the student's course instructors before making his decision, even though the university's policy regarding auxiliary services requires that this be done in most cases. OCR determined that the vice president relied mainly on his personal observations of the student in the interview and his general familiarity with her courses and likely instructors. OCR also did not believe the vice president's assertion that the student had not utilized interpretation at the August 1991 meeting.

After considering these findings, OCR held that the actions taken by the university in responding to the student's request for interpreter services "were not reasonably calculated to ensure that the requested services were unnecessary and that the alternate auxiliary aids offered would have allowed her to benefit from and participate meaningfully in its program." OCR also found that the university's decision was influenced by the costs of the interpreter services,

although costs of auxiliary aids must not be considered in determining which aids are necessary. Ultimately, OCR determined that the university had "failed to take the necessary steps to ensure that the [student] was not denied the benefits of or excluded from participation" in the two courses she planned to take due to the absence of interpreter services and this failure violated federal disability law.

Preventive Planning

In general, both Section 504 and the ADA obligate colleges and universities to provide reasonable academic accommodation to disabled students. At the same time, this duty is tempered by the recognition that institutions are not required to alter fundamentally their programs by eliminating requirements which are essential to the student's program of study. Conflicts arise when students and their schools cannot agree on an appropriate balance between these competing concerns. Although these conflicts may present an inevitable result of competing interests, colleges and universities may take steps to minimize the chances that they are violating federal law.

First, colleges and universities should implement, and follow, a clear policy regarding the process through which students may request academic accommodation. This policy should clearly articulate the institution's dedication to nondiscriminatory treatment and fully apprise students of their rights. By implementing such a policy, the institution ensures that its students have an effective opportunity of fulfilling their notification and documentation obligations. These policies protect the college from surprise accusations claiming that the college failed to accommodate a disability.

In the event a dispute arises, the college or university should thoughtfully articulate its decision and explain the reason it believes a requested accommodation is unnecessary. It may be helpful to avoid blanket requirements which refuse to acknowledge the possibility of a modification or exemption. Moreover, the college should document

that it has carefully considered various alternatives to the requirement at issue and has objectively determined that the requirement is essential. In most cases, courts and OCR are reluctant to disregard an institution's academic judgment when that judgment has been supported by documentation and adequate reflection.

—Kent M. Weeks

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Selected Bibliography

Cases

- Bennett College*, 7 NDLR 26 (OCR 1995).
Dearmont v. Texas A&M University, 2 NDLR 10 (S.D. Tex.1991).
Dubois v. Alderson-Broadus College, Inc., and Dr. Paul Bennett, 9 NDLR 151 (N.D. WVa. 1997).
McGregor v. Louisiana State University Board of Supervisors, 3 F.3d 850 (5th Cir. 1993).
Roosevelt University, 3 NDLR 217 (OCR 1992).
University of Osteopathic Medicine and Health Sciences, 1 NDLR 335 (OCR 1991).
Wynne v. Tufts University School of Medicine, 932 F.2d 19 (1st Cir. 1991), modified 976 F.2d 791 (1st Cir. 1992).

Articles and Books

- Barber, Charles K., "Waivers of Academic Progress Requirements For Federal Financial Aid: A Reasonable Accommodation For Students With Learning Disabilities?," 23 *Journal of College and University Law* 231 (Fall 1996).
Hurley, Bridget, "Note: Accommodating Learning Disabled Students in Higher Education: Schools' Legal Obligations Under Section 504 of the Rehabilitation Act," 32 *Boston College Law Review* 1051 (Sept. 1991).
Stone, Donald, "The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study," 44 *Kansas Law Review* 567 (1996).
Tucker, Bonnie Poitras, "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 *Journal of College and University Law* 1 (Summer 1996).

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