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8:30 - 10:00 a.m.

CONCURRENT SESSION TWO

Current Legal Issues Affecting Admissions Programs, Including The *bona fides* of Physical and Mental Capacity Requirements; The "Learning Disabled" Applicant; Are Certain Resources Mandated By The "Reasonable Accommodation Requirement?"

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CURRENT LEGAL ISSUES AFFECTING ADMISSIONS PROGRAMS

ADMISSIONS AUDIT CHECKLIST

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Presented at the Stetson University
College of Law Conference:

14th ANNUAL NATIONAL CONFERENCE ON
LAW AND HIGHER EDUCATION: ISSUES IN 1993
Sheraton Sand Key Resort Hotel
Clearwater Beach, Florida
February 14-17, 1993
Admissions Audit Checklist

I. The Application

1. Do you request the applicant's social security number?
   a. Do you inform applicants whether disclosure of their social security number is mandatory or voluntary?
   b. Do you inform applicants what uses will be made of their social security numbers?
   c. Do you use social security numbers as student identification or file numbers; do you post grades by social security number; do you use social security numbers on student identification cards?

2. Do you ask applicants about their health?

3. Do you ask applicants about their marital status?

4. Do you ask applicants whether they have been arrested or convicted of a crime?
   a. How do you use this information in making the admission decision?
      i. do you deny admission based on a conviction?
      ii. do you deny admission based on an arrest?
      iii. do you request additional information about an applicant's criminal record from the applicant or from third parties?
   b. Do you disclose information about an applicant's criminal record to third parties, e.g. law school and central administration, or bar examiners?

5. Do you require applicants to certify that the information supplied on the application is accurate and complete?
   a. Do you have a procedure for verifying information on applications?

* This audit checklist is not intended to be exhaustive; it covers only some of the current legal issues affecting admissions.
b. Does your application contain a statement that the applicant, by submitting an application, agrees to abide by and be subject to the institution's rules, regulations and disciplinary code?

II. Admission Criteria

1. Do you have any special admissions programs?

2. Do you assign applications of a particular group to a single admissions team?

3. Do you maintain separate wait lists by race or ethnicity?

III. The Admissions Committee

1. Does your admissions committee meet with or interview applicants? If so, are committee members trained to avoid making commitments on behalf of the institution?

2. Does your admissions committee consider information about a candidate that was not submitted by the applicant in support of his/her application, e.g. unsolicited letters of recommendation, information supplied by members of the admissions committee or other members of the faculty?

3. Do students sit on your admissions committee?

4. Are your admissions committee meetings open to the public or to members of the education community?

IV. Release of Information From the Admissions Office

1. Does your office have a formal written policy on the release of information?

2. Do you release any information about the status of an application over the phone? If yes, to whom do you release information and what type of information do you release?

3. Are minutes or notes of the deliberations of the admissions committee taken? Who maintains these minutes or notes?
4. Is the record of the deliberations on a particular applicant made available to that applicant?

5. Do you release letters of recommendation where there is no record of a waiver of access and an applicant asks for these letters?

V. Relationship with Counsel

1. Do your admission personnel have access to counsel?

2. Does university counsel approve and sign-off on your admission policies and recruitment materials?

3. Does university counsel participate in the drafting of admissions policies?

4. Does your staff receive regular training from counsel on legal issues?

VI. Selective Annotated Bibliography on Legal Issues in Admissions

[Attached]
UNIVERSITY COUNSEL AND THE LAW SCHOOL ADMISSIONS PROCESS
A Selective Annotated Bibliography

This bibliography focuses on legal issues in admissions with emphasis on the role of university counsel in the admissions process. Other topics covered include the possible liability of admissions personnel for written and oral communication with applicants, and questions of student record keeping and confidentiality. Affirmative action admissions issues are only covered tangentially.

As noted in the title, this bibliography is intended in no way to be comprehensive. The majority of the titles included are articles; but a few books which have proven useful in the research have also been included. A list of relevant cases has been provided at the end of the bibliography. The time period covered by the bibliography is 1969-1992. The materials were selected because of their relative and specific pertinence to the topic and its presentation.

The annotations are summary-oriented. They are intended to assist the reader in determining whether the materials are pertinent to his/her research. No quality judgments are included in the annotations.

The following types of information resources were utilized in preparation of this bibliography: online databases, hardcopy indexing, bibliographies, and periodical literature.

I. Role of University Counsel


The role of the university counsel is more effective when it is tailored to the character of the institution and its particular need for legal services. The author recommends that counsel be familiar with the total scope of university operations and procedures in order that counsel can provide informed advice in the decision making process. This broad role for university legal counsel is especially favored where such involvement will obviate litigation.


While university administration must rely on university counsel for legal advice, they should not delegate to the attorney authority to make administrative decisions for which the president and trustees will be ultimately responsible.

Used with permission of Robert J. Nissenbaum, Director, Law Library, Professor of Law, Loyola Law School.
This annotation reviews the issue of standing in cases challenging professional school minority admissions program. Using Bakke as guidance, courts generally have held that an applicant will have standing if there was a chance for successful admission had he/she not been prohibited from competing for all seats, but that if the applicant has no realistic chance of successful admissions under the school's admission standards, there is no standing.

Generally courts defer to academic judgment regarding decisions to admit or reject applicants to institutions of higher education. However, recent successful challenges to the admissions process, based on contract and due process grounds, have placed limitations on admissions freedom of colleges and universities. This article reviews cases where courts have set legal standards for guiding the judgment of admissions officers. The author also offers a twelve-step review of the admissions process which should assist school officials in avoiding admissions litigation.

The law school admissions process determines only who will have the opportunity to attend law school; it does not determine who will become a lawyer. The author discusses how the law school admissions process impacts on the practice of law by affecting the number of people eligible to practice and how decisions made at the admissions stage will have consequences for the quality of legal services delivered to clients.

The reliance of law schools on mechanical techniques and formulae in the admissions process has taken the place of more traditional values in determining who has the privilege of attending law school. The author believes that each applicant should be judged on a myriad of factors related to the total person plus his or her entire record and not on the basis of a computerized admissions formula. As an alternative to the LSAT exam, the author proposes a pre-admission exam based solely on the subject of ethics.

This article addresses the overall constitutionality of the procedures of the admissions process and the administrative discretion exercised by admissions officers. The author also defines the scope of the constitutional duty owed to applicants and outlines some minimum substantive and procedural standards for the law school admissions process.

Law schools determine the composition of a group that plays an important role in our society. Thus, the author favors a goal-oriented admissions policy which substitutes social accountability for pretended policies of scientific objectivity in selection using LSAT and UC GPA formulae.
This book provides an analysis of the law's role at institutions of higher learning. Among topics discussed are the sources of postsecondary education law, institutional liability for acts of administrators, legal status of students, the admissions process, and student files and records.


In matters involving student admissions, readmissions, awarding of degrees, and academic dismissals, state and federal courts have relied upon the doctrine of academic abstention to refrain from intruding in these traditional academic matters. The courts defer to the special decision making expertise of educators. They will intervene only when decisions have been made in an arbitrary or capricious fashion which constitute a substantial departure from accepted academic norms.


The author discusses what is happening in law school admissions and where it is going in the next decade. The intensity of law school competition for applicants calls for new strategies in recruiting. The author concludes that law school faculty should review the school’s mission in light of what admissions professionals know about how to improve the law school product for the current marketplace.


Admissions officers are often unaware of all facets of their institutions or are simply not sensitized to possible misstatements which they sometimes unwittingly make. These misstatements could legally bind the university. The basic ethical sense of law school admissions personnel must include the notion that the admissions officers' claims should accurately portray the actual characteristics of the university or law school.

### III. Admissions Publications and Legal Liability


The catalog is an important part of the contractual relationship between the university and the student. Actions for breach of contract are often based on misrepresentation in the catalog or on the failure of institutions to honor catalog provisions. University counsel should ensure that members of the university community have sufficient appreciation of the practical implications of the contractual nature of the catalog. The author concludes that while the catalog may no longer be an effective shield from liability, it should not be viewed as a significant consumer sword.


This article details the cases which have successfully challenged postsecondary institutions on breach of contract grounds. Students are generally successful where the college has breached a particular commitment, or where they can show that the institution had failed to follow its own published procedures.

Noting the legal significance of the college catalog, this article provides a historical and theoretical overview of the interpretation of the contract to educate. An extensive discussion of the academic abstention doctrine and its effect on student challenges of university policies and procedures on contract theories.

Note, "A Medical School's Failure to Evaluate Duly Filed Admission Applications by the Criteria It Has Published Gives Rise to An Action For Breach of Contract Maintainable as a Class Action." 47 University of Cincinnati Law Review 309 (1978-79).

This article discusses the analogy courts have found between the admission process and the formation of a contract in consumer transactions prompted by advertisements. The school's brochure is viewed as an invitation to deal. Once the student submits his application an offer is made and the college's acceptance of the application fee (consideration) forms an enforceable contract. Based on this analysis, courts will hold university accountable for following the criteria stated in its published documents.


The university is contractually bound by its published policies and procedures. To avoid misunderstandings and prevent consumer suits the administration should implement procedures and support systems that assure the honoring of the catalog information as well as informing necessary personnel of the binding nature of the catalog and of their responsibility to honor the stated catalog requirements.


It is "black letter law" that a university catalog or bulletin helps to define the contractual nature of the relationship between the university and the student. By taking the precaution of inserting a disclaimer in the catalog stating that the institution reserves the right to make changes in academic regulations and course requirements, an institution can avert student assertions of entitlement to be governed by the precise terms of the catalog when they enrolled.


Once the college catalog served to insulate and protect the institutions of higher education it is now being used against. Courts are relying on the theory of contract law to hold institutions accountable for what is published in the catalogues. This article highlights the types of court challenges in which the college catalogues was at issue and offers some specific recommendation for avoiding such problems.


In order to avoid potential litigation from students who claim that institutional representatives gave them insufficient or erroneous information on which they detrimentally relied, institutions of higher education should publish documents with caveats undercutting the apparent authority of agents and reserving the right to change applicable academic regulations of the university.
IV. Confidentiality and Student Records

Universities can obviate problems of disclosure of confidential information by making it clear to the student before the information is submitted that the university intends to receive it in a non-confidential manner, thereby giving the student the option of withholding any information he/she is unwilling to have disclosed by the university.

This article reviews the history and provisions of the Buckley Amendment, examines the arguments for and against granting a person a right to view his/her letters of recommendations. Based on policy considerations which generally favor granting a right of access, the author concludes that the right of access to letters of recommendations should extend to applicants as well as enrolled students, and should not be subject to waiver. The author also proposes modifications to the Buckley Amendment which would invalidate any waiver requirement.

Curran, Robert, "Student Privacy in the Electronic Era: Legal Perspectives."
The era of electronic record-keeping has spawned increased concerns regarding security of information and privacy and protection against errors, omissions and inaccuracies. This article discusses some of the laws, rules and principles related to student privacy, especially as they relate to the electronic era. Key elements of the Buckley Amendment are detailed and the ethical implications of the use of computerized record-keeping are discussed.

The replacement of traditional paper files with electronic record-keeping technology could conflict with certain aspects of the Buckley Amendment. This article offers suggestions to record managers in higher education on designing systems which protect the privacy and confidentiality of student records as well as complying with the requirements of the Buckley Amendment.

Under the Buckley Amendment "educational record" includes any document that contains information directly relating to a student and is maintained by an educational institution. Using this definition, the department of Education has ruled that students have a right to see comments written about them by admissions officers. Most admissions officers believe that this ruling gives students improper access to the inner workings of the admissions process, as well as affecting the quality of admissions evaluations (the fear being that evaluators will be less than candid).

This article identifies the major issues confronting the administrator or attorney dealing with the Buckley Amendment, indicates how they have been or can be resolved and gives practical advice on dealing with these issues.
V. Selected Cases

A. Admissions Challenges


The plaintiff, an unsuccessful applicant to state-operated law school, challenged the constitutionality of the law school’s minority admission policy. The plaintiff was granted injunctive relief and began his law school classes. The U.S. Supreme Court found the action to be moot and remanded to the state supreme court for reconsideration. The Washington State Supreme Court, reaffirming its original judgment, held that the minority admissions policy of the law school, and the denial of admission to the plaintiff were not unconstitutional.


Doherty v. Rutgers School of Law - Newark, 651 F.2d 893 (3d Cir. 1981).


Henson v. University of Arkansas, 519 F.2d 576 (8th Cir. 1975).

The courts in the four above listed cases have held that an unsuccessful applicant, whose qualifications did not otherwise meet the law school’s minimum level for admission, did not have standing to challenge the school’s minority admission program.

Martin v. Helstad, 699 F.2d 387 (7th Cir. 1983).

On his application for admission to law school the plaintiff omitted any reference to the fact that he was submitting his application from a federal prison. His acceptance to law school was later rescinded. Plaintiff sought an injunction to force the law school to admit. The court held that since the law school specifically asked applicants about prior criminal conduct, the plaintiff’s failure to fully disclose requested facts was a “breach” of his obligations and warranted the negation of any contract that existed.


Respondent challenged his denial of admission to petitioner’s medical school which had regular and special admissions programs. The court ordered the respondent’s admission to medical school and invalidated the petitioner’s special admissions program. The court further concluded that the special admissions program was not the least intrusive means of achieving the compelling state interest of increasing the number of minority doctors.


A prospective student alleged that the college failed to evaluate applications according to its stated admissions criteria. The court held that a contract was created, for the limited purpose of evaluating the application, when the college accepted the application fee from the plaintiff and that the university would be held to its published admissions standards.

Tarka v. Franklin, 891 F.2d 102 (5th Cir. 1989), cert. denied, 110 S.Ct. 1890 (1990).

Upon denial of admission to a graduate program, plaintiff sought access to his entire application file and letters of recommendation under the Family Education Rights & Privacy Act of 1974 (Buckley/Fell Amendment), codified at 20 U.S.C. § 1232g. Based on the legislative history of the Act, the court held that the plaintiff, as a rejected applicant, did not have rights of access to letters of recommendation nor the right to challenge the school’s decision not to admit him.
B. Catalog Challenges

*Abbariao v. Hamline Univ. School of Law*, 258 N.W.2d 108 (Minn. 1977).

*Miller v. Hamline University School of Law*, 601 F.2d 970 (8th Cir. 1979).


In these three cases the courts rejected contract claims by students alleging failure to provide promised tutorial assistance as stated in the catalog. The court held that the schools offered other types of assistance to the students and that the changes were reasonable modifications made in a good faith exercise of educational responsibility.


Plaintiff alleged that university officials assured him that prior coursework taken at another institution would fulfill degree requirements. When notified of additional coursework required to complete degree, plaintiff sued. The court held for the university citing the caveat in the catalog reserving the right to change applicable academic regulation of the university at any time.


Plaintiffs charged that the change in the university program was so major that students' educational needs could not be met and that they had detrimentally relied on the representation in the catalog. The court held that failure to disclose major changes in the educational program as described in the catalog is fraudulent representation.

C. Challenges to Oral Statements Made by University Officials


After enrolling in courses which plaintiff alleged that the admissions director promised would assure her admission to the university's graduate program, the plaintiff challenged admission denial. The court found that the admissions director's alleged promises were undercut by a prominent statement in the university's catalog which made it clear that the admissions committee would make all admissions decisions.


Plaintiff was informed by the dean and another faculty member that he would be recommended for admission. However, based on his application, submitted with poor grades and low entrance exam scores, he was not admitted. The court held that no promise of admission was made; but was told only that admission would be recommended. The concluded that while such a statement could give rise to a subjective expectation of admission, in the absence of institutional policy and procedures to support such a conclusion there the applicant had no objective expectation of admission.


The admissions committee of the state law school advised an applicant that he would be admitted if he completed a course in accounting with a "satisfactory" grade. The applicant completed the course with a grade of "D". The law school refused admission, claiming that the grade was "acceptable" but not "satisfactory". The court held that it was the university which had the opportunity to clearly define the standards of its admissions policy. The court concluded that it was an abuse of discretion and a breach of contract on the part of the law school to deny admission.

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CURRENT LEGAL ISSUES AFFECTING ADMISSIONS PROGRAMS, INCLUDING THE BONA FIDES OF PHYSICAL AND MENTAL CAPACITY REQUIREMENTS; THE "LEARNING DISABLED" APPLICANT; ARE CERTAIN RESOURCES MANDATED BY THE "REASONABLE ACCOMMODATION: EQUIREMENT?"

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Presented at the Stetson University College of Law Conference:

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I. The Statutory and Regulatory Scheme

In analyzing the obligations of colleges and universities with respect to the admission of persons with disabilities, the following statutes and regulations apply.


1. Title II - Public Services.

"Subject to the provisions of this subchapter, 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." § 12132.

2. Title III - Public Accommodations and Services Operated by Private Entities.

"No 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 by any person who owns, leases (or leases to), or operates a place of public accommodation." § 12182.

"The following private entities are considered public accommodations for purposes of this title . . . a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education." § 12181(7)(J).
B. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794:

"No otherwise qualified individual with handicaps . . . shall, solely by reason of his or her handicap, 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."


1. Eligibility criteria - § 36.301.

"A public accommodation shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.

"A public accommodation may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

"A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part."

2. Modifications in policies, practices, or procedures - § 36.302.

"A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to
afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations."

3. Auxiliary aids and services - § 36.303.

"A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense."

D. Title III of the Americans with Disabilities Act: Technical Assistance

Manual, January 24, 1992, Department of Justice:

1. III-1.4000 Examinations and courses.

"Private entities offering examinations or courses covered by title III are subject to the requirements discussed in III-4.6000 of this manual. If the private entity is also a public accommodation or has responsibility for a commercial facility, it would be subject to other applicable title III requirements as well."

2. III-4.6000 and 4.6100 Examinations and courses.

"Any private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes must offer such examinations or courses in a place and manner accessible to persons with disabilities, or offer alternative accessible arrangements for such individuals.

"Examinations covered by this section include examinations for admission to secondary schools, college entrance examinations, examinations for admission to trade or professional schools, and licensing examinations such as bar exams, examinations for medical licenses, or examinations for certified public accountants."
"A private entity offering an examination covered by this section is responsible for selecting and administering the examination in a place and manner that ensures that the examination accurately reflects an individual's aptitude or achievement level or other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure).

"Where necessary, an examiner may be required to provide auxiliary aids or services, unless it can demonstrate that offering a particular auxiliary aid or service would fundamentally alter the examination or result in an undue burden. For individuals with hearing impairments, for example, oral instructions or other aurally delivered materials could be provided through an interpreter, assistive listening device, or other effective method. For individuals with visual impairments, providing examinations and answer sheets on audio tape, in large print or Braille, or providing qualified readers or transcribers to record answers, may be appropriate. Also, some individuals with learning disabilities may need auxiliary aids or services, such as readers, because of problems in perceiving and processing written information."

3. III-1.8100 Rehabilitation Act.

"Title III is intended to provide protection to individuals with disabilities that is at least as great as that provided under Title V of the Rehabilitation Act. Title V includes such provisions as section 504, which covers all the operations of Federal Executive agencies and programs receiving Federal financial assistance. Title III may not be interpreted to provide a lesser degree of protection to individuals with disabilities than is provided under 504."

E. Nondiscrimination on the Basis of Handicap in Programs and Activities

Receiving Federal Financial Assistance, 34 C.F.R. pt. 104, Subpart E - Postsecondary Education (Office for Civil Rights, Education); and 45 C.F.R. pt. 84, Subpart E - Postsecondary Education (Department of Health and Human Services) (identical regulations).
1. These regulations essentially provide the basis for the admissions requirements applicable to colleges and universities, and are discussed below.

2. These regulations are attached as Appendix A.

II. Legal Requirements

A. Admissions and recruitment - 34 C.F.R. § 104.42:

1. Admissions policies may not establish "quotas" which limit the number or proportion of students with disabilities who may be admitted.

2. Universities may not use an admissions test or other admissions criterion for a program that has a disparate impact on persons with disabilities, unless that test or other factor has been validated as a predictor of success for that program and the Assistant Secretary cannot show that there is a different test or factor that would have a less adverse impact that is available.

(a) Prediction may generally be based on first year grades, but the institution must also conduct periodic reviews to assess whether the tests or other criteria are measuring overall success in the program.

3. Entrance examinations must be selected and administered so as to best ensure that, when taken by a person with a disability, the test is measuring whatever aptitude the test purports to measure, and not the effects of the disability.

4. A university may establish reasonable physical qualifications for admission to a clinical training program. Southeastern Community College v. Davis, 442 U.S. 397 (1979) (admission of a severely hearing-impaired person to a nursing program
was not required since it would have necessitated either the elimination of the clinical portion of the program or continuous individual faculty supervision). Admissions decisions must, however, be grounded upon the applicant's actual ability to meet the standards for admission, even where those standards are subjective. Pushkin v. Regents of University of Colorado, 658 F.2d 1372 (10th Cir. 1981) (university violated the Rehabilitation Act by refusing to admit an applicant with multiple sclerosis into a psychiatric residency program solely on the basis of his handicap, where evidence showed that the applicant met the qualifications of intelligence, emotional stability, and physical stability).

5. Specific Examples.

(a) Medical school did not discriminate by denying admission to a quadriplegic applicant where the applicant was unable to perform hands-on activity required by clinical aspects of the program and this requirement could not be changed without substantially modifying the program. Thomas Jefferson University (PA), 1 NDLR ¶ 229 (OCR 1990).

(b) Applicant diagnosed as suffering from mental depression was not unlawfully denied admission to college where, although applicant had strong high school record, the applicant's most recent college experience was at two community colleges, where she had failed to complete 4 of 6 courses, and where applicant stated in her application that she "goes inside her mind . . . and creates her own version of reality" suggesting that she would be unable to interact with the rest of the college community. Mills College (CA), 2 NDLR ¶ 58 (OCR 1991).
(c) Law school did not discriminate against applicant with a learning disability by denying him admission based on his LSAT scores, even though school knew the LSAT's were taken under "non-standard" conditions, since there was no evidence that the school applied any different standard to this applicant based on the testing conditions. University of Michigan, 2 NDLR ¶ 302 (OCR 1991).

(d) Student with learning disability (discrepancy between verbal and visual skills and disability in verbal expressive areas) was not denied admission as a result of disability but because student failed to complete the application process by scheduling a personal interview. Kent State University (OH), 3 NDLR ¶ 132 (OCR 1992).

(e) Medical school did not discriminate in denying readmission to applicant who had experienced serious psychiatric difficulties of a self-destructive and violent nature where the university reasonably concluded that there was a significant risk that the disorder would recur. Doe v. New York University, 666 F.2d 761 (2d Cir. 1981).

B. Preadmission Inquiries - 34 C.F.R. § 104.42 (b) (4) and (c):

1. A university may not make preadmission inquiries as to whether an applicant has a disability. After admission, such an inquiry is permissible, on a confidential basis, in order to assess the need for reasonable accommodation.

2. The only exception to this rule is where a university is taking remedial action to address the effects of past discrimination. The inquiry, however, must be
voluntary, be kept confidential, and the university must make clear that the purpose of the question is solely for remediation.

3. Specific Examples.

(a) Law school discriminated by denying the application of a prospective student who responded affirmatively to the question whether the applicant had any history of mental illness. Law school improperly asked the question, and then, having received an affirmative answer, subjected the application to heightened scrutiny. Thomas M. Cooley Law School (MI), 2 NDLR ¶ 130 (OCR 1991).

(b) Seminary discriminated by including on its application forms questions regarding physical and mental disorders and illnesses. Fuller Theological Seminary (CA), 2 NDLR ¶ 91 (OCR 1991).

C. Treatment of students - 34 C.F.R. § 104.43:

1. Universities must ensure that all programs - academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, and extracurricular activities - are provided on a nondiscriminatory basis.

2. Students with disabilities may not be excluded from any course, course of study, or other educational program or activity, nor may the university effectively exclude these students by imposing rules that make it impossible for them to participate fully, e.g., banning tape recorders or excluding service animals.

D. Academic adjustments - 34 C.F.R. § 104.44:
1. Universities are required to make such reasonable modifications to their academic requirements as are necessary to prevent discrimination. For example, universities must consider, where appropriate, adjusting the time permitted to finish degree requirements, modifying testing procedures, and substituting specific courses for others where possible.

2. Auxiliary aids may be required for students with impaired sensory, manual, or speaking impairments. These aids may include, taped texts, interpreters, readers in the library, and classroom equipment for students with manual impairments. Universities need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

3. A financial needs test may not be used in determining eligibility for auxiliary aids. In addition, auxiliary aids must be provided for students in non-degree programs. United States v. Board of Trustees for University of Alabama, 908 F.2d 740 (11th Cir. 1990).

4. Specific Examples.

(a) College did not discriminate against a student with a visual impairment when it denied a request to eliminate a term paper requirement in a library skills course, where the term paper was an essential element of the course, and the instructor had made other adjustments to the program including eliminating 3 of 9 required assignments, offering to provide assistance in writing the paper, and providing enlarged print materials. Griffin College (WA), 2 NDLR ¶ 187 (OCR 1991).
(b) College satisfied its obligations to a student with a learning
disability (dyslexia) as soon as they were made aware of the disability by providing
untimed tests, reduction in the number of required papers, taping class sessions, and
provision of textbook cassettes. The college further provided financial aid assistance,
tutors, and a tape recorder. *Fort Lewis College* (CO), 2 NDLR ¶ 198 (OCR 1991).

(c) Technical college did not discriminate against student with a
learning disability by refusing to substitute a different course for the course entitled
"Written Communication" where this course had been approved by the state and where
the college offered tutoring assistance to help the student complete the course.
*Gateway Technical College* (WI), 2 NDLR ¶ 142 (OCR 1991).

(d) College failed to meet its obligations to a student with a
learning disability by offering assistance through a fee-for-service program, and requiring
the student to undergo costly diagnostic testing as a prerequisite for providing any
services. In addition, school failed to provide taped texts in a timely manner and did
not provide necessary typing assistance. *University of Arizona*, 2 NDLR ¶ 285 (OCR

(e) University did not discriminate when it refused to lower its
standards for passing a course, or to redesign the course at the request of a student with
dyslexia where the university could show that the standards and course design were
justified by the university's desire to produce qualified graduates. *University of
Osteopathic Medicine and Health Sciences* (IA), 1 NDLR ¶ 335 (OCR 1991).
(f) Law school did not discriminate against student with orthopaedic and neurological problems when it dropped the student from the rolls for failing to meet academic requirements where the school had accommodated the student by providing rest time between exams, additional time to take exams, and assistance with studying and taking exams. The student's request for permission to assume a part-time schedule and to take exams at home were not reasonable because they would require substantial changes in the law center's programs. McGregor v. Louisiana State University Board of Supervisors, 3 NDLR ¶ 70 (E.D. La. 1992).

(g) School of optometry did not discriminate by denying a degree to a student suffering from retinitis pigmentosa whose disability, prevented him from completing the pathology clinical proficiency requirement. School's refusal to waive the clinical proficiency requirement was not a failure to reasonably accommodate the student since the requirement was "reasonably necessary to proper use of the degree conferred." Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988) cert. denied, 493 U.S. 810 (1989).

(h) University medical school was not entitled to summary judgment, as a matter of law, that there was no reasonable means to accommodate dyslexic medical student in its program. Wynne v. Tufts University School of Medicine, 932 F.2d 19 (1st Cir. 1991).

E. Housing - 34 C.F.R. § 104.45:

1. Universities that provide housing must provide comparable and convenient housing to students with disabilities at comparable costs.
2. Choice of living accommodations for students with disabilities must be generally comparable to choices available to other students.

3. Specific Example.
   
   (a) University discriminated by denying dormitory housing to a paraplegic student, where no other university student was denied housing. Ferris State University (MI), 3 NDLR ¶ 131 (OCR 1992).

F. Athletics - 34 C.F.R. § 104.47 (a):

1. Students with disabilities must be afforded equal opportunity with other students to participate in physical education and other athletic programs.

2. Separate programs may be provided for students with disabilities only when it is not possible to provide an integrated program and only if qualified students with disabilities are given the opportunity to compete for teams or programs that are not separate.

G. Counseling and placement services - 34 C.F.R. § 104.47 (b):

1. Counseling services must be provided without discrimination.

2. Students with disabilities may not be counseled toward more restrictive career objectives than others. Counselors may, however, provide factual information about licensing and certification requirements that may present obstacles to disabled persons in particular careers.

H. Social organizations - 34 C.F.R. § 104.47 (c):
1. If an university provides significant support to fraternities or sororities, then the university has an obligation to ensure that the membership practices of these organizations are non-discriminatory.

III. Enforcement

A. Section 12188 of the ADA provides that persons who believe that they have been subjected to discrimination may file suit in the federal courts to seek redress. This section further provides that the Attorney General shall investigate violations of the Act and undertake periodic compliance reviews. Persons who bring suit and prevail may be awarded reasonable attorneys fees and costs.

B. Under § 504, a person who believes he or she has been discriminated against may file a complaint, not later than 180 days after the alleged discrimination, with the Office of Civil Rights, Department of Education which has the authority to investigate the complaint. The person may also file suit in federal court. See Rothschild v. Grottenthaler, 907 F.2d 286 (2d Cir. 1990); Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), aff'd mem., 732 F.2d 146 (3d Cir. 1984), cert. denied, 469 U.S. 1188 (1985), Pushkin v. Regents of the University of Colorado, supra, 658 F.2d 1372 (10th Cir. 1981). See also Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028 (1992), providing that a plaintiff may be awarded damages as well as injunctive relief under Title IX, therefore indicating that comparable relief is available under § 504.
IV. Bibliography


February 15, 1993
§ 104.37 Nonacademic services.

(a) General. (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) Counseling services. A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) Physical education and athletics. (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 104.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§ 104.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in § 104.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§ 104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of §§ 104.34, 104.37, and 104.38.

Subpart E—Postsecondary Education

§ 104.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational edu-
cated programs and activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 104.42 Admissions and recruitment.

(a) General. Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) Admissions. In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handi-

capped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) Preadmission inquiry exception. When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 104.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 104.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, Provided, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) Validity studies. For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 104.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or ac-
activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 104.44 Academic adjustments.

(a) Academic requirements. A recipient to which this subpart applies 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 within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) Other rules. A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) Course examinations. In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall 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 (except where such skills are the factors that the test purports to measure).

(d) Auxiliary aids. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, 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.

(2) 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.

§ 104.45 Housing.

(a) Housing provided by the recipient. A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) Other housing. A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does

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not result in discrimination on the basis of handicap.

§ 104.46 Financial and employment assistance to students.

(a) Provision of financial assistance. (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) Assistance in making available outside employment. A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate subpart B if they were provided by the recipient.

(c) Employment of students by recipients. A recipient that employs any of its students may not do so in a manner that violates subpart B.

§ 104.47 Nonacademic services.

(a) Physical education and athletics. (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) Counseling and placement services. A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) Social organizations. A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

Subpart F—Health, Welfare, and Social Services

§ 104.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 104.52 Health, welfare, and other social services.

(a) General. In providing health, welfare, or other social services or ben-