Americans with Disabilities Act and Independent Schools

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The Americans with Disabilities Act and Independent Schools 2011

I. An Introduction to Disability Law as it Applies to Independent Schools

NAIS receives many disability related questions every year. These questions address issues relating to students, employees, parents, and facilities. In response to the pervasive interest of NAIS schools, this publication is designed as a short primer on the most applicable federal disability law, the Americans with Disabilities Act (ADA). This piece should not be relied upon as legal advice as such advice requires proper attention to fact specific detail by counsel. Schools are encouraged to consult with an attorney when faced with a particular scenario.

NAIS feels that it is important for schools to be aware of the legal obligations schools owe to individuals with disabilities and encourages its schools to reach beyond the basic obligations and reach out to disabled students. This publication covers only the federal obligations in this area, but is a good start for schools searching for answers. NAIS has an institutional commitment to diversity and believes that the diversity opportunities presented by disabled students and employees are boundless.

A. The Three Major Statutory Provisions

There are three major federal statutory provisions that outline the legal rights of disabled students in the United States. The first statute is most commonly known as Section 504; it is a part of the Rehabilitation Act of 1973. The second statute is the Individuals with Disabilities Education Act (IDEA) passed in 1975, and most recently amended in 2004. The IDEA applies to independent schools only in specific instances and will not be part of this analysis. The final statute that addresses disability concerns is the Americans with Disabilities Act of 1990 (ADA), amended most recently in 2008.

This document is designed to provide general insight into the workings of the ADA. Unlike Section 504 and IDEA, the ADA applies to a majority of NAIS schools. Section 504 only applies when a school receives federal financial assistance. However, for schools that must only follow Section 504, this piece is somewhat instructive because ADA case law has relied upon earlier Section 504 cases and regulations. Schools that are required to follow Section 504 should be aware that there are other obligations imposed by this statute.[1]

[1] A note on federal funding: Title I and Title III of the Americans with Disabilities Act ("ADA") apply to independent schools, regardless of whether the independent school receives federal funding. However, independent schools that do not receive federal funding are not subject to the Individuals with Disabilities Education Act ("IDEA") or § 504 of the Rehabilitation Act of 1973 ("Section 504").

B. The ADA

Only Titles I and III of the ADA apply to independent schools.[2] Title I applies to employer-employee issues, and Title III applies to student and other public accommodation issues. Although Title I applies to most independent school employers, Title III does not. Specifically, Title III does not apply to religious schools.[3] Additionally, Title I does not apply as broadly to religious independent schools as to non-religious independent schools, because courts will not become involved in religious doctrinal issues.

The ADA Amendments Act of 2008 ("ADAAA"), which became effective on January 1, 2009, was enacted to overturn a number of Supreme Court and other court decisions that, in the view of Congress, interpreted the ADA too narrowly. Equal Employment Opportunity Commission ("EEOC") regulations issued under Title I of the ADAAA became effective May 24, 2011. New U.S. Department of Justice ("DOJ") regulations issued under Title III became effective March 15, 2011. Importantly, the DOJ regulations do not incorporate the legal interpretations promulgated in the ADAAA, because DOJ, appaently through administrative oversight, failed to modify its proposed regulations to take the ADAAA into account. Thus, for example, DOJ regulations concerning the definition of "disability" under Title III have not changed, despite the changes in the ADAAA that are generally applicable to all of the Titles of the ADA, including Title III. Presumably, the DOJ regulations that fail to comport with the ADAAA will be modified at some point. In the meantime, with respect to Title III, the article will recommend compliance with the statutory provisions where DOJ's regulations under Title III are in conflict with the statute, and will rely upon EEOC's regulations under Title I as a guide. Please keep in mind, however, that EEOC regulations are not binding on DOJ.

At this time, there are very few cases decided under the ADAAA, and courts generally hold that the ADAAA is not retroactive in its application. Due to the significant differences between the law pre- and post-ADAAA concerning numerous issues, independent schools need to be alert to the possibility that older cases may not remain viable and binding as precedent. This article will highlight key changes in the law.

C. The Structure of this Article

This publication is structured to provide information in three parts. The first section is devoted to disabled students and the school's obligations to them. It covers admissions issues and the school's obligation to these students after they

[2] Title II of the ADA concerns public entities, and is thus not applicable to independent schools.

[3] *See* 42 U.S.C. § 12187. *See also Marshall v. Sisters of Holy Family of Nazareth*, 399 F. Supp. 2d 597 (E.D. Pa. 2005); *Doe v. Abington Friends School*, 2007 WL 1489498 (E.D. Pa. May 15, 2007) (setting forth factors to determine applicability of religious organization exemption).

have been admitted. The second section is devoted entirely to employment issues. This section covers both hiring and general employment questions. Finally, the article addresses physical plant concerns. This section discusses what sort of physical accommodations must be made in both new construction and older buildings.

This article does not address areas of state law that often overlap with federal issues. Schools should work with their attorneys to ensure that all of these areas are addressed by school policies, procedures, and practices.

II. The ADA and Students

A. The ADA as it Applies to Students Generally

As an initial matter, it is helpful to get a feeling for the overall issues addressed by the ADA. Under the ADA, independent schools may not discriminate against any student with a disability by excluding the student from fully participating in any school program or activity. The ADA protects otherwise qualified disabled students from any of the following forms of discrimination by schools:

- Using eligibility criteria that tend to "screen out" otherwise qualified individual students/applicants with disabilities or classes of students/applicants with disabilities from the full and equal enjoyment of school programs[4], unless such criteria are necessary for the provision of the school programs offered;

- Failing to ensure that no otherwise qualified student/applicant with a disability is excluded, denied services, segregated or otherwise treated differently than other students/applicants because of the absence of auxiliary aids and services, unless the school can demonstrate that offering such aids or services would fundamentally alter the nature of the school programs being offered or would result in an undue burden;

- Failing to make "reasonable modifications" in policies, practices, and procedures that are necessary in order for otherwise qualified students/applicants to have equal access to school programs, unless the school can demonstrate that making such modifications would fundamentally alter the nature of the school programs;

- Failing to remove architectural barriers, structural communication barriers in existing facilities, and transportation barriers in existing vehicles used by the school for transporting students where such removal is "readily achievable;"

[4] The term "school programs" refers to all privileges, advantages and accommodations offered by independent schools.

- If the removal of the physical barriers above is not "readily achievable," failing to make such school programs available through alternative methods, provided such methods are "readily achievable."[5]

In addition, the ADA prohibits retaliation against persons engaged in activities that are protected under the ADA.[6] Specifically, the ADA prohibits: (1) discrimination against or adverse treatment of anyone who opposes any act or practice that is unlawful under the ADA; (2) discrimination against or adverse treatment of anyone who makes a charge, assists, or participates in any investigation related to an ADA claim; or (3) threatening, interfering, intimidating, or coercing anyone from invoking rights provided under the ADA.

B. Who Qualifies for Protections Under ADA?

An understanding of the ADA is reached only through knowing the definitions as they are provided in the statute and the regulations. As noted above, however, it is important to keep in mind that DOJ's new regulations failed to incorporate changes made under the ADAAA. The EEOC regulations under Title I, which will be referenced in this section to aid understanding, are not binding on DOJ interpretations under Title III.

In general, only a student with a disability within the meaning of the ADA and who is otherwise qualified to participate in the school's programs and activities, has legal rights under this statute.[7] This statement clearly leads to the question of who falls into the category of a person with a disability, and how is the person "otherwise qualified." The answers to these questions have changed significantly under the ADAAA.

1. Definition of "Disability" Under ADA

A student must meet at least one of the following three definitions to qualify as a person with a disability under the ADA.

(a) The student must, in fact, have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; or

(b) The student must have "a record of such an impairment"; or

(c) The student must be "regarded as having such an impairment."[8]

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[5] *See* 42 U.S.C. § 12182 (b)(2)(A)(i)-(v).

[6] *See* 42 U.S.C. § 12203.

[7] One significant exception to this statement is that anyone who engages in protected activity and, as a result, is subject to retaliation, may have legal rights under the anti-retaliation provisions of the ADA.

[8] *See* 42 U.S.C. § 12102. *See also* 29 C.F.R. §1630.2(g).

Many of the students at issue will likely fall under the first of these definitions, particularly after the ADAAA. Now, students with disabilities include those with either one of the two following categories of impairments: (i) visual, ambulatory, or other significant, and apparent, impairments, or (ii) impairments that limit major bodily functions, such as impairments that limit one's immune system, neurological functioning, circulatory system, or the way in which normal cells grow.

The second category of individuals protected by the statute are those with a "record of," or a history of, a physical or mental impairment that substantially limited one or more major life activities. Students meeting this definition are those who previously had the requisite impairment, but may or may not have such an impairment currently.

Finally, most of the students will be able to assert a claim under the third category - - "regarded as having such an impairment" - - although a student cannot use this theory as the basis to request accommodations. Under the ADA, a "regarded as" claim previously required a perception the student had an impairment that substantially limited a major life activity. Now, under the ADAAA, a "regarded as" claim requires simply an actual or perceived physical or mental impairment; there is no requirement the impairment be perceived to limit a major life activity. Indeed, the only limitation is that the impairment cannot be transitory (duration of 6 months or less) and minor.[9] [10] For example, if a student has a seriously broken leg, which does not heal normally and, in fact, does not heal within six months, this student could properly claim discrimination on the ground he/she was regarded as disabled. Notably, the EEOC's expectation is that, unless an individual is seeking reasonable accommodations, cases will be brought and analyzed under the "regarded as" disabled category.[11]

2. Examples of ADA-Covered Impairments:

The determination whether a person qualifies as a person with a disability under ADA must be made on a case-by-case basis.[12] However, since the ADAAA, "[t]he question of whether an individual meets the definition of disability ... should not demand extensive analysis."[13] Indeed, the regulations set forth numerous impairments that, "in virtually all cases,"

[9] 42 U.S.C. §12102(3).

[10] Concerning the "regarded as" claim, schools often wonder whether providing accommodation without first establishing that the student actually has a disability will result in a "regarded as" claim. Before the ADAAA, the answer was generally "no." *See, e.g., Marlon v. Western New England College*, 124 Fed. Appx. 15, 2005 WL 43997 (1st Cir. Jan. 11, 2005). Because it is now so much easier to bring a "regarded as" claim, providing an accommodation may have little effect on the legal analysis.

[11] *See* Preamble to 29 C.F.R. §1630.2(g), 76 Fed. Reg. 16980 (March 25, 2011).

[12] *See* 29 C.F.R. §1630.2(j)(1)(iv).

[13] *See* 29 C.F.R. §1630.1(c)(4).

will constitute disabilities. Examples of physical or mental impairments that, in virtually all cases, will substantially limit a person in some major life activity include:

- orthopedic, visual, speech, and hearing impairments;
- muscular dystrophy;
- multiple sclerosis;
- cancer;
- diabetes, intellectual disability, autism, cerebral palsy, epilepsy, HIV infection, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.[14]

Although the ADA protects alcoholics and former or recovering drug addicts, it does not protect individuals currently using illegal drugs.[15] The ADA does protect alcoholics, but it does not require that the school tolerate alcohol use by a minor. The ADA does require that the school makes reasonable accommodations for the student to get therapy or other treatment as necessary. The ADA excludes homosexuality and bisexuality as a "physical or mental impairment."[16] Similarly, height, weight or muscle tone that is within "normal" range and not the result of a physiological disorder does not constitute an impairment.[17]

3. What Constitutes a Substantial Limitation on a Major Life Activity?

A student may qualify for protections (including accommodations) under the "actual disability" prong of the ADA if the student has an impairment that substantially limits the student in some major life activity.[18] While existence of an impairment, without demonstrating that the impairment substantially limits a major life activity, does not establish the existence of an actual disability, this standard is no longer difficult to meet.

As indicated above, the ADAAA changed the definition of "major life activities" by explicitly identifying numerous activities and bodily functions that qualify as such activities. Thus, "major life activities" include, as before, functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and

[14] *See* 29 C.F.R. §1630.2(j).

[15] *See* 42 U.S.C. § 12114; 28 C.F.R. §§ 36.104 AND 36.209.

[16] *See* 28 C.F.R. § 36.104.

[17] *See* Appendix to 29 C.F.R. Part 1630, 76 Fed. Reg. 17007 (March 25, 2011).

[18] Note that the student will also qualify for protection from discrimination, but not accommodations, if he/she has an actual or perceived physical or mental impairment that is not transitory and minor.

working.[19] They also include concentrating, thinking, and communicating.[20] And, now, they include major bodily functions, such as functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[21] Major life activities do not include those activities that, although important to the individual, are not significant within the meaning of the ADA.[22] Accordingly, leisure or recreational activities such as gardening, golfing and shopping are not deemed "major life activities."[23]

The determination whether a student's impairment substantially limits a major life activity must be made by reference to what are called "rules of construction." These rules are set out in the statute, and the EEOC has elaborated on the rules in its regulations under Title I.

Those rules are :

(1) the term "substantially limits" is contrued broadly, in favor of expansive coverage;[24]

(2) the term "substantially limits" is interpreted consistently with the findings and purposes of the ADAAA;[25]

(3) an impairment need only substantially limit one major life activity to be considered a disability;[26]

(4) an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;[27] and

(5) whether an impairment substantially limits a major life activity is assessed without regard to ameliorative effects of mitigating

[19] 42 U.S.C. §12102(2).

[20] *Id*.

[21] 42 U.S.C. §12102(2)(B).

[22] *See Amir v. St. Louis Univ.*, 184F.3d 1017, 1027 (8th Cir. 1999).

[23] *See Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 643 (2d Cir. 1998).

[24] 42 U.S.C.§12102(4)(A). *See also Franchi v. New Hampton School*, 656 F. Supp. 2d 252 (D.N.H. 2009) (noting that the ADAAA expresses Congress's original intent for the ADA; concluding that parent states a claim for disability discrimination where school dismissed student due to her eating disorder, since eating disorder required a careful watch over food intake to protect against potentially dangerous weight loss, which thus substantially limited student's major life activity of eating).

[25] 42 U.S.C. §12102(4)(B). The EEOC's regulations under Title I provide additional rules of construction on this point: (a) the impairment need not prevent or severely restrict a major activity, its limitation must be compared to "most people in the general population," and this comparison generally need not require scientific, medical, or statistical analysis; (b) the assessment whether a disability exists should not require extensive analysis; (c) the standards should be easier to meet than under pre-ADAAA law; and (d) an impairment can be substantially limiting even if it lasts fewer than six months. 29 C.F.R. §1630.2(j)(1).

[26] 42 U.S.C. §12102(4)(C).

[27] 42 U.S.C. § 12102(4)(D).

measures (such as medication, reasonable accommodations, or assistive technology).[28]

All of the changes reflected in the ADAAA and its implementing regulations specifically overturn court decisions; thus, schools should carefully consider whether any pre-ADAAA court decision has been overruled by the ADAAA.[29]

Learning disabilities. In enacting the ADAAA, Congress specifically expressed disagreement with a number of court rulings in which students with learning disabilities had been deemed not covered under the ADA due to their general academic success when compared with the general population.[30] Indeed, a Congressional Committee specifically stated, "it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking."[31] The interaction of the impairment with the "substantially limited" requirement, then, will be associated with the neurological impairment of the general population, instead of, for example, the generalized reading ability of the general population.

While this is an area where DOJ did not incorporate the ADAAA in its regulations, the EEOC has published regulations under Title I that suggest the proper approach under Title III. Specifically, these regulations state that, in appropriate cases, it may be useful to look at the conditions under which the individual performs the major life activity, the manner in which the individual performs the activity, and the duration of time it takes the individual to perform the activity. Thus, one should look at the difficulty, effort or time an activity takes, or the way in which an impairment affects the operation of a major bodily function. The focus "is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve."[32] The regulations expressly state that "someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population."[33]

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[28] 42 U.S.C. § 12102(4)(E). Ordinary eyeglasses and contact lenses are, however, not deemed "mitigating measures" and are, therefore, considered in the analysis. 42 U.S.C. §12102(4)(E).

[29] Most cases as of the date of this article are still being decided under pre-ADAAA rules. This is because the courts apply the law in effect at the time of the alleged discriminatory conduct, and it takes a long time for a case to reach resolution.

[30] H.R. 110-730, pp. 10-11 (June 23, 2008).

[31] *Id*., at p. 10.

[32] 29 C.F.R. §1630.2(j)(4).

[33] *Id*.

In the Appendix to the new regulations, EEOC quotes extensively from the Congressional Committee discussing the ADAAA, highlighting the changed approach to individuals with learning disabilities: "For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g., dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow -- throughout life. The Committee expects that individuals with specific learning disabilities that substantially limit a major life activity will be better protected under the amended Act."[34]

This new approach to assessing whether an individual with a learning disability has a disability within the meaning of the ADA, particularly when coupled with the directive to assess the impairment in its unmitigated state, will likely lead to many more students with learning disabilities being protected under the law. While case law has not yet developed on this point, schools should follow this area closely.

4. Necessity That Student Be Otherwise Qualified

Finally, assuming the student has an impairment that substantially limits a major life activity, the student must still be qualified for the program or activity (with or without accommodation). A disabled student is not, solely by virtue of having a disability, entitled to admission to an independent school or to participate in any other program or activity of the school. Rather, the student must satisfy all the essential qualifications for participation in any school program or activity that a non-disabled student must satisfy. The ADA prohibits discriminatory exclusion of an otherwise qualified student who, in spite of his disability, is qualified to participate in the school program or activity.[35]

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[34] Appendix to 29 C.F.R. Part 1630, 76 Fed. Reg. 17013 (March 25, 2011).

[35] Title III of ADA does not use the "qualified individual" language that is used in Titles I and II of ADA or the "otherwise qualified" language of the Rehabilitation Act of 1973. Instead, Title III states that "[n]o individual shall be discriminated against on the basis of a disability in the full and equal enjoyment … of any place of public accommodation." *See* 42 U.S.C. § 12182(a). However, courts interpreting Title III generally hold that the determination of whether a requested modification is "reasonable" or would result in an "undue burden" implicitly requires a determination of whether the individual is otherwise qualified. *See Bercovitch v. Baldwin Sch.*, 133 F.3d 141, 154 (1st Cir. 1998); *Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113, 121-22 (3rd Cir. 1998). Other courts compare the Title III inquiry as to whether an individual was "discriminated against on the basis of disability" to the "otherwise qualified" and "by reason of" analysis that is applied to a Title II analysis. *See Bowers v. Nat'l Collegiate Athletic Ass'n,* 118 F. Supp. 2d 494, 517 (D.N.J. 2000). Congress has also instructed that ADA be interpreted in a manner consistent with the Rehabilitation Act, which explicitly requires that the individual be "otherwise qualified" for the program or activity. *See* 42 U.S.C. § 12117(b).

Example: A student who is blind signs up to take a driver's education class. The student satisfies all other qualifications to take the class. The school is not required to enroll the student because the ability to see is an essential qualification for the driver's education course.

C. Practical Considerations in Determining Whether a Student Qualifies as a Person with a Disability Under ADA

1. Students with Hearing, Sight and Mobility Impairments

A student with a hearing, sight or mobility impairment will almost always qualify as a disabled individual under the ADAAA, as long as it is limiting when compared to most people, and will certainly qualify under the "regarded as" prong of the ADAAA (unless the impairment is transitory and minor).[36] For purposes of providing accommodations, however, the student must have an actual disability or a record of a disability in order to be entitled to accommodations. Finally, and as discussed more fully below, schools may consider whether a requested accommodation would fundamentally alter a school program or result in an undue burden.[37]

2. ADD, ADHD and Other Learning Impairments

Under the new definitions of the ADAAA, it is quite likely that an individual with Attention Deficit Disorder ("ADD") or Attention Deficit Hyperactivity Disorder ("ADHD") is a disabled individual under the ADA. More generally, and as noted above, learning disabilities will generally qualify as disabilities under the new ADA.[38]

Accommodations for a student with a mental disability would include offering different testing formats, different testing settings, and additional time to complete tests.

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[36] *Rumbin v. Ass'n of Amer. Medical Colleges*, 2011 WL 1085618 (D. Conn. March 21, 2011) (claim of "convergence insufficiency" that caused difficulty seeing and reading not an actual disability where evidence showed plaintiff's difficulties with reading were in the normal range; thus, no reasonable accommodation was required).

[37] 42 U.S.C. §12182(2)(A).

[38] *Cf. Underwood v. LaSalle University*, 2007 WL 4245737 (E.D. Pa. Dec. 3, 2007) (court rejects claim that "use of Ebonics" constitutes a disability, noting that use of Ebonics "at most makes [the student] as disabled as anyone in the United States for whom English is a second language, none of whom would be considered 'disabled'").

3. HIV/AIDS, Hepatitis, and Direct Threat

Students with HIV/AIDS disease (whether symptomatic or asymptomatic) generally qualify as disabled under the ADA.[39] Diseases such as hepatitis or other contagious diseases qualify as "impairments," but the determination whether they are "disabilities" depends on whether, based on an individualized analysis, they substantially limit a major life activity. Independent schools may only deny participation/benefits to disabled students (if they are otherwise qualified) if they, by participating in school programs or activities, pose a direct threat to the health or safety of others.[40] "Direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures or by the provision of auxiliary aids or services."[41]

In determining whether a student poses a direct threat, schools should balance the following factors based on reasonable judgment, relying on either on current medical evidence or "on the best available objective evidence:"[42]

1. the nature of the risk (how the disease is transmitted);
2. the duration of the risk (how long the carrier is infectious);
3. the severity of the risk (the potential harm to third parties); and
4. the probabilities that the disease will be transmitted and will cause varying degrees of harm.[43]

Because of the potential health risks posed by students with communicable diseases, school employees who "need to know" of the risk and methods for addressing the risks must be informed of the risk and implications for the school setting to protect the health and safety of all involved.

Rarely, if ever, would an HIV-infected student pose a direct threat to fellow students unless the student were to engage in an activity in which bodily fluids were exchanged. Speculation about some remote possibility of infecting other students at school will not allow exclusion of an HIV-infected student.[44] However, a school presumably could, consistent with

[39] *See Bragdon v. Abbott,* 524 U.S. 624 (1998).

[40] *See* 42 U.S.C. § 12182(b)(3).

[41] 42 U.S.C. § 12182(b)(3).

[42] *See Breece v. Alliance Tractor-Trailer Training II, Inc.,* 824 F. Supp. 576, 580 (E.D. Va. 1993); *see also* 28 C.F.R. § 36.208(c).

[43] *See School Board v. Arline,* 480 U.S. 273, 288 (1987).

[44] *See, e.g., Doe v. Deer Mountain Day Camp, Inc.*, 2010 WL 181373 (S.D.N.Y. 2010) (camp's refusal to admit minor with HIV based on "direct threat" was due to unsubstantiated fear, lacked any objective reasonableness, and violated the ADA; court notes camp improperly deferred to one physician's opinion without assessing the objective

the ADA, exclude a student infected with an air-borne disease or condition (e.g., tuberculosis) under the direct threat analysis.

4. Temporary Impairments

A student may be disabled under the ADA based on an existing disability, a record of a disability, or being regarded as having a disability. Under the new definitions of the ADAAA, being regarded as having a disability is a claim one may bring based solely on having a physical or mental impairment. However, such impairment cannot be "transitory and minor."[45] "Transitory," for purposes of the "regarded as" definition, means an impairment with an actual or expected duration of six months or less.[46]

For purposes of the discrimination component of the ADA, however, it is likely that the six month minimum found in the "regarded as" definition does not apply. Stated another way, an impairment can still qualify as a disability under the "actual" or "record of" prongs even if it lasts or is expected to last fewer than six months, as long as it is not minor and is substantially limiting.[47] Nonetheless, temporary, non-chronic impairments of very short duration are usually not disabilities under ADA,[48] and likely will still not be disabilities under the ADAAA. For example, broken bones, sprained joints, sore muscles, and temporary infectious diseases (e.g., chicken pox) are generally not "disabilities" under ADA.[49]

D. Responding to Student Requests for Accommodations[50]

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reasonableness of his opinion, and pointed out that the physician had not engaged in an individualized inquiry, and his opinion was not "supported by objective scientific and medical evidence").

[45] 42 U.S.C. §12102(3) (emphasis supplied).

[46] *Id*.

[47] *See* 29 C.F.R. §1630.2(j).

[48] *See McGuire v. Dobbs Intern. Services, Inc.*, 232 F.3d 895 (9th Cir. 2000) (page citations unavailable); *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996); *McDonald v. Pennsylvania Dep't of Pub. Welfare*, 62 F.3d 92, 95 (3rd Cir. 1995).

[49] *McGuire*, 232 F.3d 895; *Sanders*, 91 F.3d at 1354; *McDonald*, 62 F.3d at 95.

[50] As a technical matter, the term "accommodation" is used in Title I of the ADA, relating to "reasonable accommodations" provided to individuals with disabilities in the employment setting. The statutory language of Title III does not require "reasonable accommodations." Instead, Title III requires a public accommodation to provide "reasonable modifications" or "auxiliary aids and services," as well as to remove architectural and other barriers. DOJ regulations under Title III do, however, refer to accommodations, as well as to modifications and auxiliary aids. *See* 28 C.F.R. §36.309. To simplify the article, therefore, the term "accommodation" is used loosely to cover all actions a school may need to take for an individual with a disability.

The ADA ensures the right of any otherwise qualified disabled student to participate in any school program or activity. To facilitate a disabled student's participation, a school has an affirmative legal duty to make necessary and reasonable modifications to programs to accommodate the needs of disabled students.[51]

The ADA requires three inquiries to determine whether a requested modification to a policy, practice or procedure is required: (1) whether the requested modification is "reasonable;" (2) whether the modification is "necessary" to enable the disabled student to participate; and (3) whether it would "fundamentally alter the nature of the school or cause undue burden to the school."[52] Determining whether a requested modification is appropriate involves the definition of a couple of key terms. The following sections discuss what is meant by a "fundamental alteration," as well as examples of possible accommodations in the school setting. The sections also discuss a school's obligation to provide auxiliary aids and services to ensure an individual with a disability is not excluded, denied services, segregated, or otherwise treated differently, and a school's possible defense of "undue burden."

1. The ADA Does Not Require Any Accommodation That Would Fundamentally Alter the Nature or Purpose of a School's Programs

A requested accommodation may fundamentally alter a program in two ways: (1) by altering an essential aspect of the program; or (2) by causing a less significant change that has only a peripheral impact on the program, but nevertheless gives the requesting individual an advantage over other students.[53]

The ADA does not require a school to change its basic nature, character, or purpose to accommodate a student with a disability.[54] Stated otherwise, courts give deference to "educational institutions for decisions relating to

[51] 42 U.S.C. §12182(b). *See also Ami*, 184 F.3d at 1028; *Singh v. George Washington University School of Medicine and Health Sciences*, 597 F. Supp. 2d 89, 98 (D.D.C. 2009) (while concluding student did not have a disability (pre-ADAAA), court cautions university that, "as an educational institution, it is obligated to provide reasonable accommodations to students who demonstrate that they are entitled to them under the ADA," and notes that, "[i]f the request for reasonable accommodations is received prior to the official dismissal . . . [the university] must consider it before issuing its final decision whether to dismiss the student").

[52] *See PGA Tour v. Martin*, 531 U.S. 1049 (2000).

[53] *See id.*

[54] In *Southeastern Comm. College v. Davis*, 442 U.S. 397 (1979) (Rehabilitation Act), the Supreme Court ruled that a nursing school was not required to provide a deaf student with individual supervision whenever she attended to patients or to dispense with certain required course for the student or to train the student to perform some, but not all, of the tasks a registered nurse is required to perform. The Court reasoned that the nursing school was not required to dispense with the essential requirement of effective oral communication by nursing students in order to accommodate the student.

their academic standards."[55] More broadly, "[c]ourts defer to 'a genuinely academic decision' that a proposed accommodation is untenable under an educational institution's policies, practices, or procedures."[56] Thus, a school is not required to lower minimum academic requirements for admission, retention or graduation.[57] Requiring such modifications would alter the nature or character of a school's program.[58]

> **Example:** A school requires that all entering seventh grade students read, write, and do math at the seventh grade level or above, and this requirement is mandatory to the school's commitment to its high academic achievement mission. The school is not required to admit a student who, despite receiving reasonable accommodation, cannot perform at the requisite seventh grade level.

However, in order to be given such deference by the courts, the school must put forth evidence demonstrating its decision was a "professional, academic judgment."[59] If the school cannot establish its decision was grounded in academic concerns, or that a requested accommodation would

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[55] *See Millington v. Temple University School of Dentistry*, 2008 WL 185792 (3d Cir. Jan. 23, 2008) (upholding school's determination that proposed accommodations would negatively impact student's schooling, continuity of patient care, patient comfort, and safety, and upholding school's requirement that students complete assignments for one school year before the next school year begins); *Herzog v. Loyola College in Maryland, Inc.*, 2009 WL 3271246, at *8 (D. Md. Oct. 9, 2009) ("universities are given wide discretion to make academic determinations").

[56] *Yount v. Regent University, Inc.*, 2009 WL 995596, at *6 (D. Ariz. April 14, 2009).

[57] *See, e.g., Doe v. The Haverford Sch.*, 2003 WL 22097782, *7-10 (E.D. Penn. Aug. 5, 2003) (rejecting a student's request for a preliminary injunction against a private school because the student could not show a likelihood of success on his claim that the accommodations he requested, an additional two to five months to complete coursework, were "reasonable" and would not "fundamentally altar" the school's programs); *Guckenberger v. Boston Univ.*, 8F. Supp. 82 (D. Mass. 1998) (university's refusal to allow course as substitute for foreign language not a violation of ADA); *Sandison v. Michigan High Sch. Athletic Ass'n,* 64 F.3d 1026, 1035 (6th Cir. 1995) (rejecting a disabled student's challenge to an athletic age requirement); *Pottgen v. Missouri State High Sch. Activities Ass'n,* 40 F.3d 926 (8th Cir. 1994) (finding that waiving an essential eligibility standard would fundamentally alter the nature of the youth baseball program); *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179, 183 (7th Cir. 1983) (holding that the State of Illinois was not required to lower its graduation requirements in order to accommodate disabled individuals); *But see PGA Tour v. Martin*, 531 U.S. 1049 (2000) (holding that a golf competitor's request to use a cart does not fundamentally alter the golf competition and mandating Title III entities to make such a determination on a case-by-case basis).

[58] *See, e.g., Oser v. Capital University Law School,* 2009 WL 2913919 (S.D. Ohio Sept. 8, 2009) (school provided extra exam time, a private exam room, white noise, and a variety of counseling and skill-training, which were appropriate accommodations; school did not need to waive its academic policies and lower its academic standards; a court "should only reluctantly intervene in academic decisions"); *Manickavasagar v. Virginia Commonwealth University School of Medicine*, 2009 WL 3366924 (E.D. Va. Oct. 16, 2009) (in dismissing disability complaint brought by student who was not admitted to medical school, court notes there is no requirement to lower or substantially modify school's standards, and a school's professional academic judgment deserves deference in evaluating reasonable accommodations).

[59] *Young v. Regent University, Inc.*, 2009 WL 995596, at *6 (D. Ariz. April 14, 2009)

in fact detract from instructional quality, deference will not be given to the school's decision.[60]

2. Accommodations Are Not Required if Their Provision Would Cause an "Undue Burden"

The ADA does not require a school to provide auxiliary aids and services if to do so would impose an undue burden upon the school.[61] The determination of whether a requested modification would impose an undue burden must be made on a case-by-case basis.

A requested accommodation would impose an undue burden if the accommodation would be "significantly difficult or expensive" in light of the following factors: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of the school providing the accommodation, including the number of persons employed, the effect on expenses and resources and the impact on the operation of the school; (3) the overall financial resources of the covered entity, including the number of employees and the number, type, and location of the schools or other facilities; and (4) the type of operation(s) of the covered entity, including the composition, structure, and functions of the workforce of such entity, the geographic separateness, and administrative and fiscal relationship among the different facilities.[62] Clearly, these factors mean that whether an accommodation creates an undue burden will likely differ from school to school.

> **Example**: If a small school has 20 teachers, four administrators, a shoe string budget, an older facility, and 120 students, the school will likely not be required to meet the same accommodations as another school that has a staff that is six times the size and a myriad of other resources.

3. Examples of Accommodations That May Be Required by the ADA:

Academic Accommodations

Courts typically defer to the professional judgment of educators, physicians, psychologists and counselors in determining whether an

[60] *Id*. (where student presented evidence that the accommodation of being given "incomplete" grades instead of formal withdrawal could have addressed his condition, and school could not establish an academic basis for not accommodating the student as requested, summary judgment in favor of the school was denied).

[61] 42 U.S.C. §12182(b)(2).

[62] *See* 42 U.S.C. §12182(b)(2) ("undue burden"), which incorporates the standard at 42 U.S.C. §12181(9).

accommodation is sufficient.[63] That being said, a school need not provide the accommodation most desired by the student; it simply must provide an effective accommodation. Thus, if there are two equally effective accommodations, the school may choose which accommodation to offer.

The following are examples of reasonable accommodations, provided that such accommodations do not fundamentally alter a school's mission and objectives. Extra charges may generally not be imposed on students or their families in order to cover the cost of measures taken to ensure compliance with the ADA. Rather, the costs should be absorbed as overhead expenses.[64]

- allowing more time to complete tests or other assignments;
- substituting specific courses where substituted courses fully satisfy a school's mission and objectives;
- adapting a manner in which specific courses are conducted;
- extending the time to complete course/graduation requirements;
- adapting the manner in which the course materials are distributed;
- modifying or waiving foreign language requirements if consistent with a school's educational mission and objectives;
- providing affordable and practicable auxiliary aids -- taped examinations, interpreters, Brailled or large print examinations, transcribers and other similar services and actions;
- creating methods for evaluating achievement of students with sensory, manual or speaking impairments to ensure the result fairly reflects student's achievement (except when such skills are the factors that the test is measuring);
- offering testing at alternative sites and settings;
- adapting the manner in which a test is administered;
- providing alternative formats for examination (e.g., essay rather than objective examinations);

[63] In *Stern v. University of Osteopathic Medicine and Health Sciences*, 220 F.3d 906 (8th Cir. 2000), a medical student diagnosed with dyslexia challenged the sufficiency of the offered accommodations by the medical school. The medical school offered to have someone read multiple-choice tests to him on audio tape, to provide a private room in which to take the tests, and to grant the student additional time for tests. In addition, the student requested that he supplement his answers on multiple-choice tests, either with an essay or with oral answers. The school refused that requested accommodation. The student in *Stern* sued the medical school, alleging violations of ADA. The school supported its position with an expert psychologist's affidavit that confirmed that the school had suggested appropriate accommodations in light of the student's disabling condition. The school ultimately prevailed in its effort to have the case dismissed. The *Stern* case therefore stands for the proposition that schools must often rely on the judgment of healthcare and educational professionals to determine appropriate accommodations.

[64] However, if the school can show that a requested accommodation would place an undue burden, including a financial burden, or would fundamentally alter the nature of the school, the school need not provide such accommodation (though it would be required to provide an accommodation that was not objectionable on these grounds). The student can, of course, choose to pay for an accommodation the school is not required to provide.

- allowing a student to clarify and rephrase questions in his or her own words before answering a question on a test or assignment;
- allowing the use of calculators during exams;
- simplifying wording of exam questions.[65]
- NOTE: Indicating that a standardized test was completed by a student with a disability ("flagging" tests) is not a permissible "accommodation" and may violate ADA.

Auxiliary Aids[66]

- taped course materials, including testing materials;
- interpreters, including video remote interpreting;
- real-time computer-aided transcription services;
- other effective methods of making orally delivered materials available to students with hearing impairments; [67]
- readers in libraries for students with visual impairments and learning disabilities;
- open and closed captioning, including real-time captioning;
- classroom equipment adapted for use by students with manual impairments;
- magnification software;
- secondary auditory programs;
- Brailled or large print texts;
- other similar devices and actions.[68]

Classroom/Lecture Accommodations

- allowing students to tape lectures;
- providing students with note-takers;
- alternative accessible arrangements such as videotapes, cassettes, or prepared notes;
- allowing student to use computer to take notes.[69]

[65] *See* 28 C.F.R. § 36.309.

[66] Use of the most advanced technology is not required. However, advances in technology mean that schools must consider new technology in assessing their obligations. Thus, new DOL regulations under Title III, effective in 2011, refer to VRI services as a possible auxiliary aid. 28 C.F.R. §36.303(b)(1). VRI services mean "video remote interpreting," a technology not readily available when the initial Title III regulations were published.

[67] *See* 28 C.F.R. § 36.309.

[68] *See* 28 C.F.R. §36.303 and 28 C.F.R. §36.309. The U.S. Department of Justice has settled several claims involving deaf or hearing impaired students who were denied services or accommodations. The settlements require the school or educational center, among other things, to provide qualified sign language interpreters without charge, and to designate individuals with responsibility for handling accommodation requests. *See, e.g.*, U.S.A. and Sylvan Learning Centers, DJ 202-35-195, Sept. 2007; U.S.A. and FCNH, Inc. d/b/a Utah College of Massage Therapy, July 2007; U.S.A. v. Robin Singh Educational Services, Inc., d/b/a Testmasters, CV06-3466, May 2006.

[69] *See* 28 C.F.R. §36.303 and 28 C.F.R. §36.309.

E. Admissions Issues

1. Admissions Standards

A disabled student is qualified to participate in a program if the student can meet admissions requirements with reasonable accommodation.[70] A school need not lower or substantially modify the standards to accommodate a disabled person.[71]

Under the ADA, it is unlawful to use admissions criteria that screen out or tend to screen out individuals with disabilities **unless such criteria can be shown to be necessary** to meet the school's educational mission and objectives.[72]

Example: A school may set a baseline academic standard for entering students in order to fulfill the school's high academic achievement mission. The school is not required to enroll a student with a disability who, despite receiving reasonable accommodations, failed to meet the academic standards for enrollment. As stated by one court, the courts "decline to limit the faculty's academic judgment" by requiring a change in standards.[73]

Similarly, a school cannot be required to accept a student if the student will only enroll upon the provision of accommodations that fundamentally alter the school's programs or cause an undue burden on the school.[74]

Example: Parents request that a military school exempt their son, who has been diagnosed with ADHD, from the school's disciplinary policy. The disciplinary policy is fundamental to the school's programs and mission. The school is not required to exempt the student from its disciplinary policy.

Finally, a school may deny admission to a student if the student's disability poses a direct threat to the health or safety of others and the

[70] *See Kaltenberger v. Ohio College of Podiatric Med.*, 162 F.3d 432, 435-36 (6th Cir. 1998).

[71] *See Southeastern Comm. College v. Davis*, 442 U.S. 397, 413 (1979).

[72] *See* 42 U.S.C. § 12182(b)(2)(A)(i).

[73] *Betts v. Rector and Visitors of the University of Virginia*, 145 Fed. Appx. 7, 2005 WL 1870049, *13 (4th Cir. Aug. 5, 2005) (no legal violation where school dismissed student who, despite accommodations for his difficulties with short-term memory and reading speed, did not meet the 2.75 GPA standard due to his performance on several exams before student requested accommodations).

[74] *See, e.g., Roberts v. Kindercare,* 896 F. Supp. 921 (D. Minn. 1995) (holding that a daycare is not required to admit a child whose enrollment was conditioned on the provision of a one-on-one aid because this would impose an undue burden).

threat cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.[75]

2. Admissions Policies

Admissions policies should clearly disclaim disability-based discrimination in admissions. If an independent school is a recipient of federal funding, it may be required to provide notice of its non-discrimination policies under the Rehabilitation Act.

3. Identifying Students with Disabilities

An independent school's ADA obligations are only triggered if the school is aware of a student's disability.[76] An independent school may be liable[77] for failure to make reasonable accommodations if a student can show that the school knew or should have known of a student's disability or request for accommodation.[78] Therefore, it is generally the student's (or the student's family's) responsibility to request accommodations and to

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[75] *Montalvo v. Radcliffe,* 167 F.3d 873 (4th Cir. 1999) (holding that a traditional Japanese style martial arts school did not violate ADA by refusing admission to a minor that carried HIV because the minor posed a direct threat to the health or safety of others and because there were no alternative teaching methods found that were reasonable accommodations under ADA).

[76] *See Goldstein v. Harvard Univ.*, 77 Fed. Appx. 534, 537 (1st Cir. 2003)(holding that a student's letter to a university advisor referring to an incident during which the student reported she had impaired vision, but which did not suggest that her vision problems interfered with her ability to take an exam, did not constitute adequate notice to a university that she suffered a disability or that she was making any request for accommodations); *Rosenthal v. Webster University,* 230 F.3d 1363, 1362 (8th Cir. 2000) (granting a school summary judgment where there was no valid evidence that school officials knew of the claimed disability before taking the challenged actions of suspending the student and setting conditions for the student's readmission).

[77] The remedies under Title III are the same as those available under 42 U.S.C. § 2000a-3(a). *See* 42 U.S.C. § 12188(a)(1). Statutory language, case law, and legislative history indicate that Title III only entitles private person to equitable remedies, not money damages. *See* 42 U.S.C. §12188(a)(2); *Spychalsky,* 2003 WL 22071602 at *5 ("Title III of the ADA does not provide for monetary damages or, concomitantly, a jury trial, when the action is brought by a 'person who is being subjected to discrimination'"); 135 Cong. Rec. 19,855 (1989) (remarks of Senator Harkin, chief Senate sponsor of ADA, confirming that "Title III … expressly limits relief to equitable remedies"). Courts have also held that while ADA and the Rehabilitation Act provide for a private cause of action to assert a disability discrimination claim, there is no private cause of action for an entity's alleged failure to follow regulations that require an entity to develop and implement procedural safeguards. *See Power v. Sch. Bd. Of City of Virginia Beach,* 276 F. Supp. 2d 515, 519-520 (E.D. Va. 2003). However, a school may be liable for a claimant's attorney's fees and costs if the claimant brings a successful ADA action against the school. *See Buckhannon Bd. and Care Home v. West Virginia Dept. of Health and Human Resources,* 121 S. Ct. 1835 (2001).

[78] *See Goldstein v. Harvard Univ.*, 2003 WL 22332241, *2 (1st Cir. Oct. 14, 2003) (holding that a student's letter referring to a vision impairment was insufficient to put a university on notice that the student required any accommodation in taking an examination); *Estades-Negroni v. Associates Corp. of North America,* 377 F.3d 58 (1st Cir. 2004) (affirming summary judgment in favor of an employer where plaintiff had not been diagnosed with a disability at the time she requested a reduced workload and the employer did not know of any claimed disability); *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 795 (1st Cir. 1992) (holding that in order to be liable under the Rehabilitation Act, a student must show that the school knew or should reasonably have known of a student's handicap).

provide the school with evidence establishing disability. Courts consistently reject ADA claims against schools when the evidence indicates that there was no reason for the school to be on notice of a disability claim.[79] Finally, courts reject ADA claims for accommodation where the student fails to prove that the student has a disability.[80]

Schools should adopt and publish policies prohibiting disability-based discrimination in all school programs and activities. The policies should also identify person(s) within the school who must be notified of any request for accommodation based on disability.

F. ADA Requires That Students Be Integrated into Regular Education Programs to the Extent Possible

The ADA requires that school programs be provided "in the most integrated setting appropriate to the need of the individual" student.[81]

However, the ADA does not impose the same obligations as the Individuals with Disabilities Education Act (IDEA), which requires a free, appropriate public education in the least restrictive environment that is educationally appropriate.[82] Indeed, that a student may qualify for special education under the IDEA does not necessarily mean the student will have a disability within the meaning of the ADA.[83] Nor does the ADA require an individualized education plan ("IEP") for students.[84] However, if the independent school receives federal funding, it may be obligated under the regulations of the Department of Education to develop a plan for accommodation under the Rehabilitation Act of 1973.[85] Specifically, the implementing regulations of the Rehabilitation Act, which apply to recipients of federal funding, provide that development of an IEP as

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[79] *See Goldstein* 2003 WL 22332241 at *2; *Wynne,* 976 F.2d at 795.

[80] *See e.g., Witbeck v. Embry Riddle Aeronautical Univ.*, 219 F.R.D. 540, 544-545 (M.D. Fla. 2004) (holding that student failed to prove that he had a disability that prevented him from understanding oral instructions). While this principle likely continues to be valid after the ADAAA, it will, as discussed above, be much easier now for a student to establish he/she has a disability.

[81] *See* 42 U.S.C. § 12182(b)(1)(B; 28 C.F.R. § 36.203.

[82] *See* 28 C.F.R. pt. 36, App. B ("Private schools, including elementary and secondary schools, are covered by the rules as places of public accommodation. The rule itself, however, does not require a private school to provide a free appropriate education or develop an individualized education program in accordance with regulations of the Department of Education implementing Section 504 of the Rehabilitation Act of 1973 (34 C.F.R. § 300). The receipt of Federal financial assistance by a private school, however, would trigger application of the … regulations to the extent mandated by the particular type of assistance received.").

[83] *Ellenberg v. New Mexico Military Institute*, 572 F.3d 815 (10th Cir. 2009).

[84] *See* 28 C.F.R. pt. 36, App. B.

[85] *See id.*; *see also Response to Zirkel,* 20 IDELR 34 (August 23, 1993).

provided for in the IDEA is one method of complying with the requirements of the Rehabilitation Act.[86]

1. Examples of Integration in Every Day School Activities

To the extent it is possible, disabled students should be educated in the regular education classroom and should have full and equal access to school-related programs and activities

2. Examples of Integration in Special School Sponsored Activities

Extracurricular activities (e.g., sports, clubs) sponsored by independent schools are subject to the ADA.[87] A disabled student "otherwise qualified" to participate in a program, with the provision of an accommodation, has the right to participate in the program. Of course, the school should consider whether any requested accommodations would fundamentally alter the program or would impose an undue burden on the school.

Schools should also consider whether the disabled student's participation in the activity poses a "direct threat" to the health or safety of others. For example, the participation of an HIV positive student in a martial arts club may pose a direct threat to the health or safety of others in the class.[88]

G. Transportation of Students with Disabilities

If an independent school does not provide transportation to students generally, it is not obligated to provide transportation to students with disabilities. If the school provides transportation to students generally, it must remove transportation barriers for students with disabilities, as long as such removal is "readily achievable.[89] If removal is not readily achievable, the school has an obligation to pursue alternative methods of transporting the individual, provided the alternative is readily achievable and in the most integrated setting possible.[90]

With regard to wheelchair lifts, independent schools are not required to install lifts in *existing* vehicles.[91] Independent schools are obligated to provide access to

[86] *See* 39 C.F.R. §104.33(b)(2) *and* 39 C.F.R. §109.32 (requiring notification to parents of schools; duties under the Rehabilitation Act).

[87] *See Bingham v. Oregon Sch. Activities Ass'n,* 24 F. Supp.2d 1110 (D. Or. 1998).

[88] *See Montalvo v. Radcliffe*, 167 F.3d 873 (4th Cir. 1999) (holding that a traditional Japanese style martial arts school did not violate ADA by refusing to admit a student that was HIV positive because it posed a direct threat to the health and safety of others).

[89] *See* 28 C.F.R. §36.310.

[90] *See* 28 C.F.R. § 36.305.

[91] *See* 42 U.S.C. §12182(b)(2)(B).

students with disabilities, including students using wheelchairs, in newly purchased or leased vehicles.[92] A school may be able to meet the statutory requirements even if the school cannot provide wheelchair accessibility in all new vehicles, by providing disabled students with "equivalent service." That is, the transportation service provided to the students with disabilities must be substantially the same in schedule, response time, geographic coverage and fares as transportation provided to non-disabled students.

H. Medical Training of School Employees

State law dictates the permissible scope of treatments that school personnel may administer to students with medical and nursing needs. Schools or their legal counsel need to consider applicable state statutes and regulations and consult with boards of nursing to determine the permissible scope of medical assistance by school personnel.

If students receive medication while at school, the school should develop and implement a policy with regard to the administration of such medications.

> **Example:** A parent requests that school staff who have contact with her daughter be trained to recognize asthma symptoms and to administer treatment, including use of a nebulizer. The school is probably required to grant the request as a reasonable accommodation under ADA.[93]

I. Discipline Issues and the ADA

The ADA, unlike the IDEA, does not have specific provisions with regard to disciplining students with disabilities.[94] However, because "discipline" is a part of a school program, it must be administered in a manner that does not discriminate against disabled students. For example, it is unlawful to discipline a student solely on the basis of disability or more severely than similarly situated non-disabled peers.[95] The ADA generally does not give a disabled student license to misbehave even where the misbehavior is related to a disability. A school is not required, under the ADA, to excuse a student's misconduct or

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[92] *See id.*

[93] *See Alvarez v. Fountainhead*, 55 F. Supp. 2d 1048 (N.D. Cal. 1999). *See also* Settlement Agreement between U.S. DOJ and Carson Long Military Institute, DJ202-63-47, March 2003 (complaint that school asked student with severe food allergies to withdraw; settlement agreement required school to develop policies to ensure that students who need to self-medicate, particularly in emergency situations, may do so; and required school to establish a training program for staff with procedures to follow in the event a student with severe allergies or comparable impairment requires emergency treatment).

[94] *See generally* Ronald D. Wenkart, *Anticipate Pitfalls: Understanding the Interaction Between the IDEA, Section 504 and ADA, SCHOOL LAW IN REVIEW 10-1 (2000).*

[95] *See Brantley v. Independent Sch. Dist. No. 625, St. Paul Pub. Sch*, 936 F. Supp. 649, 657 (D. Minn 1996).

fundamentally alter its discipline policies as an accommodation of the student's disability.[96]

For example, in *Bercovitch v. Baldwin Sch., Inc.*, the court held that a private school was not required to alter its normal progressive discipline system in order to accommodate a student with numerous behavioral disorders.[97] In *Bercovitch*, parents requested that the school alter its discipline code by requiring at least three warnings before a suspension and that any suspension would be limited to the remainder of the day.[98] The court in *Bercovitch* held that such a request would create a fundamental alteration of the school's programs and therefore it was not required under ADA.[99]

In *Brantley v. Independent School District No. 625, St. Paul Public Schools,*[100] the court rejected a student's disability discrimination claim based on the student's suspensions and dismissal from school. The court in *Brantley* found no factual nexus between the disciplinary actions of the school district and the student's disability. Additionally, the court in *Axelrod v. Phillips Academy, Andover,*[101] held that a private school is not required by the ADA to disregard a student's persistent failure to meet deadlines or to excuse a student's failure to perform required coursework.[102]

J. Confidentiality Concerns

For many legal and practical reasons, information regarding a student's disability and any requested accommodations should be kept confidential and should only be disclosed to those persons with a legitimate "need to know" the information. A school and individual employees may be liable for wrongful disclosure of confidential student information.

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[96] *See Bercovitch v. Baldwin Sch.*, 133 F.3d 141, 152-153 (1st Cir. 1998).

[97] *Id.*

[98] *Id.* at 152.

[99] *Id.* at 152-153.

[100] 936 F. Supp. 649, 675 (D. Minn. 1996).

[101] 46 F. Supp.2d 72 (D. Mass. 1999).

[102] *Id.* at 86. *See also Buhendwa v. University of Colorado at Boulder*, 214 Fed. Appx. 823, 2007 WL 241283 (10th Cir. Jan. 30, 2007) (disability discrimination claim fails when teacher revokes accommodation (due to language-induced test-taking anxiety) of additional time provided to take a test because teacher discovers student fell asleep during exam); *Mershon v. St. Louis University*, 442 F.3d 1069 (8th Cir. 2006) (school did not violate the ADA when it banned student with cerebral palsy from campus, where ban was due to student telling civil rights investigator he wanted to "put a bullet" in professor's head); *Herzog v. Loyola College in Maryland, Inc.*, 2009 WL 3271246 (D. Md. Oct. 9, 2009) (disability discrimination claim fails despite student's ADHD; school had discretion to dismiss student who had problems with authority, difficulty understanding the impact of his conduct on others, and who conceded breaching the school's ethical standards).

For example, in *M.P. v. Independent Sch. Dist. No. 721*,[103] a student and his parents sued a school district alleging wrongful disclosure of the student's schizophrenia diagnosis by a school employee. The court held that although a plaintiff must show "either bad or gross misjudgment," the record contained sufficient facts supporting such a finding.[104] In support of its conclusion, the court cited numerous reports by the student's parents of verbal and physical harassment of the student by his peers following the disclosure. The record also supported a finding that the school district failed to adequately respond to the reports.[105]

Note that it is the position of the EEOC that claims of improper disclosure of confidential medical information may be brought whether or not the individual has a disability.[106]

K. Communication Is Critical

Overall, the ADA imposes an obligation on independent schools to reasonably accommodate students with disabilities so that they are comfortable in the school setting. This requires schools both to adopt policies and procedures that address the needs of students with disabilities on a general basis and to provide specific accommodations to address individual needs of these students. Teachers have an obligation to maintain awareness about the responsibilities imposed by the ADA and should be mindful of the issues facing their students with special needs.

Perhaps the most important thing to remember when addressing the needs of students with disabilities is that communication among school personnel, students, and parents is critical to the educational success of these students. Good communication between school personnel, parents, and students also decreases the likelihood of disputes requiring formal resolution. The ultimate goal is always to succeed in educating students with disabilities without interfering with the protections provided to them by the ADA.

The laws regulating students with disabilities are complex and always changing. Do not hesitate to consult with legal counsel when in doubt.

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[103] 326 F.3d 975, 982 (8th Cir. 2003).

[104] *Id.*

[105] *Id.*

[106] Appendix to Part 1630, n. 1, 76 Fed. Reg. 17003 (March 25, 2011).

III. THE ADA AND INDEPENDENT SCHOOL EMPLOYEES

A. ADA Prohibitions Against Discrimination in Employment

Title I of the ADA prohibits disability-based employment discrimination by any employer with fifteen (15) or more employees. Independent schools must comply with this ADA prohibition against disability-based employment discrimination.[107] Specifically, the ADA prohibits discrimination against any qualified individual with a disability in regard to job application procedures, hiring, advancement, training, employee compensation, discharge, or any other term, condition, or privilege of employment.[108]

To enjoy the protection of the ADA, the employee or job applicant (like a student) must meet the definition of a person with a disability.[109] That is, he/she must have one of the following: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of a physical or mental impairment that substantially limits one or more major life activities; or (3) being regarded as having an impairment that substantially limits one or more major life activities.[110] As noted above, the ADAAA and the EEOC's implementing regulations have significantly broadened the disability definition, overturning court decisions from the past several years.[111] While determining whether an employee is an individual with a disability remains an individualized, fact-

[107] *See* 42 U.S.C. § 12111 (5)(A).

[108] *See* 42 U.S.C. § 12112(a).

[109] *See, e.g., Schroeder v. Suffolk County Community College*, 2009 WL 1748869 (E.D.N.Y. June 22, 2009) (campus security guard may have disability where car accident resulted in daily pain on a periodic basis, numbness and tingling in certain toes, employee received epidural injections and a spinal stimulator, and employee wore a custom orthotic shoe).

[110] *See 42 U.S.C.* §12102; 29 C.F.R. §1630.2(g). *See also Kaw v. School District of Hillsborough County*, 2009 WL 248246 (M.D. Fla. Jan. 30, 2009) (court allows claim of "regarded as" disability to go to the jury where teacher had provided school with physician letters describing her condition of vasovagal syncope and her limitations, teacher had fainted twice in school, teacher's heart monitor sounded an alarm in a meeting with the principal, and the principal stated he thought the teacher might have a heart attack in his office); *Green v. American University*, 647 F. Supp. 2d 21 (D.D.C. 2009) (personal driver for school's president may have disability where his condition, similar to irritable bowel syndrome, significantly affects the major life activity of eliminating bodily waste); *Wilson v. Alamosa School District*, 2009 WL 2139776 (D. Colo. July 15, 2009) (teacher with anxiety, insomnia, and other conditions prevails on "regarded as" claim where superintendent perceived her as unstable, medicated, fragile, and unable to make decisions, he strongly encouraged her to resign, and he stated he would seek to prevent her from obtaining administrator positions in other districts); *Chappell v. Butterfield-Odin School District No. 836*, 2009 WL 3853144 (D. Minn. Nov. 17, 2009) (teacher with epilepsy may proceed with "regarded as" claim where superintendent was shocked to learn of teacher's epilepsy and was concerned the students would see the teacher having a seizure); *Fink v. Richmond*, 2009 WL 3216117 (D. Md. Sept. 29, 2009) (teacher who had an esophagectomy was substantially limited in major life activity of eating where she could not consume food in regular quantities or intervals; school prevails in suit because it reasonably accommodated teacher, and it did not have an obligation to create a position for teacher).

[111] *See* 29 C.F.R. Part 1630.

specific inquiry,[112] it is now much simpler for an individual to establish he/she meets the definition of "disability" under the ADAAA.

In addition to being an individual with a disability, the employee/applicant must also be *qualified* for the position he/she seeks or currently holds. That is, the individual must be able to perform the essential functions of the position with or without reasonable accommodation.[113] In the employment context, reasonable accommodation is generally any job-related assistance enabling an employee to perform the essential job functions.[114] Reasonable accommodation may include modifying school policies, providing leaves of absence with job restoration, altering facilities or equipment, providing assistive devices, job restructuring, or reassigning the employee to a vacant position.[115]

As with its obligation to disabled students, a school's accommodation obligation is not unlimited. An employer is not required to provide an accommodation that would pose an undue burden (referred to as "undue hardship" in the employment context of Title I). Whether an accommodation poses an undue burden is determined, on a case-by-case basis, by weighing the difficulty or expense of the requested or required accommodation against a number of factors, including the overall financial resources of the employer, the number of employees employed, and the effect of the accommodation on the expenses, resources or operations of the employer.[116] As a practical matter, proving an accommodation poses an undue burden on the employer is difficult and should take place only after the employer and employee have conferred and explored and exhausted all possible options for reasonably assisting the employee.

> **Example**: where a teacher suffers from seasonal affective disorder, school is required to consider changing teacher's classroom to one with more natural light. While moving teacher to a vacant classroom, or switching her classroom with another teacher, would have entailed some cost, such cost did not constitute an undue hardship on the school justifying denial of the request for a change of room.[117]

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[112] *Coberley v. North Central Texas College*, 2009 WL 500369 (E.D. Tex. Feb. 27, 2009) (individualized analysis still required under ADAAA; court dismisses claim of diabetic nursing instructor, concluding she was not substantially limited in a major life activity); *Melendez v. Morrow County School District*, 2009 WL 4015426 (D. Or. Nov. 19, 2009) (educational assistant with anxiety, depression and insomnia may have a disability because of the substantial limitation on his ability to sleep).

[113] *See* 42 U.S.C. § 12111(8).

[114] The identification of "essential" job functions is discussed in Section C, *infra.*

[115] *See* 42 U.S.C. § 12111(9).

[116] *See* 42 U.S.C. § 12111(10).

[117] *Ekstrand v. School District of Somerset*, 583 F.3d 972 (7th Cir. 2009).

B. What Can You Ask a Job Applicant?

Permissible and Impermissible Pre-Employment Inquiries

The ADA also specifically limits an employer's ability to make disability-related inquiries and/or to require medical examinations of job applicants. Generally, whether or not an employer can make a disability-related inquiry or require a medical exam turns on the stage at which the inquiry is made or the exam required, pre-offer or post-offer.[118] The circumstances under which an employer may make a disability-related inquiry are significantly more limited at the pre-offer stage. A school should, therefore, periodically review employment application and standard interview questions to ensure it does not make any inappropriate pre-employment inquiries in violation of the ADA. The guidelines below should help with the initial stage of a school's procedural review.

1. Pre-Offer Stage

At the pre-offer stage, a school generally cannot ask any question likely to elicit information about, or disclosure of, a disability.[119] This pre-offer stage includes the employment application, employment interview and the reference check. Impermissible pre-offer questions include:

- whether the employee requires an accommodation to perform the job he/she desires;
- applicant attendance record with prior employers;
- an applicant's workers' compensation claim history;
- prior hospitalizations; and
- current prescription drug use.[120]

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[118] Once an individual is employed, an employer's ability to make disability – related inquiries and/or to conduct medical examinations is again limited. An employer may only make inquiries of current employees that are "job-related and consistent with business necessity." *See* 42 U.S.C. § 12112(d)(4)(A). Generally, a disability-related inquiry may be job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat of substantial harm to himself/herself or others due to a medical condition. An inquiry may also be job-related and consistent with business necessity if it follows a request for reasonable accommodation when the disability or need for accommodation is not known or obvious. *See* EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees 915.002 (7/27/00). *See also Varley v. Highlands School District*, 2007 WL 3020449 (W.D. Pa. Oct. 11, 2007) (allowing claim of improper medical inquiry to go to trial where there was a dispute as to the business necessity to send a teacher, who had "tearful" episodes, for a medical exam, since numerous staff testified they did not think the teacher was unable to perform her job, and did not think the teacher posed a danger to herself or others, and, further, there was no basis to request teacher's complete psychiatric records.); *Horgan v. Simmons*, 704 F. Supp. 2d 814 (N.D. Ill. 2010) (allowing claim of impermissible medical inquiry to proceed where company repeatedly asked employee if "something medical" was going on, despite employee's statements he could perform his job).

[119] *See* 42 U.S.C. §12112(d)(2)(A); *see also* EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees 915.002 (7/27/00).

[120] *See* EEOC Comp. Man. (BNA) 90:0547 (January 26, 1992).

However, schools may **always** inquire about an individual's ability to perform job-related functions of the position.[121] The questions need not be limited to the "essential" functions of the job.

Example: If the position sought requires occasional lifting in excess of 25 lbs., the interviewer may appropriately ask an applicant the following:

- This position requires lifting of 25 lbs. or more at least three times a week. Can you perform this function?
- Can you perform this function with or without reasonable accommodation?
- An employer may also lawfully ask whether the applicant is currently using any illegal drugs.

2. Post-Offer/ Pre-Employment Stage

Once a school makes an offer of employment conditioned upon completion of a background check or other pre-hire procedures, but before the applicant starts work, an employer may ask disability-related questions and conduct medical examinations, regardless of whether they are related to the job. This statement is true as long as it does so for **all** entering employees in the same job category.[122] An employer may withdraw its conditional job offer based on the information it receives only if the withdrawal is justified by business necessity. The school must maintain all information received as a result of the inquiry or medical examination in separate, confidential medical files.[123]

C. Developing Accurate and Effective Job Descriptions

Because the ADA prohibits discrimination against qualified individuals with disabilities who, with or without reasonable accommodation, can perform the essential functions of a job, determining which functions of a job are "essential" is critical. Generally, "essential" job functions are those considered fundamental to the performance of the job, not marginal or tangential.[124] In identifying essential job functions, a school should focus on the **purpose** of a particular function and the **result** to be accomplished, rather than **how** the function is currently performed.[125]

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[121] *See* 42 U.S.C. §12112(d)(2)(B).

[122] *See* 42 U.S.C. § 12112(d)(3).

[123] *See id.*

[124] *See* 29 C.F.R. §1630.2(n)(1)(i)-(iii).

[125] *See* EEOC Comp. Man. (BNA) 90:0402 (December 9, 1999).

Although not required, written job descriptions are useful in identifying which job functions are essential.[126] However, they are not determinative regarding what are the essential job functions. Other factors will be considered, including: the amount of time the employee spends in performing a particular function; the consequences of not requiring the employee to perform the task; the terms of a collective bargaining agreement, if any; the work experience of past employees who held the job; and/ or the current work experience of employees who hold similar jobs.[127]

A school should periodically review its job descriptions to ensure they accurately reflect the work actually performed. Specifically, when an employer reviews existing job descriptions, it should ask the following questions with respect to each job duty listed.

- Is the function actually being performed?
- Will removing the function fundamentally alter the nature of the job?
- Does the job exist to perform the function?
- Is the job function specialized?[128]

If the school answers "yes" to one or more of these questions, the job function is likely essential.[129]

In addition to evaluating its existing description for accuracy, a school should consider incorporating in each job description any physical, mental, or emotional skills the job requires. Such skills include: body motions, working with particular equipment, attendance requirements, lifting requirements, working closely with others, working under stress, and/or following supervisors' orders or responding to customer requests.[130] Frequently, these seemingly intangible job duties are the subject of accommodation requests and disputes. Therefore, the more a school is able to state, with precision, the job requirements, the more accurately it can evaluate what accommodation, if any, it is able to make.

Most importantly, an employer not committed to periodic review and revision of its job descriptions should abandon their use. Outdated, imprecise job descriptions will simply hinder the employer in the accommodation analysis.

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[126] *See* 42 U.S.C. § 12111(8) ("…consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.")

[127] *See* 29 C.F.R. §1630.2(n)(3)(i)-(vii).

[128] *See generally* 29 C.F.R. §1630.2(n)(2)(i)-(iii).

[129] As a practical matter, it is not necessary or even recommended that an employer distinguish between essential and marginal job functions in its job descriptions.

[130] *See generally* EEOC Comp. Man. (BNA) 90:0402 (December 9, 1992).

D. A School's Obligation to Provide Reasonable Accommodation to Employees

1. General Obligations

In addition to the prohibition against discrimination, the duty to provide reasonable accommodation to qualified individuals with disabilities is considered one of the most important statutory requirements of the ADA. The objective of the reasonable accommodation obligation is to remove workplace barriers, including physical obstacles (e.g., inaccessible facilities) or workplace procedures or rules (e.g., rules regarding where work is performed, when breaks are taken, or how tasks are accomplished).

As with students, a school is required only to accommodate known disabilities of its employees.[131] Moreover, it is generally the responsibility of the employee to request the needed accommodation although he is not required to use specific language or even the term "reasonable accommodation" in doing so.[132] The employee need only provide the school with enough information that, under the circumstances, enables the school to reasonably know of both the disability and desire for accommodation.[133]

Example: An employer was on notice of the need for accommodation when an administrative assistant was notified about the employee's hospitalization for her mental condition.

Example: An employer violated the law in failing to consider accommodations after the employee (a janitor) provided a doctor's note stating that due to his "illness and past inability to return to work," he needed to be assigned to a school that would be "less stressful."[134]

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[131] *See, e.g., Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560 (7th Cir. 1996) (holding an employer must be aware of an employee's disability before it is liable for providing reasonable accommodation); *Green v. American University*, 647 F. Supp. 2d 21, 32 (D.D.C. 2009) (the requisite notice is provided "if the employee supplies enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation"); *Robertson v. Trustees of Columbia University*, 2009 WL 3425647 (S.D.N.Y. Oct. 20, 2009) (court rejects custodian's claim of failure to accommodate his prostate condition where, among other reasons, custodian failed to ask school for an accommodation).

[132] *See* Appendix to 29 C.F.R. §1630.9; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (3/1/99).

[133] *See Taylor v. Phoenixville School Dist.*, 184 F.3d 296 (3d Cir. 1999).

[134] *See Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996).

Once an employee requests accommodation, a school should engage in what is known as "the interactive dialogue" with the employee.[135] That is, the employer should:

- meet with the employee who requests accommodation;
- request information about the condition and any resulting limitations;
- ask the employee what he or she wants; and
- offer and discuss alternatives if the employee's request is too burdensome.[136]

The obligation to engage in the interactive process is so important that failure to engage in the process may indicate a failure to accommodate.[137]

Ultimately, it is the school's obligation to provide an accommodation that will effectively eliminate the workplace barrier – not necessarily to provide the **best** accommodation or the accommodation the employee most wants.[138]

Finally, once an employee requests accommodation, a school should document the request as well as its actions taken to meet its interactive dialogue obligations. As a practical matter, the school's good faith efforts to accommodate an employee's disability, even if ultimately unsuccessful, may be relevant to issues of liability and damages in any subsequent ADA action.[139]

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[135] *See id.* (employer should initiate an interactive process with the individual once accommodation is requested.). *See also Melendez v. Morrow County School District*, 2009 WL 4015426 (D. Or. Nov. 19, 2009) (District's failure to consider educational assistant's request for accommodation related to extending a deadline for a test required under No Child Left Behind leads court to reject District's request for summary judgment).

[136] *See Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, *reh'g denied,* 1999 U.S. App. LEXIS 25675 (8th Cir. 1999).

[137] *Lowe v. Independent School District No. 1*, 2010 WL 258400 (10th Cir. Jan. 25, 2010) (unpublished) (physical sciences teacher with leg braces requested reassignment and other accommodations; delay of at least four months in responding to request for accommodations means the teacher may prevail if "the result of the inadequate interactive process was the failure of the employer to fulfill its role in determining what specific actions must be taken").

[138] *See* Appendix to 29 C.F.R. §1630.9; *see also Kiel v. Select Artificials, Inc.*, 169 F.3d 1131 (8th Cir. 1999)(holding if more than one accommodation would allow the individual to perform the essential functions of the position, the employer can choose whichever accommodation it wishes to provide); *Johnson v. Cleveland City School*, 2009 WL 2610833 (6th Cir. Aug. 25, 2009) (unpublished) (district has no obligation to create an academic interventionist position for employee with cervical myelopathy, and district satisfied its accommodation obligation by providing a position that met the accommodations needed, even it if was not the position desired).

[139] *See* 42 U.S.C. 1981a (in reasonable accommodation cases, punitive and certain compensatory damages "may not be awarded … where the covered entity demonstrates good faith efforts, in consultation with the person with the disability … to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.").

2. Common Reasonable Accommodation Concerns[140]

a. Must a school alter a job as a form of reasonable accommodation?

The ADA never requires an employer to forgive, remove or reassign essential job functions in order to accommodate an individual with a disability. However, the determination as to what functions are essential must be based on the actual job, and not a hypothetical job.[141] Morever, an employer may be required to forgive, remove or reassign non-essential job duties as a reasonable accommodation.[142]

Example: where a school expects all teachers to monitor the halls for 30 minutes after school but such requirement is only a small fraction of the teacher's job responsibilities and is unrelated to their core instructional responsibilities, modification of the requirement could be required as an accommodation for an employee or applicant with a disability. In contrast, it is not necessary to accommodate a request to start 30 minutes late where the essential functions of the teaching job include covering first period home room each morning.[143] Once again, the existence of accurate job descriptions will assist a school in identifying those job duties that may require modification.

Although a school is not required to remove essential job functions, the ADA specifically recognizes reassignment to an alternative, vacant position as a form of reasonable accommodation.[144] Therefore, if an employee is no longer able to

[140] Schools should keep in mind that the purpose of a reasonable accommodation is to enable the employee to perform his/her job; "reasonable accommodation is by its terms most logically construed as that which, presently, or in the immediate future, enables the employee to perform the essential functions of the job in question." *Cooley v. Bd. of School Commissioners of Mobile County, Alabama*, 2009 WL 424593, at *7 (S.D. Ala. Feb. 17, 2009).

[141] *Schroeder v. Suffolk County Community College*, 2009 WL 1748869 (E.D.N.Y. June 22, 2009) (court rejects college's assertion a security guard's requested accommodation to use a cane would eliminate an essential function of his job; evidence established the campus security guards were only the "eyes and ears" of the police, they were not required to have the physical attributes needed for police jobs, they did not carry weapons, and the ADA coordinator for the county concluded the job could be performed while using a cane).

[142] *See* 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii); *see also Graham v. Watertown City School District*, 2011 WL 1344149 (N.D.N.Y. April 8, 2011) (music teacher with chronic pain and limited mobility may be entitled to a one-building assignment as a reasonable accommodation, but is not entitled to a shorter class duration than other teachers); *Piziali v. Grand View Coll.*, 2000 U.S. App. LEXIS 1823 (8th Cir. 2000) (unpublished) (eliminating essential functions of professor's job is not "reasonable."); *Menchaca v. Maricopa Community College District*, 595 F. Supp. 2d 1063 (D. Ariz. 2009) (providing job coach for weekly meeting lasting one hour may be a reasonable accommodation).

[143] *Francis v. Providence School Board*, 198 Fed. Appx. 18, 2006 WL 2567454 (1st Cir. Sept. 7, 2006).

[144] *See* 42 U.S.C. §12111(9)(B).

perform his/her essential job duties due to a disability, a school must explore transferring the employee to any vacant position of comparable (or lesser, if comparable is not available) grade for which he/she is qualified.[145] A school is not, however, required to bump or displace another employee from a job to create a vacancy,[146] nor is it required to promote the employee with a disability as a reassignment. [147]

b. Is attendance an essential job function?

Most courts agree that reliable, predictable attendance is an essential function of almost any job.[148] Although an employer may be required to accommodate some unforeseen absences resulting from an employee's disability, the question is one of degree. Generally, once an employee has exhausted any accrued leave and the school demonstrates the employee's unpredictable attendance is placing an undue burden on his/her co-workers and/or the school's resources, a school's obligation to accommodate the employee's unreliable attendance ends.[149]

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[145] *See, e.g., Smith v. Clark County*, 2011 WL 1576894 (D. Nev. April 26, 2011) (elementary teacher with back and neck problems, temporarily in literary specialist position, might be entitled to stay in specialist position as reasonable accommodation where school district failed to prove the sufficiency of other accommodations, which included a full-time aide, specialized furniture, and a reassignment to a higher grade level); *Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir. 1999) (ADA does not require reassignment to a position the employee is not qualified to perform).

[146] *See, e.g., U.S. Airways, Inc. v. Barnett*, 122 S.Ct. 1516 (2002) (holding the ADA's reasonable accommodation obligation does not require employers to deviate from consistently-applied seniority based systems in order to create job vacancies, even if those systems disadvantage otherwise qualified individuals with disabilities); *Pond v. Michelin*, 183 F.3d 592 (7th Cir. 1999)(the ADA does not require an employer to bump less senior employee in order to reassign more senior employee with a disability; union contract may require this action, however); *Wohler v. St. Tammany Parish School Board*, 2009 WL 4891942, at *3 (E.D. La. Dec. 10, 2009) (no requirement to create a position where one did not otherwise exist or is not available).

[147] *See e.g., Cassidy v. Detroit Edison Co.*, 138 F.3d 629 (6th Cir. 1998) (reassignment does not require promoting a disabled employee).

[148] *See, e.g., Jovanovic v. In-Sink-Erator*, 2000 U.S. App. LEXIS 140 (7th Cir. 2000)(the ADA does not require the employer to provide the employee, a factory worker, an "open-ended schedule" where he can come and go as he pleases); *Buckles v. First Data Resources, Inc.*, 176 F.3d 1098 (8th Cir. 1999)(holding an unfettered ability to leave work at any time is certainly not a reasonable accommodation because reliable, predictable attendance is required for the job), *Ramirez v. New York City Board of Education*, 481 F. Supp. 2d 209, 221 (E.D.N.Y. 2007) (rejecting disability discrimination claim, and noting that an "essential function" of teacher's position is "showing up for work"); *Fiumara v. President and Fellows of Harvard College*, 2009 WL 1163851 (1st Cir. May 1, 2009) (unpublished) ("indefinite leave is not a reasonable accommodation under the ADA"); *Cooley v. Bd. of School Commissioners of Mobile County, Alabama*, 2009 WL 424593, at *6 (S.D. Ala. Feb. 17, 2009) ("Attendance is an essential function of plaintiff's duties as a teacher").

[149] *See Dutton v. Johnson County Bd.*, 859 F. Supp. 498 (D. Kan. 1994)(finding it may be reasonable to allow an employee to use accrued, unscheduled leave to cover unpredictable absences due to illness).

Depending on the circumstances, a school may have a greater obligation to accommodate temporary leaves of absence for a specified duration. Typically, a temporary leave of absence for a specified duration with the assurance of job restoration is a reasonable accommodation.[150] Nonetheless, this is a fact specific inquiry. The school should consider the duration of the requested leave, the employee's job responsibilities, and the impact on the school's resources to fill the employee's position temporarily rather than permanently to determine whether an undue hardship exists.[151]

c. Must a school forgive performance deficiencies and/or misconduct as a form of reasonable accommodation?

Reasonable accommodation does not include overlooking performance deficiencies or rescinding disciplinary action, even if the employee later reveals that the performance deficiency or misconduct was the result of a disability.[152] However, a school should ensure it holds all employees to the same conduct and performance standards.

Although an employer need not forgive or overlook previous violations of policy, if the corrective action results in the disclosure of a disability, the school should explore whether any reasonable accommodation will prevent future violations of the workplace rule.

Example: If a teacher reveals her medication for depression makes her drowsy after being reprimanded for tardiness, the school need not rescind the reprimand. However, it may need to modify the teacher's schedule to accommodate her condition (e.g., allow the teacher to use the first period of the day as her free or prep period and forgive any tardiness of 15 minutes or less).

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[150] *See* Appendix to 29 C.F.R. § 1630.2(o); *see also Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999); *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998).

[151] *See, e.g., Windsor v. Parkway School District*, 2008 WL 161849 (E.D. Mo. Jan. 15, 2008) (leaves of absence of a definite duration are often reasonable, leaves of absence of an indefinite duration are often not reasonable, and the reasonableness of successive leave requests depends on whether they are more akin to a leave of absence of definite or indefinite duration); *Wohler v. St. Tammany Parish School Board*, 2009 WL 4891942 (E.D. La. Dec. 10, 2009) (court rejects claim from bi-polar computer technician where he admitted he could not perform his job, pointing out there was no requirement "to indefinitely excuse an employee from his work duties").

[152] *See* Fed. Reg. 35,733 (1990); *see also Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891 (8th Cir. 1999) (employer not required to rescind discharge of employee terminated for sleeping on the job even though drowsiness caused by hypertension medication. Employee failed to request a reasonable accommodation prior to violating company policy.)

d. What are a school's obligations to accommodate alcoholism and/or drug use?

The ADA does not require an employer to accommodate current users of illegal drugs[153] or past non-addicted drug users.[154] However, the ADA does protect former or recovering addicts who are no longer using drugs as well as alcoholics (whether or not they are currently using alcohol).[155] A school is not required to "accommodate" an employee's alcohol use and, in fact, may apply the same conduct rules applied to all employees prohibiting the consumption of alcohol while on duty or on school property.[156] However, a school may be required to accommodate an alcoholic and/or former addict's need for time off to participate in a rehabilitation program or otherwise attend support group meetings.

3. Retaliation

As in the Title III context, an independent school may not retaliate against, or interfere with, coerce or intimidate, an employee who engages in activity protected under the ADA.[157] Thus, schools must act cautiously when taking adverse action against an employee where the employee claims discrimination, aids or encourages another to exercise rights under the ADA, or engages in other protected activity.[158]

IV. THE INDEPENDENT SCHOOL FACILITY AS A PLACE OF PUBLIC ACCOMMODATION

As places of public accommodation,[159] independent schools must make their facilities accessible not only to applicants, employees and students, but to all members of the public, including parents, groups who use or rent school facilities, members of the public attending sporting or cultural events, and all others who enter and use the school's facilities.[160]

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[153] *See* 42 U.S.C. § 12114; 29 C.F.R. § 1630.3(a).

[154] *See, e.g., Hartman v. City of Petaluma,* 841 F. Supp. 946 (N.D. Cal. 1994) (the ADA does not protect former casual drug users; there must be "some indicia of dependence" to be considered substantially limiting).

[155] *See* 42 U.S.C. § 12114(a)-(b).

[156] *See* 42 U.S.C. §12114(c) C.F.R. 1630.16(b)(4).

[157] 42 U.S.C. § 12203.

[158] *See, e.g., Garber v. Embry-Riddle Aeronautical University,* 259 F. Supp. 2d 979 (D. Ariz. 2003) (while ultimately rejecting professor's claim, court notes professor established a *prima facie* case of retaliation where he advocated on behalf of a disabled student and was terminated).

[159] *See* 42 U.S.C. § 12181(7)(J).

[160] *See* 42 U.S.C. § 12182(a).

A. Accessibility Requirements of Existing Facilities

To make its existing facilities accessible, a school must remove any existing architectural barriers as long as removing the barriers is readily achievable. Removal is readily achievable if the school may easily accomplish the barrier removal without much difficulty or expense such as installing ramps, making curb cuts in sidewalks, repositioning shelves, rearranging tables, chairs, display racks or other furniture, or repositioning telephones.[161] If the barrier removal is not readily achievable, the school must make its facilities accessible through alternative methods such as retrieving items from inaccessible locations or relocating activities to accessible locations, if those methods are readily achievable.[162] As the Department of Justice has been implementing the new ADAAA, there have also been new, updated physical requirements for facilities to be considered accessible. All schools considering new construction should be aware of these requirements, more details on these new regulations may be found here. http://www.nais.org/government/article.cfm?ItemNumber=154552&sn.ItemNumber=154467. Clearly, schools should contact counsel if there is any question about whether more expensive accessibility provisions should be carried out.[163]

B. Accessibility Requirements of New Construction (after January 1993)

All new construction must be readily accessible to and usable by individuals with disabilities unless it is structurally impracticable to do so.[164] Full compliance will be considered structurally impracticable only in rare circumstances when the unique characteristics of the terrain prevent the incorporation of accessibility requirements.[165]

C. Alterations to Buildings

Any alterations after January of 1992 must be done to ensure, to the maximum extent feasible, that the altered portions of the building will be readily accessible to individuals with disabilities.[166] This accessibility includes being accessible to wheelchairs. Alterations requiring such accessibility include: renovations, rehabilitations, reconstruction, historic restoration, changes or rearrangement in

[161] *See* 28 C.F.R. § 36.304.

[162] *See* 28 C.F.R. § 36.305.

[163] The Department of Justice has reached Settlement Agreements with schools concerning the schools' failures, among other things, to remove barriers where removal is readily achievable, and to provide accessible routes for disabled individuals. *See, e.g.,* U.S.A. and Swarthmore College, DJ 202-62-180, Nov. 2007; U.S.A. and Colorado College, DJ 202-13-198, Aug. 2006.

[164] *See* 28 C.F.R. § 36.401(a)(b).

[165] 28 C.F.R. § 36.401(c).

[166] 28 C.F.R. § 36.402(a).

structural parts or elements, and changes or rearrangement in the plan configuration or walls and full-height partitions.[167] Re-roofing, normal maintenance, painting, wall-papering, asbestos removal, or changes to mechanical and electrical systems are usually not alterations unless they change the usability of the building.[168]

If the design of the building is such that providing full access is virtually impossible, the school must provide the maximum physical accessibility possible.[169] Further, if it is impossible to make the entire structure wheelchair accessible, every attempt must be made to make the building accessible to individuals with other disabilities.[170]

D. Websites

While not of brick and mortar, there has been some dispute whether an entity's website is a "place of public accommodation," or sufficiently related to a place of public accommodation, requiring compliance with accessibility rules.[171] As a legal matter, the question is whether a "place of public accommodation" is limited to services provided at a concrete, physical space, or whether it extends, with a sufficient nexus, to all services offered by the public accommodation. While this issue has not been definitively resolved, we suggest that independent schools ensure their websites are accessible to individuals with disabilities, including those who are blind.[172] This recommendation also comes in light of the Department of Justice's early notice of potential future rulemakings on website accessibility issues. For more information on website accessibility, schools should visit the Website Accessibility Initiative site here. http://www.w3.org/WAI/

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[167] 28 C.F.R. § 36.402(b).

[168] *Id. See also Regents of Mercersburg College v. Republic Franklin Ins. Co.*, 458 F.3d 159 (3rd Cir. 2006) (concluding private school dormitories were covered by the ADA as a public accommodation, and remanding to the trial court for a determination whether the school's insurance policy's ordinance and law endorsement covered certain renovations allegedly required by the ADA when altering a building following a lightning strike and fire).

[169] 28 C.F.R. § 36.402(c).

[170] *Id.*

[171] *Compare Nat'l Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006) (court denies motion to dismiss, and allows claim brought by blind customer, that the site Target.com is not accessible by the blind and thus impedes the full and equal enjoyment of goods and services offered in Target stores, to proceed) *with Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (court concludes airline website is not a place of public accommodation and concludes there is a lack of nexus between the website and a physical, concrete place).

[172] This can be accomplished through the website design where, for example, code is embedded beneath graphics so that screen reader software can describe the graphic.

V. CONCLUSION

A. Noncompliance

The Department of Justice reports that the ADA has resulted in relatively few lawsuits for disability discrimination in public accommodations under Title III of ADA,[173] though the changes under the ADAAA may result in more litigation Nonetheless, to date, ADA suits brought by students and their parents are not common. Complaints and lawsuits for employment discrimination in violation of Title I of the ADA are significantly more common, and schools' legal exposure for employment discrimination in violation of ADA is certainly serious. Schools should be aware that if a suit is brought, it may be brought by the individual, one of the two federal agencies authorized to enforce ADA (Department of Justice for public accommodations violations under Title III or Equal Employment Opportunity Commission for employment violations under Title I), or both. In addition, the federal agencies with enforcement authority may ask the court for a civil penalty beyond the damages sought by the individual. When all of this is considered in addition to the potential damage to a school's reputation, it is clear that compliance should be a top priority for NAIS schools.

B. Avoiding Liability Exposure

Effective communication and consistency are the two main ingredients to effectively limiting a school's liability in this area. Schools must work with otherwise qualified disabled students and employees as well as other individuals to be clear regarding the expectations and obligations of all involved. This communication should be consistent and continuous.

Schools must also work with counsel to determine what compliance, exactly, is required in regards to students, employees, the visiting public, and the physical plant of the school. Communication here is also essential. Counsel can help the school determine how to come into compliance in a cost effective and functional manner for the school. Consistency here is also important, as laws do change and other requirements may be imposed on schools in the future. Keeping up to date with developments under the ADAAA will be critical in continuing to ensure compliance with the law.

VI. MORE RESOURCES

There are many online resources available to the public, the following are particularly helpful.

[173] US Department of Justice, Civil Right Division, Myths and Facts About the Americans with Disabilities Act, http://www.usdoj/crt/ada/pubs/mythfct.txt.

United States Department of Justice:

Disabilities Page http://www.usdoj.gov/disabilities.htm

Disability Rights Section Home Page: http://www.usdoj.gov/crt/drs/drshome.htm

Children with Disabilities Page: http://www.childrenwithdisabilities.ncjrs.org/

United States Department of Education:

Office of Civil Rights: http://www.ed.gov/offices/OCR/

United States Equal Employment Opportunity Commission: http://www.eeoc.gov

Enforcement Guidance: http://www.eeoc.gov/docs/accommodation.html