The Americans with Disabilities Act and Independent Schools

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The Americans with Disabilities Act and Independent Schools

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

NAIS receives many disability-related questions every year. These questions raise issues relating to students, employees, parents, and facilities. In response to the widespread interest of NAIS schools, this publication is intended as a short primer on the most applicable federal disability law, the Americans with Disabilities Act (ADA), as amended by the Americans with Disabilities Act Amendments Act (ADAAA). This publication should not be relied upon as legal advice as such advice requires proper knowledge and careful assessment of specific facts and circumstances, which is beyond the scope of this publication. Schools are encouraged to consult with an attorney when faced with an issue involving legal obligations and rights relating to any person with a disability.

July 26, 2015, marked the 25th anniversary of the passage of the ADA, and NAIS thinks that it is important for schools to be aware of the legal obligations schools owe to individuals with disabilities and encourages its schools to go 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 by the ADAAA.
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. By comparison, Section 504 only applies when a school receives federal financial assistance. However, for schools that must only follow Section 504, this guidance is helpful because ADA case law has relied upon earlier Section 504 cases and regulations, and Section 504 was amended by the ADAAA. Schools that are required to follow Section 504 should be aware that there are other obligations imposed by this statute.

B. The ADA and the ADAAA

Only Titles I and III of the ADA apply to independent schools. 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. Additionally, Title I does not apply as broadly to religious independent schools as to nonreligious independent schools because courts will not become involved in religious doctrinal issues.

The 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. Revised U.S. Department of Justice (DOJ) regulations

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2 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).
3 Title II of the ADA concerns public entities, and is thus not applicable to independent schools.
5 29 C.F.R. Part 1630.
issued under Title III became effective March 15, 2011. Importantly, the DOJ regulations did not initially incorporate the legal interpretations promulgated in the ADAAA because DOJ, apparently through administrative oversight, failed to modify its proposed regulations to take the ADAAA into account. This was remedied through new amendments to the ADA regulations issued by the DOJ, which became effective on October 11, 2016. These new sections to the Title I and Title III regulations incorporated the changes to the ADA set forth in the ADAAA. Consistent with the ADAAA, these regulations clarify the meaning and interpretation of the term disability, expand the definition of major life activities, and modify the rules of construction related to determining whether an impairment substantially limits a major life activity.

Courts applying the ADAAA have held 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 Publication

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 have been admitted. The second section addresses employment issues, including hiring and general employment questions. Finally, it addresses physical plant or facilities concerns, including the physical accommodations that must be made in both new construction and older buildings.

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

6 28 C.F.R. Parts 35 and 36.
II. The ADA and Students

A. The ADA as it Applies to Students Generally

The ADA covers a broad range of issues applicable to schools. 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, 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;”

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7 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.”

In addition, the ADA prohibits retaliation against persons engaged in activities that are protected under the ADA. 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 the ADA?

An understanding of the ADA is reached only through knowing the definitions as they are provided in the statute and the regulations.

In general, only a student with a disability within the meaning of the ADA, who is otherwise qualified to participate in the school’s programs and activities, has legal rights under this statute. 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, which is now incorporated into the Title III ADA regulations.

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.

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9 See 42 U.S.C. § 12203.
10 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 antiretaliation provisions of 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.”

Many of the students at issue will likely fall under the first of these definitions, particularly after the ADAAA. Students with disabilities include those with visual, ambulatory, or other apparent impairments, as well as those with impairments that adversely affect major bodily functions, such as the 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, students may 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 six months or less) and minor. For example, if a student has a

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11 See 42 U.S.C. § 12102. See also 29 C.F.R. § 1630.2(g), and 28 C.F.R. § 36.105(a).

12 42 U.S.C. §12102(3).

13 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,
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.14

2. Examples of ADA-Covered Impairments

The determination of whether a person qualifies as a person with a disability under the ADA must be made on a case-by-case basis and requires an individualized assessment.15 However, since the ADAAA, and now incorporated into the Title III regulations, “[t]he question of whether an individual meets the definition of disability... should not demand extensive analysis.”16 Indeed, the regulations set forth numerous impairments that, “in virtually all cases,” 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;
- attention-deficit/hyperactivity disorder;
- diabetes;
- intellectual disability;
- autism;
- cerebral palsy;
- epilepsy;
- HIV infection;

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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.

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


• major depressive disorder;
• bipolar disorder;
• post-traumatic stress disorder;
• obsessive compulsive disorder; and
• schizophrenia.\textsuperscript{17}

Although the ADA protects alcoholics and former or recovering drug addicts, it does not protect individuals currently using illegal drugs.\textsuperscript{18} 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.”\textsuperscript{19} Similarly, height, weight, or muscle tone that is within “normal” range and not the result of a physiological disorder does not constitute an impairment.\textsuperscript{20}

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.\textsuperscript{21} 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.

\textsuperscript{17} See 29 C.F.R. § 1630.2(j)(iii), 28 C.F.R. § 36.105(b)(2).
\textsuperscript{19} See 28 C.F.R. § 36.104.
\textsuperscript{21} 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.
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 working.\textsuperscript{22} They also include concentrating, thinking, communicating, and writing.\textsuperscript{23} 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.\textsuperscript{24} Major life activities do not include those activities that, although important to the individual, are not significant within the meaning of the ADA.\textsuperscript{25} Accordingly, leisure or recreational activities such as gardening, golfing, and shopping are not deemed “major life activities.”\textsuperscript{26}

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 DOJ has elaborated on the rules in its regulations under Title III.\textsuperscript{27}

Those rules are:

1. the term “substantially limits” is construed broadly, in favor of expansive coverage;\textsuperscript{28}

\textsuperscript{22} 42 U.S.C. § 12102(2), 28 C.F.R. § 36.105(c)(1)(i).

\textsuperscript{23} Id.

\textsuperscript{24} 42 U.S.C. § 12102(2)(B).

\textsuperscript{25} See Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999).

\textsuperscript{26} See Colwell v. Suffolk County Police Dept., 158 F.3d 635, 643 (2d Cir. 1998) (superseded by statute on other grounds).

\textsuperscript{27} 28. C.F.R. § 36.105(d).

\textsuperscript{28} 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).
the term “substantially limits” is interpreted consistently with the findings and purposes of the ADAAA;\(^{29}\)

(3) an impairment need only substantially limit one major life activity to be considered a disability;\(^{30}\)

(4) an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;\(^{31}\)

and

(5) whether an impairment substantially limits a major life activity is assessed without regard to ameliorative effects of mitigating measures (such as medication, reasonable accommodations, or assistive technology).\(^{32}\)

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.\(^{33}\)

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.\(^{34}\) Indeed, a Congressional Committee specifically stated, “it is critical to reject the assumption that an individual who performs well

\(^{29}\) 42 U.S.C. § 12102(4)(B). The EEOC’s regulations under Title I provide additional, though not exhaustive, guidance on this point: (a) the impairment need not prevent or severely restrict a major activity; (b) the limitation must be compared to “most people in the general population;” (c) the comparison to the general population generally need not require scientific, medical, or statistical analysis; (d) the assessment of whether a disability exists should not require extensive analysis; (e) the standards should be easier to meet than under pre-ADAAA law; and (f) an impairment can be substantially limiting even if it lasts fewer than six months.


\(^{31}\) 42 U.S.C. § 12102(4)(D).

\(^{32}\) 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).

\(^{33}\) Despite the enactment of the ADAAA, many cases decided in 2011 and 2012 (and perhaps 2013) continued to rely upon 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.

\(^{34}\) H.R. 110-730, pp. 10-11 (June 23, 2008).
academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking."35 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.

The Title III regulations incorporate this idea by directing the focus towards how a major life activity is substantially limited, and not on what outcomes an individual can achieve.36 Specifically, the 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.37 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 regulations expressly state that “someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.”38

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

35 Id., at p. 10.
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.”\(^\text{39}\)

This new approach to assessing whether an individual with a learning
disability has a disability within the meaning of the ADA and ADAAA,
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 is still
developing 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 nondisabled
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.\(^\text{40}\)


\(^{40}\) Title III of the ADA does not use the “qualified individual” language that is used in Titles I and II of
the 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 (3d 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 the
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 the ADA and ADAAA

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). 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.

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

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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).

41 Rumbin v. Ass’n of Amer. Medical Colleges, 803 F.Supp.2d 83, 95 (D. Conn. 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 under either the ADA or the ADAAA).

generally qualify as disabilities under the new ADA, even if they have had academic success.\textsuperscript{43}

Accommodations for a student with a mental disability may, among other options, include offering:

- different testing formats,
- different testing settings, and
- additional time to complete tests.

3. \textbf{HIV/AIDS, Hepatitis, and Direct Threat}

Students with HIV/AIDS (whether symptomatic or asymptomatic) generally qualify as disabled under the ADA.\textsuperscript{44} Diseases such as hepatitis or other contagious diseases qualify as “impairments,” but the determination of whether such diseases are “disabilities” depends on whether, based on an individualized analysis, they substantially limit a major life activity. Independent schools may deny participation/benefits to such disabled students (if they are otherwise qualified) only when to do otherwise would pose a direct threat to the health or safety of others.\textsuperscript{45} “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.”\textsuperscript{46}

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

1. the nature of the risk (how the disease is transmitted);
2. the duration of the risk (how long the carrier is infectious);

\textsuperscript{45} See 42 U.S.C. § 12182(b)(3).
\textsuperscript{46} Id.
3. the severity of the risk (the potential harm to third parties);
4. the probabilities that the disease will be transmitted and will cause varying degrees of harm; and
5. whether reasonable modifications of policies, practices, or procedures will mitigate the risk.47

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.48 However, a school presumably could, consistent with 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 solely on having or being perceived to have a physical or mental impairment. However, such impairment cannot be


48 See, e.g., Doe v. Deer Mountain Day Camp, Inc., 682 F.Supp.2d 324, 346-49 (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 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”).
“transitory and minor.”49 “Transitory,” for purposes of the “regarded as” definition, means an impairment with an actual or expected duration of six months or less.50

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.51 Nonetheless, temporary, nonchronic impairments of very short duration are usually not disabilities under the ADA,52 and likely will still not be disabilities under the ADAAA.53 For example, broken bones, sprained joints, sore muscles, and temporary infectious diseases (e.g., chicken pox) are generally not “disabilities” under the ADA.54

D. Responding to Student Requests for Accommodations55

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

49 42 U.S.C. § 12102(3) (emphasis supplied).
50 Id.
52 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 (3d Cir. 1995).
54 McGuire, 232 F.3d 895; Sanders, 91 F.3d at 1354; McDonald, 62 F.3d at 95.
55 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.
reasonable modifications to programs to accommodate the needs of disabled students.\textsuperscript{56}

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.”\textsuperscript{57} 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.\textsuperscript{58}

\textsuperscript{56} 42 U.S.C. § 12182(b). See also Amir, 184 F.3d at 1028 (“The ADA requires a provider of a public accommodation to modify its program to accommodate the needs of a disabled person unless such a modification will substantially alter the nature of the program or cause an undue burden.”); Singh v. George Washington University School of Medicine and Health Sciences, 597 F.Supp.2d 80, 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”).

\textsuperscript{57} See PGA Tour v. Martin, 532 U.S. 661 (2001).

\textsuperscript{58} Id.
The ADA does not require a school to change its basic nature, character, or purpose to accommodate a student with a disability.\(^{59}\) Stated otherwise, courts give deference to “educational institutions for decisions relating to their academic standards.”\(^{60}\) 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.”\(^{61}\) Thus, a school is not required to lower minimum academic requirements for admission, retention, or graduation.\(^{62}\) Requiring such modifications would alter the nature or character of a school’s program.\(^{63}\)

\(^{59}\) 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 a 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.

\(^{60}\) 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) (“[U]niversities are given wide discretion to make academic determinations.”). *Shaikh v. Lincoln Mem'l Univ.*, 608 F. App’x 349 (6th Cir. 2015) (decelerated curriculum was not reasonable accommodation for a student who suffered from attention-deficit/hyperactivity disorder and dyslexia; student made proposal after failing two major classes, proposal involved fundamental substantive and structural changes to school’s medical program, and proposal would have precluded student from participating in requisite group examinations).


\(^{62}\) See, e.g., *Doe v. The Haverford Sch.*, 2003 WL 22097782, at *7-10 (E.D.Pa. 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 alter” the school’s programs); *Guckenberger v. Boston Univ.*, 8 F. Supp.2d 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*, 532 U.S. 661 (2001) (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).

\(^{63}\) 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*, 667 F.Supp.2d 635, 646-47 (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,
**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.” If the school cannot establish its decision was grounded in academic concerns, or that a requested accommodation would in fact detract from instructional quality, deference will not be given to the school’s decision.

2. **Accommodations Are Not Required if They 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. 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 covered entity, including

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64 Yount, 2009 WL 995596, at *6.

65 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).

the number of employees and the number, type, and location of the
schools or other facilities; and (3) 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.\textsuperscript{67} Clearly, these
factors mean that whether an accommodation creates an undue burden
will differ from school to school, depending upon the unique
circumstances of the 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 and the ADAAA:

\textit{Academic Accommodations}

Courts typically defer to the professional judgment of educators,
physicians, psychologists, and counselors in determining whether an
accommodation is sufficient.\textsuperscript{68} That being said, a school need not provide
the accommodation most desired by the student; it simply must provide

\textsuperscript{67} See 42 U.S.C. § 12182(b)(2) (“undue burden”), which incorporates the standard at 42 U.S.C. § 12181(9); 29 C.F.R. § 1630.2(p).
\textsuperscript{68} In \textit{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 \textit{Stern} sued the medical school, alleging violations of the 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. As demonstrated in \textit{Stern}, schools must often rely on the judgment of healthcare and educational professionals to determine appropriate accommodations.
an effective accommodation. Thus, if there are two equally effective accommodations, the school may choose which accommodation to offer.

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 or the ADAAA. Rather, the costs should be absorbed as overhead expenses. The following are examples of reasonable accommodations, provided that such accommodations do not fundamentally alter a school’s mission and objectives.

- 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, or 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 or settings;
- adapting the manner in which a test is administered;
- providing alternative formats for examination (e.g., essay rather than objective examinations);

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; and

simplifying wording of exam questions.70

NOTE: Indicating that a standardized test was completed by a student with a disability (“flagging” tests) is not a permissible “accommodation” and may violate the ADA.

**Auxiliary Aids**71

- 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;72
- 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; and
- other similar devices and actions.73

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70 See 28 C.F.R. § 36.309.

71 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 DOJ 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.

72 See 28 C.F.R. § 36.303.

73 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;
Classroom/Lecture Accommodations

- allowing students to tape lectures;
- providing students with note-takers;
- alternative accessible arrangements such as videotapes, cassettes, or prepared notes; and
- allowing student to use computer to take notes.\(^{74}\)

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.\(^{75}\) A school need not lower or substantially modify the standards to accommodate a disabled person.\(^{76}\)

A school must ensure that it applies admissions criteria in a nondiscriminatory manner. While a school can hold all prospective students to the same admissions standards, it cannot reject a student because of a student’s disability.\(^{77}\) Under the ADA and ADAAA, it is unlawful to use admissions criteria that screen out or tend to screen out

\(^{74}\) See 28 C.F.R. § 36.303 and 28 C.F.R. § 36.309.

\(^{75}\) See Kaltenberger v. Ohio College of Podiatric Med., 162 F.3d 432, 435-36 (6th Cir. 1998).


\(^{77}\) United States v. Nobel Learning Communities, Inc., 676 F. Supp. 2d 379, 380 (E.D. Pa. 2009) (The Department of Justice brought a suit against a private corporation that operated a charter school network; court found the plaintiff sufficiently alleged a pattern or practice of discrimination where the plaintiff identified 11 children with disabilities who were unenrolled or denied enrollment.) Additionally, in 2014, parents sued a private preschool in New York, alleging that the preschool retracted its acceptance of the student when it learned of his autism diagnosis and did not assess the student’s functioning to see whether he would be able to meaningfully benefit from the program with reasonable accommodations. The family argued that the school could not reject the student’s acceptance without ever meeting him and without considering the parents’ request for reasonable accommodations. The case settled out of court.
individuals with disabilities unless such criteria can be shown to be necessary to meet the school’s educational mission and objectives.\textsuperscript{78}

**Example:** A school may set a rigorous 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 rigorous 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.\textsuperscript{79}

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.\textsuperscript{80}

**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


\textsuperscript{79} Betts v. Rector and Visitors of the University of Virginia, 145 Fed. Appx. 7, 2005 WL 1870049, at *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).

\textsuperscript{80} See, e.g., Roberts v. Kindercare, 896 F.Supp. 921, 926 (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.\textsuperscript{81}

2. \textbf{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 nondiscrimination policies under the Rehabilitation Act.

3. \textbf{Identifying Students with Disabilities}

An independent school’s ADA obligations are only triggered if the school is aware of a student’s disability.\textsuperscript{82} An independent school may be liable\textsuperscript{83}

\textsuperscript{81}Montalvo v. Radcliffe, 167 F.3d 873, 877-78 (4th Cir. 1999) (holding that a traditional Japanese style martial arts school did not violate ADA by refusing admission to an HIV infected minor who posed a direct threat to the health or safety of others given the likelihood of blood exposure incident to the martial arts activities and the absence of alternative teaching methods. This case is distinguishable from the other HIV/AIDS cases which often find a direct threat to be absent, as the threat in this case was not the basis of irrational fear, but because the martial arts training would frequently cause bloody injuries, from which the virus could be spread.

\textsuperscript{82}See Goldstein v. Harvard Univ., 2003 WL 22332241, at *3 (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, 2000 WL 1371117, at *1 (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).

\textsuperscript{83}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 a private person to equitable remedies, not money damages. See 42 U.S.C. § 12188(a)(2); Spychalsky v. Sullivan, 2003 WL 22071602, at *5 (E.D.N.Y. Aug. 29, 2003) (“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 the 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, 519-20 (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, 532 U.S. 598 (2001). See also Schuler v. Univ. of Denver, No. 13-CV-00358-RPM, 2014 WL 4056714, at *6 (D. Colo. Aug. 15, 2014), appeal dismissed (Feb. 9, 2015) (court dismissed student’s discrimination
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. Therefore, it is generally the student’s (or the
student’s family’s) responsibility to request accommodations and to
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. Finally, courts reject ADA claims for accommodation
where the student fails to prove that the student has a disability.

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

claim premised only on alleged past discrimination, as opposed to ongoing discrimination or
discrimination that is likely to recur in the future.)

84 See Goldstein, 2003 WL 22332241, at *2 (finding 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).

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

86 See e.g., Witbeck v. Embry Riddle Aeronautical Univ., 219 F.R.D. 540, 544-45 (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, as that determination should not
now require extensive analysis.

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.\textsuperscript{88} 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.\textsuperscript{89} Nor does the ADA require an individualized education plan (IEP) for students.\textsuperscript{90} 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.\textsuperscript{91} Specifically, the implementing regulations of the Rehabilitation Act, which apply to recipients of federal funding, provide that the development of an IEP as provided for in the IDEA is one method of complying with the requirements of the Rehabilitation Act.\textsuperscript{92}

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.

\textsuperscript{88}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.”).

\textsuperscript{89}Ellenberg v. New Mexico Military Institute, 572 F.3d 815 (10th Cir. 2009).

\textsuperscript{90}See 28 C.F.R. pt. 36, App. B.

\textsuperscript{91}See id.; see also Response to Zirkel, 20 IDELR 34 (August 23, 1993).

\textsuperscript{92}See 34 C.F.R. §104.33(b)(2) and 34 C.F.R. §104.32 (requiring notification to parents of schools; duties under the Rehabilitation Act).
2. **Examples of Integration in Special School Sponsored Activities**

Extracurricular activities (e.g., sports, clubs) sponsored by independent schools are subject to the ADA. 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.

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94 Class v. Towson Univ., 806 F.3d 236 (4th Cir. 2015) (University’s decisions not to clear university football player to return to the university’s football program and to reject football player’s proposed accommodations were not unreasonable in the context of the risks, and thus did not constitute failure to accommodate in violation of the ADA and Rehabilitation Act).

95 See Montalvo v. Radcliffe, 167 F.3d 873 (4th Cir. 1999) (see Footnote 78 for case description).
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.” 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.

With regard to wheelchair lifts, independent schools are not required to install lifts in existing vehicles. Independent schools are obligated to provide access to students with disabilities, including students using wheelchairs, in newly purchased or leased vehicles. 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 nondisabled 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.

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96 See 28 C.F.R. § 36.310.
97 See 28 C.F.R. § 36.305.
99 See id.
100 See id.
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.\(^\text{101}\)

In enforcing Title III, the Department of Justice has entered into settlement agreements with schools regarding the treatment of students with diabetes, asthma, and food allergies. These settlement agreements can provide guidance to schools as they work to develop policies and procedures in this area and consider requests for reasonable accommodations related to these health issues.\(^\text{102}\)

I. **Discipline Issues and the ADA**

The ADA and ADAAA, unlike the IDEA, do not have specific provisions with regard to disciplining students with disabilities.\(^\text{103}\) 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

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\(^{101}\) See *Alvarez v. Fountainhead*, 55 F.Supp.2d 1048 (N.D.Cal. 1999).

\(^{102}\) See U.S. Dep’t of Justice, Settlement Agreement under the Americans with Disabilities Act between the U.S. Dep’t of Justice and Carson Long Military Institute, DJ 202-63-47, (March 2003) (The Agreement resolved a complaint alleging that the school forced a student to withdraw because of his severe food allergies and asthma. The agreement required the school to establish a set of policies requiring an individualized assessment of student requests for accommodations, permitting self-medication by students with disabilities when appropriate, and providing for the emergency treatment of students with life threatening allergies.); See also, U.S. Dep’t of Justice, Settlement Agreement between the United States of America and Pine Hills Kiddie Garden, DJ 202-26-62, (Oct. 2009) and U.S. Dep’t of Justice, Settlement Agreement between the United States of America and Rainbow River Child Development Center, DJ 202-12C-339, (Aug. 2010) (DOJ requires revisions to policies and practices related to students with diabetes, following complaints alleging that the centers failed to provide proper diabetes care management and excluded students from participating in field trips.); See also U.S. Dep’t of Justice, Settlement Agreement the United States of America and Lesley University, DJ 202-36-231, (Dec. 2012) (DOJ entered into an agreement to ensure that students with celiac disease and other food allergies can fully and equally enjoy the university’s food services in compliance with the ADA.)

of disability or more severely than similarly situated nondisabled peers. However, the ADA and ADAAA generally do not give a disabled student license to misbehave even where the misbehavior is related to a disability. Thus, a school is not required, under the ADA or ADAAA, to excuse a student’s misconduct or fundamentally alter its discipline policies as an accommodation of the student’s disability.

**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. In *Bercovitch*, the 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. The court in *Bercovitch* held that such a request would create a fundamental alteration of the school’s programs and, therefore, was not required under the ADA.

**Example:** In *Brantley v. Independent School District No. 625, St. Paul Public Schools,* 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.

**Example:** The court in *Axelrod v. Phillips Academy, Andover,* 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.


105 See *Bercovitch v. Baldwin Sch.*, 133 F.3d 141, 152-53 (1st Cir. 1998).

106 *Id.*

107 *Id.* at 152.

108 *Id.* at 152-53.


110 *Id.* at 86. See also *Buhendwa v. University of Colorado at Boulder*, 2007 WL 241283 (10th Cir. Jan. 30, 2007) (disability discrimination claim fails when teacher revokes accommodation (due to
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. For example, in M.P. v. Independent Sch. Dist. No. 721, 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. 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.

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.

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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).

112 326 F.3d 975, 982 (8th Cir. 2003).
113 Id.
114 Id.
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.

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 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Independent schools must comply with this ADA prohibition against disability-based employment discrimination. \(^{116}\) 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.\textsuperscript{117}

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.\textsuperscript{118} 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, irrespective of whether the actual or
perceived impairment limits or is perceived to limit a major life activity.\textsuperscript{119} As
noted above, the ADAAA and the implementing regulations have significantly
broadened the disability definition, overturning court decisions which limited the
application of the ADA.\textsuperscript{120} While determining whether an employee is an
individual with a disability remains an individualized, fact-specific inquiry, it is
now much simpler for an individual to establish he/she meets the definition of
“disability” under the ADAAA.

\textsuperscript{117} 42 U.S.C. § 12112(a).

\textsuperscript{118} See, e.g., Schroeder v. Suffolk County Community College, 2009 WL 1748869 (E.D.N.Y. June 22,
2009) (“If plaintiff is not ‘disabled,’ as defined by the statute, then he is not entitled to the protections of
the ADA, and his claim must be dismissed.”) Of course, under the ADAAA, whether an employee has a
disability is much more easily met.

\textsuperscript{119} 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,
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, 637 F.Supp.ed 818 (D.Minn. 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).

\textsuperscript{120} See 28 C.F.R. Part 36.
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.\(^{121}\) In the employment context, reasonable accommodation is generally any job-related assistance enabling an employee to perform the essential job functions.\(^{122}\) 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.\(^{123}\)

**Example:** Where an assistant principal with severe arthritis had restrictions that included not being put in a position where she was responsible for monitoring and controlling “uncontrollable” students, she was not qualified to perform the essential functions of the job, which included the potential need to physically restrain students.\(^{124}\)

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.\(^{125}\) As a practical matter, proving an accommodation poses an undue burden on the employer is difficult and should take place only after the

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\(^{121}\) 42 U.S.C. § 12111(8).

\(^{122}\) The identification of “essential” job functions is discussed in Section C, infra.

\(^{123}\) 42 U.S.C. § 12111(9).


\(^{125}\) 42 U.S.C. § 12111(10).
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, the school is required to consider changing teacher’s classroom to one with more natural light. While moving the 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.126

### 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.127 The circumstances under which an employer

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

127 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); *Belasco v. Warrensville Heights City Sch. Dist.*, 86 F. Supp. 3d 748, 763 (N.D. Ohio 2015), aff’d, No. 15-3131, 2015 WL 8538096 (6th Cir. Dec. 11, 2015) (the referral of a teacher for a fitness for duty examination was justified based on the uncontroverted evidence that the teacher was unable to manage her classroom, was frequently absent, and, was having difficulty administering the required curriculum and complying with reading and grade reporting requirements).
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, although a school may make pre-employment inquiries into the ability of an applicant to perform job-related functions.\(^\text{128}\) 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’s attendance record with prior employers related to illness, accident, or disability (although an applicant can be provided with information on the school’s attendance requirements and ask if the applicant will be able to meet these requirements);
   - an applicant’s workers’ compensation claim history;
   - prior hospitalizations; and
   - current prescription drug use.\(^\text{129}\)

   However, schools may **always** inquire about an individual’s ability to perform job-related functions of the position.\(^\text{130}\) And, the questions need not be limited to the “essential” functions of the job.

\(^{128}\) See 42 U.S.C. § 12112(d)(2); see also EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees 915.002 (7/27/00).

\(^{129}\) See EEOC Technical Assistance Manual: Title I of the ADA, 5.5(b) (January 26, 1992).

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. 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.

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. In identifying essential

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132 Id.
133 29 C.F.R. § 1630.2(n)(1).
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.

Although not required, written job descriptions are useful in identifying which job functions are essential.\textsuperscript{134} However, they are not determinative regarding what are the essential job functions. Other factors will be considered, including: whether the position exists to perform that function; a limited number of employees can perform the function; the function is highly specialized; 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.\textsuperscript{135}

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?\textsuperscript{136}

If the school answers "yes" to one or more of these questions, the job function is likely essential.\textsuperscript{137}

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\textsuperscript{134} 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.")

\textsuperscript{135} 29 C.F.R. § 1630.2(n)(2)-(3).

\textsuperscript{136} See generally 29 C.F.R. § 1630.2(n)(2)(i)-(iii).

\textsuperscript{137} 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.
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. 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.

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 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) and workplace procedures or rules (e.g., rules regarding where work is performed, when breaks are taken, or how tasks are accomplished).

A school is required only to accommodate known disabilities of its employees. Moreover, it is generally the responsibility of the employee

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138 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
to request the needed accommodation, although he/she is not required to use specific language or even the term “reasonable accommodation” in doing so.\textsuperscript{139} 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 need for accommodation.\textsuperscript{140}

**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.”\textsuperscript{141}

Once an employee requests accommodation, a school should engage in what is known as “the interactive dialogue” with the employee.\textsuperscript{142} 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

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\textsuperscript{139} See Appendix to 29 C.F.R. §1630.9; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (October 17, 2002).

\textsuperscript{140} See Taylor v. Phoenixville School Dist., 184 F.3d 296 (3d Cir. 1999); See also Wallace v. Heartland Cnty. Coll., 48 F. Supp. 3d 1151 (C.D. Ill. 2014) (community college science professor, who suffered from fibromyalgia and osteoarthritis, made her superiors aware that she was experiencing stress and pain from having to deal with inept lab assistants, but there was no evidence that professor made specific requests for accommodation concerning lab assistants, thus precluding professor’s failure to accommodate claim under ADA.)

\textsuperscript{141} See Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996).

\textsuperscript{142} See id. (employer should initiate an interactive process with the individual once accommodation is requested.).
• offer and discuss alternatives if the employee’s request is too burdensome.\footnote{See Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, reh’g denied, 1999 U.S. App. LEXIS 25675 (8th Cir. 1999).}

The obligation to engage in the interactive process is so important that failure to engage in the process may indicate a failure to accommodate.\footnote{Lowe v. Independent School District No. 1, 2010 WL 258400 (10th Cir. Jan. 25, 2010) (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”). But see Basden v. Prof'l Transp., Inc., 714 F.3d 1034, 1039 (7th Cir. 2013) (even if an employer fails to engage in the required process, that failure does not need to be considered if the employee fails to present sufficient evidence on the question of whether she was able to perform the essential functions of her job with an accommodation).}

Ultimately, it is the school’s obligation to provide an accommodation that will effectively eliminate the workplace barrier, but not necessarily to provide the best accommodation or the accommodation desired by the employee.\footnote{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) (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 if it was not the position desired).}

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, will be relevant to issues of liability and damages in any subsequent ADA action.\footnote{See 42 U.S.C. § 1981a (stating that 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

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. Moreover, an employer may be required to forgive, remove, or reassign nonessential job duties as a reasonable accommodation.

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 his/her 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 homeroom each morning.\textsuperscript{150} 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.\textsuperscript{151} Therefore, if an employee is no longer able to 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.\textsuperscript{152} A school is not, however, required to bump or displace another employee from a job to create a vacancy,\textsuperscript{153} nor is it required to promote the employee with a disability as a reassignment.\textsuperscript{154} The federal circuit courts are split, however, on whether an employer must assign a disabled employee to a vacant position, where there are other more

\begin{itemize}
  \item \textsuperscript{150} Francis v. Providence School Board, 198 Fed. Appx. 18, 2006 WL 2567454 (1st Cir. Sept. 7, 2006).
  \item \textsuperscript{151} See 42 U.S.C. § 12111(9)(B).
  \item \textsuperscript{152} 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).
  \item \textsuperscript{153} See, e.g., U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (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).
  \item \textsuperscript{154} See e.g., Cassidy v. Detroit Edison Co., 138 F.3d 629 (6th Cir. 1998) (reassignment does not require promoting a disabled employee). See also Malabarba v. Chi. Tribune Co., 149 F.3d 690, 699 (7th Cir. 1998) (employer does not have to accommodate a disabled employee by promoting him or her to a higher level position). See also Koessel v. Sublette Cnty. Sheriff’s Dep’t, 717 F.3d 736, 745 (10th Cir. 2013) (employer need not promote an employee when they reassign him).
\end{itemize}
qualified applicants for the position (i.e., is the disabled employee entitled to a preference to the vacant position?).  

b. Is attendance an essential job function?

Most courts agree that reliable, predictable attendance is an essential function of almost any job. 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

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155 Compare Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007) (“We agree and conclude the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.”) with EEOC v. United Airlines, 693 F.3d 760, (7th Cir. 2012) (holding that, absent undue hardship, the ADA requires an employer to transfer a disabled employee to a vacant position for which they are qualified, as a reasonable accommodation, even ahead of other more qualified nondisabled employees or applicants) and Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164-65 (10th Cir. 1999) (holding that the ADA reassignment obligation means something more than allowing a disabled employee to compete equally with the rest of the world for the vacant position, but that the disabled employee is entitled to the position if they are qualified for it).

156 See, e.g., Jovanovic v. In-Sink-Erator, 201 F.3d 894 (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) (“[I]ndefinite 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”). Gardner v. Sch. Dist. of Philadelphia, No. 14-4562, 2015 WL 9239298 (3d Cir. Dec. 17, 2015) (school police officer failed to show that reasonable accommodations would have enabled him to perform essential functions of his position by reporting to work, as required for him to be “qualified” individual under ADA; even viewed in the light most favorable to employee, the record did not support the conclusion that the accommodations would have qualified him to perform the essential functions of his position, which included being physically present at a school.)
employee’s unreliable attendance ends. However, the school must also be aware of an employee’s entitlement to unpaid leave pursuant to the Family and Medical Leave Act (FMLA), where applicable. The interplay between disability-related leave and FMLA can be complicated, and legal counsel should be consulted to ensure compliance with all laws.

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. 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. Again, however, depending on the reason for the leave, the FMLA may apply.

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

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157 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).

158 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).

159 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 bipolar 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”).
misconduct was the result of a disability. 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.

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 or past nonaddicted drug users. 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). 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. However, a school may be required to accommodate an alcoholic and/or former addict’s need for time off to participate in a

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160 See 29 C.F.R. Part 1630; 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.)

161 See 42 U.S.C. § 12114; 29 C.F.R. § 1630.3(a).

162 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).

163 See 42 U.S.C. § 12114(a)-(b).

164 See 42 U.S.C. § 12114(c); 29 C.F.R. § 1630.16(b)(4).
rehabilitation program or otherwise attend support group meetings.

3. Retaliation and Harassment

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.\footnote{42 U.S.C. § 12203.} 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.\footnote{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 \textit{prima facie} case of retaliation where he advocated on behalf of a disabled student and was terminated).} Additionally, schools are prohibited from retaliating against nonemployees.\footnote{Ehrlich v. New York City Leadership Acad., No. 12 CIV. 2565 AKH, 2014 WL 2767179, at *6 (S.D.N.Y. May 29, 2014) (while Title VII is an employment statute, the ADA’s anti-retaliation provision is not limited to employer-employee relations; the antiretaliation provision codified in 42 U.S.C. § 12203 prohibits retaliation by any “person” against “any individual.”)} When training on this issue, schools should also keep in mind that the concept of adverse employment action is more broadly construed in the retaliation context than in the general discrimination context.\footnote{See e.g. Leighton v. Three Rivers Sch. Dist., No. 1:12-CV-1275-CL, 2015 WL 272894, at *8 (D. Or. Jan. 20, 2015) “The concept of ‘adverse employment action’ is more broadly construed in the retaliation context than in the substantive discrimination context in a disparate treatment claim.” Grimmett v. Knife River Corp.-Nu., No. CV–10–241–HU, 2011 WL 841149, at *9 (D.Or. Mar. 8, 2011) (citing Burlington N. & Santa Fe Ry Co. v. White, 548 U.S. 53, 60–63 (2006) (antiretaliation provision of Title VII, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment and may include actions that might dissuade a reasonable employee from making or supporting a claim of discrimination)).} Finally, some courts have recognized an ADA claim based on a hostile work environment, while others have assumed, without deciding, that such a cause of action exists.\footnote{Wallin v. Minnesota Dep’t of Corr., 153 F.3d 681, 687-88 (8th Cir. 1998) (“This Court has never recognized an ADA claim based on a hostile work environment, though other courts have done so. See, e.g. Keever v. City of Middletown, 145 F.3d 809, 813 (6th Cir.1998). We will assume, without deciding, that such a cause of action exists, and that “it would be modeled after the similar claim under Title VII.”); See also, Mannie v. Potter, 394 F.3d 977, 982 (7th Cir. 2005) (“Although we have not yet decided whether a claim for hostile work environment is cognizable under the ADA or the Rehabilitation Act, we have assumed the existence of such claims where resolution of the issue has not been necessary.”)}
IV. THE INDEPENDENT SCHOOL FACILITY AS A PLACE OF PUBLIC ACCOMMODATION

As places of public accommodation, 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. The regulations for the accessibility of physical space were substantially changed in 2010, with the new regulations going into effect over a period of two years.

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. Schools must remember that readily achievable is a relative test, much like that of a reasonable accommodation. The expense is relative to both the physical requirements of the space and consideration of the overall resources of the school. 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.

172 See 28 C.F.R. § 36.304.
achievable. Clearly, schools should contact counsel if there is any question about whether more expensive accessibility provisions should be carried out.

The 2010 regulations contained a number of very specific physical accessibility requirements. If your school has the following amenities, they should be reviewed and altered if the changes are readily achievable. Review the following list and look at the new specifications for each of the items at this link, under recreation facilities:


- residential facilities and dwelling units,
- amusement rides,
- recreational boating facilities,
- exercise machines and equipment,
- fishing piers and platforms,
- golf facilities,
- miniature golf facilities,
- play areas (playgrounds),
- saunas and steam rooms,
- swimming pools,
- wading pools and spas,
- shooting facilities and firing ranges,
- team or player seating,
- bowling lanes, or
- sports facilities.

If compliance with the new design standard is not readily achievable (even partially so), then compliance will be expected when the area is next being altered or newly constructed.

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173 See 28 C.F.R. § 36.305.

174 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.
B. Accessibility Requirements of New Construction

All new construction must be readily accessible to and usable by individuals with disabilities unless it is structurally impracticable to do so.\textsuperscript{175} Full compliance will be considered structurally impracticable only in rare circumstances when the unique characteristics of the terrain prevent the incorporation of accessibility requirements.\textsuperscript{176} After March 15, 2012, all new construction must conform to the new 2010 standards. For new construction done between September 15, 2010, and March 15, 2012, the construction could conform to either the pre-2010 requirements or the new 2010 requirements. Schools should know whether their buildings conform to these new physical requirements.

C. Alterations to Buildings

Any planned alterations 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.\textsuperscript{177} These alterations must meet the new 2010 standards as well. This accessibility includes being accessible to wheelchairs. Alterations requiring such accessibility include: renovations, rehabilitations, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration or walls and full-height partitions.\textsuperscript{178} 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.\textsuperscript{179}

\textsuperscript{175} 28 C.F.R. § 36.401(a)(b).

\textsuperscript{176} 28 C.F.R. § 36.401(c).

\textsuperscript{177} 28 C.F.R. § 36.402(a).

\textsuperscript{178} 28 C.F.R. § 36.402(b).

\textsuperscript{179} Id. See also Regents of Mercersburg College v. Republic Franklin Ins. Co., 458 F.3d 159 (3d 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).
If the design of the building is such that providing full access is virtually impossible, the school must provide the maximum physical accessibility possible. 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.

D. Websites and Online Learning

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. 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.

In recent months, schools across the country have received demand letters alleging violations of Title III of the ADA by failing to provide an accessible website to individuals with disabilities. Additionally, the Office for Civil Rights, enforcing Section 504 and Title II of the ADA, has increased its enforcement in this area. Web content may be inaccessible to users in different ways, depending on an individual’s disability. Depending on how web content is programmed, it may be inaccessible to individuals with visual impairment.

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180 28 C.F.R. § 36.402(c).

181 Id.

182 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). See also Nat’l Fed’n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 576 (D. Vt. 2015) (court held that digital library’s website and mobile applications were places of public accommodation under Title III of the ADA.)

183 Recent OCR Resolution Agreements have required schools to take steps to ensure web accessibility, including developing a web accessibility policy and developing a remedial plan to ensure adherence to the policy.
(blindness, low vision, color-blindness), hearing impairment (deafness or hard of hearing) or motor impairment (inability to use a mouse, limited fine motor control). Content must be perceivable to individuals with visual or hearing impairments through the use of assistive technology (i.e., screen reader) or captioning and must be operable to individuals with motor impairments (content can be controlled with use of mouse, keyboard, or assistive device).

There are currently electronic information technology (EIT) standards in place. Section 508 of the Rehabilitation Act (Section 508) prohibits the Federal government from procuring EIT goods and services that are not fully accessible to individuals with disabilities and includes a standard for accessibility. The World Wide Web Consortium (W3C), whose mission is to lead the world wide web to its full potential by developing protocols and guidelines that ensure the long-term growth of the web, has developed accessibility guidelines called Web Content Accessibility Guidelines (WCAG 1.0 and 2.0).

While it is clear that Title III of the ADA requires schools to offer individuals with disabilities the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations” offered by the school, the technical requirements for schools’ websites are far from settled. In fact, there are currently no specific regulatory standards applicable to schools under Title III. The Department of Justice announced it would be promulgating such regulations and standards, but the regulatory process has been delayed. The DOJ recently withdrew a previously existing Notice of Proposed Rulemaking on this issue and is now seeking further comments and input.

Even without these regulations, however, DOJ has made clear its expectation that websites be accessible under Title III through statements of interest filed in litigation in this area and through its enforcement efforts. In agency settlements, the DOJ often requires compliance with WCAG 2.0 AA — the standard that may ultimately be adopted through the rulemaking process.

Given increased DOJ enforcement and focus in this area, schools would be wise to test their websites for accessibility. Schools can assess their websites using
WCAG or Section 508 checklists or online evaluation tools. Schools interested in learning more in this area should go to www.w3.org and look for the site’s web accessibility section. State law may also define an institution’s responsibilities in this area, so schools should consider state regulations that may be applicable and consult an attorney about compliance.

In the area of technology and access, there are considerations for schools that extend beyond their public-facing website. Schools should be aware that the Department of Education has taken the stance, through “Dear Colleague” letters and follow up guidance, that learning through technological means does require accessibility for disabled students. The most recent letter refers readers to a longer set of frequently asked questions, which includes this statement:

Under this definition, these students must be afforded the opportunity to acquire the same information, engage in the same interactions, and enjoy the same services as sighted students. In addition, although this might not result in identical ease of use compared to that of students without disabilities, it still must ensure equal access to the educational benefits and opportunities afforded by the technology and equal treatment in the use of such technology. The DCL uses the term “substantially equivalent ease of use” to describe this concept.

This guidance definitely applies to public schools and higher education. There is a bit of ambiguity about how it may apply to the details of independent school compliance, particularly independent schools that take no federal financial assistance and are not required to comply with Section 504. Regardless, schools would be wise to bear this guidance in mind as they are developing online learning courses and new website interfaces, as it seems likely that similar conclusions would be made for our schools. Schools should take inventory of technology that is employed to enhance the learning environment and school

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environment generally. Schools should then assess the ways this technology is accessible to all school community members and develop ways to remedy inaccessibility.

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 the ADA, 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 the 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 the ADA (Department of Justice for public accommodations violations under Title III or the 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 critical to 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.

Schools must also work with counsel to determine what compliance actions are 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.

**United States Department of Justice:**
Disability Rights Section Home Page: [http://www.justice.gov/crt/about/drs](http://www.justice.gov/crt/about/drs)

**United States Department of Education:**
Office of Civil Rights:
[http://www2.ed.gov/about/offices/list/ocr/index.html?src=oc](http://www2.ed.gov/about/offices/list/ocr/index.html?src=oc)
Office of NonPublic Education:
[http://www2.ed.gov/about/offices/list/oi/nonpublic/index.html](http://www2.ed.gov/about/offices/list/oi/nonpublic/index.html)

**United States Equal Employment Opportunity Commission:**
[http://www.eeoc.gov](http://www.eeoc.gov)

[http://www.w3.org/WAI/](http://www.w3.org/WAI/)