

16. What Legal Protections Are Available for Postsecondary Students?

Students in colleges, universities, and vocational and trade schools are also protected by federal disability discrimination laws. However, these laws do not impose the same requirements on postsecondary institutions as they do on elementary and secondary schools. Postsecondary institutions must ensure that students with disabilities have equal opportunities and are not treated less favorably, but do not have to provide every service that a student might need in order to benefit from an education. As a practical matter, many accommodations that are important earlier in a child's school career are not needed in college, and some types of accommodations will simply not be required in the college setting.

This Part provides a basic introduction to issues likely to arise in the postsecondary context. For convenience, the term "college" and "college student" is used for all postsecondary institutions and students. However, the information in this Part applies equally to vocational training programs, graduate programs, and professional programs.

16.1 What federal disability laws protect college students with diabetes?

The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) provide protection to college students with disabilities. The ADA applies broadly to all state-run and private colleges, except that it does not apply to those operated by religious institutions. Section 504 applies to all colleges—including religious colleges—that receive federal funds. Most religious colleges receive federal funds, for example, in the form of research grants or student financial aid and work-study funds.

While some students with diabetes in K-12 education receive services and are protected under the Individuals with Disabilities Education Act (IDEA), as discussed in Question 4.7, this law does not apply at the college level.

Notes

For general information about the ADA and Section 504, see Question 4.1. Title III of the ADA does not apply to religious organizations or entities they control. However, Section 504 applies where such a college is a recipient of federal funding. Where some specific program within a college receives federal funding, courts have held that Section 504 applies not only to that program but to the entire school. See Question 4.10. Federal funding may be received directly or indirectly. Examples of direct funding include grants for research, technology, school improvement, or other purposes. Some examples of federal programs

include the Federal Perkins Loan Program, the Federal Work-Study Program, and the Federal Supplemental Educational Opportunity Grant. 34 C.F.R. § 673.7. Courts have found that colleges become subject to anti-discrimination laws by participating in federal student financial aid programs. The Fifth Circuit has held that a state college that participated in the Federal Work Study and Pell Grant programs was subject to Section 504. *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448 (5th Cir. 2005). The Supreme Court also held that, in the context of Title IX, which bans discrimination based on sex in education and is structurally similar to Section 504, a school was not exempt from its anti-discrimination obligations just because federal funds were granted only to students and not directly to the college. *Grove City College v. Bell*, 465 U.S. 555, 569-570 (1984). Where Section 504 applies, its application is institution wide. In *Grove City*, the Supreme Court also held that Title IX was program specific but Congress in 1988 reversed that view with the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 (1988), clearly establishing institution-wide application.

Postsecondary education is not included in the IDEA definition of a free appropriate public education that the state is required to provide. 20 U.S.C. § 1401(a)(9)(C) (FAPE obligation extends to providing an appropriate preschool, elementary and secondary education). States are under no obligation to provide IDEA services to children with disabilities who have graduated from high school with a regular diploma. 34 C.F.R. § 300.102(a)(3)(i).

16.2 How do the legal responsibilities of K-12 schools and colleges differ?

Elementary and secondary schools are responsible for the health and safety of the children under their care and therefore may be required to provide certain health services. For example, they monitor younger students' blood glucose levels, treat hypoglycemia, help them to calculate carbohydrate content in foods, and administer insulin. Colleges do not have the same legal obligation to care for the medical needs of their students, and most college students manage their diabetes independently.

Public elementary and secondary schools that receive federal funding have an affirmative obligation to provide a “free appropriate public education” or FAPE to each qualified person with a disability in their jurisdiction. Colleges have no such obligation to provide an education to any particular person. However, they must not discriminate against otherwise qualified students. In addition, colleges need not provide modifications or accommodations which would impose an undue burden or fundamentally alter a program. These defenses are not available in the public school context.

Public elementary and secondary schools must also identify children with disabilities. In contrast, college students have the burden of identifying themselves as individuals with disabilities. If students need any accommodations, they must proactively request them, typically by working through the college's disability services office.

Finally, while many elementary and secondary schools document agree upon accommodations in an Individualized Education Program (IEP) or Section 504 Plan for students with diabetes, colleges typically do not. While college students should request written documentation of any services the school agrees to provide, this documentation will not typically be called a “Section 504 Plan.”

The goal of federal anti-discrimination laws is to level the playing field for students, not to give students with disabilities an advantage over their peers. *See Hamilton v. City College of City Univ.*, 173 F. Supp. 2d 181 (S.D.N.Y. 2001) (college's manual provided that the objective of accommodations or modifications "is always to accommodate the student's learning differences, not to water down scholastic requirements").

The obligation of an educational institution to make academic adjustments does not require that "fundamental" or substantial modifications be made to accommodate students with disabilities, but only reasonable ones. *Southeastern Community College v. Davis*, 442 U.S. 397 410 (1979) (hearing-impaired nursing student denied admission because accommodation would "result in a substantial modification to the existing program"). Further, there is no duty to assume "undue financial and administrative burdens." *Id.* Neither must a program be significantly refashioned, *Eva N. v. Brock*, 741 F. Supp. 626 (E.D. Ky. 1990). This is especially true if the modifications might cause the institution to lose its accreditation. *Hartnett v. Fielding Graduate Inst.*, 400 F. Supp 2d 570 (S.D.N.Y. 2005), *aff'd in part and rev'd in part*, *Hartnett v. Fielding Graduate Inst.*, 2006 U.S. App. Lexis 24128 (2d Cir. 2006).

At least one court has held that colleges need not provide written accommodations plans. *See Bevington v. Wright State Univ.*, 23 Fed. Appx. 444, 445 (6th Cir. 2001) (finding "neither the Rehabilitation Act nor the Americans with Disabilities Act require a written plan for postsecondary students").

16.3 What protections do applicants with diabetes have during the admissions process?

Colleges are generally prohibited from inquiring about disabilities during the admissions process.

Despite the general prohibition on pre-admission inquiries, there are two circumstances when a college may make an inquiry that has the effect of revealing a disability. First, there is a narrow exception when colleges ask applicants to voluntarily disclose a disability as part of efforts to increase participation by people with disabilities in their programs. Second, a college may inquire as to whether applicants can meet the essential requirements of their programs as long as these inquiries are not intended to reveal disabilities. This most often occurs in schools or programs designed to prepare students for a particular career or certification. For example, a criminal justice program at a local community college could ask students if they can meet certain required physical fitness standards. It could not ask applicants to reveal their chronic health conditions and list the medications they take.

After an offer of admission has been extended, colleges may make confidential inquiries as to whether incoming students may need modifications or accommodations. They also may confirm that students in fact meet the physical fitness standards.

For a discussion of standardized testing, including the SAT and ACT, see Question 11.4.

Colleges clearly cannot ask direct questions such as "do you have a disability?" 34 C.F.R. § 104.42(b)(4). However, more subtle questions, such as asking what prescription medications an applicant takes or why such medications were prescribed, may also be prohibited because they can often reveal a disability. In the context of diabetes, a college

would violate both the ADA and Section 504 by asking whether an applicant has diabetes or if the applicant uses insulin.

There is a narrow exception to this general prohibition when a college seeks to increase participation by people with disabilities in its programs. 34 C.F.R. § 104.42(c). However, it must make clear to applicants that all information is being requested on a strictly voluntary basis and only for this purpose. 34 C.F.R. § 104.42(c)(1)-(2).

While a college may ask whether an individual can meet essential requirements of its programs, it must ensure that its questions are not designed to reveal disabilities. The US Department of Education's Office for Civil Rights provides helpful guidance in distinguishing types of questions that are permissible and impermissible:

Examples of impermissible preadmission inquiries include: *Are you in good health? Have you been hospitalized for a medical condition in the past five years?* Institutions of postsecondary education may inquire about an applicant's ability to meet essential program requirements provided that such inquiries are not designed to reveal disability status. For example, if physical lifting is an essential requirement for a degree program in physical therapy, an acceptable question that could be asked is, *With or without reasonable accommodation, can you lift 25 pounds?* After admission, in response to a student's request for academic adjustments, reasonable modifications or auxiliary aids and services, institutions of postsecondary education may ask for documentation regarding disability status.

Transition of Students With Disabilities To Postsecondary Education: A Guide for High School Educators, Question 2, available at <http://www.ed.gov/about/offices/list/ocr/transitionguide.html> (emphasis in original).

Colleges are expressly authorized to make confidential inquiries to help them provide accommodations for admitted students. 34 C.F.R. § 104(b)(4). However, they must ensure that they make an admissions decision before they ask for any other information that may tend to reveal a disability. *See* University of Tennessee at Martin, 14 NDLR 72 (OCR Region IV, 1998) (finding violation of Section 504 and ADA when college required students to complete an application for a program for students with learning disabilities concurrently with the regular application).

16.4 Who should students approach in order to get accommodations at college?

College students have no obligation to disclose their diabetes to their college. If they do not require any modifications or accommodations, they may choose not to disclose their condition. However, in order to receive any accommodations, they need to let their college know. Most schools have an office responsible for coordinating the provision of needed accommodations (often called the disability services office, though the name may vary), and students should generally register with this office to get accommodations.

While many accommodations can be easily provided by professors, e.g., permission to bring snacks into class, extensions on assignments, and excusal for absences, it is often best to work through the disability services office, even for these simple accommodations. This can prevent any later confusion regarding what accommodations were agreed upon and provide students with valuable protections if disputes arise with individual instructors. Students should ensure that they receive written documentation of their agreements with this

office. This provides a critical evidentiary record in case a formal complaint or litigation becomes necessary.

Students who choose not to disclose their diabetes typically cannot get retroactive accommodations. For example, a student who has not disclosed her diabetes but is unable to complete her course work on time because of her diabetes may not be entitled to receive an extension (unless there is a general policy allowing all students with medical illnesses to receive extensions). Therefore, if some accommodations might ever be required, students should inform college officials of this possibility in advance.

16.5 What documentation should students provide in order to receive accommodations?

Students are responsible for providing documentation establishing the need for accommodations. The documentation must come from an appropriate expert, be fairly recent, and sufficiently comprehensive. Many colleges require that students provide a recent letter from their health care professional that includes the following general elements:

1. A diagnosis of the disability along with its symptoms;
2. An explanation of how it qualifies as a disability, if this has been questioned; and
3. A request for specific accommodations along with a clear rationale for why these accommodations are appropriate.

Each college usually has its own forms and exact procedures for providing documentation. Often, there are separate requirements for learning disabilities, mobility disabilities, physical disabilities, and chronic health disabilities. Typically, diabetes is classified as a physical disability or chronic health disability.

16.6 What types of academic accommodations are typically granted or denied?

Some changes to an academic program may be required in order to permit college students with diabetes to participate. Many accommodations typically requested by students with diabetes should be granted as a matter of course, e.g., permission to eat and perform diabetes care in class or extended breaks between sections of exams to check blood glucose. However, in certain circumstances, students may need to seek more substantial accommodations, such as changes in attendance policies, extensions for completion of course work, and rescheduling of exams. These requested accommodations will likely be subject to more scrutiny by colleges because they may be concerned that they may amount to a fundamental alteration to their program, as discussed in Question 1.2.

Accommodations that may often be reasonable include:

- The ability to check blood glucose in classrooms and lecture halls
- Permission to reschedule an exam if experiencing high or low blood glucose levels
- Breaks between separate sections of long exams to check blood glucose levels
- Being excused for diabetes-related absences and the ability to make up work

- Permission to have more frequent and/or extended breaks to take care of diabetes during a clinic or internship
- Permission to schedule classes so that a regular meal schedule can be maintained

Accommodations that may be found to be unreasonable include:

- Training of college staff in diabetes care
- Extra time on exams (as opposed to extra breaks during an exam)
- Exemption from course requirements

Students should be aware that colleges are granted a high level of deference in their academic decisions, including their provision of academic accommodations. Once colleges have reached a final decision to deny accommodations, administrative agencies and courts are unlikely to disturb the determination unless students can present evidence of a flaw in the process used to evaluate the reasonableness of accommodations.

Thus, students should not rely on administrative agencies and courts to provide them with needed accommodations. Rather, from the very first conversations they have with their college, they should proactively demonstrate why they need each requested accommodation and ensure that they carefully document any and all requests and communications.

Notes

Courts generally defer to the academic determinations of postsecondary institutions. *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999) (“a majority of circuits have extended judicial deference to an educational institution’s academic decisions in ADA and Rehabilitation Act cases”). However, if institutions have failed to adequately consider the individual circumstances of each student, courts are more likely to second-guess the determination. For example, one court found that, “[b]ecause the issue of reasonableness depends on the individual circumstances of each case, this determination requires a fact-specific, individualized analysis of the disabled individual’s circumstances and the accommodations that might allow him to meet the program’s standards.” *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999) (finding the college failed in its duty to properly consider student’s disability and request for accommodation). For more discussion of the issue of academic deference in the context of the ADA and Section 504, see Lynn Daggett, *Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students*, 32 J. COLL. & UNIV. L. (2006); Bonnie Tucker, *Application of the Americans with Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students*, 23 J. COLL. & UNIV. L. 1 (1996); Adam Milani, *Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability Law*, 22 J. COLL. & UNIV. L. 989 (1996).

16.7 What accommodations are available for non-academic programs and services?

Colleges may not discriminate against students with disabilities in any of their activities and programs (including housing, meal plans, athletics, etc.). Just as college students have a right to attend class without being discriminated against, they also have a right to participate in athletics and live in campus housing on an equal basis, so long as they are otherwise qualified.

Unlike elementary and secondary schools, colleges do not need to make staff members available to administer insulin or glucagon or to monitor blood glucose. Students are responsible for their diabetes while at college. If they require assistance from others, they must arrange for such assistance themselves.

Notes

Section 504 explicitly clarifies that colleges cannot discriminate in any part of their curriculum or program:

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

34 C.F.R. § 104.43(a). While some colleges may be unfamiliar with or question the applicability of the ADA and Section 504 outside of the academic context, other colleges proactively seek to ensure that students with disabilities have full access to all college programs and activities. For example, the University of Connecticut has established a policy for students who need modifications in housing and dining services based on their disability. While colleges will vary widely in their policies, this provides an example of how a college can work to accommodate the non-academic needs of its students. Center for Students with Disabilities, University of Connecticut, *Student Handbook: Accommodations and Services for Students with Disabilities, Residential Accommodations and Information*, available at <http://stamfordstudentlife.uconn.edu/wp-content/uploads/sites/418/2013/12/handbook.pdf>. A college will violate Section 504 and the ADA where it excludes a student from housing, dining or other programs because of that student's disability. See *Coleman v. Zatechka*, 4 NDLR 52 (D. Neb. 1993) (violation of Section 504 and ADA when college refused to assign a roommate to a person with cerebral palsy).

Decisions to exclude a student from physical education or athletics because of safety concerns must not be based on subjective fears but on objective and justifiable medical evidence. Compare *Rancho Santiago Community College*, 3 NDLR 52 (OCR 1992) (student barred from enrolling in physical education course because instructor was "afraid she would get hurt"), with *Knapp v. Northwestern University*, 101 F.3d 473 (7th Cir. 1996) (basketball scholarship winner prevented from playing because of heart condition college perceived as dangerous).

16.8 Are college students protected from discrimination in internships and clinical training programs?

Yes. Colleges cannot discriminate against students who participate in practical training courses and programs. Students have the right to participate equally in these programs and must be provided with reasonable accommodations if necessary. However, colleges need not permit students to participate in these programs if they present an objective safety risk or if accommodations will result in an undue burden or fundamental alteration.

Examples of such programs include: an undergraduate placed with a local social service provider doing an internship for academic credit; a nursing student in a practical training class; and a law student representing low-income clients in a clinic run by the law school. Of

course, as already mentioned, the student with a disability must meet the minimum requirements of the program with reasonable accommodations.

Notes

Section 504 regulations provide that no qualified disabled person shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance. 34 C.F.R. § 104.4(4). Recipients, in providing any aid, benefit, or service, may not, directly or through contractual relationships, on the basis of disability, deny a qualified disabled person the opportunity to participate in or benefit from the aid, benefit or service. 34 C.F.R. § 104.4(b)(1)(i). Further, postsecondary institutions must assure that other educational programs or activities not wholly operated by the recipient, yet benefiting its students, provide an equal opportunity for participation of qualified individuals with a disability. 34 C.F.R. § 104.43(b). That is, postsecondary institutions must ensure nondiscriminatory treatment by organizations with which they have contractual relationships.

For example, in *San Jose State University (CA)*, the Office for Civil Rights found that the college had violated both Section 504 and the ADA when it failed to provide modifications to a student in an internship. 4 NDLR 358 (OCR 1993). In this case, a student with a learning disability was placed at a county social services agency and his supervisor assigned him to a workstation that was inaccessible to him. *Id.* at 1320. Although the student requested accommodations, his college was unresponsive, and, because of this failure to provide accommodations, he was unable to complete the internship and received “no credit.” *Id.* at 1321.

16.9 What protections exist for college students who work on or off campus?

Many college students also work while studying, whether on or off campus. These individuals should be aware that their employers, including colleges, are prohibited from discriminating against them because of their diabetes. Employers cannot discriminate in hiring, firing, discipline, pay, promotion, job training, fringe benefits, or in any other term or condition of employment. They also must provide reasonable accommodations if requested and are also prohibited from retaliating against employees for asserting their rights.

However, employees need not hire or retain employees who are unqualified to perform their jobs or who present an objective safety risk. Further, they do not need to provide accommodations that will result in undue hardship, defined as requiring significant difficulty or expense.

The American Diabetes Association provides extensive materials on employment discrimination for both employees and their attorneys. For more information, please contact the American Diabetes Association.

Notes

Student workers who have been hired by and are paid by their college should be considered employees. *See Cuddelback v. Florida Bd. of Educ.*, 381 F.3d 1230, 1234-35 (11th Cir. 2004) (paid researcher also completing course requirements was an employee under analogous Title VII standard). In *Cuddelback*, the Eleventh Circuit analyzed whether the

graduate student assistant was an employee using the “economic realities test,” finding that the student qualified as an employee under this balancing test. *See also Clackamas Gastroenterology Associates, P.C., v. Wells*, 538 U.S. 440 (2003) (stating factors for determining if an individual is an “employee”). *But see Pollack v. Rice Univ.*, 1982 U.S. Dist. Lexis 12633 (S.D. Tex.), *aff’d mem.* 690 F.2d 903 (5th Cir. 1982) (paid services incidental to scholastic program). *See* James Rapp, Education Law §6.05[8][c] (collecting cases on coverage of employees under Title VII). When a student is not financially compensated for his or her labor, courts generally hold that the student is not an “employee.” *Jacob-Mua v. Veneman*, 289 F.3d 517 (8th Cir. 2002) (student not employee because no compensation). However, even if individuals are not able to establish that they are employees, they may have a possible claim against their college if their college sponsors the work-type activity. *See* Question 16.8.

16.10 How are disagreements resolved at the postsecondary level?

Every reasonable effort should be made by college students and their college to come to a consensus regarding any disputes. If disputes cannot be resolved informally, consulting an attorney is critical. College students may consider the following options:

- Mediation (an informal process where the parties, often with the help of a neutral third party, attempt to negotiate a solution).
- Internal college grievance procedures
- Complaints to federal or state enforcement agencies
- Lawsuits in federal or state court

See Part 14 for more information on these procedures.

If the claim involves a complaint against the college for employment discrimination, administrative exhaustion through the EEOC or state or local fair employment agency is required, and a charge of discrimination must be filed within a short period of time (usually 300 days, but as little as 180 days in certain states). Resources on employment discrimination litigation from the American Diabetes Association or other sources should be consulted before bringing such a claim, as the procedural and substantive requirements are beyond the scope of this notebook. State law or institutional policies may provide additional remedies.