

THE LEADERSHIP
JOURNEY
GUIDES, PATHWAYS, AND POSSIBILITIES



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Are Your Admissions Processes Compliant with ADA and Similar Laws? What Are the Risks?



EDUCATION PRACTICE GROUP



Who's on the Panel?



Your Presenters



Steve Piltch, Head of School, Shipley School, Bryn Mawr, PA

- 830 students

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The Law – A Refresher



- The Americans with Disabilities Act (ADA) prohibits discrimination against qualified individuals with a disability.
- The law requires institutions to make reasonable accommodations for disabled individuals as long as there is **no undue hardship** to the institution; **no direct threat of harm to the individual or others**; or **no fundamental alteration of the institution's program**.
- The goal is to create level playing field for “disabled” students or applicants.
- Emphasis on what individuals **can** do, not on limitations.



The Law – Recent Trends



- More accommodation requests, especially by parents who are aggressive and believe they know their child's rights (which are often incorrect).
- More Department of Justice (DOJ) and Office of Civil Rights (OCR) scrutiny.
- Following the right process is key:
 - Knowing when you can ask for information
 - Engaging in the interactive process with individualized determinations
 - Documenting the issues well



Definition of “Disability”



- Any individual with a **present** physical or mental impairment that substantially limits one or more major life activities
- Any individual with a **history** of an impairment
- Any individual **regarded as having** a disability



Major Life Activity

- Walking
- Talking
- Breathing
- Hearing
- Lifting
- Working
- Reproduction
- Bending
- Learning
- Thinking
- Concentrating
- Seeing



Shipley: Students with Disabilities



- What changes have you seen at Shipley in the last 5 years regarding students with disabilities?
- How many students/what percentage of students in your upper school have some form of accommodation plan?
- What are you seeing as the largest growth area in accommodations needed?

What is the audience seeing at their schools?



ShIPLEY: Challenges in this Area



- What are the challenges at Shipley School in addressing the needs of students with disabilities?
- Have you had any surprising situations or especially difficult situations?
- Have you changed staffing?
- Has your program changed at all?
- Have your support services changed?

What changes are other schools seeing?



What Are We Seeing?

- We are seeing a large growth in disability-related claims and requests for accommodation in educational institutions.
- More complicated issues, especially when dealing with learning differences.
- The laws keep changing (DOJ, OCR, EEOC, and court interpretations).
- The institution's obligations are growing and DOJ has become more aggressive.



DOJ Investigations and Penalties



- In situations where parents believe their children have not been admitted to a school due to a disability, they can file a claim with the DOJ, OCR (if the school receives federal financial assistance), or directly in court.
- The agency will review the entire admissions process and if improper disability-related inquiries were made or if the school otherwise refused to accommodate a child's disability, it can impose penalties of up to \$50,000 **per violation** and require that the entity enter into a settlement agreement that will require changes in procedures (or be sued).



Shipley and Audience Questions



Does your application for admission asks any of the following questions:

- Does your child have a disability?
- Does your child have an IEP or a psycho-educational evaluation?
- Does your child have special needs?
- Does your child need any accommodations?
- Does your child take medications?





Admissions Inquiries

- The ADA Technical Assistance Manual says that schools may not make **unnecessary inquiries** into the existence of a disability in the admissions process.
- A school may seek only information that will enable it to determine whether an applicant can participate in the **essential aspects of the academic program**, or whether the individual is entitled to a requested reasonable accommodation due to a disability.

See “Americans with Disabilities Act: ADA Title III Technical Assistance Manual” (“ADA Manual”) at III-4.1300, available at <https://www.ada.gov/taman3.html> (last visited 1/17/18).



Disability-Related Inquiries



Some exceptions apply:

- The school has or is a special needs program in which evidence of a disability and special accommodations are requirements for admission.
- The parent raises the issue up front.



Improper Inquiries



- In 2016, the Department of Justice found that the following inquiries were inappropriate for the Philadelphia YMCA to make in connection with its day camp admission:
 - Does your child have an IEP or Behavioral Plan in place during the school year?
 Yes No
 - Please describe the reason for the Behavioral Plan.
 - Does your child have a behavioral specialist?
 Yes No

[See https://www.ada.gov/rocky_run_sa.html](https://www.ada.gov/rocky_run_sa.html)



Improper Inquiries



- In 2011, a large charter school group was found to have made impermissible inquiries in the admissions process and to have failed to provide reasonable accommodations to students. It was ordered to pay \$215,000 to students who had been excluded from the school's programs (not admitted or expelled) due to varying disabilities.
- The School was required to change its admissions process to limit inquiries on the application to:
 - Would your child need assistance and/or modifications to the school's programs and services in order to fully participate in the programs. Circle yes or no. Any request for assistance must be made to [the designated officer].

[United States of America v. Nobel Learning, Civ.09-1818-MAM \(E.D. Pa. 2011\).](#)



Section 504 Regulation for Pre-Admission Inquiries



- Similarly, the regulations implementing Section 504 of the Rehabilitation Act prohibit pre-admission inquiries into whether an applicant is a handicapped person, unless the institution is doing so because it is under an order to correct past acts of discrimination.
- Section 504 only applies to institutions that receive federal financial assistance but its guidance is borrowed by the courts and DOJ in interpreting the ADA.



Your Questions



- You have to think about what you put on your applications and ask in the admissions process.
- What do you need to know? Academics, disciplinary history, standardized academic testing results.
- Do you really need to know if the student has ADHD? Or other conditions? If so, why?
- For the most part, you can tell through your interview, review of documents, etc. whether the child is going to be able to participate in your program. Medical information should be able to wait until after you have made a conditional offer of enrollment.



ShIPLEY: Diabetes and Other Conditions



- What kinds of issues have come up at ShIPLEY in the admissions process that might require that a nurse or other employee provide accommodations?
- Diabetes?
- Seizure disorders?
- Allergies?
- Have parents asked that teachers and aides be trained to check a student's glucose level and administer insulin?
- Have teachers been asked to give injections?



Audience Questions



- What conditions have come up at your school in which accommodations would be needed to allow the child to participate in your program?
- Have you encountered situations in which the school or individual employees felt uncomfortable checking a student's insulin levels or giving injections or providing other types of accommodations?



Diabetes and Similar Situations



- The DOJ has been very active in pursuing schools, camps, and day care centers for failure to accommodate students with diabetes.
- In one case, the 6 year old child's physician said that a non-nurse could assist the child with diabetes management by administering glucagon; recognizing signs and symptoms of low and high blood glucose levels; and supervising the child in administering insulin and counting carbohydrates. The parents provided information and training on how to handle blood glucose checks and materials about recognizing abnormal blood glucose levels.



Diabetes and Similar Conditions



- The school was uncomfortable managing this process and instead required the mother to come to the school at 11:30 am each day to handle this process.
- The mother reluctantly agreed to do so.
- The school also said that in the event of an emergency, if the child lost consciousness, the school would call 911 rather than administer glucagon. The mother filed a claim.
- Ultimately, the DOJ found the school in violation of the ADA and required that the school train employees about diabetes management and provide reasonable accommodations, including by requiring **non-nursing personnel** to monitor, test, and administer necessary medications.

https://www.ada.gov/rocky_run_sa.html



Diabetes and Similar Conditions



- There are a large number of settlements and cases available on the DOJ's and OCR's websites that reflect that these agencies have been very active in investigating schools, day, and summer camp for admissions inquiries, denials, and refusals to provide accommodations involving:
 - Diabetes
 - Autism
 - Behavioral disabilities



Audience Question

- Should you have students complete testing that will show IQ or cognitive ability as part of the admissions process?



ADA & Admissions Testing



- Testing that reflects IQ or cognitive impairments are medical exams that potentially reflect the evidence of a disability and should not be used until a conditional offer of acceptance has been made unless the information is necessary for the student to be able to participate in your program.
- It is highly unlikely that this information is necessary for your program.
- Better to get the information of ability to participate in a competitive program by assessing the student's academics, standardized academic testing, types of courses taken, etc.



State Admissions Requirements



- You also need to know your state law.
- Some states have state laws or local ordinances that add additional requirements.
- Washington, D.C., for example has very specific limitations on what can be asked (by information on the application or in the admissions process) about race, color, national origin, and disability, among other things.
- Even seeking a photo or asking about language facility that could disclose race/national origin, etc. would violate the law.

D.C. Human Rights Act, § 2-1402.41(1)



ShIPLEY: Providing/Obtaining Information



- What is ShIPLEY's process for communicating to other entities the fact that a student has received accommodations?
- Does ShIPLEY make any type of notation on its transcript or other information provided to colleges or other schools that evidence that a student has received accommodations?
- Discuss your reference or recommendation letters.
- Discuss verbal references or communications to other schools.
- Do you ask for this information on your requests to other schools when a student is seeking admission to ShIPLEY?



Audience Question



- Does your school do anything that implies or indicates that the student has received some type of accommodation?
- Do you ask for accommodation or special needs information from other schools?
- Do you answer questions about disabilities, special needs, or accommodations about your students who may be seeking admission to other schools?



Impermissible Information Disclosure and Use

- In 2004, OCR found that schools violate § 504 of the Rehabilitation Act and the ADA Title III when they make pre-admission inquiries about applicants' disabilities and place lower weight on standardized test scores achieved under conditions designed to accommodate disabilities.
- In another case, the court found that the admissions officer's questioning of applicants about why they needed accommodations in standardized testing was an improper inquiry in the admissions process.



Giving Recommendations with Disability Information



- This same concept (i.e., that it violates the ADA) would apply to an institution's providing of information to other schools.
- If the other school's reference to teachers, administrators, or the head ask whether the student received accommodations, had special needs, etc., your school is at risk of violating the ADA if it answers those questions without getting consent and a release in favor of your school to provide such information.
- I would not rely on the small consent on the form or on the promise of confidentiality. Get your own consent/release document signed.
- Talk to the parent about the request and potential disclosure first.



Disability-Related Inquiries After the Offer



- Schools may make disability-related inquiries **after the offer of admission**:
 - In the period after a conditional offer is accepted and before the student starts school.
 - When the student/parent requests an accommodation in the admissions process or after the student starts school.
 - To determine fitness for activity (i.e., sports, field trip)
 - When there is objective evidence that the individual presents an imminent direct threat to self or others



Shipley: Handling the Request for Accommodation



- What is Shipley School's process, whether in the admissions process or after the student starts school, in handling the request for an accommodation?
- Who handles the issues?
- What is admission's involvement?
- What is the involvement of other division heads, nurses, etc.?



Audience Question



- How many have a department that handles requests for student accommodations?
- How many have a specific individual to whom those requests are made?
- How many feel that you are handling the requests in compliance with the law?

How many do not really know?

How many have had claims asserted regarding the failure to provide appropriate accommodation?



Reasonable Accommodations



Three General Requirements:

1. School has duty to engage in a timely, good faith **interactive process** when the need for an accommodation comes up
2. The assessment of need must be **individualized**
3. School has duty to provide **reasonable accommodations** in appropriate circumstances



Interactive Process Requirements



The appropriate (trained) person must consult with parent/student regarding the request for accommodation and the student's limitations. These inquiries must be **individualized to the student:**

- Ascertain the precise school-related limitations
- Discuss how those limitations could be overcome
- Request appropriate medical documentation that describes the impairment, how it limits the student, and suggested accommodations

The School then determines whether and how it can accommodate.



A Word on Documentation

- All medical documentation must be maintained as confidential in folders/files that are separate from the student's academic records. The file cabinets must be locked.



Document Every Step of the Process



- When your school receives a request for accommodation, the entire process should be well documented to show:
 - The nature of the request (when made, by whom, for what)
 - The steps that the school took (the discussion with the parent/student to learn more information, and then to seek medical documentation).
 - The steps the school took to review/assess the medical documentation and determine whether it could accommodate.
 - The steps the school took to discuss the situation and responses with the parent.
 - The actual accommodations the school has agreed to provide (which may be slightly different than those requested). You should have the parent sign off on the agreement.



Audience Question

- How does your school let others within the community know about a student's need for accommodations?
- Who receives the information?
- What information do they receive?
- What precautions / processes are in place?



ShIPLEY Question



- What does ShIPLEY do to communicate with the community about a student's accommodations?
- Who does it provide information to? How is it provided?
- Does it disclose diagnoses?
- Shouldn't a teacher know if a student has a peanut allergy?





CASES ARISING IN THE ADMISSIONS PROCESS

Case Study



- An applicant for high school is admitted to 9th grade with a solid application file. After being offered an enrollment contract and enrolling, the family provides the school with a full battery of testing that indicates a need for accommodations. The family is requesting that the school meet his needs and provide all the accommodations he is receiving currently in his public school.

What are the school's obligations?



Analysis of Case Study



- Determine whether the school can reasonably accommodate the student without fundamentally altering the nature of its program.
- Have someone knowledgeable and trained in handling accommodations review the report and ask appropriate questions of the parents / student to understand the child's real needs. What are they actually asking that you do at school?
- If the requests seem unreasonable or would fundamentally alter your program, consider having an outside professional review the document with you to better understand the issues (if you are not clear).
- Offer what the school can do and what it cannot do. If the parents are aggressive and demand more, work with counsel to ensure you are on the right track.



Case Study



- A child with autism seeks admission to middle school. When the admissions director scheduled a meeting with the parents to discuss the application and the child's needs, the parents brought four other people (the child's shadow and three different therapists).
- The school has never permitted a shadow before and has never had a child with autism. There is a concern that the needs of the child will cause other children not to receive the education benefits they have paid for.
- The admissions director contacted the Head of School to join the meeting. After listening to the parents describe the child's impairment and accommodations needed, the Head advised that the school was not the right placement for their child and denied admission.

Thoughts?



Legal Concerns

- There are a fair number of cases, some high profile, in which a school is alleged to have summarily denied admission to a student based on the diagnosis stated (Autism, Asperger's, Down's Syndrome, etc.) without engaging in an individualized assessment to determine whether, based on the student's actual disability, limitations, and need, the school could reasonably accommodate the student without fundamentally altering the school's program.





Analysis of Case Study

- The school must take one step at a time. Don't let fear of the unknown drive your decisions.
- Just because you have not done something before (i.e., permitted a shadow, therapists, etc.) does not justify just saying no.
- **You must engage in the interactive process and make an individualized determination of the child's limitations and needs.**
- Find out what the child's needs are.
- Get **current** medical documentation (3 years old or less).
- Review the situation carefully and then decide how to move forward, with advice of counsel.



Further Analysis



- The school determined that the therapists would provide their services after school or during lunch. The shadow had worked with the student at his other school without difficulty. However, there were only 5 children in his other class. Your class has 18 children. The child will need lessons to be taught twice for optimum understanding.

What is your analysis?



Analysis of Case Study

- The pace of middle school at your school is very fast. Materials covered daily are substantial. The teacher cannot be expected to teach the material to one child twice. Asking her to do so would be a fundamental alteration of the school's programs.

Is that the end of the analysis?



Analysis of Case Study

- The shadow may be able to address the child's learning needs by going over the materials later.
- You may need to adjust the amount of work for the child as long as the child can show mastery of the concepts being taught. i.e., 5 test questions rather than 10 on a subject.
- Any use of a shadow should be with clear written guidelines as to expectations.



Case Study



An applicant for high school has a processing disorder. The parent provides you with a psychoeducational evaluation that recommends that the school tape record the lessons or permit the child to use a recording pen. The mother says her child will not be enrolled in your school unless this accommodation can be made.

- Must the school permit this?

What about the privacy rights of the teacher and/or other students?



Analysis Of Case Study



- There are few cases in this area but the federal courts in other jurisdictions that have addressed it have held that because the student has a disability, the school must permit the accommodation of either recording lessons or allow the recording pen.
- The courts have specifically held that the privacy rights of either the other students or teacher are not enough to outweigh the disabled student's rights to the accommodation under law.



Case Study



An applicant to the high school is not a strong student and struggles academically, specifically in the area of language arts. The parents share during the admissions process that the student was recently diagnosed with bilateral central hearing loss. The family shared, that despite her diagnosis the student does not require or receive any special accommodations in school. The fact that she is below grade level in writing and reading is not connected to her diagnosis.

How does the school have to consider her disability in the decision process?



Case Study Analyzed

If the parents are not asking for any type of accommodation, you can evaluate the child's performance as is. If the child's academic grades do not meet your requirements for admission, the child can be denied admission.



Case Study



A child seeking admission to your school has had serious disciplinary issues at her other school. She bullies others and kicked a student in the same leg the child had recently broken. The parents tell you that their child has ADHD which sometimes results in unpredictable behavior and advise that they know you must accommodate her disability. The child meets your academic admissions standards.

Are the parents right? Do you have to accommodate her behavior issues that are caused by her disability?



Case Study Analyzed

You can always require that students meet your social and behavioral standards. You can deny admission to a student with a disability if the student's behavioral record is not consistent with your school's expectations.





Final Questions





THANK YOU

FOR THIS OPPORTUNITY



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