

DOCUMENTING LEARNING DISABILITIES: LAW SCHOOLS' RESPONSIBILITY TO SET CLEAR GUIDELINES

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I. THE MEANING OF DISABILITY.....	193
II. DOCUMENTING LEARNING DISABILITIES.....	207
III. LEGAL REQUIREMENTS FOR DOCUMENTATION GUIDELINES.....	217
IV. LAW SCHOOL DOCUMENTATION GUIDELINES.....	222
V. RECOMMENDATIONS.....	227
APPENDIX A.....	232
APPENDIX B.....	240

INTRODUCTION

In his freshman year of college, Tommy was diagnosed with a learning disability. A school psychologist, using two primary test instruments for adults,¹ determined that, while Tommy's aptitude was strong, he displayed significant weaknesses in several areas and suffered from a Mathematics Disorder (DSM-IV-TR, 315.1) and a Disorder of Written Expression (DSM-IV-TR 315.2).² The college's office of disability services granted Tommy accommodations, including lengthy assignments broken down into smaller components, extended time for written tests, and a peer note taker. Tommy blossomed, successfully graduating from college with honors. After six months in the workforce, Tommy decided to apply to law school. He applied and was accepted at four prestigious law schools. To help make his decision as to which school to attend, Tommy searched each law school's website for information about receiving help for his learning disability. For one school he gave up after finding no

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1. Woodcock-Johnson Psychoeducational Battery-Revised: Test of Cognitive Ability and Test of Achievement.

2. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 53-56 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR].

information. One school referred him to its Disabilities Services Office for a copy of its Disability Policy. The two other schools each had somewhat different policies for what documentation was necessary to establish eligibility for accommodations for his learning disability. Both required that tests for learning disabilities be conducted by a licensed physician or clinical psychologist or an adult learning disability specialist but each recommended different adult testing instruments. Furthermore, one school required that the documentation not be more than three years old, while the other school recommended that testing be completed within the past five years. It appeared probable that neither school would accept his previous documentation. Costs for additional testing might reach \$1,500 and might take several months to complete.

Tommy's situation is not unique. Every year, several thousand individuals who have received accommodations during college move onto graduate and professional schools and face the daunting task of demonstrating anew that they have a disability under the framework of the Americans with Disabilities Act (ADA).³ Because of the differences between the Individuals with Disabilities Education Act (IDEA)⁴ and the ADA,⁵ students' transition from high school to college and college to graduate or professional school is not often a smooth one.⁶ This is particularly true for students with learning disabilities.

Central to a postsecondary educational institution's inquiry into whether it should and is able to accommodate a student who claims to have a learning disability is the initial determination as to whether the student is an individual with a disability under Title II or III of the ADA. This

3. National Center for Education Statistics, Digest of Educational Statistics: 2007, Table 221: Number and percentage of students enrolled in postsecondary institutions, by level, disability status, and selected student characteristics: 2003–04 (Mar. 2008), http://nces.ed.gov/programs/digest/d07/tables/dt07_221.asp?referrer=list (last visited Nov. 7, 2009). In fact, many graduate students, because their giftedness and work ethic in college tend to mask underlying learning disabilities, are first diagnosed with learning disabilities during graduate school. Loring C. Brinckerhoff, Joan M. McGuire & Stan F. Shaw, *Determining Eligibility for Services and Testing Accommodations*, in POSTSECONDARY EDUCATION AND TRANSITION FOR STUDENTS WITH LEARNING DISABILITIES 215, 218 (2d ed. 2002) [hereinafter POSTSECONDARY EDUCATION].

4. Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400–87 (West 2000 & Supp. 2009) [hereinafter IDEA].

5. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.A. §§ 12101–13 (West 2005 & Supp. 2009) [hereinafter ADA].

6. NATIONAL JOINT COMMITTEE ON LEARNING DISABILITIES (NJCLD), THE DOCUMENTATION DISCONNECT FOR STUDENTS WITH LEARNING DISABILITIES: IMPROVING ACCESS TO POSTSECONDARY DISABILITY SERVICES 2 (July 2007), http://www.ahead.org/uploads/docs/resources/njld_paper.pdf [hereinafter DOCUMENTATION DISCONNECT].

Article asks whether law schools, or their associated universities, have employed adequate guidelines to identify for their students the type and content of documentation necessary to demonstrate that a learning disability is a “disability” under the ADA.

Part II will review the meaning of “disability,” evaluating clinical definitions of learning disability and focusing on the disability-related statutes which apply to education, including the IDEA and the ADA. Part III will describe the deficiencies currently existing in documentation and analyze the components of documentation necessary to establish the existence of a learning disability. Part IV will look at the legal requirements for postsecondary educational institutions’ guidelines for documenting disabilities. Part V will evaluate the efficacy of current law school disability documentation guidelines and Part VI will propose more effective guidelines for documenting learning disabilities.

I. THE MEANING OF DISABILITY

For an educational institution to determine whether a student can receive disability services, the disability services provider must first assess whether the student has a disability under the relevant law, not an easy task given the disparate definitions of learning disability in clinical and legal authority. Not only do diagnosticians disagree as to how to determine whether a learning disability exists, but professionals assessing whether a student has a learning disability face strikingly different legal treatment of disabilities under the IDEA special education model versus the disability and accommodation framework of the ADA and the Rehabilitation Act.

A. Learning Disabilities

Before 1962, learning disabilities were not generally recognized by the medical community.⁷ Since that time, however, while professional understanding of learning disabilities has evolved, there is still no set agreement on a consistent clinical definition of learning disabilities.⁸ Part of the difficulty arises from the different disciplines contributing to the

7. Barbara J. Lorry, *Language-Based Learning Disabilities, in ACCOMMODATIONS IN HIGHER EDUCATION UNDER THE AMERICANS WITH DISABILITIES ACT (ADA): A NO-NONSENSE GUIDE FOR CLINICIANS, EDUCATORS, ADMINISTRATORS, AND LAWYERS* 130, 131 (Michael Gordon & Shelby Keiser eds., 2000) [hereinafter *ACCOMMODATIONS IN HIGHER EDUCATION*]. Dr. Samuel Kirk offered the first definition of learning disability in his textbook, *Educating Exceptional Children*. Donald D. Hammill, *On Defining Learning Disabilities: An Emerging Consensus*, 23 *J. LEARNING DISABILITIES* 74, 75 (1990).

8. Jim Brackett & Anne McPherson, *Learning Disabilities Diagnosis in Postsecondary Students: A Comparison of Discrepancy-Based Diagnostic Models, in ADULTS WITH LEARNING DISABILITIES: THEORETICAL AND PRACTICAL PERSPECTIVE* 68, 69 (Noel Gregg, Cheri Hoy & Alice F. Gay eds., 1996) [hereinafter *ADULTS WITH LEARNING DISABILITIES*]. Nearly a dozen different definitions of learning disabilities have been proposed over the past 40 years. See Hammill, *supra* note 7, at 75–79.

understanding of learning disabilities: medicine, education, psychology, and speech and language pathology.⁹ Of the many definitions of learning disability, several are most commonly accepted. One of the most frequently used definitions that reflects a medical or psychological approach to learning disability is expressed in the American Psychiatric Association's Diagnostic and Statistics Manual (DSM).¹⁰ The DSM-IV, the most recent edition, defines "learning disorder," as follows: "when the individual's achievement on individually administered, standardized tests in reading, mathematics, or written expression is substantially below that expected for age, schooling, and level of intelligence. The learning problems significantly interfere with academic achievement or activities of daily living that require reading, mathematical, or writing skills."¹¹ These learning difficulties can last through adulthood.¹² A DSM-IV diagnosis of a learning disorder generally requires that there be a significant discrepancy between cognitive ability and academic achievement, defining significant discrepancy as more than two standard deviations.¹³

Under an educational approach to learning disabilities, the United States Office of Education's definition of learning disability governs diagnosis of learning disability for school-aged children.¹⁴ Originally developed in 1976, the Office of Education's definition of "specific learning disability" had developed over time. "Specific learning disability" is currently defined in the regulations as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations."¹⁵ Because this definition was developed for the limited purpose of guiding state agencies in adopting criteria to determine if children were eligible for special education, it was never intended to be used outside this context or to serve as a "comprehensive theoretical statement about the nature of learning disabilities."¹⁶

9. See Donald D. Hammill, *A Brief Look at the Learning Disabilities Movement in the United States*, 26 J. LEARNING DISABILITIES 295, 299–301 (1993); see also Laura E. Naistadt, *Understanding Learning Disabilities*, 42 S. TEX. L. REV. 97, 100–01 (2000).

10. See Naistadt, *supra* note 9, at 100.

11. DSM-IV-TR, *supra* note 2, at 49. The DSM-IV-TR classifies learning disorders into four categories: 315.00 Reading Disorder, 315.1 Mathematics Disorder, 315.2 Disorder of Written Expression, and 315.9 Learning Disorder Not Otherwise Specified. *Id.* at 49–56.

12. *Id.* at 50.

13. *Id.* at 49–50.

14. Yuri Nicholas Walker, *Playing the Game of Academic Integrity vs. Athletic Success: The Americans with Disability Act (ADA) and Intercollegiate Student-Athletes with Learning Disabilities*, 15 MARQ. SPORTS L. REV. 601, 605 (2005).

15. 34 C.F.R. § 300.8(c)(10)(i) (2008).

16. Hammill, *supra* note 7, at 77.

Another commonly accepted definition was derived by the National Joint Committee on Learning Disabilities (NJCLD).¹⁷ NJCLD defines the term learning disability as:

a heterogeneous group of disorders manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities. These disorders are intrinsic to the individual and presumed to be due to a central nervous system dysfunction, and may occur across the life span. Problems in self-regulatory behaviors, social perception, and social interaction may exist with the learning disabilities but do not by themselves constitute a learning disability. Although learning disabilities may occur concomitantly with other handicapping conditions (for example, sensory impairment, mental retardation, serious emotional disturbance), or with extrinsic influences (such as cultural differences, insufficient or inappropriate instruction) they are not the direct result of those conditions or influences.¹⁸

Thus, under the NJCLD permutation, learning disabilities involve developmental dysfunctions in the acquisition and use of language that are cognitive, rather than psychiatric or environmental in nature.¹⁹ They are life-long in nature, though the range and severity of the dysfunction may change over time.²⁰

Generally, these various definitions seem to have evolved into three diagnostic models of identifying learning disabilities: discrepancy model, clinical model, and the responsiveness to intervention model.

17. NJCLD is a national committee comprised of eleven organizations concerned about individuals with learning disabilities. NJCLD, Fact Sheet, 1 (2005), http://www.ldonline.org/pdfs/njclد_factsheet.pdf.

18. NJCLD, LEARNING DISABILITIES: ISSUES ON DEFINITION 3 (Jan. 28, 1990), <http://www.ldonline.org/?module=uploads&func=download&fileId=514>.

19. Lorry, *supra* note 7, at 132–33.

20. NJCLD, *Operationalizing the NJCLD Definition of Learning Disabilities for Ongoing Assessment in Schools*, in III AM. SPEECH-LANGUAGE HEARING ASS'N, ASHA DESK REFERENCE 258a, 258a–258b (Feb. 1, 1997). Another widely recognized definition of learning disabilities was devised by the Learning Disability Association of America (LDA). After rejecting the NJCLD definition, LDA formulated the following definition: “Specific Learning Disabilities is a chronic condition of neurological origin which selectively interferes with the development, integration, and/or demonstration of verbal and/or nonverbal abilities. Specific Learning Disabilities exist as a distinct handicapping condition and varies[sic] in its manifestations and in degree of severity. Throughout life, the condition can affect self esteem, education, vocation, socialization, and/or daily living activities.” DALE S. BROWN, *STEPS TO INDEPENDENCE FOR PEOPLE WITH LEARNING DISABILITIES* 8–9 (2005), <http://www.ldaamerica.org/pdf/StepstoIndependence.pdf> (citing Association for Children with Learning Disabilities, *ACLD Description: Specific Learning Disabilities*, ACLD NEWSBRIEFS, Sept.–Oct. 1986, at 15).

1. Discrepancy Models

The most commonly accepted means of diagnosing learning disabilities is the discrepancy model.²¹ The most frequently employed category of discrepancy focuses on the relative differences between achievement and aptitude, generally using IQ testing as the measure of aptitude.²² The most common embodiment of this model is expressed in the American Psychiatric Association's Diagnostic and Statistics Manual (DSM). Generally, those diagnosticians working primarily in the elementary and secondary school context use this discrepancy model for diagnosing learning disabilities since this model is inherent in the IDEA.²³

Despite this model's entrenched use, critics have identified several problems with the discrepancy model. First, using the discrepancy between aptitude and achievement to identify learning disabilities tends to rely only on test scores rather than the underlying difficulties that may be causing the disability.²⁴ Next, critics argue that the discrepancy model uses intelligence testing as the primary predictor of academic potential, rather than other measures of success such as "social abilities, motivation, socioeconomic status, psychiatric functioning, and circumstances."²⁵ Additionally, reliance on the aptitude-achievement discrepancy tends to over identify students with above average intelligence and under identify those with below average intelligence.²⁶ Finally, critics of the discrepancy model claim that its use is inappropriate for adults since learning disabilities can, over time, adversely affect IQ testing and thus decrease the discrepancy despite the clear existence of cognitive difficulties.²⁷

2. Clinical Model

A second model of determining whether an individual has a learning disability focuses on a more general clinical assessment of a student's condition. The clinical model "integrates (1) quantitative data, (2) qualitative data, (3) self-reported background information, and (4) the clinical judgment of a multidisciplinary team to determine learning disabilities eligible for special services."²⁸ The clinical assessment model

21. Cheri Hoy, Noel Gregg, Joseph Wisenbaker, Susan Sigalas Bonham, Michael King & Carolyn Moreland, *Clinical Model versus Discrepancy Model in Determining Eligibility for Learning Disabilities Services at a Rehabilitation Setting*, in ADULTS WITH LEARNING DISABILITIES, *supra* note 8, at 55, 57.

22. Lorry, *supra* note 7, at 133. Three other categories of discrepancy models include: regression, intracognitive, and intraachievement. Hoy et al., *supra* note 21, at 57-58.

23. Lorry, *supra* note 7, at 133.

24. *Id.*

25. *Id.* at 134.

26. Brackett & McPherson, *supra* note 8, at 79.

27. Lorry, *supra* note 7, at 134.

28. Hoy et al., *supra* note 21, at 58.

relies not just on test scores, but on a combination of factors to assess whether a student has a learning disability. A clinical approach permits the dynamic assessment of the nature of learning by considering various factors including gender, age, ethnicity, motivation, experience, etc., that impact a student's learning.²⁹ Clinical assessment provides background information that gives a more thorough understanding of the individual student's learning strengths and weaknesses while at the same time differentiating between non-learning disabled, underprepared, underachieving students and actual learning disabled students.³⁰

3. Responsiveness to Intervention Model

More recently, in response to concerns about the ability-achievement discrepancy model, researchers have proposed an alternative model for assessing and implementing special education services: responsiveness to intervention (RTI).³¹ Under RTI, a student who demonstrates significantly low achievement and insufficient responsiveness to "high quality, scientific, research-based intervention" may be regarded as a student with a disability who should be referred for special education.³² The underlying assumption in RTI is that a student without disabilities will generally respond to high caliber remedial instruction.³³ The IDEA now permits schools to determine that a student has a learning disability without using the discrepancy model by using a "process that determines if the child responds to scientific, research based-intervention as a part of evaluation."³⁴ RTI is not without its problems, however. Multiple methods of assessing responsiveness are used to determine which students do not respond to intervention, possibly yielding "different subgroups of responsive and nonresponsive children with similar or dissimilar profiles of disability."³⁵ RTI's relevance to middle and high school students and

29. *Id.* at 58, 65.

30. Brackett & McPherson, *supra* note 8, at 81.

31. NJCLD, RESPONSIVENESS TO INTERVENTION AND LEARNING DISABILITIES 2 (June 2005), <http://www.ldonline.org/about/partners/njclcd#reports> [hereinafter RESPONSIVENESS].

32. *Id.* at 1, 5. Generally, under RTI, children who do not perform at their grade level are exposed to three or four tiers of increasingly more specialized instruction. If these children do not respond after this intervention, they may be designated as students with learning disabilities who need special education. Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 127-29 (2009).

33. RESPONSIVENESS, *supra* note 31, at 1.

34. IDEA, 20 U.S.C.A. § 1414(b)(6)(A) (West Supp. 2009). To identify children with learning disabilities, researchers suggest that RTI be used in conjunction with an assessment of low achievement and the application of exclusionary criteria to rule out other causes of low achievement. Jack M. Fletcher & Sharon Vaughn, *Response to Intervention: Preventing and Remediating Academic Difficulties*, 3 CHILD DEV. PERSPECTIVES 30, 35 (2009).

35. Donald Fuchs & Donald D. Deshler, *What We Need to Know about Responsiveness to Intervention (and Shouldn't Be Afraid to Ask)*, 22 LEARNING

beyond and its application to disciplines other than early reading also present issues yet to be addressed.³⁶

While there exists some agreement among experts in the learning disability community as to the major attributes of a learning disability, the lack of consensus as to the appropriate diagnostic criteria makes the translation from the clinical to the legal even more difficult.

B. Individuals with Disabilities Education Act and the Americans with Disabilities Act

Regardless of a professional's diagnosis of learning disability under any clinical definition, a student must still demonstrate that she is an individual with a disability under the appropriate legal framework. In the educational context, three federal statutes address students with disabilities' access to education: the Individuals with Disabilities Education Act (IDEA),³⁷ which governs preschool, elementary, and secondary school students,³⁸ section 504 of the Rehabilitation Act,³⁹ which applies to elementary, secondary and postsecondary educational programs which receive federal funding,⁴⁰ and the Americans with Disabilities Act (ADA),⁴¹ which pertains primarily to both public and private postsecondary educational institutions.⁴² Even though the IDEA, the Rehabilitation Act, and the ADA all address the rights of students with disabilities, little relationship exists between who is entitled to services under the IDEA and who is disabled under the Rehabilitation Act and ADA.

The purpose of the IDEA is to provide equal educational opportunities for all children. Under the IDEA, every child with a disability is entitled to a "free appropriate public education."⁴³ Students are qualified for services because of their attendance at school and the confirmed presence of a disability.⁴⁴ To receive special education and other related services, a child

DISABILITIES 129, 133 (2007); *see also* MARK C. WEBER, UNDERSTANDING DISABILITY LAW 104 (2007).

36. Fuchs & Deshler, *supra* note 35, at 134; Weber, *supra* note 32, at 136–38.

37. IDEA, 20 U.S.C.A. §§ 1400–87 (West 2000 & Supp. 2009).

38. *Id.* § 1401(9)(C) (West Supp. 2009).

39. Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701–96 (West 2008 & Supp. 2009).

40. *Id.* § 794 (West 2008).

41. ADA, 42 U.S.C.A. §§ 12101–13 (West 2005 & Supp. 2009).

42. *Id.* § 12131(1)(B) (West 2005) (applies to public entities, instrumentalities of state), § 12181(7)(J) (West 2005) (applies to public accommodations, undergraduate or postgraduate private schools).

43. IDEA, 20 U.S.C.A. § 1400(d)(1)(A) (West Supp. 2009).

44. Jo Ann Simon, *Legal Issues in Serving Postsecondary Students with Disabilities*, 21 TOPICS IN LANGUAGE DISORDERS 1, 2, 4 (2001). The zero reject principle provides that school districts must provide all age-eligible children with special education; *see also* Laura Rothstein, *Judicial Intent and Legal Precedents*, in POSTSECONDARY EDUCATION, *supra* note 32, at 71, 73.

must be a “child with a disability,” which is defined as a child who needs special education and related services because of various impairments including specific learning disabilities.⁴⁵ Specific learning disabilities means: “a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.”⁴⁶ The burden is on the school district to identify and evaluate a student’s disability.⁴⁷

A child can be identified as having a specific learning disability if the child does not achieve adequately for the child’s age or grade level in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem solving.⁴⁸ The child’s inadequate performance is judged by using either “a process based on the child’s response to scientific, research-based intervention”⁴⁹ or by considering “a pattern of strengths and weaknesses in performance, achievement, or both” relative to the child’s age, grade level, or intelligence.⁵⁰ In the alternate, the IDEA allows schools to provide services based on a general designation as “child with a disability.”⁵¹ Once a student’s disability is classified, school personnel, in conjunction with counselors and parents, must develop an Individualized Education Program (IEP) for each student,⁵² ensuring that each student receives “specially

45. IDEA, 20 U.S.C.A. § 1401(3)(A)(i–ii) (West Supp. 2009).

46. *Id.* § 1401(30); *see also* 34 C.F.R. § 300.8(c)(10)(i) (2008). Types of learning disabilities include: “perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” § 1401(30)(B).

47. Joseph W. Madaus & Melissa M.R. Madaus, *Effective Practices for the Documentation of Learning Disabilities at the Postsecondary Level*, 11 LEARNING DISABILITIES 31, 31 (2001); IDEA, 20 U.S.C.A. § 1414(a)(1)(A).

48. 34 C.F.R. § 300.309(a)(1)(i)–(viii) (2008).

49. *See supra* notes 31–36 and accompanying text.

50. 34 C.F.R. § 300.309(a)(2)(ii). A learning disability cannot be attributed to lack of appropriate instruction, a visual, hearing, or motor disability, mental retardation, emotional disturbance, cultural factors, environmental or economic disadvantage, or limited English proficiency. *Id.* § 300.309 (a)(3)–(b). Regulations implementing the most recent amendments to the IDEA mandate that states adopt new criteria for determining whether a child has a specific learning disability. Because of the trend away from the discrepancy model to identify learning disabilities, the Department of Education dictated that states could not require “the use of a severe discrepancy between intellectual ability and achievement,” “must permit use of process based on the child’s response to scientific, research-based intervention,” and may use other, alternative ways of determining that a child has a learning disability. *Id.* § 300.307(a)(1)–(3).

51. Children ages three through nine can be classified as children with disabilities if they have been appropriately diagnosed as experiencing delays in physical, cognitive, communication, social, emotional, or adaptive development so as to need special education and related services. IDEA, 20 U.S.C.A. § 1401(3)(B)(i)–(ii).

52. IDEA, 20 U.S.C.A. § 1414(d).

designed instruction to meet [his or her] unique needs.”⁵³

In contrast, the stated purpose, structure, and content of the ADA, and the Rehabilitation Act before it, are intended to redress potential wrongs, to ensure that individuals with disabilities are not excluded from or denied the benefits of programs, and are not subject to discrimination.⁵⁴ The ADA provides equivalent access to existing programs, not separate special education.⁵⁵ Based on Section 504 of the Rehabilitation Act of 1974,⁵⁶ Congress passed the Americans with Disabilities Act in 1990.⁵⁷ The purpose of the ADA is to thwart discrimination against qualified individuals with a disability, because of that disability, in the context of employment,⁵⁸ education, government entities, and other public accommodations.⁵⁹ Public entities, including public colleges and universities fall under Title II;⁶⁰ public accommodations, including private undergraduate and graduate institutions, are addressed by Title III.⁶¹

All Titles of the Act set out three ways an individual can be considered an individual with a disability: an individual with a present disability, one demonstrating a record of a disability, or one perceived as having a disability.⁶² Under each means of demonstrating disability, disability

53. *Id.* §1401(d)(1)(B)(iv)(I); *see also id.* § 1401(29).

54. ADA, 42 U.S.C.A. §§ 12101–13 (West 2005 & Supp. 2009).

55. Simon, *supra* note 44, at 2.

56. The purpose of the Rehabilitation Act is to “empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.” 29 U.S.C.A. § 701(b)(1) (West 2008). The Rehabilitation Act applies to programs that receive federal financial assistance. *Id.* § 794(a). It now imports the ADA definition of an individual with a disability into its construction. *Id.* § 705(20)(B).

57. ADA, 42 U.S.C.A. §§ 12101–13 (West 2005 & Supp. 2009).

58. Title I of the ADA applies to employment prohibiting discrimination “against a qualified individual with a disability because of a disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *Id.* § 12112(a).

59. *Id.* § 12101(a)(3).

60. *Id.* § 12132. Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” *Id.*

61. *Id.* § 12182. Title III provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” *Id.* Title III does not apply to private, postsecondary institutions controlled by religious organizations. *Id.* § 12187. If, however, private schools run by religious organizations receive federal financial assistance, they are obligated not to discriminate against individuals with disabilities under the Rehabilitation Act, 29 U.S.C.A. § 794. *See Cain v. Archdiocese of Kan. City*, 508 F. Supp. 1021, 1023 (D. Kan. 1981).

62. 42 U.S.C.A. § 12102(2).

means “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”⁶³ Under courts’ interpretation of the ADA, there is no presumption that an individual has a disability.⁶⁴ The burden lies with the individual to self-identify and provide adequate documentation of his or her disability.⁶⁵ An individual who meets the definition of disability is entitled to be free from discrimination, but is not necessarily entitled to accommodations.⁶⁶

C. ADA Case Law & Regulations

Significant case law and a number of regulations have spoken to the requirements for establishing that an individual has a disability under the ADA. Generally, the ADA definition of disability, “a physical or mental impairment that substantially limits one or more major life activities,” embodies three major concepts: impairment, major life activity, substantial limitation, and two interrelated ideas: the effect of mitigating measures on the impairment and the comparison group used to assess whether an impairment is substantially limiting.

63. *Id.* § 12102(2)(A). Although this language only appears in the “present” disability category, courts have incorporated this definition into their analysis of whether a person has a record of a disability or is perceived as having a disability. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

64. Before the ADA was passed, courts interpreting the Rehabilitation Act generally accepted a plaintiff’s assertion that she or he was handicapped. *Cf. Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 281–86 (1987). Recent amendments to the ADA have now attempted to restore that presumption. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (2008) (“[T]he question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”).

65. Madaus & Madaus, *supra* note 47, at 31.

66. See Joan M. McGuire, *Educational Accommodations: A University Administrators View*, in ACCOMMODATIONS IN HIGHER EDUCATION, *supra* note 7, at 20, 26–27. An entity cannot establish discriminatory eligibility criteria “unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.” 42 U.S.C.A. § 12182(b)(2)(A)(i). Likewise, places of public accommodation must make reasonable modifications in their policies, practices, and procedures, and must take steps to ensure no individual is denied services, unless that entity can demonstrate that doing so would fundamentally alter the nature of its goods, services, or facilities or would result in an undue burden. *Id.* § 12182(b)(2)(A)(ii)–(iii).

Interpreting the “regarded as” prong of the definition of disability, a number of cases ruled that individuals who were only “regarded as” having an impairment were entitled to accommodations. See David K. Fram, *The ADA Amendments Act: Dramatic Changes in Coverage*, 26 HOFSTRA LAB. & EMP. L.J. 193, 219–20 n. 298 (2008). Bucking that trend, Congress definitively stated that covered parties need not provide reasonable accommodations or modifications to those individuals who satisfy the “regarded as” prong of the definition of disability. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6(a)(1)(e)–(h), 122 Stat. 3553, 3558 (2008) (codified at 42 U.S.C.A. § 12201(h)). Those individuals claiming they were regarded as having a disability are still entitled to sue for discrimination.

1. Impairment

An impairment can be either physical or mental.⁶⁷ Department of Justice regulations, which govern both public and private educational institutions,⁶⁸ define physical or mental impairment to include any neurological disorder or condition, including: “Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”⁶⁹

2. Major Life Activity

Regulations define major life activity as: “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”⁷⁰ Courts have not, however, interpreted this list to be exhaustive.⁷¹ The U.S. Supreme Court in *Sutton v. United Air Lines*, when considering the effect of the impairment on the life of the individual, assessed whether the impairment limited his or her “daily activities.”⁷² In *Toyota Motor Manufacturing v. Williams*, the Supreme Court focused on those “activities that are of central importance to most people’s daily lives.”⁷³

3. Substantial Limitation

Whether an individual meets the definition of disability has been one of the most litigated issues under the ADA.⁷⁴ The central principal of that

67. 42 U.S.C.A. § 12102(2)(A).

68. Title 28 of the Code of Federal Regulations governs disability discrimination in State and Local Government Services under Title II of the ADA, 28 C.F.R. § 35.101 (2008), and disability discrimination in Public Accommodations under Title III of the ADA, 28 C.F.R. § 36.101 (2008). *See also* 29 C.F.R. § 1630.1(a)–(b) (2008) (EEOC regulations apply to Title I regarding employment).

69. 28 C.F.R. §§ 35.104, 36.104 (2008). Physical or mental impairment does not include “environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. . . . Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder.” 28 C.F.R. pt. 35, app. A, pt. 36, app. B; *see also* *Bragdon v. Abbott*, 524 U.S. 624, 633 (1998) (HIV infection constituted a physical impairment under the ADA, despite the condition not occurring in an HEW representative list of disorders accompanying the regulations).

70. 28 C.F.R. §§ 35.104, 36.104.

71. Thinking, interacting with others, reading, sleeping, reproducing, drinking, and eating have all been major life activities considered by the courts. Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217, 225–26 (2003).

72. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999).

73. *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 198 (2002).

74. *See* Scott Burris & Kathryn Moss, *The Employment Discrimination Provisions of the Americans with Disabilities Act: Implementation and Impact*, 25 HOFSTRA LAB. & EMP. L.J. 1, 22 (2007); Lisa Eichhorn, *The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC’s “Disability” Regulations under the ADA*, 39

definition is whether an impairment “substantially limits one or more of the major life activities.”⁷⁵ Regulations for Title II and III do not directly define “substantially limited.” However, both Appendices to the regulations discuss substantial limitation in some detail. A person is substantially limited “when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed.”⁷⁶ A minor trivial impairment would not be substantially limiting, while a temporary impairment could, under rare circumstances, be substantially limiting if the degree of the limitation and its expected duration were substantial.⁷⁷ The Equal Employment Opportunity Commission (EEOC) regulations under Title I go further and directly define “substantially limits” in the employment context as unable to perform a major life activity or “significantly restricted as to the condition, manner, or duration under which an individual can perform the major life activity.”⁷⁸ The regulations recommend that an employer consider: “(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”⁷⁹

In an employment context, the Supreme Court in *Sutton* relied on Webster’s Dictionary to find that “substantially” suggests “considerable” or “specified to a large degree or in the main.”⁸⁰ The Court also cited the Oxford Dictionary, which indicated that “substantially” meant: “relating to or proceeding from the essence of a thing; essential,” or “of ample or considerable amount, quantity or dimensions.”⁸¹ The Court concluded that an individual could be substantially limited in a major life activity even if he or she is still capable of functioning in society.⁸² In the *Toyota* case, the Supreme Court looked to the EEOC’s regulations to restrict its

WAKE FOREST L. REV. 177, 177 (2004).

75. ADA, 42 U.S.C.A. § 12102(1)(A).

76. 28 C.F.R. § 35.104, app. A; 28 C.F.R. § 36.104, app. B.

77. 28 C.F.R. § 35.104, app. A; 28 C.F.R. § 36.104, app. B.

78. 29 C.F.R. § 1630.2(j)(1)(i)–(ii) (2008). Condition “relates to the elements that surround the activity and are necessary for its occurrence.” James M. Zappa, Note, *The Americans with Disabilities Act of 1990: Improving Judicial Determinations of Whether an Individual is “Substantially Limited”*, 75 MINN. L. REV. 1303, 1327–28 (1991). Manner refers to “the procedure [or general processes] of conducting the activity itself.” *Id.* Duration considers “the length of time in which a person can partake in a life activity.” *Id.* But see ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(8), 122 Stat. 3553, 3554 (2008) (codified at 42 U.S.C. § 12102(2)(A)) (EEOC defining “substantially limits” as “significantly restricted” is inconsistent with congressional intent and sets the standard too high).

79. 29 C.F.R. § 1630.2(j)(2)(i)–(iii) (2008).

80. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 491 (1999) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976)).

81. *Id.*

82. *Id.* at 488.

interpretation of substantially limited by focusing on whether the impairment prevented or severely restricted the individual from doing major life activities.⁸³

4. Mitigating Measures

In *Sutton*, the Court took a new direction by requiring that employers consider the effects of mitigating or corrective measures when assessing whether an employee is an individual with a disability.⁸⁴ The Court concluded that individuals whose impairments are “corrected,”⁸⁵ “largely corrected,”⁸⁶ or “cured”⁸⁷ are not currently disabled. The Court ruled that Congress did not intend to protect “those whose uncorrected conditions amounted to disabilities.”⁸⁸ ADA coverage is “restricted to only those whose impairments are not mitigated by corrective measures.”⁸⁹ An individual only has a disability if, “notwithstanding the use of a corrective device,” the individual is still substantially limited in a major life activity.⁹⁰ While the dissent argued that the Court was excluding individuals with controllable conditions such as diabetes, hypertension, and epilepsy,⁹¹ the majority rejoined that individuals could still be substantially limited even if they take medication to lessen symptoms of impairment so that they can function.⁹² The Court determined that the ADA required courts to look at limitations individuals actually face.⁹³

5. Comparison Group

Differences between the regulations under Title I as compared to Titles II and III have created some confusion in the courts as to the basis of comparison for determining whether an individual’s ability to perform is substantially limited. Interpreting Title I, the EEOC regulations specify that the employer consider the ability to perform “as compared to the average person in the general population.”⁹⁴ For Titles II and III, although the Department of Justice regulations themselves do not speak to whether an individual’s abilities should be considered in relation to other members of the population, the appendices note that an individual has a disability if the person’s activities are “restricted as to the conditions, manner, or

83. *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 198 (2002).

84. *Sutton*, 527 U.S. at 482.

85. *Id.*

86. *Id.* at 486.

87. *Id.* at 488.

88. *Id.* at 484.

89. *Id.* at 487.

90. *Id.* at 488.

91. *Id.* at 509, 512.

92. *Id.* at 488.

93. *Id.*

94. 29 C.F.R. § 1630.2(j)(1)(ii) (2008).

duration under which they can be performed *in comparison to most people*.⁹⁵ In the educational context, courts have generally compared students to “most people” when analyzing whether they are substantially limited in learning.⁹⁶ This interpretation raises the question as to whether comparison to others to determine if a student has a disability is even appropriate in an educational context where disability is often determined by whether the student is performing to his or her own abilities.⁹⁷

D. ADA Amendments Act

In response to the growing dissatisfaction with the Supreme Court’s interpretation of disability under the ADA, Congress passed the ADA Amendments Act in 2008.⁹⁸ While Congress did not fundamentally alter the ADA’s definition of disability, the Act renounced the Supreme Court’s restrictive interpretations of disability in *Sutton v. United Air Lines* and *Toyota Motor Manufacturing v. Williams*.⁹⁹ Effective January 1, 2009, one

95. 28 C.F.R. § 35.104, app. A; 28 C.F.R. § 36.104, app. B (emphasis added).

96. See *Singh v. George Washington Univ. Sch. of Med. & Health*, 508 F.3d 1097, 1100–04 (D.C. Cir. 2007) (concluding that proper comparison is to average person in general population in assessing plaintiff’s learning disability); *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1065 (9th Cir. 2005) (assessing whether learning disability limited ability to learn as compared to most people); *Betts v. Rector of Univ. of Va.*, 18 F. App’x 114, 118 (4th Cir. 2001) (comparing learning abilities to those of the general population); *Gonzalez v. Natl. Bd. of Med. Exam’rs*, 60 F. Supp. 2d 703, 708 (E.D. Mich. 1999) (equating comparison to “most people” in DOJ regulations to “average person in general population” when analyzing whether plaintiff’s claimed learning disorder was a disability); *Price v. Natl. Bd. Med. Exam’rs*, 966 F. Supp. 419, 426 (S.D. W.Va. 1997) (comparing students’ impaired functioning with the functioning of most unimpaired people). *But see* *Vinson v. Thomas*, 288 F.3d 1145, 1152–53 (9th Cir. 2002) (no comparison when assessing whether plaintiff’s dyslexia was a disability under the Rehabilitation Act); *Bartlett v. N.Y. State Bd. of Law Exam’rs*, No. 93 Civ. 4986(SS), 2001 WL 930792, at *36 (S.D.N.Y. Aug. 15, 2001) (while comparing plaintiff’s limitations to “most people,” court concluded that clinical judgment must be used when comparing test scores).

97. MARK C. WEBER, UNDERSTANDING DISABILITY LAW 133 (2007). This is particularly troubling when applied to graduate education, where presumably all students, whether learning disabled or not, would be performing at a higher level than the general population. Accepting this interpretation might lead to the conclusion that no graduate students have learning “disabilities” under the ADA. See Melissa M. Krueger, Comment, *The Future of ADA Protection for Students with Learning Disabilities in Post-Secondary and Graduate Environments*, 48 U. KAN. L. REV. 607, 625 (2000); see also Sara N. Barker, *A False Sense of Security: Is Protection for Employees with Learning Disabilities under the Americans with Disabilities Act Merely an Illusion?*, 9 U. PA. J. LAB. & EMP. L. 325, 345–48 (2007) (proposing that, when assessing learning disabilities, the more appropriate comparison group should be the average person with comparable education, skills, and abilities).

98. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

99. *Id.* § 2(b)(2)–(5). The Act was amended to read:

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

of the Act's primary purposes was to reject the *Sutton* Court's reasoning that "whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures."¹⁰⁰ Furthermore, the Act scorned *Toyota* and the EEOC's direction that "substantially limited" be interpreted to mean prevent or severely or significantly restrict.¹⁰¹ The Act indicates that the Court had "created an inappropriately high level of limitation necessary to obtain coverage under the ADA," and that Congress intended that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."¹⁰²

The ADA's definition of disability remains intact, though the Act elaborates on the definition in a manner that would more clearly protect students with learning disabilities. The Act expands upon the regulations' definition of major life activity to include reading, concentrating, thinking, and communicating, in addition to learning.¹⁰³ Furthermore, potentially important to students seeking eligibility for accommodations due to learning disabilities, the term major life activities now includes major bodily functions such as neurological and brain functions.¹⁰⁴ An impairment need only limit one of these major life activities and can be episodic or in remission if the impairment would substantially limit the major life activity when it is active.¹⁰⁵ In general, the Act mandates broad coverage of individuals under the "maximum extent permitted,"¹⁰⁶ and that the term "substantially limits" should be interpreted consistent with this broad scope of protection.¹⁰⁷

(I) medication, medical supplies, equipment, or appliances, low-vision devices . . . , prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

42 U.S.C.A. § 12102(4)(E)(i)(I)–(IV) (West Supp. 2009).

100. ADA Amendments Act of 2008 § 2(b)(2) (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999)).

101. *Id.* §§ 2(b)(4), (6) (citing *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002)).

102. *Id.* § 2(b)(5).

103. 42 U.S.C.A. § 12102(2)(A) (West Supp. 2009).

104. *Id.* § 12102(2)(B). Recent research theorizes that some forms of learning disabilities, specifically impairments in reading abilities, have a neurological basis. See Michel Habib, *The Neurological Basis of Developmental Dyslexia: An Overview and Working Hypothesis*, 123 *BRAIN* 2373 (2000); Bruce F. Pennington, *Toward an Integrated Understanding of Dyslexia: Genetic, Neurological, and Cognitive Mechanisms*, 11 *DEV. & PSYCHOPATHOLOGY* 629 (1999).

105. 42 U.S.C.A. §§ 12102(4)(C)–(D) (West Supp. 2009).

106. *Id.* § 12102(4)(A).

107. *Id.* § 12102(4)(B).

While the Act goes a long way toward correcting the restrictive interpretations of the Supreme Court and the EEOC, the Act neglects to intervene on a number of issues important to students with learning disabilities, including what appropriate comparison population employers and disability service providers should use to assess whether an individual's impairment substantially limits a major life activity.

II. DOCUMENTING LEARNING DISABILITIES

Given the ADA's definition of disability and its component parts, students with learning disabilities should provide disability service providers with documentation that gives the providers sufficient information relevant to whether students are "individuals with disabilities" from which providers can make reasoned decisions regarding eligibility for services. For an institution's disability service provider to assess a student's eligibility for accommodations under the ADA, the provider must have adequate documentation.¹⁰⁸ The adequacy of the documentation often depends on the purpose of the documentation, the clarity of the diagnostician's understanding of the ADA's requirements, and the adequacy of the educational institution's guidelines.

A. Purposes of Documentation

Different purposes require different types of documentation. To protect an individual from discrimination, documentation of a disability need only be minimal.¹⁰⁹ In educational settings, however, most students' primary purpose in seeking help from disability service providers is not to seek redress for the institution's discriminatory actions, but to request accommodations for their disabilities. For disability service providers to provide accommodations, the students' documentation must "both establish disability and provide adequate information on the functional impact of the

108. An employer or other institution does not have to accept an employee's subjective belief that he is disabled and may rely on medical information. *See, e.g.*, *Tyler v. Ispat Inland, Inc.* 245 F.3d 969, 974 n.1 (7th Cir. 2001) (employer's request for release of medical records was not improper); *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 656 (6th Cir. 2000) (employer entitled to require employee to provide medical documentation, including submitting to a medical examination); *Brettler v. Purdue Univ.*, 408 F. Supp. 2d 640, 663–64 (N.D. Ind. 2006) (plaintiff's general statements about his condition in his affidavit did not suffice to support conclusion that he suffered from a physical impairment without medical records); *Abdo v. Univ. of Vt.*, 263 F. Supp. 2d 772, 777–78 (D. Vt. 2003) (appropriate for university to request diagnostic information regarding plaintiff's condition, rather than rely on plaintiff's statements).

109. Association on Higher Education and Disabilities (AHEAD), AHEAD BEST PRACTICES: DISABILITY DOCUMENTATION IN HIGHER EDUCATION 2 (2005), http://www.ahead.org/uploads/docs/resources/AHEAD_Documentation_Best_Practice_Resource.doc [hereinafter AHEAD BEST PRACTICES].

disability so that effective accommodations can be identified.”¹¹⁰

Using independent judgment,¹¹¹ a disability service provider must initially determine whether each student is eligible for accommodations. To do so, the disability service provider must be familiar with the ADA definition of disability. Consequently, under the first component of disability, the provider must decide whether the student has a physical or mental impairment. This requires a documented diagnosis from a professional trained and experienced in diagnosing the type of impairment the student claims. The provider must also determine if that impairment is current or whether the student merely has a record of impairment. To provide accommodations based on a present disability, the diagnostician’s documentation must be reasonably current.

The provider must then determine what major life activities the student’s impairment impacts: learning, reading, speaking, concentrating, thinking, communicating, operation of a neurological or brain function, etc. Therefore the documentation must evaluate the student’s performance in these activities. Next, because the provider must determine whether the impairment substantially limits those major life activities, the documentation must address the nature and severity of the impairment’s impact on the student’s education. Finally, the provider must determine what accommodations are appropriate to meet the student’s needs. As a result, the documentation should recommend necessary accommodations particular to the program the student is participating in and include a rationale for each recommendation.

B. Deficiencies in Documentation

While the legal determination of whether the student is an individual with a disability is the responsibility of the disability service provider, not the diagnostician, a disability service provider cannot carry out his or her obligations without significant and adequate direction from the student’s diagnostician.¹¹² Generally, however, that direction is lacking.

110. *Id.* Ideally, assessment should be twofold. After documentation establishes eligibility for services and initial accommodations, ongoing assessment should take place to identify the strengths and weaknesses of any given accommodation. See Noelle Gregg & Cheri Hoy, *Identifying the Learning Disabled*, 129 J.C. ADMISSIONS 30, 31 (1990).

111. Courts generally defer to educational institutions’ academic judgments under the ADA and the Rehabilitation Act. See *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1047 (9th Cir. 1999); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 436 (6th Cir. 1998); *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 859 (5th Cir. 1993); *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 795 (1st Cir. 1991); *Doe v. New York Univ.*, 666 F.2d 761, 775–76 (2d Cir. 1981).

112. The quality of the diagnostician’s documentation is a major factor in demonstrating the credibility of the student’s request for accommodations. See Rosa A. Hagin, *See You in Court!: Documenting Learning Disabilities*, 10 LEARNING DISABILITIES 43, 43 (2001); see also Loring C. Brinckerhoff & Manju Banerjee,

A number of studies of learning disability documentation which students and their diagnosticians have submitted to demonstrate eligibility for accommodations have demonstrated that documentation of learning disabilities has been and continues to be deficient. Several studies in Canada and the United States have found that a significant percentage of the documentation was inadequate even to demonstrate a diagnosis of a learning disability.¹¹³ Many students requesting accommodations did not provide any documentation whatsoever.¹¹⁴ Problems with documentation included: lack of a formal diagnosis,¹¹⁵ incomplete or inappropriate battery of tests,¹¹⁶ biased and jargon-filled case histories,¹¹⁷ and dated documentation.¹¹⁸

Various causes account for deficiencies in learning disability documentation. Disagreement among diagnosticians about the definition of learning disability¹¹⁹ and use of inappropriate test instruments for

Misconceptions Regarding Accommodations of High-Stakes Tests: Recommendations for Preparing Disability Documentation for Test Takers with Learning Disabilities, 22 LEARNING DISABILITIES RES. & PRAC. 246, 250 (2007) (more likely that test taker will receive the accommodations requested if the documentation is well written and complete); Nanette M. Hatzes, Henry B. Reiff & Michael H. Bramel, *The Documentation Dilemma: Access and Accommodations for Postsecondary Students with Learning Disabilities*, 27 ASSESSMENT FOR EFFECTIVE INTERVENTION 37, 45 (2002) (more than 2/3 of institutions which participated in a study reported relying on recommendations in documentation to make their accommodation decisions).

113. Allyson G. Harrison, Eva Nichols & Anne-Claire Larochette, *Investigating the Quality of Learning Disability Documentation Provided by Students in Higher Education*, 23 CAN. J. SCH. PSYCHOL. 161, 167 (Dec. 2008) (of the 133 students who actually submitted psychological reports, only 44% included a clear diagnostic statement, though not always diagnosing a learning disability); Gregg & Hoy, *supra* note 110, at 31 (documentation of only 15 of 110 students contained diagnostic information). Diagnosticians used vague language to describe the disability and failed to support diagnoses with standard diagnostic criteria under DSM-IV-TR. See Joan M. McGuire, Joseph W. Madaus, A. Vivienne Litt & Michele O. Ramirez, *An Investigation of Documentation Submitted by University Students to Verify Their Learning Disabilities*, 29 J. LEARNING DISABILITIES 297, 299 (1996).

114. Gregg & Hoy, *supra* note 110, at 31 (only 35 of 110 students requesting accommodations for a learning disability submitted documentation); Harrison et al., *supra* note 113, at 166 (61 of 247 participating in the study submitted no documentation).

115. Harrison et al., *supra* note 113, at 168; Madaus & Madaus, *supra* note 47, at 34; Gregg & Hoy, *supra* note 110 at 31 (only 15 of 110 students requesting accommodations specifically identified learning disability).

116. Harrison et al., *supra* note 113, at 168; Madaus & Madaus, *supra* note 47, at 33; McGuire et al., *supra* note 113, at 301.

117. Madaus & Madaus, *supra* note 47, at 33; Gregg & Hoy, *supra* note 110, at 32.

118. Harrison et al., *supra* note 113, at 170 (average report was more than four years old); Hatzes et al., *supra* note 112, at 44 (67% of institutions surveyed reported that they would reject documentation if it were not current).

119. In a 2002 study, 65% of postsecondary institutions responding to a survey reported that they do not require a discrepancy between a student's ability and achievement to diagnose a learning disability, while 34% of the institutions did have a discrepancy requirement. Hatzes et al., *supra* note 112, at 43. In fact, scholarship

diagnosis along with over-interpretation of test results¹²⁰ contribute to inadequate documentation. Likewise, deficient documentation has also resulted from diagnosticians' lack of understanding of requirements of the ADA,¹²¹ and a disconnect between documentation required to establish a disability under the IDEA and the ADA.¹²² A survey of nearly 150 clinicians assessed their understanding of learning disabilities and the ADA.¹²³ While the survey showed that generally clinicians understood that the ADA required more and different information than just a clinical diagnosis of learning disability, there was much less understanding that ADA is intended to prevent discrimination rather than help individuals "improve their academic success and testing performance."¹²⁴ Furthermore, a significant number of clinicians did not clearly understand the extent of the impairment necessary to receive accommodations under the ADA.¹²⁵

Two major outcomes occur as a result of inadequate documentation. First, the institution will reject questionable documentation and truly learning disabled students do not receive accommodations they need to succeed.¹²⁶ Second, institutions may accept inadequate documentation and over-accommodate a larger number of individuals, either temporarily or on an ongoing basis.¹²⁷ As a consequence, institutions will expend greater

indicates that discrepancies between ability and achievement may not be an accurate measure of the existence of a learning disability. *Id.* at 46; *see also* Brackett & McPherson, *supra* note 8, at 78–80; Gregg & Hoy, *supra* note 110, at 32.

120. Hatzes et al., *supra* note 112, at 42–43 & Table 2; Lorry, *supra* note 7, at 146–48.

121. Michael Gordon, Lawrence Lewandowski, Kevin Murphy & Kim Dempsey, *ADA-Based Accommodation in Higher Education: A Survey of Clinicians about Documentation Requirements and Diagnostic Standards*, 35 J. LEARNING DISABILITIES 357, 358 (2002) (34% of 147 clinicians working in the learning disabilities field had no training about how to prepare ADA documentation).

122. DOCUMENTATION DISCONNECT, *supra* note 6, at 1. In the IDEA, Congress's findings highlight providing effective transition services to allow students to succeed in postsecondary education as a measure of the Act's success. IDEA, 20 U.S.C.A. § 1400(c)(14). Transition services are merely described as "a coordinated set of activities" designed to facilitate a child's advancement to postsecondary education. *Id.* § 1401(34)(A).

123. Gordon et al., *supra* note 121, at 358.

124. *Id.* at 359–60.

125. *Id.* at 361; *see also* Lorry, *supra* note 7, at 149 (single most common deficit in documentation is that diagnosticians fail to provide evidence demonstrating "a substantial limitation in a major life activity").

126. Brackett & McPherson, *supra* note 8, at 69–70.

127. Hoy et al., *supra* note 21, at 56. Postsecondary educational institutions seem to err on the side of accepting a student's eligibility for accommodations even if documentation appears inconsistent with institutional guidelines or the mandates of the ADA. *See* Hatzes et al., *supra* note 112, at 47. Providing unsupported or unnecessary accommodations can create a backlash from those non-disabled students who must perform without accommodations. *See* Holly A. Currier, *The ADA Reasonable Accommodation Requirement and the Development of University Services Policies:*

resources on students who may or may not be entitled to accommodations or, when resources are limited, they may provide fewer and poorer quality services for those individuals whose documentation does demonstrate that they have a learning disability.¹²⁸ Furthermore, variations in documentation and the underlying testing process often create skepticism about whether learning disabilities are real or not.¹²⁹ In any event, when inadequate documentation influences which individuals receive accommodations, the ADA's purposes of eliminating discrimination and enabling individuals with disabilities "to fully participate in all aspects of society" are not fulfilled.¹³⁰

C. Factors Addressed by Documentation

One means of addressing the prevalent deficiencies in disability documentation is for institutions to develop specific documentation guidelines. The Association of Higher Education and Disabilities (AHEAD),¹³¹ has issued foundational principles and essential elements for adequately documenting disabilities.¹³² AHEAD makes the following recommendations for essential components of documentation:

1. The credentials of the evaluator(s).¹³³
2. A diagnostic statement identifying the disability.¹³⁴
3. A description of the diagnostic methodology used.¹³⁵
4. A description of the current functional limitations.¹³⁶

Helping or Hindering Students with Learning Disabilities, 30 U. BALT. L. F. 42, 51 (2000).

128. Hoy et al., *supra* note 21, at 56.

129. Krueger, *supra* note 97, at 618.

130. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(2), 122 Stat. 3553, 3553 (2008).

131. AHEAD is "a professional membership organization for individuals involved in the development of policy and in the provision of quality services to meet the needs of persons with disabilities involved in all areas of higher education." AHEAD Home Page, <http://www.ahead.org/about>. AHEAD has more than 2,500 members in a dozen countries. *Id.*

132. AHEAD BEST PRACTICES, *supra* note 109, at 4–8. In 1997, AHEAD drafted documentation guidelines specifically for learning disabilities. AHEAD, GUIDELINES FOR DOCUMENTATION OF A LEARNING DISABILITY IN ADOLESCENTS AND ADULTS (July 1997), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/17/53/e4.pdf [hereinafter AHEAD LEARNING DISABILITY GUIDELINES]. However, in 2004, AHEAD removed the learning disability guidelines from distribution because "they were out of date, were deemed not reflective of good practice, and were being used inappropriately as basic standards for documentation of many disabilities beyond [learning disabilities]." AHEAD, ALERT, From the President (Sept. 2005), <http://www.ahead.org/publications/alert/sept-05>. Instead, AHEAD drafted Best Practices for documenting all types of disabilities.

133. See *infra* notes 156–161 and accompanying text.

134. See *infra* notes 162–166 and accompanying text.

135. See *infra* notes 167–169 and accompanying text.

136. See *infra* notes 144–155, 170–171 and accompanying text.

5. A description of the expected progression or stability of the disability.¹³⁷
6. A description of current and past accommodations, services, and/or medications.¹³⁸
7. Recommendations for accommodations, adaptive devices, assistive services, compensatory strategies, and/or collateral support services.¹³⁹

Testing agencies such as the Educational Testing Service (ETS), the Law School Admissions Council (LSAC), and the American Association of Medical Colleges (AAMC), have all issued specific guidelines for documentation.¹⁴⁰ Guidelines for documentation submitted to the ETS for standardized testing accommodations address several areas: (1) qualifications of the evaluator; (2) recency of the documentation; (3) appropriate clinical documentation to substantiate the disability, including a) a diagnostic interview, b) a psychometric assessment in the areas of aptitude/ability, achievement, and cognitive and information processing with accompanying test scores, and c) a specific diagnosis, and interpretive summary; and (4) evidence to establish a rationale supporting the need for accommodations.¹⁴¹ Likewise, the LSAC guidelines describe similar requirements: (1) evaluator's qualifications; (2) assessment's currency; (3) neuropsychological or neuroeducational evaluation, including: a) diagnostic interview, and b) testing in the areas of aptitude, achievement, information processing, and personality with accompanying test scores; (4) a specific diagnosis; and (5) recommended specific accommodations.¹⁴² Similarly, the AAMC guidelines cover: (1) evaluator's qualifications; (2) assessment's currency; (3) psychoeducational evaluation, including: a)

137. AHEAD recommends that documentation include information on the "episodic nature of the disability and known or suspected environmental triggers to episodes." AHEAD BEST PRACTICES, *supra* note 109, at 7.

138. A description of "current and past medications [including side effects], auxiliary aids, assistive devices, support services, and accommodations" and their "effectiveness in ameliorating functional impacts of the disability" should be documented. *Id.*

139. Although the postsecondary educational institution is not obligated to accept a diagnostician's recommendation, it is useful for documentation to include recommended accommodations which are "logically related to functional limitations." *Id.*; see *infra* notes 172–176 and accompanying text.

140. Organizations like ETS, LSAC, and AAMC, which are involved in administering such high-stakes tests such as the GRE, GMAT, LSAT, and MCAT, have seen a tremendous increase in the number of requests for accommodations. ETS received over 10,000 requests for accommodations in 2005. Brinckerhoff & Banerjee, *supra* note 112, at 247.

141. Educational Testing Service (ETS), *Policy Statement for Documentation of a Learning Disability in Adolescents and Adults 5-17* (2d ed. 2007), <http://www.ets.org/> (last visited Nov. 11, 2009).

142. Law School Admissions Council (LSAC), *Guidelines for Documentation of Cognitive Impairments 1-3* (Apr. 2008), <http://www.lsac.org/pdfs/2008-2009/GuidelinesCognitive-2008.pdf> (last visited Nov. 11, 2009).

history and background and b) testing in the areas of aptitude, achievement, information processing, with accompanying test scores; (4) a specific diagnosis; and (5) recommended individualized accommodations.¹⁴³

The common threads throughout each organization's guidelines indicate that documentation should address several specific areas: recency of documentation; qualifications of the evaluator; diagnosis of condition; domains of testing and testing instruments; description of limitations; and recommendations for accommodations.

1. Recency of Documentation

A prior diagnosis of disability seldom automatically qualifies students to be eligible for postsecondary accommodations.¹⁴⁴ An institution may require that a student provide current documentation and may deny an accommodation if a student does not do so.¹⁴⁵ Indeed, an institution's disability service provider will often reject documentation which is not recent, even if the documentation meets institutional guidelines in all other respects.¹⁴⁶ There is, however, little consensus about when documentation is "current" or "recent." A NJCLD survey indicated that 45% of postsecondary institutions surveyed considered documentation to be current if it were three years old or less.¹⁴⁷

A distinction can be drawn, however, between how recent testing and assessment of that testing should be and how current the overall documentation package itself should be. When assessing the existence of learning disabilities, testing should be current since studies show that the developmental effects of learning disabilities change throughout childhood.¹⁴⁸ However, imposing a requirement that an adult college student be reassessed every three years has been considered overly burdensome considering the costly nature of assessments and the lack of research supporting the need for reassessment of a chronic, life-long condition like learning disabilities.¹⁴⁹ Despite a lack of support for

143. Association of American Medical Colleges (AAMC), *Documentation Requirements for MCAT Accommodations: Documenting Learning Disabilities 4-11* (2007), <http://www.aamc.org/students/mcat/ld.pdf> (last visited Nov. 11, 2009)

144. Hatzes et al., *supra* note 112, at 47 (eighty-six percent of surveyed institutions did not accept previous diagnosis alone).

145. Ivy Tech Community College, OCR Case No. 05-06-2028, 107 LRP 2642, 13 Disability Compliance for Higher Educ. (Midwestern Div., May 6, 2006) (College did not discriminate when student failed to follow College's request for updated documentation).

146. Hatzes et al., *supra* note 112, at 47.

147. DOCUMENTATION DISCONNECT, *supra* note 6, at 8. Three percent of institutions found documentation 5 years old or less to be current, while 17% of institutions only generally required that documentation be "recent." *Id.*

148. Harrison et al., *supra* note 113, at 171.

149. Guckenberger v. Trustees of Boston Univ., 974 F. Supp. 106, 138-39 (D. Ma. 1997). In contrast, for a student diagnosed with ADHD, three year periodic

restrictive date limitations, the testing agencies all set specific time limits for when assessment of learning disabilities must occur. The ETS specifically requires testing of adults within the last five years.¹⁵⁰ The LSAC requires that testing be conducted within three years of a request for accommodation or within five years if the individual was tested as an adult,¹⁵¹ while AAMC requires that the evaluation have been conducted within the past three years.¹⁵²

In contrast, AHEAD guidelines give no specific recommendation as to how dated testing can be.¹⁵³ Instead, AHEAD focuses on the date of the documentation rather than the testing, generally recommending “relatively recent documentation.”¹⁵⁴ AHEAD recommends that institutions be flexible in accepting older documentation when conditions are permanent or non-varying as long as the documentation reflects how the condition “currently impacts the individual.”¹⁵⁵

2. Qualifications of the Diagnostician

The qualifications of the diagnostician reflect on the credibility of his or her findings and recommendations for accommodations.¹⁵⁶ Ideally, a “licensed or otherwise properly credentialed professional who has undergone appropriate and comprehensive training, has relevant experience, and has no personal relationship with the individual being evaluated” should provide the documentation.¹⁵⁷ To assess learning disabilities, the evaluator should have extensive graduate-level training in “the history, nature, identification, and remediation of learning disabilities.”¹⁵⁸ The evaluator’s training and experience must be with regard to adults.¹⁵⁹ An evaluator’s sensitivity to cultural and linguistic differences is also very important.¹⁶⁰ The ETS lists a number of professionals who could provide evaluations, provided they have had

assessments were not overly burdensome given the evidence that ADHD symptoms could diminish over time. *Id.* at 139.

150. ETS, *supra* note 141, at 6.

151. LSAC, *supra* note 142, at 1.

152. AAMC, *supra* note 143, at 3.

153. AHEAD’s previous documentation guidelines for learning disabilities indicated only that test scores be standardized for the adult/adolescent population. AHEAD LEARNING DISABILITY GUIDELINES, *supra* note 132, at 5.

154. AHEAD BEST PRACTICES, *supra* note 109, at 6. Conditions which change over time might require more frequent evaluation. *Id.*

155. *Id.* at 6–7. “[D]ocumentation is not time-bound; the need for recent documentation depends on the facts and circumstances of the individual’s condition.” *Id.* at 7.

156. Hagin, *supra* note 112, at 46.

157. AHEAD BEST PRACTICES, *supra* note 109, at 5.

158. AAMC, *supra* note 143, at 3.

159. LSAC, *supra* note 142, at 1.

160. ETS, *supra* note 141, at 5.

adequate training in learning disabilities: “clinical or educational psychologists; school psychologists; neuropsychologists; learning disabilities specialists; and medical doctors.”¹⁶¹

3. Diagnosis of Condition

A diagnostician must make a clear diagnostic statement of the student’s condition, describing the nature and severity of the condition.¹⁶² Documentation should describe the functional impact of the condition and detail “the typical progression or prognosis of the condition.”¹⁶³ The evaluator should rule out any alternate explanations for the student’s condition.¹⁶⁴ Both AHEAD and the AAMC recommend that the evaluator refer to specific diagnostic codes such as the DSM or International Classification of Functioning, Disability and Health (ICF)¹⁶⁵ of the World Health Organization.¹⁶⁶

4. Domains of Testing and Testing Instruments

Documentation should describe evaluation methods, procedures, and testing instruments, including “both summary data and specific test scores (with the norming population identified).”¹⁶⁷ In the context of learning disabilities, all testing agencies require that testing track the discrepancy model of learning disabilities, addressing the domains of aptitude, achievement, and information processing.¹⁶⁸ Both ETS and the LSAC list specific approved testing instruments for each domain.¹⁶⁹ No agency

161. *Id.*

162. *Id.* at 14; *see also* Dubois v. Alderson-Broadus College, Inc., 950 F. Supp. 754, 758 (N.D. W. Va. 1997) (documentation stating that student “might suffer from a specific learning disability” was inadequate to support a clear diagnosis of an impairment). *But see* Abdo v. Univ. of Vt., 263 F. Supp. 2d 772, 778 (D. Vt. 2003) (evidence that fails to identify the precise medical diagnosis is not necessarily legally insufficient).

163. AHEAD BEST PRACTICES, *supra* note 109, at 5.

164. LSAC, *supra* note 142, at 3; ETS, *supra* note 141, at 14; AAMC, *supra* note 144, at 6.

165. The ICF sets out categories of mental functions, including Thought Functions, Higher-Level Cognitive Functions, Mental Functions of Language, and Calculation Functions, from which a diagnostician could identify potential deficits. WORLD HEALTH ORGANIZATION, INTERNATIONAL CLASSIFICATION OF FUNCTIONING, DISABILITY AND HEALTH (ICF) 156–61 (2001).

166. AHEAD BEST PRACTICES, *supra* note 109, at 3; AAMC, *supra* note 143, at 6; *see also* Pandazides v. Virginia Bd. of Educ., 804 F. Supp. 794, 803 (E.D. Va. 1992) (plaintiff did not have a learning disability because the physician’s diagnosis was not found in the DSM), *rev’d on other grounds*, 13 F.3d 823 (4th Cir. 1994).

167. AHEAD BEST PRACTICES, *supra* note 109, at 6.

168. ETS, *supra* note 141, at 12; AAMC, *supra* note 143, at 4; LSAC, *supra* note 142, at 2.

169. ETS, *supra* note 141, at 21–22; LSAC, *supra* note 142, at 2. *But see* Hagin, *supra* note 112, at 44 (choice of specific diagnostic tests should be the prerogative of

accepts using the RTI model for diagnosing learning disabilities, nor do they address how to deal with students who have been previously diagnosed under a RTI model.

5. Description of Limitations

Documentation should specify how the student's condition meets the ADA definition of disability. Quality documentation should describe "whether and how a major life activity is substantially limited by providing a clear sense of the severity, frequency, and pervasiveness of the condition(s)."¹⁷⁰ Students with learning disabilities must demonstrate the functional impact on their learning.¹⁷¹

6. Recommendations for Accommodations

Documentation should include specific recommendations for accommodations, including a detailed rationale for each recommendation.¹⁷² An educational institution need not provide a specific accommodation if the student's documentation fails to request or support that accommodation; the absence of a recommendation for a specific accommodation can demonstrate that a requested academic adjustment is not necessary to accommodate a student's disability.¹⁷³

the diagnostician, "provided the tests elicit the necessary information").

170. AHEAD BEST PRACTICES, *supra* note 109, at 7. Diagnosticians should base their determination that an individual's impairment substantially limits a major life activity on how the impairment affects the specific individual, not on mere generalizations about the impairment itself. EEOC, *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (Mar. 25, 1997), <http://www.eeoc.gov/policy/docs/psych.html> (last visited Nov. 11, 2009).

171. See LSAC, *supra* note 142, at 3; ETS, *supra* note 141, at 12; AAMC, *supra* note 143, at 5 (guidelines include detailed explanation of requirements of ADA in the context of learning disabilities).

172. LSAC, *supra* note 142, at 2; ETS, *supra* note 141, at 16; AAMC, *supra* note 143, at 6; see also Hagin, *supra* note 112, at 45–46.

173. Hudson County Community College, OCR Case No. 02-05-2154, 33 Nat'l Disability L. Rep. (LRP) ¶ 198 (Mar. 27, 2006) (College did not discriminate in denying complainant's request for course waiver when psychologist's evaluation did not recommend that math courses be waived); Fayetteville Technical Community College, OCR Case No. 11-05-2007, 31 Nat'l Disability L. Rep. (LRP) ¶ 26 (Mar. 31, 2005) (College did not discriminate in denying complainant's request for waiver of requirement when doctor's note did not recommend requirement be waived); Oregon State University, OCR Case No. 10-98-2071 (W. Div. Feb. 25, 1999) (letter ruling on file with author) (University did not discriminate in denying accommodations in oral examination when medical documentation did not provide input regarding effective accommodation); Minnesota Board of Teaching, OCR Case No. 05-97-4018 (Midwestern Div. June 10, 1998) (letter ruling on file with author) (Board did not discriminate in denying waiver of Pre-Professional Skills Test when student did not provide documentation requesting such a waiver); College of DuPage, OCR Case No. 05-98-2033 (Midwestern Div. June 29, 1998) (College's action of requesting documentation indicating amount of extended time necessary for student was consistent with OCR policy).

While diagnosticians should recommend individualized accommodations for each student's disability, the disability service provider may accept or reject the diagnostician's recommendations.¹⁷⁴ It is the disability service provider's responsibility to make ultimate decisions on whether the student has a disability and what type of accommodations are appropriate in that educational setting, given the nature of the program.¹⁷⁵ Nevertheless, diagnosticians need to understand what will be expected of students in the specific program to tailor accommodations to meet the demands of that program.¹⁷⁶

Overall, the more precise, thorough, and recent the documentation is, the more likely a disability service provider will be able to determine if a student is eligible for accommodations.

III. LEGAL REQUIREMENTS FOR DOCUMENTATION GUIDELINES

For disability service providers to obtain the information they need from students and their diagnosticians, the most effective approach would be to adopt disability policies and guidelines to implement those policies. Specific guidelines will fulfill two purposes: first, to provide consistent direction to students and professionals who conduct psychoeducational testing as to what documentation a service provider needs to provide accommodations, and second, to provide "a common base of understanding among service providers regarding the components of psychoeducational evaluations."¹⁷⁷

However, neither the ADA nor the Rehabilitation Act requires postsecondary institutions to develop and implement policies for assessing eligibility for disability services. Presumably, any guidelines an institution would adopt should provide "clear, strong, consistent, enforceable standards" to fulfill the broad scope of protection afforded by the ADA.¹⁷⁸ They should provide consistency within an institution and between institutions, but should be sufficiently flexible so as not to exclude students who can, in the institution's professional judgment, demonstrate they have

174. James G. Frierson, *Legal Requirements for Clinical Evaluations*, in ACCOMMODATIONS IN HIGHER EDUCATION, *supra* note 7, at 73, 82.

175. Hatzes et al., *supra* note 112, at 47-48; *see also* Currier, *supra* note 127, at 48 (for disability service providers to formulate and implement appropriate accommodations, they must understand the student's learning disability).

176. *See* Brinckerhoff & Banerjee, *supra* note 112, at 248; Rothstein, *supra* note 44, at 94 (without specific information about the program, evaluators can only make general recommendations). Keeping the diagnostician informed about what will be required of the student in a particular program does not shift the responsibility from the disability service provider to the diagnostician. Only the disability service provider truly knows the program and its essential functions and can adequately assess how a student's limitations will affect his or her success in the program.

177. Cyndi Jordan, *Using Documentation Guidelines: Applications to Clinical Service*, 10 LEARNING DISABILITIES 37, 37 (2001).

178. 42 U.S.C.A. § 12101(b)(2).

a disability under the ADA.¹⁷⁹

While the ADA itself gives little direction regarding disability policies, courts' interpretations of the ADA support institutional (and employer) use of guidelines to set forth institutional policies so long as they are not discriminatory.¹⁸⁰ An institution discriminates by failing to take necessary steps "to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals."¹⁸¹ Using criteria that screens out individuals with disabilities, however, constitutes discrimination unless the criteria are necessary.¹⁸² It is discriminatory to impose policies that "while not creating a direct bar to individuals with disabilities, diminish an individual's chance of . . . participation" in programs.¹⁸³ An institution may not employ "unnecessarily burdensome proof-of-disability criteria that preclude or unnecessarily discourage individuals with disabilities from establishing that they are entitled to reasonable accommodations."¹⁸⁴ Generally, postsecondary institutions may not "establish criteria that are inconsistent with accepted practice, especially where accepted practice requires clinical judgment."¹⁸⁵

Very little legal authority exists as to specific content of policies or guidelines a postsecondary institution should provide to its students and their diagnosticians. The *Guckenberger v. Boston University* case most clearly addresses the question of the validity of educational ADA policies.¹⁸⁶ Plaintiffs, who claimed they had learning disabilities or

179. Hatzes et al., *supra* note 112, at 46. "The guidelines should not be interpreted as advocating an arbitrary cut-off for services." Jordan, *supra* note 177, at 40.

180. See *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 91, 135 (D. Mass. 1998); *Abdo v. Univ. of Vt.*, 263 F. Supp. 2d 772, 777 (D. Vt. 2003).

181. *Guckenberger v. Boston Univ.*, 974 F. Supp., 106, 114 (D. Mass. 1997). A public entity under Title II has an "affirmative duty to establish a comprehensive policy" to address requests for services. California State University – Long Beach, OCR Case No. 09-99-2041 (Southwestern Reg. Apr. 20, 1999), <http://www.bcm.edu/ilru/dlrp/html/topical/FAPSI/OCR/csu-lb.html>.

Failure to notify individuals that the institution does not discriminate on the basis of disability would violate federal law. 34 C.F.R. § 104.8 (applicable to Rehabilitation Act). The notice must also designate the person at the institution who is responsible for coordinating the institution's disability services. 34 C.F.R. § 104.7(a). Also, it must include this notice in its recruitment materials. 34 C.F.R. § 104.8(b).

182. 42 U.S.C.A. § 12182(b)(2)(i); see also *Colo. Cross Disability Coal. v. Hermanson Family Ltd. P'ship I*, 264 F.3d 999, 1003 (10th Cir. 2001); *Hahn ex rel. Barta v. Inn County, Iowa*, 130 F. Supp. 2d 1036, 1055 (N.D. Iowa 2001); *Bowers v. Nat'l Collegiate Athletic Assoc.*, 118 F. Supp. 2d 494, 518 (D.N.J. 2000); *Guckenberger*, 974 F. Supp. at 134.

183. *Doukas v. Metro. Life Ins. Co.*, 950 F. Supp. 422, 426 (D.N.H. 1996).

184. *Guckenberger*, 974 F. Supp. at 135; see also *Abdo*, 263 F. Supp. 2d at 778; *Dubois v. Alderson-Broadus College, Inc.*, 950 F. Supp. 754 (N.D. W. Va. 1997); *Coleman v. Zatechka*, 824 F. Supp. 1360, 1368 (D. Neb. 1993).

185. *Simon*, *supra* note 44, at 11.

186. *Guckenberger*, 974 F. Supp. at 106; see also *Kaltenberger v. Ohio Coll. of*

ADHD, challenged the discriminatory nature of several aspects of the Boston University (BU) disability policy.¹⁸⁷ BU's guidelines required students to be retested every three years¹⁸⁸ by a diagnostician with the following credentials: physician, licensed clinical psychologist, or a person with a doctorate in neuropsychology, education, or child psychology, all with at least three years of experience in diagnosing learning disabilities.¹⁸⁹ During litigation, BU restructured its policy to permit students to obtain a waiver of the three-year retesting requirement if retesting was medically unnecessary.¹⁹⁰ Also during litigation, BU changed its process for evaluating a student's accommodation request from permitting the President and his assistant to evaluate the files to requiring a professional highly trained in the area of learning disabilities to evaluate the students' requests.¹⁹¹

Plaintiffs first claimed that BU's eligibility criteria were unreasonably harsh.¹⁹² For those students undergoing initial testing, the District Court held that BU's requirement that evaluators possess certain credentials did not violate the ADA.¹⁹³ The requirement for retesting did violate the ADA because the time, expense, and anxiety of retesting by an evaluator who met BU's credentials tended to screen out learning disabled students.¹⁹⁴ Furthermore, the court held that the credential requirements were not necessary to achieve its goal of properly documenting learning disabilities since BU had presented no evidence that testing by an evaluator with a masters degree was less accurate than testing by a Ph.D.¹⁹⁵ Likewise, the court found that BU's initial three-year retesting requirement was unnecessary since testimony indicated that deficits in learning did not change after adulthood.¹⁹⁶ However, with the addition of the ability to waive BU's three-year retesting requirement, the new policy was not

Podiatric Med., 162 F.3d 432, 437 (6th Cir. 1998) (college's rejection of handwritten note from doctor stating plaintiff was being treated was reasonable); *Abdo v. Univ. of Vt.*, 263 F. Supp. 2d 772, 778 (D. Vt. 2003) (university's request for documentation from licensed professional, which includes diagnostic information and explanation of functional impact of condition on student's major life activities, was reasonable).

187. *Guckenberger*, 974 F. Supp. at 114.

188. *Id.*

189. *Id.* Initially BU's policy prohibited evaluators who were not physicians or clinical or licensed psychologists, but the policy was changed during the litigation. *Id.* at 114–15.

190. *Id.* at 115.

191. *Id.* at 140–42.

192. *Id.* at 122.

193. *Id.* at 136–37.

194. *Id.*

195. *Id.* at 140. However, the court did conclude that the clinical evaluations necessary for ADHD diagnosis did necessitate evaluation by a professional with doctorate level credentials. *Id.*

196. *Id.* at 138–39. However, the court did hold that reevaluating ADHD student was essential since the symptoms change over time and in different settings. *Id.* at 139.

discriminatory since it did not screen out students with disabilities.¹⁹⁷

Next, plaintiffs argued that BU's process for evaluating a student's accommodation request was discriminatory.¹⁹⁸ The court held that BU's previous evaluation procedure constituted a method of administration that had the effect of discriminating on the basis of disability when the President and his assistant, neither of whom had training in assessing learning disabilities and who were motivated by false stereotypes of students with learning disabilities, conducted closed door evaluations of student files.¹⁹⁹ Nevertheless, the change in procedure, whereby a trained professional reviewed the files, corrected the previous procedural defects, was sufficiently interactive, and did not have the effect of discriminating against the learning disabled students.²⁰⁰ Overall, the *Guckenberger* case emphasized flexibility in procedures yet tailored requirements for specific disabilities.

The Department of Education's Office of Civil Rights (OCR), which enforces Section 504 of the Rehabilitation Act and Title II of the ADA, has recommended that postsecondary institutions adopt policies and procedures for addressing student requests for accommodations.²⁰¹ Those policies should designate clear procedures for when and how the institution will provide accommodations.²⁰² "[A]n institution may make a reasonable request that the student provide sufficient supporting medical evidence as to the functional impact of the disability on the student's ability to meet the academic and technical standards requisite to the program or degree for which an adjustment or modification is sought."²⁰³ OCR conveys to students that a school may require documentation that includes: current diagnosis of disability; "the date of the diagnosis; how the diagnosis was reached; the credentials of the professional; how [the] disability affects a major life activity; and how the disability affects . . . academic performance."²⁰⁴

197. *Id.* at 136.

198. *Id.* at 140.

199. *Id.* at 140–41.

200. *Id.* at 141–42. The court also addressed the validity of BU's appeals procedure and its policy of refusing to authorize course substitutions. *See id.* at 142–49; *see also* *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82 (D. Mass. 1998).

201. Simon, *supra* note 44, at 6.

202. *See id.*; Ranch Santiago Community College, OCR Case No. 09-92-2049, 3 Nat'l Disability L. Rep. 52 (Region IX July 22, 1992) (recommended written policies).

203. Oregon State Univ., OCR Case No. 10-98-2071 at 11 (Feb. 25, 1999) (letter ruling on file with author). A student may be required to provide results of medical, psychological, or educational diagnostic testing. University of Mississippi, OCR Case No. 06-01-2023 at 2 (July 20, 2001)(letter ruling on file with author).

204. OCR, *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities* 2 (2007), <http://www.ed.gov/print/about/offices/list/ocr/transition.html>; *see also* Univ. of Utah, OCR Case No. 08-05-2023 at 3 (May 23, 2005), <http://lexisnexis.com/us/lnacademic> (University policies, which required statement of evaluator's credentials, evaluative

The EEOC gives further guidance in the employment context about when and what an employer may ask for documentation of a disability. “If the need for accommodation is not obvious, an employer may ask an employee for *reasonable* documentation about his/her disability. . . . So, the applicant may be required to provide documentation from an appropriate professional, such as a doctor or a rehabilitation counselor, concerning the applicant’s disability and functional limitations.”²⁰⁵ The documentation should be sufficient to substantiate that the employee falls with the ADA definition of disability and that the accommodations the employee requests are necessary.²⁰⁶ Documentation is sufficient when it: “(1) describes the nature, severity, and duration of the employee’s impairment, the activity, or activities that the impairment limits, and the extent to which the impairment limits the employee’s ability to perform the activity or activities; and (2) substantiates why the requested reasonable accommodation is needed.”²⁰⁷ If an employee offers the employer insufficient documentation, then the employer must explain why the documentation is insufficient and give the employee the opportunity to provide the necessary information.²⁰⁸

The Department of Justice, in discussing regulation of private organizations which offer entrance or certification examinations, agreed that the organizations could require applicants to submit documentation of disabilities.²⁰⁹ “[D]ocumentation must be reasonable and must be limited to the need for the modification or aid requested. Appropriate documentation might include a letter from a physician or other professional, or evidence of a prior diagnosis or accommodation, such as eligibility for a special education program.”²¹⁰

data for three years, and a comprehensive narrative report listing tests administered, analyzing test results, discussing functional impact on student learning, and recommending accommodations, were reasonable); Univ. of Utah, OCR Case No. 08-05-2023 at 3 (Reg. VII May 23, 2005) (letter ruling on file with author) (University documentation guidelines that required students to submit documentation prepared by an appropriate professional which included “a diagnosis of a current disability, the date of the diagnosis, how the diagnosis was reached, the credentials of the professional preparing the diagnosis, how the disability affects a major life activity, and how the disability affects academic performance and other information,” were reasonable).

205. EEOC, *Guidance on Pre-Employment Disability-Related Inquiries and Medical Examinations* 5 (1995), <http://www.eeoc.gov/policy/docs/medfin5.pdf> (last visited Nov. 11, 2009).

206. EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act* 11 (2000), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> (last visited Nov. 11, 2009).

207. *Id.*

208. *Id.* Documentation is insufficient if: (1) it does not identify the disability; (2) it does not explain the need for accommodations; (3) it does not indicate the functional limitations imposed by the medical condition; or (4) the medical professional conducting the examination is not qualified. *Id.*

209. 28 C.F.R. pt. 36, app. B.

210. *Id.*

Overall, interpretations of the ADA support institutional development of documentation guidelines indicating the type, content, source, and recency of documentation to assist disability service providers in assessing students' eligibility for accommodations so long as the guidelines do not attempt to screen out students on the basis of disability. Further, guidelines can also assist disability service providers in fashioning individualized and effective accommodations.

IV. LAW SCHOOL DOCUMENTATION GUIDELINES

A review of disability documentation guidelines posted by ABA-accredited law schools and their associated colleges and universities reveals that most institutions do not adequately convey, either to the students petitioning for accommodations or their diagnosticians, what their expectations are for documenting learning disabilities and what the ADA requires students to document in order to demonstrate that they are individuals with disabilities. In assessing the adequacy of documentation guidelines, I reviewed 196 law school websites,²¹¹ discovering that a majority of institutions have posted some form of documentation guidelines on their websites.²¹² If the institution posted documentation guidelines specifically for learning disabilities, I focused on those guidelines. If not, then I reviewed the institution's general documentation policy.²¹³ In reviewing the documentation guidelines, I concentrated on two components: accessibility and content.

211. Overall, I reviewed the websites of 200 fully or provisionally ABA-accredited law schools. I eliminated from consideration three schools that had websites in Spanish, and one school that did not permit public access. I only reviewed the schools' websites to locate documentation guidelines; I did not consider what documentation guidelines an institution might have that were not posted on its website. The statistics included in this section are based on my assessment of each institution's disability policies and guidelines. The data was current as of September 15, 2009.

212. Of the 196 law schools I reviewed, 157 institutions posted some type of documentation guidelines, while 39 only included general references to disability policies, merely referred students to their Dean of Students or disability services office for additional information, or had no information I could locate. Of those 157 law schools, 47 had law school specific guidelines, while the other 110 either referred the student to the general college or university website (70) or did not have any link, but I located the policy directly through the university's website (40). Appendix A lists websites for each school I reviewed. The list includes websites which link directly to a school's specific guidelines for documenting learning disabilities, if any. Otherwise, the websites link to general documentation guidelines or general disability information. If I could not locate disability information on the school's website, the list states Not Available

213. Of the 140 schools which posted some form of documentation guidelines, 114 had either separate guidelines for learning disabilities or included specific requirements for learning disabilities within its general guidelines. Twenty-six institutions only included general guidelines, or guidelines for documenting disabilities other than learning disabilities.

A. Accessibility

In general, few institutions' disability policies and documentation guidelines were easy to access from the law school's home page. Generally, the most efficient way to access an institution's guidelines was to search the site.²¹⁴ Guidelines were usually located at the school's Disability Services/Resources Office page. Otherwise, the institution's Student Handbook sometimes set out the documentation guidelines or general policies, gave general contact information, or provided links to the guidelines.²¹⁵ Few institutions had guidelines directly on the law school's webpage; guidelines were generally located on the associated university's webpage.²¹⁶ Seldom did law schools have a link from their Admissions or Prospective Students page, a place where most incoming students might look for information.²¹⁷

A little less than half of the institutions that had documentation guidelines included them in easily printable format, where the other half required a student to print from multiple web pages, with content sometimes running off the page's margins.²¹⁸ About one third of the institutions required students to look both at general guidelines and then at more specific guidelines for learning disabled students.²¹⁹ Fewer than twenty-five institutions provided forms that were written specifically for the student's diagnostician.

B. Content

In reviewing content of each institution's guidelines,²²⁰ I considered whether the institutional guidelines required the student's documentation to specify: a) the recency of testing or documentation of testing; b) the diagnostician's qualifications; c) the diagnosis of disability; d) the domains

214. For 117 of the 157 schools which posted some guidelines, searching the site was easier to locate guidelines than clicking under either Prospective or Current Students. The most effective search terms were: disability, disability services, disability resource center, or accommodations.

215. For 38 of the 196 schools, students would have to look at the school's Student Handbook for disability information. However, specific document guidelines were incorporated into the Student Handbook on only nine occasions.

216. Guidelines for 110 out of 157 schools were located on the college or university site.

217. Only thirteen schools listed disability under Admissions or Prospective Students.

218. Guidelines from seventy schools were either in PDF or other easily printable format.

219. Sometimes, there were differences between the general and learning disability guidelines, which required the student to decide which guidelines took precedence.

220. A number of guidelines tracked the AHEAD Guidelines for Documenting Learning Disabilities, despite AHEAD withdrawing those guidelines in 2004. See *supra* note 132. Very few guidelines modeled AHEAD's Best Practices. See AHEAD BEST PRACTICES, *supra* note 109, at 5–6.

and types of acceptable testing instruments; and e) recommendations for accommodations.

1. Recency of Documentation

Twenty-eight out of the 157 documentation guidelines did not indicate how current the student's documentation must be. Of the remaining 129 guidelines, institutions set out 21 different prescriptions for the age of documentation. The most common requirement was that testing had been completed within the last three years.²²¹ The next most common prescription was that documentation of testing be "current."²²² Other institutions made how recent testing must be dependent on the age of the student.²²³ A small number of institutions only accepted documentation when testing had been done as an adult, without defining adult.²²⁴ Several institutions indicated that whether the documentation was sufficiently current would be judged on a case-by-case basis.²²⁵ While fifty institutions set precise, rigid guidelines, an equal number set a guideline, but allowed for flexibility in accepting documentation outside the guidelines, depending on the circumstances.²²⁶

Few if any institutions where the documentation policy was found at the institution's website rather than on the law school site specified if the currency requirement was different when the student was applying to law school or other graduate schools.²²⁷ The assumption of most college and universities' documentation guidelines was that students were applying to the institution as undergraduates.

2. Qualifications of Diagnosticians

Only a dozen institutions did not indicate the type of diagnostician or

221. Sixty-five of the 157 schools set a three year guideline for the age of documentation. Seven schools set five year guidelines; four schools indicated three to five years, two schools indicated four years, and one required testing within the past two years.

222. Twenty-one schools only required that documentation be current without specifying any further date requirements. Nine schools required that documentation be "recent."

223. The most common requirement was that if the testing were completed during adulthood, it should have been completed with the past five years (nine schools); if testing were completed as a high school student, the testing could not be more than three years old (thirteen schools).

224. Four institutions only accepted documentation completed during adulthood; three schools did not accept documentation completed prior to college.

225. Three schools used case-by-case language.

226. Forty-seven schools.

227. Only one school indicated whether documentation must be updated when a student graduated from one degree program and enrolled in another. Of course those schools which had law school specific guidelines presumably drafted those guidelines knowing that their students would all be adults.

evaluator that must document a student's disability. The most common description of the diagnostician was: a qualified, certified, licensed professional, trained and experienced in the area of learning disabilities.²²⁸ Most other institutions set out a non-exclusive list of acceptable professionals, most often including: licensed, clinical psychologist,²²⁹ school or educational psychologist,²³⁰ licensed physician or medical doctor with experience diagnosing learning disabilities,²³¹ neuropsychologist,²³² learning disability specialist,²³³ and licensed psychiatrist.²³⁴ Other acceptable diagnosticians included: psychometrist, speech-language pathologist, neuropsychiatrist, clinical social worker, counseling psychiatrist, psycho-educational professional, neurologist, psychological examiner, licensed counselor, supervised student clinician, and "other professional."²³⁵ Forty-five policies indicated that the diagnostician could not be related to the students.²³⁶

3. Diagnosis of Disability

While very few of the guidelines actually included a definition of "learning disability,"²³⁷ forty-four institutions required diagnosticians to include a specific DSM-IV diagnosis of disability.²³⁸ A majority of learning disability guidelines dictated that diagnosticians use the aptitude-achievement discrepancy model to assess whether a student had a learning disability.²³⁹

Nearly all institutions' disability policies referred to the ADA and the Rehabilitation Act as the controlling law,²⁴⁰ although only ninety-five of the institutions' policies actually used the language from the ADA's

228. Fifty-two of the 157 schools with guidelines used this type of terminology.

229. Sixty-three institutions specified licensed or clinical psychologist, while seventeen institutions indicated psychologist.

230. Thirty-four institutions indicated school psychologist; twenty-two specified educational psychologist. An additional eight schools included educational therapist and six schools listed educational diagnostician.

231. Thirty-nine schools used this terminology.

232. Thirty-nine schools.

233. Forty-eight schools.

234. Nine schools.

235. Fewer than four institutions listed any one of these individual diagnosticians. Seventeen schools added "other professional" to round out their lists.

236. One institution stated that a licensed clinical social worker was not a qualified professional.

237. Eight of the 157 institutions included the NJCLD definition of learning disability. *See supra* note 18 and accompanying text. Three policies, however, included other definitions.

238. Eleven of those institutions also permitted a diagnosis under ICD-9 or ICD-10, or ICF.

239. Fourteen schools relied on a similar three or four criteria model for diagnosing learning disabilities using the discrepancy mode

240. Two institutions only mentioned the Rehabilitation Act.

definition of disability, directing diagnosticians to conclude whether the student was substantially limited in a major life activity, generally of learning. Yet, contrary to the majority of cases,²⁴¹ only five policies specified that the impact of the student's impairment would be compared to that of the general population.

4. Testing Instruments

Consistent with the discrepancy model for diagnosing learning disabilities, most learning disability guidelines required testing in the areas of aptitude or cognitive ability and academic achievement.²⁴² In addition, eighty-five policies also required testing a student's information processing. Not a single school addressed how to deal with a student who had not undergone aptitude or achievement testing, but had been previously deemed eligible for special education using RTI.²⁴³ Nearly all schools recommended a comprehensive test assessment battery, most recommending at least one test in each of its required domains.

There was actually significant uniformity in the specific testing instruments each institution recommended.²⁴⁴ To test aptitude, most institutions recommended the Wechsler Adult Intelligence Scale (WAIS-R, or WISC-III) or the Woodcock-Johnson Psychoeducational Battery III (WJ), Test of Cognitive Ability.²⁴⁵ To test achievement, the most commonly recommended test instruments were: the Woodcock-Johnson Psychoeducational Battery III, Test of Achievement,²⁴⁶ the Wechsler Individualized Achievement Test - II (WIAT-II),²⁴⁷ the Stanford Test of Academic Skills (TASK),²⁴⁸ and the Scholastic Abilities Test for Adults (SATA).²⁴⁹ To test information processing, those schools which

241. See *supra* notes 94-97 and accompanying text.

242. 104 schools.

243. As students diagnosed with learning disabilities using RTI begin to move through the elementary and secondary school systems, more data will be available demonstrating the viability of RTI for older students, including those participating in undergraduate and graduate programs.

244. Of the 123 learning disability guidelines, thirty-five did not recommend any specific testing instruments.

245. Seventy-nine schools recommended WAIS and seventy-four recommended WJ. Two other common recommendations were the Stanford Binet Intelligence Scale IV or V (forty schools) and the Kaufman Adolescent and Adult Intelligence Test (KAAIT) (twenty-eight schools).

246. Seventy-four schools recommended this test instrument.

247. Forty-one schools.

248. Thirty-three schools.

249. Thirty-six schools recommended this test instrument. In addition, a number of schools also recommended additional tests in reading and math using Test of Written Language 3 (TOWL 3) (thirty-three schools); Woodcock Reading Mastery Test (WRMT) (thirty-five schools); the Nelson-Denny Reading Test (forty-one schools); and Stanford Diagnostic Mathematics Test (SDMT) (twenty-six schools). Twenty-seven other tests were recommended by fewer than five schools.

recommend testing listed the Detroit Tests of Learning Aptitude – 3 or Adult (DTLA-3 or A)²⁵⁰ or the Wechsler Memory Scale (WMS-R or III).²⁵¹ Interestingly, while thirty-three schools noted that the Wide Range Achievement Test (WRAT-3) was an unacceptable testing instrument, eight schools included the test on their recommended list.²⁵²

5. Recommendations for Accommodations

Most institutions required diagnosticians to make individualized recommendations for accommodations that directly addressed the student's limitations in learning and state a rationale as to why the proposed accommodations were necessary.²⁵³ While nearly all schools' general disability policies described the types of available accommodations,²⁵⁴ few listed those in their documentation policies.²⁵⁵ Furthermore, no guidelines described the nature of the program for which students would be receiving accommodations.

V. RECOMMENDATIONS

Given the history of pervasive deficiencies in learning disability documentation and the wide variation in law school documentation guidelines, law schools, or any postsecondary educational institution for that matter, should set out clear and specific guidelines for the source, type, recency, and content of documentation that students must produce to obtain accommodations for learning disabilities. While under the Rehabilitation Act, institutions technically need only give notice of who the disability contact person is,²⁵⁶ the more comprehensive and accessible guidelines are, the more effective and efficient the process will become. Furthermore, the easier it is for students and diagnosticians to understand and access the institutions' guidelines, the more likely they will be able to comply with them.

To improve postsecondary educational institutions' disability services and the documentation they receive from diagnosticians, institutions should implement several changes:

250. Twenty-eight schools.

251. Eighteen schools.

252. Likewise, three schools stated that the Wechsler Intelligence Scale for Children (WISC) was not an acceptable measure, but two schools recommended the test.

253. Only forty-six of the 157 schools with guidelines did not specifically note that diagnosticians should describe appropriate accommodations.

254. Extended test time, distraction free testing environments, notetakers, etc.

255. Twenty-four schools.

256. 34 C.F.R. § 104.8 (2008).

Guidelines to Assist Diagnosticians

1. Give clear notice of what the applicable law is.

Institutions should give diagnosticians clear notice of the ADA standards for assessing students' eligibility for accommodations. Documentation guidelines should reflect the requirements of the ADA and not the IDEA or state educational guidelines. The guidelines should explain in plain language, but in some detail, the ADA's definition of an individual with a disability, so that the diagnostician can clearly understand the distinction between the IDEA and the ADA. The diagnostician must be prepared to describe, if he or she concludes the student has a learning disorder, how the student's disorder substantially limits the student's ability to learn, speak, read, concentrate, think, or communicate, or the student's brain function. For those jurisdictions which judge whether an individual's impairment substantially limits major life activities compared to the general population, the institution should clearly convey this standard to the diagnostician.

2. Give clear notice as to which learning disability definition or model the institution subscribes to, if any.

To aid diagnosticians, guidelines should clearly indicate what definition or model of learning disability the institution is relying on. As elementary and secondary schools move away from an aptitude-achievement discrepancy model of identifying learning disabilities, law schools and universities should adapt as well. In particular, law schools should address how they will handle those students previously diagnosed with a learning disability through the RTI or other clinical model. Clinging to DSM diagnosis as the only acceptable measure of learning disabilities when elementary and secondary schools are moving away from discrepancy as a measure of assessment will further widen the disconnect between secondary and postsecondary disability services.

3. Give clear notice of the components the documentation should address.

Guidelines should describe what should be included in disability documentation. The documentation should address: background information about the student's history of learning disabilities; a clear diagnosis including an explanation of how the student's impairment substantially limits the student's learning or other major life activities; results of psychoeducational testing using appropriate test instruments and an explanation of those test results; and recommendations for accommodations with an explanation of why each accommodation will help the student overcome deficits in learning particular to the law school program. Also, if institutions look to diagnosticians to recommend

individualized accommodations, they will only receive informed recommendations if they educate the diagnostician about the nature of the law school program and the evaluation methods used in that program. Without a clear explanation of what will be expected of the student during law school, the diagnostician cannot tailor accommodations to the student's needs.

The guidelines should also be in a form that can be given directly to diagnosticians. Institutions should make it as easy as possible for the diagnostician to provide the necessary information. Inadequate documentation causes delay for the student and inconvenience for the institution. Providing forms and checklists for diagnosticians to complete might be the easiest way to get them to comply with documentation guidelines. A sample form for diagnosticians to complete is included as Appendix B.

Even though guidelines should be specific and clear about what they require of diagnosticians, they should also be flexible, allowing for different methods and sources of documentation.²⁵⁷

Guidelines to Assist Students

1. Give students clear notice how recent testing and/or documentation must be.

Guidelines should be clear about how recent documentation must be. Law students who have undergone testing for learning disabilities as adults should not have to be retested. According to *Guckenberger*, institutions should steer away from definitive date limits, and should allow for flexibility in the age of documentation.²⁵⁸ Despite requirements to the contrary by many institutions and most testing agencies, retesting to establish the existence of an ADA disability, i.e., a learning disorder which substantially limits a major life activity, is not usually necessary given that learning disabilities do not generally change during adulthood. However, the recommendations for accommodations should be updated regularly, specifically addressing the requirements of the program to which the student is applying.

Currently, because most documentation guidelines are written by the disability services office which is generally situated at the undergraduate campus, most guidelines assume that students are coming immediately from high school. When institutions frame the guidelines for how current a student's documentation must be, they should consider that students may

257. AHEAD BEST PRACTICES, *supra* note 109, at 4.

258. *Guckenberger v. Trustees of Boston Univ.*, 974 F. Supp. 106, 138–39 (D. Mass. 1997). Institutions could certainly require testing to take place while students are adults rather than accept testing that took place when they were children and when their learning disability was documented under the IDEA.

be applying to graduate programs, including law school.

2. Give students clear notice of what their responsibilities are.

Institutional guidelines should be written in plain language students can understand and should be easily accessible. Institutions should post direct links to guidelines in places that incoming students generally access, namely, the institution's website and in particular, the Admissions or Prospective Students webpage, and make links to disability information obvious.²⁵⁹ To ensure that students understand what information they should provide to whom and when, institutions should furnish students with checklists which outline the process for determining eligibility for accommodations and appropriateness of individualized accommodations.

Students should be prepared to participate in a follow-up interview with the institution's disability service provider to fill in any gaps in the diagnostician's documentation.²⁶⁰

General Recommendations

1. Create disability-specific documentation guidelines as recommended by AHEAD.²⁶¹

Different disabilities require different documentation and a school cannot expect a student or a diagnostician to guess about what would be acceptable in each instance. Likewise, students and diagnosticians should not be expected to consult both general and learning disability-specific guidelines to both connect and reconcile any differences.

2. Collaborate through organizations like AHEAD to develop consistent documentation guidelines between schools.

Institutions should avoid outdated guideline models. Guidelines should be revised regularly to be consistent with current methods of assessing learning disabilities and changes in the law.

3. Law schools should set good examples for their universities and colleges by assisting disability service offices to understand the law and formulate disability policies consistent with the law.

And, if law students must go to the university campus to receive

259. Given how web-users generally navigate web pages, namely, scanning, focusing on key words, and clicking a minimal number of times to find information, institutions should make disability information easy to access, in obvious places that require little thought to locate. See STEVE KRUG, *DON'T MAKE ME THINK! A COMMON SENSE APPROACH TO WEB USABILITY* 14, 21–23 (2d ed. 2006).

260. *Documentation Process Should Include a Personal Narrative of Disability*, 11 *DISABILITY COMPL. FOR HIGHER EDUC.*, Sept. 1, 2005.

261. AHEAD BEST PRACTICES, *supra* note 109, at 8.

disability services, the law school should provide clear guidance to its students as to how to do so. There should be clear links to the disability services office on the law school's web page for both incoming and current students.

The goal of each law school should be: to comply with the requirements of the ADA; to provide students who have learning disabilities an opportunity to succeed in the law school environment; and to implement a process for assessing eligibility for accommodations that is fair and efficient. Generating clear, specific, and thorough documentation guidelines is a step in the right direction.

APPENDIX A

Appendix A lists websites for each school I reviewed. The website listed links either directly to the law school website if disability information was located there or to their associated university website. The list primarily includes websites which link directly to a school's specific guidelines for documenting learning disabilities, if any. Otherwise, the websites link to general documentation guidelines or general disability information. If I could not locate disability information on the school's website, the list states information was Not Available. The links in this list were current as of September 2009.

SCHOOL	WEBSITE
University of Akron - C. Blake McDowell Law Center	http://www.uakron.edu/access/Accommodations_Services/lawstudents.php
University of Alabama School of Law	http://ods.ua.edu/documentation/ld.htm
Albany Law School	http://www.albanylaw.edu/media/user/student_affairs/albanylawstudenthandbook.pdf
American University, Washington College of Law	http://www.wcl.american.edu/studentaffairs/disabilities.cfm
Appalachian School of Law	http://www.asl.edu/documents/standards.pdf
University of Arizona - James E. Rogers College of Law	http://drc.arizona.edu/ada/documentation.html
Arizona State University - Sandra Day O'Connor College of Law	http://www.asu.edu/aad/manuals/usi/usi701-02.html
University of Arkansas, Fayetteville - Leflar Law Center	http://www.uark.edu/ua/csd/applications.htm
University of Arkansas at Little Rock, William H. Bowen School of Law	http://www.uarl.edu/disability/index.php/student-handbook#5
Ave Maria School of Law	Not Available
University of Baltimore School of Law	http://www.ubalt.edu/template.cfm?page=953
Barry University Dwayne O. Andreas School of Law	http://www.barry.edu/disabilityservices/guidelines/specific.htm
Baylor University School of Law	http://www.baylor.edu/oala/index.php?id=26133
Benjamin N. Cardozo School of Law, Yeshiva University	http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentDisplay&ucmd=UserDisplay&userid=10356&contentid=4076&folderid=0
Boston College Law School	http://www.bc.edu/schools/law/services/deanstudent/disability.html
Boston University School of Law	http://www.bu.edu/disability/policies/eval-learning.html
Brigham Young University - J. Reuben Clark Law School	http://www.law2.byu.edu/admissions/prepforadmission#services
Brooklyn Law School	http://www.brooklaw.edu/CityCampus/Student%20Life/Campus%20Services.aspx
University at Buffalo Law School	http://law.buffalo.edu/Student_Life_And_Services/default.asp?firstlevel=4&filename=student_support
University of California, Berkeley, School of Law	http://www.dsp.berkeley.edu/learningdisability.html
University of California, Davis, School of Law	http://sdc.ucdavis.edu/fliers/LD_flier.html

SCHOOL	WEBSITE
University of California, Hastings College of the Law	http://www.uchastings.edu/disability/forms.html
University of California, Los Angeles School of Law	http://www.osd.ucla.edu/docs/Guidelines/ucdssld.html
California Western School of Law	http://www.cwsl.edu/content/diversity/Accommodations%20Complete%20Packet%20-%20ONLINE.pdf
Campbell University of Norman Adrian Jiggins School of Law	http://www.campbell.edu/content/682/ds-guide.pdf
Capital University Law School	https://culsnet.law.capital.edu/Manual/6_06.asp
Case Western Reserve School of Law	http://law.case.edu/student_life/content.asp?id=111
The Catholic University of America, Columbus School of Law	http://dss.cua.edu/res/docs/2009-2010-LD-Documentation-Guidelines.pdf
Chapman University School of Law	http://www.chapman.edu/images/userImages/loge/Pre_4217/Handbook07-08.pdf
Charleston School of Law	http://charlestonlaw.indigofiles.com/Law_Student_Handbook_09-10.pdf
Charlotte School of Law	http://www.charlottelaw.edu/studentservices/default.asp?PageID=191
The University of Chicago, The Law School	http://disabilities.uchicago.edu/accommodation_process/Protocol%20for%20LD%20Documentation%20-%2012-13-08%20EAF%20draft.pdf
Chicago-Kent College of Law, Illinois Institute of Technology	http://www.iit.edu/cdr/guidelines/learning_disabilities_documentation_guidelines.shtml
University of Cincinnati College of Law	http://www.uc.edu/sas/disability/students.html
City University of New York, School of Law	http://www.law.cuny.edu/student/StudentServices/StudentswithDisabilities/Guidelines.html#Learning%20Disability
Cleveland State University, Cleveland-Marshall College of Law	http://www.csuohio.edu/offices/disability/students/handbook/accom2.html#docs
University of Colorado School of Law	http://www.colorado.edu/disabilityservices/learning/docs.html
Columbia University School of Law	http://www.health.columbia.edu/pdfs/ods_learning_disabilities_guidelines.pdf
University of Connecticut School of Law	http://www.csd.uconn.edu/doc_profiles.html
Thomas M. Cooley Law School	http://www.cooley.edu/students/Disability_Access_Guide.pdf
Cornell Law School	http://sds.cornell.edu/Brochures/LD_Guidelines.pdf
Creighton University School of Law	http://www.creighton.edu/EOP/Disability.html
University of Dayton School of Law	http://law.udayton.edu/NR/rdonlyres/0173D87E-95A-46DA-B5A7-9FD95142308/0/AppendixF1.pdf
University of Denver College of Law	http://www.du.edu/studentlife/disability/dsp/doc_guidelines.html
DePaul University College of Law	http://www.law.depaul.edu/students/pdf/student_handbook.pdf
University of Detroit Mercy School of Law	http://www.law.udmercy.edu/students/academicupport/disabilities.php
University of the District of Columbia, David A. Clarke School of Law	http://www.law.udc.edu/resource/collection/522B22A-7345-44EF-9C15-30C54025B36/disability_memo.pdf

SCHOOL	WEBSITE
Drake University Law School	http://www.drake.edu/acadassist/disability/studresp/onsillity.php
Duke University School of Law	http://www.access.duke.edu/pdf/SAOGuideLns/SA_guidelns_LD.pdf
Duquesne University School of Law	http://www.sites.duq.edu/special-students/learning-disability.cfm
Earle Mack School of Law at Drexel	http://www.drexel.edu/law/PDFs/osa-disability-policy.pdf
Elon University School of Law	http://www.elon.edu/docs/e-web/academics/advising/ds/guidebook.pdf
Emory University School of Law	http://www.ods.emory.edu/ldcriteria.htm
Faulkner University of Thomas Goode Jones School of Law	http://www.faulkner.edu/jsl/info/disabilities.asp
University of Florida, Fredric G. Levin College of Law	http://www.dso.ufl.edu/drc/documents/Learning%20Disability%20Evaluation%20Process%20II.pdf
Florida A&M University College of Law	http://law.famu.edu/go.cfm/do/Page.View/pid/28/t/Student-Handbook
Florida Coastal School of Law	http://www.fcsl.edu/sites/fcsl.edu/files/FCSL%20Student%20Handbook-%208-6-09.pdf
Florida International University College of Law	http://law.fiu.edu/images/docs/Student_Information/policy%20for%20students%20and%20applicants%20with%20disability.pdf
Florida State University College of Law	http://www.law.fsu.edu/current_students/rules/exams.pdf
Fordham University School of Law	http://law.fordham.edu/office-of-student-affairs/2821.htm
Franklin Pierce Law Center	http://www.piercelaw.edu/assets/pdf/studenthandbook/16-17.pdf
George Mason University School of Law	http://ods.gmu.edu/students/documentation.php
The George Washington University Law School	http://gwired.gwu.edu/dss/students/eligibility/LD/
Georgetown University Law Center	http://www.law.georgetown.edu/counseling/disabilities.html
University of Georgia School of Law	http://drc.uga.edu/disabilities/eligibilityofd.php
Georgia State University College of Law	http://www2.gsu.edu/~wwwoods/documentation_guidelines/index.htm
Golden Gate University School of Law	http://www.ggu.edu/school_of_law/law_student_services/disability_services
Gonzaga University School of Law	http://www.gonzaga.edu/Campus-Resources/Offices-and-Services-A-Z/Disability-Resources-Education-and-Access-Management/Prospective-Students/Documentation-Policies/default.asp
Hamline University School of Law	http://www.hamline.edu/hamline_info/offices_services/student_relations/studentaffairs/disabilities_services/documentation_guidelines.html
Harvard Law School	http://www.law.harvard.edu/students/disability.php
University of Hawaii, William S. Richardson School of Law	http://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/StudentHandbookJuly182008.pdf
Hofstra University School of Law	http://law.hofstra.edu/StudentLife/StudentAffairs/Handbook/stuhb_chapter_07.html
University of Houston Law Center	http://www.uh.edu/csd/ld.htm

SCHOOL	WEBSITE
Howard University School of Law	http://www.law.howard.edu/377
University of Idaho College of Law	http://www.access.uidaho.edu/default.aspx?pid=9639
University of Illinois College of Law	http://www.disability.uiuc.edu/page.php?id=23
Indiana University School of Law, Indianapolis	http://indylaw.indiana.edu/students/handbook/
Indiana University Maurer School of Law	http://129.79.17.23/dss/forms/new/adhd.pdf
University of Iowa College of Law	http://www.law.uiowa.edu/documents/2006-7_handbook_web-final.pdf
Atlanta's John Marshall Law School	http://www.johnmarshall.edu/images/pdf/Student_Handbook.pdf
The John Marshall Law School	http://www.jmls.edu/registrar/disability%20Acc%20req%20form.pdf
University of Kansas School of Law	http://www.disability.ku.edu/~disability/documentation/general_documentation.shtml
University of Kentucky College of Law	http://www.uky.edu/StudentAffairs/DisabilityResourceCenter/ldGuidelines.html
University of La Verne College of Law	http://law.ulv.edu/student_services/students_with_disabilities.html
Lewis and Clark Law School	http://www.lclark.edu/dept/access/policy.html
Liberty University School of Law	http://www.liberty.edu/academics/law/index.cfm?PID=6253
Louisiana State University Law Center	http://appl003.lsu.edu/slas/ods.nsf/\$Content/Learning+Disabilities?OpenDocument
University of Louisville, Louis D. Brandeis School of Law	http://www.law.louisville.edu/sites/www.law.louisville.edu/files/disabilities_handbook_0.pdf
Loyola Law School, Los Angeles	http://intranet.lls.edu/studentaffairs/disability.html
Loyola University, Chicago, School of Law	http://www.luc.edu/sswd/documentation.shtml
Loyola University, New Orleans, School of Law	http://www.loyno.edu/arc/disability-services-faqs
University of Maine School of Law	http://www.usm.maine.edu/~oassd/policynprocedures/ld.htm
Marquette University Law School	http://www.marquette.edu/oses/disabilityservices/documents/PDFMarquetteUniversityDisabilityDocumentationGuidelines.pdf
University of Maryland School of Law	http://www.law.umaryland.edu/students/resources/policies/documents/ADA_policy_11272007.pdf
University of the Pacific, McGeorge School of Law	http://www.mcgeorge.edu/x579.xml
The University of Memphis, Cecil C. Humphreys School of Law	http://www.memphis.edu/sds/disabilitysvcs/pdfs/Guidelines_for_Documentation_-_LD.pdf
Mercer University Law School	http://www.law.mercer.edu/life/studenthandbook.pdf
University of Miami School of Law	http://www.umarc.miami.edu/pages/ld.html
The University of Michigan Law School	http://www.umich.edu/~sswd/resources/forms/index.html
Michigan State University College of Law	http://www.law.msu.edu/academics/ac-police-exam.html
University of Minnesota	http://ds.umn.edu/Students/Documented%20Disability/AdditionalDocumentationGuidelinesforLearningDisabilities.htm

SCHOOL	WEBSITE
Mississippi College School of Law	http://law.mc.edu/student/accommodations.htm
University of Mississippi School of Law	http://www.olemiss.edu/depts/sds/SDSDocLD.htm
University of Missouri School of Law (Columbia)	http://law.missouri.edu/students/policies/disabilitieshandbook.html
University of Missouri-Kansas City School of Law	http://www.umkc.edu/disability/images/documentin_id.pdf
University of Montana School of Law	http://life.umt.edu/dss/name/documentation
University of Nebraska College of Law	http://www.unl.edu/ssd/services/
University of Nevada, Las Vegas, William S. Boyd School of Law	http://www.law.unlv.edu/pdf/StudentHandbook.pdf
New England School of Law	http://www.nesl.edu/students/exam_schedule.cfm
University of New Mexico School of Law	http://lawschool.unm.edu/academics/policies/bulletin-handbook-policies.pdf
New York Law School	http://www.nyls.edu/pages/5993.asp
New York University School of Law	http://www.nyu.edu/csd/forms/LD_documentation.pdf
North Carolina Central University School of Law	http://disabilityservices.unc.edu/eligibility/documentation-guidelines.html
University of North Carolina School of Law	http://disabilityservices.unc.edu/eligibility/documentation-guidelines.html
University of North Dakota School of Law	http://www.und.edu/dept/dss/html/disability%20documentation%20guidelines.html
Northeastern University School of Law	http://www.slaw.neu.edu/asp/aspguide.pdf
Northern Illinois University College of Law	http://www.niu.edu/caar/guidelines/guidelines_id.html
Northern Kentucky University, Salmon P. Chase College of Law	http://www.nku.edu/~disability/accommodations/register.php
Northwestern University School of Law	http://www.northwestern.edu/disability/students/considering/documentation/learning-disabilities.html
Notre Dame Law School	http://law.nd.edu/student-life/student-services/policies
Nova Southeastern University, Shepard Road Law Center	http://www.nova.edu/disabilityservices/forms/special_learning_disability.pdf
Ohio Northern University, Pettit College of Law	http://www.law.onu.edu/academics/disability/disabilityservices.html
The Ohio State University, Michael E. Moritz College of Law	http://www.ods.ohio-state.edu/prospective-students/learning-disability-documentation-guidelines/
University of Oklahoma College of Law	http://www.ou.edu/drc/home/students/documentation_guidelines.html#Learning%20Disability
Oklahoma City University School of Law	http://www.okcu.edu/law/admittedstudents/AdmissionDisabilityAccommodations.php
University of Oregon School of Law	http://www.law.uoregon.edu/students/disabilities/
Pace University School of Law	http://www.pace.edu/emplibrary/student%20handbook.pdf
University of Pennsylvania Law School	http://www.vpul.upenn.edu/lrc/sds/Documentation%20Guidelines/Learning%20Disability%20Documentation%20Guidelines.pdf

SCHOOL	WEBSITE
Pennsylvania State University, The Dickinson School of Law	http://law.psu.edu/office_for_student_services
Pepperdine University School of Law	http://www.pepperdine.edu/disabilityservices/students/guidelines/learning.htm
University of Pittsburgh School of Law	http://www.drs.pitt.edu/documentation.html#ld
Phoenix School of Law	http://www.phoenixlaw.edu/downloads/PhoenixLaw_Student_Handbook.pdf
Quinnipiac University School of Law	http://law.quinnipiac.edu/prebuilt/pdf/student_handbook07-08.pdf
The University of Richmond School of Law	http://law.richmond.edu/about/disabpol.php
Regent University School of Law	http://www.regent.edu/admin/stusrv/student_handbook.cfm#disabled_students
Roger Williams University School of Law	http://law.rwu.edu/content/pdf/studenthandbook.pdf
Rutgers School of Law - Camden	http://disabilityservices.rutgers.edu/docs/ld.pdf
Rutgers School of Law - Newark	http://law.newark.rutgers.edu/files/u/RUGuidelinesforDisabilityAccommodations.pdf
Saint Louis University School of Law	http://law.slu.edu/handbook/chapters/ch14/D.html
St. John's University School of Law	http://www.stjohns.edu/campus/handbook/chapter6/disabilities.sju
St. Mary's University of San Antonio School of Law	http://www.stmarytx.edu/disability/?go=proc
University of St. Thomas School of Law	http://www.stthomas.edu/enhancementprog/policies/docRequirementsProcedures.html
St. Thomas University School of Law	http://www.stu.edu/IMG/pdf/DisabilityGuidelines.pdf
Samford University, Cumberland School of Law	http://cumberland.samford.edu/files/Student%20Handbook%2009-10.pdf
University of San Diego School of Law	http://www.sandiego.edu/law/documents/admissionorientation/DisabilityServices.pdf
University of San Francisco School of Law	http://web.usfca.edu/templates/sds_inside.aspx?id=2147488007
Santa Clara University School of Law	http://www.scu.edu/advising/learning/disabilities/index.cfm
Seattle University School of Law	http://www.law.seattleu.edu/Student_Life/Student_Resources/Disability_Services.xml
Shelton Hall University School of Law	http://law.shu.edu/Students/support/disability-support-service.cfm
University of South Carolina School of Law	http://www.sa.sc.edu/sds/Guidelines.htm
University of South Dakota School of Law	http://www.usd.edu/academics/disability-services/accommodation-process.cfm
South Texas College of Law	http://www.stcl.edu/registrar/StudentHandbk0708.pdf
Southern University Law Center	http://www.sulc.edu/administration/academic-support/specialaccommodations.htm
University of Southern California Gould School of Law	http://sait.usc.edu/academicsupport/centerprograms/dsp/registration/guidelines/guidelines_sld.html
Southern Illinois University School of Law	http://www.law.siu.edu/studentlife/Students%20With%20Special%20Needs.pdf
Southern Methodist University, Dedman School of Law	http://smu.edu/studentlife/SSD/OSSD_Eligibility.asp
Southwestern School of Law	http://www.swlaw.edu/studentservices/deanofstudents/disabilitypolicy

SCHOOL	WEBSITE
Stanford Law School	http://www.stanford.edu/group/DRC/index.html
Stetson University College of Law	http://www.law.stetson.edu/tmpl/about/internal-asp?id=7777
Suffolk University Law School	http://www.law.suffolk.edu/offices/deanofstu/disability/guidelines1.cfm
Syracuse University College of Law	http://provost.syr.edu/documents/2008/4/21/Guidelines_for_documenting_a_Learning_Disability.pdf
Temple University, James E. Beardsley School of Law	http://www.temple.edu/disability/documentation.html
University of Tennessee College of Law	http://ods.utk.edu/files/guidelines/learning.pdf
The University of Texas School of Law	http://www.utexas.edu/diversity/ddce/ssd/doc_ld.php
Texas Southern University Thurgood Marshall School of Law	http://www.tsulaw.edu/life/orientation/accHandbook.pdf
Texas Tech University School of Law	http://www.depts.ttu.edu/studentaffairs/sds/DocumentationGuidelines.asp
Texas Wesleyan University School of Law	http://www.txwes.edu/provost/documents/DisabilityPolicySummary.pdf
Thomas Jefferson School of Law	http://www.tjsl.edu/disability_services
University of Toledo College of Law	http://utoledo.edu/studentaffairs/accessibility/
Touro College, Jacob D. Fuchsberg Law Center	http://www.tourolaw.edu/about/touro_law_center_policies.asp
Tulane University School of Law	http://erc.tulane.edu/disability/documents/AccompanetPDF.pdf
The University of Tulsa College of Law	http://www.utulsa.edu/student-life/Student-Academic-Support/Disability-Services.aspx
University of Utah, S.J. Quinney College of Law	http://www.sa.utah.edu/ds/documents/ADD-DHD-Learning.pdf
Valparaiso University School of Law	http://www.valpo.edu/cas/support/dss.php#statement
Vanderbilt University Law School	http://www.vanderbilt.edu/odc/ds_students.html#a2
Vermont Law School	http://www.vermontlaw.edu/Documents/disabilityPolicy-080708.pdf
Villanova University School of Law	http://www.villanova.edu/vpaa/learningsupport/docs/guidelines/learningdisability.htm
University of Virginia School of Law	http://www.law.virginia.edu/main/COD%2BDisability%2BAccomm
Wake Forest University School of Law	http://www.wfu.edu/lac/LD-Guidelines.pdf
Washburn University School of Law	http://washburnlaw.edu/policies/disabilities.php
Washington and Lee University School of Law	http://counsel.wlu.edu/policy/CognitiveDisabilityGuidelines.pdf
University of Washington School of Law	http://www.washington.edu/students/drs/
Washington University School of Law	http://cornerstone.wustl.edu/disabilityResources/critlearning.htm
Wayne State University Law School	http://www.law.wayne.edu/current/academic_services.html#ada
Western New England College School of Law	http://www1.wnec.edu/academicaffairs/index.cfm?section=doc.6659
Western State University College of Law	http://www.wsulaw.edu/current-students/disabled-services.aspx
West Virginia University College of Law	http://law.wvu.edu/r/download/14295
Whittier Law School	http://www.law.whittier.edu/pdfs/disability.pdf

SCHOOL	WEBSITE
Widener University School of Law, Harrisburg	http://law.widener.edu/CampusLife/AdvisingandCounseling/OfficeofStudentAffairsHarrisburg/~media/Files/studentaffairshb/2009_10HSBGHANDBOOKv3.ashx
Widener University School of Law, Wilmington	http://law.widener.edu/CampusLife/AdvisingandCounseling/OfficeofStudentAffairsDelaware/~media/Files/studentaffairsde/2009_10DelawareHandbook.ashx
Willamette University College of Law	http://www.willamette.edu/dept/disability/pdf/mini_um_standards.pdf
College of William and Mary, Marshall- Wythe School of Law	http://www.wm.edu/offices/deanofstudents/services/disabilityservices/disabilityregistration/documentation/index.php
William Mitchell College of Law	http://issuu.com/mitchell/docs/2009-10-william-mitchell-student-handbook?mode=embed&viewMode=presentation&layout=http%3A%2F%2Fskin.issuu.com%2Fv%2Fcolor%2Flayout.xml&backgroundColor=9a0000&showFlipBtn=true
University of Wisconsin Law School	http://www.mcburney.wisc.edu/information/documentation/disdocguide.php
University of Wyoming College of Law	http://uwadmnweb.uwyo.edu/udss/info.asp?p=5892
Yale Law School	http://www.yale.edu/rod/student_info.html

APPENDIX B

UNIVERSITY SCHOOL OF LAW

LEARNING DISABILITIES VERIFICATION FORM

The Disability Services Office (DSO) provides academic services and accommodations for students with diagnosed disabilities. It is the student's responsibility to provide documentation that identifies a diagnosed disability covered under Section 504 of the Rehabilitation Act of 1973 and Titles II or III of the Americans with Disabilities Act (ADA) of 1990. Under the ADA, students with learning disabilities must provide documentation demonstrating that the student is an individual with a disability, which means that: 1) the individual has a physical or mental impairment such as a diagnosed learning disability; 2) the impairment limits one or more major life activities, including speaking, learning, reading, concentrating, thinking, communicating, or neurological or brain function; and 3) the extent of the limitation on the major life activity is substantial. A student can still have a disability under the ADA even if he or she takes medication or has learned behavioral techniques to help ameliorate the effects of his or her learning disability. In the employment context, courts have usually assessed whether an individual's activities are substantially limited by comparing the individual's ability to perform to the general population, but in an educational setting, the law is less clear.

The DSO requires current and comprehensive documentation from a qualified professional to determine students' eligibility for services and to identify individualized accommodations appropriate for the law school program. A qualified professional can be any licensed or other properly credentialed professional who has training and experience in diagnosing learning disabilities. Documentation is current if it documents that the student was assessed for and diagnosed with learning disabilities as an adult and it incorporates recommendations for accommodations specific to the law school program.

Description of Law Program

Classroom Skills:

- Sitting for 1–3 hours at one sitting, possibly 6 hours a day
- Standing for 10–30 minutes, occasionally
- Comprehending oral and written material, daily
- Reading 50–150 pages, daily
- Listening to lectures 1–3 hours at one sitting, possibly 6 hours a day
- Participating in small group discussions, weekly
- Taking notes, handwritten or typed, 4–6 hours daily

Responding when questioned in class, weekly
 Participating in classroom discussions, daily
 Researching using print materials or online databases, weekly
 Analyzing course or research materials, 4–6 courses, daily
 Organizing course and research materials, 4–6 course, daily

Evaluation Methods:

Essay examinations, 1–4 hours, typed or handwritten, 3–5 examinations, mid-term and end of each semester
 Multiple choice examinations, 1–2 hours, Scantron forms, 1–3 examinations, mid-term and end of each semester
 Written memorandum, 2–4 week process, 8–25 pages, 2–4 times per semester
 Oral argument or presentation, once or twice per semester

The DSO does not subscribe to a single model for diagnosing learning disabilities. The DSO recommends that health care professionals rely on a combination of factors including: the student's history of learning deficits as reported by the student, his or her family, and previous school records; data from testing in the areas of achievement, information processing, and cognitive ability, if appropriate; and the professional's clinical judgment. Regardless of the approach the health care professional takes, the documentation must clearly support a diagnosis of learning disability and the diagnosis must clearly support the recommended accommodations.

STUDENT'S CONSENT FOR RELEASE OF INFORMATION

Name (Last, First, Middle): _____

Date of Birth: _____ SSN or ID#: _____

Status (check one): Prospective Student

Current Student

Transfer Student

Telephone: (____) _____ - _____ Cell Phone: (____) _____ - _____

University Email Address: _____

Personal Email Address: _____

I hereby authorize my Health Care Professional to release information requested in this document and further authorize DSO to communicate with the individual or entity identified below to obtain clarification as needed to determine my eligibility for disability services at University School of Law. This authorization is valid for six months.

Student Signature: _____ Date: _____

Parent Signature

(if student is under 18): _____ Date: _____

DIAGNOSTIC INFORMATION

I. Learning Disability Diagnosis

A. Diagnostic Criteria (check all that apply):

1. DSM-IV

- 315.0 Reading Disorder
- 315.1 Mathematics Disorder
- 315.2 Disorder of Written Expression
- 315.3 Learning Disorder NOS
- _____

2. ICF

- b160__ Thought Functions: _____
- b164__ Higher-Level Cognitive Functions: _____
- b167__ Mental Functions of Language: _____
- b172__ Calculation Functions: _____
- b189__ Specific Mental Functions, Other Specified and Unspecified
- b_____

3. ICD

- F81.0 Specific reading disorder
- F81.1 Specific spelling disorder
- F81.2 Specific disorder of arithmetical skills
- F81.3 Mixed disorder of scholastic skills
- F81.8 Other developmental disorders of scholastic skills
- F81.9 Developmental disorder of scholastic skills, unspecified
- _____

4. Other Diagnostic Tool

B. Date of Diagnosis (check one):

- I diagnosed patient on _____ (date) when s/he was _____ years old.
- Patient was previously diagnosed on _____ (date) when s/he was _____ years old by _____

(state name, address, and telephone number of professional who made the initial diagnosis).

C. To confirm the learning disability diagnosis, I have (check all that apply):

Conducted a diagnostic interview with the student and gathered background information regarding the student's:

- developmental history
- family history
- medical history
- academic history
- behavior

Conducted a cognitive assessment on _____ (date) using the following test instruments (check all that apply & attach test scores):

- Wechsler Adult Intelligence Scale-III
- Woodcock-Johnson Psychoeducational Battery Revised: Test of Cognitive Ability
- Kaufman Adolescent and Adult Intelligence Test
- Stanford-Binet Intelligence Scale – 4th ed.
- _____

Conducted an achievement assessment on _____ (date) using the following test instruments (check all that apply & attach test scores):

- Wechsler Individualized Achievement Test
- Woodcock-Johnson Psychoeducational Battery Revised: Test of Achievement
- Scholastic Abilities Test for Adults
- Stanford Test of Academic Skills
- Test of Written Language 3
- Woodcock Reading Mastery Test
- Nelson-Denny Reading Test
- Stanford Diagnostic Mathematics Test
- _____

Conducted an information processing assessment on _____ (date) using the following test instruments (check all that apply and attach test scores):

- Detroit Tests of Learning Aptitude 3 or Adult
- Wechsler Memory Scale
- _____

Conducted other assessments on _____ (date) using the following assessment technique:

- _____
- _____

II. Functional Limitations of Learning Disability in Law School Setting

A. Address how the student’s learning disability will affect the student’s ability to perform as compared to the general population in the law school **classroom** as described above:

B. Address how the student’s learning disability will affect the student’s ability to perform as compared to the general population in law school **evaluations** as described above:

C. Check below the level of limitation the student’s learning disability creates for each major life activity:

Major Life Activity	No Limitation	Moderate Limitation	Substantial Limitation	Not Applicable
Speaking				
Learning				
Reading				
Concentrating				
Thinking				
Communicating				
Brain Function				
Neurological Function				

D. Briefly describe any treatment, medications, accommodations, etc. the student has received in the past and/or is currently receiving and their effect on the student's learning disability:

E. Briefly describe any associated impairments and their effect on the student's learning disability:

III. Recommendations for Accommodations & Program Modifications

Note: The DSO will make a final determination of the appropriateness of accommodations recommended by the health care professional.

A. Classroom Accommodations

Accommodations	Used in Past?	Recommended?	Explain why accommodation is necessary
Books on CD	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Audio books	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Notetakers	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Tape-recorded lectures	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Extended time on written assignments <hr/> (amount of extra time)	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Reduced Course Load	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Other: _____ _____	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	

B. Evaluation Accommodations

Accommodations	Used in Past?	Recommended?	Explain why accommodation is necessary
Extended time on Examinations: Essay <hr/> (amount of extra time)	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Extended time on Examinations: Multiple Choice <hr/> (amount of extra time)	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Distraction-reduced test environment	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Rest time during examination <hr/> (amount of rest time per exam hour)	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Use of reader	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Use of dictating software	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Use of spellcheck software	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Alternative test format, i.e., no scantron, larger print, etc. Describe: _____ _____	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Other: _____ _____	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No	

IV. Additional Information: Briefly describe any additional information about this student and his or her learning disability that would help the DSO is assessing whether the student is eligible for services and what types of accommodations are necessary:

HEALTH CARE PROFESSIONAL INFORMATION

Signature: _____ Date: _____

Name (Print): _____

Title: _____

License or Certification #: _____

Training or Experience in Diagnosing Learning Disabilities:

Address: _____

Phone Number: _____

Fax Number: _____

The information you provide will not become part of the student's academic record, but will be stored in a separate file with the DSO. The DSO may release this form to the student at the student's request.