
Section 7

Technical Standards

Michael Stein and Mary Vargas

Overview

Increasing numbers of individuals who are deaf and hard of hearing are entering professions such as nursing, pharmacy, veterinary practice, and medicine raising questions about the proper use of technical standards to assess whether a student with a disability is qualified to be in an educational program. Both the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504) require educational institutions to provide qualified individuals with a disability with an opportunity equal to that of other students to participate in and benefit from educational programs, services, and activities.¹ A qualified student is one who can meet the essential eligibility requirements or academic and technical standards, of a program.² Recent case law provides guidance on how to draft and apply essential eligibility requirements or technical standards.

Technical standards: Organic vs. functional

Technical standards set forth the competencies that a student must be able to perform in order to succeed in an educational curriculum. There are two types of technical standards. Organic technical standards focus on how students will perform tasks while functional technical standards focus on the ability to complete the task.³ For example, an organic technical standard might specify that a medical student must be able to hear heart and lung sounds while a functional technical standard might specify that a student must be able to assess heart and lung status. Notably, the functional technical standard does not require the student to assess heart and lung sounds through hearing. Although a medical student who is deaf or hard of hearing may not be able to hear sounds using an auditory stethoscope, a visual stethoscope would provide the student with the ability to assess heart and lung sounds and get the job done. The goal of these functional technical standards is to ensure that medical students possess the skills necessary to be effective doctors, without dictating the precise means that they must use to do so.⁴ Schools that employ functional technical standards are well-positioned to accommodate students who may not be able to hear but otherwise possess the skills necessary to become excellent doctors, nurses, and pharmacists.

In 1979, the United States Supreme Court held that a nursing school did not violate Section 504 when it refused to admit a student who was deaf into its program.⁵ However, the Supreme Court noted that advances in technology could make it possible to accommodate students who are deaf in the future and render discriminatory future exclusions from such programs.⁶ That prediction has been borne out by three recent cases involving students with disabilities that highlight the importance of adopting functional technical standards.

Real-life example: Argenyi v. Creighton University

In *Argenyi v. Creighton University*, a medical student who was deaf alleged that his medical school violated the ADA and Section 504 by failing to provide the interpreters and real-time captioning necessary for effective communication. The medical student further alleged that the school discriminated against him by refusing to permit him to use interpreters in the clinical setting.⁷ The United States Court of Appeals held that the ADA and Section 504 require medical schools “to provide reasonable auxiliary aids and services to afford [medical students with a disability] ‘meaningful access’ or an equal opportunity to gain the same benefit as his nondisabled peers.”⁸ Following a jury verdict in favor of the medical student the United States District Court ordered the school to provide interpreters and real-time captioning, including for clinical rotations.⁹

Real-life example: Featherstone v. Pacific Northwest University of Health Sciences

In *Featherstone v. Pacific Northwest University of Health Sciences*, a medical student who was deaf alleged that his medical school violated the ADA and Section 504 by withdrawing his admission because he was deaf. The school alleged that providing interpreters would fundamentally alter the curriculum and that the student’s use of interpreters might threaten patient safety.¹⁰ The United States District Court ordered the school to enroll the student, holding that the school’s concerns were “unfounded based upon the growing trend of successful deaf health care professionals.”¹¹ The court held that sign language interpreters are “nothing more than a communication aid” and that such auxiliary aids do not alter “the fact that [the medical student] will have to successfully complete the labs, communicate with patients, and complete the clinical program, just as his classmates would.”¹² The court rejected the argument that the use of interpreters would threaten patient safety, noting that interpreters are routinely used in the course of medical care and doctors who are deaf use interpreters “in even emergency situations without creating a danger.”¹³ The court ordered the school to provide interpreters and real-time captioning to ensure effective communication.¹⁴

Real-life example: Palmer School of Chiropractic v. Davenport Civil Rights Commission

In another case, the Supreme Court of Iowa held that a chiropractic school discriminated against a student who was blind when it relied on its technical standards in refusing to provide accommodations.¹⁵ The school had organic technical standards that required that degree candidates have “sufficient vision, hearing, and somatic sensation necessary to perform chiropractic and general physical examination.”¹⁶ The school had accommodated prior students who were blind but asserted that its current organic technical standards precluded the student’s requests for accommodation including a sighted assistant.¹⁷ The Supreme Court of Iowa rejected the school’s assertion that “all chiropractic students must be able to see radiographic images,” noting that “at least twenty percent of current chiropractic practitioners practice without the ability to take plain film radiographs in their office” and “frequent consultation” with “radiology specialists is oftentimes part of the clinical practice of chiropractic.”¹⁸ The court further noted that “numerous medical schools” have “admitted blind students and made accommodations in recent years.”¹⁹ For these reasons, the court rejected the school’s assertion that accommodating the student who was blind would fundamentally alter its technical standards.²⁰

Together, these cases show that courts have taken note of the growing number of health care professionals with disabilities and are unlikely to be sympathetic to the argument that technical standards preclude accommodating students who are deaf or hard of hearing. These cases

underscore the importance of adopting functional technical standards. Such functional standards are flexible and permit the use of auxiliary aids such as sign language interpreters, real-time captioning, visual stethoscopes, and sighted assistants to demonstrate required skills such as diagnostic ability.

Practitioner's pointers

Universities can take the following steps to comply with the ADA and Section 504:

- Pre-emptively review technical standards to ensure that the standards are functional rather than organic.
- When analyzing a student's ability to meet the technical standards, consider the student's ability to meet the standards *with* accommodations.
- Consult with other institutions offering similar educational programs that have successfully educated students who are deaf or hard of hearing.

Endnotes

¹ The ADA prohibits universities from discriminating on the basis of disability in their programs, services, and activities. 42 U.S.C. § 12101 *et seq.*; 28 C.F.R. § 35.160 (public universities); 28 C.F.R. § 36.303 (private universities). Universities receiving Federal financial assistance must comply with Section 504's prohibition on disability discrimination. 29 U.S.C. § 794; 34 C.F.R. § 104.44. Although these laws theoretically permit universities to assert that providing accommodations would be an undue burden, no court has recognized such a defense in practice given the large financial resources of universities.

² 42 U.S.C. § 12131(2); 34 C.F.R. § 104.3(l)(3); 34 C.F.R. § 104.44(a).

³ http://www.rit.edu/ntid/hccd/system/files/FINAL_REPORT_Building_Pathways_March_2012.pdf, p. 58.

⁴ http://www.rit.edu/ntid/hccd/system/files/FINAL_REPORT_Building_Pathways_March_2012.pdf, p. 58.

⁵ Davis v. Southeastern Community College, 442 U.S. 397 (1979).

⁶ Davis v. Southeastern Community College, 442 U.S. 412 (1979).

⁷ Argenyi v. Creighton University, 703 F.3d 441, 443-445 (8th Cir. 2013).

⁸ Argenyi v. Creighton University, 703 F.3d 441, 449 (8th Cir. 2013).Id.

- ⁹ Argenyi v. Creighton University, 2014 WL 1838980 (D.Neb. May 8, 2014). The court further ordered the school to pay the deaf student \$478,372.42 in attorneys' fees and costs, in addition to taxed costs.
- ¹⁰ Featherstone v. Pacific Northwest University of Health Sciences, No. 1:CV-14-3084-SMJ, 2014 U.S. Dist. LEXIS 102713 (E.D. Wa. July 22, 2014), at *4, *11.
- ¹¹ Featherstone v. Pacific Northwest University of Health Sciences, No. 1:CV-14-3084-SMJ, 2014 U.S. Dist. LEXIS 102713 (E.D. Wa. July 22, 2014), at *2.
- ¹² Featherstone v. Pacific Northwest University of Health Sciences, No. 1:CV-14-3084-SMJ, 2014 U.S. Dist. LEXIS 102713 (E.D. Wa. July 22, 2014), at *12.
- ¹³ Featherstone v. Pacific Northwest University of Health Sciences, No. 1:CV-14-3084-SMJ, 2014 U.S. Dist. LEXIS 102713 (E.D. Wa. July 22, 2014), at *15-*16.
- ¹⁴ Featherstone v. Pacific Northwest University of Health Sciences, No. 1:CV-14-3084-SMJ, 2014 U.S. Dist. LEXIS 102713 (E.D. Wa. July 22, 2014), at *22.
- ¹⁵ Palmer College of Chiropractic v. Davenport Civil Rights Commission, 850 N.W.2d 326 (Iowa 2014).
- ¹⁶ Palmer College of Chiropractic v. Davenport Civil Rights Commission, 850 N.W.2d 329 (Iowa 2014).
- ¹⁷ Palmer College of Chiropractic v. Davenport Civil Rights Commission, 850 N.W.2d 330 (Iowa 2014).
- ¹⁸ Palmer College of Chiropractic v. Davenport Civil Rights Commission, 850 N.W.2d 345 (Iowa 2014).¹ (quotation marks and brackets omitted).
- ¹⁹ Palmer College of Chiropractic v. Davenport Civil Rights Commission, 850 N.W.2d 345 (Iowa 2014).
- ²⁰ Palmer College of Chiropractic v. Davenport Civil Rights Commission, 850 N.W.2d 346 (Iowa 2014). The Supreme Court of Iowa drew on ADA and Section 504 guidance in holding that the school violated the Iowa Civil Rights Act. *Id.* at 333-34.

