

What We Learned: AISNE Admission Conference

May 4, 2000, Moses Brown School, Providence, RI

TO: AISNE Admission Conference Participants

FROM: Robert M. Gault, Esq., Mintz Levin Cohn Ferris Glovsky and Popeo PC

DATE: May 26, 2000

RE: Guidelines for Requesting Information Regarding Disabilities During the Admissions Process

Following the seminar on "Legal Challenges in the Admission Office," several people asked me to provide the language a school could include in its application and admissions materials regarding disabilities and to describe the procedures a school should follow in determining whether to admit a disabled applicant. In response to those requests, this letter describes two approaches your school might use. Before getting into the details, however, I caution you to be aware of several things.

First, you should contact legal counsel regarding any possible state law requirements which may conflict with —; or add requirements to —; federal law. We are not aware of any Massachusetts law that would impact the language and procedures discussed below.

Second, please keep in mind that Section 504 of the Rehabilitation Act applies only to independent schools that receive federal funding. The Americans with Disabilities Act ("ADA") applies to all independent schools, regardless of whether they receive federal funds, except for schools with a religious affiliation.

Third, the first approach described below is drawn from opinion letters issued by the Department of Education's Office of Civil Rights ("OCR") which enforces Section 504. While it is completely appropriate to look to these opinions for authority, they do not carry as much weight as a final decision by a court. Unfortunately, this issue has not been addressed by a court, so we are left to rely on the OCR opinions. OCR has construed the federal regulation addressing the application of Section 504 to private schools (34 C.F.R. § 104.39) to require private schools to consider the nature and extent of an applicant's disability prior to admission in order to determine whether, with minor adjustments to its program, it could provide the applicant with an appropriate education. This information, however, may not be used to screen out applicants based on disability. Although the ADA does not set out any particular procedures an independent school must follow in regard to admissions, the ADA generally is consistent with Section 504 in this area. (1) Thus, we believe either approach described below would be consistent with the ADA, but we are without judicial guidance on the subject.

The first approach, based on OCR's opinion letters, is to include a request on the application that disabled individuals identify themselves and describe the type of accommodation, if any, they require. This request should be accompanied by a statement indicating that the information is requested for the sole purpose of determining

whether the school can meet the student's needs with a minor adjustment or reasonable accommodation, that it will not be considered in determining whether the student is otherwise qualified for admission, and that it will be kept confidential to the greatest extent practical. The application should further state that the decision as to whether an adjustment or accommodation can be made will consider not only the information provided in the application, but also a consultation with the parents and, if appropriate, other professionals with expertise related to the particular disability. For example, the application might state:

Please describe any disability that may affect your ability to fully participate in the academic and/or other programs provided at the [Name] School. If you are requesting an adjustment or accommodation to allow you to participate in any program, please describe your request as well. All information should be provided in sufficient detail to allow the School to assess your situation. Additional information may be requested from your parent or guardian and from an appropriate health professional. This information is requested for the sole purpose of determining whether the school can provide you with an appropriate education (2) or reasonable accommodation (3) and will not be considered in determining whether you are otherwise qualified for admission. The School will maintain, as far as practical, the confidentiality of any information provided.

If you choose to take this approach, the determination should be an interactive process, all stages of which are thoroughly documented. To the greatest extent possible, the determination as to whether a school can accommodate a student should be separated from the determination as to whether academic and other admissions criteria are satisfied. If possible, the disability information should only be disclosed to those involved in the admissions decision on a need to know basis to avoid tainting —; or appearing to taint —; the admissions decision with the accommodation issue.

Another approach would be to complete the entire admissions process without inquiring as to disability until after all admissions decisions have been made. Under this approach, the acceptance letter could include that statement explaining that, in regard to individuals with disabilities, acceptance is contingent upon the school's determination that it could provide an appropriate education with a minor adjustment or reasonable accommodation. The letter would then request that the student provide the necessary information. For instance, your acceptance letter could state,

Please note that if you are disabled, this offer is contingent upon the School's determination that it can adjust its programs or reasonably accommodate your needs. To make this determination, we ask that you provide detailed information regarding any disability that may affect your ability to participate in the [Name] School's academic and/or other programs and the type of accommodation, if any, you request. In making this determination, additional information may be requested from your parent or guardian and from an appropriate health professional. The School will maintain, as far as practical, the confidentiality of any information provided.

Upon receipt of this information, the school would then follow the same process for making a determination described above. While this approach may be safer because it

isolates the disability issue from other factors in the admissions process, timing issues may render it difficult or unworkable.

Finally, in determining the best approach for your school, it is important to review your entire admissions process. This review should examine:

- the criteria set out in brochures and admissions materials with an eye to how they are applied in the decisional process;
- any statement of non-discrimination;
- use of test scores, grades and subjective criteria in admissions decisions;
- who is involved in the admissions process;
- who is involved in determining whether a minor adjustment or reasonable accommodation can be made;
- how the process is documented (or where documentation falls short);
- who is responsible for responding to inquiries regarding pending applications;
- who is responsible for responding to inquiries regarding disabled students;
- any grievance procedure set up for responding to complaints from applicants and their parents about any form of discrimination in the admissions process.

Please bear in mind that this memorandum is intended to provide general guidelines for conducting a discrimination-free admissions process. To ensure full compliance with disability and other anti-discrimination laws, or in the event that you are confronted with a complaint, I advise you to consult an attorney.

Notes

(1) The key difference between the two statutes is that the ADA requires schools to provide a "reasonable accommodation" while Section 504 requires only "minor adjustments."

(2) Include the phrase "appropriate education" if the school receives federal funds and is covered by Section 504.

(3) Include the phrase "reasonable accommodation" if the school is covered by the ADA (i.e., all schools except those with a religious affiliation).

