

AMERICAN ASSOCIATION OF COLLEGES OF PHARMACY

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*Developing Student-Institutional Policies
Without Developing Legal Headaches*

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AVOIDING LEGAL LIABILITY BY DEVELOPING INSTITUTIONAL POLICIES

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OUTLINE OF MATERIALS COVERED

- I. Americans with Disabilities Act
 - A. Develop Policy¹
 - 1. Definition
 - a. “Disability” means that, with respect to an individual, s/he has: (1) a physical or mental impairment that substantially limits one or more major life activities²; (2) a record of such an impairment; or (3) is regarded as having such an impairment.
 - b. “Qualified Individual with a Disability” means with respect to academic programs, an individual with a disability who meets the academic and/or technical standards requisite for admission to and participation in the program or activity. 34 CFR §104.3(k)(3). If not “qualified,” not entitled to accommodations.
 - 2. Coverage
 - a. Americans with Disabilities Act and Section 504 applies, with respect to postsecondary and vocational education services, to a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient=s education program or activity.
 - b. With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.
 - c. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance. 34 CFR ' 104.4.

¹Policy does not need to restate statute or law, but should reiterate institution=s commitment to nondiscrimination. It may be better to have one policy that covers all forms of discrimination, and then set forth separate procedures for handling requests for disability determinations and requests for accommodation for the office that will handle such requests directly.

²Note that the U.S. Supreme Court has limited what may be considered a disability, especially as it relates to major life activity of working. Important to keep up-to-date regarding definition of disability and major life functions that are limited as a result.

3. Accommodation process
 - a. Who is responsible for determination of disability and accommodation process?
 - b. Is this done centrally or within the college?³
 4. “Undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth below:
 - a. Nature and cost of the accommodation;
 - b. Overall financial resources of the unit providing the accommodation, the number of individuals participating in such program, and the effect on the expenses and resources;
 - c. Overall financial resources of the University, and the effect on expenses and resources;
 - d. The effect of such accommodation upon the operation of the University or the providing unit, including the effect upon academic integrity requirements, and the effect on the nature of the program or activity;
 - e. The type of operation or operations, including the composition, structure, and functions of the workforce; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the University.
- B. Make clear non-discrimination statement.
- C. Address commitment to making reasonable accommodations under appropriate circumstances based upon case-by-case determination.
- D. Development of Technical Standards
1. Develop list of technical standards/essential competencies for students in program.
 2. Distribute to all *applicants* to program and participants in program who have not received them prior to promulgation of policy.
 3. Describe the essential functions, *e.g.*,:
 - a. Observation
 - b. Communication
 - c. Intellect
 - d. Behavioral and Social Attributes
 - e. Motor Skills

³Disability determinations should be made centrally at the University. Neither the College nor the individual supervisor/professor is entitled to know the nature of the disability or diagnosis, but is required to work with the University’s disability resource center and student interactively, to develop an accommodation plan, given the limitations disclosed by the student.

4. Make contingent offer of admission conditioned upon student attesting to his/her ability to fulfill technical standards, with or without an accommodation.⁴

E. Pre-admission and Admissions Decisions Inquiries

1. Section 504 of the Rehabilitation Act provides that qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment.
 - a. Recipients of federal funds may not apply limitations upon the number or proportion of handicapped persons who may be admitted;
 - b. May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless:
 - (1) the test or criterion, as used by the funds recipient, has been validated as a predictor of success in the education program or activity in question and;
 - (2) alternate tests or criteria that have a less disproportionate, adverse effect are shown by the Assistant Secretary to be unavailable.
 - c. Shall assure itself that:
 - (1) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual or speaking skills, the test results accurately reflect the applicant=s aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant=s impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure);
 - (2) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and
 - (3) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and
 - (4) Except as provided elsewhere in the statute, may not make preadmission inquiries regarding whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis regarding handicaps that may require accommodation.

⁴See attached example of technical standards affidavit, which all conditionally accepted applicants must sign, which was developed for University of Arizona College of Medicine, as Exhibit “A”.

2. No pre-admission questions may be asked about disability, but College may make post-admission inquiries on a confidential basis regarding handicaps that may require accommodation.⁵
 3. Cannot impose additional conditions on someone with a disability because of the disability or deny admission because of disability.
 4. May not ask questions regarding disability prior to admission; thereafter, may make confidential inquiries regarding need for accommodations, after ascertaining that there are disabilities for which an accommodation may be required, if they are required to enable the student to perform the technical standards of the program.
 5. Documentation⁶
 - a. Student must document disability through qualified health care provider.
 - b. Disability must “qualify”; some disabilities will not qualify for accommodations.
- F. Reasonable Accommodations for Qualified Individuals with a Disability
1. Need for Interactive Process
 - a. Courts have held that it is essential that school engage in an interactive process, not only with student, but also among administrators and those implementing accommodations plans.
 - b. Give explanations of reasons to students for denying accommodations requests.
 - c. Policy statements can assist with this process.
 2. Designing Accommodations Requests
 - a. Designate central office to evaluate and determine disability status.
 - b. Same office should work with administrators and professors to design reasonable accommodations.
 - c. School is not required to provide requested accommodation; must provide a reasonable accommodation, if it does not impose an undue burden.
- G. Readmission
1. Court uses same standard of review to determine whether someone should be readmitted to a program that is used to determine whether an individual with a disability is otherwise qualified and whether the institution is attempting to reasonably accommodate the student.
 2. Courts defer to institutions= academic judgment that a reasonable accommodation was simply not available.
 3. Refusal to readmit an individual with a disability based upon pretext is indefensible.
- H. Retaliation
1. Section 504 of the Rehabilitation Act and the Americans with Disabilities Act contain anti-retaliation provisions that prohibit discrimination against any individual because that individual “opposed any act or practice made unlawful by the [law] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing” conducted pursuant to the statute.

⁵Exceptions exist with respect to recipients of federal funds who are taking remedial action to correct effects of past discrimination for disability that resulted in limited participation by disabled individuals. The recipient must state in the written questionnaire that the purpose for seeking the information is consistent with remediating past discrimination and intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and state that it is voluntary whether to respond; and must state that the information will be kept confidential, that refusal to provide it will not subject the applicant to adverse treatment, and that it will be used only in accordance with the regulation. 34 CFR §104.42(c)(2).

⁶Medical records must be maintained confidentially. Neither professors nor others should become privy to diagnoses or treatment of students requesting accommodations, unless student *voluntarily* discloses this information. Medical information is not necessary to participate in interactive process; however, information regarding the limitations may be necessary to formulate an accommodation plan.

2. If retaliation is alleged, the defendant has the burden to describe a nondiscriminatory basis for the adverse action.
 3. If someone files a grievance because of alleged discrimination and later is affected by an adverse action (such as dismissal), the institution must proffer a nondiscriminatory basis for taking the action that sustains a claim of pretext.
- I. Access to electronic information C Section 508 of Rehabilitation Act
1. Electronic and information technology that is accessible to people with disabilities provides greater access opportunities for all. Section 508 was established to prohibit barriers in information technology and present new opportunities and promises for people with disabilities.
 2. For complete information and resources, see <http://www.section508.gov>.
- II. Family Education and Rights to Privacy Act (The “Buckley Amendment” or FERPA)
- A. Definition of Educational Records
1. Records, files, documents and other materials that contain information directly related to a student and are maintained by an educational agency or institution.
 2. They do not include:
 - a. “Sole possession records” created by school official for his or her own use and not accessible to any person except a temporary substitute;
 - b. Medical/psychological records used solely in connection with treating a student;
 - c. Employment records (except student employment records);
 - d. Police department records maintained solely for law enforcement officials and law enforcement purposes;
 - e. Alumni records containing information about a student no longer in attendance and not relating to person as a student.
 - f. Records of applicants before they become students in attendance at educational institution.
- B. Rights of Students vis-a-vis education records
1. Right to review records
 - a. Must make request *in writing*;
 - b. Assemble data and make available for viewing within set number of days;
 - c. Review must take place in the presence of a University official;
 - d. Does NOT mean student can make a *copy* of an exam, confidential letters in their file, etc.
 - e. Does NOT include right to review financial information submitted by parents or records with information about more than one student. If record contains information about another student, that information must be redacted before disclosing to inquiring student; or confidential letters and statements of recommendation to which student has waived his/her right to inspect and review.
 2. Right to seek to amend student records
 - a. Statute provides students an opportunity to challenge and seek to amend contents of their education records that they consider to be inaccurate, misleading, or in violation of their privacy or other rights.
 - b. Students cannot question the appropriateness of a grade. (There should be a grade appeal process within the institution to handle such requests, which the student would be required to utilize.)
 - c. They only have a right to amend if the grade given by the instructor is not correctly recorded.
 3. Right to limit disclosure of those records to third parties without consent. General rule requires that school obtain *written* consent from students *before* disclosing any personally identifiable information from their education records to a third party.
 4. Consent is not necessary to disclose directory information, which can be defined by

- institution, so long as student has not limited right of others to have access to such directory information.
5. School officials who have a legitimate educational interest in having access to those records need no prior consent to access those records.
 - a. This includes faculty, administration, clerical and professional employees, and other persons who need student record information for the effective functioning of their office or position.
 - b. **CAUTION:** Disclosure to an instructor with a legitimate educational interest does not authorize redisclosure of that information to a third party.
- C. Rights of Students vs. Rights of Parents
1. Initially, parents are presumed to hold these rights.
 2. When a student becomes 18 or attends university, the student becomes the “holder” of Family Education and Rights to Privacy Act rights and privileges.
 3. Parents of dependent students do not acquire “holder” status under Family Education and Rights to Privacy Act.
 4. Family Education and Rights to Privacy Act does not **require** disclosure to parents of a dependent student, but merely **permits** it without the student=s consent. Institution, however, may restrict that permission.
 5. Some universities’ policies give parent of dependent student right to examine records.
- D. When records may be released to parents
1. Student was claimed as a dependent on most recent Federal Income Tax form
 - a. Releasing records to parents without PROOF of dependency, even if the students are informed that they will be “assumed” to be dependent, is a violation of Family Education and Rights to Privacy Act.
 - b. University can require student to verify if he/she has been claimed by parent(s) as a dependent for federal tax purposes on most recent tax return. If discrepancy exists, parent(s) can then be asked to send copy of tax form.
 - c. When student gives express consent.
 2. What if only one parent declares student as dependent due to divorce, separation or custody issues?
 - a. Both parents still get access.
 - b. The law permits disclosure to the other parent (and should be set forth in University’s policy) unless there is a court order, state statute, or legally binding document stating otherwise.
- E. Disclosure of Education Records to Other than Students and Eligible Parents with Consent of Student
1. Adequate written consent must:
 - a. specify the precise records to be released;
 - b. specify the purpose of the disclosure;
 - c. precisely identify to whom the disclosure may be made;
 - d. be signed and dated by the student;
 - e. consent by financially independent student to one parent is not consent to the other parent.
- F. Disclosure of Education Records and Information without Prior Consent of Student
1. University may disclose to a parent or legal guardian information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution governing the use or possession of alcohol or a controlled substance, IF:
 - a. the student is under the age of 21 (20 or younger); AND
 - b. the University determines the student has committed a disciplinary violation with respect to such use or possession.
 - c. This provision does NOT authorize the University to notify parents of students 20 years and younger of the student’s threatened academic status (even if the notice is non-specific and does not mention grades or reasons).

2. Student disciplined for crime of violence or nonforcible sex offense.
 3. University may release “final results” of disciplinary proceeding if it determines through disciplinary proceeding that a student committed a violation of the University’s rules or policies with respect to a crime of violence or nonforcible sex offense.
 4. The **ONLY** information the University may reveal is:
 - a. the name of the student being disciplined;
 - b. a description of the violation committed;
 - c. any sanction imposed by the University on that student; **AND**
 - d. the names of any other students, such as any victims or witnesses, **BUT ONLY** if the other students consent in writing to the release of their names.
 5. Disclosure should clarify that student has been sanctioned through disciplinary system, and not charged with or found guilty of any criminal offense.
 6. University receives subpoena requesting release of records
 - a. The subpoena must be lawfully issued and served pursuant to state and federal rules of civil procedure.
 - b. The University must notify the student of the subpoena prior to releasing the records in order to allow the student to take steps to quash the subpoena or obtain a protective order.
 - c. The University can only release records described in the subpoena (a request for academic transcripts does not authorize the release of financial aid or other records).
 - d. No notification is needed if the subpoena is issued by a federal grand jury or law enforcement agency and the subpoena **clearly instructs** the University “to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.”
 7. Disclosure to parent (or others) is necessary to protect the health or safety of the student or other individuals
 - a. Factors the University must consider in making a decision to release nondirectory information in a crisis or emergency situation include:
 - (1) the severity of the threat to the health or safety of those involved;
 - (2) the need for the information;
 - (3) the time required to deal with the emergency;
 - (4) the ability of the parties to whom the information is to be given to deal with the emergency.
 - b. This information may subsequently be revealed to teachers and school officials who have legitimate educational interests in the behavior of the student, including officials at other schools (even if the student does not attend that institution or is not seeking or intending to enroll in the other institution).
- G. Duty to Notify *Not* to Rediscover
1. The University is responsible for informing parties to whom personally identifiable information is released (parents and others), that recipients, as a general rule, are not permitted to disclose the information to others without the written consent of the student.
 2. Example: “The attached information has been forwarded to you at the request of the student with the understanding that it will not be released to other parties. The Family Educational Rights and Privacy Act of 1974 as amended, prohibits release of this information without the student’s written consent. Please return this material to us if you are unable to comply with this condition of release.”
 3. This notification rule does not apply if the information is directory information or if the information was released pursuant to subpoena or court order.
- H. Limitations of Waivers
1. Must be knowing;
 2. Must be voluntary;
 3. Should be time-limited.

- I. Compliance
 - 1. Violation of Family Education and Rights to Privacy Act subjects institution to loss of federal funding.
 - 2. No private right of action under Family Education and Rights to Privacy Act; however, violation may constitute a breach of the student's rights of privacy under state law or constitution and give rise to civil rights cause of action.

- III. Safety and Treatment of Students in Internships/Residencies Located Off-campus
 - A. Should develop Preceptorship and Affiliation Agreements
 - 1. Preceptorships apply when a single professional is working with a student.
 - 2. Affiliation agreements apply when student is working with an agency/institution where more than one professional will be working with students.
 - B. State purpose for agreement, including University's desire to participate with preceptor/affiliate in providing coordinated clinical, educational, research, and public service programs for the education and training of pharmacy students, classified as interns or program participants.
 - C. Delineation of Responsibility and Liability
 - 1. Each party should maintain complete control over their own programs that are outside the scope of the agreement.
 - 2. Set limits of term of agreement, but make agreements automatically renewable, except upon notice of termination, without cause, *e.g.*, 90 days advance notice in writing.
 - 3. If public University, continuation may be dependent upon the appropriation of funds, which may shorten notice period.
 - 4. Set forth level of supervision expected of preceptor/affiliate; if the preceptor/affiliate cannot provide level of supervision anticipated, agreement should be subject to cancellation.
 - 5. University may provide assurances regarding health insurance coverage for program participants, and may prescribe expectations of preceptor/affiliate with respect to educational opportunities provided, in accordance with degree, certification or training being pursued and required of candidates for degree, certification, etc.
 - 6. Establish that the administration of all pharmaceutical services is responsibility of preceptor/affiliate and that preceptor/affiliate assumes liability for anything student does while under his/her supervision.
 - 7. Program participants should have no authority to make independent decisions, and all decisions should be reviewed and approved by preceptor/affiliate.
 - 8. Should be an educational activity; no money should change hands between preceptor/affiliate and student or patients and student. Stipends, if any, should be paid by University.
 - 9. University should educate students about confidentiality of patient information; program participants should not have access to patient information, including patient records, nor should program participants have responsibility to create such records.
 - 10. Program participants should agree to comply with all policies and procedures outlined by preceptor/affiliate; preceptor/affiliate should have right to request University to withdraw any program participant who does not do so.
 - 11. If removal from program is considered a disciplinary action, student should be given notice of reasons for termination from program, and preceptor/affiliate should agree to participate to the extent necessary to assist in carrying out discipline.
 - 12. If program participant is injured on the preceptor's or affiliate's site, include provision that preceptor/affiliate agrees to obtain emergency medical care or transportation in life-threatening situation to emergency care facility; however, program participant will bear cost of all such care/transportation.
 - 13. If students require certification to participate in program, ensure that such certifications are in place prior to placing students in such programs.
 - 14. Any substitute preceptor/affiliate will agree to be bound by provisions in agreement between preceptor/affiliate and University.

15. Establish limits of professional experience of program participants in preceptorship/affiliation agreements.
 - a. Indicate level of responsibility preceptor/affiliate must assume over program participants;
 - b. Require preceptor/affiliate to exercise absolute control, guidance and supervision over all health and patient care activities of the program participants;
 - c. No employment relationship should exist or be inferred or implied from participation of program participants in internship and patients must be advised that participants are students.
16. Make clear that neither the University nor the Board of Regents is providing insurance to preceptor/affiliate and get assurance that preceptor/affiliate has appropriate insurance coverage of his/her/its own.

IV. Use of Standardized Tests in Admissions

- A. Heated debates about use of standardized tests as admissions criteria, because of potential disparities in performance based upon race/ethnicity, family income, parents' education, etc.
- B. Debate about predictive validity and differential impact of the SATs and other standardized tests have led some schools to place less weight on such preadmission requirements.
- C. When standardized tests are being used to make admissions decisions, take care to ensure that these are not the sole criteria on which decisions are made.
 1. Issues of race, gender, family background/income, socioeconomic factors, etc., may play a part in making playing field less than level.
 2. *Hopwood* and other decisions denouncing affirmative action make objective criteria more important in admissions decisions.
 3. Failure to consider broad-based factors may lead to allegations of discrimination.

Exhibit "A"

**TECHNICAL STANDARDS FOR
THE UNIVERSITY OF ARIZONA COLLEGE OF MEDICINE
ADMISSION, PROMOTION AND GRADUATION**

1. **OBSERVATION.** Independently, the student must be able to observe a patient accurately. A student must be able to integrate all information received by whatever sense(s) employed.
2. **COMMUNICATION.** A student must be able to communicate effectively, sensitively, and rapidly with patients and members of the health care team. A student must be able to elicit information from patients, describe changes in mood, activity and posture, and perceive nonverbal communications.
3. **MOTOR COORDINATION.** Students must be able to elicit independently information from patients by palpation, auscultation, percussion, and other diagnostic maneuvers. A student must be able safely to execute motor movements reasonably required to provide general care and emergency treatment to patients.
4. **INTELLECT.** A student must be able to problem solve rapidly. This critical skill demanded of physicians requires the ability to learn and reason, and to integrate, analyze, and synthesize data concurrently in a multi-task setting. In addition, the student should be able to comprehend three-dimensional relationships and to understand the spatial relationships of structures.
5. **BEHAVIORAL AND SOCIAL ATTRIBUTES.** Students must possess the emotional health required for full use of their intellectual abilities, the exercise of good judgment, and the prompt and safe completion of all responsibilities. They must be able to adapt to change, to display flexibility and to learn to function in the face of uncertainties and stressful situations. The student must possess empathy, integrity, and concern for others.

STATE OF _____)
) ss.
 COUNTY OF _____)

The undersigned, who appeared personally before me and is either known to me or presented identification that satisfied me that s/he was the person whose signature appears below, and being first duly sworn upon his/her oath, deposes and states that s/he has read the above-described Technical Standards for the University of Arizona College of Medicine for Admission, Promotion and Graduation and declares that s/he:

- Is able to meet the College of Medicine=s Technical Standards without accommodation, **OR**
- **Has a disability that necessitates accommodation to meet the College of Medicine=s Technical Standards. In accordance with the Procedural Policies, undersigned has submitted documentation of the disability, along with a request for a reasonable accommodation, and a copy of this affidavit to the Center for Disability Related Resources, University of Arizona.

DATED this ____ day of _____, 20__.

 Signature of Accepted Applicant

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me, a Notary Public, for the purposes stated here, by _____, the person whose signature appears above, who was either known to me, or who provided identification that satisfied me that s/he was such person.

Notary Public

**The original affidavit, without documentation of the disability or written request for accommodation should be forwarded to the Associate Dean for Student Affairs. All other medical documentation, including documentation of disability and request for accommodation, should be sent to the Disability Resource Center.