# Paradigms (Constructs) for Disability Resources & Services, from Legislative & Judicial Sources

# TMLS Consulting resource

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1. **Qualified Student with a Disability** – **QSD**

"No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . Section 504 of the Rehabilitation Act of 1973 (enacted in 1977)."

* 1. **Definition and application** – originally this was a broad protection against discrimination (for recipients of federal funds) solely based upon a person having a disability. It also stated that the person must be ‘qualified (with or without accommodations) to be admitted or participate’, for example in higher education.
  2. The construct of being a ‘qualified student with a disability’ later became linked to remaining qualified, i.e. a person with a disability, using accommodations who became ‘unable’ to meet the requirements of a course.
  3. *Example*: A student with a disability has become a ‘direct threat to health and safety of others’, or is unable or unwilling to adhere to sanctions from a conduct hearing with accommodations, or is requesting an accommodation that is an ‘undue burden or fundamental alteration.

1. **Fundamental Alteration** **and Undue Burden**

**Fundamental alteration** is “A modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered. If a public entity can demonstrate that the modification would fundamentally alter the nature of its service, program, or activity, it is not required to make the modification. If a public accommodation (private entity) can demonstrate that a modification would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations it provides, it is not required to make the modification.”

**Undue financial or administrative burden** is – “A public entity does not have to take any action that it can demonstrate would result in an undue financial and administrative burden. This applies to program accessibility, effective communication, and auxiliary aids and services.” The determination of a undue financial and administrative burden must be:

1. Made by the head of the public entity or his/her designee.
2. Accompanied by a written statement of the reasons.
3. Based on all resources available for use in the program.
4. An undue financial burden must into consideration all campus resources/funding, not just a specific department’s resources.
   1. **Definition and Application** – in education, “fundamental alterations” most often refer to courses and are related to determining whether an accommodation requested for a specific course would compromise the learning objectives, demonstration of skills or other essential elements of the course. Similarly, an “undue burden” refers to services, alterations or tasks undertaken that would not be feasible or possible. The definition allows for either administrative or financial burdens, but OCR investigations and settlements have never supported a financial burden as a legitimate barrier.
   2. *Example*: Would a student with a mobility impairment or chronic illness who cannot come to campus for a in-person class be able to receive an accommodation of having the entire class moved to an online format (none currently existing)? Most likely NO. However, would the same student be able to request remote participation using video conferencing – possibly a Yes, depending on the course.
5. **Personal services and devices (plus preferences)**

Public entities and public accommodations are not required to provide personal services or personal devices. Examples of personal devices that entities are not required to provide include wheelchairs, prescription eyeglasses, and hearing aids. Personal assistance service need not be provided in activities such as eating, toileting, and dressing unless the service is typically provided by the entity.

* 1. **Definition and application** – some services and devices are not the responsibility of colleges such as a hearing aid which is a device for hearing better, however a campus could be responsible for providing access to a lecture hall event or theatrical event which might involve using an ALD, assistive listening device. Similarly a wheelchair user can’t expect a college to provide s/he a wheelchair but could expect that a campus shuttle service was wheelchair accessible. Sometimes students with disabilities make requests that are not directly related to access barriers or the functional impact of their disability, but are merely a ‘preference’.
  2. *Example:* a student who is a wheelchair user reports to DS that they are running late to morning classes because of the distance they must cover from their dorm to their first course in the morning. They are requesting that an aide meet them and push them to their first class – is this reasonable? Why or why not?

*Example:* a student with epilepsy requests a room with a private bathroom – what is the access barrier and what is the connection with their condition?

1. **Equally, effective alternative –** this usually applies to auxiliary aids such as sign language interpreting, CART or STT (speech to text) or it could be inferred to pertain to a course assignment which a student cannot complete because of inaccessible spaces, equipment or the environment (field work). This would result in consulting with faculty to determine if an alternate assignment is reasonable, since access to the original requirement isn’t accessible. In the case of communication with a person with a disability, it must be as effective as communication to others.
   1. **Definition and application** – regarding auxiliary aids such as sign language interpreting or CART requested by a student, a campus who wants to offer a different service must be confident that the alternate service is equally effective. Furthermore, OCR has encouraged campuses to give consideration to a student’s first request. The other inferred application of this principle could be applied to a situation where a student has a course experience requirement that is inaccessible to them. If there is no effective way to make the experience accessible through accommodations or modifications in the environment, than an alternate should be pursued, in consultation with the faculty. Ideally the alternative proposed should be a new option allowing all students to choose either, not an isolated experience solely for the student with a disability.
   2. E*xample*: a student who is mobility impaired and uses a wheelchair cannot easily or fully participate in a field assignment to gather samples from tide pools at a nearby ocean. So the instructor in consultation with DSP considers an alternative assignment for all students that provides a similar learning experience.
2. **Timely, effective and substantially equal**

This concept refers particularly to effective communications and to alternate format materials. Both services need to be timely – meaning that the services enable access at substantially the same time as other students; that the services themselves are effective – enable access to communication or instructional materials in a manner that is equivalent to other students without disabilities.

* 1. **Definition and application** – colleges often provide sign language interpreting, CART and captioning services to enable access for students who are Deaf/HH and provide materials in alternate formats (digital audio, accessible documents and Braille) to students who are Blind/VI). These services/products need to be backed up by procedures and/or contractual arrangements to ensure that qualified individuals are hired to deliver services and that accessible materials can be prepared for a student with a disability at the same time as other students have access, i.e. at the beginning of a term or sooner. Additionally, information and services provided through the web or internal digital systems, i.e. a college portal, should be enabling access that is substantially equivalent to what other students can access. This means there needs to be a concerted effort to design, evaluate and remediate digital information, web pages and systems to ensure that they are accessible.
  2. *Example*: a math course delivered through a digital platform, i.e. software package for learning algebra, should be accessible to students with disabilities. Procurement of such software should include a review of accessibility and if there are inaccessible features, there should be a college plan for offering equally effective alternatives to achieve access.

1. **Not burdensome**

This paradigm (concept) appeared in the revision of the ADA in 2008 and it was in response to a rash of litigation mostly related to ‘high stakes’ testing organizations, who were rejecting students requests for accommodations by making the documentation process difficult. In addition, AHEAD issued a White Paper in 2010 which flipped the process/priorities of what to consider when approving accommodations, where documentation became the 3rd element preceded by the interactive interview (self-reported experiences) and past use of accommodations.

* 1. **Definition and application** – The 2008 amendment of the Americans with Disabilities Act “rejected the heightened standard for documenting disability that the Supreme Court articulated in a series of decisions and emphasized that it intended the protections of the ADA to be applied broadly – source, AHEAD web site.” AHEAD’s guidance going forward was to consider:
     1. The student’s self-report
     2. Use observation and interaction to form conclusions
     3. Rely on third party information to fill in gaps

By extension, it is feasible to think that the ways students obtain and utilize accommodations and the ways that faculty facilitate access or accommodations can also be evaluated for their ‘usability’ or ease of use.

* 1. *Example*: first example, what is the justification for requiring a student with a Learning Disability to have a new evaluation (with adult norms), if there is an older evaluation that establishes the learning disability? How does a new evaluation aid DS professionals in determining accommodations? Second example, students wanting flexibility with attendance or assignment deadlines need clear guidelines for how this accommodation works and what its limits are – input from the faculty teaching the courses is important: class structure, learning objectives, skills to demonstrate, group work, course absence policies, experiential learning, etc .

1. **Direct threat to health and safety**

A direct threat is defined as “a significant risk of substantial harm to the health or safety of a person or others, which cannot be eliminated or reduced by a reasonable accommodation. It should include a consideration of the duration, nature and severity of potential harm, the likelihood that harm will occur and the imminence of the potential harm. The determination must be based upon objective and factual evidence. There should also be a consideration of whether an accommodation would reduce or eliminate the risk of harm.

* 1. **Definition and application** – Colleges should recognize that a ‘direct threat to self’ (suicidal ideation or actions) is much more difficult to handle in terms of whether sanctions can be applied. A ‘direct threat to others’ can be evaluated as long as it objectively reasonable and is supported by medical evidence. It cannot be pursued based merely upon one’s belief that a person is a direct threat. The potential harm to occur must be serious and ‘likely’ to occur, not remote or speculative.
  2. *Example*: a person with epilepsy who has frequent, unexpected seizures and who is in a Science Lab course where caustic chemicals are being handled, might be considered a direct threat to others. Could an accommodation mitigate this danger?

1. A ***central feature of determining accommodations*** is to consider the impact of a person’s condition(s) or disability(s). These are usually called **functional limitations** AND

should include the **characteristics and requirements of the environment** (classroom, laboratory, field experience, recreational activity, clinical settings and expectations, etc. Barriers to access, participation or to the demonstration of knowledge/skills are an “intersectional” issue – the intersection of a person’s functional limitations and the accessibility of tasks, experiences or physical settings.

*Examples*:

* 1. A deaf student in an online course about Social Work might not be able to access synchronous or asynchronous lectures. Their “limitation” is hearing. However if these lectures are captioned or have a live CART reporter working, there is no barrier. One principle from Universal Design for Learning is to produce multiple representations of instructional materials (Multiple means of representation), to increase access to materials. This is akin to having ramps or elevators for buildings.
  2. A mobility impaired (wheelchair user) in an Environmental Biology class requires students to do two “field experiences”. One is local – collecting water samples from a nearby pond to analyze the samples for pollutants and the other is to collect water samples from tide pools on the coast, about 25 miles from the campus.
* What types of access barriers might exist?
* What else do you need to know about these assignments?
* If one of the sites were found to be inaccessible, what options could be explored to meet this course requirement?
* After your initial interview with this student, what do you plan to do as follow up?
  1. A blind student who is pursuing a non-science major nevertheless has to complete one Lab Science course as part of the colleges’ Gen Ed requirements. The student is a junior and has put off completing this requirement till they are starting their senior year.
* How would you advise this student? What options could you explore with them?
* What access barriers could exist in a Lab Science course and how can they be addressed?
* Could this student ask and receive a Course Substitution accommodation? Why or why not?
  1. A student with Crohn’s disease and Generalized Anxiety has applied to DSP and is a Theater major. S/he is currently taking Introduction to Acting, Introduction to Theatrical Production, Directing and Costume Construction = 13 units. The student reports that her/his Crohn’s is somewhat ‘controlled’ but that s/he has flare-ups which sometimes can last for a week. S/he had to be hospitalized last year, while in high school and missed about a week and a half of classes.
* How would you approach this initial interview? What do you want to know about this person? What do you know about Crohn’s?
* What questions are vital to understanding and supporting s/he as a student?
* What learning/participation barriers might exist for this student?
* If her/his health were to deteriorate during the upcoming semester, what plans could be made to keep up with the work?
* Do specific accommodations (and other supports or self-care skills) come to mind that you’d want to discuss?