

**Feeling some
Pressure?
About to
pop?
Let's take a
minute or
two...**



**Hum, I am not sure about
this request...**

**Marilyn Harren, M.S., LSW
marilyn@CollegeADA.com**

Or:

**Technical Standards, Essential Elements,
and Fundamental Alterations...How to
Deal with Those Unique Requests**

Marilyn Harren

marilyn@CollegeADA.com

Your Speaker:

Marilyn Harren, M.S. LSW

M.S. in Disability Services in Higher Education

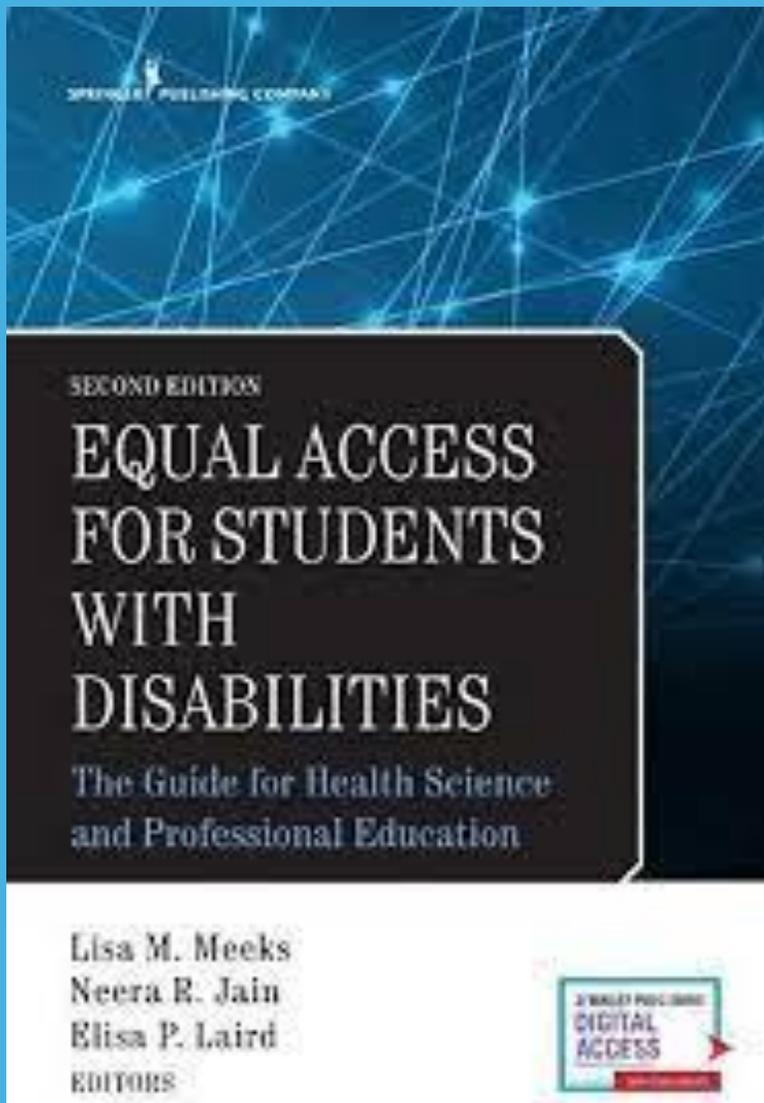
Licensed Social Worker

Certified Special Education Teacher

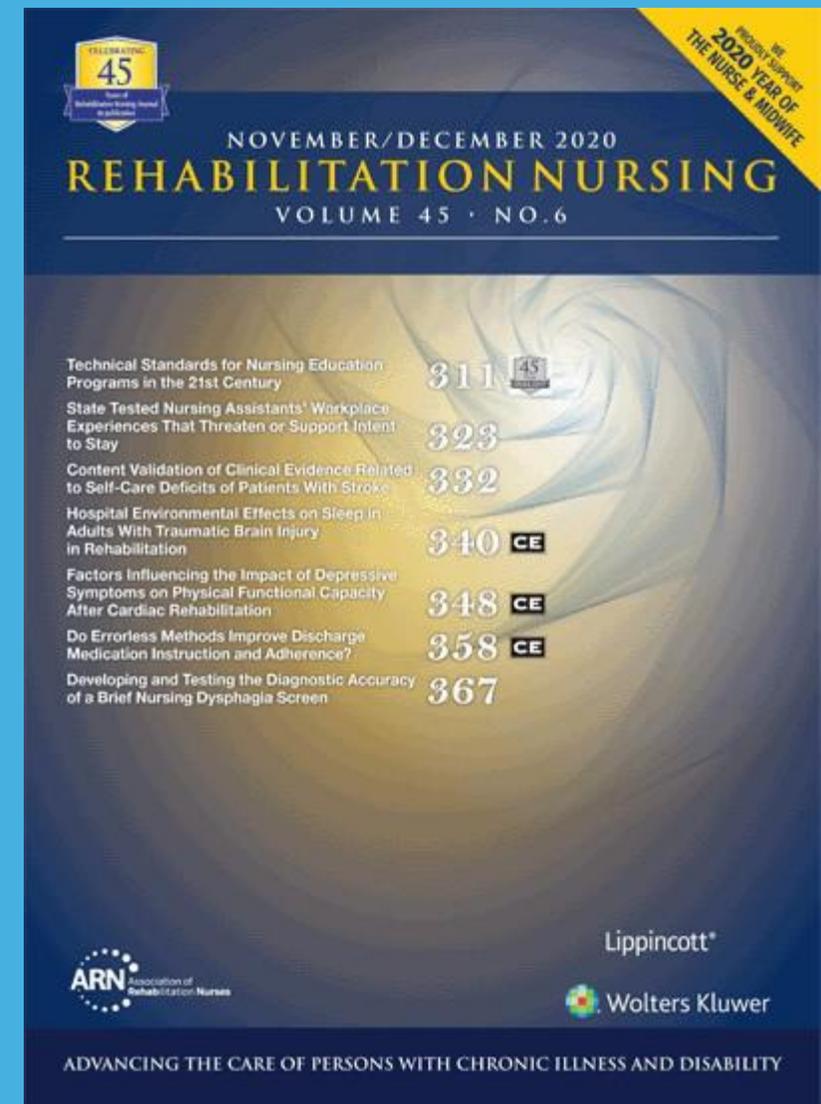
Worked as a Disability Services director at a Technical College and at Collin College, ret.

marilyn@CollegeADA.com

Resources



Meeks, L., Jain, N., & Laird, E. (2021). *Equal Access for Students with Disabilities, The Guide for Health Science and Professional Education* (Second). Springer Publishing.



Matt, S. B., Maheady, D., & Fleming, S. E. (n.d.). *Educating Nursing Students with Disabilities: Replacing Essential Functions with Technical Standards for Program Entry Criteria*. 8.

Why do we accommodate/modify?

A bit of background...

Title II regulations, (28 CFR sec. 35.130 (b)(7) states,
“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity”

Why do we accommodate/modify #2?

Regulations implementing the ADAAA in regard to Title II and Section 504 of the ADA:

<http://federalregister.gov/a/2016-17417>

Purpose is to ensure that the ADAAA definition of disability is implemented in entities covered by Titles II and Section 504 with regard to all claims of disability. The focus is on two entities, higher education and testing and on two kinds of impairments, learning disabilities, including dyslexia and ADHD.

Technical Standards-Defined Slide 1

Technical standards are the requirements for admission and participation in a program (With or Without accommodations)

Technical Standards-Defined Slide 2

- Non-academic abilities and characteristics
 - admission
 - promotion
 - graduation
- Safe/Effective practice
- Defined expectations as learners
 - Soft skills
 - professionalism
 - behaviors

Technical Standards- Applied



- Ethics
- Interpersonal interactions
- Behavior expectations

Can become enforceable standards when posted/publicized

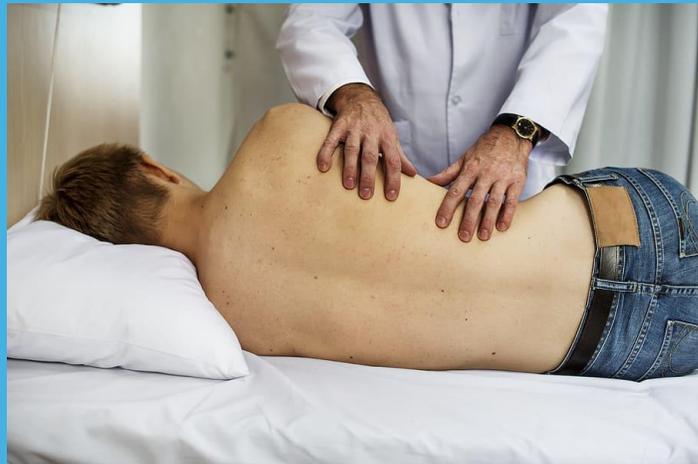
Technical Standards - Applied #2

- Admission
 - reflect current practice
 - not past practice



Technical Standards – Applied #3

- Required skills identified
 - not how they occur



Franklin Mountains-Q&A?



Essential Elements-Defined

Essential elements are those tasks which must be performed in the classroom, clinical, and/or lab setting on a day-to-day basis.

Stanford link:

<https://oae.stanford.edu/faculty-staff/faculty-teaching-staff/determining-essential-requirements-coursesprograms>

Essential Elements-Defined #2

- In the field of work, “employers determine the essential functions for a particular job and those functions are related to each individual employment setting and each individual job”.
- List of essential and preferred skills...
(Matt, et al., n.d.)

Essential Elements – Applied

Determine:

- What is the purpose of the course?
- Are there pre-existing abilities or skills all participating students must have?
- What other knowledge, background is expected?
- What methods of instruction are non-negotiable?

E.E. Applied- Specific Example

A student with a psychological disability requests to give a required oral presentation in a history class to the instructor in private rather than to the entire class.

The accommodation could be approved since the essential requirement is met, which is the presentation itself.

E.E. Applied- Specific Example #2

The same student with a psychological disability requests the same accommodation in an oral communication class where preparing and giving speeches is required.

The accommodation is denied because the fundamental requirement is the delivering a speech publicly is essential to the course objective.

Comparing the two

Technical Standards:

Are enforceable standards for ethics, interpersonal interactions, behavior expectations and other similar non-academic competencies which can be spelled out. (Meeks et al., 2021)

Essential Elements:

The outcomes: including skills, knowledge, and attitudes that all students must demonstrate with or without accommodations which instructors articulate to complete the course. (Matt et al., n.d.)

Franklin Mountains Landscape-Q&A?



How do we in a disability office figure out these requirements?

This is not the sole responsibility of a disability office. You should involve and collaborate with your faculty in this discussion.

- Faculty bring knowledge of the coursework content.
- The DSO staff understand which accommodations might be available.

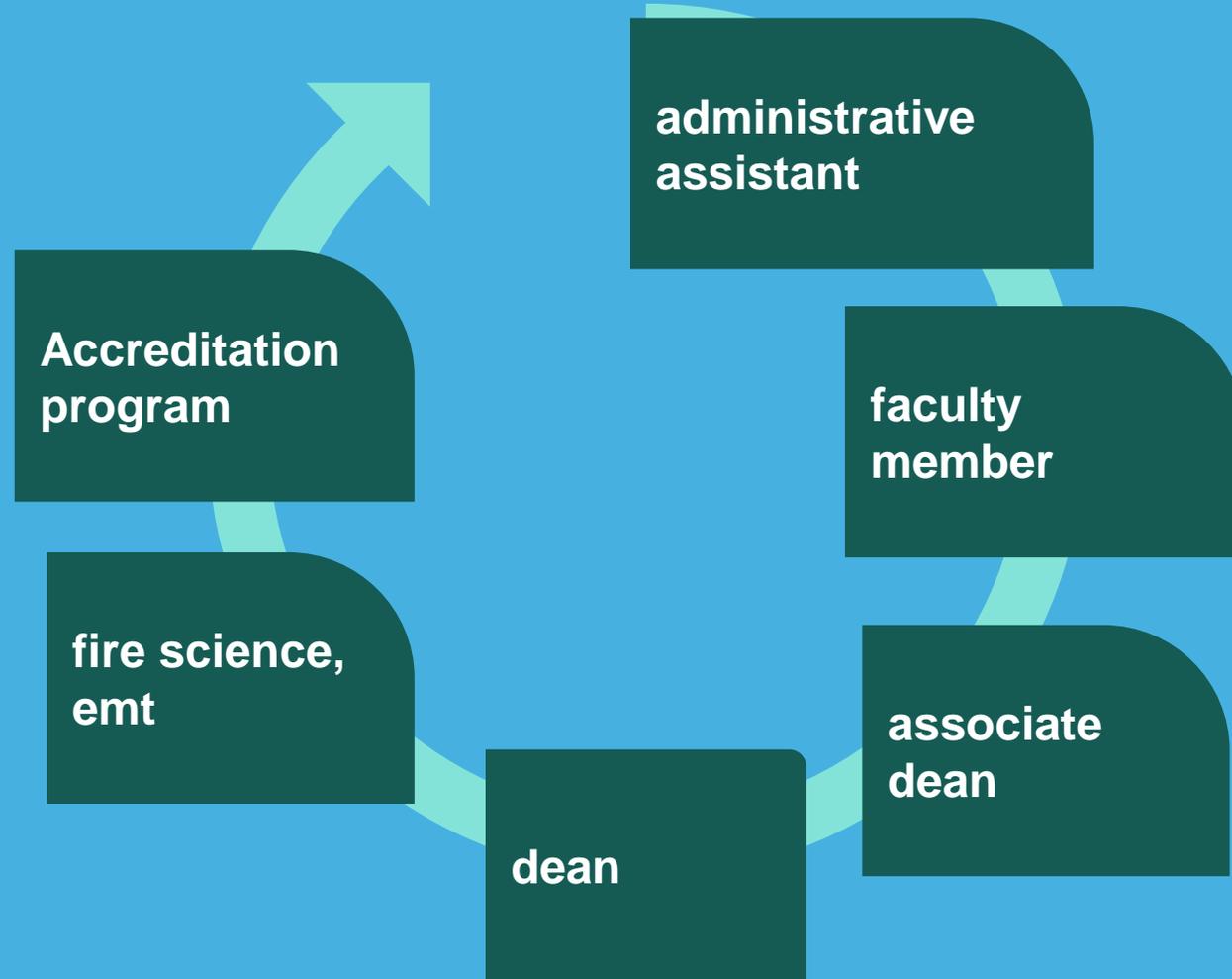
Bringing in Faculty



DSO



Faculty Connections



Faculty Information

- Help faculty to understand the reason for posting these standards
- Posting can occur online in applications, and on websites
- Partnership is required... DSO cannot do it alone

Faculty: Technical Standards #1

Do's

- Task requirements should be based on skills needed
- Standard should include abilities students will need to learn the skills
- Apply standards equally across all applicants

Don'ts

- Standards should not be based on the skills the student will have upon completion of their entire training
- Standards should not focus on how the student uses their abilities to complete the task successfully
- Standard should not single out Students with Disabilities

Faculty: Technical Standards #2

Do's

- Contemplate how a student may use alternative ways of completing each task
- Make sure to include “able to meet these requirements with or without reasonable accommodations”

Don'ts

- Do not include these alternatives in the standards themselves
- Don't confuse technical standards and essential elements

DSO and Faculty Partnerships

- Increasing numbers of students looking for accommodations in programs having Technical Standards, Essential Elements, and Accreditation requirements.
- Posted and well written standards allows the DSO to analyze the appropriateness of the requested accommodation as well as to determine whether a fundamental alteration may occur.
- With the increasing number of requests for accommodations that make us as staff in a DSO say, “Humm, I am not sure about this”.
- We probably chat about these issues with faculty informally as needed.

DSO and Faculty Working together

Leaning on well written technical standards and essential elements which faculty have developed and posted, would allow a DSO and faculty to analyze whether the request could lead to a fundamental alteration of the program or class.

What if the request makes you say, Hum I am not sure...?

Moving towards a Wynne v. Tufts process...

When to review *Wynne v. Tufts*

What do you do when the student or parent/guardian pushes back?

Wynne v. Tufts process!

City of El Paso with Mountains in background-Q&As?



Understand your Wynne v. Tufts Process

Develop and/or understand your Wynne v. Tufts Process at your institution. This will assist you to know and understand whether a request for an accommodation is a fundamental alteration.

Let's dive into Fundamental Alterations based on Wynne v. Tufts.

Wynne v. Tufts University School of Medicine I&II
932 F, 2d 19, 26 (1st Cir. 1991), 976 F.2d 791 (1st Cir. 1992)

In cases involving modifications and accommodations the burden is on the institution to demonstrate that relevant officials within the institution considered alternative means, their feasibility, cost and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower academic standards or require substantial program alteration.

Sources: Karen Nielson, JD/MSW, UC Berkeley, City University of New York, Spring 2017; Rothstein, Laura, Center for Excellence in Higher Education Law and Policy, Feb. 2012; Colker, Ruth & Grossman, Paul "The Law of Disability Discrimination in Higher Education".

OCR Letter to Kent State University
OCR Case Number 15-21-2136 (April 2022)

“With regard to whether a requested academic adjustment or auxiliary aid would fundamentally alter an essential program requirement, courts and OCR give deference to an institution’s academic decision-making. ***However, in order to receive such deference, relevant officials within the institution are required to have engaged in a reasoned deliberation, including a diligent assessment of available options. OCR has stated that an appropriate deliberative process should include a group of people making the decision who are trained, knowledgeable, and experienced in the relevant areas.*** The decision makers must consider a series of alternatives, and the decision should be a careful, thoughtful, and rational review of the academic program and its requirements.”

Xavier University
Resolution Agreement
OCR Docket #15-21-2139 10/23/23

The University is not required to provide services that would fundamentally alter the nature of the course or lower or waive essential course requirements. Prior to refusing any requested academic adjustment on that basis, however, the University must:

- i. convene persons knowledgeable about the student's disability, including any applicable members of the ODS, and about the course, such as faculty and a department chair, to engage in a careful, thoughtful deliberation of: the course requirements at issue; whether such requirements are essential; the feasibility, cost, and effect on the course of the requested academic adjustments; and any available alternatives. The University, only after engaging in such a deliberative process, will reach a rationally justifiable conclusion as to whether the requested academic adjustment would fundamentally alter the course or lower essential academic standards; and

Xavier University Resolution Agreement-Continued
OCR Docket #15-21-2139 10/23/23

- i. document the conclusions reached and why and provide copies of the documentation to the ODS.

The University will deny the student requested academic adjustments only if it determines that they will fundamentally alter the course or lower or waive essential academic standards. Any such denial decision will be sent in writing to the student and will include an explanation of the reasons for that determination and his or her right to appeal the determination through the University's disability grievance procedures.

Hikers in the Franklin Mountains-Q&As?



Fundamental Alteration Procedure #1

- If an accommodation requested by a student appears to be a fundamental alteration to a course or program of study, the following will be of assistance in analyzing this request.
- **A fundamental alteration cannot include any change to curriculum or course of study that is so significant that it alters the required objectives or content of the curriculum in the approved course outline, thereby causing a fundamental alteration.**
- If a request by a student is considered by the DSO Advisor to possibly be a fundamental alteration, a committee will be gathered to discuss the request.

Fundamental Alteration (continued #2)

- The committee will **consist of objective and knowledgeable persons** to include:
- The professor of the class
- A second professor with licensing, accreditation, or subject matter expertise of the class topic
- The Associate Dean or Dean of the division
- The Associate Dean of DSO, or ADA coordinator.
- In attendance for consultation would be an DSO advisor familiar with the student and the Director of DSO.

Fundamental Alteration (continued #3)

- The committee will review the requested accommodation and document thoroughly as the **burden of justification** is on the institution when denying a requested accommodation as a fundamental alteration.

Examples of Fundamental Alterations

Examples of fundamental alterations include:

- The lowering of academic standards
- The removal of an essential skill
- The implementation of a practice that is unsafe.

Questions to review for a Course request:

- What is the purpose of the course?
- What are the prerequisites or other background knowledge needed?
- What core outcomes/expectations are stated on the syllabus and required of all students?
- What specific knowledge, principles, skills or concepts must be mastered and demonstrated?

Questions to review-Continued

- What aspects/requirements constitute a significant component of the learning process?
- Could an alternative achieve the same result?
- What are the essential methods of instruction which are fundamental to the nature of the course?
- Have we diligently searched for alternatives?

Questions to review for an Academic Program:

- What skills or competencies will be needed within the field after graduation?
- What are the requirements for licensing or professional accreditation?

Fundamental Alteration- Final

- If the committee has explored this issue in a well-reasoned manner, without discrimination, and believes the accommodation would fundamentally alter the essential elements of the course or program and no reasonable alternative accommodations exist, then the requested accommodation can be denied

Fundamental Alteration- Final #2

Remember, the burden is on the institution to justify a denial by following their processes and document, document, document!

Full Moon over the City of El Paso-Q&As?



O*Net

- O*Net can assist establishing technical standards.
- <https://www.onetonline.org/>
- O*Net is a U.S. Labor Job website which has knowledge, skills, and abilities for most any job out there.

Share with Faculty the O*Net online resource. This resource allows them to know the hard work has been done for them by the U.S. Department of Labor.

Questions???

marilyn@CollegeADA.com

Resources

Ada_cases—Disability Support Services | CSUF. (n.d.). Retrieved March 7, 2022, from https://www.fullerton.edu/dss/faculty_staff/ada_cases.php

Axelrod, J., & Grossman, P. (2020, July 23). *Individualization, The Interactive Process and Fundamental Alteration* [Presentation]. AHEAD National Virtual Conference, Virtual AHEAD Conference.

Axelrod, J., Grossman, P., & Vance, M.L. (2024, July 16), *Introduction to Postsecondary Student Disability Law for DSS Directors, Staff, Attorney, and ADA officers*, AHEAD National Conference, Baltimore, July 16, 2024.

Resources #2

Determining Essential Requirements for Courses/Programs | Office of Accessible Education. (n.d.). Office of Accessible Education Stanford University. Retrieved February 14, 2022, from <https://oae.stanford.edu/faculty-staff/faculty-teaching-staff/determining-essential-requirements-coursesprograms>

Resources #3

Marks, B. and Ailey, S., (n.d.). *White Paper on Inclusion of Students with Disabilities in Nursing Educational Programs for the California Committee on Employment of People with Disabilities (CCEPD)*. 24.

Matt, S. B., Maheady, D., & Fleming, S. E. (n.d.). *Educating Nursing Students with Disabilities: Replacing Essential Functions with Technical Standards for Program Entry Criteria*. 8.

Resources #4

Meeks, L., Jain, N., & Laird, E. (2021). *Equal Access for Students with Disabilities, The Guide for Health Science and Professional Education* (Second). Springer Publishing. (now available as a free download)

*O*NET OnLine*. (n.d.). Retrieved June 2023, from <https://www.onetonline.org/>