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BAY AREA DIRECTORS OF ADMISSIONS (BADA) SYMPOSIUM

Sound Advice for Common Tripping Spots: Navigating Potential Potholes Legally and Skillfully

5/16/2018

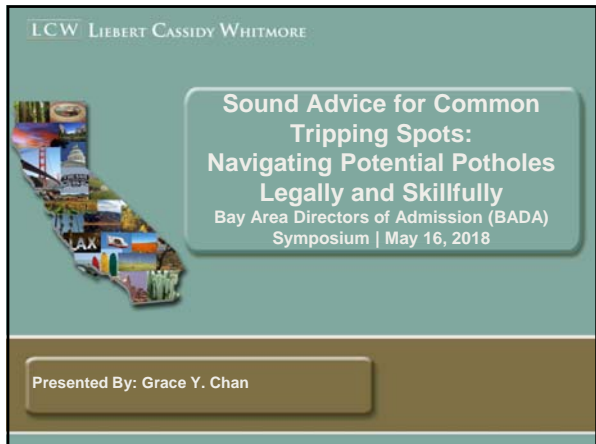
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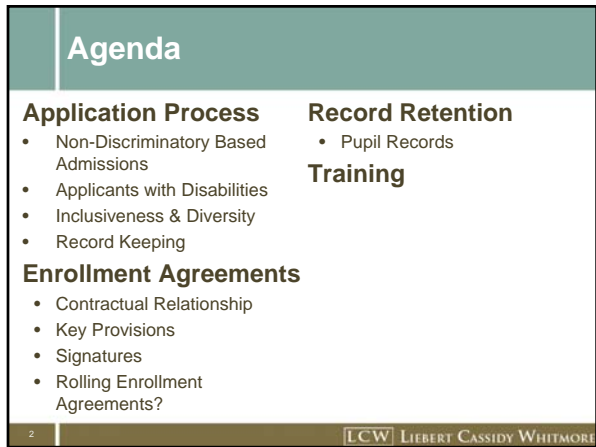
Grace Chan

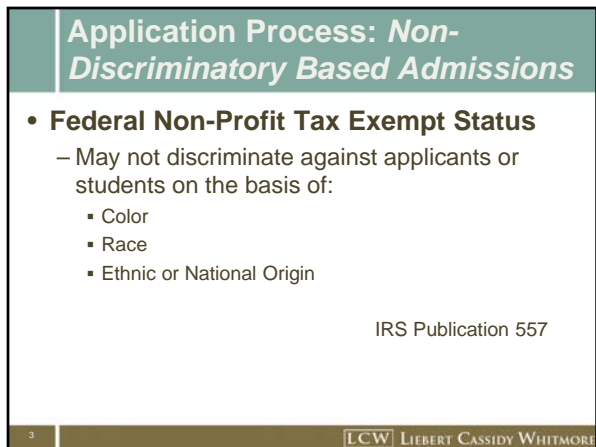
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Application Process: Non-Discriminatory Based Admissions

The School admits students of any race, color, and national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the School. It does not discriminate on the basis of race, color, national or ethnic origin in the administration of its educational policies, scholarship and loan programs, and athletic and other school-administered programs.

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Application Process: Non-Discriminatory Based Admissions

Education Code § 220

- Private schools that receive state financial assistance or enroll students who receive state financial aid also cannot discriminate based on:
 - Gender, Gender Identity, Gender Expression,
 - Sexual Orientation,
 - Ethnic Group Identification,
 - Religion,
 - Disability, and
 - Other Protected Categories.

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Application Process: Non-Discriminatory Based Admissions

Unruh Civil Rights Act

- Prohibits discrimination in business establishments
- Applies to all business establishments which provide services, goods, or accommodations to the public.
- General Rule: Private schools are not businesses under the Unruh Act (with respect to admissions).
- *But* whether a private school may be considered a business establishment is a fact-based determination.

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Application Process: Non-Discriminatory Based Admissions

- School's Policies on Discrimination
- Voluntarily-Added Protected Classifications are Binding
- Contract Not Statutory Cause of Action

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Application Process: Applicants with Disabilities

- **Americans with Disabilities Act ("ADA")**
- Applies to All Independent Schools:
 - Title III of the Americans with Disabilities Act
 - > Except for Religious Schools
 - > Technical Assistance Manual
 - > <http://www.ada.gov/taman3.html>
 - California Education Code, Section 48203
- Applies to Schools that Receive Federal Financial Assistance:
 - Section 504 of the Rehabilitation Act

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Application Process: Applicants with Disabilities

Title III of the ADA

- Applies to students who:
 - Have a physical or mental impairment
 - Substantially limits one or more major life activities
 - Have a record of an impairment
 - Are regarded as having an impairment

42 U.S.C. § 12102(2); 28 C.F.R. § 36.104

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Application Process:
Applicants with Disabilities

Title III of the ADA

- Can a Private Religious School Deny Admission to a Student Because the Student is Disabled?
 - Religious Schools are exempt from Title III of the ADA if:
 - A Religious Organization; or an Entity Controlled by a Religious Organization. (ADA Title III Technical Assistant Manual at III-1.5000 to 1.52000.)
 - But NOT exempt from Title I of the ADA regarding employees

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Application Process:
Applicants with Disabilities

Definition of Disability

- The student must, in fact, have “a physical or mental impairment that substantially limits one or more of the major life activities of such individual”; or
- The student must have “a record of such an impairment”; or
- The student must be “regarded as having such an impairment.”

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Application Process:
Applicants with Disabilities

Definition of Disability (Cont'd)

- Student must be otherwise qualified for the program/activity with or without accommodation.
 - Disabled student is not entitled to admission to a school solely because of having a disability.
 - Student must satisfy the essential qualifications for participation in the school (or program/activity) that apply to non-disabled students.

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Application Process:
Applicants with Disabilities

Requests for Accommodation

- Schools have an affirmative duty to make reasonable modifications to its program(s) to accommodate the needs of disabled students.
 - (1) Is the requested modification “reasonable”?
 - (2) Is the requested modification “necessary” to enable the disabled student to participate?
 - (3) Would the requested modification fundamentally alter the nature of the school or cause undue burden to the school?

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Application Process:
Applicants with Disabilities

Requests for Accommodation (Cont'd):

- Schools not required to provide accommodations that would “fundamentally alter” the nature or purpose of the school’s program.
 - Altering an essential aspect of the program
 - Causing a less significant change that has only a peripheral impact on the program, but gives the student an advantage over other students.
 - Courts give deference to schools’ decisions regarding academic standards/academic decisions.

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Application Process:
Applicants with Disabilities

Requests for Accommodation (Cont'd)

- Schools not required to provide accommodations that would cause an “undue burden”
 - Nature/cost of accommodation needed
 - Overall financial resources of the school, including the number of employees, effect on expenses/resources, impact on operation
 - Case-by-case basis

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Application Process:
Applicants with Disabilities

Common Questions

- Who should be informed about a student's disability and requested/received accommodations? Who should requests for accommodations be directed to?
- What information/documentation may the School request from the family?
- Are schools entitled to diagnosis information?
- Who should participate in interactive process meetings?
- Who will review the information?
- Who will discuss accommodations with the family?
- Who will determine whether accommodations are reasonable?
- How will the family be informed?

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Application Process:
Applicants with Disabilities

Application & Interview Questions

- Every question or statement on the application or in an interview should have an educational purpose.
- Every question or statement on the application must not be a proxy to obtain impermissible information.

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Application Process:
Applicants with Disabilities

Application & Interview Questions (Cont'd)

- What can a School **NOT** ask about?
 - Questions to determine Race, Color, National or Ethnic Origin
 - Schools that receive state financial assistance or have policies protecting these classifications:
 - Gender, Gender Identity, Gender Expression, Sexual Orientation, Ethnic Group Identification, Religion, Disability, and other protected categories.

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Application Process:
Applicants with Disabilities

Application & Interview Questions (Cont'd)

- Schools may not make oral or written pre-admission inquiries as to whether an applicant is disabled:
 - Are you disabled?
 - Do you have any physical or mental disabilities?
 - Have you ever sought counseling or treatment for a mental health problem?
 - What medications are you taking?

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Application Process:
Applicants with Disabilities

Schools May Consider

- Academic Abilities
- Extracurricular Interests
- Letters of Recommendation
- Confirmation of Good Standing
- Economic Status
- Test Scores
- Student/Parent Interviews
- In-Class Observations
- Parent Support and Educational Philosophy

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Application Process:
Applicants with Disabilities

- **Post-Conditional Offer of Enrollment, Schools May:**
 - Ask applicants to identify needed accommodations
 - Ask applicants about disabilities after conditional offer
 - Engage in interactive process and discuss reasonable accommodations

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Application Process:
Applicants with Disabilities

Admissions

- Schools need not lower or substantially modify their admissions standards.
- Unlawful to use admissions criteria to screen out applicants with disabilities unless criteria necessary to meet school's mission and objectives.
- School can deny admission if disability poses direct threat to the health or safety of others and the threat cannot be eliminated by modification or auxiliary aid/service.

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Application Process:
Applicants with Disabilities

- **Denying Admission / Separating Special Needs Student**
- Reporting requirements for special needs students denied admission (Ed. Code section 48203(b).)
 - Principal must report the exclusion, expulsion, or suspension for more than 10 days to the County Superintendent of Schools.
 - Report must include the student's name, age, last known address and reason for exclusion/expulsion.

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Application Process:
Applicants with Disabilities

Dept. of Justice Settles with Preschool Who Refused to Admit Any Children with Autism.

The full settlement can be accessed at:
<http://www.justice.gov/opa/pr/2011/May/11-crt-631.html>

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Application Process:
Applicants with Disabilities

Department of Justice Settles with Pennsylvania Private School That Refused Admission to HIV Positive Eighth Grader.

The full settlement can be accessed at:
http://www.ada.gov/milton-hershey_sa_aids.htm.

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Application Process:
Applicants with Disabilities

U.S. Attorney's Office Settles Disability Discrimination Allegations at The Park School.

The full settlement can be accessed at:
<https://www.justice.gov/usao-ma/pr/us-attorney-s-office-settles-disability-discrimination-allegations-park-school>

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Application Process:
Applicants with Disabilities

Common Questions from Clients:

- Should we ask about disabilities on application materials?
- If we know that we cannot accommodate certain disabilities, should we include that information in our admissions materials?
- Can we rescind our enrollment offer if we later discover that a family lied or withheld material information about a disability?
- If we can't ask about disabilities on the application, how do we proceed if we cannot accommodate?

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Application Process:
Inclusiveness & Diversity

Gender Spectrum Considerations

- Not everyone fits in a binary box;
- Some people do fit in binary boxes;
- Some of those who fit in the box express themselves outside the box when given the chance; and
- Everyone is affected by gender bias and sexuality bias regardless of how they identify.

NAIS Publication (2017): Embracing Gender and Sexuality Diversity

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Application Process:
Inclusiveness & Diversity

Gender Spectrum Considerations – Cont'd

- Policies
- Dress Code
- Use of Bathrooms and Locker Rooms
- Participation in Athletics
- Do procedures exist that allow students to amend or alter gender markers in student records?
- Gender balancing of classes?

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Application Process:
Inclusiveness & Diversity

Modern and Blended Families

- Language on the application should reflect all types of family situations
- Single parent families, multiple parent families, legal guardians
- Different last names
- Legally mandated or good practical protection?
- Be careful on financial aid applications

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Application Process:
Student / Family Photographs

- Should schools ask applicants to include photographs with their applications?
 - Industry standard to include them
 - To help them remember the applicant
 - Employment context:
 - Photographs are not permissible for job applicants under DFEH
- Photographs submitted by students can inadvertently disclose information that schools should not use to determine a student's eligibility (e.g., race, ethnicity, disability)

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Application Process:
Other Questions

- When may schools discourage applications from families they are unlikely to consider?
- Are we required to send decision letters to families who have started but not completed the application process?

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Enrollment Agreement:
Contractual Relationship

Relationship with Families is Contractual

- Enrollment Agreement
 - Positive and Constructive Relationship
- Parent/Student Handbook
- Code of Conduct

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**Enrollment Agreement:
Contractual Relationship**

- Acts as acceptance of an offer to attend a school
- Legally binding contract that defines the terms under which student enrolls
- Key provision of agreement is to define details and obligations regarding payment of tuition

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**Enrollment Agreement:
Contractual Relationship**

- Should include:
 - A schedule of tuition and fees for the upcoming school year
 - Tuition payment plans
 - Tuition refund plans
 - The consequences of a failure to timely pay tuition
 - i.e. late fees, and or preventing students from attending classes or other school activities

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**Enrollment Agreement:
Contractual Relationship**

- Policies as to whether tuition is refundable:
 - Voluntary Withdrawals
 - i.e. if a student withdraws prior to the beginning of school, a portion of or all of tuition paid may be refundable
 - Expulsion
 - Indicate whether students who are expelled are entitled to any tuition refund
 - Date when Tuition is not Refundable
 - Include language that after a certain date parents are not entitled to a refund because the school has already relied upon that tuition being available for the entire school year

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**Enrollment Agreement:
Contractual Relationship**

- **Other Provisions to Consider**
 - Attorneys' Fee Provision:
 - Provides that the prevailing party is entitled to recover attorney's fees and costs from the losing party in any breach of contract action
 - Cannot be one-sided
 - Pros:
 - May discourage students/parents from pursuing frivolous actions against school
 - Cons:
 - Prevailing party difficult to determine
 - More stringent obligation on School to strictly comply with enrollment agreement

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**Enrollment Agreement:
Contractual Relationship**

- **Other Provisions to Consider – Cont'd**
 - Arbitration Provision
 - Waivers
 - Integration Clause
 - Parent/Student Behavior
 - Indemnification / Hold Harmless
 - Force Majeure
 - Terms and Conditions of Student Handbook
 - Publications Provision
 - No Guarantee of Future Enrollment

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**Enrollment Agreement:
Contractual Relationship**

Rolling (“Evergreen”) Enrollment Agreements

- More difficult to enforce
- Damages not limited to one year
- School in the position of having to justify terminating enrollment rather than letting agreement expire on its own terms
- Reduces school's flexibility to decide whether to re-enroll student
- Reduces school's ability to modify terms and conditions

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**Enrollment Agreement:
Contractual Relationship**

Signatures

- Enrollment contracts should require that both living parents and/or legal guardians sign and agree to the terms of enrollment in the school
 - Exception if parental rights terminated
 - Exceptions on a case by case basis
 - Helps ensure that parents are in agreement
 - Waivers
 - Communicate signature expectation during admissions process

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**Record Retention:
Pupil Records**

Pupil Records

- What is a Pupil Record?
 - Any information maintained by the school which:
 - Identifies a Student; and
 - Is maintained for second-party review.
 - Regardless of form.

Ed. Code § 49061(b); 5 CCR § 430

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**Record Retention:
Pupil Records**

Pupil Records

- Who has Access to Pupil Records?
 - Parents have an "Absolute Right to Access" Pupil Records
 - Related to Their Children
 - What about when students turn 18?

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**Record Retention:
Pupil Records**

Pupil Records (Including Application Materials)

- Is your school governed by the Family Educational Rights and Privacy Act (FERPA)?
 - Probably not
- Should your school maintain applications from students who are not admitted?
 - Yes
- Are emails between teachers and administrators confidential?
 - Not always, so exercise caution!

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**Record Retention:
Pupil Records**

Letters of Recommendation

- Protected in the same manner as pupil records (Ed. Code, § 49069, Family Code, § 3025.)
- Keep separate from general cumulative file
- Confidentiality Issues
 - Request parents and older students sign waiver

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Training

- Schools should provide training on how to comply with the law in the admissions process
 - Admissions Team
 - Teachers who participate in interviews
 - Teachers who allow potential students to sit-in on classes
 - Campus tour guides

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Questions?

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Thank You
