

## **SUGGESTED GUIDELINES FOR CASES OF “RETROACTIVE ACCOMMODATION”**

The concept of “retroactive accommodation” is recognized in human rights law. However, its application is challenging and highly fact specific. The relevant jurisprudence indicates that the following eight questions are central in answering the question of when a university may have a duty to make present accommodations for past disabilities, and what the extent of such a duty to accommodate may be if it is found to exist in a given case.

1. If the facts that come to light at a later time were known earlier, how would the request have been handled in the first place? Would it have triggered the duty to accommodate?
2. What is the delay in time between the material time and the request for accommodation?
3. Could the requester, with due diligence, have brought the issue to the respondent’s attention at the appropriate time? If he/she didn’t, was the failure to do so related to the underlying medical problem or other relevant factors, such as language / cultural barriers or stigma and embarrassment?
4. Did the respondent have actual or constructive knowledge of the issue that later gives rise to the accommodation request?
5. Does offering some form of accommodation now put the respondent into a position of undue hardship - the answer could change depending on what accommodation or remedy is offered – it does not necessarily have to mirror the accommodation requested by the student.
6. What is the quality and specificity of the medical evidence – should more medical evidence be requested to clarify the issue and eliminate other sources of difficulty?
7. What other factors, not related to a prohibited ground of discrimination, may explain the student’s difficulties at the material time?
8. What is the overall context of the appeal? Has the student sought late withdrawals in the past, is there evidence tending to undermine the student’s credibility? Has the student sought a late withdrawal in other courses that he or she was enrolled in at the same time?

## When the Duty to Accommodate is Likely to be Triggered

The chart below is based on principles abstracted from relevant case law. There are **two assumptions** made in this chart. The **first** is that the request itself is of a type that would trigger the duty to accommodate and that there is medical evidence in support; the **second** is that the request was made as soon as the student became aware of his or her disability or as soon as he or she became capable of making the request. The remaining issues are therefore:

(1) When was the request for accommodation made?

(2) What was the state of knowledge regarding the student's disability prior to the request being made?

Knowledge of disability prior to Request >>>>	Neither student nor instructor had knowledge of disability	Student had no knowledge, but instructor had constructive knowledge of disability	Student had knowledge, but instructor did not have knowledge of disability	Student had knowledge of disability but was prevented from requesting accommodation due to nature of disability or other factors, instructor had no knowledge of disability	Student had knowledge of disability but was prevented from requesting accommodation due to nature of disability or other factors, instructor had constructive knowledge of disability
Timing of Request v v v v v					
Years after degree granted	<b>Unlikely</b>	<b>Unlikely</b>	<b>Very unlikely</b>	<b>Very unlikely</b>	<b>Unlikely</b>
Shortly after degree granted	Somewhat likely	Somewhat likely	<b>Very unlikely</b>	Somewhat likely	Somewhat likely
After grades finalized	Likely	Likely	<b>Unlikely</b>	Somewhat likely	Likely
After course ends but before grades finalized	Likely	Likely	<b>Unlikely</b>	Somewhat likely	Likely
Post drop date, but while course still running	Likely	Likely	<b>Unlikely</b>	Somewhat likely	Likely
Prior to drop date	Very likely	Very likely	Very likely	Very likely	Very likely