

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
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5
6 August Term, 2003
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8 (Argued October 7, 2003 Decided April 7, 2004
9 Errata Filed September 16, 2004)
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11 Docket No. 02-9385
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15 MARIE POWELL,
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17 Plaintiff-Appellant,
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19 v.
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21 NATIONAL BOARD OF MEDICAL EXAMINERS, UNIVERSITY OF CONNECTICUT
22 SCHOOL OF MEDICINE, BRUCE M. KOEPPEN,
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24 Defendants-Appellees.
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28 Before:

29 WALKER, Chief Judge,
30 NEWMAN, and CARDAMONE, Circuit Judges.
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34 Plaintiff Marie Powell appeals from the grant of summary
35 judgment in favor of defendants National Board of Medical
36 Examiners, the University of Connecticut School of Medicine and
37 Bruce M. Koeppen, its Dean of Academic Affairs, entered in the
38 United States District Court for the District of Connecticut
39 (Thompson, J.) on October 7, 2002. Plaintiff, a student at the
40 school of medicine, was required by the school to pass an
41 examination administered by the National Board. She
42 unsuccessfully requested an accommodation on account of her
43 alleged disability. As a result of that denial, plaintiff filed
44 suit against defendants under the Americans with Disabilities Act
45 and the Rehabilitation Act.
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47 Affirmed.
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Appellant.

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Blumenthal, Attorney General, Hartford, Connecticut, of
counsel), for Defendants-Appellees University of Connecticut
School of Medicine, and Bruce M. Koeppen.

1 CARDAMONE, Circuit Judge:

2 Plaintiff Marie Powell (plaintiff or appellant) appeals from
3 a judgment of the United States District Court for the District of
4 Connecticut (Thompson, J.) entered October 7, 2002, granting
5 motions for summary judgment made by defendants the National Board
6 of Medical Examiners (National Board), the University of
7 Connecticut School of Medicine, and Bruce M. Koeppen, M.D., its
8 academic dean (collectively, UConn or school). In two complaints,
9 plaintiff alleges that defendants discriminated against her based
10 on her alleged disability in contravention of the Americans with
11 Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 et seq.
12 (ADA), and the Rehabilitation Act of 1973, as amended, 29 U.S.C.
13 § 701 et seq. (Rehabilitation Act). Plaintiff contends UConn
14 discriminated against her when it required that she pass the
15 United States Medical Licensing Examination (licensing
16 examination) administered by the National Board in order to
17 continue into the third year of the school's medical program. She
18 asserts further that the National Board discriminated against her
19 when it refused her application for an accommodation on the
20 examination. Several state law claims were also alleged in
21 plaintiff's complaints, but the grant of summary judgment to
22 defendants on these claims is not appealed.

23 Plaintiff is a young woman now in her 30's who 12 years ago
24 matriculated at medical school where, after completing two years
25 of course work, she experienced difficulties in passing the
26 licensing examination required by the defendant medical school and

1 administered nationally by the defendant testing service. After
2 twice failing the licensing examination, plaintiff asked for an
3 accommodation of more time to take it on the grounds that she had
4 a learning disability. That request was denied and plaintiff took
5 the test and failed it for the third time, and later was dismissed
6 from medical school, prompting the litigation now before us on
7 appeal.

8 To decide an appeal where what is involved is right versus
9 wrong is not difficult; but where, as here, neither party has
10 acted wrongfully, to make a just determination between the parties
11 is difficult. A review of the record reveals plaintiff's
12 perseverance and dedication to her studies and also reveals
13 defendant school of medicine's truly extraordinary efforts to help
14 plaintiff succeed. Applying the relevant legal standards, we
15 affirm the grant of summary judgment in defendants' favor.

16 BACKGROUND

17 A. Plaintiff's Medical School History

18 Powell enrolled in UConn's medical program in August 1992.
19 She was discontinued as a student in 1997. At the time of her
20 enrollment the school was unaware that plaintiff allegedly
21 suffered from a disability. Of the 11 courses she took that made
22 up the first-year curriculum, Powell was deficient in two of them.
23 The first-year courses are referred to as Basic Medical Sciences I
24 (BMS-I). After successfully completing remedial work with respect
25 to one of the courses, plaintiff was promoted to the second-year
26 curriculum, referred to as Basic Medical Sciences II (BMS-II). In

1 her second year, Powell was deficient in four out of ten courses,
2 resulting in the award of an unsatisfactory grade for BMS-II. In
3 addition, in June 1994 Powell failed Step I of the United States
4 Medical Licensing Examination.

5 Developed and administered by the defendant National Board, a
6 private, non-profit corporation, the medical licensing examination
7 is a comprehensive test. It is composed of three parts, or steps,
8 and most medical schools in the United States require their
9 students to pass Step I before advancing to the third-year medical
10 school curriculum. Further, in all United States jurisdictions,
11 passage of all three steps of the medical licensing examination is
12 mandated in order to satisfy state licensing requirements to
13 become a doctor. Step I, the part at issue in this case, is
14 designed to assess a medical student's ability to apply the
15 concepts, knowledge and principles that make up the fundamentals
16 of patient care.

17 The 1992-93 UConn student handbook states that at the end of
18 each of the first two years students are required to take a
19 comprehensive examination, and that taking Step I fulfills the
20 second-year requirement. The handbook further provides that the
21 school may place conditions for promotion on a student who
22 receives an unsatisfactory in BMS-II, including retaking and
23 passing Step I. UConn stated that two to five students per year
24 are asked to obtain a passing score on Step I as a condition for
25 promotion to the third-year medical school curriculum.

1 In June 1994 plaintiff was informed by the Promotions
2 Committee that in order to convert her BMS-II grade to
3 satisfactory, and thus be eligible to begin the third year, she
4 needed to pass Step I and remediate three of her course
5 deficiencies. For two years -- from June 1994 until June 1996 --
6 plaintiff repeatedly attempted to fulfill these and other
7 requirements for advancement to the third-year clinical
8 curriculum. The school actively assisted her in these efforts by
9 providing free tutoring services, overlooking an honor code
10 violation she committed, expressing its concern with her level of
11 stress and allowing her the opportunity to remediate certain
12 subjects multiple times.

13 In June 1996 UConn conditionally promoted plaintiff to the
14 third-year curriculum, again subject to her passing Step I of the
15 medical licensing exam. The school wanted evidence that plaintiff
16 had mastered the BMS-I and BMS-II subject matter since it had
17 taken four years for her successfully to complete the first two
18 years of the school's curriculum. UConn believed passage of Step
19 I would provide them with that proof. In October 1996, after the
20 school paid for plaintiff to take a preparatory course, she failed
21 Step I again. In response, the school developed a six-month
22 tutorial program for plaintiff to follow during the spring of 1997
23 in preparation for the June 1997 Step I exam, and did not charge
24 plaintiff tuition for this period.

25 Powell failed the test again in June 1997 and the school
26 initiated the process of dismissal. Final decision regarding the

1 student's dismissal was deferred pending the outcome of her
2 lawsuit against the National Board regarding its failure to grant
3 her accommodation request, a matter which will be discussed below.
4 If the National Board prevailed, plaintiff would be dismissed. If
5 plaintiff prevailed, she would be given another chance to sit for
6 Step I and, if she passed, would be allowed to continue to the
7 third year of the medical program. As it turned out plaintiff did
8 not prevail, and was later discontinued as a student.

9 B. Plaintiff's Application to the National
10 Board of Medical Examiners

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12 In February 1997 plaintiff was referred to a
13 neuropsychologist, Dr. A. Wallace Deckel. Dr. Deckel was employed
14 by UConn's Department of Psychiatry and the medical school paid
15 for his examination of plaintiff. Dr. Deckel's report concluded
16 that, based on a battery of tests, Powell appeared to be suffering
17 from dyslexia and attention deficit disorder (ADD), but the doctor
18 also was of the opinion that anxiety and depression could not be
19 ruled out as the causes of her academic problems. He recommended
20 Powell be given extra time to take the Step I examination.

21 Plaintiff submitted a redacted version of Dr. Deckel's
22 evaluation to the National Board as part of her application for an
23 accommodation of extended or double time to take the June 1997
24 exam. The National Board rejected her request because it
25 concluded Powell's documentation failed to establish that she was
26 disabled and thus a covered individual under the ADA. It further
27 noted that her documentation did not include objective evidence of

1 difficulties she experienced before entering medical school, as
2 would be expected were the disability a significant functional
3 impairment. The National Board also faulted Dr. Deckel, stating
4 that when making his diagnosis he did not provide full clinical
5 data to support his conclusions, and that the role of plaintiff's
6 anxiety and depression was not ruled out as the cause of her
7 academic difficulties.

8 Powell later submitted an unredacted version of Dr. Deckel's
9 evaluation, accompanied by an additional letter from him,
10 addressing the National Board's concerns and stating his
11 diagnosis. These materials were received too late for the June
12 1997 exam. Powell was told she could resubmit them for a later
13 examination, although the National Board informed plaintiff that
14 the additional information and documents she had submitted did not
15 appear to support a test accommodation.

16 Having failed to obtain an accommodation and having been
17 dismissed as a medical student in 1997, plaintiff filed two
18 complaints against the National Board and UConn in 1999. The
19 first complaint claimed violations of a number of state and
20 federal statutes and sought all possible relief, including
21 injunctive relief allowing plaintiff to sit for the medical
22 licensing examination with an accommodation, and to be allowed to
23 continue the third-year curriculum at the medical school. In the
24 second, she claimed that UConn violated Titles II and III of the
25 ADA and the Rehabilitation Act, and that the National Board
26 violated Title III of the ADA and the Rehabilitation Act, but

1 sought only damages, not injunctive relief. In November 1999 the
2 two complaints were consolidated. Defendants moved for summary
3 judgment in April 2001, on all of plaintiff's claims. The
4 district court granted defendants' motion.

5 On this appeal plaintiff asks us to review the district
6 court's grant of summary judgment only with respect to her ADA and
7 Rehabilitation Act claims.

8 DISCUSSION

9 I Standard of Review

10 Both parties moved for summary judgment in the district
11 court. When that court denied plaintiff's motion and granted
12 defendants', it prompted this appeal. The standard applicable to
13 a motion for summary judgment, resolution of which we review de
14 novο, is a familiar one. Summary judgment shall be granted when
15 there is no genuine issue of material fact and the moving party is
16 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
17 This form of relief is appropriate when, after discovery, the
18 party -- here plaintiff -- against whom summary judgment is
19 sought, has not shown that evidence of an essential element of her
20 case -- one on which she has the burden of proof -- exists. See
21 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). This form of
22 remedy is inappropriate when the issue to be resolved is both
23 genuine and related to a disputed material fact. An alleged
24 factual dispute regarding immaterial or minor facts between the
25 parties will not defeat an otherwise properly supported motion for
26 summary judgment. See Howard v. Gleason Corp., 901 F.2d 1154,

1 1159 (2d Cir. 1990). Moreover, the existence of a mere scintilla
2 of evidence in support of nonmovant's position is insufficient to
3 defeat the motion; there must be evidence on which a jury could
4 reasonably find for the nonmovant. Anderson v. Liberty Lobby,
5 Inc., 477 U.S. 242, 252 (1986).

6 If the movant demonstrates an absence of a genuine issue of
7 material fact, a limited burden of production shifts to the
8 nonmovant, who must "demonstrate more than some metaphysical doubt
9 as to the material facts," and come forward with "specific facts
10 showing that there is a genuine issue for trial." Aslanidis v.
11 United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993). If
12 the nonmovant fails to meet this burden, summary judgment will be
13 granted against it. Gallo v. Prudential Residential Servs., 22
14 F.3d 1219, 1224 (2d Cir. 1994).

15 II Provisions of the Acts

16 A. ADA Provisions

17 We turn now to the provisions of the Acts which plaintiff
18 claims were violated in her case. The ADA, which serves to
19 protect the rights of individuals with disabilities, states that a
20 disabled individual is one who suffers from "a physical or mental
21 impairment that substantially limits one or more of the major life
22 activities of such individual." 42 U.S.C. § 12102(2)(A) (2000).
23 Title II of that Act proscribes discrimination against the
24 disabled in access to public services. Section 202 states "[N]o
25 qualified individual with a disability shall . . . be excluded
26 from participation in or be denied the benefits of the services,

1 programs, or activities of a public entity, or be subjected to
2 discrimination by any such entity." Id. § 12132. A qualified
3 individual with a disability is defined as a disabled person who,
4 whether or not given an accommodation, "meets the essential
5 eligibility requirements for the receipt of services or the
6 participation in programs or activities provided by a public
7 entity." Id. § 12131(2). Title II applies to any state or local
8 government or instrumentality of a state or local government. Id.
9 § 12131(1). UConn concedes it is an instrumentality of the state
10 of Connecticut.

11 Title III of the ADA proscribes discrimination against the
12 disabled in public accommodations. "No individual shall be
13 discriminated against on the basis of disability in the full and
14 equal enjoyment of the goods, services, facilities, privileges,
15 advantages, or accommodations of any place of public accommodation
16 by any person who owns . . . or operates a place of public
17 accommodation." Id. § 12182(a). UConn concedes that, as an
18 educational institution, it meets the definition of public
19 accommodation and is therefore subject to Title III. See id.
20 § 12181(7)(J). The defendant National Board of Medical Examiners
21 also concedes that its services constitute a public accommodation
22 covered by Title III.

23 B. Rehabilitation Act Provisions

24 Enacted before the ADA, the focus of the Rehabilitation Act
25 is narrower than the ADA's in that its provisions apply only to
26 programs receiving federal financial assistance. 29 U.S.C.

1 § 794(a) (2000). Section 504 states that "[n]o otherwise
2 qualified individual with a disability . . . shall, solely by
3 reason of her or his disability, be excluded from the
4 participation in, be denied the benefits of, or be subjected to
5 discrimination under" any covered program or activity. Id.

6 In short, the Rehabilitation Act and Titles II and III of the
7 ADA prohibit discrimination against qualified disabled individuals
8 by requiring that they receive "reasonable accommodations" that
9 permit them to have access to and take a meaningful part in public
10 services and public accommodations. See Henrietta D. v.
11 Bloomberg, 331 F.3d 261, 273 (2d Cir. 2003); Felix v. New York
12 City Transit Auth., 324 F.3d 102, 104 (2d Cir. 2003) (quoting 42
13 U.S.C. § 12112(b)(5)(A)) ("The statute defines 'discriminate' to
14 include 'not making reasonable accommodations [available to a
15 qualified person with a disability] unless [the provider of the
16 service] can demonstrate that the accommodation would impose an
17 undue hardship on [its operations].'"). Since the standards
18 adopted by Titles II and III of the ADA are, in most cases, the
19 same as those required under the Rehabilitation Act, see Henrietta
20 D., 331 F.3d at 272, we consider the merits of these claims
21 together.

22 In order for a plaintiff to establish a prima facie violation
23 under these Acts, she must demonstrate (1) that she is a
24 "qualified individual" with a disability; (2) that the defendants
25 are subject to one of the Acts; and (3) that she was "denied the
26 opportunity to participate in or benefit from defendants'

1 services, programs, or activities, or [was] otherwise
2 discriminated against by defendants, by reason of [her]
3 disabilit[y]." Id.

4 III Analysis

5 A. Injunctive Relief

6 Turning to plaintiff's consolidated complaint, plaintiff
7 alleges the National Board of Medical Examiners violated the Acts
8 by turning down her request for an accommodation of extended time
9 when taking Step I of the medical licensing examination, and that
10 UConn violated the same Acts by making her continued advancement
11 in the medical school contingent on her passage of the test. In
12 her complaint, she sought compensatory damages, punitive damages,
13 attorneys' fees and costs. Monetary relief, however, is not
14 available to private individuals under Title III of the ADA. 42
15 U.S.C. § 12188(a)(1) (same remedies available under Title III of
16 ADA as under Title II of Civil Rights Act of 1964). A private
17 individual may only obtain injunctive relief for violations of a
18 right granted under Title III; he cannot recover damages. See
19 Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)
20 (only injunctive relief available as remedy for violation of Title
21 II of Civil Rights Act of 1964). The district court granted
22 summary judgment to the National Board and UConn on the Title III
23 claims based on the fact that plaintiff failed to request
24 injunctive relief specifically against defendants. This ruling
25 was error.

1 Under Rule 54(c) of the Federal Rules of Civil Procedure, a
2 court can grant any relief to which a prevailing party is
3 entitled, whether or not that relief was expressly sought in the
4 complaint. See Holt Civic Club v. City of Tuscaloosa, 439 U.S.
5 60, 66 (1978); see also Krumme v. WestPoint Stevens Inc., 238 F.3d
6 133, 142 (2d Cir. 2000). The sole exception to this rule is when
7 a court grants relief not requested and of which the opposing
8 party has no notice, thereby prejudicing that party. In such
9 case, unasked for relief should not be granted. See Albemarle
10 Paper Co. v. Moody, 422 U.S. 405, 424 (1975). Lightfoot v. Union
11 Carbide Corp., 110 F.3d 898, 910 (2d Cir. 1997), which defendant
12 National Board relies on, is distinguishable from the case at hand
13 and from the above cited cases. In that case there was a general
14 prayer for relief in the complaint, and the court recognized that
15 under Rule 54(c) plaintiff might have been entitled to some form
16 of equitable relief after establishing his claim. Yet, damages
17 were time-barred, reinstatement had been refused, and plaintiff
18 was unable to articulate what activity ought to be enjoined; we
19 ruled that in those circumstances the general prayer for relief
20 was, as a matter of law, insufficient to defeat summary judgment.
21 Id.

22 Here, those sorts of circumstances are not present. Nor
23 would defendant be prejudiced were the plaintiff awarded
24 injunctive relief since plaintiff's first complaint --
25 consolidated with plaintiff's ADA and Rehabilitation Act complaint
26 -- put the defendants on notice of Powell's request to be allowed

1 to take Step I with the accommodation and/or be allowed to
2 continue with her medical education. After being placed on notice
3 of plaintiff's request for injunctive relief to attain these ends,
4 defendants cannot successfully maintain that they would be
5 prejudiced were plaintiff to receive that relief. Consequently,
6 even though plaintiff failed to request injunctive relief in her
7 complaint alleging violations of the ADA and the Rehabilitation
8 Act, the district court could not have granted summary judgment to
9 the defendants on this ground, absent a showing of prejudice to
10 defendants.

11 B. Plaintiff Not Prevailing Party

12 Nevertheless, plaintiff cannot take advantage of this rule to
13 avoid summary judgment being taken against her. The reason is
14 because she was not the prevailing party -- she did not make the
15 necessary showing under Fed. R. Civ. P. 54(c) that she was
16 entitled to injunctive relief under the Acts. Rule 54(c) states:
17 "every final judgment shall grant the relief to which the party in
18 whose favor it is rendered is entitled, even if the party has not
19 demanded such relief in the party's pleadings" (emphasis added).
20 Thus, plaintiff was not entitled to injunctive relief, and summary
21 judgment for the defendant was warranted due to the lack of merit
22 of any claim plaintiff might have made for injunctive relief.

23 C. Proof of Entitlement to Continue

24 Appellant did not make a showing of entitlement to injunctive
25 relief because she failed to make out a prima facie case of
26 discrimination under the Acts. First, we note she did not

1 demonstrate that she was a qualified individual with a disability.
2 Even assuming for purposes of our review, that plaintiff met the
3 definition of being a disabled person under the Acts, she still
4 did not present evidence showing she was otherwise qualified to
5 continue to be a medical student at UConn.

6 It seems worthwhile at this juncture to set out appellant's
7 educational background which supports the argument that she lacked
8 academic eligibility, and thus was not otherwise qualified. She
9 attended elementary parochial school where her best grades were in
10 science, and although she now concedes she was slow, she did not
11 require tutoring. In junior high school at St. Matthew's and at
12 Cardinal Spellman High School she maintained a B average and was
13 on the high school honor roll. Her major academic problem was
14 slowness, although she never was held back a grade. Powell
15 attended Hunter College where she majored in biology and
16 psychology.

17 Further, the record reveals that despite long hours of study
18 and much assistance from family members and members of the
19 educational community, appellant was an average student for her
20 entire educational life. The average to low-average results of an
21 I.Q. examination led her own neuropsychologist, Dr. Deckel, to
22 conclude that she would be likely to encounter difficulties in her
23 advanced post-secondary courses such as those given in medical
24 school. Powell's 3.16 undergraduate grade point average (GPA) was
25 significantly below the average 3.45 GPA of an incoming medical
26 student in her class, and her composite MCAT score of 20 was

1 significantly lower than those of her colleagues of 28.4 as well.
2 These facts suggest that she did not meet the essential
3 eligibility requirements for participation in this medical school
4 program. See 42 U.S.C. § 12131(2).

5 Plaintiff presented no additional proof to show that in fact
6 she met those requirements and, in her own words, described the
7 difficulties she experiences with basic memory function, vision,
8 and reading comprehension in general. Thus, she failed to carry
9 her burden to demonstrate she was otherwise qualified, as she
10 needed to in order to establish her prima facie case and move
11 forward to trial. See Heilweil v. Mt. Sinai Hosp., 32 F.3d 718,
12 722 (2d Cir. 1994).

13 D. Proof of Discrimination on Basis of Plaintiff's
14 Alleged Disability Lacking

15 1. UConn

16 Moreover, even if plaintiff proved she was otherwise
17 qualified to be a medical student and to take Step I, she produced
18 no proof that she was discriminated against under the Acts on
19 account of her alleged disability, by either UConn or the National
20 Board. On the contrary, nothing suggests that UConn did anything
21 other than support Powell in her efforts to succeed in its medical
22 program. The school supplied tutors for her, excused an honor
23 code violation ostensibly because of its sympathy for her high
24 level of stress, allowed her to remain matriculated without paying
25 tuition, and gave her multiple opportunities to remediate classes
26 that she had previously failed. In the end, the school decided
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1 that it needed to be certain that appellant had integrated all of
2 the learning from BMS-I and BMS-II in a way that she could utilize
3 in her clinical rotations, and later as a treating physician.

4 A defendant is not required to offer an accommodation that
5 imposes an undue hardship on its program's operation; it is only
6 required to make a reasonable accommodation. 28 C.F.R. § 41.53
7 (2002). The ADA defines undue hardship as one requiring
8 significant difficulties or expense when considered in light of a
9 number of factors, one factor being the type of service or product
10 being offered. Cf. Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263
11 F.3d 208, 221 (2d Cir. 2001) (defendant employer failed as a
12 matter of law to show that accommodation to plaintiff employee
13 would cause it undue hardship) (citing 42 U.S.C. § 12111(10)(A) &
14 (B)). In addition, a defendant need not make an accommodation at
15 all if the requested accommodation "would fundamentally alter the
16 nature of the service, program, or activity." 28 C.F.R.
17 § 35.130(b)(7); Henrietta D., 331 F.3d at 281.

18 It was well within UConn's authority to decide that in order
19 for it to adhere to the demanding standards of a medical school
20 responsible for producing competent physicians, it needed to
21 require plaintiff to pass Step I. The accommodation requested by
22 plaintiff, that she be allowed to continue in the program without
23 first passing Step I, would have changed the nature and substance
24 of UConn's program. Other underperforming students were required
25 to prove their mastery of this knowledge before being allowed to
26 advance. Permitting a student who did not definitively prove her

1 mastery of basic medical sciences to advance into the later stages
2 of medical school, and become a treating physician who had direct
3 contact with patients was something the medical school correctly
4 believed would unreasonably alter the nature of its program. See
5 28 C.F.R. § 35.130(b)(7).

6 When reviewing the substance of a genuinely academic
7 decision, courts should accord the faculty's professional judgment
8 great deference. See Regents of Univ. of Michigan v. Ewing, 474
9 U.S. 214, 225 (1985). A sister circuit facing a similar issue
10 observed that the medical school had diligently assessed the
11 available options and then made an academic judgment that a
12 reasonable accommodation was not available and, that to
13 accommodate the student would work a change in the substance of
14 its medical program, and impose an undue hardship on its academic
15 program. Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 795
16 (1st Cir. 1992). In the pending case, after diligent review,
17 UConn made a similar rational decision.

18 Plaintiff failed to produce evidence to create an issue of
19 fact with respect to whether UConn's decision was made on a
20 discriminatory basis. Her failure to present such proof,
21 accordingly, entitled defendants to an award of summary judgment
22 dismissing her complaint.

23 2. National Board

24 With respect to the National Board, it is clear that it
25 followed its standard procedure when it determined that appellant
26 was not entitled to a test accommodation. Its procedures are

1 designed to ensure that individuals with bona fide disabilities
2 receive accommodations, and that those without disabilities do not
3 receive accommodations that they are not entitled to, and which
4 could provide them with an unfair advantage when taking the
5 medical licensing examination. As administrator of the national
6 exam used by a number of states for licensing medical doctors, the
7 National Board has a duty to ensure that its examination is fairly
8 administered to all those taking it.

9 Contrary to Powell's allegations, neither the timing of the
10 National Board's review of her application or its response to it,
11 nor the nature of that review and response, are in any way
12 discriminatory. Appellant did not produce any evidence in support
13 of such allegations. She simply declares that Dr. Deckel's
14 diagnosis of her condition relating to her alleged disability is
15 enough to establish that she is disabled and thus entitled to an
16 accommodation. The National Board, however, upon review of the
17 documentation submitted in conjunction with plaintiff's
18 application, determined that Dr. Deckel's diagnosis was unsound
19 and that he had not ruled out emotional issues, stress or low
20 intellectual capacity in general as reasons for appellant's
21 difficulties in passing the Step I test.

22 Were the National Board to depart from its procedure, it
23 would be altering the substance of the product because the
24 resulting scores would not be guaranteed to reflect each
25 examinee's abilities accurately. Nothing in the record suggests
26 that the National Board's review and rejection of plaintiff's

1 application for an accommodation was anything other than standard
2 procedure. Nor is there evidence that the standard procedure
3 itself was unreasonable or discriminatory in nature. Thus,
4 appellant has not identified a material issue of fact that exists
5 with respect to her allegations of discrimination against the
6 National Board.

7 IV Money Damages

8 In order to obtain money damages as a remedy for UConn's
9 alleged violation of Title II of the ADA, plaintiff would need to
10 show not only that there was a violation, but that such violation
11 was motivated by either discriminatory animus or ill will stemming
12 from plaintiff's disability. Garcia v. S.U.N.Y. Health Sciences
13 Ctr. of Brooklyn, 280 F.3d 98, 112 (2d Cir. 2001). In order to
14 recover monetary damages under the Rehabilitation Act against the
15 National Board, plaintiff would need to show that any violation
16 resulted from "deliberate indifference" to the rights the disabled
17 enjoy under the Act. Id. at 115. As stated earlier we find that
18 the defendants did not violate the Acts. Moreover, we agree with
19 the district court that plaintiff failed to present evidence
20 showing the existence of either ill will or animus on the part of
21 UConn, or deliberate indifference on the part of the National
22 Board. Hence, she would not be entitled to money damages, in any
23 event. Finally, since we have disposed of this appeal on the lack
24 of merit to plaintiff's claims, we need not reach or decide the
25 sovereign immunity issue raised by the district court as it is
26 unnecessary to our holding.

1 CONCLUSION

2 In sum, even if the plaintiff is disabled, she has produced
3 no evidence to show she is otherwise qualified to continue in
4 medical school and has offered no evidence of discrimination by
5 either the National Board or UConn. She is thus unable to show
6 that a material issue of fact exists that would prevent defendants
7 from being entitled to summary judgment. Accordingly, we affirm
8 the district court's grant of summary judgment for defendants on
9 all claims.

10 Affirmed.