

Rights of Disabled Students in University Examination Procedures under Special Consideration of the COVID-19 Situation

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ABSTRACT

Social participation of disabled people is a challenging task of modern society. That includes access to higher education. Universities worldwide work hard to give handicapped students a chance to graduate. Thus, compensation of disadvantages in examination procedures is an important matter. Each year, millions of students worldwide apply for special examination arrangements as a compensation for disadvantages that disability entail. To ensure equal examination opportunities, university authorities must be creative to find individual compensation solutions. Especially in the COVID-19 pandemic, support of disadvantaged students becomes more important but also demanding for universities. To ensure equal opportunities, examination regulations of most universities know rules of compensation for these special cases. But, the question arises if they are still suitable in times of special situations, such as in the current COVID-19 pandemic. The paper analyzes examination regulations in different countries and offers solutions to compensate disabled and chronic ill students' disadvantages. It discusses the necessity of compensation for different types of disability and chronic illness. In reaction to the current COVID-19 crisis, authors inform about alternative solutions for classical examination forms and resulting compensation difficulties. Finally, an overview of current German case law and solutions for compensation problems are provided. The conclusion is that the examination process entails a wide variety of risks for universities. That is why careful planning and realization of the examination process is half the battle. Universities are obliged to organize the exams in a way that no student will be discriminated but also overcompensation will be prevented.

Keywords: *Examinations, Compensation, Disability, Equal Opportunities, COVID-19*

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1. Introduction¹

Currently in Germany, 11 per cent of students are handicapped with a disability or chronic illness which negatively affects their studies (E. Middendorff et al. 2017). From a total number of 2.37 million enrolled German students and students holding a German secondary school leaving certificate, around 264.000 proofed a health impairment with negative consequences for their studies (E. Middendorff et al. 2017). The additional support for these students faces the universities with an enormous challenge, not only while teaching but also in recording their learning successes.

In general, the examination process for all students entails a wide variety of legal risks for universities, beginning with the admission to exams and ending with an appeal against examination's results. Universities' staff and bodies responsible for examination are well advised to work carefully in elaborating examination regulations and to comply with them in order to prevent a lawsuit. Especially, decisions about compensation of disadvantages in university examinations is prone to error and students often try to legally enforce their rights. That's why there must be an interest of universities to avoid every mistake in the examination process. With its combination of approaches from different research fields, this paper contributes to inter-disciplinary communication.

2. Principles in Examination Procedures

2.1 International Principles

University examinations affect the right to freely choice a profession. Study programs with limited university examination attempts may restrict students to graduate and therefore also to exercise the desired profession, if the examinee fails the last possible examination attempt. That is why it is extremely necessary to organize examinations on the basis and in compliance with legal regulations laid down by the respective countries. Additionally, nearly each university enacted examination rules and regulations to conduct tests and examinations according to the national law.

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If disabled or chronic ill students will take part in the examination process, the departmental examination committee must additionally pay attention to the United Nations Convention on the Rights of Persons with Disabilities as well. It states in Article 24(5) that it shall be ensured that “persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities” (United Nations 2006). Furthermore, there are relevant national regulations, for example in USA the Americans with Disabilities Act and ADA Amendments Act (Americans with Disabilities Act of 1990 and ADA Amendments Act of 2008) or in Germany the Act on Equal Opportunities for Persons with Disabilities (German Act on Equal Opportunities for Persons with Disabilities 2018).

At most of the universities worldwide, examination regulations or other ordinances exist regarding special examination arrangement for disabled and chronic ill students. Below, various university regulations on special examination arrangements for handicapped students will be analyzed, for example from the German Ludwig-Maximilians-University Munich, the Swiss University of St. Gallen, the British University of Oxford and the US-American Texas A&M University. All of them contain instructions how to deal with disabled and chronic ill students during an examination procedure.

2.2 German Specialties

In Germany, all Germans have the constitutional right freely to choose their occupation or profession (occupational freedom) guaranteed in Art. 12(1) of the German Basic Law (Basic Law for the Federal Republic of Germany 2019). University examinations affect that right because a large majority of study programs allow only limited university examination attempts. Each German higher education institution has to lay down examination rules and regulations to conduct tests and examinations which must be in compliance with the German Basic Law, the Higher Education Acts of the 16 German Federal States and, regarding equal opportunities for students with disabilities, the relevant legal regulations.

In Germany, the United Nations Convention on the Rights of Persons with Disabilities came into legally binding effect on 26th March 2009 (Act on the Convention on the Rights of Persons with Disabilities 2008). Rights of disabled people in Germany further will be protected by Article 3 of the German Basic Law (Basic Law for the Federal Republic of Germany 2019). From that fundamental right of equal treatment the right of compensation of disadvantages in universities examination procedures results.

Thus, the requirement of equal treatment can be found in all universities' examination regulations and must be met in the whole examination process. Many universities offer guidelines for teaching staff how to deal with handicapped students. These handouts offer information about types of impairment, options of assistance in special situations and recommendations about adjusting courses and examinations in order to meet the needs of disabled and chronic ill students.

3. Types of Disadvantages

To allow handicapped students to show their best performance in university examinations it can be necessary to allow them a compensation of their handicap with suitable measures. But not for all handicapped students a compensation of disadvantages is allowed. In the university examination process a distinction has to be made between temporary ill students and disabled or chronic ill students. This difference is important because temporary ill candidates normally have other rights in university examination procedures than disabled or chronic ill examinees. Students with short term diseases (such as a broken leg or an influenza) can withdrawal from an examination under special conditions if they are not able to perform at their best. For these candidates it is acceptable to wait for a health improvement and then to apply for the examination again. But, students with disability or chronic illness are suffering from non-temporary impairments usually their whole life. Postponing the examination to a later date, when they are free of impairments, in the worst case could mean that they will never have the chance to take the examination and to graduate. For that reason they have the right to take the examination but to apply for suitable compensation of their disadvantages.

In the case an examination candidate applies for compensation of disadvantages, the examination committee first has to define if the student is temporary ill, chronic ill or disabled. In some cases, especially regarding mental impairments, the differentiation is difficult, even for medical experts. Beside the defined kinds of disability always the individual case must be examined. Often students have not only one single impairment but a variety of disabilities or chronic illnesses.

Compensation measures in university examinations only will be offered for impairments that are not dependent on the examination and which make it more difficult for the student to complete examinations. This means that only these types of disability must be compensated which make it harder for students to proof his/her knowledge and skills e.g. because of visual or writing impairments (N. Niehues and E. Fischer 2018). For handicaps which are significant for the competences to examine, compensation cannot be offered.

Chronic ill or disabled students have to inform the examination committee about the impeding circumstances a defined time before they attend the examination. Deadlines for application for compensation of disadvantages normally can be found in the examination regulations of the respective university. Furthermore, they shall substantiate their impairment by disabled person's pass or medical certificate.

3.1 Disability

A definition of disability can be found in the United Nations Convention on the Rights of Persons with Disabilities. Thus, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others (United Nations 2006). But, also other regulations or handbooks contain definitions of disability. Thus for example a Guide for College and University Students published by California's Protection & Advocacy System about Rights of Students with Disabilities in Higher Education. It explains that impairment will not meet the ADA or Section 504's (Americans with Disabilities Act of 1990 and ADA Amendments Act of 2008) definition of a "disability" if it is expected to, or in fact does, affect a person for six months or less (California's Protection &

Advocacy System 2013). A disability, as defined by German Social Law, exists when bodily functions, mental abilities or mental health deviate, for more than six months, from the condition typical for a given age so that participation in society is impaired (Book IX of the German Social Code 2019). The same definition can be found in Section 3 of the German Act on Equal Opportunities for Persons with Disabilities (German Act on Equal Opportunities for Persons with Disabilities 2018). Typical kinds of disability for example are visual impairments such as blindness or walking impediment.

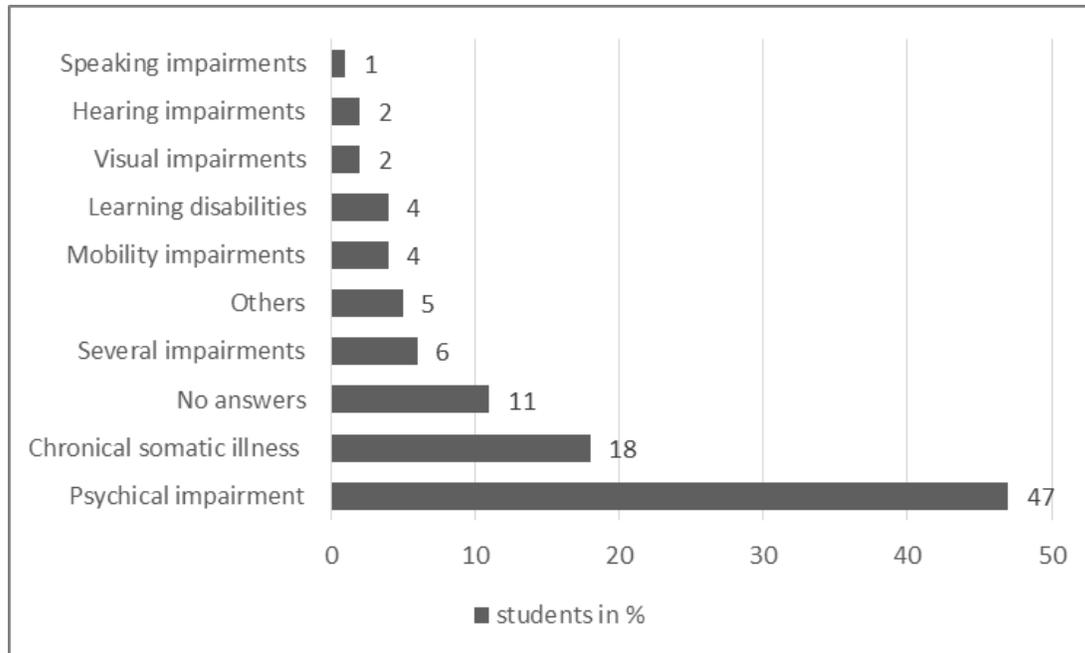


Figure 1: Types of German students’ health impairment - on the data basis of (E. Middendorff et al. 2017).

The German Federal Ministry of Education and Research initiated an investigation about handicapped students and the types of disability and chronic illness which have substantial effect on the study situation. The results show that 11 per cent of the German students and students holding a German secondary school leaving certificate are disabled or have a chronic illness which negatively affects their study performance (E. Middendorff et al. 2017). A large number of these students (47 per cent) suffer from psychical problems while only 3 per cent are handicapped with hearing or speaking impairments (E. Middendorff et al. 2017) (see Figure 1).

3.2 Chronic Illness

Chronic illness can be defined as non-temporary health problems or such impairments with episodic progression as for example chronic disease of the bowel or epilepsy (German Association of Student Services Organizations 2013). A further detailed differentiation is not required because both students with disability as well as students with chronic illness may apply for compensation of disadvantages in university examination procedures.

3.3 Other Personal Disadvantages or Restrictions

Sometimes, students apply for individual examination arrangements because of other personal restrictions or disadvantages, for example (foreign) student's poor language skills, examination nerves, non-pathological learning difficulties or motivations problems which are not qualified as chronic illness or disability.

Non-pathological impairments or handicaps which affect a student for less than six month are not to compensate by special examination arrangements. As mentioned above, students with temporary disadvantages can withdrawal from the examination up to the time it ends. All other individual student's poor constitutional performances characterize his or her personal ability to perform and are relevant for the examinees academic qualification which should be examined (Administrative Court Dresden 2010a). Also, pregnancy cannot be defined as a disability. A pregnant student does not have a right for compensation of disadvantages because she is not disabled or chronic ill but only temporary unable to take an examination (Administrative Court Dresden 2010b). Although 2018 in Germany a new Maternity Protection Act was enacted that intends to protect not only pregnant and nursing workers but also students intensively, pregnancy can't be defined as a disability or a chronic illness which would allow a compensation of disadvantages.

In Germany, there is no legal obligation to offer compensation measures to students with other disadvantages than disability and chronic illness. Nevertheless, there are examination regulations of universities, not only in Germany but also in other countries, which allow a compensation also for other handicaps. Thus, some universities arrange a compensation of language disadvantages for foreign students to support academic internationalization. As

an example, the Swiss University of St. Gallen offers students, whose language is foreign, additional 15 minutes per examination hour in written central examinations in the German-language Assessment Year, except in accountancy, foreign language tests and mathematics (University of St. Gallen 2020). But, offering reliefs from examination requirements for students who are not disabled or suffer from a chronic illness, violates the principle of equality. That principle is constitutionally guaranteed in Germany, and also in other European countries and applies in all university examination procedures. It says that university examination authorities have to treat all examinees equal as long as there is an objective reason not to do so. As objective reasons a disability or a chronic illness is accepted. That is why universities should be reluctant in offering individual examination arrangements for students who are not able to proof a non-temporary health problem.

4. Special Examination Arrangements

Depending on the type of impairment, students can apply for individual compensation arrangements. As many types of disability and chronic illness exist as many types of compensations universities have to offer. Students and universities must know that equal opportunities in examination procures are not a privilege but rather a legal right and a step towards integration and equality. Nevertheless, in Germany less than one of three students applies for compensation of disadvantages (see Figure 2) (German Association of Student Services Organizations 2018). As reasons for this low number, disabled and chronic ill students named lacking information about compensation of damages (54% of the asked students), no interest in a special treatment (51% of the asked students) and the wish to avoid knowledge about their handicap (42% of the asked students) while multiple answers were possible (German Association of Student Services Organizations 2018).

It is important to mention that students do not have a right to a special compensation measure. They only can apply for an appropriate compensation of their personal disadvantages. The United Nations defined that “reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an

equal basis with others of all human rights and fundamental freedoms” (United Nations 2006).

The decision which special measure means an appropriate compensation of the examinee’s individual disadvantages takes the examination board. Compensation measures must guarantee nothing more and nothing less than equal examination treatment among the examinees. An additional advantage for disabled or chronic ill students compared with not handicapped students must be avoided in any case.

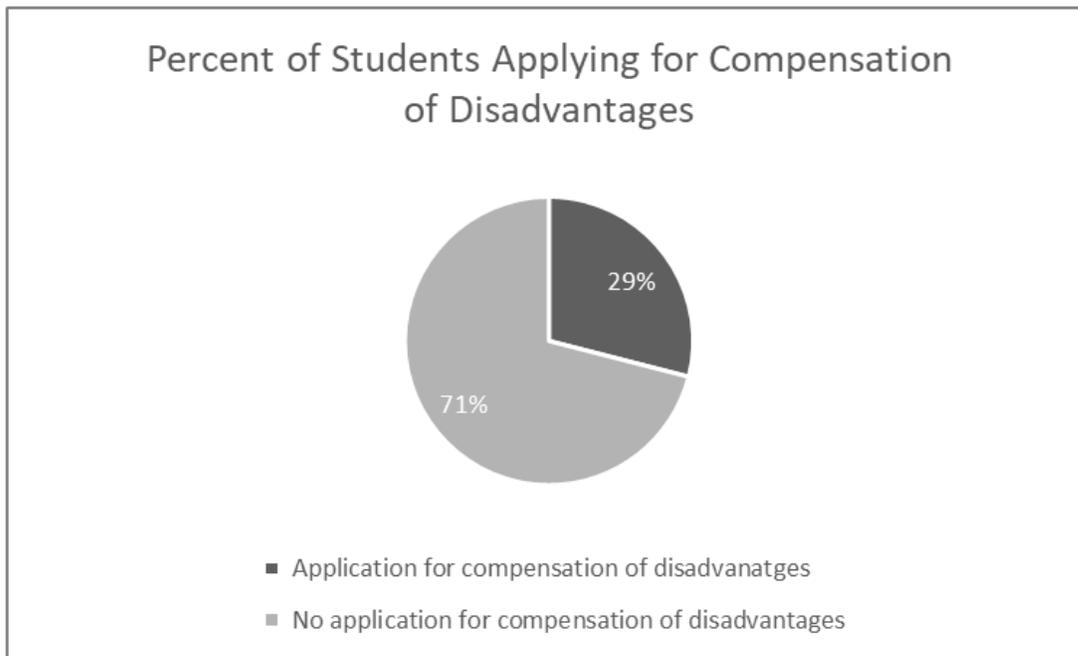


Figure 2: Percent of German students with handicap who applied for special study arrangements - on the data basis of (German Association of Student Services Organizations 2018).

4.1 Application and Procedure

A request from the student to the examination committee for compensation of disadvantages is a precondition for adapted study and examination conditions. Without information about the disability or chronic illness, universities are not able to react on the student’s special situation and to organize compensation for disadvantages.

Students shall apply for individual examination arrangements normally before starting the examination. After an examination has been taken, students are not allowed to complain about not providing a compensation for disadvantages when not applied for it.

How long in advance of the examination the application for compensation must be submitted depends on the respective university's regulation. At University of Oxford, special examination arrangements should be requested after matriculation and no later than Friday of week 4 of the term before the examination (Oxford University 2020). The University of St. Gallen (for decentral examinations) set the application deadline two weeks prior to the examination (University of St. Gallen 2020). For central examinations the application for special arrangements must be submitted before expiry of the registration period (University of St. Gallen 2020).

Nearly all investigated universities' examination regulations demand a submission of the application via a filled application form or in another written way. The application for compensations must be sent to the responsible body at the university, typically the examination committee. Furthermore, an evidence of the disability/chronic illness by a medical certificate etc. is necessary. In particular cases also a certificate of the public health officer needs to be requested.

4.2 Time Extension

Time extension is one of the most often used special examination arrangement in higher education (German Association of Student Services Organizations 2020). It is able to compensate various kinds of disability and chronic illness. 30 per cent of all disabled and chronic ill students at German universities have problems with time limitation in examinations, a survey of the German Association of Student Services Organizations found (German Association of Student Services Organizations 2020). As a result, 29 per cent of handicapped students of all disciplines applied for time extension in examinations while the approval rate for that kind of compensation was 80 per cent (German Association of Student Services Organizations 2020).

Recommendations for time extension as a compensation for handicapped students can be found in all of the compared university regulations. An extended time for testing is suggested especially for students with visual impairments and specific learning disabilities, chronic illness and mental health issues (Texas A&M University 2020). Most of universities compensate disadvantages by 15 additional minutes per examination hour (University of St. Gallen 2020) or even up to 50 per cent of the regular examination duration (Ludwig-Maximilians-Universität Munich 2020a). But, not in any case an extension of time may be justified. The Higher Administrative Court of North Rhine-Westphalia decided 2010 that thinking blockades resulting from an anxiety disorder in examination situations do not entitle the student to additional time in a written examination (Higher Administrative Court North Rhine-Westphalia 2010). It stated that written examinations are used to proof the examinee's knowledge and skills. Their results are based on the individual mental performance which must be able to express by students under equal conditions. This means that only impairments which limit the examinee to technically express his or her mental performance must be compensated, e.g. if the examinee has problems in the mechanical presentation of knowledge and skills (Higher Administrative Court North Rhine-Westphalia 2010) such as students with Muscular Dystrophy. In the mentioned court case the individual mental performance already has been limited by personally-based impairments.

4.3 Type of Examination

Because of the type of their disability or chronic illness, some students are not able to take an examination in the regular form. For example for students with writing impairments because of physical disabilities or visual problems, the change of a written test into an oral examination may be an adequate compensation of disadvantages. Students with mental health issues sometimes have problems with examination in front of an auditorium or with proctored tests. Instead of the planned examination students may be offered homework or another adequate form of testing.

But compensation for disadvantages by changing the testing type is not legitimate in any case. Thus, a German administrative court decided that special examination arrangements such as replacement of proctored tests by homework is not allowed if, with this special kind of examination, the

examinee's personally-based mental performance should be examined (Administrative Court Bremen 2015).

Nearly all investigated university regulations contain the compensation measure of replacement of one type of examination by another one, thus see for example the Guidelines for Lecturers of the Ludwig-Maximilians-University Munich (Ludwig-Maximilians-Universität Munich 2020b). Nevertheless, the university has to examine in detail if switching to another examination type will overcompensate the student's handicap.

4.4 Personal or Material Aids

Disadvantages of students often will be compensated by time extension or visual aids. But there are various other possibilities to compensate impairments of disabled or chronic ill students in examination procedures (see also Quapp 2018). Below, a list is provided with personal or material compensation measures most commonly offered by universities all over the world:

- Separate examination room
- Refreshable braille display
- Adjustment of examination papers (e.g. large letters, colored paper)
- Use of a word processor
- Use of a computer with a spell-checking program
- Written instructions for students with hearing impairments
- Ergonomic or other seating arrangements
- Permission to bring food and drink in an examination
- TV monitor connected to microscope to enlarge images for students with visual impairments
- Computers with enlarged screen images for students with visual impairments
- Visual aids, visual warning systems for students with visual impairments

Universities in other countries than in Germany are mostly very moderate in compensation of students' disadvantages. But, in German jurisprudence there are some concerns regarding too generous compensations e.g. using a laptop as a compensation measure for students with writing impairments. Using a laptop may cause a danger of overcompensating disadvantages resulting from

disability or chronic illness. In 2011, the Bavarian Higher Administrative Court argued that while typing on a laptop the writing speed could be higher compared to handwriting which might be an advantage in relation to other, not disabled examinees. Furthermore, while writing on a laptop, all advantages of word processing and spell-checking can be used. Also advantageous can be the better readability because of the electronic writing (Bavarian Higher Administrative Court 2011). That's why German Examination Law only allows a personal typist as a compensation measure in these cases. Writing on a laptop should only be a compensation measure if the disabled or chronic ill student, because of other handicaps, is not able to dictate a text to the typist as well.

5. Compensation in Times of Unforeseen Occurrences

Unforeseen occurrences such as pandemics, natural disasters, economic troubles, civil unrest, war or terrorism may affect higher education institutions to a greater extent. The COVID-19 pandemic forced universities worldwide to reorganize teaching and research in order to protect staff and students from an infection. A useful measure was to switch the high share of in-classroom teaching to online teaching. Furthermore, face-to-face interactions and oral examinations have been replaced by alternative examination forms without any personal contact. The future will show, if higher education institutions can use the pandemic as a chance to prepare better for unforeseen occurrences, by for example, further encouraging digitalization in teaching and examinations.

The COVID-19 pandemic confronted universities with considerable challenges but digitalization tools in teaching helped students and lecturers to reach the planned learning targets together. For some handicapped students this special situation imposed various difficulties due to the switch from in-classroom teaching to digital teaching. For other students, e.g. with mobility impairments or psychological problems, online courses also could have been advantageous. Even though the infection rates in Europe are decreasing, planning of the university examination processes is demanding for higher education institutions. Probably, a combination of digital examination methods and in-classroom examinations is unavoidable. But, in this context, new questions will arise regarding the compensation of disadvantages for disabled and chronic ill students.

5.1 In-classroom Examinations

While planning in-classroom testing, examination authorities have to comply with the distance and hygienic regulations of the respective country, state and/or university. The currently required distances of 1.5 m between persons not living in one household, normally will make it necessary that much less students can take a written examination in one room or can use one lab room for practical tests. As challenging this situation for universities is, as advantageous it is for students with psychological handicaps or weak immune system. Especially examinees who suffer from social phobia may help the reduced number of other students in the room to concentrate and to perform better. In that case an additional compensation of disadvantages shall not be agreed because it will be not necessary and would constitute an overcompensation.

Of course, in case of personal contact with students, the examination staff has to be advised in all distance and hygienic requirements and shall be equipped with protection wear such as masks, rubber cloves and disinfectants.

5.2 Examinations under Distance

Examinations under elimination of any personal contact help to prevent students and university staff from an infection. Nevertheless, there are other difficulties which universities must keep in mind if they intend to switch from in-classroom exams to distance and/or online examination. Thus, examination authorities must be able to verify the identity of the examinee free of doubt. Another challenge will be to prevent and to detect cheating, such as using prohibited additional materials or copying from other students.

Examinations with distance to the examiner and other students can be an enormous advantage for students who have problems with personal contact or who have physical/visual impairments. Due to the opportunity to use technical facilities for examinations, for example screen magnifier for students with visual handicaps, students are able to compensate their disadvantage. The examination board therefore should verify in detail if an additional compensation for disadvantages is necessary or overcompensates a

disadvantages which is already compensated by the changed examination type. On the other side, if disabled and chronic ill students currently apply for compensation of disadvantages, an intensive analysis of the personal situation of is needed regarding a considerable hardship due to the COVID-19 situation.

6. Legal Remedies

The way to enforce the right to compensation of disadvantages in university examination procedures depends on the respective national law and the individual university regulations. In Germany, an objection against the decision of the chairman of the responsible examination committee must be submitted within one month. See as an example paragraph 17 of the Examination Regulations of the International Master's Degree Program Structural Engineering at HTWK Leipzig (HTWK Leipzig University of Applied Sciences 2019). If the objection will be rejected by the examination committee, a rejection notice will be issued. Against that notice, legal proceedings can be instituted by the student with the administrative court in charge. In other countries, instruments of remedies depend on the respective national law. For example in the USA, handicapped students have the possibility to

- File an internal grievance/appeal with the school
- File a complaint with the Office for Civil Rights of the U.S. Department of Education (OCR) or the U.S. Department of Justice (DOJ)
- Try to resolve things informally through private mediation; and/or
- File a lawsuit (California's Protection & Advocacy System 2013).

7. Recommendations

On the basis of the above mentioned, recommendations can be made as follows.

7.1 Compensation

A professional university's compensation policy starts with the first day disabled or chronic ill students arrive at university. Earliest information about handicaps of students facilitates the planning of special course and examination

accommodations for the department and examination management. At start of each new term, lecturers should ask students for handicaps and offer these student personal assistance during the lectures because some of them do not inform the faculty about their disability or chronic illness by themselves.

Additionally, personal consultation for students with disadvantages shall be offered by the examination board or the university's disability advisory service to advice students on applications for examination arrangements and to discuss the useful compensation for disadvantages arising from the particular student's situation in detail. This is essential because necessity and type of compensation measures can vary even for similar handicaps. The respective circumstances at the place of study, the specific requirements of the study program and the examination conditions play a major role in this situation. Compensations must always be individual, situation specific, necessary and suitable. Often it will be a package of compensation measures. That's why it is difficult to give binding recommendations for an individual compensation of disadvantages. In any case, universities have to avoid illegal advantages of handicapped students in comparison with other students.

Compensation arrangements should be made in writing in order to avoid misunderstandings. If there are any doubts about the disability or chronic illness status, students have to provide a medical certificate from the public health officer.

7.2 Examination Procedure

Legal compliance of examination procedures with the examination regulations and other relevant law is extremely important for a fair university examination process. Regarding compensation of impairments, a careful formulation of the universities' examination regulations will be as helpful as the continuous training and instruction of the examination management (Quapp 2016). It is recommended to offer examination guidelines to the responsible staff. These guidelines should contain an organizational checklist and a preprinted form where the procedure and special occurrences during the examination can be noted. This practice will be useful as evidence in a lawsuit. Regarding disabled and chronic ill students, the approval of individual examination arrangements and their correct realization while the examination must be documented.

8. Conclusions

Handicapped people have potential to be great scientists and researchers. As an outstanding example, Stephen Hawkins, one of the brilliant brains of our time, was able to enlighten the world of physics and astrophysics. Thus, higher education of disabled people is not an end in itself but an important service for society. However, not everyone who is starting in a study program is talented enough to graduate. This applies to both handicapped and not handicapped students. Disabled people do not want to be privileged. They only should have equal opportunities.

Many university examination regulations are similar and care about students with handicaps. Of course, at universities there is still a lot of work to create equal opportunities for handicapped students without disadvantage the other students. But higher education institutions in Europe and USA are on a good way to improve the access of disabled people to university education.

Universities worldwide are open to students with disadvantages because they have the potential to positively stimulate the academic society. The future will show if universities' efforts in compensating disadvantages in examination procedures will help more handicapped students to a graduation. The paper's purpose was to increase the sensibility of different research fields regarding this topic and therefore to contribute to inter-disciplinary communication.

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