Chapter 6

Higher Education

A. Introduction and Overview

The goal of this chapter is to provide insights into the application of the major nondiscrimination statutes to the unique context of higher education. Earlier chapters introduced the key elements and principles of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. It is particularly useful to apply these principles in a separate chapter on higher education for five major reasons.

First, because Section 504 (passed in 1973) applied only to programs receiving federal financial assistance, most employers and other private and public programs of accommodation were not subject to disability discrimination mandates. Higher education, however, because of federal grants and student loans, was one of the few major institutions to implement the nondiscrimination mandates. Judicial attention to these issues, therefore, was in the context of higher education. That body of case law helped to form the framework for the 1990 Americans with Disabilities Act, which incorporated into its statutory text many of the principles arising out of those early decisions. While issues such as technology, service and support animals, and food sensitivities can arise in any context, higher education still often finds itself in the position of being the early laboratory of judicial attention on these issues.

Second, architectural barrier issues and facilities access apply to twelve categories of accommodations and to a wide range of programs operated by state and local governments. In higher education, however, the unique aspects of housing, classrooms, libraries, clinical programs, sporting events, performance venues, food service, and social events to which the public is invited, require a holistic approach to ensuring access. Transportation systems only available on campus can be important as well.

Third, professional education programs (such as law schools and medical schools) are connected to professional licensing. Although there is increasing judicial attention to the issue, it remains unclear how the assessment of whether an individual is otherwise qualified in the educational program can take into account the eligibility for licensing in the profession. And licensing agencies frequently request information about character and fitness from the educational program from which the applicant received a degree. This connection is particularly important because of the high stakes for the student (cost, time, status, and income potential) and the need to balance protection of the public, particularly in the case of health care professional programs.

Fourth, higher education cases initially focused primarily on student access, but because higher education also includes employment issues and the unique issues relevant to faculty with disabilities, attention to this issue has emerged over the years as well.

Fifth, cost issues are an increasing concern in higher education. Public institutions are receiving reduced funding from state and local governments, student ability to pay increasingly higher tuitions is adversely affected, and other reductions in support from agencies such as veterans and vocational rehabilitation agencies are reduced. Resource challenges become even more critical when higher education institutions face increasing demands related to technology and providing auxiliary aids and services. While undue burden has rarely been raised as a defense, the tension of costs and resources

may lead to cases that begin to address that issue.

Many of the cases in this chapter are early cases that provide the initial conceptual framework that have been used by subsequent courts. They are also selected because they represent a wide variety of disabilities in an array of settings.

[1] Chapter Goals

This chapter provides the following:

- A review of the key principles of the applicable statutes
- An application of these principles in the context of:
    - student admission issues
    - the enrolled student
    - confidentiality and privacy expectations
- A discussion of qualifications, testing, and documentation of disability to determine if the individual is protected by Section 504 or the ADA and is eligible for reasonable accommodations (including auxiliary aids and service and modification of policies practices and procedures and disqualification for performance or behavior reasons)
- An overview of how architectural barrier and physical plant requirements apply to campuses, including housing
- A general overview of some of the emerging issues of direct threat, technology, animals on campus, food sensitivities, and faculty issues

The primary focus of the chapter is to understand the substantive law as it applies in the higher education context. The underlying importance of how to implement the law and what procedures and remedies are available is not addressed to a great extent in this chapter's readings.

[2] Key Concepts and Definitions

The following are some key concepts for reference in learning about individuals with disabilities in the context of higher education settings.

Animals on campus

There is clarity about what animals must be allowed on campus in areas of public use. These are service dogs (and miniature horses) that are trained to perform a service. In settings of housing and employment, the guidance is more general, and other types of animals and animals that are for comfort or emotional support might be required. This raises issues of documentation that are not completely resolved.

Auxiliary aids and services

Such services in higher education would often include sign language interpreters, notetakers, and provision of materials on a modified format. These services do not include tutors or services that are personal in nature. They might include modified equipment.

“Best ensures”

Testing is supposed to be in a format and setting that best ensures that students with sensory or mobility impairments can demonstrate knowledge. Some have suggested that this requires that any accommodation be the “best” or “preferred” accommodation of the individual requesting it. An institution is to provide a “reasonable” accommodation, not the best or preferred accommodation.

Direct threat

In the employment context, employers are allowed to consider whether an individual presents a direct threat to self or others. The student context is less certain, and there is some "guidance" from the Department of Education that prohibits using threat to self as a factor in how students are treated. This can raise unique concerns in a college setting where housing and other situations in the context of individuals with mental health or substance abuse issues must be addressed.

Documentation

An issue of much debate is how much can or should be required of individuals to demonstrate that they meet the definition of disability under the applicable statute and how a requested accommodation relates to that disability. Aspects of documentation have been clarified in ADA regulations, but there are still some unresolved issues. Documentation issues include what is required, who is qualified to make evaluations, and how recent the evaluation must be. This issue is particularly challenging in the context of students requesting additional time on exams, waiver of coursework, reduced course loads, animals in some contexts (particularly comfort or emotional support animals in housing), and being excused from some behavior or conduct violations.

Fundamental or essential requirements

Higher education programs are not required to waive or alter essential requirements for students or for faculty or to make fundamental alterations to the program. The burden is generally on the institution to demonstrate what those requirements are and why an accommodation is necessary. Historically, courts have given substantial deference to institutions in setting their academic requirements. These institutions have historically been even more deferential to academic programs involving health care because of the patient protection issue.

Federal financial assistance

If any aspect of an institution receives federal financial assistance (including federal grants and student loans), the entire institution must comply with nondiscrimination mandates.

Housing in higher education

Students live in a wide array of settings when they attend higher education institutions. Those operated or facilitated by the institutions themselves can include traditional residence halls/dormitories or apartment buildings or other settings. It is not entirely settled when campus housing is subject to requirements under the Fair Housing Act and/or Titles II and III of the ADA. While there is greater clarity about the requirements for construction of campus housing, the issue is less clear in the context of students with animals in their housing settings.

Mandatory retirement impact on faculty

While mandatory retirement has been eliminated for almost all employment for several decades, the context of higher education can be particularly problematic. This is because, at least historically, most faculty members had very vague written employment expectations. When a faculty member's performance becomes deficient because of a health issue or because of aging generally, it can be challenging for the institution to establish that the individual is no longer otherwise qualified.

Modification of policies, practices, and procedures

In higher education, this type of reasonable accommodation might include additional time on exams or assignments, waivers of attendance requirements, reduced course loads, exam modifications, and other modifications. Whether a requested modification must be provided is fact specific and should be addressed in a proactive, interactive, individualized, and consistent manner.

Otherwise qualified

For students, the requirement of being able to meet the academic requirements as well as

applicable behavior and conduct requirements has been an issue of attention. This issue can arise in the context of students requesting second chances after academic or conduct deficiencies. In some contexts, particularly health care programs, being able to meet the physical requirements of the program (including mobility and sensory requirements) can be an issue.

For faculty members, the specific requirements of a position may not be well defined. Faculty members whose performance becomes deficient (sometimes related to the aging process) raise unique employment concerns.

Public accommodations and public services

Title II of the ADA applies to state and local governmental programs, and Title III of the ADA applies to twelve categories of private providers of accommodations to the public. While the requirements under these two sections are quite similar, there are some differences. Public higher education programs are subject to Title II and private institutions are subject to Title III.

Both entities can find that private programs that are licensed, leased to, or facilitated by the higher education program may raise additional responsibilities of control by the educational institution. Programs such as fraternities and sororities, food vendors, and bookstores are examples of such interrelationships.

Technology

Campus technology issues include websites, course materials, links to documents, textbooks, email communication, teaching platforms, and sports arena and display areas. While there is some clarity about what is required in some settings, this is an evolving area. It is not completely resolved what is required and who is responsible to ensure access.

Transition issues

Transition issues occur at two primary levels in the higher education context. Students may come from K-12 education with an expectation about whose responsibility it is to identify the individual as having a disability and to pay for that evaluation and what must be provided (special education and related services instead of reasonable accommodations). Planning for these expectations in terms of proactive communication can benefit both the students and institutions.

Transition from the academic degree to professional licensing may have issues when the institution is asked to verify character and fitness. Reporting on students who received mental health or substance abuse counseling during the educational process may have the unintended consequence of deterring students from receiving needed treatment.

B. Nondiscrimination in Higher Education

[1] The Rehabilitation Act of 1973

As noted in earlier chapters, Section 504 of the Rehabilitation Act, 29 U.S.C. §794, prohibits discrimination on the basis of disability against otherwise qualified individuals with disabilities by entities receiving federal financial assistance. Section 504 also has been interpreted to require reasonable accommodation and is intended to incorporate the concept of "least restrictive environment."

Although Section 504 of the Rehabilitation Act has applied to most institutions of higher education since 1973, only in the late 1980s did disability discrimination issues begin to receive much attention on college campuses. One factor that probably led to this focus was the passage of special education laws in 1975 (now the Individuals with Disabilities Education Act, as discussed in Chapter 7). As a result, many students with disabilities had reached college age better prepared for college, having

been identified as having a disability, expecting procedural safeguards to be in place. Another factor may be the media attention on disability rights surrounding the passage of the Americans with Disabilities Act in 1990.

It is clear that Section 504 of the Rehabilitation Act of 1973 applies to most institutions of higher education because they are recipients of federal financial assistance. The regulations under Section 504, 34 C.F.R. §104.41 et seq., include a subpart relating specifically to postsecondary educational issues. This subpart includes regulations relating to admissions and recruitment, general treatment of students, academic adjustments, housing, financial and employment assistance to students, and nonacademic services (including athletics, counseling, and social organizations).

While it was always clear that Section 504 applied to institutions of higher education receiving federal financial assistance, it was not always as clear that all programs within a higher education institution were covered if only one program received the federal financial assistance. For example, if the college of education received a federal grant from the Department of Education, did that mean that the athletics programs were subject to the nondiscrimination mandates of Section 504?

In 1984, the Supreme Court addressed this question in the context of a claim of sex discrimination. Grove City College in Pennsylvania, is a small private liberal arts college, whose only nexus to federal financial assistance was that it provided forms to apply for federal guaranteed student loans and that some students who received these loans attended the college. The issue was whether Grove City College was subject to the nondiscrimination mandate of Title IX of the Civil Rights Act, which prohibits discrimination on the basis of sex by higher education institutions receiving federal financial assistance. The Court in *Grove City College v. Bell*, 465 U.S. 555 (1984), held that the entire institution was not subject to Title IX (nor would it be subject to several other similar nondiscrimination mandates including Section 504) by virtue of receiving federal financial assistance. Congress responded to this ruling by passing the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28. This Act amends Section 504 to provide that all operations of an institution are subject to its nondiscrimination mandates if any part of a program or activity receives federal financial assistance. The other civil rights statutes were similarly affected. It has since been clarified by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1993), that the Civil Rights Restoration Act is not retroactive.

The application of Section 504 to various areas affecting student life, including admissions, academic programming, and architectural barriers, is addressed in the remaining sections of this chapter. As the following section indicates, there is now even more comprehensive protection against discrimination for students with disabilities as a result of the Americans with Disabilities Act.

[2] The Americans with Disabilities Act

The Americans with Disabilities Act (ADA), 42 U.S.C. §§12101 et seq., applies to public colleges and universities (Title II) and private educational institutions (Title III). Because of the detailed postsecondary education regulations under Section 504, which is to be read consistently with the ADA, regulations under the ADA do not focus directly on postsecondary education, but in essence incorporate the Rehabilitation Act requirements on these issues. There are some areas where regulations under the ADA provide additional clarification for certain aspects of higher education programming beyond what is available in the model regulations under Section 504. Architectural barrier issues and licensing and credentialing issues are two examples. Some issues that would benefit from additional higher education regulations have not yet been addressed. These include issues such as confidentiality, student records, and housing on campus.

It is important to understand the difference between Title II and Title III, why it may make a difference which statute applies, and when there may be overlapping application. It should also be noted that Section 504 will apply to most institutions of higher education because most receive federal

financial assistance. Thus, the question will be whether Title II or Title III applies in addition to Section 504. Often it will not matter which statute applies because all three may have similar mandates in certain instances. Occasionally, however, it will be necessary to determine which statute is applicable. This is particularly true for procedural issues and remedies.

Title II, 42 U.S.C. §§12131 et seq., prohibits discrimination on the basis of disability by state and local governmental agencies. Thus state universities, community colleges, and other state or local governmentally operated institutions of higher education would fall under the mandates of Title II. Those entities subject to Title II were to have conducted a self-evaluation of their services, policies, and practices by January 26, 1993. They were to identify needed structural changes and develop a plan for making the needed changes. To the extent that a self-evaluation had already been done pursuant to the Section 504 mandate (requiring a self-evaluation by 1978), Title II institutions were not required to repeat this but they were required to update it. Given the fact that 15 years intervened between these two deadlines, as a practical matter, it is difficult to imagine that most campuses did not need to do a substantial update of the self-evaluation. In addition to the self-evaluation, Title II higher education institutions were required to make the program accessible when viewed in its entirety by January 26, 1992.

Title III prohibits discrimination on the basis of disability by twelve categories of private entities that provide public accommodations. One of these twelve categories is places of education. Thus, private colleges and universities are subject to Title III mandates. Although private entities are not subject to an additional self-evaluation mandate (beyond what they may have already done pursuant to Section 504), they are required to remove barriers to the extent it is readily achievable to do so. The term readily achievable is defined as "without much difficulty or expense."

There are several examples of when both Title II and Title III (as well as Section 504) probably apply. A private bookstore or fast food vendor that is given a contract to operate out of a student union building on a public university campus is one such instance. The pizza vendor is obligated under Title III to ensure nondiscrimination and accessibility, but the university is obligated under Title II to ensure that private vendors operating on its campus meet Title II mandates. Another example would involve activities held off campus. Where a public university holds an alumni function at a private club or hotel or holds athletic events at private facilities, both Title II and Title III come into play. Universities are increasingly facilitating alumni travel such as river cruises. The specifics of what will be required in various cases will be addressed in some of the decisions discussed and included in the remaining portion of this chapter.

Chapter 2 provided a detailed overview of who is covered under the statutes, including the 2008 amendments that ensure broader coverage. Many of these cases in this chapter on higher education were decided before the 1999 Supreme Court decisions that narrowed the definition, so coverage is not an issue. Rather, the courts focused on the substantive requirements of qualifications and accommodations. In reading these cases, however, it is worth noting whether the individual would be covered applying current definitional standards. "Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." Major bodily functions also include but are not limited to "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C. §12102(2). Transitory and minor conditions are not covered. Mitigating measures are not to be considered in deciding whether a person is substantially limited in a major life activity.

A comprehensive overview of the application of the ADA in higher education can be found at Laura Rothstein, *The Americans with Disabilities Act and Higher Education 25 Years Later: An Update on the History and Current Disability Discrimination Issues for Higher Education*, 41

JOURNAL OF COLLEGE & UNIVERSITY LAW 531–590 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629306.

C. Admissions

The first step in entering an institution of higher education is the admissions process. At this stage, there are several issues that arise with respect to ensuring that an applicant is not discriminated against on the basis of disability under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act. These issues include how and whether an institution may identify an applicant as having a disability and whether certain criteria may have the effect of being discriminatory at this stage of the process.

Hypothetical Problem 6.1

Samantha has applied to a relatively competitive public law school, Springfield Law School. She has taken the LSAT without accommodations and scored in the 70th percentile. The law school's median LSAT is in the 75th percentile. During her first two years at College A, an elite private college, she did not do well. Her boyfriend broke up with her, she stopped attending classes, and she was dismissed from college because of her grades.

She has a supportive family, and they had her evaluated by the family physician, who referred her to a psychiatrist. After she was diagnosed with depression, she began medication and was able to re-enroll at a different college (College B) (for two years during which she did volunteer work at a food bank and worked part time at the library). Her physician had prescribed an effective medication regimen, which caused side effects of drowsiness in the morning. Samantha was careful to schedule afternoon only classes, to be sure she was alert. She became involved in extracurricular activities, served in leadership positions in some service organizations, and received excellent grades. Her GPA from College A was a 1.50 and her GPA from College B was a 3.95. Her cumulative GPA was 2.7. The median GPA for the students admitted to Springfield Law School is 3.25.

Springfield Law School's application form includes the following request for information in the section requesting a resume and a personal statement. “You are encouraged to identify hardships that you may have overcome. If these hardships relate to a disability or illness (that affected your academic or other performance), you are encouraged to provide the documentation relating to these conditions.” Samantha does not want to share the information about her depression and treatment, although she believes that it not only affected her grades at College A, but the side effects of the medication made it difficult for her to take the LSAT, which was given in the morning. She has heard that Springfield Law School considers all factors in the application and believes that her strong performance and activities record at College B will compensate for the deficiencies. She decides not to discuss any of this in her application.

In May, Samantha receives a rejection letter from Springfield Law School. At this point, she decides to submit a request for reconsideration, in which she includes the background information about her depression, the medication, and her performance. The law school admissions dean and admissions committee is now considering this request. What must/should the admissions office do in response? What are Samantha's options if they deny a reconsideration or upon reconsidering, still deny the admission.

In reviewing this hypothetical while reading the cases and materials in this section, consider whether it matters that she is applying to law school instead of undergraduate school or medical school.

[1] Determining Qualifications

The admissions process for most institutions of higher education usually involves submitting an application which includes information about previous academic work, extracurricular activities, work experience, and other background information to assist decisionmakers in deciding why to select one applicant over another. Such applications almost always require a submission of letters of recommendation, official transcripts of prior academic work, and submission of scores received on the appropriate standardized test.

There are various aspects of this process that raise potential concerns under Section 504 of the Rehabilitation and/or the Americans with Disabilities Act. These include whether and when preadmissions inquiries can be made and the criteria that may be used to determine whether a student is otherwise qualified for the academic program. The criteria issue includes whether it is permissible to use standardized test scores, whether entities administering these tests must provide reasonable accommodations, and how such test scores must be evaluated. See also *Bowers v. NCAA*, 974 F. Supp. 459 (D.N.J. 1997), for a discussion of the NCAA bylaws and reasonable accommodations to standardized test scores and other factors affecting the eligibility of athletes with learning disabilities.

The first case addresses several of these issues. In addition, it provides an historical perspective on the development of the "otherwise qualified" requirement under Section 504 of the Rehabilitation Act. The *Southeastern Community College v. Davis* decision in Chapter 2, *supra*, should be reviewed at this point. That decision established that for purposes of Section 504, a determination of whether an individual is "otherwise qualified" requires that the person be one who is able to meet all of the program's requirements in spite of the disability. Reference to this decision is included in many of the case excerpts that follow. See also LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §§3:4–3:6 (2012 and cumulative supplement); Laura Rothstein, *The Story of* Southeastern Community College v. Davis: *The Prequel to the Television Series "ER,"* Chapter 7 of Education Stories (2008) (discussing the impact of the *Davis* decision on higher education and students with disabilities).

The following cases involve admissions decisions for different types of programs by students with different types of impairments—college (*Halasz*/learning disability) and a medical residency program (*Pushkin*/multiple sclerosis). These differences should be kept in mind in comparing the cases and in deciding how they might resolve Samantha's situation.

Halasz v. University of New England

816 F. Supp. 37 (D. Me. 1993)

GENE CARTER, CHIEF JUDGE:

I.

The undisputed facts as set forth in Defendant's statement of material facts and supported by the record are as follow. The University of New England is a private college in Biddeford. Its catalog for 1990–91 stated its policy that "no discrimination on the grounds of ... handicap, ... will exist in any area." Admission to the college is competitive, based upon, inter alia, the applicant's course of study in high school, grades and class standing, written recommendations and scores obtained on standardized college aptitude tests. At the time Plaintiff applied, the university had separate admissions criteria for transfer students. Students with a grade point average of at least 2.5 were considered for, but not guaranteed, admission. Those with averages below 2.5 might be considered, but it would have been a rare exception for a transfer applicant with an average below 2.0 to be admitted.

At the time Plaintiff applied, U.N.E. also ran programs for students with learning disabilities. For example, students who qualified for admission to the university could also participate in the Individual Learning Program (ILP), which offers specific support services appropriate for the learning

disabled in a university setting. These services include access to taped textbooks/readers, proctors/readers for untimed exams, diagnostic testing, and supervision and counseling by a learning specialist.

A second program, called First Year Option (FYO), was for learning disabled students who did not have the academic credentials necessary for admission to the degree programs. The FYO program was designed to provide those students with an integration/transition period during which they could, in an unmatriculated status, take one or two degree courses per semester while receiving the same support services for their learning disabilities that are available to students in the ILP.

Students who completed the FYO program could apply for regular admission to U.N.E. Their admission was based on their academic and social adjustment during the FYO program. Only FYO students with a cumulative grade point average of at least 2.0 for "two consecutive regular semesters, i.e. fall and spring or spring and fall," were recommended for regular admission.

Plaintiff applied to U.N.E. seeking admission in January 1991 as a transfer student. His high school record contained many failures and D grades. His cumulative grade point average from three previously attended colleges in New York was 1.98 (out of 4.0). Moreover, he had been required to withdraw from the State University of New York at Fredonia for academic reasons. The admissions officers at U.N.E. had doubts about his ability to adjust to college pressures given his inability to complete any program at the three previous academic institutions. In both timed and untimed reading tests, Plaintiff got the lowest possible score. On the Scholastic Aptitude Test, which Plaintiff had taken in a timed setting, his scores were also very low. An experienced UNE admissions officer avers that during her tenure the University has never accepted an applicant with academic credentials as poor as those of Plaintiff.

Plaintiff suffers from a learning disability and Tourette's Syndrome. He initially called U.N.E. because he was interested in its program for the learning disabled. In the call he stated he was learning disabled. With his application, he also wrote a letter to the Director of the ILP, stating that his transcripts and test scores did not reflect his abilities because of lack of understanding and accommodation for his disabilities by his former teachers and testers. Based on his academic record, Plaintiff was considered unqualified for admission to U.N.E. as a regular transfer student. He was, however, admitted to the FYO.

Plaintiff enrolled in two college level courses, Psychology I and Human Development I, in his first semester, as well as in several non-college-level remedial courses. He was assigned tutors in both courses, but dropped Psychology very early in the semester. He requested that he be provided with a notetaker as well as a tutor for Human Development, but his ILP learning specialist refused, believing it better to evaluate Plaintiff's own capabilities in that regard before concluding such services were necessary. Plaintiff's grade in Human Development was a C-, giving him a GPA of 1.75 after the first semester.

In his second FYO semester, Plaintiff again enrolled in two college level courses. Although advised to drop one of the courses because of his struggles the previous semester, he declined to do so during the add/drop period. Ultimately, however, he withdrew from one of the courses. He earned a D in the course he finished, giving him a cumulative G.P.A. at the end of his second semester of 1.375.

Plaintiff was offered the same services which had successfully helped other FYO students qualify for regular admission at U.N.E. He received advising from an ILP specialist at least weekly. He had peer tutors, some taped texts, proctored, untimed testing, oral testing, and readers for some of his classes. He also had remedial courses, as well as access to a writing specialist at times during both semesters and to a reading specialist in the fall semester.

ILP and FYO participants are assessed a fee for services provided exclusively to them. The fee varies depending on use of the services. The highest use fee in 1990–91 was $1450. The next year it was $1550. Regularly admitted U.N.E. students taking twelve credit hours per semester were charged

$362.50 per credit hour. An FYO student taking a similar load, but including only one or two college level classes and some remedial courses, was charged $145 per credit hour plus the applicable ILP fees.

II.

A. *Count I*

Plaintiff alleges in Count I that Defendant twice discriminated against him on the basis of his handicap: first when it denied him regular admission to its undergraduate program, and again when it denied him admission to the regular program after completion of the FYO program. Plaintiff alleges that he should not have been placed in the FYO program because he met the requirements for admission of transfer students despite his disability.

The undisputed facts submitted by Defendant show that Plaintiff was not academically qualified for admission to U.N.E. as a transfer student. The admissions officer at U.N.E. avers that it would have been a rare exception for a transfer student with a cumulative GPA of less than 2.0 to be admitted. Plaintiff had a cumulative GPA of 1.98 at the other institutions at which he had studied. The other indicia of Plaintiff's academic potential which were available to the admissions office at the time he applied did not mark him as the "rare exception" who would be academically qualified for the U.N.E. program despite a low grade point average.

Plaintiff's SAT scores were "very low," as described both by him and Defendant's admissions officer. Although in his application materials Plaintiff sought to explain these low scores by the fact that he had not taken the test untimed,[1] on both timed and untimed diagnostic reading comprehension tests, Plaintiff scored in the first percentile, the lowest possible score. Moreover, Plaintiff had never completed any of the programs at the schools in which he had previously been enrolled, even though, as shown in his essay in support of his application, one of them was a special program for learning disabled students. His better grades in those programs were generally in non-academic subjects while he failed or withdrew from many of his academic college courses. Plaintiff does not dispute Ms. Cribby's statement that during her tenure at U.N.E., no student with academic credentials as poor as Plaintiff's was ever accepted as a transfer student.

The record shows that UNE does not discriminate in its admissions process against students with learning disabilities. It regularly evaluates and admits learning disabled students to its baccalaureate program. Some of these students, who demonstrate in the admissions process that they are academically qualified for UNE, are admitted without condition and some on the condition that they participate in the ILP, which is designed "to promote and enhance learning disabled students' independent and successful academic functioning as quickly as possible." Some of the learning disabled students admitted without condition also choose to participate in the ILP. UNE's admissions policy, therefore, accommodates for learning disabled students who are not already functioning independently and successfully in an academic setting. In considering Plaintiff for admission, UNE used not only its regular criteria, but also untimed tests and performance in previous special programs for the learning disabled. The record shows that UNE made reasonable accommodations in its admissions process for learning disabled students like Plaintiff.

Along with the materials required for his application, Plaintiff submitted a letter telling the UNE admission officers not to consider his grades at previous institutions or his bad standardized test scores because they were not representative of his abilities. Rather he sought to be allowed to enroll at UNE "and prove that I can do the work." Plaintiff, therefore, sought to have UNE abandon all criteria for admissions. Section 504 clearly does not require that an educational institution lower its admissions standards to accommodate the handicapped.

In *Alexander v. Choate*, 469 U.S. 287, 301, 105 S. Ct. 712, 720, 83 L. Ed. 2d 661 (1985), the Supreme Court articulated the reasonable accommodation requirement under section 504:

> The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.

Here the benefit sought by Plaintiff is admission to Defendant's regular baccalaureate program. Defendant has provided meaningful access to the benefit for learning disabled students like Plaintiff. Plaintiff is not "otherwise qualified" for admission to UNE and is not, therefore, entitled to relief under section 504.

U.N.E. has submitted undisputed facts that its officials provided even further accommodation to learning disabled students who have not shown themselves to be qualified for regular admission to the baccalaureate program. The FYO program, which provides services, support, and remedial attention to students like Plaintiff, allows them the opportunity to be regularly matriculated upon successful completion of two semesters of the FYO program. Earning a GPA of 2.0 or better in a reduced load of college-level courses and obtaining the recommendation of the faculty demonstrates a disabled student's capabilities after accommodation has been made for his or her disabilities.

In Count I Plaintiff also alleges that after his participation in the FYO program, Defendant did not allow him to matriculate in the baccalaureate program and dismissed him on the basis of higher academic standards than those imposed on nonhandicapped students. The undisputed facts submitted by Defendant show that matriculation into the regular program from the FYO program required a GPA of 2.0 over two consecutive regular semesters, while regularly matriculated students were required to maintain only a GPA of 1.7 to remain in good academic standing. For regularly matriculated students, grades from the short winter term were considered in determining the GPA, while they were not considered for purposes of determining if FYO students could matriculate.

The undisputed facts also show a rationally justifiable academic reason for these distinctions. In her affidavit, U.N.E. admissions officer Patricia Cribby stated:

> The purpose of the FYO program was to provide an opportunity for non-qualified learning disabled applicants to become qualified for matriculated status at U.N.E. By contrast, matriculated students have already demonstrated through the initial admission process that they are qualified for admission and that they possess the academic abilities and other relevant qualifications for successful participation in U.N.E.'s baccalaureate program. Whereas FYO students generally take only three college-level credit hours per semester, matriculated students generally take twelve to eighteen college-level credit hours per semester.

Thus, Defendant requires a higher grade point average for the FYO students who are taking fewer courses to make sure that they are qualified for the regular program which will require them to take many more college level courses and course hours per semester. Were the GPA requirement not higher for the FYO students, Defendant would have run the risk of lowering academic standards in the regular program by admitting students who would not be able to cope when faced with the necessity of taking a full load of college-level courses. The record discloses, however, that even if Plaintiff had only been required to maintain a 1.7 GPA, he would have failed to meet it with his GPA of 1.375.

Ms. Cribby's affidavit also discloses a rationally justifiable pedagogical basis for the decision to exclude winter term courses from the calculation of FYO students' GPAs while including them to determine the academic standing of regularly matriculated students. First, the winter term courses vary greatly in the level of difficulty and the intensity of the required study. Defendant looks to the success of the FYO students in their college level courses, while they are receiving special assistance for their disabilities, to predict whether they will be successful students in the baccalaureate program if provided with adequate support. Courses that are not necessarily comparable to the majority of courses in the curriculum cannot have that predictive value. The winter term is part of the regular

curriculum, however, and its courses are used to evaluate regularly matriculated students who, in contrast to FYO students, have previously demonstrated academic qualification for U.N.E. admission.

Plaintiff complains that the accommodations made for him in the FYO program were not adequate and that he would have been more successful in the program with better accommodations. For example, he argues that he requested the assistance of notetakers, but that his request was resisted by UNE. He also complains that the academic counseling he received from his learning specialist was inadequate, that he was provided with inadequate readers in lieu of taped texts and that his tutors were of poor quality.

The undisputed facts show that Plaintiff was offered the same wide array of accommodations which had been offered previously to other learning disabled students in the FYO program and which had enabled them to matriculate successfully in the baccalaureate program at the end of the year. Although the regulations promulgated under section 504 require academic institutions to provide auxiliary aids to handicapped students, Plaintiff was not entitled to "devices or services of a personal nature." The Court finds, therefore, that even after reasonable accommodation was made for Plaintiff's handicaps, he was not "otherwise qualified" for admission to UNE's baccalaureate program, and the university did not discriminate against him by dismissing him after his FYO year. Summary judgment is, therefore, appropriate for Defendant on Count I.

Plaintiff also complains that UNE violated 34 C.F.R. §104.42(b)(4) which provides that in administering its admissions policies, a recipient of federal financial aid "may not make preadmission inquiry as to whether an applicant for admission is a handicapped person, but after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation." In this case, the record discloses that Plaintiff called UNE precisely because it had a program for the learning disabled and that in his initial contact with the university, he inquired about the ILP program and volunteered information about his handicap. Plaintiff argues that these facts in no way affect Defendant's obligation not to inquire about his handicap. That position is untenable.

UNE's application form does not require a handicapped applicant to disclose his or her handicap. If the applicant wishes to be considered for UNE's ILP program, which is available only to the learning disabled, he or she may indicate that on the form. As discussed above, not all learning disabled students at UNE participate in the ILP.

When a university operates a program specifically for the handicapped, it clearly needs to know about an applicant's handicaps before it can make a decision about admission to the program, for the program may be appropriate for some handicapped individuals and not for others. Section 504 is designed in part to assure that handicapped applicants and students are not, because of their handicaps, denied the benefits of programs offered by federally subsidized universities to nonhandicapped students. None of the purposes of the statute would be served by enforcing the inquiry prohibition when a university offers a program available only to handicapped students and a handicapped person seeks to participate in that program.

Here, Plaintiff did not check the ILP box on the application form. His telephone inquiry, voluntary provision of information about his handicap, and letter seeking recognition of his handicapped status, however, made it clear that he was interested in UNE's special program for the learning disabled. Certainly, UNE could only tell if Plaintiff could benefit from the ILP or FYO programs for the learning disabled by seeking information about his handicaps. The Court finds, therefore, that under the circumstances presented here UNE did not violate the above-cited regulation by requiring Plaintiff to provide information about his handicaps before being admitted to the FYO program.

The *Halasz* decision discusses the preadmissions inquiry prohibition. As the court notes, generally preadmission inquiries are prohibited except in unusual circumstances where the presence of the

disability as eligibility for a program or an accommodation is at issue. The following case raises an issue that may arise in higher education admissions programs where an interview is a required aspect for the admissions process. This seems to be particularly true in admission to medical school and other health professional programs. It should be recalled that in the *Southeastern* case the hearing impairment of Ms. Davis was identified by Southeastern Community College in her admissions interview.

The following decision is a rare example of a situation where the stated reasons for the denial of admission are clearly related directly to the disability. It is also unusual for its result. In most cases, institutions of higher education (especially health care professional programs) are given substantial deference and their decisions are upheld by the courts. This is one of the earlier appellate decisions applying the Rehabilitation Act. The decision would probably be the same if this were an ADA claim.

Pushkin v. Regents of the University of Colorado

658 F.2d 1372 (10th Cir. 1981)

WILLIAM E. DOYLE, CIRCUIT JUDGE:

Dr. Pushkin is a medical doctor who alleges that the University of Colorado wrongfully denied him admittance to the Psychiatric Residency Program because he suffers from multiple sclerosis. As a result of this disease Dr. Pushkin is confined to a wheelchair, and is disabled in his abilities to walk and to write.

What is the Proper Standard of Review?

The standards for determining the merits of a case under §504 are contained in the statute. First, the statute provides that the individual in question must be an "otherwise qualified handicapped individual;" second, the statute provides that a qualified handicapped individual may not be denied admission to any program or activity or denied the benefits of any program or activity receiving federal financial assistance "solely" on the basis of handicap. To ask the court to defer to admissions decisions of a recipient of federal financial assistance whenever such a decision is rationally related to legitimate government needs is to ask the court to ignore the plain statutory language of §504. To approach §504 in such a manner, that is by applying the rational basis test, would be to reduce that statute to nothingness, which should always be avoided.

[T]he Supreme Court [has] rejected the argument that admissions decisions of universities should not be subjected to judicial scrutiny. To limit judicial scrutiny of university admissions decisions solely to the rational basis test where §504 is involved would be to ignore the standards set forth in §504 and would eliminate judicial scrutiny altogether under the statute. It is, of course, understandable why the University seeks such a soft test. We conclude that the University is not entitled to ignore the statute and focus on equal protection principles, and to have us adopt, in addition, the least demanding of the equal protection tests; one which is at odds with §504.

The University's argument that discrimination may not be found under §504 in the absence of recognized discriminatory intent also fails.... [T]he statute itself does not contemplate either a disparate treatment or a disparate impact analysis.

We repeat what we said before and that is that §504 sets forth its own criteria for scrutinizing claims under that statute. First, the individual is required to show that he is otherwise qualified for the position sought; second, the individual must show that even though he is otherwise qualified, he was rejected for the position solely on the basis of his handicap. The two factors are interrelated, since if the individual is not otherwise qualified he cannot be said to have been rejected solely because of his handicap.

In *Southeastern Community College v. Davis*, ... the Supreme Court considered the express statutory language of §504 to solve the problem. Under *Davis* the first test applied was whether the

individual in question was qualified for the position sought in spite of his handicap. If the plaintiff's handicap would preclude him from doing the job in question, the plaintiff cannot be found to be otherwise qualified. If the handicap would not preclude the individual from performing the job in question, however, and the plaintiff has met all other qualifications for the position in question, the plaintiff cannot be rejected from the program solely on the basis of his handicap. The record is clear that Dr. Pushkin established that he had the necessary ability despite his handicap. The examining committee, however, focused on the handicap continuously in connection with determining whether to admit him to the residency program. It emphasized factors such as the effect of the handicap on patients and the resulting effect on Dr. Pushkin. Thus, the issue is not merely whether the handicap played a prominent part in his rejection, as in cases dealing with alleged discrimination on the basis of race, for example (where race is never expressly mentioned as a consideration), the issue is whether rejecting Dr. Pushkin after expressly weighing the implication of his handicap was justified. The question is whether Dr. Pushkin was qualified for admission to the residency program in spite of his handicap, so that he was wrongfully rejected from the program on the basis of that handicap, or whether Dr. Pushkin's handicap would preclude him from carrying out the responsibilities involved in the residency program and future patient care, so that the University rightfully excluded him from the program after weighing the implications of his disability.

The trial judge quotes in his findings that an interrogatory was submitted by counsel for Dr. Pushkin requesting the defendants to state every reason why the application of plaintiff for the position of psychiatric resident in any defendant institution was rejected and every reason why he was not appointed to said position. The response to that interrogatory was “the plaintiff was not admitted into the ‘psychiatric resident, R II program,’ because plaintiff's interview mean ratings, based upon plaintiff's four interviews with faculty members of the University of Colorado Psychiatric Hospital, was far below the level of any other person accepted into the program.”

The trial court's findings go on to say that the mean interview ratings as a general practice are not necessarily controlling in the selection process. Moreover, in a specific reference to Dr. Pushkin, Dr. Carter stated that “the numbers,” i.e. the mean interview ratings, did not dispose of his application. Dr. Pushkin was never told that his mean interview rating was the reason for his rejection. However, even if the mean interview ratings were the reason for his rejection, that is like saying that he was rejected because he was rejected. In other words the interrogatories should have detailed his insufficiencies in specific terms at the very least. The court also found that the narrative contained on each interviewer's report explains the reasons for the rating on the prediction scale. Each instance shows that the interviewer's rating was inextricably involved with Dr. Pushkin's handicap and by the interviewer's perception of the problems the handicap would create. It is not possible to extricate ratings from the reactions to the handicap itself. The court finally noted that neither Pushkin nor his wife were ever given a reason for his rejection from the program other than that specified by Dr. Carter that Pushkin was rejected because of his handicap. They were left to draw inferences in their conversations with Dr. Carter and the only inference to be drawn by each from the statements made and the absence of other statements being made was that the handicap itself was the reason for the rejection.

The record is replete with testimony dealing with the inability of Dr. Pushkin to serve in the residency program based upon his handicap. These observations of the members of the panel are not predicated on any known deficiency of Dr. Pushkin himself, but rather these are reasons that are based upon the examiners' general knowledge of multiple sclerosis and their concern for psychologic reactions of the patient and in turn the doctor, as a result of his being in a wheelchair. The trial court concluded that the evidence in the case clearly established that these general reasons did not apply with regard to Dr. Pushkin, but that Dr. Pushkin was an otherwise qualified handicapped individual who was wrongfully, by sole reason of his handicap, excluded from participation in or denied the benefits of or subjected to discrimination under a program or activity receiving federal financial

assistance.

It would be neither correct nor right, under the circumstances presented, to analyze this case in accord with a strict disparate treatment test.... Instead, our approach to the case is fully in harmony with the statute, §504, as the same has been construed by the Supreme Court in *Southeastern Community College v. Davis*.... We believe that the appropriate standards to be gleaned from the court's opinion are the following:

> 1) The plaintiff must establish a prima facie case by showing that he was an otherwise qualified handicapped person apart from his handicap, and was rejected under circumstances which gave rise to the inference that his rejection was based solely on his handicap;
>
> 2) Once plaintiff establishes his prima facie case, defendants have the burden of going forward and proving that plaintiff was not an otherwise qualified handicapped person, that is one who is able to meet all of the program's requirements in spite of his handicap, or that his rejection from the program was for reasons other than his handicap;
>
> 3) The plaintiff then has the burden of going forward with rebuttal evidence showing that the defendants' reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself.

The Final Analysis

Unquestionably plaintiff has established a prima facie case by showing that he is a handicapped person who is qualified for the residency program apart from his handicap and that he was rejected from the program under circumstances which support a finding that his rejection was based solely on his handicap. As to his qualifications, plaintiff met the requisite academic standards of the program in that he held an M.D. degree and had obtained a satisfactory “dean's letter.” Plaintiff also presented a letter from Dr. Wong, his supervisor during one year of residency in psychiatry at the Menninger Foundation in Topeka, Kansas. [Substance of letter omitted.]

The position of the University is that Dr. Pushkin was denied admittance to the residency program on the basis of the interview reports of four members of the program faculty. Dr. Pushkin's mean interview ratings, when computed by scores granted by the four interviewers, were held to be too low. In addition to the grades given by the interviewers each made comments expressing their views about Pushkin's capabilities. [Observations of four faculty members omitted.]

We next consider the reasons articulated by the University at trial for the plaintiff's rejection.

Dr. Barchilon testified that he viewed Pushkin as an ill person, rather than a handicapped one, since a handicapped person is “stabilized” in that his defect is predictable and can be accounted for, while a sick person is not stabilized. [Substance of this testimony omitted.]

The Pushkins, husband and wife, testified as to what Dr. Carter had told them, which was that Dr. Pushkin had been rejected from the program because of his handicap. According to Dr. and Mrs. Pushkin, Dr. Carter had told them that Pushkin's multiple sclerosis would prevent him from relating well with his patients, and would prevent the patients from relating well to Dr. Pushkin. Mrs. Pushkin also stated that Dr. Carter had told her that Dr. Pushkin might miss work due to hospitalization for his illness, and that would leave his patients without a doctor. Regarding this, both Doctor and Mrs. Pushkin testified that Dr. Pushkin's multiple sclerosis allowed his episodes of hospitalization to be planned in advance, similar to the way vacations were planned in advance by other doctors, and that Dr. Pushkin had always arranged for other doctors to care for his patients when he was hospitalized, just as most doctors arrange for others to care for their patients when they are on vacation. Dr. and Mrs. Pushkin further noted that Dr. Pushkin did not tell his patients he would be hospitalized, any more than other doctors told their patients where they were going on vacation, so that the patients would not be unduly burdened by such information.

There was testimony also from Dr. Gordon Farley, Dr. Pushkin's psychiatrist and a psychiatrist at the University of Colorado Health Center. [The substance of this testimony omitted. It was favorable to Dr. Pushkin.] According to Dr. Farley, Dr. Pushkin would make an "exceptional" psychiatrist.

The reports of the interviewers and the testimony of the other witnesses indicates that on the basis of 45 minute interviews and discussions by some of the interviewers with Dr. Bernstein, the admissions committee made certain assumptions regarding his handicap, such as:

> 1) That Dr. Pushkin was angry and so emotionally upset due to his MS that he would be unable to do an effective job as a psychiatrist; and
>
> 2) That Dr. Pushkin's MS and use of steroids had led to difficulties with mentation, delirium and disturbed sensorium; and
>
> 3) That Dr. Pushkin would be unable to handle the work involved in the residency because of his MS; and
>
> 4) That Dr. Pushkin would miss too much time away from his patients whereby they would suffer.

The testimony of the Pushkins and Dr. Farley and the letter from Dr. Wong rebut all these assumptions. Dr. Farley, who actually counseled Dr. Pushkin, and has done so for over a long period of time and was not merely reaching conclusions on the basis of his observations in the interview, stated that after four years of observing Pushkin closely he could not agree that any of the assumptions made by the admissions committee regarding MS applied to Dr. Pushkin.

It is within the power of the trier of the facts, here the trial court, to weigh the evidence and to determine the credibility of the witnesses. The trial judge found that the assumptions made by the admissions committee were rebutted by other evidence, and thus Dr. Pushkin could not be held to be unqualified due to his handicap. When the trial court's decision is supported by substantial evidence in the record, we are not free to reverse that decision. It boils down to that factor. We fully understand also why the trial court would find that the evidence on behalf of Pushkin was the more persuasive. In short, in the absence of a clearly erroneous decision by the trial court, this court is not going to substitute its judgment for that of the trial court.

It is argued that the judgment of Dr. Farley may not be used as a substitute for the judgment of the admissions committee, who are solely responsible for admissions decisions. We do not disagree with this but feel that the defendants' argument misses the point. The trial court did not substitute Dr. Farley's judgment for that of the admissions committee. That witness was offered to rebut the University's articulated reasons for maintaining that Dr. Pushkin was not qualified for the program despite his handicap. The witnesses on behalf of the University, and the reports of the interviewers, alleged that Dr. Pushkin's handicap would preclude him from doing a good job as a psychiatrist. Thus Dr. Farley was offered as a witness to show that, after four years of observing Dr. Pushkin, he believed the University's assumptions to be based on incorrect factual premises. We see no more effective way for Dr. Pushkin to rebut the University's assumptions or unduly restrictive beliefs as to Dr. Pushkin's capabilities when considered in relation to multiple sclerosis. To preclude this kind of evidence would be to preclude individual plaintiffs from ever rebutting the reasons articulated by a defendant for the actions which it has taken. Indeed it would preclude relief under §504.

An attempt was made by some of the interviewers to say that Dr. Pushkin was not rejected solely because of his handicap, but that he would have been rejected anyway even if he had not been handicapped. The trial court found that this evidence was overshadowed by the contrary evidence, including the interviewers reports, showing that Pushkin was rejected from the residency program solely on the basis of his handicap. The record fully supports the trial court's decision that their conclusions at the interview were centered on the multiple sclerosis. It was only when the interviews reached the trial stage that they sought to expand their reasoning.

Dr. Barchilon testified that Dr. Pushkin was not of the caliber of people usually interviewed for the residency program and that Dr. Pushkin overidentified with his patients. However, Dr. Barchilon testified that he had not communicated any of those thoughts to any of the committee members prior to the time the decision to reject Dr. Pushkin was made. That doctor further testified that on the basis of such a brief interview of Dr. Pushkin, his assessment was merely an "educated guess." ...

Dr. Scully also stated at trial that Dr. Pushkin was not of the caliber of residents usually admitted to the program. This is in conflict with the testimony of Dr. Bernstein, who indicated that Dr. Scully was primarily concerned with the fact that Dr. Pushkin had MS. Moreover, Dr. Scully's testimony indicated uncertainty as to factors other than MS causing Dr. Pushkin's rejection, since he stated further that he thought Dr. Pushkin "had more issues going on than his MS or whatever; I wasn't quite sure."

In addition, Dr. Weissberg stated that Dr. Pushkin was not up to the usual quality of applicants to the program. He also stated, however, that he had not made that observation in his interview report.

As noted before, however, the trial court weighed the credibility of the conflicting evidence and rejected the after the fact testimony that Dr. Pushkin was not qualified for the program apart from his handicap. We are disinclined to substitute our judgment for that of the trial court, since that court's conclusion is supported by the record. We have evaluated the evidence and considered the findings and have approved the trial court's action. The conclusions of the examining board rest on psychologic theory. Our reaction is that these are weak and inadequate threads where, as here, the entire future of the plaintiff is at stake. We also hold that he applied the proper tests in determining whether defendants' articulated reasons for finding Dr. Pushkin unqualified on the basis of his handicap were legitimate or whether those reasons were based upon incorrect assumptions or inadequate factual grounds. Based upon the weighing of all the evidence the trial court held that the latter applied and since the decision is supported by the record, this court cannot reach its own factual conclusion and determine otherwise.

Viewing the record as a whole we conclude that the judgment of the district court is affirmed.

The previous decision might also have involved whether Dr. Pushkin was "regarded as" having a disability. The 2008 ADA Amendments provide the following: "An individual meets the requirement of 'being regarded as having such an impairment' if the individual ... has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. §12102(3). The Amendments further clarify, however, that programs are not required to provide reasonable accommodations where the individual is covered only under this definition. 42 U.S.C. §12201(h). Dr. Pushkin might have required reasonable scheduling accommodations for hospitalizations. Would he have been entitled to request these if his condition only met the "regarded as" prong? It is also noteworthy that the symptoms of MS might be episodic, but the 2008 ADA amendments clarify that impairments that are episodic or in remission are disabilities if they would substantially limit a major life activity when active. 42 U.S.C. §12102(4)(D).

A 1996 Ohio Supreme Court decision addressed whether an applicant to medical school who is blind is otherwise qualified for admission. The court in *Ohio Civil Rights Commission v. Case Western Reserve University,* 76 Ohio St. 3d 168, 666 N.E. 2d 1376 (1996), held that she was not. In its lengthy decision, the court referenced the Association of American Medical Colleges technical standards. Although Ms. Fischer apparently had the necessary academic credentials and letters of recommendation, and did make it to the interview process, the interviewers determined that she would not be able to complete courses that required observation and identification of tissues and organ structures. In addition, she would not be able to complete the third and fourth year clerkships that required drawing blood, reacting in emergencies, and reading X-rays and EKGs. The committee

considered whether an intermediary could assist, but because of the extra time not available in an emergency, determined that this would not be a reasonable accommodation. The court further discussed a decision by Temple University fifteen years before Ms. Fischer applied to admit a blind student. It discussed in detail the accommodations that had been provided and noted that at least some of them had required "the willingness of the faculty and other students to spend the extra time describing and sharing information with [the student.]"

In reading case decisions involving visual impairments, keep in mind the 2008 ADA amendments relating to eyeglasses and vision. While the amendments generally prohibit considering ameliorative effects of mitigating measures in determining disability, they allow for considering the ameliorative effect of mitigating measures of "ordinary eyeglasses or contact lenses in determining whether there is a substantial limitation." 42 U.S.C. §12102(4)(E)(iii). The amendments prohibit covered entities, however, from using qualification standards or selection criteria that are based on uncorrected vision unless these are job-related and consistent with business necessity. 42 U.S.C. §12113(c). It is not clear if this clarification applies only to employment. If not, a medical school or other program could have qualification standards related to vision that might screen out individuals with visual impairments, but the program would have to demonstrate that the requirement was necessary. Even if proof of job-relatedness and consistency with business necessity is not required in the education context for students, it should apply in that context for employees of the medical school, such as professors.

The *Halasz*, *Pushkin*, *Case Western,* and *Southeastern Community College* decisions have all raised issues of whether the applicant meets the qualifications essential to the program. Higher education institutions are not required to waive fundamental requirements for admission, and they are given substantial deference in setting those criteria. Fundamental requirements relate not only to academic ability, but also to physical qualifications in some cases. Concerns about safety and health of the applicant and others are raised in some cases. Character and conduct can also be relevant for professional programs such as law school.

Notes

1. *Conditional Admission:* The case of *Crancer v. Board of Regents*, 156 Mich. App. 790, 402 N.W.2d 90 (1986), involved an unusual request for accommodation under state law in the admission process. The claimant sought admission into the University of Michigan Doctoral Program of English Language and Literature. Because of her condition of Post Traumatic Stress Disorder, she requested that she be admitted conditioned on receiving certain level of performance in her master's program. She argued that the conditional admission would relieve the stress so that she would perform at a better level in the master's program. The court rejected this claim giving judicial deference to the university's evaluation standards.

2. *Changing the Requirements:* What happens when an institution admits a student under one set of criteria, and then changes the requirements for completion of the program while the student is enrolled? This was the situation in *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988), a case brought under Section 504. A student with retinitis pigmentosa and an associated neurological condition affecting his vision was admitted into a program of optometry. While he was in his first year of the program, the college established a new requirement requiring visual ability to perform certain techniques that had become part of the professional expectation for practice. Because the student could not perform these techniques due to his visual impairment, he was unable to complete the program. His request for accommodation of waiving this requirement was denied by the college, and subsequently by the court. It was determined that "An educational institution is not required to accommodate ... by eliminating a course requirement which is reasonably necessary to proper use of the degree conferred at the end of a course of study." Perhaps key to the court's decision

was that this profession involves the health and safety of others. In cases such as this, courts generally give substantial deference to the health care professional organization. Text above highlights the 2008 ADA amendments as they relate to vision criteria. Does this make the result in *Doherty* even more valid?

3. *Discriminatory Intent:* In *Wood v. President & Trustees of Spring Hill College*, 978 F.2d 1214 (11th Cir. 1992), the college requested that a student who was already enrolled defer her admission when it learned that a mistake had been made in her admission. She did not have the requisite grades for admission as a freshman or as a transfer student. The discovery only occurred after the father of her roommate "called the school demanding that his daughter not be assigned to live with a schizophrenic." The plaintiff claimed that after the college learned of her condition, she was treated in such a hostile manner that she withdrew, and that this was a "constructive dismissal." The court disagreed and held that the actions of the college did not amount to intentional discrimination under Section 504. The case is instructive on the importance of developing good practices and procedures in dealing with students with mental health problems.

4. *Tort and Contract Theories in Disability Discrimination Cases.* Before the passage of the ADA, a private college not receiving federal financial assistance would not have been subject to the mandates of Section 504 of the Rehabilitation Act. Thus, an individual with a disability who believed there had been unfair treatment might have to resort to other theories to redress this treatment. One such case is *Russell v. Salve Regina College*, 890 F.2d 484 (1st Cir. 1989). The student was an extremely overweight woman in a nursing program at a private college. Although she successfully completed her freshman year, she was eventually pressured to lose weight by trying to get her to sign a contract. After a series of events when she did not lose weight, the program dismissed her. She brought claims under several tort and contract theories, including intentional infliction of emotional distress (which was dismissed), invasion of privacy (which was dismissed), and breach of contract (on which she was successful). It is significant that none of the catalogs, manuals, handbooks referred to weight, and her performance in the program was not at issue. It is important that nursing program and other health care professional programs take care in establishing physical requirements and ensure that these requirements relate to the ability to perform or some other essential attribute of participation in the program. Thus a nursing program might want to establish that standing for long periods of time, moving between beds quickly, lifting, stamina, and other physical requirements are essential, but it should not make the assumption that being overweight necessarily means that an individual cannot carry out these requirements.

5. *Increasing Attention to Health Care Professional Programs and Sensory Impairments.* There have been a number of decisions involving medical professional programs and sensory impairments. These include *Argenyi v. Creighton University*, 44 Nat'l Disability Law Rep. ¶13, 2011 (D. Neb. 2011), rev'd on other grounds (8th Cir. 2013) (involving a medical student with significant hearing loss who requested communications access, real time transcription, and interpreters as accommodation; court recognized that fact issues existed about whether request was reasonable); *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919, 285 Ed. Law Rep. 968 (Mo. Ct. App. S.D. 2012) (finding no evidence that providing sign language interpreter to student in nursing program would fundamentally alter the program or pose a threat to safety); *Doherty v. Southern College of Optometry*, 862 F.2d 570, 50 Ed. Law Rep. 680 (6th Cir. 1988) (holding that an optometry student with retinitis pigmentosa was not qualified because of inability to operate certain equipment necessary to practice of optometry). Many of these decisions raise the need to clarify the relationship between health care professional education and the licensing process. Is it common for an individual to attend a health care professional program that is intended to lead to a license, but not to intend to practice the profession? Is that relevant? See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §10.7 (2012 and cumulative supplement).

6. *Deference to Professional Programming Decisions in Transition?* Until recently, courts have

shown substantial deference to health care professional programs in their establishment of health and safety concerns of patients. In *Doe v. Washington University*, 780 F. Supp. 628 (E.D. Mo. 1991), a dental student with HIV was removed from the program because the dental school and subsequently the court believed that his condition posed a risk to health of patients because of the invasive procedures inherent to dental student training. Because the decision was based on reasonable medical judgments given the state of medical knowledge, the exclusion was allowed.

The court opinion in the *Case Western* decision, noted above, referenced the general practice of judicial deference to the administrative agency experts where there are evidentiary conflicts. The court found that the administrative agency (OCRC) had rejected its own referee's conclusions and substituted testimony by the doctor who had been admitted to Temple University 20 years ago, an individual who was not an expert in medical education. The court noted that although, ordinarily, programs are to make individualized inquiries about qualifications for individuals with disabilities, Ohio law contemplates "situations in which a school could justifiably exclude all persons with a particular handicap from admission" where it is based on a "bona fide requirement or standard for admission"

This opinion can be contrasted with a 2014 decision by the Iowa Supreme Court. That court declined to defer to the educational program and licensing standards. The case of *Palmer College of Chiropractic v. Davenport Civil Rights Comm'n*, 850 N.W.2d 326 (Iowa 2014), involved the admission of a blind student to a chiropractic program. The court addressed deference to the institution but found that the decision by the program was discriminatory. There is a strong dissent in the case. In the majority opinion, the court seems to distinguish between deference to licensing standards and deference to the medical education program. The court emphasized the importance of individualized decisionmaking and held that the program had discriminated, although the state licensing requirements in Iowa might not have found the individual qualified for admission to practice.

For additional cases on health care professional programs, see LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §§3:5 & 10:2 (2012 and cumulative supplement).

Problems

1. The *Salve Regina* case is decided on tort and contract theories. The facts in the case occurred before the passage of the ADA. How would this case be decided under the ADA? Could an action under Section 504 of the Rehabilitation Act have been successful?

2. Many law schools have as a requirement that students present an oral argument in moot court as part of the first year curriculum. Could a deaf student who does not speak be legally denied admission on the basis that he/she is not otherwise qualified because of the inability to complete the oral argument? What would the law school need to do in terms of exploring reasonable accommodations?

3. Is there any difference when serious psychiatric problems are involved whether the student is attending undergraduate school, law school, medical school, or some other program? What if the problem is alcohol addiction rather than other psychiatric problems? Is emotional stability a more justifiable criterion in some academic programs than in others?

[2] Standardized Testing and Other Evaluation

For entry into most academic disciplines, it is generally required that the applicant take a standardized test, such as the Law School Admissions Test. Before the passage of the Americans with Disabilities Act, most standardized testing programs were themselves not required to provide accommodations for taking the test because these entities were not recipients of federal financial assistance. The ADA is very clear that such entities are considered covered under Title III as public accommodations. Before the ADA, the issue was whether the institutions of higher education, which

were recipients of federal financial assistance, could legally use scores when accommodations were not provided. This question never reached the courts because most, if not all, of the standardized testing by the professional test administrators began voluntarily providing accommodations in response to market forces. Colleges and universities had been raising these questions directly with the testing agencies.

The issues that arise with respect to standardized testing are 1) whether applicants can be required to undergo such testing or if there are circumstances where there should be a waiver; 2) what accommodations should be provided and when; 3) how these scores should be reported to the institution wanting to take them into account; 4) how these scores should be used by the institution.

Section 504 regulations require institutions of higher education to demonstrate that such tests have been validated as a predictor of success when a test has a disproportionate adverse impact on an applicant with a disability. 34 C.F.R. §104.42. As the following cases demonstrate, courts have generally upheld the use of standardized tests. These cases also illustrate the issue of accommodations that should be provided. The question about whether a testing service can require documentation of a disability before providing an accommodation is discussed in the next section, and is not addressed to any great extent in the following cases in this section. That is addressed in the following sections.

The following decision is not a Supreme Court decision, but because of its sound reasoning, it has the stature of such a decision and is generally cited for the framework it provides in making determinations about reasonable accommodations.

Wynne v. Tufts University School of Medicine

932 F.2d 19 (1st Cir. 1991)

COFFIN, SENIOR CIRCUIT JUDGE:

[After admission to medical school, Wynne became aware during his first year of medical school that he had difficulty with multiple choice exams.] At the end of his first year [of medical school] he had failed eight of fifteen courses. Although the school's guidelines provide for dismissal after five course failures, and the Student Evaluations and Promotions Committee and the Student Appeals Committee had both voted to dismiss Wynne, the dean decided to permit him to repeat the first-year program.

During the summer between his first and second years, Wynne underwent a neuropsychological evaluation at the request of the medical school, which arranged and paid for the test. The psychologist began by noting that Wynne had described having difficulties with multiple choice examination questions and experiencing more success on practicum, laboratory, or applied sections of his courses. She summarized his neuropsychological profile as follows:

> [E]valuation reveals average general cognitive abilities with marked variability among individual skills. Significant strengths were noted in conceptual thinking and reasoning abilities. In contrast, Mr. Wynne encountered serious difficulties processing discrete units of information in a variety of domains, both verbal and non-verbal. Formal language testing revealed insecurities in linguistic processing including inefficient retrieval and retention of information. This type of neuropsychological profile has been identified in the learning disabled population.[3]

The difficulties identified by the psychologist impaired Wynne's ability to answer multiple-choice questions, even though he did manage to pass several such examinations. A reading specialist who worked with him after he was dismissed from medical school observed that he had difficulty interpreting “Type K” multiple-choice questions because of their structure, which often includes passive constructions and double and triple negatives.

Wynne began his second exposure to the first-year program with the assistance of counselling, tutors, note-takers, and taped lectures, the nature, quantity, and regularity of which are presently

subjects of considerable dispute. In addition to retaking the seven courses he had failed, Wynne also was required to attend classes and take exams in three courses he had passed with low-pass scores. At the end of the year he passed all but two courses, Pharmacology and Biochemistry. The Student Evaluations and Promotions Committee permitted him to take make-up exams in these two courses. He subsequently passed Pharmacology but failed Biochemistry for the third time. The two committees, Student Evaluations and Student Appeals, recommended dismissal and the dean agreed. Wynne was dismissed from the medical school in September 1985.

In 1986 Wynne filed a complaint with the United States Department of Education Office for Civil Rights alleging discrimination. On January 12, 1987 that office issued its report, finding no discrimination. A year later Wynne filed suit, alleging that Tufts' treatment of him constituted discrimination on the basis of his handicap. Although the record contains references to various supposed faults in Tufts' response to his disability, Wynne's brief on appeal ties his claim of discrimination solely to the school's failure to offer an alternative to written multiple choice examinations. We therefore treat the appeal as limited to this issue.

Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with handicaps in the United States ... shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...."

Our inquiry into the meaning of "otherwise qualified" begins, but does not end, with *Southeastern Community College v. Davis*. That case involved a nursing school applicant who was afflicted with a serious hearing disability and whose dependence on lip reading would prevent her from clinical training and limit her in other ways. The court of appeals had set aside a district court finding that plaintiff was not an "otherwise qualified" handicapped individual, reasoning that the Act required the College to consider the application without regard to hearing ability and that it required "'affirmative conduct' on the part of Southeastern to modify its program to accommodate the disabilities of applicants, 'even when such modifications become expensive.'"

The Court, in reversing the judgment, addressed both propositions embraced by the court of appeals. It first rejected the idea that an institution had to disregard any limitation resulting from a handicap, saying, "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Second, observing that no action short of a "substantial change" in Southeastern's program would accommodate plaintiff, and that the Act did not impose an affirmative action obligation on all recipients of federal funds, it held that no such "fundamental alteration" in Southeastern's program was required. It also noted that the program, aimed at training persons for "all normal roles of a registered nurse, represents a legitimate academic policy." The Court did, however, leave open the possibility that an insistence on continuing past requirements notwithstanding technological advances might be "unreasonable and discriminatory."

The arguably absolutist principles of *Davis*—a handicapped person must be able to meet all requirements of an institution; and there is no affirmative action obligation on an institution—were meaningfully qualified by the Court in *Alexander v. Choate*, 469 U.S. 287 (1985). The Court signalled its awareness of criticism that the *Davis* pronouncement on "affirmative action" obscured the difference between "a remedial policy for the victims of past discrimination" and "the elimination of existing obstacles against the handicapped." It then distinguished "substantial" and "fundamental" changes (affirmative action) from "changes that would be reasonable accommodations." *Id*. It added this gloss to *Davis*:

> The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable

accommodations in the grantee's program or benefit may have to be made.

Thus, in determining whether an individual meets the "otherwise qualified" requirement of section 504, it is necessary to look at more than the individual's ability to meet a program's present requirements. As the court in *Brennan v. Stewart* recognized:

> The question after *Alexander* is the rather mushy one of whether some "reasonable accommodation" is available to satisfy the legitimate interests of both the grantee and the handicapped person. And since it is part of the "otherwise qualified" inquiry, our precedent requires that the "reasonable accommodation" question be decided as an issue of fact....

What we have distilled from [other case precedents] is consistent with the well established principle enunciated in *Regents of University of Michigan v. Ewing*, "When judges are asked to review the substance of a genuinely academic decision, ... they should show great respect for the faculty's professional judgment." The question in *Ewing* was whether a university had violated substantive due process (i.e., had engaged in wholly arbitrary action) in dropping plaintiff from an academic program after plaintiff had failed several subjects and received the lowest score so far recorded in the program. This was a context where no federal statutory obligation impinged on the academic administrators; their freedom to make genuine academic decisions was untrammeled. This is why the Court added to the above quoted passage the sentence: "Plainly, [judges] may not override [the faculty's professional judgment] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."

In the context of an "otherwise qualified-reasonable accommodations" inquiry under the Rehabilitation Act, the same principle of respect for academic decisionmaking applies but with two qualifications. First, as we have noted, there is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation. Second, the *Ewing* formulation, hinging judicial override on "a substantial departure from accepted academic norms," is not necessarily a helpful test in assessing whether professional judgment has been exercised in exploring reasonable alternatives for accommodating a handicapped person. We say this because such alternatives may involve new approaches or devices quite beyond "accepted academic norms." As the Court acknowledged in *Davis*, "[t]echnological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment."

It seems to us that the case before us, where the adversaries are an individual and an academic institution, involves a set of conflicting concerns....

We believe [the approach that is appropriate is] to assess whether an academic institution adequately has explored the availability of reasonable accommodations for a handicapped individual. If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation. In most cases ... the issue of whether the facts alleged by a university support its claim that it has met its duty of reasonable accommodation will be a "purely legal one." Only if essential facts were genuinely disputed or if there were significantly probative evidence of bad faith or pretext would further fact finding be necessary.

The district court, in granting Tufts' motion for summary judgment, explicitly relied on the fact that Wynne had failed eight of his first year courses, two of the eight a second time, and one a third time. Following the literal language of *Davis* that an "otherwise qualified person" must meet "all of a program's requirements," the court felt compelled to grant the motion. As we have indicated in our review of the caselaw, *Alexander* in effect modified the "all" language of *Davis* and articulated the

obligation to make reasonable accommodation part of the "otherwise qualified" inquiry.

If the record were crystal clear that even if reasonable alternatives to written multiple-choice examinations were available, Wynne would have no chance of meeting Tufts' standards, we might be able to affirm on a different ground from that relied on by the district court. But although Wynne has an uphill road to travel, with much to indicate that he has cognitive and other problems that are independent of his difficulties with multiple-choice examinations, we do not think the record permits this course. The results of his neuropsychological evaluation after his first year indicated average general cognitive abilities and well-developed skills in conceptual reasoning and abstract problem solving; he did pass most of his exams; he scored substantially higher in time-measured "practicum," a form of examination requiring him to apply his knowledge to a problem; he assertedly read and digested information from medical journals for his master's thesis; he read and assimilated computer-generated data in his Hematology course, which was successfully completed; experts asserted that he had the ability and motivation to improve his language skills. Whatever may be the ultimate outcome, we think that on the record as made thus far Tufts had the obligation of demonstrating that its determination that no reasonable way existed to accommodate Wynne's inability to perform adequately on written multiple-choice examinations was a reasoned, professional academic judgment, not a mere ipse dixit.

Tufts' submission on this issue consisted of an affidavit from the Dean of its School of Medicine, Dr. Henry Banks. Three paragraphs concern written multiple-choice (Type K) examinations. The first stated the test's purpose: "to measure a student's ability not only to memorize complicated material, but also to understand and assimilate it." The second, and major, paragraph stated:

> In the judgment of the professional medical educators who are responsible for determining testing procedures at Tufts, written multiple choice (Type K) examinations are important as a matter of substance, not merely of form. In our view, the ability to assimilate, interpret and analyze complex written material is necessary for the safe and responsible practice of modern medicine. It is essential for practicing physicians to keep abreast of the latest developments in written medical journals. Modern diagnostic and treatment procedures often call for the reading and assimilation of computer-generated data and other complex written materials. Frequently, and often under stressful conditions fraught with the most serious consequences, physicians are called upon to make choices and decisions based on a quick reading, understanding and interpretation of hospital charts, medical reference materials and other written resources. A degree from the Tufts University School of Medicine certifies, in part, that its holder is able to read and interpret such complicated written medical data quickly and accurately.

The third paragraph asserted that it was the judgment of "the medical educators who set Tufts' academic standards" that the above described demands "are best tested ... by written, multiple choice examinations."

[A] court's duty is first to find the basic facts, giving due deference to the school, and then to evaluate whether those facts add up to a professional, academic judgment that reasonable accommodation is simply not available. The above quoted affidavit, however, does not allow even the first step to be taken. There is no mention of any consideration of possible alternatives, nor reference to any discussion of the unique qualities of multiple choice examinations. There is no indication of who took part in the decision or when it was made. Were the simple conclusory averment of the head of an institution to suffice, there would be no way of ascertaining whether the institution had made a professional effort to evaluate possible ways of accommodating a handicapped student or had simply embraced what was most convenient for faculty and administration. We say this, of course, without any intent to impugn the present affiant, but only to attempt to underscore the need for a procedure that can permit the necessary minimum judicial review.

We therefore set aside the summary judgment and remand this issue for further proceedings. As is evident from our discussion, the court will be free to consider other submissions, to enter summary

judgment thereon if they meet the standard we have set forth, or to proceed with further fact-finding if such should prove necessary.

Notes

1. The language from *Wynne* that is regularly quoted is the following:

> If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.

In applying that language in the *Wynne* case, the court on rehearing determined that the standard set out by the previous opinion subsequently had been applied by the medical school, and that there was no violation of the Rehabilitation Act. The medical school had demonstrated that the alternatives proposed would be a substantial program alteration. *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791 (1st Cir. 1992).

2. In *Price v. National Bd. of Med. Exmrs.*, 966 F. Supp. 419 (S.D. W. Va. 1997), the court held that medical students claiming learning disabilities had not even demonstrated that they were substantially limited in major life activities.

A number of decisions have focused more on whether the individual with a learning disability is even "disabled" within the definition. Often in these cases, courts found that the individual was not "substantially limited" in a major life activity if he or she has succeeded in the previous academic program. Previous to the *Sutton* trilogy, see Chapter 2[B][4], *supra*, the defendant colleges and universities had focused less on dismissing the cases because the claimant was not protected and more on the merits of the case. Higher education and professional licensing cases after *Sutton* were substantially more focused on whether the individual is covered. See, e.g., *Wong v. Regents of University of California*, 410 F.3d 1052 (9th Cir. 2005) (medical student with a learning disability was not substantially limited for purposes of daily living as compared to most people); *Swanson v. University of Cincinnati*, 268 F.3d 307 (6th Cir. 2001) (surgical resident with major depression not substantially limited in the ability to perform major life activities). The 2008 ADA amendments were an attempt to return courts to the pre-*Sutton* definition of disability. Learning disabilities and related disabilities such as ADD and ADHD are likely to continue to be addressed by the courts. While compensating measures may no longer be considered, the individual must still demonstrate that the condition creates a "substantial" limitation. Just having a diagnosis of an impairment does not mean that requirement has been met.

3. The *Wynne* decision comments on the term "affirmative conduct" and how the Court in *Southeastern Community College* used the term. In light of recent attention to affirmative action programs relating to considering race and ethnicity in higher education admissions, this comment should be reviewed. Neither Section 504 nor the Americans with Disabilities Act was ever intended to mandate preferential admission or discounting of qualifications. The inartful use of the term in *Southeastern Community College* was intended to reference the expectation that individuals with disabilities should be given "reasonable accommodations" and that these do not require lowering standards or fundamentally altering the program.

4. *"Flagged" Test Scores.* An issue that arises in the context of standardized test scores used for entry into higher education programs is whether a testing service may "flag" or indicate that a standardized test was not taken under standard conditions. Although a 1970 Department of Education interim policy allowed the practice of flagging, A 1993 Office of Civil Rights ruling found that devaluing MCAT scores of individuals who took the test under nonstandard conditions violates Section 504. *SUNY Health Science Ctr. at Brooklyn—College of Med. (NY)*, 5 N.D.L.R. ¶77 (OCR

1993). That ruling noted that using flagged test scores is not noncompliance with the Rehabilitation Act, so long as such test scores are not the only basis for admissions decisions and so long as the applicant is not denied admission because an accommodated test was taken. In *Doe v. National Board of Medical Examiners*, 199 F.3d 146 (3d Cir. 1999), a lower court ruling that had stopped flagging of the MCAT exam was suspended. The most recent judicial attention to this issue resulted in a settlement. Although a settlement is not precedent, it is likely that most standardized testing services will discontinue flagging. The case was brought by the Department of Justice, the California Department of Fair Employment and Housing and several individual plaintiffs against the Law School Admission Council ("LSAC") regarding flagging and a number of other issues about accommodations and documentation involved in the administration of the LSAT. The agreement was that LSAC would no longer flag tests taken under accommodated conditions. See http://www.ada.gov/dfeh_v_lsac/lsac_consentdecree.htm. A later section of this chapter comments on a separate settlement regarding documentation of the disability to receive accommodations.

5. *"Best Ensures" Standard.* Title III regulations applicable to examinations given for admission, licensure, certification, or credentialing provide the following:

> [T]he institution should ensure that the examination is selected and administered so as to *best ensure* that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure). 28 C.F.R. §36.309(b)(1)(i) (2014) (emphasis added).

This regulation does not mean that an institution in all settings (not just testing) must provide the "best" accommodation. The regulation references only certain types of disabilities (sensory, manual, or speaking). While the standard may provide guidance for other settings, it does not require a higher education institution to provide a student with a learning disability requested exams because of a claim that this is the "best accommodation."

Problems

1. Is it permissible under the Americans with Disabilities Act to require an earlier deadline for registration for a standardized admission test if the individual is requesting an accommodation? 42 U.S.C. §12189; 36 C.F.R. §36.309.

2. Would it be permissible to set absolute minimum standardized test scores for admission into an academic program? How is that different from requiring a certain grade point for graduation from the program?

[3] Identifying and Documenting the Disability

Higher education institutions generally may not inquire about a disability in the admissions process. However, where the applicant wishes to put the disability at issue, it is the obligation of the applicant to raise the existence of the disability, and in some cases, to provide documentation to justify accommodation or consideration in the admissions process. The type of documentation required will depend on the circumstances.

For example, an applicant who uses a wheelchair and who wants to meet with the admissions interview committee in an accessible location should not have to provide medical documentation of the disability. An applicant who claims to have a learning disability, and who wants to be given additional time on the SAT test or wants the college to consider the learning disability as justification for poor performance in certain undergraduate classes, will be held to a different standard. The institution will be justified in requiring appropriate documentation. This will mean that the evaluation

of the disability must have been done recently enough to be valid, it must be done by a professional qualified to evaluate the disability, and, ideally, the professional should not only identify the disability, but should indicate what accommodations are needed in response to the limitations resulting from the disability. In most cases, the institution will be on solid legal ground to require the applicant to pay for the cost of the documentation.

The following decisions illustrate some of these points.

Nathanson v. Medical College of Pennsylvania

926 F.2d 1368 (3d Cir. 1991)

SCIRICA, CIRCUIT JUDGE:

I. *Facts and Background*

With noted exceptions, the following facts are undisputed. In 1981, Nathanson was involved in an automobile accident that resulted in continuing back and neck injuries. During the next several years she engaged in physical therapy to recover from her injuries. In 1982, she decided that she wanted to go to medical school and began taking medical-related courses at Temple University and the University of Pennsylvania. In November, 1984, she applied for admission to MCP's 1985 entering class for the M.D. degree. On August 26, 1985, she was accepted for admission to MCP.

During her interviews with two MCP faculty members in July, 1985, and in the narrative section of her application, Nathanson informed MCP about her accident and injuries. She also told the MCP interviewers that she had not been able to sit in the seats provided for examinees for the Medical College Admissions Test (MCAT) because of her disability. Instead, she had been allowed to take the examination at an ordinary table. She stated, however, that she believed at that time that she would not require special accommodations at MCP because she had "never had a problem" with her seating arrangements during her prior course work at Temple and Penn.

At issue in this case is what took place between Nathanson and MCP administrators from the time that Nathanson first attended MCP to the point of her final departure approximately one year later. Nathanson's transactions with MCP are important because they clarify when and whether MCP was ever aware that Nathanson had a handicap and had requested accommodations, and whether her requests were sufficiently specific for MCP to respond.

[The factual background, including the various transactions leading up to this complaint are omitted in this excerpt, but they are referred to throughout the remainder of the opinion.]

At issue here, then, is the district court's conclusion about the fourth requirement [of §504 of the Rehabilitation Act] relating to discrimination and denial of the program's benefits. As the district court said, "[a]lthough [Nathanson] discussed her physical discomfort in prior correspondence with defendant, no reason existed for defendant to consider plaintiff's condition to be a handicap as contemplated by the statute ... [or] that plaintiff did not have meaningful access to defendant's program."

For the reasons provided below, we cannot agree with this assessment.

A. *Did MCP Have Reason to Know That Nathanson's Condition Was a Handicap?*

In order to be liable under the Rehabilitation Act, MCP must know or be reasonably expected to know of Nathanson's handicap. Neither the Rehabilitation Act nor the regulations specifies what notification is necessary to adequately inform a recipient of a person's handicap or what constitutes awareness of a handicap.

In this case, Nathanson's handicap was not visibly obvious. The district court found that Nathanson never sufficiently demonstrated to MCP that one of her "major life activities" was impaired. Therefore, MCP had no reason to know that she was handicapped. The district court also found that

Nathanson never made a sufficiently direct and specific request for special accommodations that would have put MCP on notice of her handicap. Of course, this would be relevant only if MCP neither knew nor had reason to know that Nathanson was handicapped.

We believe there is sufficient evidence to create a material issue of fact whether MCP knew or had reason to know that Nathanson met the standards of a "handicapped individual" under §706(8)(B)(i) and (ii). With regard to §706(8)(B)(i), Nathanson's meeting with Beasley on September 12, 1985, their depictions of this meeting, and her letter to him the next day, raised a factual issue whether Nathanson's "physical impairment," her neck and back injuries, "substantially limited" one of her "major life activities," which was "learning." Beasley's affidavit stated that Nathanson's physical difficulties precluded her from attending classes at MCP for the next academic year. Moreover, Nathanson's letter of September 13, 1985, requesting permission to defer classes for one year "because of the increased pain and spasm" that she had been experiencing, documented that she believed that her handicap was interfering with her learning.

With regard to §706(8)(B)(ii), there was sufficient evidence to create a material issue of fact whether Nathanson had a "record of impairment." Nathanson wrote Beasley that:

> I had been in a car accident several years ago, injuring my neck, back, and shoulders and have made major strides in terms of recovery each year. Based upon my performance under a full-time load last spring [at Penn], I truly believed that I was physically prepared to handle the burden of a medical curriculum. Sadly this has not been so, each day the situation has worsened in terms of my pain and fatigue and I do not believe my physical condition is good enough to proceed [in attending classes at MCP] successfully.

A person with a record of impairment can still qualify as a handicapped individual even if that individual's impairment does not presently limit one or more of that person's major life activities. Nathanson described to MCP that she had expanded her course load at Penn and at Temple over the years since her injury in part to test and prepare for the endurance needed to handle a fulltime course load in medical school. Thus, her statements created an issue of fact concerning whether she notified MCP that she had a record of impairment that "substantially limited" one of her "major life activities," learning.

MCP contends that it could not have reasonably known about Nathanson's record of impairment because she indicated at her preadmission interviews that she would not require special accommodations at MCP because she had "never had a problem" with her seating arrangements during her prior course work at Temple and Penn. Moreover, the regulations specifically prohibit schools that receive federal funds from asking if an applicant is handicapped although they may do so confidentially after an individual has been admitted for purposes of accommodation. However, as we have noted, there is sufficient evidence to create an issue of fact about whether Nathanson gave notice of her record of impairment after she was admitted to MCP.

Furthermore, it appears that there was a disputed fact whether Nathanson made a specific request for accommodations before August 21, 1986. There is some evidence that Nathanson did ask for direct help with her accommodations at least three times during the course of the year: [Testimony omitted.]

In general, then, we find some evidence that Nathanson made known that she had difficulty in "learning," that her handicap prevented her from attending classes, and that she made direct requests for accommodations. Therefore, we believe that there is a disputed issue of material fact whether MCP knew or reasonably should have known that Nathanson met the standards for a handicapped individual under the Act.

B. *Did MCP Provide Reasonable Accommodations for Nathanson's Handicap?*

For individuals in Nathanson's position, the regulations implement the reasonable accommodation

standard under §504 as follows:

> A recipient [of federal funds] shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

[Discussion of *Southeastern Community College v. Davis* and *Alexander v. Choate* omitted.]

Much of the case law interpreting §504 relates to circumstances like those in *Southeastern* where a plaintiff claims denial of admission into a program because of a handicap. Southeastern's holding was particularly stringent because the admission standards were designed to protect public health and safety, a concern that has been given considerable deference by the courts.

Nathanson does not typify those handicapped individuals to which the "reasonable accommodation" standard in *Southeastern* was directed because that standard was designed to clarify whether an individual was "otherwise qualified" for a program. This distinction is important because Nathanson's case involves alleged discrimination or denial to a handicapped individual who has already been admitted to a program and deemed to be "otherwise qualified" but who requests individual accommodation in order to have access to or to continue benefitting from the program. Moreover, Nathanson's request does not relate to concerns of public safety involving others and does not require the kind of alteration found in *Southeastern* or *Alexander*.

As we have noted, the regulations require that a recipient make reasonable accommodation to the "known physical or mental limitations" of otherwise qualified individuals like Nathanson unless the recipient can show that the accommodation "would impose undue hardship on the operation of its program." We find nothing inconsistent between the regulations and the Supreme Court holdings that we have reviewed. Therefore, if MCP's failure to provide a suitable seating arrangement makes its program effectively unavailable to a student with a back injury, then that failure could constitute the type of "benign neglect" referred to in *Alexander* and a violation of the Rehabilitation Act. MCP would have to show that the required modification entails a substantial alteration in order to avoid a violation of the Act.

Despite Nathanson's conflicting messages over the course of the year and despite her change of expectations from MCP, we believe the following to be disputed issues of fact:

> 1) whether Nathanson left school before MCP had an opportunity to reasonably accommodate her; 2) whether Nathanson assumed the responsibility for finding her own accommodations after her meeting with Beasley on September 12, 1985; and 3) whether MCP made a reasonable effort to accommodate Nathanson even after August 21, 1986, the date that MCP claimed that it first became aware that Nathanson was handicapped.

The district court construed the statute to require that MCP "need only make it possible for [Nathanson] to have 'access' to the building, her classes and other facilities." The court believed that MCP need not make Nathanson "comfortable," and commented that Nathanson "had access to the facilities and building." As is evident from the regulations, a defendant's obligation goes further than making the building and physical facilities accessible.

We note that MCP would not have been in legal jeopardy for seeking more information from Nathanson because the regulations provide that a recipient "may make inquiries [from handicapped individuals] on a confidential basis as to handicaps that may require accommodation." Furthermore, the regulations state that recipients of federal funds are obligated to provide the types of auxiliary aids that Nathanson requested, therefore enabling reasonable accommodation inside a building as well as access outside.

> (d) *Auxiliary aids*. (1) A recipient to which this subpart applies *shall take such steps as are necessary* to ensure that no handicapped student is denied the benefits of, excluded from

> participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills. (2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for visual impairments, *classroom equipment adapted for use by students with manual impairments*, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

45 C.F.R. §84.44(d) (emphasis added).

Nathanson requested closer parking and a straight back chair which, she emphasized, did not need to be specifically designed for her. It is therefore a disputed issue of fact whether Nathanson needed "reasonable" accommodations that would not cause "undue financial or administrative burdens" or "impose an undue hardship" upon the functioning of the recipient's program. A district court's estimate of what is reasonable "rests in large part upon factual determinations." In turn, the regulations suggest the following "factors to be considered" in determining whether an accommodation would create an undue hardship:

> 1) The overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget; 2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and 3) The nature and cost of the accommodation needed.

Accommodations that are "reasonable" must not unduly strain financial resources. Furthermore, a recipient must be allotted sufficient time and opportunity to investigate and acquire accommodations if appropriate. However, we believe there are disputed issues of fact whether MCP provided Nathanson with reasonable accommodations and whether MCP evidenced the type of "benign neglect" referred to in *Alexander*. These matters must be resolved by the factfinder.

In summary, we find that the following disputed issues of fact remain: 1) whether MCP knew or had reason to know that Nathanson's condition was a handicap either because her condition "substantially limited" her ability to learn or because she had a "record of impairment"; 2) whether Nathanson made a sufficiently direct and specific request for special accommodations in either of her three meetings with Beasley (on September 12, 1985, August 21, 1986, or September 3, 1986) that would have put MCP on notice of Nathanson's handicap if MCP neither knew nor had reason to know that Nathanson was handicapped; 3) whether MCP's failure to provide Nathanson with "reasonable accommodations" in the form of a suitable seating arrangement constituted "benign neglect" and effectively made its program unavailable to her; 4) whether Nathanson gave MCP a fair opportunity to provide the necessary reasonable accommodations; and 5) whether MCP demonstrated that the modifications that Nathanson had requested imposed an "undue hardship," a "financial or administrative burden," or a sufficiently "substantial alteration" to the functioning of MCP's program.

[The court remanded on this issue.]

Notes

1. In the case of *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997), the court addressed a number of issues involving students with learning disabilities, including the documentation that was appropriate. The court held that Boston University's policy of requiring that documentation be within the past three years was a significant burden on students with learning disabilities, and that this requirement should be waived where a qualified professional deemed that retesting was not necessary. The court also discussed the credentials of those qualified to make evaluations of students with learning and related disabilities. The court held that those reevaluating individuals for learning disabilities need not have doctorate degrees, so long as they had appropriate

training and professional experience. Evaluations of individuals for Attention Deficit Disorder and Attention Hyperactivity Deficit Disorder, however, must be made by evaluators with a Ph.D. or an M.D.

2. The court in *Price v. National Bd. of Med. Exmrs.*, 966 F. Supp. 419 (S.D. W. Va. 1997), also discussed the credentials of evaluators in finding that the individuals seeking accommodations to medical board examinations had not demonstrated that they were substantially impaired by their "learning disabilities."

3. The case against the Law School Admission Council noted above in the reference to "flagging" also challenged the practices of LSAC in requiring documentation for a disability. The settlement incorporates a detailed system for documentation. http://www.ada.gov/dfeh_v_lsac/lsac_consentdecree.htm. This case was brought after the 2008 ADA Amendments and the subsequent regulatory clarification about the definition of disability and documentation of it. The changes contemplate more deference to past accommodations. For a discussion of this, see Laura Rothstein, *ADA at 25: Current Issues for Higher Education,* 41 JOURNAL OF COLLEGE & UNIVERSITY LAW 531 (2015) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629306.

4. Issues such as documentation and accommodations and whether someone is otherwise qualified frequently arise in the context of legal education and the legal profession. For a discussion of these issues, see Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues?* 22 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & LAW 519 (2014); http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441240; (IHELG Monograph, 14-04, 2014), http://www.law.uh.edu/ihelg/monograph/14-04.pdf.

Problems

1. In *Wynne*, see Section [C][2] of this Chapter, *supra*, the medical school paid for the cost of the evaluation of the student. Is this required under Section 504 or the ADA? Or because the burden is on the individual with a disability to make known the disability when requesting accommodation, could the medical school have required the student to pay for the assessment.

2. What is the obligation of the program if the student does not succeed academically, but he/she seeks evaluation that identifies the student as having a learning or other disability that might have affected academic performance? Is the program required to give the student a second chance?

3. If the evaluation paid for by the student is different than an evaluation paid for by the institution, whose documentation is to be given deference? For a brief discussion of this issue, see Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading*, 63 MD. L. REV. 101, 115 (2004).

D. The Enrolled Student

Once the applicant has been admitted to the higher education program, new questions arise. Some of the issues are similar to those in the admission process. These questions include whether, when, and what auxiliary services and programs must be provided; when modifications of policies and practices must occur; questions that arise in response to behavior and conduct matters; and confidentiality issues. There is also the initial question, of course, when a student challenges the institution in one of these circumstances whether the student is considered to be an individual with a disability under Section 504 of the Rehabilitation Act and/or the Americans with Disabilities Act. This issue was discussed in Chapter 2.

[1] Auxiliary Aids and Services

Both the Rehabilitation Act and the ADA contemplate reasonable accommodation. Reasonable accommodation does not mean waiver of fundamental requirements. Nor does it require that the institution make accommodations if it would be unduly burdensome, either administratively or financially. What constitutes an undue burden will depend on the nature and cost of the accommodation, financial resources, and the type of operation involved.

Accommodations that would be required under the ADA and the Rehabilitation Act would include auxiliary aids and services, modifications of policies and practices, and barrier removal. The 2008 ADA amendments codify this requirement into the statute itself, which applies to both the ADA and the Rehabilitation Act. 42 U.S.C. §12103(1). Previously, the auxiliary aids requirement was drawn from the Section 504 regulations. Accommodations might be required in the admissions process or after the student has been accepted. Accommodations for the enrolled student might be required for the academic program itself including test modifications, for extracurricular opportunities, and for housing.

The Supreme Court has addressed the issue of cost in the higher education context only once. It provided little guidance in doing so, but subsequent judicial analysis has helped to shed some light on these issues. See *University of Texas v. Camenisch*, 451 U.S. 390 (1981). One of the few cases to address cost issues after *Camenisch* is the case that follows. The problems following the case suggest why that might be.

Hypothetical Problem 6.2

Henry is deaf and has been admitted to an undergraduate program at a small private college. He received sign language interpreter services during his K–12 education. Nothing in his college application indicated a need for any services. On the first day of class, he asked his Poli Sci 101 professor to make sure there is an interpreter for him at the next class, which is two days later. Henry sent an email to the college dean of students indicating that he expects to have an interpreter provided for all classes and for all on-campus events (speakers, sports events, student organization meetings) that he plans to attend. He also expects to have all of his classes transcribed and to receive the transcriptions on the day after the class. The college is in a rural area of New England, not close to any major city. In winter, travel to the college town can be difficult because of snow. The college has recently had to terminate a number of clerical, custodial, and non-tenure track faculty employees because of budget challenges. What is the obligation of the college to provide the requested services?

The following case addresses both the issues of auxiliary aids and services (interpreters) and facilities access (campus transportation). The cost of these services is the primary focus.

United States v. Board of Trustees for the University of Alabama

908 F.2d 740 (11th Cir. 1990)

CLARK, CIRCUIT JUDGE:

This case requires us to determine the validity of certain portions of the regulations implementing section 504 of the Rehabilitation Act of 1973 promulgated by the Department of Health, Education and Welfare ("HEW"). The University of Alabama at Birmingham ("UAB") appeals the district court's order permanently enjoining UAB from denying auxiliary aids to handicapped students based on consideration of their financial ability, and from failing to grant auxiliary aids to handicapped "special" students and those handicapped students enrolled in the UAB Division of Special Studies. The United States cross-appeals the district court's holding that UAB has made a reasonable accommodation for the transportation of its handicapped students.

Background

This case was tried before the district court mostly on a stipulation of agreed facts. That stipulation, and the factual findings outlined in the district court opinion, reveal the following. At the time of trial there were approximately 175 handicapped students enrolled at UAB, of whom approximately 8 suffered a significant hearing impairment. HEW initiated an investigation in 1979 of UAB's compliance with section 504 of the Rehabilitation Act upon receipt of a complaint by a deaf student whose request for services of a sign language interpreter at UAB's expense was initially denied.

During the pendency of that investigation, UAB adopted an auxiliary aids policy. This policy states that while UAB will provide some aids, such as note-takers or transcriptions of tape recordings of classes to deaf students, UAB generally will not provide interpreters or other "costly" aids. Most of the requests for "costly" auxiliary aids at UAB have been for sign-language interpreters. Students requiring an aid such as an interpreter must notify UAB several months in advance of the academic quarter. Once notified, UAB will direct the student to seek free interpreter services provided by the state Vocational Rehabilitation Service. If the student is not eligible for assistance from the state Vocational Rehabilitation Service and cannot afford to pay for interpreter services, the policy is to direct the student to apply for financial aid (grants, loans, or work-study) and to include the cost of the interpreter services as an educational expense. Only in the case that a student demonstrates to UAB the need for financial aid to pay for an interpreter and an inability to receive the necessary aid or free interpreter services will UAB provide an interpreter for the student.

In addition to its regular educational degree programs, UAB has a Division of Special Studies that offers some courses for credit and some non-degree community education and continuing education courses. The Auxiliary Aids Policy excludes students taking non-credit or non-degree courses from receiving auxiliary aids from UAB. The University of Alabama's Chancellor, Thomas A. Bartlett, describes the Special Studies programs as "a public service that is educational." He also admits that in an ideal world, auxiliary aids should be offered to Special Studies students, but that "it's a lower priority than making those services available in [the] credit programs." The Special Studies budget is part of the overall budget for UAB. Special Studies has received several federal grants for its Cooperative Education Program, and uses UAB buildings on an "as available" basis for its classes.

[Case discussion of on-campus bus system is omitted from this case excerpt.]

The district court held that UAB violated section 504 of the Rehabilitation Act of 1973, when it failed to:

> 1) provide interpreter services to deaf students who were unable to procure such services elsewhere free of charge and who were not eligible for financial aid for such services; 2) provide any auxiliary aids to students in non-degree programs; 3) accommodate mobility impaired students in the business education laboratory; and 4) make the UAB swimming pool accessible to mobility-impaired students.

UAB is not appealing the district court's third and fourth holdings regarding access to the business education lab and the swimming pool. The district court also found that UAB had made a reasonable accommodation for transportation of mobility-impaired students. The court enjoined UAB from denying students auxiliary aids based on financial ability, and from refusing to grant auxiliary aids to non-credit or non-degree students. The court also ordered UAB to reimburse one family for money they spent on interpreter services.

In reaching its decision, the district court found that the Department of Education regulation that precludes the use of a financial needs test in considering whether to provide auxiliary aids to handicapped students is entitled to conclusive weight, because it is neither "unreasonable, 'clearly erroneous,' nor 'demonstrably irrational.'"

[Subpart E of the Section 504 regulations relating to postsecondary education provides:]

> (d) Auxiliary aids. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from

> participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills. (2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments.... Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

34 C.F.R. §104.44. [When HEW proposed these regulations, there were hundreds of comments expressing concerns about cost.]

In response to these comments, HEW modified the auxiliary aids regulation such that universities could meet the requirements of section 504 by referring students to state vocational rehabilitation agencies and private charities as a first step in obtaining auxiliary aids. The regulations nevertheless maintained the requirement that "[w]here no such existing resources supply auxiliary aids, the proposed regulation obligates the recipient to provide the needed auxiliary aid." HEW noted that it anticipated that the bulk of the costs of auxiliary aids would be paid by state and private agencies, and that the proposed regulation allowed universities considerable flexibility in providing auxiliary aids, including using students who are earning degrees in fields related to handicapped persons to provide the necessary services.

After receiving and considering additional comments on the modified proposed regulations, HEW published the final regulations on May 4, 1977. In the accompanying analysis of the final regulations, HEW acknowledged the concern of colleges and universities about the costs of compliance with the auxiliary aids regulation, but emphasized that recipients "can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations." HEW repeated its prediction that the bulk of the costs of auxiliary aids would be paid by these state and private agencies, and that the regulation allowed universities significant flexibility in choosing the methods by which they would provide aids when students were unable to obtain them elsewhere.

UAB argues that its policy is consistent with the HEW auxiliary aids regulation. UAB contends that the regulation only requires it to provide auxiliary aids to handicapped students who are "otherwise qualified" to receive financial aid. The government argues that the history of the formulation of the regulations summarized above clearly indicates that HEW intended for the burden of providing auxiliary aids to be shouldered by the university, whether the university obtained such services for the student through a state vocational rehabilitation service, private charities, or the university's own funds. In response to the concerns voiced by colleges and universities about the costs associated with providing auxiliary aids, HEW noted that the regulation anticipated that recipients would use state vocational rehabilitation services and private charities as a means of meeting this obligation. HEW nevertheless made clear that if these sources were unavailable, the university was responsible for providing the auxiliary aid. In all explanations of the regulation, the government contends that HEW consistently spoke of the obligation of ensuring that an auxiliary aid was available to any handicapped student who needed one as being an obligation of the university. Nothing in these statements indicated that HEW intended for the handicapped student to be responsible for providing an auxiliary aid.

Under the UAB policy, instead of being the primary source for the provision of auxiliary aids, the university merely disseminates information as to possible sources of free services or loans to pay for the services, and becomes a source of last resort for students who have been otherwise unable to procure auxiliary aid services. Thus, the university's policy shifts the burden of providing auxiliary services onto the shoulders of the student. Most handicapped students are forced to either procure the services through state or private agencies, or pay for them themselves from personal resources or by incurring increased financial aid debt. The Department of Education's position in this litigation on the meaning of the auxiliary aids regulation is consistent with the language of the regulation itself and with the original explanation of the regulation during the notice and comment period. Under these

circumstances, the Department of Education's assertion that UAB's incorporation of a financial need test into its auxiliary aids policy violates the regulation is entitled to substantial deference.

Having accepted the Department's interpretation of its regulation as prohibiting a university from denying an auxiliary aid to a handicapped student on the basis that the student has failed to demonstrate a need for financial assistance, we must determine whether such a regulation conflicts with Congress' intent in passing section 504. Section 504's general language and sparse legislative history do not reveal that Congress directly addressed the issue of whether universities should be required to provide funding for auxiliary aids only for those students who demonstrate financial need. Our scope of review of the regulations promulgated by HEW is limited, therefore, to a determination of whether the agency's interpretation of section 504 is based on a permissible construction of the statute.

In support of the reasonableness of HEW's auxiliary aids regulation, the government argues that the Supreme Court has repeatedly held that the HEW regulations are due significant deference. We must, therefore, attempt to make an independent determination of Congress' intent in passing section 504 as it relates to the provision of auxiliary aids to university students. Two Supreme Court decisions have established important guidelines for interpreting section 504. In *Southeastern Community College v. Davis*, the Court held that neither the language, purpose nor legislative history of section 504 revealed an intent to impose affirmative action obligations on recipients of federal funds. [In that case t]he Court reasoned that section 504 did not require recipients to make substantial changes in their programs nor to make changes that would cause "undue financial or administrative burdens."

In *Alexander v. Choate*, the Court was presented with an opportunity to clarify its ruling in *Davis*. In *Alexander*, handicapped Medicaid recipients challenged a state's proposal to reduce its Medicaid program's in-patient hospital coverage from 21 days to 14 days for all patients. The plaintiffs argued that because the average hospital stay for handicapped Medicaid recipients was greater than 14 days, this reduction in coverage would violate section 504 by denying them "meaningful access" to Medicaid in-patient hospital coverage. The Court agreed with the plaintiff's assertion that section 504 requires recipients of federal financial assistance to provide the handicapped meaningful access to the benefit conferred, but found that the state's proposed reduction in coverage did not deny handicapped persons such meaningful access.

The Court reasoned that the state's Medicaid program was not intended to guarantee "adequate health care" to all recipients, and that Medicaid programs do not guarantee that each beneficiary will receive a level of health care precisely tailored to his or her needs. Therefore, the Court held, section 504 does not require the state to alter its program to meet the reality that the handicapped have greater medical needs. While section 504 requires that the handicapped have equal access to Medicaid, it does not guarantee them equal results. Because the proposed reduction did not deny handicapped recipients the same access to in-patient coverage that would be offered to non-handicapped recipients, it did not violate section 504. In reaching this conclusion, the Court further explained its holding in *Davis*, stating that "*Davis* struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs." While section 504 does not mandate affirmative action, and thus grantees "may not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, [they] may be required to make 'reasonable' ones."

UAB argues that its auxiliary aids policy, like the state's Medicaid program in *Alexander*, offers the same benefit to all qualified students. That benefit is the opportunity to be educated and earn a college degree. UAB does not, however, guarantee each student equal results. UAB does not offer each student an educational program specifically tailored to his education needs. Some students are smarter than others, some work harder than others. Some students incur more expenses than others. UAB simply opens its doors to those who meet certain academic requirements and who can muster up the

funds to pay, and offers them the chance to learn. Therefore, under *Alexander*, UAB is not required to change its program simply to meet the reality that the deaf must spend more money to receive the same results as hearing students.

This argument ignores the fact that in some instances the lack of an auxiliary aid effectively denies a handicapped student equal access to his or her opportunity to learn. In *Alexander*, the 14 days of in-patient coverage offered by the state provided the same benefit to handicapped Medicaid recipients, as non-handicapped, i.e., the benefit of 14 days of hospital care. Depending on the severity of their illness, some people would benefit proportionately more than others, but the handicapped were not excluded from this benefit. A university, by offering lecture, laboratory and discussion courses, also offers a benefit to its students. Some students, by virtue of their innate intelligence or their willingness to study, will benefit more from this opportunity than others. In the case of a deaf student, however, all access to the benefit of some courses is eliminated when no sign-language interpreter is present. In the context of a discussion class held on the third floor of a building without elevators, a deaf student with no interpreter is as effectively denied meaningful access to the class as is a wheelchair bound student. Just as providing 14 days of in-patient coverage was, on the average not as beneficial for handicapped persons as nonhandicapped, the provision of an auxiliary aid still may not eliminate the disadvantages suffered by handicapped students in the classroom. For example, having an interpreter would not be as effective as being able to hear a lecture or the comments and questions of fellow classmates oneself, as some things will probably get lost in the translation. Nevertheless, under *Davis*, if the provision of interpreters when necessary would not impose an undue financial burden on UAB, then it would be a reasonable accommodation which would allow deaf students to get some benefit from attending UAB, just as having 14 days of in-patient coverage provided some benefit to handicapped Medicaid recipients.

UAB acknowledges that the lack of an interpreter may in some instances deny a deaf student meaningful access to education. It contends, however, that by requiring the university to provide auxiliary aids for students who are not eligible for financial aid, the regulation exceeds the scope of section 504 by effectively mandating "affirmative action." The Department of Education argues that the auxiliary aids regulation does not impose an affirmative action requirement, but instead requires universities to make reasonable accommodations to allow handicapped students equal access to a university education.

The Supreme Court noted in *Davis* that the "line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons will not always be clear. Identification of those instances where refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW." HEW's decision that the provision of interpreters is necessary to comply with the non-discrimination mandate of section 504, and does not amount to an affirmative action requirement, is a policy choice that HEW is empowered to make. The Supreme Court has repeatedly noted that these types of policy choices made by HEW in promulgating the implementing regulations for section 504 are due substantial deference because the regulations were enacted with the oversight and approval of Congress.

Soon after the final HEW regulations became effective, HEW reported on the rulemaking process and the final regulation to a Congressional oversight committee. In 1978, Congress amended the Rehabilitation Act of 1973 to require state vocational rehabilitation centers to provide technical assistance, including interpreters, to universities to assist them in complying with the Rehabilitation Act, and "particularly the requirements of" section 504. In light of Congress' awareness of HEW's decision that universities should be required to provide interpreters and other auxiliary aids for students, the 1978 amendment requiring state vocational rehabilitation centers to assist universities in meeting this requirement signals Congressional approval of the policy choice made by HEW. We find, therefore, that the legislative history of section 504, along with the Supreme Court interpretations of section 504 in *Davis* and *Alexander*, indicate that HEW's auxiliary aids regulation is based on a

permissible construction of the statute.[4]

C. *Non-credit and Non-degree Programs*

The district court held that UAB's auxiliary aids policy violated section 504 insofar as it excludes "special" students from eligibility for assistance in the form of auxiliary aids. "Special" students are those enrolled in non-credit or non-degree programs, which are operated through UAB's Division of Special Studies. Subpart E of the HEW regulations apply to "postsecondary education programs and activities ... that receive or benefit from Federal financial assistance...." The Department of Education argues that non-credit and non-degree programs, which include both continuing education programs and courses such as canoeing and chess, are nevertheless educational programs, and that nothing in subpart E is intended to limit its coverage to only programs that lead to a college degree. This interpretation of subpart E by the Department is reasonable and consistent with the language of the regulation, and therefore is due substantial deference. Moreover, any doubt that section 504 was intended to cover non-degree and non-credit programs was resolved by the Civil Rights Restoration Act of 1987, which provides that section 504 applies to "*all of the operations* of ... a college, university, or other postsecondary institution...." (emphasis added). The Department of Education's application of its auxiliary aids regulation to the Division of Special Studies and all non-degree and non-credit programs of UAB is therefore based on a permissible construction of section 504.

[Most of the court's discussion of UAB's bus system is omitted. Noteworthy, however, is the following in which the court specifically references the entire transportation budget in the context of cost issues.]

Thus, the transportation services provided to handicapped persons are clearly "not equal to" nor "as effective as" the transportation services offered to non-handicapped persons. Under the Supreme Court's interpretation of section 504, recipients of Federal financial assistance are required to make "reasonable" accommodations, but only to the extent that such accommodations would not cause "undue financial or administrative burdens." The record shows that the cost of installing a lift on UAB's buses is $5,000. By installing lifts on two more buses, UAB could provide handicapped persons full 12 hour on-campus bus service equivalent to that provided to non-handicapped persons. Even if none of the seven vans were equipped with a lift, UAB could reasonably accommodate campus groups with mobility-impaired members by arranging to rent accessible vehicles from commercial agencies, and charging the group the same amount that they would have paid for using a UAB van. In light of UAB's annual transportation budget of $1.2 million, an expenditure of $15,000, plus occasional amounts representing the difference in commercial rental fees versus the UAB rental fee for vans, is not likely to cause an undue financial burden on UAB.

Conclusion

Having determined that the Department of Education's auxiliary aids regulation prohibits universities from denying auxiliary aids to students on the basis that they do not qualify for financial aid, and that this regulation is based on a permissible construction of section 504 of the Rehabilitation Act of 1973, as amended, we *Affirm* the district court's order enjoining UAB from denying auxiliary aids to handicapped students based on consideration of their financial status. We also *Affirm* the district court's order enjoining UAB from denying auxiliary aids to special students or those enrolled in the Special Studies program, based on our conclusion that the auxiliary aids regulation applies to such students and that its application to them is based on a permissible construction of section 504. Because we find that UAB has not made a reasonable accommodation for the handicapped in the provision of its transportation services, we *Reverse* the district court's holding as to this issue, and *Remand* this case to the district court for consideration of an appropriate remedy.

Affirmed in part, *Reversed* in part, and *Remanded*.

Problems

1. Would mandating auxiliary services for non-degree and non-credit courses be likely to result in colleges deciding not to offer such programming? In evaluating whether accommodations in those programs are reasonable, are only the budgets for the program or department relevant or will undue burden be decided by looking at the entire university budget?

2. The court notes the budget for the transportation system as the context for holding that the university had not acted reasonably. Could it have used the budget for the entire university?

3. The *Halasz* facts, see Section [B][1] of this Chapter, *supra*, noted that ILP and FYO participants were required to pay a fee for services provided only to them. In light of the language in the preceding case, would such a fee be likely to be upheld as permissible in the Eleventh Circuit? Are these services provided exclusively to ILP and FYO students "reasonable accommodations" or are they supplementary services for which a fee might be permissible?

Note

In *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), the Supreme Court held that it does not violate the Establishment Clause when a state vocational rehabilitation agency provides funding to a student attending a religious institution. When reading the note on the *Zobrest* opinion following the *Garrett F.* decision in Chapter 7[B][2], keep the *Witters* holding in mind.

[2] Modifications of Requirements

As was noted above, reasonable accommodations may include modifications of requirements. This may mean reduced course loads, waiver of courses, or exam accommodations.

Hypothetical Problem 6.3

Samantha (from Problem 6.1) decided to attend a less prestigious law school (Oakdale Law Center) when she was not accepted to Springfield Law School. On the first day of class, she realized that the Socratic method of calling on students might mean that she would be called on without any advance notice. She has begun to have panic attacks and wants to have class participation waived. She has asked one of the sympathetic law professors if that would be possible. The professor has consulted with the law school dean of students. Samantha has asked the dean of students about whether class attendance requirements could be waived to allow for more absences, whether the first year moot court competition could be waived, whether all of her classes could be scheduled in the afternoon, and if she could be assigned only to professors who have a reputation for being "nice" in class. She has also been told by her treating psychiatrist that having her small dog, Tootsie, live with her would help. The law school housing does not allow pets. She has requested a waiver of that rule.

In considering this problem, note the following clarification (or perhaps confirmation) from the 2008 ADA amendments, which codifies well settled language from case law:

> Nothing in this Act alters the provision specifying that reasonable modifications in policies, practices, or procedures shall be required unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

42 U.S.C. §12201(f). The rules of construction amendments also note that accommodations are not required for an individual who is only "regarded as" having a substantial impairment. 42 U.S.C. §12210(h).

McGregor v. Louisiana State University Board of Supervisors

[A courseload reduction is generally viewed as a modification that should be considered. This following excerpt is a decision that perhaps conflates the issues of whether this individual could ever succeed even with accommodations (a fact issue) with whether this requested accommodation really does affect essential requirements of the program or lower standards.

The case involved a student with serious and permanent head and spinal injures from several accidents. The student was admitted to LSU's law school based on his LSAT score and GPA. After repeated failures to achieve a passing law school GPA, he was academically dismissed. Robert McGregor's claim is that the denial of his request to attend part-time when he was initially admitted was a refusal to accommodate that violated the Rehabilitation Act. He was conditionally readmitted and given other accommodations (including tutoring, arranging his classes to be in the more accessible portion of the law school, acquiring accessible desks for his classes, and removing some barriers in a restroom). He was also given academic assistance by faculty members throughout the year after his readmission. He was also allowed to take some exams at home and given additional time and some other exam accommodations. Even with these accommodations, his grades continued to place him at risk, and he requested additional accommodations after the readmission year. The law school offered to allow him accommodations but required him to re-start as a first year student. The law school, however, continued to refuse to allow a part-time schedule.

The portion of the opinion below is the discussion of the accommodations issue.]

ZAGEL, DISTRICT JUDGE:

B. *Accommodations Required*

McGregor attacks the accommodations because they did not directly address his disability, i.e., fatigue and pain that impaired his ability to learn, and argues that the Law Center discriminated against him by insisting on a full-time schedule, in-class examinations, and advancement only upon achievement of a 68 average in each freshman semester. He says this was equal treatment which resulted in unequal opportunity to participate in the law program. The Law Center says that they "bent over backward" to help McGregor; that what McGregor seeks is to blame the Law Center for his mental ineptitude; and that his additional requests for accommodations amount to demands for preferential treatment or a substantial modification of its program, which is not required by law.

Here, the Law Center has not and does not assume that McGregor cannot function in its legal educational environment. Unlike the plaintiff in *Davis*, McGregor gained admission to the law school program. Some accommodations were made to allow McGregor to participate and to remain a participant in the program. Despite the Law Center's joint efforts and McGregor's repeated attempts, McGregor did not achieve the necessary GPA to advance to the junior year. McGregor's repeated attempts demonstrate that he cannot function successfully in the Law Center's program.

McGregor argues that he could succeed in law school if the Law Center accommodated him with (1) a part-time schedule and (2) at-home examinations. As proof of his abilities, he points to the spring 1989 semester (during which he earned a 70 in Constitutional I and passed Legal Writing and Research) and the fall 1989 (during which he received a 70.2 cumulative GPA with three at-home examinations and extra time on the fourth in-class examination). First, we are unpersuaded that this is competent evidence that McGregor can meet the academic demands set by the Law Center on a part-time schedule. McGregor received these passing scores after having a second crack at the courses. Second, his ability to pass given a part-time schedule is not dispositive of the issue here. We agree with the Law Center that many more students could succeed in law school on a part-time schedule. While other law schools in Louisiana and in other states have part-time students, the Law Center has made an academic decision to require that all freshman students carry a full-time course load. Any deviation from this constitutes an accommodation for McGregor's disability. We must decide whether

§504 requires the Law Center to accommodate McGregor either by giving him a part-time freshman schedule or at-home examinations or by advancing him to the junior year despite his failure to satisfy the minimum standard GPA, and later the minimum probationary GPA.

The Supreme Court in *Davis* made clear that §504 does not mandate that an educational institution "lower or effect substantial modifications of standards to accommodate a handicapped person," assuming such standards are reasonable. This rule was crafted in an effort to balance the institution's right to decide the basic requirements pertinent to its program and the handicapped student's right to participate. The extent of an institution's affirmative duties to accommodate handicapped individuals is far from clear. The best that opinions have been able to state definitively is that an educational institution must make "reasonable," but not "fundamental" or "substantial" modifications to accommodate the handicapped. McGregor, therefore, is entitled to the requested accommodations only if he can demonstrate that the accommodations constitute reasonable deviations from the Law Center's usual requirements "which meet his special needs without sacrificing the integrity of the [Law Center's] program." However, absent evidence of discriminatory intent or disparate impact, we must accord reasonable deference to the Law Center's academic decisions. Ultimately, to recover under the Rehabilitation Act, McGregor must demonstrate that his requests are reasonable and do not sacrifice the integrity of the Law Center's program. The imposition of this burden on McGregor is not only consistent with precedent but broadens some plaintiffs' chances of prevailing. Simply placing the burden on the Law Center to explain why McGregor's requests effect a substantial modification only diminishes McGregor's chances of prevailing, since arguably all the regulations require is that the institution articulate a legitimate nondiscriminatory reason for not altering the program.

The record on summary judgment is devoid of evidence of malice, ill-will, or efforts on the part of the Law Center to impede McGregor's progress. Therefore, we must accord deference to the Law Center's decisions not to modify its program if the proposed modifications entail academic decisions. McGregor characterizes the proposed changes as reasonable schedule modifications since the ABA accredits programs with part-time or evening students and the Law Center's bulletin allows such deviation in exceptional circumstances. This does not persuade.

First, whether the ABA accredits part-time programs is not determinative of reasonableness under the Rehabilitation Act, and we refrain from giving ABA accreditation such adjudicatory effect. Second, the fact that the Law Center has recognized in its Bulletin that exceptional circumstances may prompt the institution to alter its full-time attendance does not mean that such an alteration is not substantial. Given the Law Center's history and admittance practices, the full-time attendance requirement is critical to their program and the requested deviation would be a substantial modification under any circumstance. Whether the Law Center yields to such a request and whether §504 requires the Law Center to yield to such a request are two different questions.

We conclude that the Law Center's decisions to require full-time attendance and in-class examinations for first year students are academic decisions, ones which we find reasonable in light of the Law Center's admittance practices. The first year courses are specifically chosen to simulate the same challenges found in the practice of law, i.e., to assess and assimilate various legal theories in an intelligible manner. The Law Center has structured an intensive program with high academic standards, which it believes is best equipped to produce high quality lawyers. Essential to its program is a level playing field for all students: First year students cannot engage in outside work during the semester; they must take the same required courses in the same semesters; the examinations are given in class at the same time for each class section; and the final grades are generally based entirely on the final examinations.

The Law Center's program, though strict, is effective by some accepted measures. The Law Center has had and continues to have the highest bar passage rate in Louisiana. McGregor proposes that the Law Center create for him a law school program, either with a part-time schedule and at-home

examinations or with lowered passing GPA requirements. These additional accommodations clearly force the Law Center either to lower its academic standard and pass McGregor to the next level or to compromise the reasonable policy of its academic program and allow McGregor to attend part-time and take his examinations at home. Section 504 does not require this much.

The Law Center proved, by way of L'Enfant's affidavit, that no other student has ever been allowed to audit a course in the second semester after failing the first semester, and that "no other student, under any circumstances, has ever had a professor assigned to him for the specific purpose of concentrated tutorial instruction on a one on one basis." Also, no student other than McGregor has ever been permitted to take examinations at home, except in the junior or senior level courses in which all students took the examinations at home. Furthermore, no student has ever received the additional accommodations requested. Although the Bulletin allows for schedule changes under exceptional circumstances, the Law Center has not, in fact, permitted it and says that even under exceptional circumstances, a student must have proven his analytical abilities to succeed in the law program before receiving such an accommodation.

Viewing the undisputed facts, we can conclude only that the Law Center reasonably accommodated McGregor's disability and that the additional accommodations, if granted, would constitute preferential treatment and go beyond the elimination of disadvantageous treatment mandated by §504. We agree with Judge Duplantier that despite the reasonable accommodations provided, McGregor did not achieve the minimum cumulative GPA as required under the academic standards set by the Law Center. McGregor, therefore, is not an otherwise qualified individual who has been denied the benefits of the Law Center's program solely because of his handicap. We affirm the summary judgment in favor of the defendants on the Rehabilitation Act claims.

Problems

1. Might the decision in *McGregor* have been different if McGregor had come in with a high GPA and LSAT, was subsequently injured, and then required a part-time schedule as a result? Is the court conflating two issues in the *McGregor* decision?

2. Student A has mild cerebral palsy and was admitted to law school in spite of her low LSAT (which was taken with additional time), because of good undergraduate grades and recommendations. Because it takes her longer to read material, she has been given a lighter course load each semester, and she is allowed extra time to take exams and to complete some assignments. The law school dean for academic affairs wants to know if a notation about these special allowances should be made on her transcript. How should the dean be advised?

The following case deals with an issue that has frequently been raised in complaints to the Office for Civil Rights, whether course requirements must be waived. The court follows the *Wynne* analysis of how a program should demonstrate that something is a fundamental alteration.

Guckenberger v. Boston University

8 F. Supp. 2d 82 (D.Mass 1998)

SARIS, D.J.

Introduction

A class of students with learning disabilities brought this action against defendant Boston University ("BU") alleging that BU's policies toward them violated the Americans With Disabilities Act ("ADA"), the Rehabilitation Act, and state law. The Court issued its findings of fact, conclusions of law, and order of judgment on August 15, 1997, after a ten-day bench trial. See *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997) ("*Guckenberger II*"). In paragraph two of its order,

the Court required BU to propose and to implement a "deliberative procedure" for considering whether course substitutions for the foreign language requirement of BU's College of Arts and Sciences (the "College") would "fundamentally alter the nature" of BU's undergraduate liberal arts degree. BU, using the College's existing Dean's Advisory Committee to consider the issue, decided that course substitutions would constitute such a fundamental alteration. Plaintiffs challenge that determination. After hearing, the Court holds that BU has complied with the order.

Background

A. *Procedural History*

As part of a wholesale attack on BU's policies toward the learning disabled, plaintiffs alleged that BU's refusal to allow learning disabled students at the College to satisfy its foreign language requirement by completing selected non-language courses constituted a violation of federal and state discrimination law. Unlike some other portions of the case, the dispute over foreign language course substitutions involves only the College of Arts and Sciences and not other BU faculties. The Court rejected plaintiffs' sweeping argument that "any across-the-board policy precluding course substitutions" violates discrimination law. Rather, the Court concluded that "neither the ADA nor the Rehabilitation Act requires a university to provide course substitutions that the university rationally concludes would alter an essential part of its academic program." Plaintiffs did not appeal this or any other aspect of the Court's order of judgment.

Plaintiffs were successful, however, in pressing an inquiry into reasonable accommodation. Based on an administrative regulation that course substitutions "might" be a reasonable means of accommodating the disabled, 34 C.F.R. Pt. 104, App. A ¶31 (1997), and evidence introduced at trial, the Court held that plaintiffs had "demonstrated that requesting a course substitution in foreign language for students with demonstrated language disabilities is a reasonable modification." *Guckenberger II*, 974 F. Supp. at 147. Therefore, the burden of demonstrating "that the requested course substitution would fundamentally alter the nature of [BU's] liberal arts degree program" shifted to the University.

The Court determined, for two reasons, that BU had failed to meet its burden at trial of demonstrating why it should not have to accommodate plaintiffs' request. First, BU's president, defendant Jon Westling, had been substantially motivated by uninformed stereotypes (as reflected in the "Somnolent Samantha" metaphor) when he made the decision to deny the request. Second, President Westling did not engage in any form of "reasoned deliberation as to whether modifications would change the essential academic standards of [the College's] liberal arts curriculum." 974 F. Supp. at 149. The Court's conclusion was directly guided by two opinions of the First Circuit in *Wynne v. Tufts University School of Medicine*, which concerned a request for reasonable accommodations by a learning disabled medical student with dyslexia who challenged the multiple choice format of medical school examinations. See 932 F.2d 19 (1st Cir. 1991) (en banc) ("*Wynne I*"); 976 F.2d 791 (1st Cir. 1992) ("*Wynne II*").

Because of BU's failure to "undertake a diligent assessment of the available options," *Guckenberger II*, 974 F. Supp. at 149 (quoting *Wynne II*, 976 F.2d at 795), the Court ordered BU:

> to propose, within 30 days of the receipt of this order, a deliberative procedure for considering whether modification of its degree requirement in foreign language would fundamentally alter the nature of its liberal arts program. Such a procedure shall include a faculty committee set up by the College of Arts and Sciences to examine its degree requirements and to determine whether a course substitution in foreign languages would fundamentally alter the nature of the liberal arts program. The faculty's determination will be subject to the approval of the president, as university by-laws provide. As provided in *Wynne*, BU shall report back to the Court by the end of the semester concerning its decision and the reasons.

Id. at 154–55.

B. *BU's Deliberative Procedure*

The Court considers the following facts to be undisputed.

On October 6, 1997, the Court approved the use of the existing Dean's Advisory Committee (the "Committee") of the College as the mechanism for deliberating the issue of course substitutions for the foreign language requirement in accordance with the Court's order. In the course of normal business, the Committee "is charged by the by-laws of the College with advising the Dean on issues involving academic standards." During the relevant time period, the Committee was composed of eleven faculty members of the College, including professors of mathematics, English, philosophy, natural sciences, engineering and foreign languages.

The Committee convened to consider the issue of course substitutions on seven occasions. In keeping with its practice for general business, the Committee meetings were closed to interested parties and the public, with two exceptions. The first meeting on this issue was attended by Attorneys Lawrence Elswit and Erika Geetter, counsel for BU, who "set out the Committee's responsibilities as outlined in the Court's decision." Also, several College students addressed the Committee at the November 14, 1997 meeting. Their involvement was directed by the Court at a[n] October 6, 1997 hearing and was solicited through notice posted on an internet bulletin board and an advertisement published in BU's student newspaper. On December 2, 1997, the Committee completed its eight-page report (plus attachments) and submitted it to President Westling in accordance with the BU by-laws. Its final recommendation was:

> After extensive review and deliberation, the [Committee's] professional and academic judgment is that the conjunction of the foregoing considerations (which we have merely summarized here) entails but one conclusion: the foreign language requirement is fundamental to the nature of the liberal arts degree at Boston University. The [Committee] therefore recommends against approving course substitutions for any student as an alternative to fulfilling the foreign language requirement.

Two days later, President Westling, in a letter to Dean Berkey, accepted the recommendation of the Committee.

Discussion

A. *The Test*

The First Circuit crafted the following test for evaluating the decision of an academic institution with respect to the availability of reasonable accommodations for the learning disabled:

> If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.

Wynne I, 932 F.2d at 26, quoted in *Guckenberger II*, 974 F. Supp. at 148. "[T]he point is not whether a [university] is 'right' or 'wrong' in making program-related decisions. Such absolutes rarely apply in the context of subjective decisionmaking, particularly in a scholastic setting." *Wynne II*, 976 F.2d at 795.

B. *Basic Facts Showing Reasoned Deliberation*

The Court's first task under this test is "to find the basic facts, giving due deference to the school...." *Wynne I*, 932 F.2d at 27. Those "basic facts" must include showings of the following: (1) an "indication of who took part in the decision [and] when it was made"; (2) a "discussion of the unique qualities" of the foreign language requirement as it now stands; and (3) "a consideration of possible alternatives" to the requirement. As these elements suggest, the required showing of undisputed facts

refers to the "consideration" of the request by BU and not, as plaintiffs suggest, to a broad-ranging consensus of expert or university opinion on the value of foreign languages to a liberal arts curriculum.

The Court concludes that BU has presented sufficient undisputed essential facts, satisfying each of the three aspects of *Wynne*'s requirements. First, the Committee, made up of eminent members of the College faculty, deliberated this issue over the course of two months. The eleven Committee members include four department chairmen and represent diverse disciplines beyond the foreign languages. Though it would have been better to have kept minutes of all seven meetings, the four meetings provide the Court with sufficient insight to allow the Court to review the procedure that BU followed and to "demythologize the institutional thought processes...." *Wynne II*, 976 F.2d at 795. BU took pains to insulate President Westling from the process to remove any concerns about his earlier comments which, in substantial part, necessitated this remedy. The Committee gave adequate notice to College students, both with and without learning disabilities, of the opportunity to provide input into the Committee's decision. The Committee's reliance on only its own academic judgment and the input of College students was reasonable and in keeping with the nature of the decision.

Second, the Committee had vigorous discussions of the "unique qualities" of the foreign language requirement and its importance to the liberal arts curriculum. Its members rallied around an articulated defense, highlighted throughout the Report, of the rigorous foreign language requirement of the College. In both the Minutes and the Report, the Committee mentioned technical educational gains from the learning of foreign languages, such as enhancing an ability to read foreign literature in its original form and laying a "foundation" for other areas of academic concentration. For example, some members at the October 8 meeting believed it was important to be immersed in ancient Greek and Latin to understand Greek and Roman cultures. Another Committee member waxed "that someone who can read in French would realize that Madame Bovary dies in the imperfect tense, something we don't have in the English language, and it makes for a very different understanding of the novel."

Additionally, the Committee repeatedly emphasized its view that foreign language study uniquely contributed to the College's emphasis on multiculturalism: "A mind cooped up within a single culture is not liberally educated, and knowledge of a foreign language is essential to countering parochialism of outlook and knowledge." The Committee also portrayed foreign language study as part of a broader liberal arts education which, in its view, contemplates "some competence in thinking in diverse areas of knowledge." Commenting on the specific contribution of foreign language learning to liberal arts, the Committee reported that "[e]ncountering a foreign culture in and through the complexities of its verbal structures and representations poses a unique challenge to familiar idioms, settled habits of mind, and securities of knowledge."

Third, the Committee "explained what thought it had given to different methods" of meeting the requirement and "why it eschewed alternatives" to meeting the requirement. *Wynne II*, 976 F.2d at 794. The minutes indicate that alternatives were discussed in at least four of the Committee's meetings. The Report discusses objections to the Committee's conclusion. One dissenting member suggested an alternative proposal whereby a "student would select courses from a faculty approved list that focus on the language, culture, history, literature, and art of countries where the language is spoken." However, "[n]o other member shared this belief that the goals of foreign language study could be met by 'alternative paths' outside the foreign languages." Additionally, the objections of several students were noted at length.

As a whole, the Committee concluded that "[n]o content course taught in English can substitute fully for the insider access to other cultures—with its attendant invitation to thoroughgoing critical self-awareness—that is the hallmark of foreign language study." The Committee acknowledged that some students, both learning disabled and not, will "struggle" with the rigorous requirement, but

nonetheless concluded "that no other goal could serve the same purpose within the [College] curriculum."

Furthermore, the Committee discussed the College's existing accommodations of learning disabled students attempting to fulfill the foreign language requirement, a consideration that weighs in BU's favor in this analysis. See *Wynne II*, 976 F.2d at 795 (noting with favor Tufts' accommodations of tutoring, taped lectures and untimed examinations). The College allows all its students to satisfy the foreign language requirement in a variety of ways, including a free "Foreign Language Enhancement Program" that provides one-on-one instruction to learning disabled students navigating the required sequences of language classes. Learning disabled students are allowed spelling accommodations in language classes, and student tutoring is provided by the foreign language department at no cost to students. BU provides for additional time on tests, a reading track for French and Spanish, distraction-free testing, distribution of lecture notes in advance, and replacement of written with oral exams.

C. *Professional, Academic Judgment*

Having found undisputed facts of a reasoned deliberation, the Court must "evaluate whether those facts add up to a professional, academic judgment that reasonable accommodation is simply not available." *Wynne I*, 932 F.2d at 27–28. In the unique context of academic curricular decision-making, the courts may not override a faculty's professional judgment "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."

This standard is in keeping with the policy of judicial deference to academic decision making. The Court previously indicated that BU's decision would be given "great deference" so long as it occurred "after reasoned deliberations as to whether modifications would change the essential academic standards of its liberal arts curriculum." *Guckenberger II*, 974 F. Supp. at 149. Such deference is appropriate in this arena, because "[w]hen judges are asked to review the substance of a genuinely academic decision, ... they should show great respect for the faculty's professional judgment." *Wynne I*, 932 F.2d at 25. While, of course, "academic freedom does not embrace the freedom to discriminate," the First Circuit has observed that "[w]e are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations."

Plaintiffs attack the academic judgment of the Committee in three ways. First, they argue that BU's decision does mark "a substantial departure from accepted academic norms" because a majority of other colleges and universities—including Princeton, Harvard, Yale, Columbia, Dartmouth, Cornell and Brown—either do not have a general foreign language requirement or permit course substitutions for foreign languages. They also point out that the academic program would not be substantially affected because at BU only 15 students (out of 26,000) a semester would require such course modifications and suggest that similar low numbers of students requesting accommodations in other universities inform their willingness to allow substitutions. The evidence that BU is only among a handful of schools of higher education in its decision to deny course substitutions in language requirements is relevant to an evaluation of its decision to deny a reasonable accommodation. However, a court should not determine that an academic decision is a "substantial departure from accepted academic norms" simply by conducting a head-count of other universities. This approach is particularly inappropriate in the protean area of a liberal arts education. The liberal arts curriculum cannot be fit into a cookie cutter mold, unlike the medical school curriculum in *Wynne*, where no one disputed that mastery of biochemistry was necessary.

The *Wynne* decisions indicate that the appropriate question is whether BU's decision is "rationally justifiable" rather than the only possible conclusion it could have reached or other universities have reached. See *Wynne I*, 932 F.2d at 26. In *Wynne II*, the First Circuit endorsed the professional, academic judgment of Tufts Medical School officials, who had concluded after deliberation that allowing a requested accommodation "would require substantial program alterations, result in

lowering academic standards, and devalue Tufts' end product....” *Wynne II*, 976 F.2d at 795. The Court of Appeals there rejected a similar argument that at least one other medical school and a national testing service had permitted oral renderings of multiple-choice examinations. 976 F.3d at 795. Instead, because “Tufts decided, rationally if not inevitably, that no further accommodation could be made without imposing an undue (and injurious) hardship on the academic program,” *Wynne II*, 976 F.2d at 795, the First Circuit ruled as a matter of law that the medical school had met its burden under the ADA.

This Court concludes that so long as an academic institution rationally, without pretext, exercises its deliberate professional judgment not to permit course substitutions for an academic requirement in a liberal arts curriculum, the ADA does not authorize the courts to intervene even if a majority of other comparable academic institutions disagree.

Second, plaintiffs challenge the substance of the Committee's conclusions and analysis. Specifically, they argue that there are sixteen “material facts” in dispute, such as the following: (1) the two year (four semester) foreign language requirement is not “sufficient to permit the vast majority of students to read major works of literature in a foreign language,” thus debunking the Madame Bovary line of argument as involving an imperfect logic, not an imperfect tense; (2) a “foreign language requirement does not provide students with educational benefits regarding a foreign culture”; (3) there is “no particular thinking process involved in learning a foreign language that is distinct from any other type of learning”; and (4) BU's “foreign language requirement does not address ethnocentrism among students.”

In particular, Naomi S. Baron, a chair of the Department of Language and Foreign Studies at American University, criticized the foreign language “mystique” on plaintiffs' behalf. Nevertheless, even Professor Baron acknowledges that many academic and governmental institutions in recent years have espoused foreign language requirements, indicating the existence of a genuine academic dispute on this issue. Many colleges and universities (like Harvard and Haverford) have required proficiency in foreign languages based on the rationale that they deepen the students' appreciation of their own language, promote mental discipline, improve understanding between languages and thought, and make students less ethnocentric. While plaintiffs have submitted affidavits of Professor Baron and other academics who strongly disagree with BU's conclusions and label them as “trite,” “idealistic” or “cliches,” these issues raise the kinds of academic decisions that universities—not courts—are entrusted with making.

Plaintiffs' final mode of attack is to argue that BU's report does not meet the minimum accepted standards of academic study and inquiry, especially in the Committee's not having referred to outside experts. Prior to the initiation of this litigation, President Westling did not substantially consult experts in learning disabilities or engage in any deliberative process in reaching his decision to preclude course substitutions. In *Guckenberger II*, I held that a decision involving reasonable accommodations must involve more than an ipse dixit or blind adherence to the status quo. However, the Committee's deliberative process occurred after a lengthy trial in which experts in the field of learning disabilities testified about the difficulty which students with learning disabilities experience in their efforts to gain proficiency in a foreign language. This testimony summarized in *Guckenberger II* was available to the members of the Committee. In light of the tight timetable which the litigation imposed on the Committee, and the expert evidence in prior proceedings, I am unpersuaded that further academic study (like a “longitudinal” study) would have refined or altered the decision-making process, which ultimately involved a qualitative evaluation: What is essential to a liberal arts education?

Plaintiffs' vigorous attacks on BU's submission generally overstate the Court's level of scrutiny at this stage of litigation. My opinion as to the value of foreign languages in a liberal arts curriculum is not material so long as the requirements of *Wynne* have been met. Despite plaintiffs' attempts to pull

truly academic policy debates into the courtroom, the facts "essential" to this order are actually undisputed: BU implemented a deliberative procedure by which it considered in a timely manner both the importance of the foreign language requirement to this College and the feasibility of alternatives. Plaintiffs' argument that the procedure should have been more extensive and inclusive—effectively, more like a legal proceeding—does not have any support in the *Wynne* opinions.

BU's deliberations and conclusions pass muster under *Wynne*. The Court has no cause to doubt the academic qualifications and professionalism of the eleven members of the Committee. There is no evidence that the Committee's decision was mere lip service to the Court's order or was tainted by pretext, insincerity, or bad faith, beyond plaintiffs' unsubstantiated speculation that President Westling's bias infected the Committee. The Report is rationally premised on the Committee's conclusion that the liberal arts degree is "[i]n no sense a technical or vocational degree" like other degrees and that, in its view, the foreign language requirement "has a primarily intellectual, non-utilitarian purpose." With the justifiable belief in mind that this decision could not be made empirically, the Committee concluded that "[k]nowledge of a foreign language is one of the keys to opening the door to the classics and so to liberal learning. It is not the only key, but we do judge it as indispensable."

The Court concludes that the Committee's judgment that "a person holding a liberal arts degree from Boston University ought to have some experience studying a foreign language," is "rationally justifiable" and represents a professional judgment with which the Court should not interfere. Therefore, the Court concludes as a matter of law that BU has not violated its duty to provide reasonable accommodations to learning disabled students under the ADA by refusing to provide course substitutions.

Note

It has previously been noted that historically courts have been extremely deferential to institutions of higher education regarding their standards and programming. The *McGregor* and *Guckenberger* decisions demonstrate that deference. The deference is even greater when health care programs are involved. Why might that be the case?

Two recent cases involving health care professional programs raise questions about whether the deference traditionally granted to institutions is given in all cases, even where the *Wynne* analysis has been followed by the institution. LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW §10.7 (2012 and cumulative supplement). The cases are *Argenyi v. Creighton University*, 703 F.3d 441 (8th Cir. 2013), which has not yet been finally decided on the merits, and *Palmer College of Chiropractic v. Davenport Civil Rights Com'n*, 850 N.W.2d 326 (Iowa 2014). Both cases involved health care professional programs (medical school and chiropractic school). One involved a student with a severe hearing impairment and the other a student who is blind. The cases raise the question of the degree to which professional licensing requirements relating to patient safety can be a concern in the professional education program. A student who cannot hear or see can be accommodated during the academic program (at least while not engaging in clinical aspects of the program), but can the institution consider the fact that the student may not be licensed (or not licensed in some states) in denying an accommodation? The *Argenyi* case is not yet resolved on the fundamental alteration issue. The cost of providing the interpreter would be considered at a later point if the issue of undue financial burden is to be addressed. The *Palmer* court reached a final resolution and determined that although an individual with a visual impairment might not be able to be licensed in some states, the educational program still had to allow admission and provide accommodations. The Iowa Supreme Court addressed deference to the institution but found that the decision by the program was discriminatory. There is a strong dissent in the case.

Are these decisions consistent with other similar case decisions? How would they impact the

academic decisionmaking in a program where different states have different licensing standards? What if there were no states that would license a blind or deaf health care professional?

Problems

1. Student A is blind and has a guide dog. She enrolls in a seminar with ten students that is scheduled in a small room. The professor for the course is allergic to dogs. What should be done? Is the professor protected under §504 or the ADA because of his allergies? If so, whose disability must be accommodated? Can both needs be met?

2. Student B is enrolled in first year law school. Just before his first exam, he approaches the professor saying that he has "exam anxiety" and asks to take the exam later. Must the professor grant the request?

3. Student C has epilepsy that is not completely controlled with medication. She has advised her professors for the semester that she is likely to have a seizure occasionally in class, and that if that occurs, the emergency medical squad should be called. The professor is concerned about both the disruption and liability should something happen to Student C. What should the university counsel advise if the professor refuses to allow the student into the class?

[3] Behavior and Conduct Issues

Hypothetical Problem 6.5

Samantha (from Problem 6.1) has dropped out of Oakdale Law Center and decided to go to nursing school instead. She did not indicate anything about her depression and its treatment in her application. The dean of the nursing school learned of this when Samantha asked to have a mid-term exam rescheduled due to stress related to her condition. The dean has also learned that fellow students have complained that Samantha's grooming is not good, she has strong body odor, and her hair is often uncombed and her clothes are not clean. This has become more of an issue since Samantha started in the clinical classes where she works with patients under the supervision of a faculty or staff member. It has been reported that Samantha has been rude and abrupt with patients and on one occasion slammed a tray of medication down on a hospital cart.

The dean consults the university counsel's office about whether Samantha should be removed from the program. If she is not to be removed, what other steps can or should be taken? Who should be advised of her condition and how should this be handled in her student records?

An increasing number of cases in a variety of contexts, including employment and housing, raise questions about the degree to which behavior and conduct must be excused or accommodated when it results from mental illness or psychological conditions. Mental problems also raise concerns about when it is permissible to decide that a student is not qualified to participate in a program because of concerns about future behavior and conduct problems. The following cases illustrate some of these points.

The *Doe v. NYU* case involves a lengthy history of serious psychiatric and mental disorders, which had evidenced themselves in a series of very serious self-destructive acts and attacks on self and others. The problems dated back at least as far as when Ms. Doe was age 14. Ms. Doe falsely represented her mental health history in her application to medical school. The court does not address whether the medical school violated the Rehabilitation Act in asking mental health history questions. She was admitted to NYU Medical School in 1975.

The NYU Medical School learned of Ms. Doe's psychiatric history after a post-matriculation mandatory medical examination when it was learned that scars noticed on her arm were self-imposed,

and she disclosed some of her psychiatric history. She agreed to begin psychiatric therapy, but did not follow through. It was ultimately agreed that she would take a leave of absence, with the understanding that she could request reinstatement, which was not guaranteed. After various treatments, she worked at an advertising agency in New York.

Eventually she applied for readmission to medical school. Her treating psychiatrists provided letters of support to meet the standards that NYU required for readmission, that a student "must demonstrate that the problems that precipitated the leave are resolved, that the applicant must be able to handle all of the academic and emotional stress of attending medical school, and that the school must be satisfied that the applicant will be able to function properly after graduation as a physician." She was also required to show that she does not pose a significant risk of reexhibiting her prior disorder. She was required also to prove that "in addition to being fully cured, she possesses the additional qualifications of good judgment, personal integrity and truthfulness, and a genuine commitment to the medical profession."

Her request for readmission was denied. She was, however, admitted as a graduate student to the Harvard School of Public Health. She made false statements about her emotional state in her application to Harvard.

Because of the denial of readmission, Doe sought legal assistance, and ultimately brought suit in December of 1977, claiming a violation of §504 of the Rehabilitation Act. In June of 1978, she completed her Harvard graduate program and began work as a summer intern at the Department of Health, Education and Welfare (HEW) in Washington, D.C., where she continued to work until October 1981, when the lower court ordered her to be readmitted to NYU. Her work at HEW and other government agencies was of high quality under pressure. There was no evidence that she had any mental health related problems since fall 1977.

Doe v. New York University

666 F.2d 761 (2d Cir. 1981)

MANSFIELD, CIRCUIT JUDGE:

NYU contended that its decision not to readmit Doe should be upheld against a §504 challenge as long as it could show that there was a "substantial basis" for its decision. It argued that such a basis had been shown, and thus that its motion for summary judgment should be granted. It pointed to Doe's history of psychiatric difficulties and to the diagnoses of several psychiatrists who had examined her that she had suffered and continued to suffer from a "Borderline Personality disorder," a serious psychiatric problem that is extremely difficult to cure and that can lead to the type of self-destructive behavior that Doe had engaged in the past. NYU relied not only on the opinions of in-house psychiatrists, such as Drs. Fisher, Stern, and Zimmerman, but also on Dr. Lawrence C. Kolb, a former President of the American Psychiatric Association and an eminent clinical psychiatrist. When Doe refused to submit to an examination by Dr. Kolb he executed an affidavit setting forth his opinion on the basis of his study of the pertinent records in the case, including extensive depositions of Doe and the numerous medical reports and interviews. Dr. Kolb stated: "It is my opinion, which I can state with a reasonable degree of medical certainty, that Jane Doe suffers from a Personality Disorder known as Borderline Personality, and that her condition is serious.... None of her therapeutic efforts ... would be considered of sufficient duration or intensity by me or by most experienced therapists to bring about major personality change of such a nature that Jane Doe would not relapse in the face of future emotional stress such as that encountered in medical school." As the result of an order by the district court, Doe finally submitted to an examination by Dr. Kolb on August 27, 1981. He reported, "In my opinion Mrs. Jane Doe remains at high risk of recurrence of personality disorganization if exposed to situations of stress such as would occur on return to medical school."

NYU also produced an affidavit of Dr. Zimmerman, who had re-examined Doe in September of

1978 and had again concluded at that time that she was not qualified for readmission. Dr. Zimmerman reaffirmed this conclusion, stating: "The character of [the] stress [of medical school], Jane Doe's prior history of failing to be able to deal with it, her diagnosis of personality disorder, and her failure to have received any appropriate degree of psychiatric treatment for it leads me to conclude that she has not made any reasonable showing that she is now qualified to re-enter medical school." NYU also relied on the Payne-Whitney diagnosis of Borderline Personality, which confirmed several other medical diagnoses. It pointed out that even one of Jane Doe's own doctors, Dr. Samuel Bojar, although disagreeing with the diagnosis in Doe's case, admitted that "a borderline person is not very treatable. It's a fixed situation." On the basis of these medical diagnoses, which it claimed were well supported by Doe's history, NYU argued that Doe poses a danger to herself, her teachers, her fellow students, and her patients.

In a decision issued on September 25, 1981, Judge Goettel found that Doe was a "handicapped person" under §504 and implementing regulations. He stated that whether she was "otherwise qualified" for admission to NYU Medical School depended on whether her psychiatric symptoms would recur, preventing her from performing as a medical student and causing her to pose a danger to herself and others. In deciding this issue the judge discounted the testimony of the psychiatrists on both sides and relied upon Doe's "actual behavior and condition over the past five years." He concluded that Doe "will more likely than not be able to complete her course of medical studies and serve creditably as a physician," that she was therefore "otherwise qualified" under the Act, and that she had been denied readmission "solely because of the handicap." [H]e further concluded that NYU had failed to sustain its burden of going forward and proving that Doe was not an otherwise qualified handicapped person or that her application for readmission was rejected for reasons other than her handicap. No deference was given to NYU's evaluation of Doe's qualifications as compared with those of other qualified first-year students. Judge Goettel denied NYU's motion for summary judgment and found that Doe was likely to prevail on the merits.

In claiming to be a handicapped person under the Act, Doe is faced with her representations on applications that she did not suffer from any emotional problems and her testimony that her ability to function in major life activities has never been impaired and that she has never been unable to work or learn, as is attested to by her successful graduation from college, her receipt of a Masters Degree from Harvard and her outstanding record of employment as a member of HEW. Notwithstanding this evidence we believe that for present purposes she should be classified as a handicapped person under the Act, in view of the independent evidence of her extensive history of mental impairments requiring hospitalizations and her departure from NYU in 1976 because of her psychiatric problems, all of which indicate that she has suffered from a substantial limitation on a major life activity, the ability to handle stressful situations of the type faced in a medical training milieu. NYU's refusal to readmit her on the ground that she poses an unacceptable risk to faculty, students, and patients makes clear that she is "regarded as having such an impairment." §7(7)(B)(iii). Our conclusion is reinforced by the wide scope of the definition in §7(7)(B), which includes in subdivision (ii) a "record of such impairment," and by its legislative history.

Turning to the Act's term, "otherwise qualified handicapped individual," it is now clear that this refers to a person who is qualified in spite of her handicap and that an institution is not required to disregard the disabilities of a handicapped applicant, provided the handicap is relevant to reasonable qualifications for acceptance, or to make substantial modifications in its reasonable standards or program to accommodate handicapped individuals but may take an applicant's handicap into consideration, along with all other relevant factors, in determining whether she is qualified for admission. The institution need not dispense with reasonable precautions or requirements which it would normally impose for safe participation by students, doctors and patients in its activities. Section 504 simply insures the institution's even-handed treatment of a handicapped applicant who meets reasonable standards so that he or she will not be discriminated against solely because of the

handicap. But if the handicap could reasonably be viewed as posing a substantial risk that the applicant would be unable to meet its reasonable standards, the institution is not obligated by the Act to alter, dilute or bend them to admit the handicapped applicant.

In determining whether a handicapped person is "otherwise qualified" for admission to an institution of higher education, a court must also consider other factors not normally encountered in evaluating ability to satisfy employment standards or to qualify for a job. The first of these is a court's limited ability, as contrasted to that of experienced educational administrators and professionals, to determine an applicant's qualifications and whether he or she would meet reasonable standards for academic and professional achievement established by a university or a non-legal profession.

Another factor which must be taken into account is that the qualification of a handicapped person for admission to an institution turns not only on whether he or she meets its reasonable standards but whether the individual, where a few (in this case 170) must be chosen out of thousands of applicants, is as well qualified despite the handicap as others accepted for one of the limited number of openings. In performing the difficult task, where there are more qualified applicants than places available, of making comparative judgments to determine which are the most promising candidates, the institution is not required to accept a qualified handicapped person if the handicap renders that individual less qualified than other qualified applicants.

Since an institution or employer is permitted to take into consideration an applicant's handicap in deciding whether he or she is qualified, a §504 action frequently does not lend itself easily to the analysis used for allocation of burdens and order of presentation of proof used in suits alleging discrimination based on impermissible factors (race, color, religion, sex or national origin) in violation of Title VII of the Civil Rights Act of 1964. In such suits, although the plaintiff has the ultimate burden of proving by a fair preponderance of the evidence that the defendant discriminated against him on the basis of an impermissible factor, he may establish a prima facie case by proving that he applied for a position for which he was qualified and was rejected under circumstances indicating discrimination on the basis of an impermissible factor. The burden then shifts to the defendant to rebut the presumption of discrimination by coming forward with evidence that the plaintiff was rejected for a legitimate reason, whereupon the plaintiff must prove that the reason was not true but a pretext for impermissible discrimination. That procedure may be appropriate for §504 suits in which the defendant disclaims any reliance on the plaintiff's handicap.

On the other hand, in the more typical suit under §504, the defendant acknowledges reliance on the plaintiff's handicap and since the plaintiff's handicap may be a permissible factor to be taken into account in determining whether he is qualified, the order of presentation of proof in such cases cannot be framed in terms of permissible versus impermissible factors. The pivotal issue is not whether the handicap was considered but whether under all of the circumstances it provides a reasonable basis for finding the plaintiff not to be qualified or not as well qualified as other applicants. Accordingly we hold that in a suit under §504 the plaintiff may make out a prima facie case by showing that he is a handicapped person under the Act and that, although he is qualified apart from his handicap, he was denied admission or employment because of his handicap. The burden then shifts to the institution or employer to rebut the inference that the handicap was improperly taken into account by going forward with evidence that the handicap is relevant to qualifications for the position sought. The plaintiff must then bear the ultimate burden of showing by a preponderance of the evidence that in spite of the handicap he is qualified and, where the defendant claims and comes forward with some evidence that the plaintiff's handicap renders him less qualified than other successful applicants, that he is at least as well qualified as other applicants who were accepted.

Applying these principles, it is clear in the present case that Doe, a handicapped person, was denied readmission because of her handicap. NYU has come forward with evidence that the handicap was relevant to her qualifications for readmission according to its standards which appear reasonable

enough and are not challenged. She therefore bears the burden of showing that despite her handicap she is qualified. Since her admission in 1975 was obtained on her false representation that she did not suffer from any recurrent illnesses or emotional problems, that initial admission does not serve to establish that she is "otherwise qualified" under the Act except to indicate that except for her personality disorder, which involved self-destructive and antisocial behavior, she was academically acceptable. NYU, however, was entitled, in determining whether she was qualified, to be advised of and to take into account her mental impairment, since it is directly relevant to her qualifications and bears upon her ability to function as a student and doctor, to get along with other persons, and to withstand stress of the type encountered in medical training and practice. NYU is of necessity concerned with the safety of other students, faculty and patients to whom Doe would be exposed, since this could adversely affect them as well as the success and reputation of its Medical School activities. Any harm done by her as a medical student to others, moreover, might expose it to legal liability for knowingly permitting such exposure.

The crucial question to be resolved in determining whether Doe is "otherwise qualified" under the Act is the substantiality of the risk that her mental disturbances will recur, resulting in behavior harmful to herself and others. The district court adopted as its test that she must be deemed qualified if it appeared "more likely than not" that she could complete her medical training and serve as a physician without recurrence of her self-destructive and antisocial conduct. We disagree with this standard. In our view she would not be qualified for readmission if there is a significant risk of such recurrence. It would be unreasonable to infer that Congress intended to force institutions to accept or readmit persons who pose a significant risk of harm to themselves or others, even if the chances of harm were less than 50%. Indeed, even if she presents any appreciable risk of such harm, this factor could properly be taken into account in deciding whether, among qualified applicants, it rendered her less qualified than others for the limited number of places available. In view of the seriousness of the harm inflicted in prior episodes, NYU is not required to give preference to her over other qualified applicants who do not pose any such appreciable risk at all.

The evidence in the record before us indicates that there is a significant risk that Doe will have a recurrence of her mental disorder, with resulting danger to herself and to others with whom she would be associated as a medical student. The non-recurrence of Doe's self-destructive and antisocial activity for the past four years, during which she has peacefully coexisted with others, is attributed to the fact that the types of stress to which she has been subjected at the Harvard School of Public Health and as an HEW employee do not approximate the seriousness of those which she would experience as a medical student and doctor. Moreover, her history indicates that although there were no manifestations of disorder for seven years after the earlier episodes in 1963–64, they recurred during the period 1972–1977, indicating that despite a period of dormancy they may recur again.

In support of her claim Doe, on the other hand, has offered the opinions of various psychiatrists to the effect that she is fit to pursue a medical career. However, none of these psychiatrists rules out the risk that she may suffer a recurrence. Moreover, in their depositions Dr. Casella described Doe as having a "Passive-Aggressive personality" (DSM-II, 301.81) which is a type of personality disorder and Dr. Richards, while preferring to describe her as suffering from a "Depressive Neurosis" (DSM-II, 300.4), agreed that she might fall in the category of "Passive-Aggressive personality." Dr. Bojar, while not agreeing that Doe had a Borderline Personality disorder, described his diagnosis as follows:

> Q: Did you make a diagnosis of Jane Doe at that time?
>
> A. Yes. My diagnosis was that of a chronic neurotic depression with anxiety precipitated when her particular needs could not be met. If I may elaborate on my formulation—I prefer "formulations" rather than diagnostic labels. I see her as a perfectionist who is an overachiever, who imposes very high demands on herself and on others; and when these can't be met, she undergoes a great deal of frustration.

Her security is based on her doing well, and when she cannot utilize this defense of really achieving at a high level she becomes anxious and, well, quite depressed. When she was making demands on others, when she needed others and people could not come through, she felt the same kind of frustration that she would feel from herself if she could not do well; and it was in these settings that the hostility would arise and some of these cutting episodes occurred, which I saw as really expression of anger and hostility against the others.

Dr. Calkins' summary affidavit could hardly be given much weight, since he is not a specialist in psychiatry or behavioral sciences and his training in this area was limited to a one month clerkship at medical school, from which he graduated in 1975, and occasional experience in psychiatry as a resident, principally among outpatients.

For the reasons stated by the district court, it acted properly in refusing to give any weight to the findings of the OCR and, if the action is tried, they should not be accepted as evidence. On the other hand, the court erred in ruling that it would disregard for the most part Doe's prior psychiatric history and treat the expert testimony as being of lesser reliability than her recent behavior. In light of the type of behavioral disorder presented, which could result in a recurrence after a dormant period, expert opinion was entitled to greater weight in reaching a decision as to whether Doe was qualified. The court is required to perform the disagreeable task of considering Doe's entire psychiatric history and weighing the expert testimony on each side.

In our view, Doe, in addition to her failure to show threatened irreparable injury, has not on this record established any likelihood of success in proving that despite her handicap she is qualified for acceptance as a medical student or to engage in the practice of medicine. Moreover, while there may possibly be questions going to the merits that are sufficiently serious to make them a fair ground for litigation, the evidence indicates that there is a significant risk of recurrence of her self-destructive and harmful conduct, which NYU should not be required to bear pending trial and that a substantial basis exists for upholding NYU's decision to deny her readmission.[5] Against this, pending a full decision on the merits, plaintiff can show only the hardship of delay of another year in admission to medical school, which as indicated above, she has voluntarily chosen to do in the past. Thus the balance of hardships tips in NYU's favor, not in Doe's. Accordingly, the grant of a mandatory preliminary injunction must be reversed.

Accordingly, the district court's denial of NYU's motion for summary judgment is affirmed and its grant of mandatory preliminary injunctive relief is reversed.

Notes

1. The previous case discusses burdens of proof and weight to be given to various kinds of assessments. In employment requirements under the ADA, an interactive process for addressing accommodation needs is expected. Requirements for higher education are not as specific, but courts generally require such a process. In light of the burden of proof expectations, what might be the best way to ensure that these issues are resolved without litigation?

2. Institutions of higher education are concerned about the presence of students and others on campus with difficult behavior problems. The concerns are for the safety of others on campus and related potential liability as well as concern about the disruption to the learning of other students. Finding the appropriate means of ensuring that behavior problems cause neither danger nor disruption is a challenge. In *Aronson v. North Park College*, 94 Ill. App. 3d 211, 49 Ill. Dec. 756, 418 N.E.2d 776 (1981), a private college dismissed a student based on results of a psychological examination, the Minnesota Multiphasic Personality Inventory Test (MMPI), a test required of all incoming students. She was dismissed because the college's psychologist believed that she lacked sufficiently strong mental health to continue college or an educational career. The legal action was not based on disability discrimination theories but rather on whether the dismissal was impermissible under

contract theories. There was a dispute about whether students had adequate notice of the process of psychological evaluation and whether the dismissal was arbitrary and capricious. The court held that the college acted reasonably based on the information it received from the counseling center about the student's mental state.

Several things make *Aronson* an interesting contrast with the *Doe v. NYU* decision. First, there was no indication of any past record of behavior or conduct to raise concerns, only a psychological evaluation. Second, the case was based on common law theories rather than discrimination theories. In 1981, the ADA would not have been applicable, and many private colleges may not have been recipients of federal financial assistance to subject them to Section 504. If this same case occurred today, although Title III of the ADA would apply, it is far from clear that this student would be considered to be "disabled" within the statute after the limitations set out in the *Sutton* Supreme Court opinion.

For development on this issue, see *Stebbins v. University of Arkansas*, 2012 U.S. Dist. LEXIS 182620, 2012 WL 6737743 (W.D. Ark. 2013) (addressing accommodation of a student with "intermittent explosive disorder" who had engaged in tactless behavior with a faculty member; discussing student's repeated incidents of misconduct applying the "direct threat" analysis and determining that the student did not have to be readmitted because he was not otherwise qualified); *Shurb v. University of Texas Health Sciences Center*, 63 F. Supp. 3d 700 (S.D. Tex. 2014) (no violation of Section 504 to remove a medical school student who had intentionally tried to harm himself by drinking antifreeze; student did not provide treating psychiatrist certification that he was not a danger to self or others); *Letter to Marietta College*, 31 Nat'l Disability Law Rep. ¶23 (OCRXII, Cleveland 2005) (dismissal of student based on concern about suicide must be based on individualized and objective assessment). A settlement in 2015 between the Department of Justice and Quinnipiac University involved a student who was dismissed because of mental health issues. The settlement can be found at http://www.ada.gov/quinnipiac_sa.htm.

The trends on such issues demonstrate the importance of proactive, interactive, individualized, and consistent application of behavior and conduct requirements as they relate to students with mental health problems. What is not yet clear is whether an institution may take action based only on a threat to self (such as suicidal tendencies or eating disorders) or only where there is a threat to others. Title II regulations provide that "direct threat means a significant risk to the health or safety of *others* that cannot be eliminated by a modification of policies, practices or procedures or by the provision of auxiliary aids or services as provided in §35.139." 28 C.F.R. §35.104. See also *Shinabargar v. Board of Trustees of University of District of Columbia*, 2016 WL 393180 (D.D.C. 2016) (former law student suspended for violating code of student conduct not motivated by protected activities; suspension was for acting erratically towards students and faculty in ways that could be interpreted as threatening). The determination of direct threat is to be based on an individualized assessment "based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk." 28 C.F.R. §35.139(b). Title I regulations applicable to employment, however, allow direct threat as a defense when the individual poses a direct threat to the health or safety *of the individual* or others in the workplace.

Problem

1. What ADA or §504 issues would arise if the facts in *Aronson* occurred today?

2. What are the responsibilities of the institution of higher education in reporting past problems to licensing boards? If a student knows that mental health treatment will be reported to a licensing board, will this be a deterrent from getting the treatment?

3. Would it be a reasonable accommodation to a student with a panic disorder to attend classes by telephone hook-up or Skype to the classroom? See *Maczaczyj v. State of New York*, 956 F. Supp. 403 (W.D.N.Y. 1997). What would be the basis for the institution demonstrating fundamental alteration or undue burden? What if the student had HIV or highly contagious influenza and was concerned about being exposed to contagious diseases or exposing others by class attendance?

[4] Obligations after Disqualification

Higher education enrollment may be terminated for students because of the failure to meet academic standards or for disciplinary reasons resulting from conduct that is disruptive or violent. This raises questions not directly answered in the statutes regarding the degree to which reasonable accommodation requires excusing past behavior. The following cases indicate how some courts have responded to these situations.

Hypothetical Problem 6.6

Jacob has enrolled in Oakdale Law Center. He had done well in undergraduate school and had an extraordinary record of service in the Peace Corps. Although his LSAT score was fairly low, he was admitted based on the overall record, including his service. In college, Jacob had managed to do well because he took a lot of classes where he had substantial time to write papers, but had taken very few classes requiring essay or multiple choice exams in a timed format. In high school, one of his counselors had mentioned to Jacob that he might have a mild form of ADHD, but Jacob had not received special education.

After his first semester of law school, Jacob received very low grades, and his second semester grades were even lower. He was surprised and upset, and before petitioning for readmission, he had an evaluation by an adult learning disability expert, who diagnosed Jacob with a learning disability. The evaluation recommended that Jacob receive additional time on exams and that he take exams in a distraction-free environment. If Jacob petitions for readmission presenting this documentation, must the law school readmit him? Must his records be expunged? Must it allow him to start over? Must it refund his first year tuition? Does it matter whether Jacob's dismissal was for academic reasons instead of a dismissal for violent and threatening conduct, that is later diagnosed as relating to a mental illness for which the student is now being treated (as was the case for Samantha)?

Anderson v. University of Wisconsin

841 F.2d 737 (7th Cir. 1988)

EASTERBROOK, CIRCUIT JUDGE:

The University of Wisconsin Law School at Madison admitted Fradus Lee Anderson to the class entering in August 1979. He completed the semester with an average of 75, below the 77 required by the Law School. He was not permitted to complete the second semester of the 1979–80 year because he had not furnished the Law School with the necessary certification of his undergraduate degree. The Law School allowed him to return for the spring semester in 1981, despite his poor average and the knowledge that he is an alcoholic. Sensing that he was doing poorly Anderson asked to withdraw. The request was granted, but not before he received a D in legal writing and, while drunk, harassed and threatened his legal writing partner. The Law School admitted Anderson for a third time in the spring semester of 1982. He completed this semester with a cumulative average of 76.92. The Law School informed Anderson that he would not be allowed to continue.

The district court recounts Anderson's saga in trying to be readmitted for a fourth try. The Law School generally readmits students whose failure stems from a problem that has been overcome. Anderson attributed his failure to drink and contended that he was recovering. The Retentions Committee thrice concluded that Anderson had not conquered his drinking problem, the third time

after receiving live testimony from four of Anderson's supporters, including a counselor at his clinic. The Retentions Committee learned that Anderson generally abstained but still drank on occasions. It concluded both that Anderson was not prepared for a pressure-filled curriculum and that he could not complete the program within the five years ordinarily allowed.

The Petitions Committee of the Law School then reexamined the subject, holding a de novo inquiry in response to Anderson's grievance against the Retentions Committee. The Petitions Committee considered not only Anderson's grades and drinking but also his performance at the Business School. Anderson had received an "A/B" grade in "Legal Aspects of Business Administration," an undergraduate-level course duplicating materials Anderson covered in law school; the other grades were B/C, C, and D (which Anderson had reported as a C). The Business School said that it would not consider this performance sufficient for admission to its graduate program. The Petitions Committee concluded that the record did not augur satisfactory completion of the Law School program and declined to readmit Anderson. The Vice Chancellor for Academic Affairs of the University, after still another inquiry, affirmed this decision. Anderson then filed this suit against the University, its Chancellor and Vice Chancellor, the Law School, and the members of the two committees (collectively the University). He argued that the University violated §504 of the Rehabilitation Act by discriminating against him on account of alcoholism.

On the Rehabilitation Act aspect of the case, the University does not dispute Anderson's contention that an alcoholic is a "handicapped individual" within the meaning of the Rehabilitation Act; we therefore assume that he is. Anderson does not contend that the Act requires the University to alter its standards or procedures to accommodate his alcoholism; we therefore assume that it need not.

Section 504 provides that an institution receiving federal funds may not discriminate against an "otherwise qualified handicapped individual." The district court ruled in favor of the University because, it believed, Anderson is not "otherwise qualified" to continue as a law student. His average was below 77; the Law School requires an average of 77; that is that. Anderson replies that but for his drinking he could achieve an average of 77, but this misses the point.

Although inability to perform at the required standard as a result of a handicap makes a person not "otherwise qualified," a court still must decide what that standard is. The meaning of a standard lies in the method of its application. A student who cannot maintain an average of 77 at the Law School is not qualified to remain as a student, unless the student shows that the source of the academic problem has been abated, making future work of satisfactory quality likely. The bright line at 77 is diffracted by the Retentions Committee. Its decisions are part of the whole standard the Law School uses. The University wants us to disregard the "unless" clause—to treat the standard of qualification as if there were no Retentions Committee. The exceptions are part of the rule, however, and a university could not say to handicapped persons "None may apply to the Retentions Committee" or "We apply only the basic rules, and not the exceptions, to you." We therefore disagree with the district court's approach to the case.

This does not affect the outcome, however, because no rational jury could return a verdict for Anderson on this record, and the grant of summary judgment therefore was proper. Nothing in the record suggests that the University's decision was based on stereotypes about alcoholism as opposed to honest judgments about how Anderson had performed in fact and could be expected to perform. The Law School allowed Anderson to reenter the program twice, knowing that he is an alcoholic; the Business School also allowed Anderson to take courses. In none of his four stints at the University did Anderson perform up to standard. During spring 1981 he harassed and threatened another student. He did not abstain from alcohol during any substantial portion of the period covered by the record. Although there is a dispute about how serious his drinking remains—the University characterizes Anderson as a person with "fits of sobriety," while Anderson prefers the characterization of a person generally successful at abstaining with periods of inconsequential backsliding—it is undisputed that

Anderson sometimes still drinks. His performance at the Business School during a period when he insists he was free from drink does not give confidence that he could succeed at the Law School.

Anderson believes that a jury should evaluate the evidence and determine whether, as his counselor told the Retentions Committee, he had recovered enough to take the stress. There is a dispute about how Anderson would fare if placed back in the classroom, but this is not a "material" issue. The Act does not designate a jury, rather than the faculty of the Law School, as the body to decide whether a would-be student is up to snuff. The Law School may set standards for itself, and jurors unacquainted with the academic program of a law school could not make the readmissions decision more accurately than the faculty of the Law School; the process of litigation would change the substantive standard in addition to raising the costs of its application. The Supreme Court has repeatedly admonished courts to respect the academic judgment of university faculties.

The question is not whether a court believes that Anderson could handle the work. It is whether the University discriminated against him because of his handicap—that is, excluded him even though it would have readmitted a student whose academic performance and prospects were as poor but whose difficulties did not stem from a "handicap." Just as Title VII of the Civil Rights Act of 1964 ensures only equal treatment and not "correct" decisions, so the Rehabilitation Act requires only a stereotype-free assessment of the person's abilities and prospects rather than a correct decision. Not a shred of evidence in the record suggests that the University held a stereotypical view of alcoholism. The committees and the Vice Chancellor looked, hard, at what Anderson had done and could do. If they erred in their appreciation of these things, the error does not violate the Rehabilitation Act.

Notes

1. *Second Chances*: A decision that raises a difficult issue is *Betts v. Rector & Visitors of Univ. of Va.*, 967 F. Supp. 882 (W.D. Va. 1997), in which a medical student was not identified as having a learning disability until after academic problems occurred. Although the student was given appropriate accommodations after that time, the student could not achieve the requisite cumulative grade point average required to continue in the program because of the earlier low grades. This raises the question of what the obligation of the institution is in such a case. While the courts have been consistent in not requiring the institution to discount or eliminate the grades achieved before the disability was identified, there is a bigger policy question about whether they should do so and if so, in what circumstances. At least two decisions have indicated that institutions should consider a later diagnosed disability in considering dismissal and readmission. See *Singh v. George Washington University*, 368 F. Supp. 2d 58 (D.D.C. 2005), and *Steere v. George Washington University*, 368 F. Supp. 2d 52 (D.D.C. 2005).

2. *Limitations on Exam Attempts:* In *Riedel v. Board of Regents for the State of Kansas*, 1993 U.S. Dist. LEXIS 17262 (D. Kan. 1993), the plaintiff sought relief under §504 and Title II of the ADA because he was academically dismissed from medical school after unsatisfactory attempts at the National Board Examinations. The National Board policy was that after three unsuccessful attempts, the student must petition to try a fourth time. He was dismissed in 1990, after his petition to take the test a fourth time was denied. Two years after his dismissal he sought to retake the test based on a claimed learning disability that had been identified.

The court concluded that he no longer had standing to petition to retake the test because he was no longer a student. The court thus leaves open the question of whether the four-attempt policy violates §504 and/or the ADA. The case raises the difficult problem of the later identified disability. In this case, it was not apparent that the claimant had documentation justifying accommodations, but in a case where such documentation did exist, and the disability was not identified until after the failure, it raises the question this court left undecided. Should an institution be required to allow second (or third or fourth) chances where the disability is not known even to the claimant at the time of the

failure? Such situations are not unlikely to occur in cases involving learning disabilities and some mental illnesses.

[5] Athletics

To some, the American college campus could not be imagined without the presence of athletics. Competition in intramural sports or intercollegiate athletics is a big part of campus life. On many college campuses, whether one is interested in athletics or not, completion of the physical education requirement is a part of the required curriculum.

Students with vision in one eye, or with only one kidney or with other impairments are often excluded from participation in college athletics, usually out of paternalistic concerns for the student's safety and welfare.

The Rehabilitation Act regulations, 34 C.F.R. §104.47(a), provide some guidance, and there have been a few cases on these issues.

Notes

1. *Deferring to Institutions on Safety Issues:* The two major cases that have addressed this issue have reached consistent results and reflect the general rule that courts will defer to the decisions of academic institutions so long as their decisions are rationally based. In *Knapp v. Northwestern University*, 101 F.3d 473 (7th Cir. 1996), a student who had been awarded an NCAA basketball scholarship at Northwestern University suffered a sudden cardiac death during a pick-up basketball game. He recovered and an internal cardioverter-defibrillator was implanted. Northwestern University later decided, based on recommendations of conference guidance that he was ineligible to play. Although his scholarship continued, the student's ineligibility to play college basketball would certainly have affected his potential to play professional basketball. The court, however, held that Knapp was not substantially limited in obtaining an education. The court further recognized that where the severity of the potential injury is high as in Knapp's case, and where the potential for a further episode was unclear, the university acted reasonably in its decision. The court noted that medical determinations such as these should be left to team doctors and universities so longs as they act reasonably and rationally and "with full regard to possible and reasonable accommodations."

The *Knapp* court cited a similar case of *Pahulu v. University of Kansas*, 897 F. Supp. 1387 (D. Kan. 1995), in which a high risk for permanent and severe neurological injury rendered a college student unqualified for intercollegiate football participation.

2. *Waiver of Liability:* In *Wright v. Columbia Univ.*, 520 F. Supp. 789 (E.D. Pa. 1981), the claimant sought to play college football although he had lost sight in one eye. The college sought to deny his participation although he and his parents were willing to release Columbia from potential liability. The court in granting the plaintiff's request for a preliminary injunction noted that a highly qualified ophthalmologist had indicated that there is no substantial risk of serious eye injury related to football. Other factors of importance were the fact that he was mature enough to make this decision, in contrast to students who might not be old enough to weigh the risks involved. In what ways can this decision be distinguished from *Knapp*? In *Class v. Towson University*, 806 F.3d 236 (4th Cir. 2015), the court held that a student-athlete with a liver transplant was not otherwise qualified to participate in the football program although cleared by his personal physicians because of an unacceptable risk of serious injury or death.

Problems

1. Does it violate Section 504 or the ADA if a student with one kidney is prohibited from participating in the football program assuming the student is athletically qualified? How can the college protect itself from liability if participation is permitted?

2. Does it violate Section 504 or the ADA if a student who is HIV-positive is precluded from the basketball team?

3. Is it legal for a student who is deaf to be prohibited from participating in the football program?

4. What are the implications of a university practice of waiving the physical educational requirement for students with mobility impairments? What if a student does not want waiver, but prefers adaptive physical education? Must that be provided?

5. Must colleges provide equivalent intermural and intramural athletics programs similar to those required under Title IX? For example, must colleges provide opportunities for intermural wheelchair basketball or tennis? The Department of Education in 2010 commented on athletic programs in K-12 and postsecondary settings. In 2013, the Department clarified and provided more detailed guidance on what would be expected. Given the complexity of the types of disabilities and the number of sports and athletics programs, it is useful to having that clarifying guidance. See http://www.ed.gov/news/press-releases/us-department-education-clarifies-schools-obligation-provide-equal-opportunity-students-disabilities-participate-extracurricular-athletics; and http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf.

Note

Standardized Tests and Athlete Eligibility: A number of cases have been brought since the passage of the ADA challenging NCAA scholarship eligibility based on standardized test scores and curricular requirements. The NCAA was not subject to Section 504 of the Rehabilitation Act because it was not a recipient of federal financial assistance. Title III of the ADA, however, applies to private providers of public accommodations. Although it is unsettled whether the NCAA fits the definition of a Title III entity, the Supreme Court's broad ruling in the case of *PGA v. Casey Martin*, in Chapter 4[A], *supra*, signals that it probably does fall within Title III. The substantive application of the nondiscrimination requirements, however, is also unsettled. Several cases have involved athletes with learning disabilities challenging the absolute requirements of minimum SAT scores and certain core courses. The courts have generally recognized that such requirements have a disparate impact on students with learning and other disabilities, but have recognized that it is legitimate for requirements to be set that ensure that college athletes have the requisite ability to do college academic work. Since these cases began, the NCAA has changed its eligibility requirements and provides for accommodation to allow for individualized assessment of athletes with disabilities. Because of the high stakes in these cases, it is probable that they will continue to be brought.

For a general discussion of college athletes with disabilities, see Laura Rothstein, *Don't Roll in My Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding of the Americans with Disabilities Act*, 19 U. TEX. REV. LITIG. 400 (2000).

[6] Other Programming

Most college campuses offer counseling and placement programs, financial aid programs, and health and insurance services. There are also numerous social activities including fraternities and sororities, and there are a variety of social service and other clubs and organizations on campus. The Section 504 regulations, 34 C.F.R. §104.46–.47, provide some guidance about discriminatory practices, but they do not answer all of the questions.

Problems

1. The placement director for the undergraduate program at State College believes that deaf students will have significant difficulty in law school and as lawyers. Student A, a deaf political science major, comes to the placement office seeking advice about attending law school. What kind of counseling is appropriate for the placement director to offer?

2. As part of law school placement programs, law firms interview students on campus. The placement director facilitates these interviews by providing resumes of students to the firms, providing space for the interviews, and by posting notices of firms interested in interviewing. If the director hears that a law firm has refused to interview a student who is in a wheelchair because they do a lot of trial practice and need someone who will be aggressive in the courtroom, what is the obligation of the placement director? Does he/she have any obligation to actively find out whether law firms discriminate?

3. Do athletics scholarships have a disparate discriminatory impact on students with disabilities? Is it illegal to have such scholarships?

4. What obligations do sorority and fraternity houses have to be accessible to individuals with mobility impairments? Does it matter the degree to which the college facilitates or supports Greek activities or whether the university owns the fraternity or sorority house?

[7] Confidentiality Issues

The student in a wheelchair is unlikely to be able to have the disability status be treated as a confidential matter. But for the student with a learning disability, with HIV, with epilepsy, or with a history of alcohol problems or mental problems, there may well be a desire to keep that information confidential. The student may be concerned about stigma and discrimination. The institution may need to have documentation of the disability in the student's record in order to justify an accommodation, but it is essential that this information be disclosed only to those at the institution with a need to know. Disclosure to third parties must be made only when there is consent by the student. The Family Education Rights and Privacy Act (FERPA), 20 U.S.C. §1232g(a)9-(i); 34 C.F.R. pt 5b, not only requires that institutions subject to FERPA comply with this disclosure requirement, but also provides for other protections with respect to student access to their own records and an opportunity to challenge the inclusion of certain information.

There are several problems with FERPA as an avenue for protecting confidentiality. First, FERPA is very vague about who in an institution may have access. Second, there is no private right of action to obtain a remedy under FERPA. The only remedy is to complain to the Department of Education. A student who believes that there have been privacy violations may have to resort to common-law tort theories for protection. Third, it is not entirely clear whether certain types of information would be considered to be academic records or whether they are medical records, subject to protection under other laws.

While it might be argued that student disability documentation should be placed in a separate file, similar to requirements under Title I of the ADA relating to employment, there are logistical reasons in higher education institutions why this may not be feasible. A more appropriate response might be to establish and implement policies and procedures to ensure protection of this information in the student's record.

The following cases illustrate some of the issues that arise with respect to confidentiality. In particular, they raise questions about when there is a privilege to inform another institution or agency about a disability.

Doe v. Southeastern University

732 F. Supp. 7 (D.D.C. 1990)

STANLEY S. HARRIS, DISTRICT JUDGE:

This matter is before the Court on defendant's motion to dismiss and plaintiff's opposition. Upon consideration of the pleadings and the entire record, the Court grants defendant's motion.

Plaintiff is a former student at Southeastern University. Allegedly plaintiff tested positive for

Human Immunodeficiency Virus (HIV). Because of a complication which plaintiff associated with having HIV, plaintiff had to be hospitalized and missed a significant portion of a semester of classes. In order to get excused from his fall 1986 classes, he had his physician transmit medical statements to the University confirming plaintiff's inability to have attended classes. According to the plaintiff, this information was improperly leaked to unauthorized faculty and staff. As a result, plaintiff alleges that he was harassed, embarrassed, and finally felt forced to withdraw from Southeastern and transfer to the University of Maryland. Plaintiff also alleges that after his transfer, defendant improperly notified the University of Maryland of his condition. Plaintiff's complaint appears to make several claims: (1) intentional infliction of emotional distress; (2) negligent infliction of emotional distress; (3) invasion of privacy; and (4) violation of §504 of the Rehabilitation Act of 1973.

Defendant specifically argues that plaintiff's Rehabilitation Act claim ... should be barred by the one-year statute of limitations. The Court disagrees. The Rehabilitation Act does not contain its own statute of limitations, and therefore the period to be applied must be drawn from the appropriate state statute. Courts have applied a wide variety of state statutes of limitations to the Rehabilitation Act. Some, primarily in cases involving discrimination in employment, have applied the state's statute of limitations involving contracts. Some have found that the applicable standard is found in the state's statute of limitations specially enacted to be used in actions created by statute. Still others have applied the state's applicable personal injury statute.

However, in growing numbers courts have looked to analogous discrimination actions such as those brought under 42 U.S.C. §1981 and §1983, and have applied the state's personal injury statute of limitations to Rehabilitation Act claims. Title VI, like §504, does not have a specific statute of limitations. In determining which state statute of limitations applies to Title VI actions, courts have looked to the statute of limitations used in §1981 and §1983 actions. Thus, this Court holds that the District of Columbia's three-year personal injury statute of limitations applies.

Remedies Available under the Rehabilitation Act

Even reading the complaint liberally and assuming that testing positive for AIDS antibodies is a handicap, and assuming he could prove damages, the Court determines that plaintiff would be limited to equitable relief. Plaintiff requests compensatory and punitive damages. Courts are divided as to whether monetary damages are available to a plaintiff in a §504 case. The Supreme Court has expressly declined to decide “the extent to which money damages are available under §504.” The Supreme Court has allowed back pay and similar types of relief. The remedies allowed in §504 are set forth in 29 U.S.C. §794a. Section 794a(a)(2) states that:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

The Supreme Court also is undecided as to whether non-equitable damages apply to Title VI claims. To hold that compensatory and punitive damages are available would be to engage in judicial activism. If Congress feels that additional remedies are necessary to protect the rights of handicapped individuals, Congress must make that law, not this Court. Accordingly, the Court grants defendant's motion to dismiss on this issue.

Note

The previous case did not directly address the privilege to transmit certain student information in student records when a student transfers. The problem, however, is when communication beyond privileged parties occurs. In the case of *Rothman v. Emory University*, 123 F.3d 446 (7th Cir. 1997), the court did not directly address the issue of privilege, although it might have. The case involved a law student with epilepsy who claimed that the law school's reporting to the state bar authorities information about his behavior and conduct (which he claimed related to his epilepsy) was

discriminatory. The court held that the bar certification letter was not discriminatory, but rather a candid and forthright evaluation of the student. For additional discussion of this issue, see Chapter 5, Governmental Services, E. Licensing and Other Regulatory Practices, 2. Professional Licensing.

E. Architectural Barrier and Facility Issues

Chapter 4 discusses architectural barriers issues generally. There are some interesting issues that arise in the higher education context by virtue of its unique setting. Probably more than any other phase of life, college requires the ability to get from place to place several times a day for full participation. In public school, the student is usually in the same room or at least the same building for most of the day. On the job, the individual generally will be in one place for a substantial part of the day. But the life of the college student involves waking up in one location (a residence hall, apartment, or home), perhaps going somewhere else to eat breakfast, attending classes in three or four different buildings each day, going to the student center for social and extracurricular activities, and on weekends probably attending athletic events or cultural performances in stadiums, arenas, or auditoriums.

Students who attend classes on large campuses and who must rush from one end of campus to another to get to class on time, or students who commute and cannot find a parking space near the classroom building may complain about getting around campus. And students who are in a hurry when the elevator is slow may think they have problems. For most people, however, getting around campus is taken for granted. For the student in a wheelchair or on crutches, the campus experience can be a nightmare. Many buildings were built before the Rehabilitation Act and other architectural barrier requirements were enacted. The result, while not due to intentional discrimination, is that college campuses are often inaccessible.

Under Section 504, not every aspect of every building on campus must be accessible. Rather, the standard is that the program when viewed in its entirety must be readily accessible. 34 C.F.R. §104.22(a). The Americans with Disabilities Act applies this same standard to public universities. Private institutions, however, are to be made accessible to the extent it is readily achievable to do so. In addition to this general requirement, the regulations under Section 504 make specific reference to housing. 34 C.F.R. §104.45.

Facilities issues can also include campus transportation issues.

Hypothetical Problems 6.4

1. California Law School's downtown Los Angeles building has little open space such as parks near the building. The administration is considering adding a patio type area for use by students for lunch, etc., on the roof. There is presently no access to the roof. Installation of an elevator would cost approximately $50,000. Stairs could be installed at a cost of $10,000, but it would not be feasible to include a lift system on the stairway. There are presently three students who have mobility impairments. Must the law school install the elevator if it adds the patio? Does it matter if there are no students with mobility impairments? If there is only one? If there are ten?

2. Midwestern University School of Education has admitted Student A to its graduate education program. At the beginning of the year, she finds that she is suffering from a severe allergic reaction to the chemicals in the newly constructed building (carpet, etc.). She wants to have all her classes moved to a different building, approximately six blocks from the education school. Should the education school be required to make the accommodation she requests? Would it make a difference if she were an undergraduate student enrolled in a basic freshman curriculum and she only had problems in the building in which she was to take English?

3. The dean of a professional graduate program is a member of a private club (which for purposes

of this question would be considered to be exempt from the Title III requirements). The dean entertains candidates for faculty positions, prospective donors, and others at the club. Occasionally the dean hosts a larger event for alumni. If there are no accessible restrooms at the private club, must the dean stop using the club for all college related events? Only for those when the dean knows that a person with a mobility impairment will be attending?

4. May a professor host a social event for students in his/her home if the house is not accessible? Does it matter what the nature of the event is and whether the professor knows who is coming?

5. A college of education makes placements for student teachers in local schools. If one of the schools is inaccessible to individuals with mobility impairments, is the college of education precluded from making any placements of student teachers there regardless of whether they require accessibility or not?

6. College and universities frequently provide summer and semester abroad programs in countries that do not have the same access requirements as the United States. What requirements should there be with respect to accessibility for housing, classrooms, and other activities?

7. Fraternity and sorority houses are often older structures. These programs are unique because they are "private clubs" with some exemption from application of the ADA. What might require them to be subject to university nondiscrimination requirements? What aspects of these living spaces would have to be made accessible?

The following cases provide some guidance on barrier issues.

[1] Housing

Coleman v. Zatechka

824 F. Supp. 1360 (D. Neb. 1993)

PIESTER, UNITED STATES MAGISTRATE JUDGE:

Plaintiff, a twenty-one year old student attending the University of Nebraska, Lincoln (UNL), has cerebral palsy. Due to the resulting paresis in her legs plaintiff requires the use of a wheelchair and the services of a personal attendant to assist her with dressing, showering and toileting.

In the summer of 1991 plaintiff applied to and was accepted by UNL as an undergraduate student for the 1991–92 academic year. Prior to beginning classes she completed and submitted a residence housing contract application to secure dormitory housing. On her application plaintiff indicated she wanted a double room in Selleck Hall, and preferred a nonsmoking roommate. Because plaintiff requested a double room but did not specify a particular individual with whom she wished to be housed, she expected that her name would be placed in the pool of roommate candidates and she would be randomly assigned a roommate by the UNL Housing Department, as is UNL's usual procedure. The Residence Hall Handbook, which is provided to all UNL students who request student housing, states that "[b]ecause of Federal and State law, roommate assignments will not be made on the basis of ... handicap...." There is no dispute that plaintiff, having been admitted to the university and having completed and submitted a residence housing contract application requesting a double room, met all the requirements necessary to be randomly assigned a roommate.

Upon arriving at UNL in August of 1991, plaintiff discovered she had been assigned a dormitory room in Selleck hall but was disappointed to discover she had not been assigned a roommate. She later was informed that university policy prohibits the assignment of roommates to students with disabilities who require personal attendant care. The policy in question reads as follows:

> Although the University will attempt to assign residence hall living accommodations to all students based upon the choices made in a student's residence hall contract application, the University cannot always do so. In the case of students with disabilities or special medical considerations,

> double rooms will not be assigned if personal attendant service, nursing care, or trained animal assistance is required unless there is a mutual room request.... The University will provide a special grant to cover the difference between the double and single room rate for any student assigned to a single room as a result of this policy if the differential cannot be covered by a third party payer.

Thus, although it is UNL's practice to assign roommates to all students who request double rooms but do not specify particular roommates, UNL policy prohibits the assignment of roommates to students with disabilities requiring personal attendant care. This is a blanket policy, and defendants testified that no individualized inquiry is made when a student with a disability requests a roommate to determine the extent of a student's disability, the dimensions of any equipment necessitated by the disability, or the number, duration and nature of any necessary personal attendant visits.

Defendant Zatechka testified that the policy in question was first implemented roughly thirteen years ago, at a time when UNL had a relatively small number of students with disabilities. Responding to complaints from disabled students who expressed embarrassment at having an assigned roommate present during attendant care visits, and hoping to eliminate the room change requests from assigned roommates who found themselves in what Zatechka described as a “less than desirable” situation, the university decided to permanently set aside a block of double rooms to be used as single rooms by students with disabilities requiring attendant care. The policy was intended to accommodate the privacy concerns of students with disabilities requiring attendant care and avoid the hurt feelings and administrative worries that followed the room change requests. It appears plaintiff is the first student at UNL to openly challenge the policy and request the assignment of a roommate.

After plaintiff unsuccessfully renewed her request for an assigned roommate, she filed a formal complaint against UNL with the United States Department of Education's Office for Civil Rights charging that UNL did not provide students with disabilities with housing comparable to that provided other students. Shortly after the complaint was filed a meeting was scheduled between plaintiff, UNL, and the Office for Civil Rights (OCR) in an attempt to resolve the dispute. Following formal discussions, plaintiff agreed to withdraw her OCR charge in exchange for UNL's promise to make a prompt and vigorous effort to find her a “mutually acceptable” roommate for the fall 1992 term.

After withdrawing her OCR complaint, plaintiff heard nothing for two months regarding UNL's attempts to find her a roommate. Believing UNL was not living up to the terms of the agreement, plaintiff filed a second OCR complaint against the university. Although UNL had not been communicating with plaintiff regarding its efforts to locate a roommate for her, the evidence showed the university had in fact been pursuing the matter during the months following the agreement.

Shortly after the agreement was signed UNL housing staff was directed by defendant Zatechka to contact certain female students and ask whether they would voluntarily agree to be plaintiff's roommate. Six women were contacted; none was interested in rooming with plaintiff. Housing staff then contacted eight additional students, none of whom wanted to room with plaintiff. Plaintiff finished out the 1991–92 school year without a roommate.

Prior to beginning classes for the 1992–93 academic year plaintiff again completed and submitted a residence housing application to secure dormitory housing. On her application she once again indicated she wanted a double room in Selleck Hall and preferred a nonsmoking roommate. Due to plaintiff's disability and need for minimal attendant care, her name was not placed in the pool of roommate candidates and she was not assigned a roommate for the 1992–93 academic year.

Despite their persistent refusal to assign plaintiff a roommate, defendants continued their efforts to locate a “voluntary” roommate for her. A form letter was sent to approximately 680 female students who had signed residence hall contracts for the 1992–93 academic year, informing them that a junior studying human development and the family who uses a wheelchair and requires minimal attendant care wanted to share a room in Selleck Hall with a nonsmoking female. Interested parties were instructed to contact housing staff. The letter generated only one response, from a student who

mistakenly believed her room and board would be paid by the university if she agreed to room with plaintiff. After being informed she would be required to pay the standard rate for a double room, the student lost interest.

In a final effort to locate a voluntary roommate for plaintiff, six female students were contacted by the university and offered $550.00 off the charge for a double room if they would agree to be plaintiff's roommate. Defendant Zatechka testified that this figure was chosen because students are charged $550.00 more for single rooms than double rooms, and it was determined that a further reduction in privacy was worth an additional $550.00. No student was interested.

At no time during their extensive efforts to locate a voluntary roommate for plaintiff did the university communicate to plaintiff their plans for approaching students, sending letters to students or offering financial incentives to students to persuade them to be her roommate. Plaintiff acknowledges that defendants have expended a great deal of time and energy attempting to locate someone who will agree to be her roommate, but nevertheless is dissatisfied with, and offended by, the approach the university has taken in its efforts. Plaintiff does not wish to be singled out and treated differently merely because she has a disability, and she is not asking that special accommodations be made for her; rather, she wants only to be treated like all other students who request a double room but do not specify a particular roommate—that is, she wants her name placed in the pool of students to be assigned a roommate. The university remains adamant in its position that it "will not require another student to be [plaintiff's] roommate."

Plaintiff testified the university's refusal to assign her a roommate because of her disability, combined with the approach taken in attempting to persuade students to agree to be her roommate, has made her feel isolated and stigmatized.

When asked why she wants a roommate, plaintiff testified that when she transferred to UNL from Peru State College in 1991 she didn't know anyone in Lincoln and believed a roommate would facilitate and enhance her social involvement. Although she has since made some friends and become active in residence-hall government, she continues to believe a roommate would enable her to meet, and perhaps become friends with, people who have different interests, lifestyles and possibly even different cultures from her own. In summary, she wants the growth experience of rooming with another college student while attending UNL. Contrary to defendants' suggestion that plaintiff is seeking the assignment of a roommate hoping to obtain free personal attendant care, plaintiff made it very clear that she does not expect, nor would she want, an assigned roommate to provide her with personal attendant care; that service is, and will continue to be, provided by trained professionals.

Defendants admit plaintiff's name has never been placed in the pool of students to be assigned a roommate, and further admit that due to her disability and need for minimal attendant care, UNL policy excludes her from participating in the assigned roommate program.

II. *Conclusions of Law*

Plaintiff has brought this action pursuant to section 504 of the Rehabilitation Act, and the Americans with Disabilities Act.

In the postsecondary education context, a "qualified" handicapped person is defined as one who:

> meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

There is no dispute that plaintiff met these eligibility requirements. Thus, she is "qualified" under the ADA to participate in the roommate assignment program.

Defendants argue, however, that plaintiff is not qualified under either the Rehabilitation Act or the ADA to participate in the roommate assignment program because:

> her disability requires her to use more space than allotted to a double room occupant and to have

> attendant care visits at least three times a day, thereby impinging on the physical space and solitude her roommate might otherwise be able to enjoy were it not for the plaintiff's medical needs.

Defendants' argument essentially implies that, in addition to being admitted to the university and submitting a proper residence hall contract application, there are two additional, implied eligibility requirements which must be met before a student can be considered "qualified" to be assigned a roommate:

> (1) the student must not use more space than allotted to a double room occupant (presumably half the room), and (2) the student must not routinely have three or more visitors per day.

Defendants suggest that to be "qualified" to participate in the roommate assignment program a student must not utilize more than half the space in the room. For the reasons discussed below I conclude this is not an "essential" eligibility requirement under either the ADA or the Rehabilitation Act.

First, although defendants suggest that students using wheelchairs utilize more physical space in a double room than nondisabled students, I cannot conclude from the evidence presented that plaintiff actually utilizes more than half of the space in the double room she has been assigned, or that the amount of space she does use would unnecessarily impinge upon an assigned roommate's physical space. Moreover, even if the evidence had shown that plaintiff utilized more than half the space in the room, this is not something defendants knew prior to refusing her request to assign her a roommate, as no individualized inquiry was conducted to determine the amount, size or location of the equipment used by plaintiff. Defendants simply made an assumption that because she uses a wheelchair she will utilize more than half the space in the dormitory room. The ADA prohibits using assumptions of this sort rather than facts and conclusions gleaned from individualized inquiry:

> [The provisions of the ADA] are intended to prohibit exclusion and segregation of individuals with disabilities ... based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities.

Consistent with these standards, public entities are required to ensure their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do. Defendants' assumption that plaintiff's use of a wheelchair causes her to utilize more than half the space in a dormitory room falls far short of the individualized assessment that is required by the ADA.

Second, although the university purports to be concerned about the amount of dormitory room space utilized by students in wheelchairs, the challenged policy does not prohibit students using wheelchairs from being assigned roommates so long as the students do not also require attendant care. Defendants explain they do not apply the challenged policy to these students because they "expect the roommate to yield some to the needs of the other roommate for slightly more physical space. The roommates must, after all, share the room with each other." The university allows students who use wheelchairs but do not require attendant care to participate in the roommate assignment program; this fact effectively undermines the contention that plaintiff cannot be assigned a roommate because her wheelchair utilizes too much physical space.

Third, it is important to note that defendants' concern over equity in the amount of physical space utilized by each roommate is not a concern generally applied to nondisabled students. There is no requirement, for instance, that roommates use only half the space in a double room; rather, students are allowed—indeed encouraged—to arrange and decorate their room how ever they choose. There are no limitations placed on the amount of additional furniture, permissible appliances or personal property a student can bring from home to use in his or her dormitory room. Defendant Zatechka testified that the university does not police how much personal property a roommate brings in, and would become aware that a particular student was dominating room space only if the other roommate complained to housing staff. Absent evidence that defendants actually require dormitory room space

to be evenly divided between roommates and actively enforce such a requirement, I cannot conclude that it is an "essential" eligibility requirement that a student not utilize more than half the floor space in the room.

In light of the foregoing, I conclude this particular eligibility requirement—that students use no more than half the space in a room—is not "necessary" to the roommate assignment program and cannot properly be considered an "essential" eligibility requirement which a student must meet in order to be qualified to participate in the program.

Defendants next suggest that plaintiff is not "qualified" to participate in the roommate assignment program because she must be visited three times daily by a personal attendant and it would be unfair, defendants argue, to ask an assigned roommate to endure these daily intrusions. Defendants imply by this argument that to be "qualified" to participate in the roommate assignment program plaintiff cannot receive frequent daily visitors which might disrupt her roommate's solitude. As discussed below, given the nature of dormitory living and the fact that students without disabilities are allowed to participate in the roommate assignment program regardless of the number or frequency of daily visitors, I conclude this is not "necessary" to the roommate assignment program and not an "essential" eligibility requirement under either the ADA or the Rehabilitation Act.

First, I note that the evidence in this case did not indicate that plaintiff's personal attendant visits are unusually disruptive. Two of the three daily visits are relatively brief, and during a good portion of each visit plaintiff and her personal attendant are not even in the room. The daily visits are scheduled, predictable, and amount to nothing more than assisting plaintiff in the daily routine of dressing, showering and toileting—things that all roommates do. No medical care is provided during the visits, and there is no evidence of any reason why the roommate could not remain in the room during the entire visit if she wished.

Second, to the extent the personal attendant visits are disruptive, the disruptions are not of the sort unique to roommates with disabilities, but rather are common disruptions present in all roommate situations. For example, at trial defendants suggested the personal attendant's morning visit (which occurs at either 8:00 or 9:00 a.m. depending on the day of the week) might disturb a roommate who wished to sleep later. While I do not doubt that this could happen, the same problem arises regardless of whether the roommate has a disability. Likewise, interruptions caused by frequent visitors are not unique to students who have disabilities. The argument that it is unfair to require an assigned roommate to tolerate frequent attendant care visits would carry more weight if students were not generally required to tolerate frequent visitors; however, the evidence shows that Selleck hall has 24-hour unlimited visitation, and interruptions caused by frequent visitors are quite common.

Nevertheless, defendants attempt to distinguish the type of intrusion occasioned by attendant care visits from what they term "typical" intrusions encountered by roommates. Defendants suggest that while problems stemming from typical intrusions can be resolved through mutual compromise, plaintiff is not in a position to compromise when it comes to her personal attendant needs and an assigned roommate would be forced to constantly subordinate her interests to accommodate plaintiff's disability. The evidence does not support this argument.

Although plaintiff cannot agree to forgo attendant care altogether (an option which could hardly be termed a compromise), she testified there is some degree of flexibility as to when and where the visits take place.

In light of the foregoing, I conclude this particular implied eligibility requirement—that students not receive frequent daily visitors which might disrupt their roommate's solitude—is not necessary to the roommate assignment program and cannot properly be considered an "essential" eligibility requirement which a student must meet in order to be qualified to participate in the program.

Thus, neither of the additional implied "requirements" advanced by defendants can be considered necessary or essential requirements within the meaning of the ADA and the Rehabilitation Act. If

these additional requirements were actually intended to screen out undesirable roommate candidates who use too much space or who have frequent daily visitors, then one would expect to see the requirements applied to all students requesting an assigned roommate; they are not. The fact that these additional eligibility requirements are not applied to all students indicates the additional requirements are not "essential" to the roommate assignment program, but rather were advanced by defendants in an attempt to legitimize the policy of excluding students who have disabilities from the roommate assignment program.

The only "essential" eligibility requirements for participation in the roommate assignment program are admission to the university and submission of a completed residence hall contract application requesting a double room but not specifying a particular roommate. Because plaintiff met both these eligibility requirements, she is a "qualified individual with handicaps" within the meaning of the Rehabilitation Act and a "qualified individual with a disability" within the meaning of the ADA.

I recognize that the policy of requiring students with disabilities to live in single rooms may have been adopted as an accommodation to students with disabilities who were uncomfortable having an assigned roommate present during attendant care visits. However, nothing in the Rehabilitation Act or the ADA requires that plaintiff accept such accommodations. Even where special accommodations have been made, qualified individuals with disabilities must be given the option to participate in regular programs if they choose. Because the challenged policy forecloses this option to plaintiff, it runs afoul of both the Rehabilitation Act and the ADA.

The defendants argued that the policy exists because the university does not want to "require" students without disabilities to room with students who have disabilities and require attendant care, perceiving such a room assignment to be somehow "unfair" to the students without disabilities. Yet such a policy fosters the very attitudes and stereotypes about individuals with disabilities that the ADA was designed to eliminate.

The ADA's Findings and Purposes illustrate that Congress, in enacting the statute, aimed to bring people with disabilities into society's mainstream, to cause the kinds of interaction which might facilitate recognition of the true equality of human worth as between individuals—regardless of disabilities. In contrast, the university's policy at issue here of excluding plaintiff from the roommate assignment program, however well intentioned it may have been, sanctions the attitude that students with disabilities are less desirable and suggests that others should not be required to live with them. Such standoffishness places less value on the human worth of individuals with disabilities—because of their disabilities. As implemented, the policy unnecessarily separates students with disabilities from those without disabilities and thus strikes at the essence of the ADA and specifically violates the statute's stated purpose "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

Note

Reduced Cost for Single Occupancy of a Double Room: The case of *Fleming v. New York Univ.*, 865 F.2d 478 (2d Cir. 1989), addressed the reverse side of the issue raised in *Coleman v. Zatechka*. In *Fleming*, the student was a graduate student and a wheelchair user. Unlike the plaintiff in *Coleman*, Mr. Fleming wanted to live alone in a double room, but be charged only the single room rate. He was allowed to live in an undergraduate dormitory as the sole occupant of a room (an accommodation to the usual policy), but was still charged the higher rate, i.e., twice the single occupancy charge. His claim was that he was forced to seek housing in an undergraduate dormitory because of inaccessible graduate housing. The facts are problematic because it was unclear whether graduate housing had been made available to the complainant or whether he had applied for such housing. Unfortunately, because adequate proof of the unavailability of graduate housing was not provided in a timely manner, the court does not really reach the issue of whether the reduced rate must be provided as a

reasonable accommodation, but grants the summary judgment because the plaintiff's basis for suit was discrimination by not providing accessible graduate housing. What facts would be important to addressing the reasonableness of such an accommodation, i.e., reduced rate for single room occupancy? Should students with Attention Deficit Disorder, who require solitude in order not to be distracted while studying be able to obtain such an accommodation, i.e., sole occupancy of a room (at either the single or double room rate)? The Department of Justice has recognized the need for clarification about accessibility issues in postsecondary housing. See 73 Fed. Reg. 34466, 34545 (June 17, 2008).

Remedies: If it were determined that the University of Nebraska should have included this student in the general roommate pool, what remedies are or should be available? In Laura Rothstein, *Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?* 75 OHIO ST. L.J. 1273–1322 (2014), that issue is addressed.

Fraternities and Sororities and the ADA: While some activities of fraternities and sororities would fall under the private club exception, discussed in Chapter 4, there are some campuses where the higher education institution owns the structures and leases them to the Greek organization. In addition, on many campuses, fraternities and sororities are eligible for student organization recognition (giving them access to various privileges on campus) which might subject those organizations to at least some aspects of federal discrimination statutes. This has the potential of subjecting Greek houses to the architectural barrier requirements under the ADA, the Rehabilitation Act, and the Fair Housing Act.

Special Programs for Students with Intellectual Disabilities: Although most students with intellectual disabilities would be unlikely to meet the academic requirements for admission to traditional colleges and universities, there are a few institutions that have created program for these students. Are students admitted under these special programs eligible to live in university housing?

[2] Other Facility Issues

There has not been a great deal of judicial attention in the area of architectural barrier issues on campus. The Department of Justice regulations issued in 2010 address stadiums and swimming pools, but there has been little litigation on these issues. 75 Fed. Reg. 56,163 (Sept. 15, 2010); 28 C.F.R. 36.604; 29 C.F.R. 35.150.

One of the issues receiving some attention involves barriers that prevent full participation in off campus programming, such as alumni events, student externship placements, and summer or semester abroad programs.

In terms of campus buildings themselves, the readings in Chapter 4 on architectural barriers provide the general overview of the requirements for new construction, alterations, renovations, and so forth. It should be noted that in situations where a class is located in an inaccessible building, which would be infeasible to retrofit, the institution may still have an obligation to relocate the class for a student with a mobility impairment.

F. Faculty Issues

Chapter 3 on Employment addresses the issues that would arise for employees of a university or college, including faculty and staff issues. Faculty appointments are somewhat unique, however, because often the initial appointment terms are not detailed in terms of essential functions and fundamental requirements. Faculty members generally have responsibilities for teaching, research, and service, but the details of these expectations has historically not been as well spelled out as would be desirable.

Notes

The following are some of the more interesting decisions involving faculty members claiming disability discrimination. Generally, faculty members are not successful in these cases because the institution is able to demonstrate that the faculty member was not otherwise qualified and the adverse employment action was based on performance deficiencies. See, e.g, *Newberry v. East Texas State University*, 161 F.3d 276 (5th Cir. 1998) (photography professor dismissed because of work performance and lack of collegiality, not because he was perceived as disabled because of his obsessive-compulsive disorder); *Silk v. Board of Trustees, Moraine Valley Community College, Dist. No. 524*, 795 F.3d 698 (7th Cir. 2015) (adjunct professor with heart condition requiring triple bypass surgery terminated because of his work, including problems with syllabi, using wrong textbook, poor attendance in courses and non-participatory classroom environment with students playing video games and talking on the phone); *Housel v. Rochester Institute of Technology,* 6 F. Supp. 3d 294 (W.D.N.Y. 2014) (lecturer termination based on poor performance and insubordination); *Paststrump v. Southern Utah University*, 50 Nat'l Disability L. Rep. ¶109 (D. Utah 2015) (professor with lupus, fibromyalgia, and chronic anemia suspended based on performance deficiencies (failure to turn in document on time); accommodations to teaching schedule had been provided); *Caruth v. Texas A & M University-Commerce,* 2013 U.S. Dist. LEXIS 35183, 2013 WL 991336 (N.D. Tex. 2013) (granting summary judgment to university in denial of tenure case; based on publication guidelines); *Curtis v. University of Houston*, 127 F.3d 35 (5th Cir. 1997) (professor's denial of promotion was not based on alcoholism; history of nonperformance related to drinking problems can be considered); *Craig v. Columbia College Chicago*, 2012 U.S. Dist. LEXIS 19039, 2012 WL 540095 (N.D. Ill. 2012) (college instructor with hearing impairment not denied tenure track position based on disability; nonrenewal based on offensive blog entries and email correspondence to supervisor); *Becker v. Gallaudet University*, 66 F. Supp. 2d 16 (D.D.C. 1999) (deaf faculty member did not request accommodations in advance).

One of the few cases in which discrimination was found is *Nedder v. Rivier College*, 972 F. Supp. 81 (D.N.H. 1997) (professor with morbid obesity entitled to reinstatement). See also Suzanne Abram, *The Americans with Disabilities Act in Higher Education: The Plight of Disabled Faculty,* 32 J.L. & ED. 1 (2003) (providing detailed discussion of cases involving faculty members who had won their cases).

G. Other Issues

A number of issues that are covered in other chapters, but which arise in the context of higher education, demonstrate the unique challenges of applying a range of disability rights issues to a postsecondary setting. The following is adapted from an excerpt from Laura Rothstein, *The Americans with Disabilities Act and Higher Education 25 Years Later: An Update on the History and Current Disability Discrimination Issues for Higher Education,* 41 JOURNAL OF COLLEGE & UNIVERSITY LAW 531 (2015).

[1] Direct Threat

[The issue of direct threat is discussed in the employment context (Chapter 3[E][2]), in the section on professional licensing (Chapter 5[E][2]), and previously in this chapter Section [D][3]in the context of behavior and conduct issues, but the inclusion of the issue here provides an overarching perspective on the topic.]

General Principles

The issue of direct threat is an element of whether a student is "otherwise qualified." It is an area of

some contention within the context of higher education and student issues. It has received substantial attention in light of the numerous highly publicized mass shootings involving students on campus and students who had recently been dismissed or left campus. See also Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption,* 35 JOURNAL OF COLLEGE & UNIVERSITY LAW 691 (2009). The issue also receives attention whenever there is a suicide on campus.

Direct threat can involve a threat to others, and an institution's decision to act on the basis of such a threat is generally permissible. Where the threat is to oneself, it is less clear what actions may be taken. There is statutory language under Title I that defines direct threat as meaning a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." Neither Title II nor Title III includes statutory language about the definition of direct threat as applicable to those sections of the ADA.

The regulations under Title I (employment), which were promulgated by the EEOC, expand the definition by defining it as "a significant risk of substantial harm to the health or safety *of the individual* or others that cannot be eliminated or reduced by reasonable accommodation." (emphasis added). This regulation further clarifies that such an assessment is to be individualized and "based on a reasonable medical judgment relying on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. §1630.2(r) (2011). Factors for making that assessment are the following:

(1) Duration of the risk;

(2) Nature and severity of the potential harm;

(3) Likelihood that potential harm will occur; and

(4) Imminence of potential harm.

The statutory language for Titles II and III, however, is silent on the definition of "direct threat," and universities are left to rely on regulations and agency guidance. The Title II regulations (which would seemingly apply to most student situations) provide the following regarding direct threat:

> Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in §35.139.

28 C.F.R. §35.104 (2011) (definitions). The determination of direct threat is to be based on an individualized assessment and is to be,

> based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk.

28 C.F.R. §35.139(b) (2011). While the EEOC regulation has been upheld by the Supreme Court as valid and within the scope of the statute in *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S.73 (2002), the Title II regulation (which is part of the regulations issued in 2010) has not been subjected to judicial review. While the Title II regulation is silent as to whether it might be permissible to use threat to self as a basis for responding to a student's conduct, the Department of Education guidance is unclear but indicates that it would view such action as discriminatory.

Self-Harm Situations

Many in higher education have raised concerns about how the Title II regulation (not considering threat to "self") will be applied to actions towards students who are suicidal or who have other self-destructive behaviors such as severe depression or eating disorders.

A 2014 NACUA Note provides a thorough review of the history of the need for more guidance on

this issue, including OCR Resolution Agreements about Self-Harm. Paul G. Lannon, Jr., *Direct Threat and Caring for Students at Risk for Self Harm: Where We Stand Now*, NACUANOTES (Sept. 3, 2014), http://www.nacua.org/nacualert/notes/selfharm.pdf.

Threat to Others

The cases involving threat to others are much easier to respond to in terms of whether it violates disability discrimination law to adversely treat a student in such a situation. One recent decision provides valuable guidance on dealing with students whose conduct raises issues of direct threat. In *Stebbins v. University of Arkansas*, 2012 U.S. Dist. LEXIS 182620, 2012 WL 6737743, at *1 (W.D. Ark. Dec. 28, 2012), the court addressed the issue of accommodating a student with "intermittent explosive disorder" who had engaged in tactless behavior with a faculty member. The court discussed the student's repeated incidents of misconduct applying the "direct threat" analysis and determined that the student did not have to be readmitted because he was not otherwise qualified. Another recent case illustrates what seems to be consistent judicial treatment of such cases.

[2] Technology

Technology issues affect access not only for students, but also for faculty and staff and for others "visiting" the campus in a range of ways. For the students, classroom technology (classroom materials, access to teaching platforms) is the primary concern. For the applicant for admission, ensuring that websites and admissions processes are accessible is essential. For faculty and staff, communication issues can involve technology. Attendees at sports events, concerts, and graduations can require access that technology can facilitate or make more challenging.

Currently several statutes and regulations impact the range of technology issues on campus. These include Section 508 of the Rehabilitation Act, 29 U.S.C. §794d (2013). See also 36 C.F.R. §1194 (2000) (implementing Section 508); 21st Century Communications and Video Accessibility Act, Pub. L. 111-260, 124 Stat. 2751 (Oct. 8, 2010). Much remains unresolved as to the specifics.

The most difficult aspect of ensuring compliance is understanding what is required, especially in light of the evolving standards and regulations and the fact that courts have not yet provided guidance. While there have been several high profile settlements in litigation surrounding these issues, there is very little reported case law to provide precedent and guide institutions about what they must do.

Course Materials and Other Teaching Issues

Technology has changed the way coursework is presented in many ways. Course materials are now available on line, as e-readers, or as textbooks with links to materials on the web. Many courses are now presented only on line or through other distance learning such as MOOCs (massive online open courses). The MOOCs initiative has often been seen as a way for a university to receive the benefit of tuition dollars with lower investment. Without consideration about ensuring access, however, such plans may go awry.

Faculty members frequently use Blackboard and other teaching platforms for communicating with students. They may use streaming or threaded discussion platforms. Faculty members often use power point presentations for in class or online teaching. Again, without planning, such teaching techniques may be a landmine. Most faculty members have not been made aware of these issues and many (particularly those who did not grow up with technology) are ill prepared to make the materials accessible. There are also concerns about copyright issues as well as academic freedom questions. See, e.g., *Author's Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012), *aff'd*, 755 F.3d 87 (2d Cir. 2014). This case addressed whether production of material in an alternate medium is allowed by the fair use exception to the Copyright Act and protection under the Chafee Amendment, which affects taking published books and putting them on tape, in braille, large print, etc. The Second Circuit ruled that it is fair use.

Higher education institutions with open enrollment or other enrollment plans where students often enroll at the last minute are faced with a significant challenge. A student enrolling in a course that does not have teaching materials that are already in an accessible format may be delayed in obtaining accessible materials. Student service offices charged with ensuring that materials are accessible are often understaffed and not able to react quickly to such requests. If publishers made sure that all of their publications were accessible, this would be much less burdensome for institutions. It is suggested that at least at some institutions, it may become a practice that materials that are not accessible will not be adopted for use in a particular course. Such a practice would certainly be an incentive to the publishers.

Websites

It is unimaginable today that an institution of higher education does not have a web presence. Virtually all of them have a home page for the college or university and there are often separate home pages for various academic departments and athletic programs. A few early cases raised the issue about whether a website is even a program of "public accommodation" under Title III (and by reference whether web pages should be treated as a service under Title II), but the case law to date seems to trend towards an expectation that websites are subject to the ADA. See, e.g., *Nat'l Assoc. of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (holding that a subscription video company's video streaming website is a place of public accommodation). What is less clear is what is expected in terms of design and function and content for webpages.

An individual with a visual impairment who cannot use a computer mouse is at a significant disadvantage if material is not coded to be readily navigated by use of a keyboard cursor alone. It is likely under current and evolving statutory and regulatory guidance that the design and navigation of a webpage will be expected to meet accessibility standards.

The content also requires attention. Many websites include links to video tours of campus or a link to a lecture that was given at an event. Such links present obstacles to individuals with visual and hearing impairments. Someone with a visual impairment cannot see the visual aspect of something like a campus tour or even still pictures. If there is audio recording along with the presented material, without transcription, an individual with a hearing impairment cannot access that program.

At a college or university, there are often links to various documents, including archived materials. If the materials themselves are not in an accessible format, an individual with a visual impairment cannot use them. Large sets of archived materials (such as materials on microfiche) may be a particular challenge. It is far from clear exactly what materials must be made accessible, and there is concern that a policy requiring all archived materials to be made accessible may have an adverse impact on research, because universities will simply take these materials out of archives for use by scholars and others rather than put them into an accessible format.

Finally, it is uncertain when webpages link to materials such as a faculty publication, whose responsibility (if anyone's) it is to ensure that these documents are accessible. For example, a faculty member might have a webpage that links to an authored article. Does such a link in and of itself require that the linked document be accessible?

Events and Other Public Issues

The third major area involving technology for individuals other than students, faculty, and staff relates to athletics events, performance events (concerts, plays, lectures), and alumni activities. Many higher education institutions have museums on campus that include films and/or video materials at various display areas. The area receiving the greatest attention to date involves technology at sports events. See, e.g., *Innes v. Bd. of Regents of Univ. Sys. of Md.*, 29 F. Supp. 3d 566 (D. Md. 2014). This case addresses whether a university must provide certain transcription services on jumbo-trons and similar places at athletic events to ensure equal access to individuals who are deaf. The court allowed

the case to go forward and recognized that compensatory damages could be required under Title II of the ADA and the Rehabilitation Act. The case also discussed how alternative technologies, such as hand-held devices at sports events, did not provide equal access.

[3] Food Issues

Food on campus has received recent attention, although there is not yet definitive guidance on this issue. The food issue primarily involves peanut products and other foods that have significant allergic reaction potential. Related to that is the issue of celiac disease and students and others who may need (or want) to eat only gluten free products, sometimes including products that have been prepared in gluten free settings.

Requested accommodation decisions might first require a determination about whether the individual is "disabled" under the statute. While some with food allergies and reactions might only be mildly affected, for many, these foods can create reactions that substantially affect major life activities such as breathing. It is not clear whether campuses are required to provide gluten free foods or only ensure that labeling is provided. While campuses that have mandatory food plans would seem to be subject to ensuring that gluten free and peanut free options are available, it is less certain what might be required in other settings.

Another food related issue is eating disorders—anorexia and bulimia. It is likely that both conditions would be defined as disabilities in most settings. What is less clear is what action an institution may take when there are concerns about students engaged in this type of self-harm.

H. Summary

Higher education institutions provide a unique context in which to study and apply disability discrimination laws. A separate chapter on higher education is merited for several reasons. Not only was it the first area in which the initial federal nondiscrimination statutes were applied, but the first Supreme Court case (*Southeastern Community College v. Davis* (1979)) on any topic of disability discrimination under federal law occurred in the higher education context.

Higher education provides the key transition point between K–12 education (which now incorporates not only nondiscrimination principles under the Rehabilitation Act and the ADA, but also provides for substantial and important benefits under the special education Individuals with Disabilities Education Act), and employment and/or independent living. The transition from professional education to professional licensing is also unique.

Also specific to this setting is that unlike many other institutions subject to the Rehabilitation Act, the ADA, and the Fair Housing Act, institutions of higher education provide a microcosm of society —students often are housed on campus, attend classes and other programs, socialize, and access many other services (food, bookstores, sports and performance events), sometimes without ever leaving the college campus. Health care can even be provided within the institutional setting. As is the case in Chapter 9 (Health Care and Insurance), the higher education chapter brings together several federal statutes applying not only the treatment of the individual, but also a number of architectural barrier and technology issues. These impact not only students, but also faculty, staff, alums, and other visitors to campus.

While there has been a substantial and emerging body of caselaw, it is notable that few Supreme Court decisions have directly involved higher education. Other than the 1979 *Southeastern Community College v. Davis* case, most judicial guidance directly involving higher education has been the result of lower court decisions and settlements.

The Department of Justice and the Department of Education have issued a number of regulations and other agency guidance documents on a range of issues that affect higher education. This guidance

includes regulations on service and emotional support animals, stadium and public space and swimming pool construction and ticketing. There remains, however, a lack of certainty on how animals on campus guidelines apply in employment and housing settings. Also uncertain is how institutions can treat students and others whose conduct indicates a threat to self only. Also unresolved are the specific design standards and expectations for a range of technology issues.

While the definition of who has been protected was broadened in the 2008 ADA Amendments, that was never the primary issue in the higher education context, except with respect to some learning disabilities and some mental health situations (such as exam anxiety). The focus before the 2008 amendments and since has primarily been on whether the individual meets the essential requirements of the program and what accommodations would be considered reasonable. Courts will continue to address these issues on an individualized basis—individualized not only with reference to the disability and severity of the disability, but also the particular type of program involved.

An area that may be in flux is the issue of deference to educational institutions (particularly health care professional programs) that courts will give regarding whether an individual is qualified and what requirements are essential or fundamental. It is probable that courts will continue to address those issues, because the stakes are often high. Historically, the deference to the institution was quite high, but a few recent decisions indicate a possibility that this may be changing.

At the moment, the issue of undue financial burden is rarely raised as a defense. As higher education budgets become more limited, and as costs for some accommodations increase, it is possible that this may become the focus of future judicial attention.

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1. Plaintiff now asserts that UNE acted illegally in considering his SAT scores because the giving of the SAT in a timed setting discriminates against students with learning disabilities. The regulations interpreting §504 prohibit the use by educational institutions of any tests which have a disproportionate, adverse effect on handicapped persons unless the test has been validated as a predictor of success in the education program and alternate tests that have less disproportionate, adverse effects are not shown by the Secretary to be available. 34 C.F.R. §104.42(b)(2).

The Court rejects Plaintiff's premise. UNE requires students to submit either SAT or ACT standardized aptitude test scores. The SAT, submitted by Plaintiff, is not one that has a disproportionate, adverse effect on handicapped persons because, as noted by Plaintiff himself, it is available in special formats for the handicapped, including an untimed format that does not discriminate against people like him with learning disabilities.

Plaintiff further argues that UNE violated 34 C.F.R. §104.42(b)(3), which provides that a school must assure itself that admissions tests are selected and administered so as to ensure that the test accurately reflects a handicapped applicant's aptitude or achievement level. The regulation, unlike the previous regulation, speaks only of admissions tests, rather than of “any test or criterion for admission,” 34 C.F.R. §104.42(b)(2). The Court is satisfied that §104.42(b)(3) applies to admissions tests administered by a school and not to other criteria of admission, and that it does not impose an obligation on UNE and other colleges and universities to oversee the administration of national standardized tests to all of its applicants who, as is evident by Plaintiff's application, come from far-flung states. The SAT is not an admissions test covered by the cited regulation. It is one of many criteria for admission used by UNE.

It was incumbent upon Plaintiff to take the test in the desired form and submit those scores. Plaintiff, knowing full well that another test format suitable to his condition was available, decided to submit his timed SAT scores and then tell Defendant not to consider them. This is tantamount to not submitting the SAT results, and Plaintiff cannot fault UNE for considering what he submitted when the choice was his. Moreover, it is plain that Defendant used the SAT only in addition to a number of other criteria, including specifically an untimed reading test. None of those other criteria suggested that Plaintiff was a qualified applicant, and the untimed test, on which Plaintiff received the lowest possible score, showed him to be patently unqualified.

3. Subsequent to Wynne's dismissal from Tufts, he underwent testing at the Massachusetts General Hospital Language Disorders Unit. In a report dated January 9, 1986, the reading therapist who evaluated Wynne

observed that the 1984 neuropsychological testing, "which showed weaknesses in sequencing, memory, visual memory and part-whole relationships, taken in conjunction with his academic history, strongly suggests dyslexia."

4. In reaching this conclusion, we have considered the possibility that as applied to UAB, the auxiliary aids regulation might impose an "undue financial burden." UAB has not explicitly argued that the regulation would impose such a burden, but does note that sign-language interpreters charge between $5 and $10 per hour, which it considers "costly." Nevertheless, the stipulated facts indicate that the Alabama Vocational Rehabilitation Service ("VRS") will provide interpreters regardless of economic need to full-time students in programs VRS considers reasonably likely to lead to employment. Furthermore, not all hearing-impaired students need sign language interpreters for all classes. Some students can tape-record lectures, and have volunteers at the UAB Handicapped Services office transcribe the tapes, while others have fellow students take notes for them. Our ruling, therefore, will result in UAB being required to furnish interpreters only to those students who are not eligible for VRS assistance, cannot obtain interpreter services from private charitable organizations, and for whom the provision of an interpreter is the only method by which they will have meaningful access to the class.

5. Care must be exercised by schools and employers (and courts assessing their decisions under §504) not to permit prior mental illness to be routinely regarded as a disqualification. This case, however, involves not simply a prior mental illness; Doe has been diagnosed as having a recognized disorder for which long-term treatment has been prescribed by competent psychiatrists and Doe has declined to accept such recommended treatment.