

THE AMERICANS WITH DISABILITIES ACT AND
HIGHER EDUCATION 25 YEARS LATER:
AN UPDATE ON THE HISTORY AND CURRENT
DISABILITY DISCRIMINATION ISSUES FOR
HIGHER EDUCATION

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I. INTRODUCTION

The year 2013 was an opportunity to reflect on forty years of higher education disability developments since the 1973 Rehabilitation Act. The year 2015 provides an opportunity to reflect on what the 1990 Americans with Disabilities Act added with respect to disability discrimination requirements over the past twenty-five years.

This article provides a brief historical overview of this issue.¹ This article highlights the critical and most important issues to which college and university counsel and administrators should be giving attention at this

1. In 2010, a 50th Anniversary issue of the Journal of College and University Law included an overview of the history of disability law in higher education. See Laura Rothstein, *Higher Education and Students with Disabilities: A Fifty Year Retrospective*, 36 J.C. & U.L. 843, 846 (2010). That article can be referenced for a more detailed overview of the history.

time. The discussion in this article is based on issues arising within higher education, statutory changes and regulations, recent regulatory guidance (including opinion letters, agency decisions, commentary and compliance), judicial decisions, and significant settlement agreements.

While the primary focus of the article is on student issues, there are other important areas addressed as well. These include employment issues relating to faculty and staff and overarching issues that affect students, faculty, staff, and the public. The crosscutting issues affecting all of these groups include technology, architectural barriers, service and emotional support animals, and food. These are also addressed.

II. A HISTORICAL OVERVIEW

The application of disability law to higher education began in 1973 with the enactment of Section 504 of the Rehabilitation Act of 1973, which prohibited discrimination on the basis of disability for programs receiving federal financial assistance.² Because higher education institutions were some of the few programs that received substantial federal funding, they became a laboratory for interpreting the statute in its earliest years.³ Because comprehensive federally supported special education opportunities did not come into existence until 1975,⁴ it took a few years before a substantial number of students with disabilities were prepared for and sought entry into higher education institutions. For that reason, the courts did not focus on Section 504 of the Rehabilitation Act to any great degree until about 1979, with the Supreme Court decision in *Southeastern Community College v. Davis*.⁵ Between 1979 and 1990, the courts began to focus on procedural issues and some substantive issues. There was little judicial attention in that timeframe to whether the individual met the definition of “disabled” under the statute. Instead the courts focused on whether the individual was otherwise qualified and what reasonable accommodations would be required in a particular case.⁶

The passage of the Americans with Disabilities Act (ADA) in 1990⁷ began to change the judicial focus. The ADA expanded protection against disability discrimination to most employers (those with fifteen or more em-

2. 29 U.S.C. § 794 (2014).

3. See Laura Rothstein, *Southeastern Community College v. Davis: The Prequel to the Television Series “ER”*, in EDUCATION LAW STORIES 197–215 (Michael Olivas & Ronna Schneider eds., 2007).

4. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW ch. 3 (4th ed. 2015) (overview of special education law) [hereinafter DISABILITIES AND THE LAW].

5. 442 U.S. 397 (1979).

6. See Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843 (2010) for an overview of these developments.

7. Pub. L. No. 101-336, 101 Stat. 327 (1990) (codified at 20 U.S.C. §§ 12101–12213 (2006)).

ployees), to state and local governmental programs (which included many colleges and universities already covered by the Rehabilitation Act), and to twelve categories of private providers of public accommodations, including educational programs (which included many private colleges and universities that had been covered by the Rehabilitation Act). The ADA application to most employers, however, resulted in backlash. Employers who were now faced with increasing demands by individuals in the workplace began to bring summary judgment and motions to dismiss actions claiming that the individual was not disabled. This culminated in the 1999 and 2002 Supreme Court decisions narrowing of the definition of coverage.⁸ It took until 2008, however, to amend the ADA (and the Rehabilitation Act) to broaden the definition of coverage to what many thought had been intended in the first place.⁹

With the amended definition and subsequent clarifying regulations from several federal agencies, the courts have in the past five years begun to clarify several issues falling under the ADA and the Rehabilitation Act within the context of higher education. The past five years have also brought increased federal agency attention to compliance with a number of highly publicized settlement agreements and some areas of controversy over agency interpretation. A number of developments within the past five years highlight the importance of revisiting these issues.

- The Affordable Care Act¹⁰ has begun to have an impact. This may have particular impact on access to mental health services, which are addressed in the Mental Health Parity and Addiction Equity Act¹¹ enacted in 2008.
- The return of large numbers of veterans from combat in the Middle East has resulted in a population of students with post-traumatic stress disorder, traumatic brain injury, and physical injuries.
- There is an increase in the stress among students, and this results in increasing concerns about mental health issues on campus.

8. See *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) (deciding that determining whether one has a disability includes reference to mitigating measures); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (narrowing the definition of what constitutes a major life activity).

9. Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified as portions of 42 U.S.C. §§ 12101–12210 and 29 U.S.C. § 785).

10. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

11. 29 U.S.C. § 1185a (2010); see also 42 U.S.C. § 300gg-5 (2008).

- The number of students with disabilities (particularly those with learning disabilities) on campus continues to increase.¹²
- New and emerging technologies and the increasing use of technology in teaching and other programming in higher education continues to require institutions of higher education to be proactive in a range of areas where technology might become an issue. The recent interest in MOOCs and expanded use of the internet presents new challenges.
- The aging professoriate (baby boomers who may not want to retire) requires attention.
- Recent judicial activity has addressed the issue of what it means to be “otherwise qualified” in the context of professional education with results that are sometimes surprising and inconsistent and which may signal a lessened judicial deference to institutions of higher education.
- The Obama administration signals activities that may require institutions of higher education to anticipate and plan for greater attention to disability issues. The potentially greater access to community colleges¹³ is an example of how an increase in the population of students with disabilities at institutions that are often the least well staffed and funded may result in concerns for institutions of higher education. Attention to sports and athletics for students with disabilities and enforcement on food issues highlights current Obama administration focus and attention to these issues.
- The 2014 Ebola crisis has implications for higher education.¹⁴ Policies related to handling of contagious and infectious diseases may have a discriminatory impact. The recent dramatic attention to this reminds institutions of the value of proactive planning.

These recent developments, combined with economic challenges within

12. See *Students with Disabilities from Post-Secondary Degree Granting Institutions: First Look*, NAT'L CTR. FOR EDUC. STATISTICS (2011), available at <http://nces.ed.gov/pubs2011/2011018.pdf>, for statistics as of 2011.

13. See generally *Higher Education*, WHITE HOUSE, <http://www.whitehouse.gov/issues/education/higher-education> (last visited Apr. 24, 2015).

14. Karen MacGregor, *Higher education and West Africa's Ebola outbreak*, UNIV. WORLD NEWS (Aug. 30, 2014), <http://www.universityworldnews.com/article.php?story=20140829160149102>; Elizabeth Reddent, *On Edge Over Ebola*, INSIDE HIGHER ED (Oct. 20, 2014), <https://www.insidehighered.com/news/2014/10/20/us-campuses-are-edge-over-ebola>.

higher education, might result in institutions using the “undue burden” defense, which has to date not been raised in most (if any) cases.

For each of the issue topics in this article, the following will be provided as appropriate: the statutory framework, the regulatory framework, any administrative agency guidance or opinion letters, judicial interpretations, a perspective on interesting trends and developments, and thoughts about how institutions of higher education can proactively implement disability policy on campus. The approach of the article is to discuss what the law requires (what higher education “must” do), what the areas of litigation or complaints to OCR are likely to be (and why), how disputes about whether the requirements have been violated are likely to be resolved, and how campus service providers, administrators, policymakers, and faculty members (and the students themselves) can be proactive in developing policies, practices, and procedures to respond to what is required, what is not required, and how to best accomplish the goals of current law. The approach is preventive lawyering –with the strategy of avoiding litigation by assisting all stakeholders in understanding the requirements and how far they extend and ensuring a positive (rather than a defensive) approach to implementation of disability nondiscrimination policy.

III. MAJOR ISSUES FOR STUDENTS

A. Definition of Coverage and Documentation

1. Statutory and regulatory framework

The statutory and regulatory definitional framework applies to students, faculty, staff, and the public. Under both the Rehabilitation Act, and the ADA, to receive protection an individual must be substantially limited in one or more major life activities, meaning they must be regarded as so impaired or have a record of such impairment.¹⁵ The individual must be otherwise qualified – able to carry out the essential functions of the program with or without reasonable accommodation.¹⁶ Institutions are not required to engage in activities that would pose an undue hardship, fundamentally alter a program or lower standards. Individuals must not pose a direct threat and must make “known” the disability and have appropriate documentation, and must do so in a timely manner in order to demonstrate that program discriminated or failed to provide a reasonable accommodation.

The ADA Amendments Act of 2008 clarified and amended the defini-

15. 29 U.S.C. § 794 (2014); 42 U.S.C. § 12102(2) (2012); *see* DISABILITIES AND THE LAW, *supra* note 4, at § 3:2.

16. *See* 34 C.F.R. § 104.3(l) (2000); 42 U.S.C. § 12131(2) (2001); 42 U.S.C. § 12182(b)(2)(A) (2009); DISABILITIES AND THE LAW, *supra* note 4, at § 3:3.

tion of “disability.”¹⁷ These amendments responded to 1999 and 2002 Supreme Court decisions¹⁸ that had narrowed the definition, and provide for a broad interpretation of the definition of disability under the ADA.¹⁹

The Amendments clarified that 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.²⁰ A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.²¹ The references to major life activities that include “concentrating, thinking, and communicating” may make it more likely that an individual with a learning disability or with certain mental impairments will fall under the definition.

To meet the requirement of “being regarded as having such an impairment,” the individual must establish “that he or she 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.”²² The definition of disability does not apply to impairments that are transitory and minor. A transitory impairment is one with an actual or expected duration of six months or less.²³

The 2008 Amendments further clarify that the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures. There is an exception for eyeglasses or contact lenses, but covered entities are prohibited from using qualification standards or selection criteria that are based on uncorrected vision unless these are job-related and consistent with business necessity.²⁴

The Amendments also provide that

Nothing in this Act alters the provision. . . specifying that reasonable modifications in policies, practices, or procedures shall be

17. See 42 U.S.C. § 12102 (2014). Regulations pursuant to the amendments relevant to employment were promulgated on March 25, 2011, effective May 24, 2011. They can be found at 29 C.F.R. § 1630 (2011) and are available at www.eeoc.gov. The Amendments state that the definitions are also to be applied to the Rehabilitation Act. 29 U.S.C. § 705(9)(B) (2014), incorporating 42 U.S.C. § 12102.

18. *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

19. 42 U.S.C. § 12101(b) (2012).

20. 42 U.S.C. § 12102(2).

21. *Id.*

22. 42 U.S.C. § 12102(3).

23. 42 U.S.C. § 12102(4)(D).

24. 42 U.S.C. § 12102(4)(E).

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.²⁵

The past five years have brought substantial regulatory agency and judicial attention to interpreting the Amendments. The following sections highlight those responses.

2. Administrative agency guidance (regulations), opinion letters and enforcement activities

There are several federal agencies likely to play a role in disability discrimination policy on campus. The primary agencies include the Department of Justice (enforcing Titles II and III of the ADA), Housing and Urban Development (regarding housing on campus), the Department of Education (educational programming), and the Equal Employment Opportunity Commission (regarding employment). A number of other agencies may play a role in architectural barrier issues, which may have impact on buildings that are used by the public.²⁶

Administrative agencies carry out several roles in implementation of statutory policy. They promulgate regulations (which are subject to notice and public comment); they issue agency guidance; and they may have enforcement roles through opinion letters or other means.

The key regulations for higher education and disability are from the original regulations promulgated by the Department of Health Education and Welfare (HEW) in 1978 for Section 504.²⁷ More recently, a substantial body of regulatory guidance has been developed under the ADA of 1990 and the ADA Amendments Act of 2008. Important recent regulations relevant to higher education and student issues were issued by the Department of Justice in 2010,²⁸ the agency with primary responsibility for enforcing Title II and Title III of the ADA. These sets of regulations (which are quite similar) update previous regulations and include requirements related to definitions, service animals, mobility devices, ticketing (relevant to stadium

25. 42 U.S.C. § 12201(f).

26. These include the Architectural and Transportation Barriers Compliance Board, the National Institute on Disability and Rehabilitation Research (within the Department of Education), and the National Center on Accessibility. *See generally* Laura Rothstein, *Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?*, 75 OHIO ST. L.J. 1263, 1273 (2014) (discussing the agency activities related to architectural barrier issues).

27. *See* Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104 (2000). HEW is now the Department of Health and Human Services and the Department of Education.

28. *See* 28 C.F.R. §§ 35–36 (2010).

and concert seating), auxiliary aids and services, architectural barriers (including housing at places of education, assembly areas, and swimming pools), examinations and courses, transportation, and telecommunications and interpreting. This set includes clarification about housing on campus.²⁹

Other sets of regulations relevant to student issues include regulations regarding housing, issued by the Department of Housing and Urban Development³⁰ and general regulations issued by the Department of Education.³¹

In addition to regulations, agencies often issue agency guidance. Such guidance does not have the same force as regulations, but it can signal how an agency is likely to interpret a statute or regulation.³² Agencies also often provide technical assistance, which provides guidance about how to implement regulatory requirements.

3. Judicial interpretations

a. Meeting the definition

There are a number of cases addressing the issue of who is entitled to protection from discrimination in the higher education student context.³³ The first decision by the Supreme Court addressing any aspect of disability discrimination rights involved exactly that issue. The 1979 decision in *Southeastern Community College v. Davis*³⁴ decided the question of whether a student with a severe hearing impairment enrolled in a nursing program was “otherwise qualified” to continue because of concerns about safety of patients. While the Court did not question whether Francis Davis had a disability, it incorporated the requirement that to be protected one must not only have a disability, but must be otherwise qualified to carry out the essential requirements of the program.

As noted earlier in this article, in the early years of application of Section 504 of the Rehabilitation Act to higher education, the courts rarely focused on whether the individual was “disabled” under the statute.³⁵ Nor were there many such cases under the ADA. The exceptions primarily involved students with learning disabilities and some mental health conditions.³⁶ The courts addressing the issue of who is “disabled” were primarily

29. *See id.*

30. 24 C.F.R. §§ 100–200 et seq. (1996).

31. 34 C.F.R. § 104 (2000).

32. *See generally* ADA, www.ada.gov (last visited Apr. 24, 2015).

33. *See* DISABILITIES AND THE LAW, *supra* note 4, at § 3:2.

34. 442 U.S. 397 (1979).

35. *See* Laura Rothstein, *Southeastern Community College v. Davis: The Prequel to the Television Series “ER,”* Ch. 7, EDUCATION LAW STORIES 197–215 (Michael Olivas & Ronna Schneider eds., 2007).

36. *See* DISABILITIES AND THE LAW, *supra* note 4, at §§ 3:2; 3:22; 3:24. *See, e.g.,* Swanson v. Univ. of Cincinnati, 268 F.3d 307 (6th Cir. 2001) (holding that a surgical

those where employment was the context.³⁷

The 2010 article³⁸ written for the fiftieth anniversary of NACUA was written too soon after the 2008 ADA Amendments (which took effect on January 1, 2009)³⁹ for much case law to have developed.⁴⁰ Cases decided since 2010 generally reinforce the fact that in higher education, at least in the student context, the issue of whether the individual has a disability is rarely addressed. Instead the courts focus more on the aspect of otherwise qualified (including direct threat). The case law involving definition of disability in higher education often incorporates a focus on documentation, but usually addresses whether the documentation justifies the accommodation, not on whether the documentation demonstrates that the individual has a disability.

One of the issues that recent decisions in higher education have addressed is whether certain mental health conditions meet the definition for an individual to be considered “disabled” and entitled to protection. In some cases, the courts have remanded for further consideration.⁴¹

For example in *Doe v. Samuel Merritt University*,⁴² a student with anxiety disorders claimed the right to have additional opportunities to take medical licensing exam. The case was allowed to go forward on issues of whether test taking is a major life activity.⁴³ Another example of a court’s

resident with major depression was not substantially limited in ability to perform major life activities; difficulty with concentrating was temporary and alleviated by medication; communications problems were short-term, caused by medication and there were only a few episodes).

37. See DISABILITIES AND THE LAW, *supra* note 4, at Ch. 4. Discussion of cases on this issue in the context of faculty and staff are addressed later in this article. See *infra* Part X.

38. See Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843 (2010).

39. Most cases have held that the amendments do not apply retroactively. See, e.g., *Singh v. George Wash. Univ. Sch. of Med. & Health Sciences*, 667 F.3d 1 (D.C. Cir. 2011) (arising pre-ADA Amendments).

40. In *Cordova v. University of Notre Dame Du Lac*, 936 F. Supp. 2d 1003 (N.D. Ind. 2013), the court addressed a case involving a student claiming a learning disability and psychological disability who claimed numerous denials of requested accommodations. The court dismissed the case for statute of limitations reasons and also found that isolated bouts of depression did not constitute disabilities under the pre-2008 interpretation of the ADA when the complained of actions occurred. *Id.* at 1009. It is unclear whether these conditions would be more likely to be found to be disabilities applying the language of the amendments.

41. See also *Millington v. Temple Univ. Sch. of Dentistry*, 261 F. App'x 363 (3d Cir. 2008) (holding that a long list of health problems that were not sufficiently documented as demonstrating substantial limitation was not a disability and in addition the student had not met academic standards).

42. 921 F. Supp. 2d 958 (N.D. Cal. 2013).

43. *Id.* The case was also allowed to go forward on the issue about whether the limit on taking exams was entitled to deference by the courts.

further consideration is *Forbes v. St. Thomas University, Inc.*,⁴⁴ in which the court held that there were issues of material fact remaining regarding whether post-traumatic stress disorder was a disability and, if so, whether the law student had received reasonable accommodations.⁴⁵

In *Ladwig v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*,⁴⁶ the court found that a doctoral student with recurrent depression and a head injury was not substantially limited in a major life activity.⁴⁷ In another case in which the court found the student not to be disabled, *Rumbin v. Association of American Medical Colleges*,⁴⁸ the court looked at the testing done to demonstrate the disability and found that the evaluating optometrist did not compare reading skills of a medical school applicant to those of an average person. The comparison group is not to other test takers or to future doctors. When compared to the general population, his reading skills were not substantially limiting and thus the applicant was not entitled to accommodations on the medical school exam. Because this case was based on application of the pre-2008 ADA, it is not certain whether the outcome would be different today, although the comparator group issue has not changed because of the 2008 Amendments.

One unusual holding applying the 2008 definition involved a student who was HIV positive and whether that student was disabled so as to be covered by discrimination law. While pre-2008 cases involved a few decisions in which it was not clear that HIV positive status would be almost a “per se” disability, it was generally believed that after the 2008 Amendments which provided that major life activities include operation of the immune system that anyone who was HIV positive was substantially limited in that major life activity.⁴⁹ In *Alexiadis v. New York College of Health Professions*,⁵⁰ however, a college student who was HIV positive was arrested for stealing a bag of hand sanitizer and was dismissed from college. The court allowed the claim to go forward regarding whether he was disabled, whether the dismissal was because of disability, and whether the explanation was a pretext. While it is not unusual that the case would proceed on these other grounds, the issue of whether he was disabled should have been decided without further judicial attention. Anyone who is HIV

44. 768 F. Supp. 2d 1222 (S.D. Fla. 2010).

45. *Id.* The court also noted that there was evidence that denial of requests was based on rational belief that no further accommodation could be made without imposing a hardship on the program. *Id.* at 1234.

46. 842 F. Supp. 2d 1003 (M.D. La. 2012).

47. *Id.* The court also held that accommodation of attendance exceptions was contingent on her providing accommodation letter to professors, that the student’s work was substandard and denied retroactive withdrawal or assigning grade of “incomplete.”

48. 803 F. Supp. 2d 83 (D. Conn. 2011) (occurring before the 2008 Amendments).

49. *See* DISABILITIES AND THE LAW, *supra* note 4, at § 3:24.

50. 891 F. Supp. 2d 418 (E.D.N.Y. 2012).

positive is substantially limited in the major life activity of the operation of the immune system major bodily function.⁵¹

A key principle of claiming disability discrimination is that the individual must make “known” the disability or condition to have it taken into account before participation in the activity.⁵² Recent cases have highlighted that requirement. In *North v. Widener University*,⁵³ the court held that disclosing a disability after dismissal is not sufficient to give protection. The student’s admission essay about taking medications for behavior was not adequate to demonstrate that faculty members knew of his ADHD and had discriminated against the student because of that condition. Similarly in *Cunningham v. University of New Mexico Board of Regents*,⁵⁴ the court found that a medical school student did not allege that his Scotopic Sensitivity Syndrome was a disability in claims against the university.

The 2008 Amendments clarify the “regarded as” prong to the definition of disability by providing in the definitions the following:

To meet the requirement of “being regarded as having such an impairment” the individual must establish “that he or she 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.”⁵⁵

There has been some post-2008 judicial clarification about this. In *Widomski v. State University of New York at Orange*,⁵⁶ the court addressed a claim of discrimination by a student in a medical technician program whose hands shook too much to draw blood from patients. The court held that he was not perceived to have an impairment limiting a major life activity and that he was still employable for medical technician jobs not requiring phlebotomy so his condition did not substantially limit a major life activity.

b. Documentation

An issue that arises in the context of definitional coverage is what kind of documentation must be provided to demonstrate that an individual is disabled within the statute. This often relates to the documentation required for a requested accommodation. The discussion of this issue includes the qualifications of the evaluating professional, what deference is

51. 42 U.S.C. § 12102(2)(B) (2012).

52. See DISABILITIES AND THE LAW, *supra* note 4, at § 3:8 (collecting cases).

53. 869 F. Supp. 2d 630 (E.D. Pa. 2012).

54. 779 F. Supp. 2d 1273 (D.N.M. 2011), *aff'd*, 531 F. App'x. 909 (10th Cir. 2013).

55. 42 U.S.C. § 12102(3) (2012).

56. 748 F.3d 471 (2d Cir. 2014).

required for documentation provided by the treating professional, the payment for such documentation, and how recent it must be. These issues are discussed in the section on accommodations.⁵⁷

B. Otherwise qualified

Under the Rehabilitation Act and the ADA, a student claiming protection must not only have a disability as defined in the statute but must also be otherwise qualified, which can include not posing a direct threat.

1. Statutory and regulatory framework

The 1973 Rehabilitation Act provided virtually no guidance about the terms “otherwise qualified” and “direct threat.” The implementing regulations for postsecondary education provide that a qualified person with a disability is one “who meets the academic and technical standards requisite to admission or participation in the recipient’s education program or activity.”⁵⁸ The Supreme Court’s early guidance in *Southeastern Community College v. Davis*⁵⁹ as well as other judicial interpretations became the basis for the much more specific and detailed statutory provisions of the ADA and its implementing regulations, both in the 1990 statute and within the 2008 Amendments and regulations promulgated under both. Because the Rehabilitation Act is intended to be interpreted as consistent with the ADA, the definitions are relevant to both statutes.

Under the ADA statutory language, the term “otherwise qualified” is not more fully defined with respect to students, although there is specificity for employment.⁶⁰ The same is true for the implementing regulations.⁶¹ There is, however, some administrative agency guidance on this issue.⁶²

2. Administrative agency guidance and enforcement

The administrative agencies that would be most involved with student issues are the Department of Education (enforcing Section 504) and the Department of Justice (enforcing Titles II and III of the ADA). Both have provided guidance, but the guidance is not necessarily clear or consistent, particularly in the case of interpreting what is meant by “direct threat.”⁶³

57. See *infra* Part III.D.

58. 34 C.F.R. § 104.3(1)(3) (2000).

59. 442 U.S. 397 (1979).

60. 42 U.S.C. § 12111(8) (2011) (defining “qualified individual” for employment).

61. 29 C.F.R. § 1630(2)(g)–(n) (2012).

62. See generally *The ADA: Questions and Answers*, U.S. EQUAL EMP’T. OPPORTUNITY COMM’N., <http://www.eeoc.gov/eeoc/publications/adaqa1.cfm> (last visited Apr. 25, 2015).

63. See *infra* Part III.C.

3. Judicial interpretations

The Supreme Court's first decision to address any issue of disability discrimination involved the issue of "otherwise qualified." In *Southeastern Community College v. Davis*,⁶⁴ the Court considered whether a nursing student with a significant hearing impairment was otherwise qualified to continue in the nursing program because of the possible risk to patients. The Court held that "[a]n otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap,"⁶⁵ and found her not to meet the necessary qualifications.

In the years since 1979, courts have applied this standard to numerous settings requiring that students meet academic requirements, honesty requirements, technical abilities, attendance requirements, and behavior and conduct expectations.⁶⁶ Cases decided within recent years provide examples of such judicial assessments.

In *Singh v. George Washington University School of Medicine and Health Sciences*,⁶⁷ the court found that the student was academically deficient and that causes other than learning disabilities (including extracurricular activities, anxiety, and poor study habits) related to those deficiencies. Another recent decision involving academic deficiencies is *Peters v. University of Cincinnati College of Medicine*,⁶⁸ in which a medical student with depression, a learning disability, and ADD was placed on academic probation. The medical school refused to allow her to retake exams after her medication regimen had stabilized because her history of depression and mood swings would prevent her from being a good physician. However, the court found that evidence that the dismissal was because of a pattern of psychiatric difficulties might establish a Title II case. Failure to request accommodation until after academic deficiencies was also a factor in the decision not to readmit a student in an osteopathic program.⁶⁹

In *Shaikh v. Lincoln Memorial University*,⁷⁰ a student who was dismissed from an osteopathic medicine program was found to be not otherwise qualified because of academic deficiencies. Accommodations had been provided (additional exam time, access to lecture notes, class video recordings). The requested accommodation of deceleration of program was

64. 442 U.S. 397 (1979).

65. *Id.* at 406.

66. DISABILITIES AND THE LAW, *supra* note 4, at § 3:3 (collecting cases).

67. 667 F.3d 1 (D.C. Cir. 2011) (holding that the 2008 ADA Amendments do not apply retroactively to the student's claim and the student had failed to establish a relationship of the impairment to her performance).

68. No. 1:10-CV-906, 2012 WL 3878601 at *1 (S.D. Ohio Sep. 6, 2012).

69. *See* *Shaikh v. Lincoln Memorial Univ.*, 46 F. Supp. 3d 775 (E.D. Tenn. 2014) (finding that a request for the deceleration of a program occurred after decision to dismiss in case where other accommodations had been requested and provided).

70. *Id.* at 775.

made after dismissal recommendation. The court found that such an accommodation would be unreasonable because it would require changes to clinical program, financial aid, and accreditation procedures.

While the case has not yet been decided and the preliminary opinion only allowed the case to go forward, the court addressed alleged theft of a bag of hand sanitizer by a student who was HIV positive. In *Alexiadis v. New York College of Health Professions*,⁷¹ the student who was dismissed from college because of the theft claimed that the dismissal was because of the disability and that the explanation was a pretext. The court allowed the claim to go forward regarding whether he was disabled; whether dismissal was because of disability, and whether explanation was a pretext.

Students whose disabilities might relate to their misconduct must raise that connection before the misconduct occurs. In *Halpern v. Wake Forest University Health Sciences*,⁷² a medical student with ADHD and anxiety disorder did not request accommodations until several years after engaging in unprofessional acts, including abusive treatment of staff and multiple unexcused absences. The proposed accommodation (allowing psychiatric treatment, participating in program for distressed physicians, and continuing on strict probation) was not reasonable.

Attention to the issue of technical requirements has been the subject of a recent decision that called into question the issue of deference to the educational agency.⁷³ Some recent cases provide examples of cases on this topic. In *Widomski v. State University of New York at Orange*,⁷⁴ the court upheld the denial of admission of a student to a phlebotomy program. The university did not reach the issue of whether he was otherwise qualified because his hands shook too much to draw blood from patients. Instead the case was dismissed because he was not “disabled” within the statute because he was not perceived to have an impairment limiting a major life activity. The court found that he was still employable for medical technician jobs not requiring phlebotomy.

The case of *Sjöstrand v. Ohio State University*,⁷⁵ involved denial of admission to a Ph.D. program by an applicant with Crohn’s disease. She had disclosed her condition in the application process, but the court found that it was not discriminatory to deny her admission because faculty interviewers had a legitimate basis for not accepting her for program. On appeal, however, the circuit court found that there were sufficient issues of fact regarding the reason for rejection and remanded to the lower court for further

71. 891 F. Supp. 2d 418 (E.D.N.Y. 2012).

72. 669 F.3d 454 (4th Cir. 2012).

73. This is discussed more in the later section on professional education standards and possible emerging trends. See *infra* Part III.E.

74. 748 F.3d 471 (2d Cir. 2014).

75. 930 F. Supp. 2d 886 (S.D. Ohio 2013).

review.⁷⁶

Judicial decisions have been consistent that attendance is often an essential requirement and deficiencies need not be excused. In *Harville v. Texas A&M University*,⁷⁷ the court held that it did not violate the ADA to terminate a research assistant because of excess absences. Similarly in *Ladwig v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*,⁷⁸ the court found that a doctoral student with depression and anxiety did not make out a Title I or Title II case. The student was not qualified to perform essential functions of her graduate assistantship. She did not adequately request accommodations for her head injury excusing her from attendance and allowing additional time to turn in assignments. The university had provided accommodations by providing letters supporting absences and extra time.

C. Direct Threat

1. 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.⁷⁹ The issue also receives attention whenever there is a suicide on campus.

Direct threat can involve a threat to others, and acting 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.”⁸⁰ 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

76. *Sjöstrand v. Ohio State Univ.*, 750 F.3d 596 (6th Cir. 2014) (remanded as issues of fact remained regarding reason for PhD school psychology program’s admission denial to student with Crohn’s disease).

77. 833 F. Supp. 2d 645 (S.D. Tex. 2011).

78. 842 F. Supp. 2d 1003 (M.D. La. 2012).

79. See DISABILITIES AND THE LAW, *supra* note 4, at § 3:24. See also Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 691 (2009).

80. 42 U.S.C. § 12111(3) (2012). See also DISABILITIES AND THE LAW, *supra* note 4, at § 4:12 (collecting cases and discussing the issue of “otherwise qualified—direct threat”).

be eliminated or reduced by reasonable accommodation.”⁸¹ 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.”⁸² 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.⁸³

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 § 35.139.⁸⁴

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.⁸⁵

While the EEOC regulation has been upheld by the Supreme Court as being valid and within the scope of the statute in *Chevron U.S.A. Inc. v. Echazabal*,⁸⁶ 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 discrim-

81. 29 C.F.R. § 1630.2(r) (2011) (emphasis added).

82. *Id.*

83. *Id.*

84. 28 C.F.R. §35.104 (2011) (definitions) (emphasis added).

85. 28 C.F.R. §35.139(b) (2011). This provision is particularly relevant to issues involving contagious and infectious diseases (such as HIV) and mental health impairments.

86. 536 U.S.73 (2002). The Court made this decision although the statutory language is silent and some legislative history suggesting that a contrary result was intended.

inatory.⁸⁷

2. 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 recent OCR Resolution Agreements about Self-Harm.⁸⁸ The Note points out that resolution agreements, while not legally binding precedent, can provide insight into OCR analysis and identifies some consistent principles from agency action. This well reasoned NACUA Note provides the following as guiding principles until there is something more official from federal agencies:

- Avoid “direct threat to self” language
- Conduct individualized risk assessments in a team environment
- Assess observable conduct that affects the health, safety, or welfare of the campus community
- Enforce conduct codes or other policies applicable to all students
- Compare with similarly-situated, non-disabled students to avoid disparate treatment
- Absent emergency circumstances, first consider voluntary leave or other voluntary restrictions
- Consider “behavioral contracts” with reasonable, tailored terms
- Resort to involuntary removal in emergency or direct threat situations
- Satisfy due process concerns by providing adequate notice, an opportunity to present information, and an appeal
- Establish reasonable and individualized conditions for a student’s return.⁸⁹

The Note concludes by reminding institutions of the “absence of formal guidance or a clear model on how best to comply” in self-harm situations. Subsequent to the NACUA overview, a recent settlement addressed a stu-

87. See *infra* Part III.C.2.

88. 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>.

89. *Id.* at 9–11.

dent who sought mental health counseling, where it was alleged that she was summarily dismissed.⁹⁰ It highlights the importance and value of having policies and procedures in place before issues arise.

3. 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*,⁹¹ 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. In *Rivera-Concepción v. Puerto Rico*,⁹² a student with bipolar disorder was expelled from a government internship program. The student did not make out case of disability discrimination because the expulsion was based on a manic episode and the program was not aware of mental condition. The expulsion was based on behavior. What accommodation might be expected in such a case is addressed in the later section on accommodations.⁹³

A later section on professional education and trends raises an issue relevant to “direct threat.”⁹⁴ Professional education programs may be asked by state licensing boards whether students have been diagnosed or treated for mental health impairments or substance addiction. While asking about behavior and conduct (that might be a result of such impairment) seems permissible, it is questionable how these agencies can demonstrate that diagnosis or treatment indicates that an individual is a “direct threat.”

4. Access to Treatment

Another issue that is more a social policy issue than a disability discrimination issue is the increasing need for mental health services on college campuses today. While a discussion of that topic is beyond the scope of this article, it should be noted that every time one of the high profile shoot-

90. *Settlement Agreement between the United States of America and Quinnipiac University under the Americans with Disabilities Act*, ADA.gov (Dec. 19, 2014), available at http://www.ada.gov/quinnipiac_sa.htm.

91. No. 10-5125, 2012 WL 6737743, at *1 (W.D. Ark. Dec. 28, 2012).

92. 786 F. Supp. 2d 489 (D. P.R. 2011).

93. See *infra* Part III.D.

94. See *infra* Part III.E.

ings has occurred, the media, policymakers, and others raise the need for more access to mental health services (particularly in light of the increasing stress on campus). The lack of institutional will to do something in combination with financial realities, however, leaves this concern largely unaddressed. While the Affordable Care Act⁹⁵ allows parents to keep children aged 26 and under on their health insurance policies and provides much broader protection for preexisting conditions in combination with the Mental Health Parity and Addiction Equity Act,⁹⁶ there are indications that true access to mental health services is still woefully inadequate.⁹⁷

5. Privacy and Confidentiality

Another issue beyond the scope of this article is that whenever issues of any disability, particularly those with stigma attached, are part of a student record, extreme care must be taken about protecting the privacy and confidentiality of those records.⁹⁸ Both the Family Educational Rights and Privacy Act of 1974 (FERPA)⁹⁹ and the Health Insurance Portability and Accountability Act of 1996 (HIPAA)¹⁰⁰ provide coverage on this issue. It is important, however, that internal policies implementing FERPA and HIPAA take into account the challenge of ensuring confidentiality within student records and that only those with a need to know have access to this information. Protections should be included in practices and procedures, and training should ensure this protection.

6. Contagious and Infectious Diseases

The late 2014 attention to Ebola threats, while it has been less of a concern after an initial strong and confusing reaction by officials, different states, federal agencies, and the media, should be a wake-up call to campuses to anticipate such issues. Students (and others) who return from countries where Ebola has been present may raise questions about whether

95. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

96. 29 U.S.C. § 1185a (2009); *see also* 42 U.S.C. § 300gg-5 (2010) (interaction with the Affordable Care Act); 29 C.F.R. § 2590 (2009) (regulations regarding group health insurance policies promulgated pursuant to the Employee Retirement Income Security Act of 1974).

97. *See, e.g.*, Jill Harkins, *Study: Increased Demand, Inadequate Resources for College Mental Health Services*, PITTSBURG POST-GAZETTE (Feb. 7, 2015), <http://www.post-gazette.com/news/education/2015/02/07/Study-Increased-demand-inadequate-resources-for-college-mental-health-services/stories/201502070034>.

98. *See* DISABILITIES AND THE LAW, *supra* note 4, at § 3:21. *See also* 34 C.F.R. § 99 (2014); 73 Fed. Reg. 74,806 (Dec. 9, 2008) (Department of Education regulations relating to school records).

99. 20 U.S.C. § 1232g(a)–(i) (2013). *See also* 34 C.F.R. § 5b (2012) for regulations.

100. 42 U.S.C. § 300gg (2012).

they should be quarantined, excluded, or other adverse action taken. While no case has yet addressed such treatment as an ADA issue, it is quite likely that such individuals might be “perceived as” having a disability, and thus protected under disability discrimination law. The failure to make individualized assessments regarding threat to others may risk liability for the institution. This is an area where campus policymakers would do well to be proactive before the next epidemic of this type occurs.¹⁰¹

D. Accommodations

1. Statutory and regulatory requirements

Both the Rehabilitation Act and the ADA require more than nondiscrimination. Both statutes require reasonable accommodations. Although the Rehabilitation Act mandates are found initially in the model regulations,¹⁰² the ADA (and the 2008 Amendments) incorporates specific language into the statute¹⁰³ and also expand on the requirements within the regulations.¹⁰⁴

In the context of students in higher education, the accommodations generally fit within two categories: 1) auxiliary aids and services and 2) modifications of policies, practices, and procedures. In a sense, architectural and other design features could be viewed as proactive accommodations, but these are addressed in a separate section of this article.¹⁰⁵

The ADA Amendments of 2008¹⁰⁶ codify the basic provisions of the ADA and Rehabilitation Act regulations by providing that auxiliary aids and services are to include:

- qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- acquisition or modification of equipment or devices; and

101. See generally Ashley Killough, *Chris Christie on Possible Ebola Lawsuit: 'Whatever'*, CNN (Oct. 29, 2014), <http://www.cnn.com/2014/10/29/politics/chris-christie-lawsuit/> (commentary on Governor Chris Christie's quarantine decision regarding a nurse with no symptoms of Ebola).

102. 34 C.F.R. § 104 (2015).

103. See 42 U.S.C. § 12103(1) (2011); 42 U.S.C. § 12111(9) (2010); 42 U.S.C. § 12182(b)(2)(A) (2010); 42 U.S.C. §§ 12201(f) & (h) (2010).

104. See 29 C.F.R. § 1630.2(o) (2012); 29 C.F.R. § 1630.9 (2011) (Title I); 28 C.F.R. § 35.104 (2011); 28 C.F.R. § 35.135(7) (2010); 28 C.F.R. § 35.135-138 (2010) (Title II); 28 C.F.R. § 36.104 (2011); 28 C.F.R. §§ 36.302–36.303 (2011); 28 C.F.R. § 36.306 (2010); 28 C.F.R. § 36.309(b) (2013) (Title III).

105. See *infra* Part VIII.

106. 42 U.S.C. § 12103(1) (2010).

- other similar services and actions.

Accommodations can also include:

- additional time for exams;
- other exam modifications (separate room; extra rest time);
- reduction, waiver, substitution, or adaptation of course work;
- extensions on assignments;
- extension of time for degree completion;¹⁰⁷
- preference in registration;
- permission to tape record classes;
- modification of policies, practices and procedures such as modification of attendance policies, and allowing assistance or emotional support animals in some settings.¹⁰⁸

The regulations specifically provide that accommodations do not include “attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.”¹⁰⁹

While modification of programs may not require substantial financial expense, the provision of auxiliary aids and services (such as interpreters and modified written materials) may require funding. The issue then may become whether the higher education institution is responsible for payment of these expenses, or if another program (such as a state vocational rehabilitation program) can be held responsible. Primarily because of cost concerns, the issue of reasonable accommodations has been the basis of litigation over the years.¹¹⁰

2. Judicial interpretation

a. General historical framework

The 1979 decision in *Southeastern Community College v. Davis*,¹¹¹ recognized the interrelationship between otherwise qualified and reasonable accommodation, when the Court noted that a higher education institution could not refuse to admit a student simply because a modification or ad-

107. In *Shaikh v. Lincoln Memorial University*, 46 F. Supp. 3d 775 (E.D. Tenn. 2014), the court found that it would be unreasonable to grant the accommodations of deceleration of the program because it would require changes to the clinical program, financial aid, and accreditation procedures. In addition, the request was made after the academic deficiencies had occurred and other accommodations had been granted.

108. DISABILITIES AND THE LAW, *supra* note 4, at § 3:9.

109. 34 C.F.R. § 104.44(d)(2) (2010).

110. See DISABILITIES AND THE LAW, *supra* note 4, at § 3:10.

111. 442 U.S. 397 (1979).

justment might be necessary to allow participation.¹¹² The Court clarified that the reasonable accommodation requirement does not require substantial modifications or fundamental alterations in the nature of the program.¹¹³

Litigation in the 1980s addressing the responsibility for paying for accommodations has resolved this issue to some extent.¹¹⁴ It would seem fairly settled that while an institution of higher education can request and facilitate a student obtaining payment and provision of certain services through the state vocational rehabilitation agency or another charitable organization, it still falls primarily to the higher education agency to ensure that reasonable accommodations and services are provided. Because of the lead time it can take for a student to establish eligibility for such services,¹¹⁵ higher education programs would do well to develop proactive procedures and communications to students about seeking eligibility for the services. It is also valuable for there to be good communications among the agencies with these responsibilities. Because there has been very little litigation on this point, it is not clear whether ultimately the institution of higher education would not be responsible if it can demonstrate undue financial burden.¹¹⁶ It may be that large higher education institutions with significant budgetary resources within the athletics programs do not seek to raise this defense for political reasons. It may also be that litigation raising this defense has been settled. It is also quite possible that institutions of higher education have engaged in the interactive process, and as a result, these issues are resolved before they reach a dispute in court.

There are a number of recent opinions interpreting the requirements for reasonable accommodations, but a key touchstone decision is *Wynne v. Tufts University School of Medicine*,¹¹⁷ which addressed the standard and burden of demonstrating whether a particular accommodation should be provided. The court addressed this issue in the context of a student seeking to take a multiple-choice exam in a different format. The court provided that in cases involving modifications and accommodations, the burden is on the institution to demonstrate that relevant officials within the institution considered alternative means, their feasibility, cost and effect on the pro-

112. *Id.* at 412–13.

113. *Id.* at 413.

114. DISABILITIES AND THE LAW, *supra* note 4, at § 3:10.

115. It should also be noted that state vocational rehabilitation services are not necessarily available to all individuals with disabilities. Quite often students in graduate and professional programs do not qualify for such services. These are state established requirements.

116. What courts have never addressed is what budget is to be considered in the context of claiming undue burden. Would it be only the departmental budget, the entire university budget, the entire higher education budget for state universities, or some other consideration?

117. 932 F.2d 19, 26 (1st Cir. 1991).

gram, and came to a rationally justifiable conclusion that the alternatives would either lower academic standards or require substantial program alteration. While this is not a Supreme Court decision, it is so frequently cited that it carries the weight of such a decision.

Another key principle of deciding about accommodations is the expectation that the higher education agency engage in an interactive process in addressing requests for accommodations. The obligation to engage in the process also is applied to the student.¹¹⁸

The following are examples from recent cases¹¹⁹ of the kinds of issues that courts have been addressing in the context of reasonable accommodations, often incorporating the reasoning of *Southeastern Community College* and *Wynne v. Tufts University*. Before reviewing those recent opinions, it is important to note that a general principle of resolving issues under the Rehabilitation Act and the ADA is that the parties engage in an interactive process to resolve issues of reasonable accommodations and other disability discrimination issues. Having good policies, practices, and procedures that ensure that students and others know where to turn to request accommodations is also a positive factor in avoiding litigation. Currently there is substantial guidance on good or best practices for implementing accommodation issues. This is available through the Association on Higher Education and Disability¹²⁰ and government websites.¹²¹

b. Tutors

There is no specific mention of tutors within the Rehabilitation Act or ADA statutory or regulatory language. Because such a service might be interpreted as of a personal nature, it has generally been determined that tu-

118. *But see* *Schneider v. Shah*, No. 11-2266(SRC), 2012 WL 1161584, at *5 (D.N.J. Apr. 9, 2012) (holding that the obligation to engage in an interactive process about accommodations ends on the day student sues university). The case involved a student in paralegal program who had excess absences. *See also* *Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108 (5th Cir. 2005) (holding that university foundation office should have engaged in interactive process to decide about reasonable accommodation to visual impairment); *Edmunds v. Bd. of Control of E. Mich. Univ.*, No. 09-11648, 2009 WL 5171794, at *7 (E.D. Mich. Dec. 23, 2009) (granting summary judgment against student seeking accommodations because student did not allow good faith interactive process, although lengthy, to resolve request for accommodations to clinical off-campus program).

119. *See also* *T.W. v. Hanover Cnty. Pub. Sch.*, 900 F. Supp. 2d 659 (E.D. Va. 2012) (holding that there is no obligation on the college under special education statutes (IDEA) to offer free tuition to a student with disability after graduation from high school; the state required free education only through high school graduation).

120. *See generally* AHEAD, <https://www.ahead.org> (last visited Apr. 23, 2015).

121. For example, the federal Job Accommodation Network (JAN) provides significant information on accommodations. Much information can be found through the government homepage for the ADA. *See, e.g.*, www.ada.gov (last visited Apr. 23, 2015).

toring services to assist a student with a learning or mental impairment is not a required auxiliary service.¹²² If, however, a program offers such a service to students generally, it must be offered on a nondiscriminatory basis, and reasonable accommodation might be required when providing such a service.¹²³

One recent case involving tutors is *Sellers v. University of Rio Grande*,¹²⁴ in which the court held that although ordinarily tutors are not required, where services are provided to the general student population they must be provided to students with disabilities. The case involved disputed facts about whether a nursing student had been prevented from accessing these services.¹²⁵

c. Interpreters, transcription and similar services

Services for individuals with hearing impairments can be costly. Programs of higher education would do well to plan for this through budgetary allocations. An unresolved issue is whether the student is entitled to a preferred accommodation or the best accommodation in a particular setting, or whether it is sufficient to ensure that the student has received an accommodation that is “reasonable.”

Two recent cases have addressed the issue of such services generally. In *Argenyi v. Creighton University*,¹²⁶ a medical student with significant hearing loss requested communications access to real time transcription and interpreters as accommodations. The lower court deferred to the faculty decision that because the student could not show that certain accommodations would be necessary (although they were helpful), they were not required to be provided.¹²⁷ On appeal, however, the court issued a preliminary order remanding the case, recognizing that fact issues about whether the request was reasonable remained.¹²⁸ The court allowed a claim to proceed regarding interpreter service in *Wolff v. Beauty Basics, Inc.*¹²⁹ The student was denied a sign language interpreter during the enrollment process. The outcome of cases such as this could also provide guidance regarding programming such as orientation, tutoring, or extracurricular activities. It is important that institutions not conflate the issue of undue burden with

122. *Facts on the ADA, Disability, and Accommodations*, IMPERIAL VALLEY COLL., <https://www.imperial.edu/students/dsps/information-about-disabilities/facts-on-the-ada-disability-and-accommodations/> (last visited May 11, 2015).

123. *Id.*

124. 838 F. Supp. 2d 677 (S.D. Ohio 2012).

125. *Id.*

126. No. 8:09CV341, 2011 WL 4431177, at *1 (D. Neb. 2011), *rev'd*, 703 F.3d 441 (8th Cir. 2013).

127. *Argenyi*, 2011 WL 4431177, at *10.

128. *Argenyi*, 703 F.3d at 450.

129. 887 F. Supp. 2d 74 (D.D.C. 2012).

whether such a service must be provided. It is likely that courts will find that any programming or service offered to students must generally be accompanied by reasonable accommodations.

d. Tape recording

There is virtually no case law addressing when a faculty member must permit a student to tape record classes. Certainly as a general rule, such recording must be considered as an accommodation. The Wynne standard noted previously should then be provided to address situations where a faculty member does not wish to have a class recorded¹³⁰ With current technology, it is quite possible for students to video and/or audio record classes without anyone knowing. For that reason, faculty members should discuss with relevant administrators how to implement such policies appropriately and reasonably for students (both those with and those without disabilities).

e. Foreign language, math and other required courses

Some types of learning disabilities make it quite challenging to learn foreign languages and/or mathematics information. As a general rule, courts are deferential to the educational institutions in setting curricular and other programmatic requirements and are not likely to require waiver of required courses.

Two related and early decisions raised this issue. In *Guckenberger v. Boston University*,¹³¹ the court held that the university had demonstrated that waiving foreign language would be a fundamental alteration of program, although in an earlier decision involving the same parties the court had held that course substitution for foreign language might be a reasonable accommodation but course substitution in math was not.¹³²

Little reported litigation on this issue occurred after those decisions, although a recent case addressed the issue. In *Hershman v. Muhlenberg College*, the court held that it was not appropriate to dismiss the case of a student seeking to substitute a class when facts had not been considered regarding fundamental alteration including the student's major and the nature of courses involved.¹³³

f. Excusing performance deficiencies or misconduct

The issue of excusing academic or behavior performance deficiencies was previously addressed in the context of the issue of "otherwise quali-

130. *Wynne v. Tufts Univ. Sch. Of Medicine*, 932 F.2d 19 (1st Cir. 1991).

131. 8 F. Supp. 2d 82 (D. Mass. 1998).

132. *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997). The court also awarded \$30,000 in damages to the students. *Id.* at 155.

133. 17 F. Supp. 3d 454 (E.D. Pa. 2014).

fied.”¹³⁴ Requests for “second chances” can arise in several different situations. These include the student who did not know that he or she had a learning or other impairment before the deficiency occurred, the student who knew but did not realize the need to request an accommodation because none had been needed previously, and the student who simply requests that the failure be excused because of the disability.

As a general rule, programs are not required to excuse performance or conduct deficiencies even if they are related to a disability.¹³⁵ Institutions are only required to provide accommodations where the disability has been made known, so even if the student did not know, second chances are generally not required.¹³⁶ A suggested practice, however, is that institutions should take account of this fact in making readmissions decisions.¹³⁷ Institutions can require that documentation demonstrate the relationship between the disability and the requested accommodation.¹³⁸ That issue is discussed in more detail in the section on documentation issues below.¹³⁹

One recent decision illustrates a complex fact setting in which a medical student with ADHD and an anxiety disorder was dismissed from medical school.¹⁴⁰ The student had not requested accommodations until several years after engaging in unprofessional acts, which included abusive treatment of staff and multiple unexcused absences.¹⁴¹ The court in *Halpern v. Wake Forest University Health Sciences*,¹⁴² found that the proposed accommodations (allowing psychiatric treatment, participating in a program for distressed physicians, and continuing on strict probation) were not reasonable.

Another recent case involved a student who had received numerous modifications for her ADHD.¹⁴³ She was granted a medical withdrawal after disciplinary issues arose; however, the court in *Reichert v. Elizabethtown College* held that the student could not make out a claim for “constructive discharge” from the academic program.¹⁴⁴

134. See *supra* Part III.B.

135. See DISABILITIES AND THE LAW, *supra* note 4, at § 3:4, *supra* text accommodating note 8; *supra* text accommodating note 14.

136. 34 C.F.R. 104.12(a) (2013).

137. 34 C.F.R. 104.42 (2014).

138. 34 C.F.R. 104.42(c).

139. See *infra* Section III.D.2.h.

140. *Halpern v. Wake Forest Univ. Health Sciences*, 669 F.3d 454 (4th Cir. 2012).

141. *Id.* at 465.

142. *Id.*

143. *Reichert v. Elizabethtown Coll.*, No. 10-2248, 2012 WL 1205158, at *1 (E.D. Pa. Apr. 10, 2012).

144. *Id.* at *13.

g. Testing

The issue of testing is one that has been the subject of a significant amount of litigation in recent years. This judicial attention has arisen in three contexts that relate to higher education. First are the cases involving standardized testing for admission to programs of higher education.¹⁴⁵ Second are cases of testing given in the higher education programs themselves.¹⁴⁶ Third are the professional licensure tests.¹⁴⁷

An issue common to all of these topics is whether “test anxiety” and similar conditions are in and of themselves disabilities, a factual determination essential to requiring the institution to provide accommodations.¹⁴⁸ Unless the condition substantially limits a major life activity (such as learning or thinking), it does not entitle the individual to accommodations. The comparator group is most people in the general population, not other individuals taking the same examination.¹⁴⁹

Another common issue in the testing context is what deference should be given to accommodations that were previously given and what deference is

145. The most high profile case involving admission testing resulted in a consent decree between the Department of Justice (DOJ), the California Department of Fair Employment and Housing (DFEH), and the Law School Admission Council (LSAC). Consent Decree, *Dep't of Fair Emp't. and Hous. v. Law Sch. Admissions Council*, No. CV 12-1830-EMC (N.D. Cal. May 29, 2014). The case involved a number of disputed practices including flagging of scores reported to law schools. *Id.* at *1; *see also* Ruth Colker et al., *Final Report of the “Best Practices” Panel*, CAL. DEP'T. OF FAIR EMP'T. AND HOUS., available at <http://www.dfeh.ca.gov/res/docs/LSAC/Final%20Panel%20Report%20redacted.pdf> (a draft document proposing best practices for accommodating the LSAT). The Law School Admissions Council has objected to these recommendations. *Council Challenges Proposed LSAT Disability Accommodations*, NAT'L. LAW J. (Mar. 27, 2015), <http://www.nationallawjournal.com/id=1202721888115/Council-Challenges-Proposed-LSAT-Disability-Accommodations>.

146. *See, e.g.*, *Johnson v. Wash. Cnty. Career Ctr.*, 982 F. Supp. 2d 779 (S.D. Ohio 2013) (holding that reasonable issues remained regarding reasonable accommodations for student with dyslexia who had requested reading device for tests); *McInerney v. Rensselaer Polytechnic Inst.*, 977 F. Supp. 2d 119 (N.D. N.Y. 2013) (holding that allowing graduate student with permanent brain damage to have only one break during doctoral candidacy exam was not a denial of reasonable accommodation because student could have but did not ask for additional breaks); *Ladwig v. Bd. of Supervisors of Louisiana St. Univ. & Agric. and Mech. Coll.*, 842 F. Supp. 2d 1003 (M.D. La. 2012) (holding that a doctoral student with depression and anxiety did not make out Title I or Title II case because she did not adequately request accommodations for head injury excusing her from attendance and allowing additional time to turn in assignments and that university had provided accommodations by providing letters supporting absences and extra time); *Hoppe v. Coll. of Notre Dame of Md.*, 835 F. Supp. 2d 26 (D. Md. 2011) (holding that program was not required to provide an additional opportunity to pass comprehensive examinations for a student with ADD).

147. *See* DISABILITIES AND THE LAW, *supra* note 4, at § 5:7.

148. *See generally id.* at § 3:2.

149. 29 C.F.R. § 1630.2(j)(1) (2014).

to be given to the professionals making recommendations for accommodations. The regulations under Title III relating to examinations and courses provide that considerable weight should be given,

to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations, as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP) . . . or a False Section 504 Plan.¹⁵⁰

Guidance from the Association of Higher Education and Disability on documentation practices is quite helpful. It notes the basic principle of a broad interpretation of the ADA and its application found in the 2008 Amendments. This guidance notes the core values of individualized review, common sense approach, nonburdensome process, and the standard for current and relevant information.¹⁵¹

A concern that should be considered, however, is the transition from a K-12 setting to a higher education program. A student receiving special education or Section 504 accommodations in a K-12 situation should have been provided accommodations based on a fairly thorough evaluation process that was paid for by the educational program.¹⁵² Both the educational programming itself and testing within such programs can be very different in higher education. The practices of review of accommodation requests vary substantially from institution to institution. Community colleges and open admission program often have fewer resources, and do not necessarily ensure that experts have reviewed the documentation of the disability or the connection to the requested accommodation. As the regulation notes, prior documentation should be reviewed in light of whether the situations involve “similar testing [and perhaps other] situations.”¹⁵³ The kinds of tests given in higher education and by standardized testing programs may be very different than a high school exam. The concern then is that a student might be given an accommodation based on documentation that has not been carefully reviewed. That student at the next stage of education may then have an unreasonable expectation that whatever was received before will be given in all settings. Institutions should thus advise students receiving accommodations that each institution has its own standards.¹⁵⁴

150. 28 C.F.R. § 36.309(b)(1)(v) (2014). *See also Supporting Accommodation Requests: Guidance on Documentation Practices*, AHEAD (Apr. 2012), <https://ahead.org/learn/resources/documentation-guidance>.

151. *See Supporting Accommodation Requests*, *supra* note 150.

152. 34 C.F.R. 104.35 (2014).

153. 28 C.F.R. 36.309(b)(1)(v) (2014).

154. A significant gap in preparation for higher education is the fact that many students (and their parents) do not realize that the burdens and standards are different in higher education. As noted previously, it is the student’s obligation to request accommodations, whereas in K-12, the educational program has the obligation to be proactive

Another testing issue is whether “best ensures” is the standard to be applied in determining what is meant by a “reasonable accommodation.” Title III regulations applicable to examinations given for admission, licensure, certification, or credentialing state that the institution should ensure that

[t]he 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). . . .¹⁵⁵

It is important that this regulation not be used to claim that an institution in all settings must provide the “best” accommodation. This standard is limited to testing and only to certain types of disabilities (sensory, manual, or speaking). While the standard could be useful in providing guidance for other settings, it does not require a higher education institution to provide a student with a learning disability triple time on an exam because of a claim that this is the “best accommodation” for that student.

An issue that relates to testing, but also to other accommodations, is the issue of documentation and the expectation that the professional evaluator document not only the disability itself, but also the relationship of the disability to the requested accommodation.¹⁵⁶ Finally, an issue in testing is the format of the test itself (often raised in multiple choice exams).¹⁵⁷ The primary universal guidance to draw from these decisions about testing is the importance of making an individualized assessment and engaging in an interactive process.

In the context of professional licensing tests,¹⁵⁸ three major issues have been addressed by recent decisions.¹⁵⁹ These are limiting the number of times a licensure test can be taken, changing the format, and using technology on bar examinations.

in identifying students eligible for special education.

155. 28 C.F.R. § 36.309(b)(1)(i) (2014) (emphasis added).

156. 28 C.F.R. 36.309(b)(1)(iv).

157. That was the issue in the *Wynne v. Tufts University School of Medicine* decision setting the standard for the burden on determining whether something is a reasonable accommodation. In a remand in that case, the court upheld the use of multiple choice tests in that particular setting, and few if any decisions since have required any change in format nor has that generally been raised as an issue. *Wynne v. Tufts Univ. Sch. of Med.*, No. 88-1105-Z, 1992 WL 46077, at *1 (D. Mass. Mar. 2, 1992).

158. See also *DISABILITIES AND THE LAW*, *supra* note 4, at § 5:7.

159. Other issues receiving judicial attention include auxiliary aids and services. See *supra* text accompanying notes 7–10.

There is no clear direction yet from the courts about the permissibility of policies that limit the number of times an individual may take a state licensure exam. One unpublished opinion involving a dental exam and a student with a reading disorder upholding the denial of a request to be allowed to take the exam an unlimited number of times without paying the re-matriculation fee each time.¹⁶⁰ Another recent opinion allowed the case to go forward on whether limiting the number of opportunities for an individual to take the medical licensing exam was permissible.¹⁶¹

The *Wynne v. Tufts University* decision established the standard for demonstrating the basis for why an accommodation is not reasonable in the context of a request to take a test in another format.¹⁶² There have been few cases in which that standard has been considered in the context of testing formats. One of the few other cases to do so is *Falchenberg v. New York State Department of Education*,¹⁶³ which involved a request to take a state teacher test as an oral exam and to use a dictionary. The court held that such an accommodation would be a fundamental alteration and would not test writing skills.

The use of technology on state bar examinations has been the subject of a number of recent decisions, most resulting in holdings (or at least preliminary injunctions) in favor of the individual seeking the accommodations. The issue in these cases involved the use of screen reading devices by individuals with visual impairments. The plaintiffs in these cases had been granted this accommodation while in law school, but the bar authorities denied the use on the Multistate Professional Bar Exam, pursuant to the requirements of the National Conference on Bar Examiners standards. Some state bars had allowed the accommodation for other portions of the bar exam.¹⁶⁴

160. *Lipton v. N.Y. Univ. Coll. of Dentistry*, 865 F. Supp. 2d 403 (S.D.N.Y. 2012), *aff'd*, 507 Fed App'x 10 (2d Cir. 2013). *See also* *Healy v. Nat'l Bd. of Osteopathic Med. Exam'rs, Inc.*, 870 F. Supp. 2d 607 (S.D. Ind. 2012) (addressing issue of accommodations for student with ADHD).

161. *Doe v. Samuel Merritt Univ.*, 921 F. Supp. 2d 958 (N.D. Cal. 2013) (allowing the case to go forward on the issue of whether test-taking is a major life activity).

162. *Wynne v. Tufts Univ. Sch. Of Med.*, 932 F.2d 19 (1st Cir. 1991).

163. 567 F. Supp. 2d 513 (S.D.N.Y. 2008), *aff'd*, 338 Fed. App'x 11 (2d Cir. 2009).

164. *See, e.g.*, *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153 (9th Cir. 2011) (issuing a preliminary injunction for a blind bar exam applicant who had been denied a computer accommodation she had used throughout law school and on the California bar exam applying the "best ensure" standard); *Bonnette v. D.C. Ct. of App.*, 796 F. Supp. 2d 164 (D.C. Cir. 2011) (applying the "best ensures" standard from ADA regulations requiring bar examiner to allow use of certain technology); *Elder v. Nat'l. Conference of Bar Exam'rs*, No. C11-00199 SI, 2011 WL 672662, at *12 (N.D. Cal. Feb. 16, 2011) (issuing a preliminary injunction allowing the use of screen reader); *Jones v. Nat'l. Conference of Bar Exam'rs*, 801 F. Supp. 2d 270 (D. Vt. 2011) (issuing a preliminary injunction allowing a bar applicant with visual impairment to use screen

An issue that is addressed in the cases involving the use of screen readers as an accommodation on bar examinations is important to highlight at this point. The cases address the “best ensure” standard in the ADA regarding test accommodations.¹⁶⁵ Title III of the ADA (which is probably also applicable to any testing given by state agencies) includes a provision applicable to entities providing examinations or courses for applications, licensing, certification or credentialing.¹⁶⁶ The limitations of that provision, however, are unlikely to apply in the cases involving screen readers because the applicants do have sensory impairments. The “best ensures” standard might be misinterpreted in other settings, as noted previously.¹⁶⁷

This provision should not be considered to require that test takers be given the “best” or “preferred” accommodation in test taking. It is also important to emphasize that this provision relates to test taking and applies only to those with sensory, manual, or speaking impairments. It does not apply to individuals with learning disabilities and it does not apply to settings other than testing.¹⁶⁸

Another provision that has the potential for being misinterpreted is the ADA requirement related to deference to past accommodations. The issue involves whether a program must grant the same accommodations that an individual has received in the past for the same disability. The Title III regulations are also the basis for this issue. This provision also applies to test taking, but might be applied to consideration for other accommodations being requested.

When considering requests for modifications, accommodations, or auxiliary aids or services, the entity gives considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations, as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act or a plan describing services provided pursuant to [S]ection 504 of the Rehabilitation Act of 1973, as amended (often referred to as a Section 504 Plan.)¹⁶⁹

This requirement may be misinterpreted by some individuals with disabilities to mean that “considerable weight” is the same as absolute presumption. It is important to understand that each setting is different, and that

access software on Multistate Professional Responsibility Exam).

165. See *Enyart*, 630 F.3d at 1163.

166. 42 U.S.C. § 12189 (2010).

167. See *supra* note 140 and accompanying text.

168. For additional discussion of this issue, 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 AM. U. J. GENDER SOC. POL’Y & L. 519, 564–66 (2014).

169. 28 C.F.R. § 36.309(b)(1)(v) (2014) (emphasis added).

IDEA often provides for more than a “reasonable accommodation,” unlike the ADA and Section 504, which do not have such a requirement.¹⁷⁰ Students must therefore, change their expectations based on the differing standards in higher education.

h. Documentation issues

The issue of documentation raises several questions. These include what is to be required, how recent it must be, what professionals are qualified to provide documentation, and who must pay for the documentation. Documentation may be needed not only to demonstrate that an individual has a disability that ensures protection against discrimination, but also to demonstrate the connection between the disability and the requested accommodation.¹⁷¹

This issue has been addressed in the most recent ADA regulations that respond to litigation on these issues and that incorporate the intent of the amended ADA.¹⁷² The challenge is to strike the balance between nondiscrimination and fairness to others within an education program. There are also concerns of validity when standardized testing is at issue.

ADA regulations promulgated in 2010 provide new guidance on the documentation that should be required to receive accommodations on tests given by testing companies. The new regulations provide that documentation requests should be reasonable and limited to the need for the accommodation, that considerable weight should be given to documentation of past accommodations, and that responses to requests should be timely.¹⁷³

Issues of documentation have not been clearly resolved by the courts, although one recent high profile settlement was reached involving documentation for standardized testing.¹⁷⁴ The case challenged practices for documentation by the Law School Admission Council for individuals seeking accommodations on the LSAT.¹⁷⁵ Because the case was settled, and the

170. See generally *A COMPARISON of ADA, IDEA, and Section 504*, DISABILITY RIGHTS EDUC. & DEFENSE FUND, dredf.org/advocacy/comparison.html (last visited May 11, 2015).

171. See *Forty Years*, *supra* note 168, at 570–74.

172. The early cases addressing this issue were *Guckenberger v. Boston University*, 957 F. Supp. 306, 313–16 (D. Mass. 1997), and *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2d Cir. 2000). The *Guckenberger* court recognized the burden of requiring documentation to be created within the past three years and held that this standard should be applied where qualified professionals demonstrated that retesting was not necessary. The court in the litigation also clarified the professional credential for testing learning disabilities, ADD, and ADHD.

173. 28 C.F.R. § 36.309(b)(1)(iv)-(vi) (2014).

174. *Dep’t of Fair Emp’t. and Hous. v. Law Sch. Admissions Council Inc.*, 896 F. Supp. 2d 849 (N.D. Cal. 2012).

175. The case was settled and the settlement also addressed the issue of flagging reported test scores. Consent Decree, *Dep’t of Fair Emp’t. and Hous. v. Law Sch. Ad-*

terms of the settlement are still in stages of resolution, there is not yet definitive judicial guidance on an array of documentation issues.¹⁷⁶

The concern about documentation and the deference to be given to past accommodations is that each setting is different in a variety of ways. In the K-12 setting students are entitled to much more than “reasonable accommodation,” and while accommodations received subject to an individualized education program should be considered, they are not necessarily dispositive of what must be provided.

E. Students in Professional Education Programs and the Relationship to Licensure: Judicial Trends in “Deference”

Students in professional education programs (particularly law and health related programs) who are seeking licensure to practice within the chosen field raise special considerations. The 2010 ADA regulations under Titles II and III and some recent judicial decisions highlight the unique status of these educational programs. Given the high stakes for those individuals participating in the programs, it is not surprising that many of the cases challenging denial of admission or accommodations or other adverse action arise in the context of such professional education programs.¹⁷⁷

Following the continuum of participation in these programs, the first step is the admission process. This raises two issues. First is the requirement for documentation of the disability and the related accommodation requests for taking a standardized test with accommodation. This issue has arisen in the context of the Law School Admission Test.¹⁷⁸

A much different admissions issue is raised in the context of an individual with an impairment that may not affect performance in the early aspects of the academic program, but who may have difficulty in later stages of the program leading to licensure (such as clinical rotations or performing technical requirements that might require dexterity or visual acuity). How should it be determined whether that individual is “otherwise qualified” for admission? It raises the question of whether the educational program may use licensure requirements in determining qualifications for admission into the professional education program or denying accommodations during the academic portion of the program. Traditionally educational programs were given substantial deference by the courts in making such decisions, particularly in the context of health related professions (medical school, nursing

missions Council, No. CV 12-1830-EMC (N.D. Cal. May 29, 2014).

176. See *Law School Admission Council Agrees to Systemic Reforms and \$7.73 Million Payment to Settle Justice Department's Nationwide Disability Discrimination Lawsuit*, DEP'T OF JUSTICE, OFFICE OF PUB. AFFAIRS (May 20, 2014), <http://www.justice.gov/opa/pr/law-school-admission-council-agrees-systemic-reforms-and-773-million-payment-settle-justice> for information about the settlement.

177. See also *DISABILITIES AND THE LAW*, *supra* note 4, at § 10:7.

178. See *supra* Part D.2.h.

school, dentistry, optometry, chiropractic, etc.) because of patient health and safety issues. It is not clear whether that same deference continues.

The most recent example was noted earlier.¹⁷⁹ In denying admission to a chiropractic school to a student who was blind, the school had previously established specific technical program requirements which included the requirements that “candidates must have sufficient use of visionFalsenecessary. . .to review radiographs.”¹⁸⁰ The school had looked to the licensing requirements that included the ability read x-rays and interpret them in establishing that requirement. Although Mr. Palmer was able to complete coursework in the first four semesters and achieve a strong grade point average with accommodations, the program denied continuation and any further accommodation to his visual impairment. In taking the position that allowing any further accommodations in subsequent semesters would be a fundamental alteration of the educational program, the school would not allow further accommodations. The state civil rights committee found that this was an ADA violation, but that was overruled by the district court.¹⁸¹ The Supreme Court of Iowa, however, sided with the state commission and found the decision to be a violation of the ADA.¹⁸² This outcome is in stark contrast to a much earlier case in Ohio, where deference was given to the medical school in denying admission to a blind student in a situation similar to the Palmer case.¹⁸³ The Iowa Supreme Court noted the importance of individualized determination, but declined to give the traditional deference to educational institutions (particularly those involving health care professional programs) to the school’s determination of fundamental requirements.¹⁸⁴ It would be inappropriate to view this as a broad turn away from judicial deference, but the decision was surprising to many in higher education.

A related issue has arisen in the context of several cases involving students with learning and related disabilities and mental health conditions that may not initially affect academic performance, but which involve questions of qualifications at a later point either because of the inability to pass interim exams or because of conduct and behavior during the clinical phases of the programs. The chiropractic school in the Palmer case had just such a concern and seemed to question whether it was appropriate to even admit him for the undergraduate portion of the program before he was to

179. *Palmer v. Davenport Civil Rights Comm’n*, 850 N.W. 2d 326 (S. Ct. Iowa) (addressing admission of a blind student to chiropractic program and accommodations).

180. *Id.* at 330.

181. *Id.* at 332.

182. *Id.* at 346.

183. *Ohio Civil Rights Comm’n v. Case W. Reserve Univ.*, 666 N.E.2d 1376 (St. Ct. Ohio 1996) (holding that a blind medical school applicant was not otherwise qualified).

184. *Palmer*, 850 N.W. 2d at 337–39.

engage in clinical and technical requirements.¹⁸⁵

The final phase that is somewhat unique to professional programming involves the licensure. At this phase, there have been recent developments involving accommodations on the licensing exam and mental health history issues in the character and fitness aspect of licensure. Both of these areas of development arise primarily in the context of entry into the legal profession.

IV. 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 Blackboard, and other similar 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 there are an array of statutes and regulations that impact the range of technology issues on campus. These include Section 508 of the Rehabilitation Act¹⁸⁶ and the 21st Century Communications and Video Accessibility Act.¹⁸⁷ Proposed regulations in this area are also in progress.¹⁸⁸ There is a general philosophy that compliance with Section 504 requires some level of ensuring access to websites, etc., and that compliance with Section 508 is one way to ensure such compliance.¹⁸⁹ But 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

185. For more cases on health care professional programs and technical requirements, see *DISABILITIES AND THE LAW*, *supra* note 4, at § 10:7.

186. 29 U.S.C. § 794d (2013). See also 36 C.F.R. §§ 1194 (2000) (implementing Section 508).

187. Pub. L. 111-260, 124 Stat. 2751 (Oct. 8, 2010). See generally *21st Century Communications and Video Accessibility Act*, FED. COMM’NS COMM’N (May 27, 2014), <http://www.fcc.gov/guides/21st-century-communications-and-video-accessibility-act-2010>.

188. 80 Fed. Reg. 10,880 (Feb. 27, 2015). See generally *4 Steps to Ensure Electronic and Information Technology Accessibility*, ACADEMIC IMPRESSIONS.COM (Sept. 10, 2015), <http://www.academicimpressions.com/webcast/4-steps-ensure-electronic-and-information-technology-accessibility>.

189. See generally *What is section 504 and how does it relate to Section 508?*, U.S. DEP’T. OF HEALTH & HUMAN SERV., www.hhs.gov/web/508/section504.html (last visited May 11, 2015).

is very little reported case law to provide precedent and guide institutions about what they must do. There is a fair amount of technical assistance, however, so institutions taking a proactive approach have at least some guidance on how to best ensure access for individuals with visual and hearing impairments, who are those most affected by technology issues.¹⁹⁰

A. 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 issues¹⁹¹ as well as academic freedom questions.

At 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

190. See generally L. Scott Lissner & Lisa LaPoint, *4 Common Misperceptions about EIT Compliance*, ACADEMIC IMPRESSIONS.COM (Aug. 19, 2014), <http://www.academicimpressions.com/news/4-common-misperceptions-about-eit-compliance>.

191. 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 media 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, on braille, large print, etc. The Second Circuit ruled that it is fair use.

a particular course. Such a practice would certainly be an incentive to the publishers.

Several recent settlements and agency actions highlight the importance of universities taking a proactive approach to the use of technology on campus websites and in teaching materials.¹⁹² The National Federation for the Blind, the Department of Education, and the Department of Justice have all sent signals that this is a high priority issue.¹⁹³

192. An April 2, 2015 settlement between DOJ and edX addressed issues of the web page, online platform and mobile applications. *Settlement Agreement Between the United States of America and EDX INC.*, DJ. No. 202-36-255 (Apr. 1, 2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx_settlement_agreement.pdf. The case is significant because edX, Inc., is a large provider of online course material and its courses are used at some of the nation's most prestigious universities. See also Resolution Agreement, South Carolina Technical College System, Office of Civil Rights No. 11-11-6002 (Feb. 28, 2013), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-b.pdf>; Resolution Letter from Alica B. Wender, Regional Director, U.S. Dep't of Educ., Office of Civil Rights, to Dr. Darrel W. Staat, President, South Carolina Technical College System (Mar. 8, 2013), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-a.doc>; *Justice Dept. Settles with Louisiana Tech Univ. Over Inaccessible Course Materials*, JUSTICE.GOV (July 23, 2013), available at <http://www.justice.gov/opa/pr/2013/July/13-crt-831.html> (settlement between Department of Justice and Louisiana Tech University and University of Louisiana System involving online learning program that excluded a blind student from the course); *Settlement Agreement Between the United States of America, La. Tech Univ., & the Bd. of Supervisors for the Univ. of La. System under the Americans with Disabilities Act*, DJ #204-33-116 (July 23, 2013), available at <http://www.ada.gov/louisiana-tech.htm> (prohibiting University from purchasing materials that are not accessible and providing guidance on faculty involvement in ensuring access); Settlement between the Regents of the Univ. of Cal. And Disability Rights Advocates (May 7, 2013), available at <http://dralegal.org/sites/dralegal.org/files/casefiles/settlement-ucb.pdf> (settlement regarding assistive technology and accessibility of library material). The Office of Civil Rights (OCR) recently issued a resolution agreement with the University of Montana as a model for institutions to use to ensure their electronic and information technologies (EIT) are accessible and compliant with Section 508 of the Rehabilitation Act of 1973. Letter from Barbara Wery, Team Leader, U.S. Dep't of Educ., Office for Civil Rights, to Dr. Royce C. Engstrom, President, University of Montana-Missoula (Mar. 10, 2014) <http://www.ahead.org/Presidents%20Post/March%202014/Final%20Agrmt%20Univ%20Montana-Missoula%203-10-14%20Accessible.pdf> (enclosing the Resolution Agreement between OCR and the University of Montana); see also *Dear Colleague Letter*, 43 NAT'L DISABILITY L. REP. 75 (OCR 2011). This opinion letter advises universities that use of technology in classroom settings must either ensure full access to students with disabilities or provide an alternative that allows them to use the same benefits.

193. Tamar Lewin, *Harvard and M.I.T. Are Sued Over Lack of Closed Captions*, N.Y. TIMES, Feb. 2, 2015, http://www.nytimes.com/2015/02/13/education/harvard-and-mit-sued-over-failing-to-caption-online-courses.html?_r=0 (Harvard and Yale were sued in February 2015 over their online course captioning).

B. 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.¹⁹⁴ What is less clear is what is expected in terms of design and function and content for webpages.¹⁹⁵

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 that 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, that means that 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

194. 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 video streaming website is a place of public accommodation). See also *U.S. Education Department Reaches Agreement with Youngstown State University to Ensure Equal Access to its Website for Individuals with Disabilities*, U.S. DEP'T OF EDUC. (Dec. 12, 2014) <http://www.ed.gov/news/press-releases/us-education-department-reaches-agreement-youngstown-state-university-ensure-equal-access-its-websites-individuals-disabilities> (settlement about website accessibility). See also *DISABILITIES AND THE LAW*, *supra* note 4, at § 9:5.

195. See *Settlement Agreement Between the United States of America and EDX INC.*, DJ. No. 202-36-255 (Apr. 1, 2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx_settlement_agreement.pdf. This is a settlement and does not necessarily define what is required, but it sends an important signal about what the Department of Justice will be expecting related to webpages.

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.¹⁹⁶

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?

The Communications and Video Accessibility Act, which became effective in October 2013,¹⁹⁷ requires that video content owners (not distributors) have the primary responsibility for captioning video information. Universities that use video on their websites or at events should be sure that they are in compliance with these requirements. This is likely to receive greater attention by plaintiff advocates in the future.

C. Events and Other Public Issues

The third major area that would benefit from proactive attention involves technology for individuals other than students, faculty, and staff at events such as 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.¹⁹⁸

The lessons to be drawn at this point (because there is little specific case law or detailed guidance) are to include individuals with disabilities in facilitating access. As regulatory guidance and technical assistance evolves, this is likely to be an area of increased attention by advocates and an area that would benefit from proactive planning.

196. *See generally* FRANK H. SERENE, MAKING ARCHIVES ACCESSIBLE FOR PEOPLE WITH DISABILITIES, available at www.archives.gov/publications/misc/making-archives-accessible.pdf.

197. 47 C.F.R. § 79.4(c)(1) (2014).

198. *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. *See also* Feldman v. Pro Football Inc., 579 F. Supp. 2d 697 (D. Md. 2008) (requiring access under Title III to deaf and hard of hearing attendees to aural information broadcast by a professional football team). The Fourth Circuit affirmed this decision in an unpublished opinion on March 25, 2011. Feldman v. Pro Football, Inc., 419 F. App'x 381 (4th Cir. 2011). In the Fourth Circuit, unpublished opinions are not binding precedent.

V. SERVICE AND COMFORT ANIMALS

In recent years there have been a number of developments relating to animals on campus.¹⁹⁹ A set of 2010 Department of Justice regulations provided some specific guidance as did some judicial decisions, OCR opinions, and court settlements. One of the issues that remains unclear, however, involves the issue of animals in campus housing.²⁰⁰

There is nothing in the ADA or Rehabilitation Act statutory language that directly references animals as an accommodation for individuals with disabilities. The 2010 regulations, however, responded to a number of questions that have been raised as more individuals seek to have a range of animals that provide specific assistance or that provide emotional support (comfort) to individuals with mental health disabilities. These regulations, however, only address when animals may be required as an accommodation in public accommodation or public service settings. They do not provide guidance on what is mandated in employment or housing settings. For that reason, it is important to first identify the kind of situation at issue, the type of animal, and the service or accommodation being performed to determine what is required.²⁰¹

The regulations for Title II and Title III seek to balance the concerns about the need for the animal and the burden of having documentation to justify the need. It is suggested that in striking that balance, the Department of Justice may not have completely considered the unique setting of a university campus and how the balance may not work as well in that setting compared to a shopping mall, restaurant, hotel, or health care office where the person is a visitor for a short term and not on a sustained basis where the concerns of others may be more relevant.

It should be noted at the outset that regardless of whether it is required that the animal be allowed, the specific regulations and cases addressing these issues recognize that the animal must itself be “otherwise qualified” in a sense. It cannot be disruptive or dangerous. Providers of programs are not expected to take care of the animal’s care needs nor are they required to clean up after the animals. Exclusion of animals for these reasons is not

199. See, e.g., DISABILITIES AND THE LAW, *supra* note 4, at § 5:5; Rebecca J. Husal, *Canines on Campus: Companion Animals at Postsecondary Educational Institutions*, 77 MO. L. REV. 417 (2012); see also *Update on Accommodating Service and Assistance Animals on Campus: Making Heads or Tails of Federal Disability Laws*, NACUANOTES (Mar. 16, 2012), available at <http://www.calstate.edu/gc/documents/AccommodatingServ-AssistanceAnimals.pdf>.

200. See *Update on Accommodating Service and Assistance Animals on Campus*, *supra* note 199.

201. One of the recent cases to address this issue is *Alejandro v. Palm Beach State College*, 843 F.Supp.2d 1263 (S.D. Fla. 2011). The court granted a temporary injunction to a student seeking to bring a psychiatric service dog to campus and classes. The dog was trained to alert her to impending panic attacks.

generally considered discrimination on the basis of disability. Guidance from settings other than higher education provides examples of how courts have addressed some of these issues.²⁰²

The DOJ regulations applying to Title II and Title III entities provide that only dogs and miniature horses are service animals that are referenced as accommodations.²⁰³ The animal must be trained to do something. That means that emotional support or comfort animals need not be allowed. Documentation of a disability and any training is not allowed. The only inquiries that are allowed are “whether the animal is required because of a disability and what work or task the animal has been trained to perform.”²⁰⁴ Animals may be excluded if they are not under control of the handler or if they are not housebroken.²⁰⁵

For appropriate implementation of these requirements, training of various campus personnel (or at least communication about the requirements) is needed. What is not clarified in the regulations themselves is how to address situations where others are affected. Individuals with allergies, fear or phobias about animals, and other concerns may be put in the position of “accommodating” another individual, rather than the program itself providing the accommodation. Federal regulatory guidance seems to indicate that such concerns do not justify denial of having the animal. This concern has not yet been tested in court, but those implementing policies should keep that concern in mind and be proactive about that. It is more likely to be an issue in the housing setting, where individuals are in close physical proximity to each other for extended periods of time, than it might be in other settings. This is one of the issues that is particularly appropriate for an individualized interactive process.²⁰⁶

The regulations seem to indicate that campus housing is considered to be part of the public accommodation or public program, so the DOJ regulations would seem to apply. The Fair Housing Act, however, probably also applies to some (or even all) campus housing situations,²⁰⁷ and accommo-

202. DISABILITIES AND THE LAW, *supra* note 4, at § 5:5, *see also supra* notes 7–16 and accompanying text.

203. 28 C.F.R. § 35.136 (2014); 28 C.F.R. § 36.302(c) (2014).

204. 28 C.F.R. § 35.136(f) (2014); 28 C.F.R. § 36.302(c)(6) (2014).

205. 28 C.F.R. § 35.136(b) (2014); 28 C.F.R. § 36.302(c)(2) (2014).

206. For additional commentary on this issue from AHEAD, *see* L. Scott Lissner, *Staying out of the Dog House, Revisited*, AHEAD (May 21, 2013), *available at* <http://www.ahead.org/uploads/docs/Staying%20out%20of%20the%20Dog%20House%20Revisited%20S%20Lissner%20AHEAD.doc>.

207. *See, e.g.*, *United States v. Univ. of Neb. at Kearney*, No. 4:11CV3290, 2013 WL 2146049, at *1 (D. Neb. May 15, 2013). The court decision determined that student housing at the University of Nebraska is subject to the Fair Housing Act. This makes the university subject to HUD guidance related to support and service animals. *See also Velzen v. Grand Valley State*, 902 F. Supp. 2d 1038 (W.D. Mich. 2012). The court addressed the applicability of FHA and Section 504 to residential settings on campus. The case involved a student who had been prohibited from living with her

dations in the housing setting are both broader and narrower than under ADA Titles II and III.²⁰⁸ Animals in housing that provide emotional support or comfort may be included, but under the FHA, a program might be allowed to require more documentation for such animals. The same could be true in the employment setting. The major complicating situation would be a dog that is primarily for emotional support. While dogs are accommodating animals allowed under Titles II and III of the ADA, they must be trained to perform a service to be allowed in those settings. This leaves a dilemma for housing supervisors (such as residence hall counselors) regarding what questions can be asked and what documentation can be required. Further guidance from federal agencies would be helpful, but such guidance has not been recently updated.

VI. 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 only eat 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 be available, it is less certain what might be required in other settings.

One highly publicized settlement addresses this issue, but it is important to note that a settlement is not precedent, and care should be taken in assuming that the settlement terms are what is required for every institution. The case by the Department of Justice on behalf of a student against Lesley University could provide some guidance.²⁰⁹ The case involved a mandato-

guinea pig as a comfort animal to control stress. Although she had moved off campus, she was still enrolled and might still want to live on campus. The campus policy about animals had not changed so the case was not moot.

208. The Department of Housing and Urban Development is the agency responsible for regulations under the Fair Housing Act. For cases on this issue, see *DISABILITIES AND THE LAW*, *supra* note 4, at § 7:8; see *supra* notes 25–26 and accompanying text.

209. See *Settlement Agreement Between the United States of American and Lesley University*, DJ No. 202-36-231 (Dec. 20, 2012), available at http://www.ada.gov/lesley_university_sa.htm; *Questions and Answers About the Lesley University Agreement*

ry meal plan. The settlement notes that only reasonable steps are required that do not fundamentally alter the program.

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. This falls into the general issue of “direct threat” discussed previously.²¹⁰

VII. MENTAL HEALTH ISSUES

Mental health issues have been addressed in several previous sections of this article. They arise in the context of the definition of who is protected, what it means to be otherwise qualified (including direct threat issues), and professional education leading to licensing. Separate focus is given here because of the significant concerns that have arisen involving students (and others on campus) with mental health impairments.

Such impairments may affect the ability to meet the requirements of the program, but they may also present a concern for the well being of the individual and for others on campus.²¹¹ One outcome of the numerous unfortunate high profile events (including Virginia Tech and others) has been greater attention to these issues. With respect to the definitional coverage, it is important to keep in mind that the “regarded as” portion of the definition may be applicable in the context of individuals with mental health issues. Any adverse action towards an individual based on a perceived or actual mental health impairment raises potential discrimination claims.

While the need for more mental health services arises whenever a high profile event occurs, and the Affordable Care Act in combination with the Mental Health Parity Act should make access to such services more available, this continues to be a concern. It can be of particular relevance to veterans returning from combat, but it is also an ongoing issue in light of economic pressures in society.

VIII. ARCHITECTURAL BARRIERS

Access to the built environment should be less of an issue today given the fact that it has been over forty years since the Rehabilitation Act of 1973 was enacted. Regulations promulgated pursuant to the Americans with Disabilities Act (and applicable to institutions under Section 504) have provided substantial guidance for new construction, existing facilities,

and Potential Implications for Individuals with Food Allergies, ADA (Jan. 25, 2013), www.ada.gov/q&a_lesley_university.htm. Some of the practices included answering questions about menu ingredients and changing ingredients upon request.

210. See *supra* Part III.C.

211. Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 691 (2009).

and renovations.²¹² These design standards have addressed a broad range of building issues. Institutions of higher education should long ago have done self-evaluations and developed and implemented transition plans.

A key element of such plans is to consider facilities programmatically, taking into account the various users of physical space and anticipating that not only in design, but also for signage and parking. For example, a law school building may be used primarily for classes, with students and faculty needing access to and within classrooms. The library, however, may be open to visitors other than students and faculty. A law school clinic may have clients who visit. The admissions office will be visited by prospective applicants. Public events may be held in auditoriums and court room spaces. Employers may visit to interview students. It is therefore wise to periodically reassess how space is used and make sure that all anticipated users have appropriate access.

The basic original requirements for access under the regulations have been in place for some time. The 2010 DOJ regulations of relevance to higher education are the detailed additional guidelines regarding accessible seating at performance and sports event, and accessible swimming pools.²¹³

There has not been a great deal of litigation involving architectural barrier issues on campus in the past or recently.²¹⁴ A 2010 NACUA outline provides additional references to settlements and investigations involving architectural barrier issues and highlights the fact that most situations are settled and do not get litigated in court.²¹⁵

The case of *Covington v. McNeese State University*²¹⁶ involved a prolonged battle by a wheelchair user regarding lack of an accessible restroom in a student life center on campus in 2001 (many years after such an issue should have been addressed). In the most recent disposition, the court reversed some of the attorney fee awards and held that district court decisions on the amounts was not an abuse of discretion, but it did not overrule any of the substantive issues. The court ordered a substantial award in attorneys' fees and costs in case involving 15,000 architectural barriers. The court noted the university's "prolonged 'militant' behavior" over several years of litigation in allowing over one million dollars in attorneys' fees to

212. See 28 C.F.R. §§ 35.149–59 (2014).

213. For information on 2010 standards for accessible swimming pools, see *Accessible Pools Means of Exit and Entry*, ADA (May 24, 2012), http://www.ada.gov/pools_2010.htm. And for stadium seating, see *Accessible Stadiums*, ADA.GOV, <http://www.ada.gov/stadium.pdf>.

214. DISABILITIES AND THE LAW, *supra* note 4, at §§ 3:16–3:20 (collecting cases).

215. See, e.g., John H. Catlin, et al., *Surviving and ADA Accessibility Audit: Best Practices for Policy Development and Compliance* (June 2010), available at <http://www.higheredcompliance.org/resources/resources/xxiii-10-06-61.doc>.

216. 118 So. 3d 343 (La. 2013). For the facts in this case that lead to the decision, see *Covington v. McNeese St. Univ.*, 98 So. 3d 414 (La. Ct. App. 2012).

the plaintiff's attorney.²¹⁷ The university must have incurred substantial court costs for attorney's fees in defending the suit.

Recent regulations involving stadium seating should remind universities of the importance of addressing stadium access proactively. An October 2007 opinion letter from the Department of Justice Office for Civil Rights²¹⁸ to the University of Michigan found several aspects of its stadium out of compliance with Section 504. These included location and number of accessible seating, accessible routes to and within the stadium, lack of restroom access, and inaccessible shops and concession stands.²¹⁹ The lengthy letter provides a detailed discussion of the violations, the standards to be applied, and expected compliance.

Other recent cases have raised issues of parking²²⁰ and whether there is any limitation on damages when there is continuing violation.²²¹ The issue of damages has also been raised with respect to whether ongoing violations require repeated awards of damages.

IX. OTHER ISSUES

A. Greeks on Campus

It might seem that the ADA and Section 504 do not apply to fraternities and sororities because of the private club exception²²² and the fact that they do not receive federal financial assistance. The interrelationship of the main university with regulating Greek life, as well as the fact that on some campuses, the buildings themselves are owned by the university and leased to the fraternal organizations, however, raises the potential for at least indirect application of disability discrimination law.

Because a university could decide not to officially recognize a fraternity or sorority as a student organization entitled to various benefits (use of

217. *Covington*, 98 So. at 431.

218. Opinion Letter from Harry A. Orris, Director, Cleveland Office, Midwestern Division, U.S. Dept. of Ed. Office for Civil Rights, to Gloria A. Hage, Associate Vice President and Deputy General Counsel, Univ. of Mich. (Oct. 26, 2007), available at http://www.galvin-group.com/media/60384/ocrletter_umichiganstadiumaccess%5B1%5D.pdf

219. *Id.*

220. *See, e.g.*, *Adams v. Montgomery Coll.*, 834 F.Supp.2d 386 (D. Md. 2011) (allowing a claim by a student regarding inadequate parking accommodations during period of construction); *Cottrell v. Rowan Univ.*, 786 F. Supp. 2d 851 (D.N.J. 2011) (denying standing to advocates for disability rights in an attempt to monitor handicap parking violations; holding that ban from campus was not retaliation but was based on activity that was hostile, harassing, disruptive, and aggressive).

221. *See, e.g.*, *Grutman v. Regents of the Univ. of Cal.*, 807 F. Supp. 2d 861 (N.D. Cal. 2011) (declining to exercise supplemental jurisdiction over a claim involving college student's case that each day her disability affected ability to open dorm door was a new violation of state law).

222. 42 U.S.C. § 12187 (2010).

space, use of official communications channels, etc.), it is useful to at least provide an overview of how the range of disability discrimination requirements might affect Greek life on campus.

Meeting membership requirements is likely to be less subject to federal law because the private club exception is carved out primarily in recognition that private clubs can make their own rules of membership so long as they are not becoming programs that are generally open to the public. On the other hand, it is difficult to imagine that a Greek organization could have official university recognition if it discriminated on the basis of race. For that reason, membership requirements that might adversely impact individuals with disabilities might be called into question. It is probable that any challenge to such exclusions would uphold requirements that individuals meet academic and behavior and conduct expectations. A fraternity or sorority that excluded an individual solely on the basis of a physical or mental impairment, however, could probably be challenged in cases where there is university oversight of Greek life.

Perhaps the biggest concern is the issue of architectural barriers. Fraternity and sorority houses on campus are often old buildings. Some may even have historic landmark designation. They were not designed with elevators or accessibility features in mind and can be difficult to retrofit. The requirements of the ADA should be taken into account, however, when new building construction or renovations take place.²²³ It may be that certain activities might need to be relocated for individuals with mobility impairments. Chapter meetings in basement rooms are a good example. Often sleeping rooms are on floors not reached by elevators, and it may prove unduly burdensome to relocate such rooms. In considering whether ramps or other entry access should be added, it is useful to note that these have other benefits, such as facilitating the use of roller luggage and delivery carts. In addition, while the members themselves might not have mobility impairments, it would not be unusual for a parent or other family member visiting the member to require accessible entry. Carrying individuals up stairs, however, is almost never an acceptable accommodation, except, perhaps in the case of an emergency.

Within a fraternity or sorority setting, the application of the various principles described previously can take on unique considerations. Accommodations such as interpreters may be needed at social events, which are often integral to Greek life participation. The extent to which these are required would be evaluated under the principles of “reasonableness” considering undue burden and essential requirements. The privacy of chapter meetings and Greek rituals may require considerations of how to provide interpreter

223. See Tahree Lane, *Suit settled: UT agrees to install lifts for disabled*, TOLEDO BLADE, Nov. 23, 1989, at E1 (describing how the University of Toledo settled a case agreeing to install platform lifts on a fraternity and sorority complex).

service. Creative solutions may be needed. This is not an issue that has yet arisen in the context of ADA cases.

Issues related to mental health and behavior impairments may be particularly challenging in Greek settings where behavior standards and academic achievement are often integral to membership. These issues can relate to depression, substance use and abuse, Asperger's, ADD, ADHD, anorexia, and bulimia.

The obligation to accommodate food allergies such as Celiac disease or peanut allergies may have unique challenges in a fraternity or sorority. The request to have an emotional support animal raises the question of whether a Greek house is covered as housing or under the ADA public accommodations requirements.

For Greek organizations that might be affected by the ADA (directly or indirectly), one of the most challenging issues would be the architectural barrier issues for the chapter facility, especially if it includes housing. Many sororities and fraternities were built long before the ADA, and some have historical significance. Few were constructed with elevators, which makes the social access which is important to Greek life difficult to ensure.

B. Returning Veterans

After many years of military engagement in the Middle East, many veterans are returning to campus and this influx has the potential for raising disability discrimination issues. Some veterans will have apparent mobility impairments, where the condition is readily visible and the related necessary accommodations are apparent. More challenging, however, are veterans with Post-Traumatic Stress Disorder or Traumatic Brain Injury.²²⁴ A veteran with such an impairment requesting an accommodation may have difficulty complying with the ordinary requirements for documentation of the condition and the need for related accommodations. This is because the military branches of government are not known for getting paperwork done quickly. It seems unethical to deny an accommodation in some of these situations. No court cases have addressed this, but an institution might find a practice of allowing at least some accommodations on a temporary basis until documentation is received. These could be renewable accommodation grants, with the student record clarifying that there is no guarantee that the accommodations would be continued on an indefinite basis.

C. Facilitated and Sponsored Programming –Who's In Charge?

Increasingly alumni organizations are sponsoring programs, such as

224. It is important that institutions not make assumptions that all veterans have PTSD or anger management issues. Doing so runs the risk that some actions by the institution may be claimed to be based on the "regarded as" prong. Training staff about this issue is important.

travel programs for alums. While the responsibility for ensuring nondiscrimination for such events is relatively untested in court, a proactive approach is essential to avoid liability. University alumni offices should ensure that the contracts with providers address and anticipate such issues, and they should be aware that simply by sponsoring or facilitating the programs, there is the potential for liability should it be determined that the travel program itself is not in compliance.²²⁵

Similar issues could be raised regarding vendors (such as book stores, food vendors, and banks) that operate on campus through contractual arrangements such as leases, licenses, or other plans. The individual faced with noncompliance may be able to recover from either the university or the provider of services or goods, with those parties left to sort out indemnification between them. Similarly, hosting conferences and events at locations that are off campus requires attention to anticipating who is responsible for ensuring architectural access and various accommodation services.

Study abroad programs also fall under this category.²²⁶ The obligation to ensure access to such programs is not clear. There is some indication that because these programs are abroad, that the ADA does not apply.²²⁷ Such a position does not explain how an institution can defend hosting and giving credit to students for such programs that are not accessible. Would these institutions make the same argument if the issue were race or gender discrimination? The better approach is to try to assess what is reasonable to expect in terms of access to such programs. Many programs are located in places where there are many historic buildings or sites and in countries without an ADA equivalent law. It is suggested that the obligation of the host institution should be that at least housing and classroom components should be located in accessible facilities. The enrichment visits to historic sites and buildings should be described in a way that an individual with a mobility impairment would be able to determine in advance whether it would be feasible to benefit from participation in such a program. This has not been addressed in any reported litigation. With respect to auxiliary aids and services such as interpreters for individuals with hearing impairments, the challenge can be one of cost. This can be particularly the case for a program in a country where another language will be used for a significant

225. See, e.g., *Alumni Cruises, LLC v. Carnival Corp.*, 987 F.Supp. 2d 1290 (S.D. Fla. 2013) (allowing issues to be tried on whether the cruise line had made reasonable modifications; organization was allowed to have standing to bring these claims).

226. *DISABILITIES AND THE LAW*, *supra* note 4, at §3:20.

227. See, e.g., Arlene S. Kanter, *The Presumption Against Extraterritoriality as Applied to Disability Discrimination Laws: Where Does It Leave Students with Disabilities Studying Abroad?*, 14 *STAN. L. & POL. REV.* 291 (2003); Letter from L. Thomas Close, Supervisory Team Leader, Dep't of Educ. Office of Civil Rights to Dr. Lattie Coor, President, Ariz. State Univ. (Dec. 3, 2001), available at http://www.nacua.org/documents/ocrcomplaint_signlanguageinterpreter.pdf (stating that neither §504 nor Title II apply to extraterritorial programs).

component of the classroom experience. While guidance on this is sparse, it is an area for proactive policymaking.

While it was noted previously, the issue of distance learning programs bears attention in this section. Institutions are increasingly offering on line courses and giving credit to such courses from other institutions. While such courses may improve access for individuals with mobility impairments, they can create barriers for those with sensory impairments (hearing and vision). The unresolved issues include determining which institution is responsible for any costs associated with access to the course and for planning related to accessible textbooks, captioning materials, providing interpreters, etc. Similar issues can arise even for a single institution that has multiple campuses. It is advisable for institutions to engage in advance planning on these issues to avoid disputes and costly litigation.

D. Title IX for Students with Disabilities?

In 2013, the Department of Education Office for Civil Rights raised the issue of equal athletic opportunities for students in educational programs. This is primarily an issue for K-12, but it could have implications for higher education. A January 25, 2013, Dear Colleague Letter notes what is already required – that programs should provide reasonable modifications to rules and other requirements, although they need not make fundamental alterations to programs. The letter gives some examples and encourages separate programs in some instances.²²⁸

Any requirements to provide equivalent athletic programming for student with disabilities do not clarify what types of disabilities should be provided equivalent special programming. While having separate programs for students with mobility impairments or sensory impairments might be possible in some cases, what about students with mental health impairments? While the 2013 Department of Education attention was well meaning, it probably makes the most sense to clarify and remind institutions that they are obligated to make reasonable modifications to programs and not to discriminate against students who want to participate in those programs. It does not seem realistic to expect a college to provide an entire separate basketball or tennis program for wheelchair users. This issue has receive little enforcement or other attention since 2013.

X. FACULTY AND STAFF ISSUES

Faculty and staff issues are essentially employment issues that are not

228. See Dear Colleague Letter from Seth M. Galanter, Acting Assistant Sec'y. for Civil Rights, U.S. Dept. of Educ., *Students with Disabilities in Extracurricular Athletics* (Jan. 25, 2013), available at www.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf.

necessarily unique to higher education. The unique requirements for higher education faculty work, however, do provide some differences. The primary significant feature of faculty employment that is somewhat different than other employment is the often vague job descriptions or lack of clarity about fundamental requirements of the program.²²⁹ As today's baby boomers reach what in the past (in the 1980s) would have been mandatory retirement age, the shaky economy and the fact that teaching in higher education offers substantial benefits (such as contact with students, access to office space and support for technology needs, travel funding, clerical support) means that faculty are staying on longer. Why leave a faculty position if one does not have to?

With respect to employment generally, it is important to first examine the most recent judicial guidance on the definition of coverage since the 2008 Amendments. It is difficult to assess the impact of the 2008 Amendments on whether the broadened definition has affected litigation in employment. That is because measurement of changed employer practices and policies is difficult and the fact that more disputes may be resolved through internal alternative dispute resolution or external settlement of disputes. A general impression, however, is that there are fewer cases addressing the issue of whether one met the definition of coverage.²³⁰ In the context of higher education employment cases, the focus is not on definition, but more on whether the individual is otherwise qualified or whether the adverse action by the employer was based on nondiscriminatory reasons.²³¹

Some recent examples of cases addressing the issue of definitional coverage include *Carter v. Chicago State University* (sleep apnea not a disability),²³² *Coursey v. University of Maryland Eastern Shore* (aberrant behavior did not make professor regarded as having a disability),²³³ *Hamilton v. Oklahoma City University*, (selection committee not aware that applicant for

229. 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. 122, 122 (2004).

230. See generally DISABILITIES AND THE LAW, *supra* note 4, at § 4:8.

231. DISABILITIES AND THE LAW, *supra* note 4, at § 3:26. See also AMY GAJDA, THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION (2009) (discussing the trends that courts are no longer as deferential to institutional decision making than has been the case previously).

232. No. 07C4930, 2011 WL 3796886, at *1 (N.D. Ill. Aug. 24, 2011). In a preliminary decision in the case the court applied the 1990 definition of disability under the ADA and held that sleep apnea was not a disability. It is likely that under the 2008 Amendments, it would be covered. In this case the accounting professor was also found not to be otherwise qualified and that reasonable accommodations had been provided.

233. No. CCB-11-1957, 2013 WL 1833019, at *1 (D. Md. Apr. 30, 2013). A professor was required to undergo fitness for duty after aberrant behavior. The court found that he was not regarded as having a disability and issues of student safety were job-related.

position had vertigo),²³⁴ and *McCracken v. Carleton College* (employee with mental health concerns was regarded as disabled).²³⁵

Institutions are still generally prevailing when the merits of the cases are reached.²³⁶ Some examples include decisions where the faculty member did not meet established publication guidelines for tenure,²³⁷ termination of employment based on offensive blog entries and email correspondence with a supervisor,²³⁸ and termination for excessive absences.²³⁹

It is becoming more apparent that there is a need for a proactive approach to establishing essential functions and fundamental requirements at the outset²⁴⁰ and that documenting deficiencies should be done consistently and not just for older faculty members (where age discrimination might be an issue). Institutions should also be reminded of the requirement to keep employment records about a disability separate, to make individualized decisions, to engage in an interactive process,²⁴¹ and to ensure that any ad-

234. 911 F. Supp. 2d 1199 (W.D. Okla. 2012) (ordering a summary judgment against the professor).

235. 969 F. Supp. 2d 1118 (D. Minn. 2013) (recognizing prima facie case of disability discrimination by university buildings and grounds employee; burden of demonstrating his mental health and other conditions made him regarded as disabled).

236. *But see* Suzanne Abram, *The Americans with Disabilities Act in Higher Education: The Plight of Disabled Faculty*, 32 J. L. & EDUC. 1 (2003) (discussing cases involving faculty members who prevailed).

237. *Caruth v. Texas A&M Univ. – Commerce*, No.3:12-CV-351-B, 2013 WL 991336, at *1 (N.D. Tex. Mar. 14, 2013) (granting summary judgment to the University).

238. *Craig v. Columbia Coll. Chicago*, No. 09-CV-7758, 2012 WL 540095, at *1 (N.D. Ill. Feb. 16, 2012) (holding that a college instructor with a hearing impairment was not denied tenure track position based on a disability; nonrenewal was based on offensive blog entries and email correspondence to a supervisor).

239. *Horton v. Bd. of Trs. of Cmty. Coll. Dis.*, 107 F.3d 873 (7th Cir. 1997) (upholding termination of community college professor terminated because of excessive absences making him not otherwise qualified).

240. The failure to have information on position descriptions in a faculty file can compromise the ability to evaluate accommodation requests, FMLA leave requests, and ADA requests for accommodation.

241. *Compare* *Tse v. N.Y. Univ.*, No. 10 Civ. 7207DAB, 2013 WL 5288848, at *1 (S.D.N.Y. Sept. 19, 2013) (denying university's motion for summary judgment; holding that there were triable issues remaining about reasonable accommodation in a case involving a professor who lost status as a program director; employer was not required to provide preferred accommodation to faculty member with severe arthritis and Lupus, but questions remained about whether university engaged sufficiently in the interactive process), *and* *Dansby-Giles v. Jackson State Univ.*, No. 3:07-CV-452 HTW-LRA, 2010 WL 780531, at *1 (S.D. Miss. Feb. 28, 2012) (allowing case regarding professor claiming denial of coordinator position and issues of interactive process in accommodation process to go forward), *with* *Hoppe v. Lewis Univ.*, 692 F.3d 833 (7th Cir. 2012) (finding no ADA violation when interactive process had been provided to a faculty member with clinically-diagnosed adjustment disorder with request for accommodation for office location). *See also* Lawrence C. DiNardo, John A. Sherrill, & Anna R. Palmer, *Specialized ADR to Settle Faculty Employment Disputes*, 28 J.C. & U.L. 129

verse actions by the institution are not based on retaliation.²⁴²

It is likely that initial appointment letters in 2015 are much more specific than those from 1975, when a baby boomer professor might have received the first appointment.²⁴³ But many institutions have not implemented practices of refining those expectations for all faculty members after they achieve tenure. While many have implemented post-tenure review processes, it is unclear how carefully the issue of redefining “essential requirements” has been thought through and put into practice. Consistency in documenting misconduct and performance deficiency is critical. If only the unlikeable faculty member who is thought to be “crazy” or problematic or becoming senile is evaluated on a regular basis, this is problematic from the perspective of differential treatment.

Institutions should also take guidance from the case of *Wynne v. Tufts University School of Medicine*.²⁴⁴ While the case involves accommodation for a student, it provides guidance for faculty and other employment decisions. The court held that in cases involving modifications and accommodation, the burden is on the institution to demonstrate that relevant officials within the institution considered alternative means, their feasibility, cost and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower standards or require substantial program alteration.²⁴⁵

Institutions should take care with respect to their policies for terminating employment of faculty members. Until recently, the American Association of University Professors (AAUP) had a guidance policy that recommended separate policies for dismissal for faculty with disabilities. In recognition that this was not within ADA policy, a revised policy was issued in

(2001).

242. *Stevens v. Bd. of Trs., S. Ill. Univ.*, No. 11-CV-126-DRH, 212 WL 3929894, at *1 (S.D. Ill. Sept. 9, 2012) (allowing case to go forward regarding engagement in interactive process where university professor responsible for maintaining and repairing nuclear magnetic resonance instruments had back problems affecting performance and needed more graduate assistance and allowing consideration of ADA/Section 504 and FMLA retaliation claims). *See also Housel v. Rochester Inst. of Tech.*, 6 F. Supp. 3d 294 (W.D.N.Y. 2014) (granting summary judgment to university finding there was no evidence of link between request for accommodation and FMLA requests and termination and performance issues were already in question).

243. *See generally* Barbara A. Lee & Judith A. Malone, *As the Professoriate Ages, Will Colleges Face More Legal Landmines?*, CHRON. OF HIGHER EDUC. at B6-B8 (Nov. 30, 2007).

244. 976 F.2d 791 (1st Cir. 1992). *See discussion supra* Part III.D.2.a.

245. *See generally* BARBARA A. LEE & PETER H. RUGER, ACCOMMODATING FACULTY AND STAFF WITH PSYCHIATRIC DISABILITIES, (NACUA 1997). In addressing accommodations for faculty members, it is important to also consider institutional policies on medical leave and federal requirements under the Family and Medical Leave Act.

2012.²⁴⁶

XI. SUMMARY AND CONCLUSIONS

My 2010 article reflecting on fifty years of NACUA provides a framework for the summary and conclusions to a reflection on the impact of the twenty-five years of ADA in higher education. The following is from the section of that article entitled “The Crystal Ball – 2011 and Beyond?”²⁴⁷ Commentary and update looking at the past five years and forward to the future is noted in italics at the end of each comment.

Some of the current challenges for postsecondary institutions include the transition of students from K-12 (and the lack of preparation for the change), providing the range of services (many that are resource intensive or require specialized knowledge), and providing staffing for these needs (such as for coaching students with autism in social skills).

Transition is still a problem (students not realizing that special education is not the same as ADA accommodations).

Lack of awareness of some faculty members about the legal requirements relating to students with disabilities presents another problem.

Most faculty members are still not prepared for the expectations of online courses, interactive learning, the need to ensure that materials are accessible.

The growing number of veterans with disabilities will require attention, as will students with intellectual disabilities.

The influx of veterans has increased and while some institutions have been quite proactive in addressing disability concerns, some have not recognized the unique needs relating to documentation and proactive outreach.

There are already signals of the future legal issues. These include **distance learning** and **online coursework** and **web access** and other access to technology.

This is proving to be a major issue that should be proactively addressed and planned for. Institutions that do not do so are vulnerable to private litigation and Department of Justice enforcement. The use of such technology is the wave of the future and universities should consider this at the procurement stage and coursework selection stage.

246. Media Release, American Ass'n of Univ. Professors, Rights and Responsibilities of Faculty Members Who Have Disabilities (Feb. 7, 2012), available at <http://www.aaup.org/media-release/rights-and-responsibilities-faculty-members-who-have-disabilities>.

247. Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843, 871–74 (2010).

Health care reform is likely to affect access to mental health and other mental health services that may have particular impact for students with disabilities.

The number of high profile cases involving higher education situations and mental health demonstrate the need for attention to this issue. Many campuses have implemented proactive intervention programs, but the issue of what can be done when a student is only engaging in self-harm has yet to be resolved.

These may be of particular importance for returning veterans from Iraq and Afghanistan.

The movie "American Sniper" brought attention to this issue. Whether it will be adequately addressed remains to be seen.

Another health care related issue is the increasing concern about **contagious and infectious diseases** (such as H1N1) and how students with disabilities might raise unique concerns about how such situations are handled.

The public attention to the Ebola issue in late 2014 where a few institutions reacted out of fear, not fact, highlights the need to plan for such situations more proactively.

The economy and the high stakes of a professional education may drive more individuals to pursue legal remedies when they seek accommodations on **licensing exams** or raise issues about character and fitness questions asking about mental health or substance abuse.

This issue is currently receiving substantial attention, particularly in the context of use of technology for state bar exams and the mental health history question still being asked in the licensure process for membership in the legal profession. Interaction between the institutions and state licensure agencies would be beneficial to avoid protracted and expensive litigation.

It is likely that increasing attention to the issue of **service and emotional support animals** in various arenas, including higher education, will occur.

The primary area where there is a need for clarification at the federal agency level involves student housing.

It is likely that litigation will clarify the impact of the **ADA Amendments Act and the broader definition of disability** that it now includes.

Preliminary indicators are that the 2008 Amendments and the regulatory guidance have proven to make it much less likely that institutions will focus on whether the student or faculty member has a disability and will focus primarily on whether the individual is otherwise qualified and whether the requested accommodations are reasonable. The issue of cost may begin to

receive more attention because of shrinking resources.

This is probably an era where there will be little legislative activity (other than on health care), but substantial regulatory guidance, and continued litigation and OCR activity.

This remains true. Today's Congress does not seem likely to engage in any major overhaul of federal law in this area, although the special education statute may receive attention during its reauthorization. That could have some impact for higher education. The Department of Justice has been quite active in recent years in a number of matters related to higher education, and often settlements in these cases are being publicized, probably as a means of encouraging institutions to be proactive in compliance.

The 2010 article did not include any "Crystal Ball" predictions related to architectural barriers. The McNeese case (involving a student center with no accessible restroom) referenced previously²⁴⁸ should be noted, however, because of the high financial cost to the institution in defending the case (over a million dollars in attorney's fees and damages paid to the plaintiff and the litigation costs to the institution itself) and the good will costs. Institutions do not want the bad publicity associated with cases such as this, and should view such cases as cautionary tales and engage in regular self-assessments and other activities that demonstrate positive attitudes, not resistance.

What does the Crystal Ball tell us for 2020, the next five-year milestone? The issue of accessible technology is likely to continue to receive major attention. Depending on who is in the White House after the 2016 election, there may well be a continued attention in enforcement by federal agencies on disability issues in higher education. And it is likely that key advocacy organizations, such as the National Federation for the Blind and the National Federation for the Deaf, will also bring cases with the goal not only of changing things at a particular institution, but also to gain attention so that others will change. Many recent cases have received high profile settlements and have been quite costly in terms of money and good will to some colleges and universities.

For those representing these institutions, a proactive and positive approach and an ongoing review and consideration of all policies, practices, and procedures will be of great value. Including individuals with disabilities in these efforts will be of great value in ensuring compliance and avoiding litigation and compliance reviews. There is a lot of good technical assistance available. Those who take advantage of it are less likely to make the headlines.

248. See *supra* Part VII.

APPENDIX

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by Laura Rothstein**

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