"IS SOMEONE RIDING AROUND A GOLF COURSE FROM SHOT TO SHOT *REALLY* A GOLFER?" †
THE SUPREME COURT DETERMINES THE ESSENCE OF THE GAME OF GOLF—AND WHAT THE DECISION COULD MEAN FOR LEARNING DISABLED STUDENTS IN HIGHER EDUCATION

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I. INTRODUCTION

Casey Martin is a talented golfer who suffers from a debilitating degenerative circulatory disease known as Klippel-Trenaunay-Weber Syndrome.[1] This disease restricts the flow of blood from Martin's leg to his heart, causing great pain, fatigue, and anxiety.[2] To play golf during college, Martin requested and was granted waivers by the National College Athletic Association (NCAA) of its rules requiring golfers to walk the course and carry their own golf clubs.[3] When Martin turned professional, he sought to qualify for a Professional Golf Association (PGA) tournament, which requires successful completion of a three-stage qualifying event known as the "Q-School."[4] Martin entered the Q-School and successfully completed the first two stages, in which use of a golf cart is permitted.[5] During the third stage of the Q-School, however, the PGA rules do not permit use of a cart. Martin, therefore, requested a waiver of the "no cart" rule as

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† PGA Tour, Inc. v. Martin, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting).

1. *Id.* at 667–68.
2. *Id.* at 668.
3. *Id.*
4. *Id.* at 669.
5. *Id.*

an accommodation for his disease.[6] The PGA refused the waiver and Martin sued alleging, *inter alia*, discrimination in violation of Title III of the Americans With Disabilities Act (ADA).[7]

Even though disability claimants rarely win,[8] Martin won his lawsuit. Over the PGA's contentions to the contrary, the Supreme Court held that a waiver of the "no cart" rule would not fundamentally alter PGA tournaments.[9] Casey Martin's case does not involve an institution of higher learning, but it does involve a professional association's decision that one of its rules is essential and cannot be waived without fundamentally altering its tournaments. The Court's willingness to substitute its opinion for that of the institution may prove troublesome for colleges and universities in determining whether to accommodate learning disabled students on their campuses.

Accommodating learning disabled students in higher education provokes controversy nationwide. Proponents of federal disability laws consider accommodations for learning disabled students necessary to provide access to higher learning and eliminate stigma against disabled students, aiming to establish a level playing field in which no student has an unfair advantage.[10] Opponents contend that accommodations in the form of extra time on exams, distraction free environments for testing, and course waivers, unlike books in Braille, would aid all students and therefore, give disabled students an unfair competitive advantage and ultimately result in lowering the educational bar.[11] But as colleges and universities strive to accommodate disabled individuals on their campuses, very few cases ever reach the courts. And when they do, students—like most disability claimants—rarely win.

Statistics show that 92.11% of disability cases brought by employees are decided in favor of the defendant.[12] Similarly, a study by the editors of the

6. *Id.*

7. Martin v. PGA Tour, Inc., 994 F. Supp. 1242 (D. Or. 1998).

8. *See infra* Parts II–VII.

9. PGA Tour, Inc. v. Martin, 532 U.S. at 683.

10. *See, e.g.*, Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans With Disabilities Act*, 111 HARV. L. REV. 1560 (1998). *See also*, *Preface to* ACCOMMODATIONS IN HIGHER EDUCATION UNDER THE AMERICANS WITH DISABILITIES ACT (ADA): A NO-NONSENSE GUIDE FOR CLINICIANS, EDUCATORS, ADMINISTRATORS AND LAWYERS 1–18 (Michael Gordon & Shelby Keiser eds., 1998) [hereinafter ACCOMMODATIONS] (setting forth the arguments in favor of—and against—the ADA).

11. For a thorough treatment of this issue, see MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE, AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILTIIES (1997); Robert J. Sternberg & Elena L. Grigorenko, *Which Queue?*, 97 MICH. L REV. 1928 (1999) (reviewing MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE, AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILTIIES (1997)) (arguing that, in theory, protection for students with learning disabilities is justifiable, but that in practice, the law falls short of having the desired affect).

12. Susan M. Denbo, *Disability Lessons in Higher Education: Accommodating Learning Disabled Students and Student-Athletes Under the Rehabilitation Act and the Americans With Disabilities Act*, 41 AM. BUS. L.J. 145, 174 (2003) (citing the Commission on Mental & Physical Disability Law, American Bar Ass'n, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (1998)).

National Disability Law Reporter found that in 110 disability cases, the question was raised as to whether the plaintiff met the definition of "disabled."[13] Of those cases, only six found in favor of the plaintiff.[14] This means that in 94.5% of the disability cases examined, plaintiffs lost because they were unable to establish that they were disabled within the meaning of federal disability laws. A review of the cases involving disabled students claiming mental impairments such as dyslexia, dysgraphia, dyscalculia, ADD, and ADHD reveal that these plaintiffs also lose at an alarming rate.[15]

Nevertheless, the courts continue to narrow the definition of "disabled" under federal disability laws, making it even more difficult to establish the threshold requirement of being disabled.[16] If a disabled student gets over this hurdle, however, he or she is entitled to accommodations so long as they are necessary, reasonable, and do not fundamentally alter academic programs.[17] The courts have traditionally given great deference to decisions by institutions of higher education refusing accommodations on the premise that it fundamentally alters academic programs.[18] Deference at this point in the litigation will mean that even though the student is disabled, and even though the accommodations are assumed to be necessary for the disabled student's successful completion of the program in question, they will not be required by the court in which the lawsuit was brought. The *Martin* decision could have an impact on how courts decide this issue.

Following a review of recent decisions in federal disability law as it affects higher education, this article examines the *Martin* decision and the impact that it could have on higher education.

II. AN OVERVIEW OF THE ADA

In 1990, Congress passed the Americans With Disabilities Act extending disability protection to private employers and places of public accommodation, whether or not they receive federal financial assistance.[19] Prior to the enactment of the ADA, disabled individuals relied on the Rehabilitation Act of 1973, often cited as Section 504, which prohibits discrimination by programs that receive federal

13. Denbo, *supra* note 12, at 173–74 (citing Thomas D'Agistino, National Disability Law Reporter, Defining "Disability" under the ADA: 1997 Update ii (1997)).

14. Denbo, *supra* note 12, at 173–74.

15. For an interesting example, see Price v. Nat'l Bd. of Medical Exam'rs, 966 F. Supp. 419 (S.D. W. Va. 1997).

16. *See generally* Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184 (2002) (narrowing the definition of what constitutes a major life activity under the ADA by holding that only activities of central importance to daily life are major life activities and that the "class of activities" concept is reserved for work). For a thorough discussion of this case, see *infra* Part V.

17. *See* Se. Cmty. Coll. v. Davis, 442 U.S. 397 (1979).

18. *See, e.g.*, Alexander v. Choate, 469 U.S. 287, 300 (1985); McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 859 (5th Cir. 1993), *cert. denied*, 510 U.S. 1131 (1994); Maczaczyj v. N.Y., 956 F. Supp. 403, 409 (W.D.N.Y. 1997).

19. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2000)).

financial assistance.[20] Today, cases may be filed under one, or both of these statutes, and because of the symmetry of the two laws, courts will use cases decided under either interchangeably.[21] For this reason, when references are made to the ADA henceforth in this paper, the discussion may be taken to apply equally to Section 504 of the Rehabilitation Act of 1973, unless otherwise noted. Title II of the ADA applies to public entities. It provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[22]

A public entity is defined as "(A) any State or local government; [and/or] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government...."[23]

Similarly, Title III, which applies to places of public accommodation, provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[24]

Title III provides a list of private entities that are considered to be public accommodations under the ADA, such as inns, hotels, restaurants, theaters, convention centers, bakeries, shopping centers, banks, barbers, museums, etc.[25] Section 12181(7)(J), specifically includes: "a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education."[26]

Thus, institutions of higher education organized under the auspices of either state or local government are public entities as defined in Title II of the ADA, or places of public accommodation, specifically included in Title III.[27] As a result, they are prohibited from discriminating against students with disabilities, which includes failing to provide necessary and reasonable accommodations to disabled students.[28] Before a disabled student is entitled to accommodations, however, he

20. 29 U.S.C. § 794(a) (2000).

21. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1387 (S.D. Ga. 2002). It should be noted that plaintiffs may also raise disability discrimination claims under any and all state laws that apply.

22. 42 U.S.C. § 12132 (2000).

23. 42 U.S.C. § 12131(1)(A)–(B) (2000).

24. 42 U.S.C. § 12182(a) (2000).

25. 42 U.S.C. § 12181 (2000).

26. 42 U.S.C. § 12181(7)(J) (2000).

27. *See* Dubois v. Alderson-Broaddus Coll., Inc., 950 F. Supp 754, 757 (N.D. W. Va. 1997). Also, the *Martin* decision includes an enlightening discussion as to what the ADA means by "public accommodation." *See* PGA Tour, Inc. v. Martin, 532 U.S. at 674–81.

28. 42 U.S.C. § 12182(b)(2)(A)(ii) (2000). For the text of the statutory provision, see *infra* Part VII.

or she must meet the threshold requirement of being disabled within the meaning of the ADA. If a court finds that a student is not disabled under the ADA, the lawsuit will be dismissed and the court will never reach the substantive issues in the case.

III. WHAT IT MEANS TO BE DISABLED FOR PURPOSES OF THE ADA

With respect to an individual, the ADA defines disability as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.[29]

An individual claiming entitlement to accommodations due to disability might theoretically meet the requirements of any one of these three criteria. Claiming under (A), a student would allege that he/she "has" a disability. The *Martin* decision is an example of this type of claim. Casey Martin actually has a degenerative circulatory disease known as Klippel-Trenaunay-Weber Syndrome, which qualifies as a physical impairment.[30] Under (B), a student would allege that someone "says" he/she has a disability. In one very famous case, the claimant suffered from tuberculosis for which she was hospitalized.[31] The Supreme Court held that her hospitalization established that she had a "record of... impairment" within the meaning of the law.[32] Finally, under (C), a student may claim that someone "thinks" he/she has a disability. Examples could include students affected with the HIV virus that are asymptomatic. In *Cook v. Rhode Island Department of Mental Health, Retardation and Hospitals*, a morbidly obese woman who was rejected for employment as an institutional assistant because of her obesity alleged discrimination on the basis of a perceived disability.[33] The institution had not tested Cook to determine if she could perform the job requirements.[34] The court held for Cook, stating: "Section 504's perceived disability model can be satisfied whether or not a person actually has a physical or mental impairment."[35] Thus, students can be perceived as disabled, even when they are, in fact, not disabled.

Generally, however, students seek to establish that they have a physical or mental impairment that substantially limits a major life activity. This definition involves the analysis of three basic issues: (1) whether the individual has a physical or mental impairment; (2) whether the impairment limits a major life

29. 42 U.S.C. § 12102(2) (2000).

30. Martin v. PGA Tour, Inc., 994 F. Supp. at 1244.

31. Sch. Bd. of Nassau County, Fl. v. Arline, 480 U.S. 273 (1987).

32. *Id.* at 286.

33. Cook v. R.I. Dept. of Mental Health, Retardation & Hosp., 10 F.3d 17, 20–21 (1st Cir. 1993).

34. *Id.* at 27.

35. *Id.* at 22.

activity; and (3) whether the limitation is substantial. In the following pages of this article, cases and factual scenarios are included to give the reader a thorough, practical understanding of these issues.

IV. WHEN DOES AN INDIVIDUAL HAVE A PHYSICAL OR MENTAL IMPAIRMENT?

The ADA does not define "physical or mental impairment," "major life activity," or "substantially limits." As a result, courts turn to regulations promulgated by the agencies that have been granted authority to interpret the ADA and to relevant case law when they adjudicate ADA claims.[36] Regulations promulgated by the Equal Employment Opportunity Commission (EEOC) define the phrase physical or mental impairment as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
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> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[37]

Examples of mental illnesses include bipolar disorder, major depression, anxiety disorders such as panic disorder, obsessive-compulsive disorder, and post-traumatic stress disorder, schizophrenia, and personality disorders.[38] Mental impairment under the ADA does not encompass common personality traits such as, irritability, poor judgment, or irresponsible behavior.[39]

Pazer v. New York State Board of Law Examiners is instructive as to what is considered an "impairment" under the ADA.[40] Pazer claimed to have a learning disability from impaired visual processing.[41] As a reasonable accommodation, he requested to take the New York Bar Examination over a period of four days instead of two, using a computer with word processing, spell-check, and

36. Authority to promulgate regulations under the ADA was divided among three agencies: The Equal Employment Opportunity Commission (EEOC) has authority to regulate under Title I, 42 U.S.C. § 12116; the Attorney General regulates under Title II, 42 U.S.C. § 12134; and the Secretary of Transportation regulates transportation provisions under Title III, 42 U.S.C. § 12186(a)(1). The U.S. Attorney General regulates the remaining provisions, 42 U.S.C. § 12186(b). Some years ago, the Supreme Court noted that no agency has been given authority to regulate under the generally applicable provisions of the ADA, which include the definition of "disability." Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999). In *Sutton*, the Court quoted extensively from the regulations, but declined to decide what deference courts should give to agency regulations interpreting these provisions. The lower courts have been divided as to the binding nature of agency regulations.

37. 29 C.F.R. § 1630.2(h) (2005).

38. SECTION 504 COMPLIANCE HANDBOOK, LAWS, REGULATIONS & ORDERS, App. III, 621 (1997). The list is not meant to be exhaustive, only exemplary.

39. *See* Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989).

40. 849 F. Supp. 284 (S.D.N.Y. 1994).

41. *Id.* at 285.

abbreviation expanding software, with permission to record his answers in the test booklet, and in a distraction-free environment.[42] These accommodations were denied and Pazer sued.[43] In concluding that Pazer did not have an impairment for purposes of the ADA, the court stated: "The [c]ourt... finds some merit to the argument that a disparity between inherent capacity and performance on a test may, in some circumstances, permit the inference that an individual has a learning disability, even though that individual's performance has met the standard of the ordinary person."[44]

However, in Pazer's case, the court was convinced that he did not have an eye-motor coordination problem, because he had scored well within the adult average range on the Woodcock-Johnson-Spatial Relations and other achievement tests—if he had a problem, the court believed that it would have been revealed in these tests.[45] Moreover, Pazer had not received accommodations in high school or during his first two years in college.[46] The court was persuaded by expert testimony in the case that the disparity between Pazer's test performance and inherent capacity could have been the result of stress or nervousness, and was therefore, not due to a learning disability. Thus, the court held that Pazer did not have a disability within the meaning of the ADA, noting: "Indeed, to hold otherwise would compel the conclusion that any underachiever would by definition be learning disabled as a matter of law...."[47]

There are also issues concerning who is the appropriate professional to document impairment.[48] Establishing that one actually has an impairment is generally the easy part for most disability claimants. Having an impairment, however, is not sufficient. Under the ADA, the impairment must affect a major life activity.

V. WHAT IS A "MAJOR LIFE ACTIVITY" UNDER THE ADA?

Major life activities are defined in the regulations as "those basic activities that the average person in the general population can perform with little or no difficulty."[49] Major life activities include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[50] This relatively short list has been expanded by the courts to include

42. *Id.* at 285–86.
43. *Id.* at 285.
44. *Id.* at 287.
45. *Id.*
46. *Id.*
47. *Id.*
48. For a thorough analysis of mental impairments, including a discussion of what documentation is needed to establish that an individual suffers from a mental impairment, see generally James G. Frierson, *Legal Requirements for Clinical Evaluations*, in ACCOMMODATIONS, *supra* note 10, at 47.
49. 29 C.F.R. pt. 1630, App. § 1630.2(I) (2005).
50. 28 C.F.R. § 35.104(l)(iii)(2) (2005).

sleeping, engaging in sexual relations and interacting with others[51]; reproduction[52]; eating, drinking and learning[53]; thinking[54]; and reading.[55]

Recently, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Supreme Court made its first pronouncement on what constitutes a "major life activity" under the federal disability laws.[56] There, the plaintiff, Williams, claimed to be disabled because of carpal tunnel syndrome.[57] She claimed that the major life activities affected by her impairment were: manual tasks, housework, gardening, playing with her children, lifting, and working.[58] The trial court held that she was impaired, and that manual tasks, lifting, and working are major life activities within the meaning of the ADA, but that her impairment was not substantially limiting because she could perform her job tasks in assembly and paint inspection at the plant.[59] On appeal, the court held that the plaintiff proved that she was disabled by establishing that her manual disability involved a "class" of manual tasks affecting her ability to work.[60] The Supreme Court reversed. In its first opinion to address the meaning of major life activity under the federal disability laws, the Court rejected the notion that a "class" of manual tasks affecting the plaintiff's ability to work could establish a major life activity.[61] The "class" analysis is reserved for cases in which the major life activity affected is working, the Court said.[62] Citing Webster's Dictionary, the Court stated that "major" means important, and thus the phrase "major life activities" refers to "those activities that are of central importance to daily life."[63]

Toyota Manufacturing narrows the meaning of major life activity, and will provide an obstacle for disability claimants seeking to widen the range of activities that implicate the ADA. Though courts may still add to the list of activities under

51. McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999). *But see* Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997) (rejecting plaintiff's claim that his mental illness substantially limited his ability to get along with others, and stating that while the ability to get along with others is a "skill to be prized," it is "different in kind from breathing or walking" and thus not a major life activity under the ADA).

52. Bragdon v. Abbott, 524 U.S. 624 (1998).

53. Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999), *reh'g denied*, No. 98-2894 EMSL, 1999 U.S. App. LEXIS 22998 (8th Cir. Sept. 21, 1999).

54. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 307 (3d Cir. 1999).

55. Bartlett v. N.Y. State Bd. of Law Exam'rs, No. 93 Civ. 4986 (SS), 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. Aug. 15, 2001).

56. *Toyota*, 534 U.S. 184.

57. *Id.* at 187.

58. *Id.* at 190.

59. *Id.* at 191. The trial court rejected the plaintiff's claims that housework, gardening, and playing with her children are major life activities cognizable under the ADA.

60. *Id.* at 192.

61. *Id.* at 200.

62. *Id.* (quoting EEOC regulations, 29 CFR § 1630.2(j)(3) (2001): "With respect to the major life activity of *working* [,] [t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.").

63. *Id.* at 197.

the federal disability laws, they must be vigilant to include only activities that are of central importance to daily life. Perhaps more significantly, any extension of the "class" analysis is henceforth effectively proscribed.

VI. WHEN IS A MAJOR LIFE ACTIVITY SUBSTANTIALLY LIMITED BY AN INDIVIDUAL'S IMPAIRMENT?

The EEOC regulations define "substantially limits" as:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
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> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.[64]

The regulations thus contemplate comparing the residual abilities of an impaired person to the abilities of an average person in the general population. The EEOC gives the following example in its interpretive guidance to the regulations:

> [A]n individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at a moderately below average speed.[65]

Factors that should be considered in determining whether an impairment is substantially limiting include:

> i. The nature and severity of the impairment;
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> ii. The duration or expected duration of the impairment; and
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> iii. The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.[66]

In *Price v. National Board of Medical Examiners*, the court employed the EEOC's "average person in the general population" formula and concluded that three medical students were not disabled for purposes of the ADA.[67] All three students had been diagnosed with ADHD, and two of the students had been further diagnosed with learning disorders.[68] They requested, but were denied, accommodations in the form of additional time and separate rooms for the United States Medical Licensing Examination (USMLE).[69] The court noted that the

64. 29 C.F.R. § 1630.2(j)(1) (2005).
65. 29 C.F.R. pt. 1630, App. § 1630.2(j) (2005).
66. 29 C.F.R. § 1630.2(j)(2) (2005).
67. *Price*, 966 F. Supp. at 422.
68. *Id.*
69. *Id.*

students were clearly impaired, but held that they were not substantially limited in the major life activity of learning, because they were able to learn as well as, or better than, the average person in the general population.[70] The court utilized an example involving two hypothetical students:

> Student A has average intellectual capability and an impairment (dyslexia) that limits his ability to learn so that he can only learn as well as ten percent of the population. His ability to learn is substantially impaired because it is limited in comparison to most people. Therefore, Student A has a disability for purposes of the ADA. By contrast, Student B has superior intellectual capability, but her impairment (dyslexia) limits her ability so that she can learn as well as the average person. Her dyslexia qualifies as an impairment. However, Student B's impairment does not substantially limit the major life function of learning, because it does not restrict her ability to learn as compared with most people. Therefore, Student B is not a person with a disability for purposes of the ADA.[71]

The court found that the plaintiffs in this case best compared to Student B.[72] Plaintiff Price had graduated from high school with a 3.4 grade point average, and from Furman University with a 2.9 grade point average—all without accommodations.[73] He did receive accommodations on the MCAT, and was admitted to medical school.[74] Morris was a national honor student in high school, graduated from Virginia Military Institute with average grades, maintained a 3.4 grade point average at Sheperd College, and was admitted to medical school—all without accommodations.[75] Plaintiff Singleton was designated gifted from second grade through high school, graduated high school with a 4.2 grade point average, was admitted into the United States Naval Academy, graduated from Vanderbilt University, and was admitted to medical school—all without accommodations.[76] This history reflected superior scholastic achievement with no evidence of substantial limitation on learning ability. Thus, the court held that while these students were impaired, they were not substantially limited in the major life activity of learning when compared to the average person in the general population.[77]

70. *Id.* at 427–28.

71. *Id.* at 427.

72. *Id.*

73. *Id.* at 423.

74. *Id.*

75. *Id.* at 424.

76. *Id.* at 423.

77. *Id.* at 427–28. *See also* Gonzalez v. Nat'l Bd. of Medical Exam'rs, 60 F. Supp. 2d 703 (E.D. Mich. 1999) (quoting S. REP. NO. 101-116 (1989)). Plaintiff's doctor, a psychologist in the Neuropsychology Division of the University of Michigan Hospitals, testified that he "compared plaintiff's performance to fourth year college students and found that some of his scores were below average to impaired." *Id.* at 707. Noting that the ADA does not define "substantially limits," the court turned to legislative history. *Id.* at 707–08. According to the report of the Senate Committee which developed the ADA structure, an impairment must restrict a person's

In *Sutton v. United Air Lines, Inc*., the Supreme Court added to the difficulties faced by disability claimants trying to establish that they are substantially limited in a major life activity under the ADA.[78] Sutton involved twin sisters with severe myopia, an abnormal eye condition commonly known as near-sightedness.[79] They applied for jobs as commercial pilots but were rejected because of an airline rule requiring uncorrected vision of at least 20/100.[80] The twins had 20/20 vision with corrective lenses, but uncorrected, their vision was only 20/200.[81] The twins sought a waiver of the airline rule requiring uncorrected vision of 20/100.[82] The Supreme Court found that myopia qualified as impairment under the ADA, and that the impairment affected the major life activity of seeing.[83] The Court determined, however, that because corrective lenses mitigated the effects of the functional impairment, the twins were not substantially limited by their myopia.[84] Consequently, the twins did not meet the threshold requirement of being disabled under the ADA, and were not entitled to accommodations.[85]

The *Sutton* Court found that Congress intended that disability be determined using a functional approach, with the term "substantially limits" to mean currently limiting, not potentially, or hypothetically, limiting.[86] As a result, impairments that can be controlled or corrected by mitigating measures such as eyeglasses or medications may not substantially limit a major life activity.

Two fairly recent cases involving a mental impairment deserve mention here. In the first of these cases, Swanson, a young man suffering from major depression, brought suit after his surgical residency at the University of Cincinnati was terminated.[87] Shortly before being terminated, he sought professional help and was placed on Paxil and later Prozac, both of which are anti-depressants.[88] The trial court held that major depression is an impairment, and that the ability to concentrate and sleep are major life activities.[89] Nevertheless, the court reasoned that since Swanson was taking anti-depressant medications to control his depression, and it was undisputed that the medications had improved his sleep and ability to concentrate, his limitation was only temporary at best, and therefore, not

major life activity as to the "conditions, manner, or duration under which [the activity] can be performed in comparison to *most people*." *Id.* at 707. The court concluded that it was error to compare plaintiff's performance to other college students and found that, when compared with "most people," the plaintiff was not disabled because he was superior to the average person in the general population. *Id.* 708–09.

78. *Sutton*, 527 U.S. 471.
79. *Id.* at 475.
80. *Id.* at 476.
81. *Id.* at 475.
82. *Id.* at 476.
83. *Id.* at 490.
84. *Id.* at 488.
85. *Id.* at 491.
86. *Id.*
87. Swanson v. Univ. of Cincinnati, 268 F.3d 307 (6th Cir. 2001).
88. *Id.* at 311.
89. *Id.* at 314.

substantial.[90] As evidence of improvement, the district court noted that since Swanson was terminated, he had begun a new preliminary residency at the University of Nevada (UN) and was given a "solid performance" rating.[91]

On appeal, Swanson argued that the district court erred in considering his performance at UN as evidence of improvement.[92] According to Swanson, the court was required to determine whether he was substantially limited at the time of his termination and that, at that time, his medication had not had time to reach its optimal effect.[93] Quoting the factors for determining whether an impairment is substantially limiting as set forth in the regulations,[94] the court of appeals held that the district court was correct in looking forward in time to his later performance at UN, because it showed that his impairment was short term in duration and mitigated by medication.[95] The court affirmed the district court's conclusion that Swanson was no more limited by his depression than the average person, and was therefore not substantially limited.[96] Quoting from *Sutton*, the appeals court stated: "The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting."[97]

In the second case, the Tenth Circuit considered a claim by a medical student that he was disabled because of an anxiety disorder that manifested itself when he took chemistry and mathematics tests.[98] Although the anxiety disorder qualified as an impairment under the ADA, the court determined that its manifestation in only two subjects did not amount to a limitation on a major life activity.[99] The court stated, however, that even if the plaintiff's impairment limited a major life activity, that limitation would not be substantial.[100] The plaintiff had developed study habits that allowed him to overcome his difficulties, thus mitigating the effects of his anxiety disorder.[101] Holding that the plaintiff was not disabled, the court stated, *in dicta*: "Just as eyeglasses correct impaired vision, so that it does not constitute a disability under the ADA, an adjusted study regimen can mitigate the

90. *Id.* at 315.
91. *Id.* at 312, 315.
92. *Id.* at 316.
93. *Id.*
94. *See* 29 C.F.R. § 1630.2(j)(2) (2005); *supra* p. 109.
95. *Swanson*, 268 F.3d at 317.
96. *Id.* at 316.
97. *Id.* (quoting *Sutton*, 527 U.S. at 488).
98. McGuinness v. Univ. of N.M., 170 F.3d 974, 976 (10th Cir. 1998), *cert. denied*, 526 U.S. 1051 (1999).
99. *Id.* at 978 (quoting 29 C.F.R. § 1630.2(j)(3)(1)). The court reasoned that limitations with respect to academic subjects is similar to limitations in working; to be disabled from working, an individual must be unable to perform "a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." Following the decision in *Toyota*, the court's reasoning may be flawed.
100. *Swanson*, 268 F.3d at 978.
101. *Id.*

effects of test anxiety."[102]

In demonstrating the difficulties facing a disability claimant, the cases and regulations provide insight into the reasons for the poor statistical outlook facing disability claimants. Keeping in mind that the purpose for establishing a disability under the ADA is to be entitled to accommodations, failing in this threshold determination spells dismissal, and hence, no entitlement to accommodations. The next part of this article focuses on accommodations for the rare claimant that overcomes the federal disability hurdle.

VII. ADA ACCOMMODATIONS FOR DISABLED STUDENTS MUST BE NECESSARY, REASONABLE, AND THEY MAY NOT FUNDAMENTALLY ALTER ACADEMIC PROGRAMS

Under the ADA, students with disabilities, as that term has been defined by the regulations and the courts, may be entitled to an accommodation of their academic program. According to Title III of the ADA, discrimination includes:

> [A] failure to make *reasonable* modifications in policies, practices, or procedures, when such modifications are *necessary* to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations (emphasis added).[103]

Thus, under the ADA, required accommodations for disabled students must be reasonable, necessary and they must not fundamentally alter the nature of the academic program.[104]

In higher education, accommodations may include double time on exams, course waivers, distraction-free environments for taking exams, additional time for completing written assignments, impunity from spelling errors, alternative exam formats, note takers, and readers. Extra time on exams and distraction free rooms for test taking are generally considered reasonable.[105] Whether an accommodation is necessary turns on its effectiveness at ameliorating the effects of a student's functional limitations. The more tightly an accommodation is tailored to a student's functional limitations, the more likely it will be found to be necessary.[106]

Greater difficulty for disability claimants in the context of higher education come from the ADA requirements that accommodations be reasonable and that

102. *Id.* at 979.

103. 42 U.S.C. § 12182(b)(2)(A)(ii) (2000).

104. *See* Se. Cmty. Coll. v. Davis, 442 U.S. 397.

105. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 436 (6th Cir. 1998); Axelrod v. Phillips Acad., Andover, 36 F. Supp. 2d 46, 52 (D. Mass. 1999). Unlimited time, however, has been held to be an unreasonable accommodation for the reason that it is not in accord with real life situations. *See* Panazides v. Va. Bd. of Educ., 804 F. Supp. 794, 803 (E.D. Va. 1992), *rev'd on other grounds*, 13 F.3d 823 (4th Cir. 1994).

106. Michael Gordon & Kevin Murphy, *Attention Deficit Hyperactivity Disorder*, in ACCOMMODATIONS, *supra* note 10, at 70.

they not fundamentally alter the nature of academic programs. It has long been accepted wisdom that a "university need not modify its programs in a manner that fundamentally alters their nature or constitutes an undue burden on it."[107] The seminal case is *Southeastern Community College v. Davis.*[108]

In *Davis*, Frances Davis, a licensed practical nurse with a serious hearing disability, sought to be trained as a registered nurse.[109] She was denied admission to Southeastern Community College's nursing program after it was determined that she could not safely participate in the school's normal clinical training program because of her disability, and that it would ultimately be unsafe for her to practice nursing.[110] After she was notified that she was not qualified for nursing school, she sued Southeastern under Section 504 of the Rehabilitation Act of 1973,[111] alleging discrimination for failure to accommodate her functional limitations.[112] Requested accommodations included (1) close, individual supervision by faculty members when Davis would be directly attending patients; (2) waiver of specified required courses; and (3) limited training in some, but not all, duties of a registered nurse.[113] Davis claimed that it would be sufficient if she were trained to perform "some of the duties of a registered nurse or to hold some of the positions available to a registered nurse."[114]

The district court rejected Davis's claim.[115] The court held that because of her disability, she was not "otherwise qualified" for the nursing program.[116] On appeal, the Fourth Circuit reversed.[117] The appeals court held that an individual's impairment should not be taken into account for the purpose of determining whether the individual is "otherwise qualified" for the program.[118] The Supreme Court rejected the Fourth Circuit's reasoning, holding that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[119]

The Supreme Court then turned to consider whether the qualifications required by Southeastern for participation in its nursing program might not be necessary. If the requirements were found to be unnecessary, then Southeastern might be discriminating against a qualified, handicapped individual. Citing the relevant regulations,[120] the Court found that the accommodations that Davis requested

107. Stern v. Univ. of Osteopathic Med. and Health Sci., 220 F.3d 906 (8th Cir. 2000).

108. 442 U.S. 397.

109. *Id.* at 400.

110. *Id.* at 401.

111. 29 U.S.C. § 794 (2000).

112. Se. Cmty. Coll. v. Davis, 442 U.S. at 402.

113. *Id.* at 407–08.

114. *Id.* There was evidence in the case that a number of positions would be available that Davis could satisfactorily perform even with her limited hearing, such as physician's office work.

115. Davis v. Se. Cmty. Coll., 424 F. Supp. 1341 (E.D.N.C. 1976).

116. *Id.* at 1345.

117. Davis v. Se. Cmty. Coll., 574 F.2d 1158 (4th Cir. 1978).

118. *Id.* at 1161.

119. Se. Cmty. Coll. v. Davis, 442 U.S. at 406.

120. Under a § 504 claim, the following Health, Education & Welfare regulations would be

would fundamentally alter the nursing program. First, the sort of close, personal supervision of Davis that would be necessary to ensure patient safety was expressly rejected as a required accommodation by the regulations.[121] Second, by waiving the clinical courses and allowing Davis to take only academic courses, she would not receive the normal training that Southeastern's program was designed to deliver.[122] Finally, if Southeastern were required to train Davis in only some of the duties of a registered nurse, it would be required to abandon its academic purpose in nursing, which according to the uncontroverted testimony of Southeastern's staff and faculty "was to train persons who could serve the nursing profession in all customary ways."[123] The Court held: "Such a fundamental alteration in the nature of a program is far more than the 'modification' the regulation requires."[124]

In conclusion, the Court stated:

> One may admire respondent's desire and determination to overcome her handicap, and there well may be various other types of service for which she can qualify. In this case, however, we hold that there was no

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relevant:

> (a) *Academic requirements*. A recipient [of federal funds] to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.
>
> . . .
>
> (d) *Auxiliary aids*. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.
>
> (2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

45 CFR § 84.44 (2005). It is important to note that the Rehabilitation Act of 1973, unlike Title III of the ADA, did not expressly set forth the fundamental alteration test. That test was formulated by the Supreme Court and later adopted in the language of Title III. Nevertheless, after Davis, whether a claim against an educational institution is brought under the ADA or the Rehabilitation Act of 1973, the fundamental alteration test applies.

121. Se. Cmty. Coll. v. Davis, 442 U.S. at 409.

122. *Id.* at 409–10.

123. *Id.* at 413.

124. *Id.* at 410.

> violation of § 504 when Southeastern concluded that respondent did not qualify for admission to its program. Nothing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in Southeastern's program would render unreasonable the qualifications it imposed.[125]

Following *Davis*, the courts have indicated a willingness to defer to an educational institution's decision that reasonable accommodation is not available so long as the decision is based on reasoned, professional, academic judgment.[126] In *McGregor v. Louisiana State University Board of Supervisors*, the Law Center's refusal to allow a student to attend part-time and take exams at home was upheld by the court.[127] The Law Center had a policy requiring that all students carry a full-time course load.[128] The court made reference to an affidavit introduced by the Law Center establishing that the accommodations sought by McGregor had never been given to any student, and concluded that to require the Law Center to permit McGregor to attend part-time would force it to lower its academic standards or compromise a reasonable academic policy.[129] Noting that it "must accord reasonable deference to the Law Center's academic decisions," the court held that the requested accommodations would fundamentally alter the program.[130]

In *Jacobsen v. Tillman*, the court found the plaintiff's request to be relieved of the requirement of passing the math portion of a teacher certification program to be an unreasonable accommodation for her dyscalculia.[131] According to the Minnesota Board of Teaching, the purpose for requiring teachers to pass the math test was to ensure that teachers have adequate skills.[132] The court found the requirement to be an essential aspect of the teacher certification program and concluded that waiving the test would fundamentally alter the nature of the certification program.[133]

Deference was again given to a college's decision to refuse a plaintiff's request to attend a required residency program via telephone because of his severe panic

125. *Id.* at 414. *Accord Alexander*, 469 U.S. at 300–01.

126. Guckenberger v. Boston Univ. (*Guckenberger II*), 974 F. Supp. 106 (D. Mass. 1997). *See also* Wynne v. Tufts Univ. Sch. of Med. (*Wynne I*), 932 F.2d 19, 26 (1st Cir. 1991), *cert. denied*, 507 U.S. 1030 (1993); Wynne v. Tufts Univ. Sch. of Med. (*Wynne II*), 976 F.2d 791, 795 (1st Cir. 1992).

127. *McGregor*, 3 F.3d at 858.

128. *Id.*

129. *Id.* at 860.

130. *Id.* at 859.

131. Jacobsen v. Tillmann, 17 F. Supp. 2d 1018 (D. Minn. 1998).

132. *Id.* at 1021.

133. *Id.* at 1026. For another case involving a teacher seeking professional licensing, see *Panazides*, 804 F. Supp. at 803 (finding that even if plaintiff was disabled for purposes of the Rehabilitation Act of 1973, she had received reasonable accommodations, and her further request for unlimited time was not reasonable and would have amounted to a fundamental change to the test design).

disorder.[134] In *Maczaczyj v. New York*, the court held that although the institution offered a distance-learning program through which the plaintiff had earned his bachelor's degree, the master's program was not designed for distance delivery.[135] The school argued that personal attendance in the residency program was fundamental to the program and that students were expected to engage in intensive academic seminars, group discussions, presentations, and public critiques of each other's contributions.[136] The court stated:

> The affidavits submitted by defendants demonstrate that administrators at Empire State College designed the residency program to achieve definite pedagogical objectives. The court does not wish to substitute its judgment for that of experienced education administrators and professionals in assessing whether the program does in fact meet its pedagogical objectives.[137]

Finally, in *Zukle v. Regents of the University of California*, Sherrie Zukle was diagnosed learning disabled in reading.[138] The University's Learning Disability Resource Center recommended various accommodations, all of which were granted.[139] Yet despite accommodations, Zukle was unable to pass her medical school courses and was finally dismissed.[140] Before her dismissal, Zukle requested that her clerkship schedule be rearranged.[141] This request was denied, and Zukle sued, claiming that the failure to grant the requested accommodations violated the ADA.[142] The district court concluded that since she was unable to meet academic standards, she was not otherwise qualified for medical school.[143] As a result, her ADA claim was rejected. On appeal, Zukle argued that the accommodations she received were not reasonable.[144] Reasonable accommodations in her case would have included: interrupting the sequence of required clerkships, leaving the hospital early during the in-hospital portion of clerkships to prepare for her written exams, and obtaining a decelerated schedule during the clerkship portion of her medical studies.[145] The University argued that these accommodations would substantially modify the program and lower academic standards.[146] The appellate court agreed and affirmed the lower court's determination that Zukle was not qualified for medical school.[147]

134. *Maczaczyj*, 956 F. Supp. 403.
135. *Id.* at 406.
136. *Id.*
137. *Id.* at 409.
138. 166 F.3d 1041, 1043 (9th Cir. 1999).
139. *Id.*
140. *Id.* at 1044.
141. *Id.* at 1045.
142. *Id.*
143. *Id.*
144. *Id.* at 1046.
145. *Id.* at 1049–51.
146. *Id.*
147. *Id.* at 1051. *See also Panazides*, 804 F. Supp. at 803 (holding that Panazides was not otherwise qualified because she could not perform the "essential functions" of a public school

The foregoing cases illustrate that an institution's determination that it cannot waive a policy or grant an accommodation because to do so would fundamentally alter its academic program has been given deference by the courts. However, in two noteworthy cases, courts refused to grant blind deference to the assertion that requested accommodations would fundamentally alter academic programs. Instead, the courts ordered the institutions to deliberate and actually reach a rationally based decision about whether the compromised aspects of their programs were essential such that the requested accommodations would constitute a fundamental alteration.

The first of these cases is *Wynne v. Tufts University School of Medicine*.[148] On appeal, the court found the record insufficient to demonstrate that the university had rationally assessed its program to determine whether the requested accommodation of allowing oral testing for a medical student with cognitive deficits would fundamentally alter the program.[149] Tufts had filed only a single affidavit signed by the dean, with "no mention of any consideration of possible alternatives, nor reference to any discussion of the unique qualities of multiple choice examinations. There is no indication of who took part in the decision or when it was made."[150] Summary judgment for Tufts University was vacated and the case was remanded.[151]

On the second appeal following remand, the court held that the university had carried its burden to undertake a rational assessment and had reached a conclusion that to allow oral testing would fundamentally alter its program.[152] The court stated:

> Following remand, Tufts satisfactorily filled the gaps that wrecked its initial effort at summary judgment. The expanded record contains undisputed facts demonstrating, in considerable detail, that Tufts'[s] hierarchy "considered alternative means" and "came to a rationally justifiable conclusion" regarding the adverse effects of such putative accommodations. Tufts not only documented the importance of biochemistry in a medical school curriculum, but explained why, in the departmental chair's words, "the multiple choice format provides the fairest way to test the students' mastery of the subject matter of biochemistry." Tufts likewise explained what thought it had given to different methods of testing proficiency in biochemistry and why it eschewed alternatives to multiple-choice testing, particularly with respect to make-up examinations. In so doing, Tufts elaborated upon the unique qualities of multiple-choice examinations as they apply to biochemistry and offered an exposition of the historical record to show

teacher; Panazides had taken the teacher's examination multiple times, both with and without accommodations, yet could not pass).

148. *Wynne II*, 976 F.2d at 795.

149. *Wynne I*, 932 F.2d 19.

150. *Id.* at 28.

151. *Id.*

152. *Wynne II*, 976 F.2d at 795.

> the background against which such tests were administered to Wynne. In short, Tufts demythologized the institutional thought processes leading to its determination that it could not deviate from its wonted format to accommodate Wynne's professed disability. It concluded that to do so would require substantial program alterations, result in lowering academic standards, and devalue Tufts'[s] end product—highly trained physicians carrying the prized credential of a Tufts degree.[153]

The court deferred to Tufts's decision that to deviate from its multiple-choice testing policy "would require substantial program alterations, result in lowering academic standards, and devalue Tufts'[s] end product—highly trained physicians carrying the prized credential of a Tufts degree."[154]

The second case is *Guckenberger v. Boston University*.[155] In this much celebrated case, a group of learning disabled students brought a class action suit against Boston University (BU), claiming that BU's treatment of mentally disabled students violated the ADA, Rehabilitation Act, and state law.[156] The students claimed that BU's policy violated the law in three respects: (1) It was overly burdensome in requiring students to be re-tested every three years and prohibiting evaluations by professionals other than physicians, clinical psychologists, or licensed psychologists; (2) it failed to provide reasonable procedures for reviewing a student's request for accommodations; and (3) it wrongly instituted an across the board policy precluding course substitutions in foreign language and mathematics.[157] Over the course of a long, expensive battle, BU changed its policy on re-testing, allowing a waiver of the requirement where it was medically unnecessary, and restructured its policy on the qualifications of evaluators and review procedures.[158] Despite these changes, the court held that BU had failed to establish that evaluators with master's degrees and appropriate training and experience could not assess a learning disability as well as an evaluator with a doctorate.[159] The court further held that the ban on course substitutions had been instituted without appropriate consideration.[160] BU was ordered to undertake a diligent assessment of course substitutions as an available accommodation to disabled students.[161] The court endorsed the following test taken verbatim from the decision in *Wynne I*:

> If the institution submits undisputed facts demonstrating that the

153. *Id.* at 794–95 (citations omitted).

154. *Id.* at 795.

155. *Guckenberger I*, 957 F. Supp. 306 (D. Mass. 1997); *Guckenberger II*, 974 F. Supp. 106; 8 F. Supp. 2d 82 (D. Mass. 1998) (order); 8 F. Supp. 2d 91 (D. Mass. 1998) (memorandum and order on assessment of attorneys' fees and costs).

156. *Guckenberger I*, 957 F. Supp. at 310–11.

157. *Id.* at 311.

158. *Guckenberger II*, 974 F. Supp. at 115.

159. *Id.* at 140.

160. *Id.* at 149.

161. *Id.* at 154–55.

> relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.[162]

After BU returned to court with a decision based on reasoned judgment, its decision that course waivers would fundamentally alter its liberal arts program was upheld.[163]

The "fundamental alteration" test thus evolved through cases involving educational institutions. Until Casey Martin, it appeared that so long as an institution of higher learning actually engaged in deliberations about its program requirements, the courts would give great deference, refusing to substitute their decisions for that of the institution. It was against this jurisprudential background that Casey Martin took his disability-based discrimination claim to the courts.

VIII. CASEY MARTIN'S CASE

To rebut Casey Martin's charge of disability-based discrimination in violation of the ADA, the PGA argued that the walking rule serves the fundamental purpose of injecting fatigue and anxiety into the tournament at this high qualifying level.[164] At trial, golf greats including Arnold Palmer, Jack Nicklaus, and Ken Venturi testified that "fatigue can be a critical factor in a tournament, particularly on the last day when psychological pressure is at a maximum."[165] The PGA has waived the "no cart" rule on previous occasions, but for all players, thus honoring the age old concept of athletes competing under the same conditions.[166] The PGA has never granted a request for waiver on behalf of a single player.[167]

The trial court consulted the Rules of Golf and found nothing to indicate that walking is required.[168] Further, the court found that the fatigue factor is not significant because under normal circumstances, very little energy is actually exerted by walking the course.[169] Against strong arguments from the PGA that it was inappropriate to consider Martin's unique physical disability in determining whether a waiver of the "no cart" rule would fundamentally alter the tournament, the trial court undertook an "individualized assessment" and concluded that there

162. Guckenberger v. Boston Univ., 8 F. Supp. 2d 82, 87 (quoting *Wynne I*, 932 F.2d at 26).

163. *Id.* There were many claims and decisions made in the *Guckenberger* case. My reference to the case here is for the limited purpose of illustrating the court's treatment of the issue involving whether a waiver of course requirements at a liberal arts institution would fundamentally alter BU's program. The court finally accepted BU's contention that it would. *Id.*

164. Martin v. PGA Tour, Inc., 994 F. Supp. at 1250–51.

165. PGA Tour, Inc. v. Martin, 532 U.S. at 670–71.

166. Martin v. PGA Tour, Inc., 994 F. Supp. at 1249.

167. *Id.*

168. *Id.* (citing the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland).

169. *Id.* at 1250–51.

would be no unfairness to the other players.[170] Even with a cart, Martin would still suffer greater fatigue and stress than other players.[171] The court concluded that to waive the "no cart" rule was a reasonable accommodation for Martin that would not fundamentally alter the PGA tournament.[172] The PGA was ordered to waive the "no cart" rule.[173]

On appeal, the decision was affirmed.[174] The appellate court agreed that shot-making, and not walking, is essential to the game of golf.[175] The court further agreed that an individualized determination of the facts in each particular case was appropriate to the ADA analysis.[176] The PGA appealed to the United States Supreme Court.

In the Supreme Court, the lawsuit focused on two issues: 1) whether Title III of the ADA applied to this private, non-profit event with respect to Martin, a competitor in the event as opposed to a spectator at the event; and 2) whether a waiver of the "no cart" rule would fundamentally alter the nature of the PGA tournament.[177] On the first issue, the Court ruled that the tournament is a public accommodation under Title III, because any member of the public may pay $3,000, submit two letters of recommendation, and enter the qualifying "Q-School."[178] As to the second issue, which is the subject of this paper, the Court held that a waiver of the rule against using a cart would not fundamentally alter the tournament because walking from hole to hole is not essential to the game of golf, and given the severity of Martin's condition, allowing him to use a cart would not give him an unfair advantage.[179]

According to Justice Stevens, writing for the majority:

> In theory, a modification of petitioner's golf tournaments might constitute a fundamental alteration in two different ways. It might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally; changing the diameter of the hole from three to six inches might be such a modification. Alternatively, a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and, for that reason, fundamentally alter the

170. *Id.* at 1249.
171. *Id.* at 1251.
172. *Id.* at 1253.
173. *Id.*
174. Martin v. PGA Tour, Inc., 204 F.3d 994 (9th Cir. 2000).
175. *Id.* at 1000.
176. *Id.* at 1002.
177. PGA Tour, Inc. v. Martin, 532 U.S. at 664–65.
178. *Id.* at 665–66. A thorough analysis of the issue as to whether Title III of the ADA applies to the PGA is beyond the scope of this article. The various opinions, including Justice Scalia's dissent, provide an illuminating exposition of this issue.
179. PGA Tour, Inc. v. Martin, 532 U.S. at 683–84.

character of the competition.[180]

The court disagreed with the PGA's assertion that the "no cart" rule was essential, and thus went on to determine whether a modification of that non-essential rule would nevertheless make the competition unfair such that it would fundamentally alter the game. In upholding the decision in favor of Martin, the Court endorsed the lower courts' individualized assessment of the details of Martin's disease in determining whether a particular modification or accommodation would fundamentally alter the game.[181]

Justice Scalia, joined by Justice Thomas, dissented. The dissent noted that the rules of all games are arbitrary; therefore, only the rule-maker can pronounce one or another of them to be essential or nonessential.[182] Justice Scalia questioned how the Court could be so sure that the size of the hole (three inches) is essential to the game of golf, and just as sure that walking is not:

> One can envision the parents of a Little League player with attention deficit disorder trying to convince a judge that their son's disability makes it at least 25% more difficult to hit a pitched ball. (If they are successful, the only thing that could prevent a court order giving the kid four strikes would be a judicial determination that, in baseball, three strikes are metaphysically necessary, which is quite absurd.)[183]

Justice Scalia noted that the nature of competitive sport depends upon unevenly distributed athletic talents such as speed, agility, and strength.[184] Any modification or accommodation to the rules that make it easier for a player to compete is against that nature, and fundamentally unfair.[185] Justice Scalia would have deferred to the PGA's determination.

IX. WHAT IMPACT COULD *MARTIN* HAVE ON DISABILITY DISCRIMINATION CASES BROUGHT BY STUDENTS AGAINST EDUCATIONAL INSTITUTIONS?

Martin could prove favorable for disabled students. First, it is Supreme Court precedent for refusing to defer to an accommodation decision in a disability discrimination case. Second, it is Supreme Court precedent explaining that *Sutton* requires an individualized analysis in accommodation decisions. Both of these contentions will be put forth by disabled students seeking greater accommodations than colleges and universities are willing to give. Courts may be persuaded by these arguments. These arguments are considered below.

180. *Id.* at 682–83 (citations omitted).

181. *Id.* at 688 (citing S. REP. NO. 101-116, at 61 (1989); H.R. REP. NO. 101-485(II), at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 385).

182. *Id.* at 699 (Scalia, J., dissenting).

183. *Id.* at 702–03 (Scalia, J., dissenting).

184. *Id.* at 703 (Scalia, J., dissenting).

185. For a discussion of the *Martin* case, see Darryl L. Liguori, *Fore! The Supreme Court Tees Off a Standard to Apply the Americans With Disabilities Act to Professional Sports in* PGA Tour, Inc. v. Martin, 12 WIDENER L. J. 185 (2003). For a general discussion of cases involving student athletes, see Denbo, *supra* note 12.

A. Martin Is Supreme Court Precedent Refusing To Defer To An Accommodation Decision In An ADA Case

Martin demonstrates the Supreme Court's willingness to disregard a decision by the governing authority (institution) that a modification or accommodation of the rules would fundamentally alter the program. In *Martin*, the courts recognized that the PGA considered the "no cart" rule essential such that a modification or accommodation of the rule would fundamentally alter the tournament, but then disregarded that decision in favor of their own interpretation of the Rules of Golf and the essence of the game. Unless there is a compelling reason for treating accommodation decisions by institutions of higher learning differently from the same decisions made by professional sports organizations, *Martin* is precedent for courts to substitute their judgments about whether a rule or policy is essential and would fundamentally alter programs.

How then might the accommodation decision in *Martin* be distinguished from accommodation decisions made by institutions of higher education? Colleges and universities might argue that decisions made by sports organizations are not entitled to deference for the following reasons: (1) the rationale for judicial deference to academic decisions does not apply to decisions by sports organization; and/or (2) that accommodation decisions by sports organizations are not as important as the same decisions made in the context of higher education and therefore, do not merit deference. Each of these arguments is considered below.

1. Martin Can Be Distinguished Becasue The Rationale For Judicial Deference To Academic Decisions Does Not Apply To Decisions By Sports Organizations

The courts have a long history of deferring to academic decisions made by educational institutions.[186] Deference to academic decision-making finds its root in the First Amendment to the United States Constitution and finds expression in such famous cases as *Regents of the University of California v. Bakke*,[187] where the Supreme Court stated:

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:
>
> > "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of

186. For a thorough treatment of this issue, see Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393 (1998) (pointing out that this deferential treatment by the courts does not extend to decisions made by lower educational institutions, such as elementary and secondary schools).

187. 438 U.S. 265 (1978).

> a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." [188]

The notion that academic freedom requires some autonomy for academic decision-making was endorsed in *Board of Curators of University of Missouri v. Horowitz,* where the Court stated: "Courts are particularly ill-equipped to evaluate academic performance."[189] And in *Regents of the University of Michigan v. Ewing*, the Court upheld the University's refusal to allow a student in the Inteflex medical school program to retake part of the NBME qualifying examination.[190] Ewing claimed that the University's decision to dismiss him from the program violated his rights to Due Process under the Fourteenth Amendment of the U.S. Constitution.[191] The Court said:

> The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[192]

According to James Leonard, the basis for deference to institutions of higher learning in disability decisions is not found in the First Amendment, but in a common law principle requiring courts to abstain from interfering in academic decision-making.[193] Reasons cited for the deference principle include the antiquated notions that colleges and universities must control student behavior as they are responsible for moral development, the idea that higher education exists in a "separate realm" to be kept free of judicial interference, and the still current contention that courts lack relevant expertise in academic matters and are thus incompetent to review academic decisions.[194] The incompetence rationale appears to provide the basis for judicial deference in the majority of disability discrimination cases that reach the courts.[195]

188. *Id.* at 312 (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)).

189. 435 U.S. 78, 92 (1978).

190. 474 U.S. 214 (1985).

191. *Id.* at 215.

192. *Id.* at 225 (citations omitted).

193. James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of The Americans With Disabilities Act*, 75 NEB. L. REV. 27, 57–60 (1996) (noting that whether this common law abstention principle can be called a "doctrine" is debated).

194. *Id.* at 58–59 (citing J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 257, 325 (1989)).

195. *See, e.g.*, Doe v. N.Y. Univ., 666 F.2d 761, 775–76 (2d Cir. 1981) (where the court's concern regarding the incompetence of the judiciary to review academic decisions is apparent).

The notion that courts are incompetent in specialized areas where they lack expertise also finds expression in cases involving other types of professional organizations. Leonard notes that even outside the realm of higher education, courts defer to decisions by public officials when those officials have expertise in the subject matter of the decision being made.[196] Leonard cites the *Arline* decision where the Court stated, *in dicta*: "school authorities should defer to the reasonable medical judgments of public health officials when assessing the risks of contagious disease."[197] *Arline* involved the dismissal of a public school teacher who had a record of infectious tuberculosis.[198] As the following representative survey reveals, the very few cases involving athletes that have reached the courts also involve deference to decisions not made by academic institutions, but instead by sports organizations.[199]

In *Sandison v. Michigan High School Athletic Association* (MHSAA), Ronald Sandison, a student athlete, requested that the MHSAA's age limitation be waived.[200] Sandison was learning disabled and had been put back a year in school, making him too old to participate.[201] The reasons for the age limitation were to prevent injury to players and to prevent unfair advantage by older, more physically mature students.[202] The court deferred to the MHSAA, holding that the age limitation was an essential aspect of the program and that a waiver would fundamentally alter the program.[203] Sandison urged the court to require the MHSAA to undertake an individualized inquiry taking into consideration his particular body size and structure to determine if in *his* case, a waiver would not compromise the essential purposes of the rule.[204] The court refused to require an individual assessment, stating that such an undertaking would be tremendously burdensome and was not required by the law.[205]

In *Ganden v. NCAA*, the court criticized *Sandison* for not engaging in an independent evaluation of the organization's assertion that its purposes were essential and could not be waived without fundamentally altering the program.[206]

196. Leonard, *supra* note 192, at 70.

197. *Id.* (citing *Arline*, 480 U.S. at 288). *See also* Strathie v. Dept. of Transp., 716 F.2d 227 (3d Cir. 1983) (stating that decisions by public officials that accommodations would fundamentally alter a program are entitled to deference so long as the relevant officials actually considered the requested accommodations and rejected them); Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402 (5th Cir. 1981) (deferring to a decision that a psychiatric worker was not otherwise qualified for the position due to her own psychiatric problems, so as not to second guess the program administrator's expertise).

198. *Arline*, 480 U.S. 273.

199. *See* Sandison v. MHSAA, 64 F.3d 1026 (6th Cir. 1995); Bowers v. NCAA (*Bowers II*), 118 F. Supp. 2d 494, 520 (D.N.J. 2000); Bowers v. NCAA (*Bowers I*), 974 F. Supp. 459 (D.N.J. 1997); *Ganden*, 1996 U.S. Dist. LEXIS 17368.

200. 64 F.3d 1026.

201. *Id.* at 1028–29.

202. *Id.* at 1035.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Ganden*, 1996 U.S. Dist. LEXIS 17368, at *39–40.

At issue in *Ganden* was an NCAA rule requiring that certain "core" courses be taken by student athletes, and excluding courses taught below the regular academic instructional level.[207] The court engaged in an independent evaluation of the "core course" rule, and determined that the rule was essential.[208] The court went on to address Ganden's contention that an individualized inquiry was necessary under the ADA.[209] The court agreed, but held that the NCAA does an individual assessment through its waiver procedure, which requires consideration of each course and allows some lower level courses to count if they are similar in academic requirements to the upper level courses.[210] The NCAA's "core course" rule was upheld.[211]

The last case to be examined here is *Bowers v. NCAA*, in which the NCAA's "core course" rule was again considered by the courts. In *Bowers I*, the court denied plaintiff's motion for a preliminary injunction, finding that because it appeared that the "core course" rule was essential and promoted the NCAA's purpose of ensuring that student athletes are representative of the college community and are academically prepared to succeed in college, it was unlikely that plaintiff would be successful on the merits of his lawsuit.[212] In *Bowers II,* the plaintiff had filed an amended complaint, and the NCAA was seeking dismissal on the grounds that it was not subject to Title III of the ADA.[213] The court found that the NCAA was subject to Title III, and further, that plaintiff could prevail if he could establish that a reasonable accommodation was available.[214] The court could not determine whether the "core course" rule was essential, however, because the NCAA had failed to present a fully developed record concerning this issue.[215] Nevertheless, the court concluded that because the waiver procedure in *Bowers* occurred too late to be effective in his case, it was not a reasonable accommodation.[216] The NCAA's motion to dismiss was denied.[217]

What the student athlete cases have in common with the education cases is that they all involve, at least in part, ADA Title III discrimination claims, and they all employ the fundamental alteration analysis established by the Supreme Court in *Davis*. Just as the courts in education cases require that the program at issue be essential, all of the student athlete cases have required that the purpose for the rule at issue be essential. As in education cases, some courts have deferred to the sports organization's determination that the rule in question was essential and could not be waived without fundamentally altering the program.[218] Reminiscent

207. *Id.* at *4.
208. *Id.* at *43–48.
209. *Id.* at *48–49.
210. *Id.* at *49–50.
211. *Id.* at *51–52.
212. *Bowers I*, 974 F. Supp. 459.
213. *Bowers II*, 118 F. Supp. 2d at 514.
214. *Id.* at 515, 519.
215. *Id.* at 520.
216. *Id.* at 523–24.
217. *Id.* at 538.
218. *See Sandison*, 64 F.3d at 1034.

of *Wynne* and *Guckenberger*, at least one court found that without an adequate record, it could not determine if a policy or rule was essential.[219] It appears that the rationale for deferring to academic decisions in the disability context is the very same rationale that favors judicial deference in cases involving sports (and other) organizations.

A quite famous post-*Martin* deference case deserves mention in this context, for it too rested on the judicial incompetence rationale. In *Grutter v. Bollinger*, the recent affirmative action case that was brought against the University of Michgan Law School, the Supreme Court began its opinion upholding the Law School's race conscious, affirmative action policy by stating that it would defer to the Law School's determination that a diverse student body would be beneficial to the school.[220] In so doing, the Court specifically noted that the Law School's decision was "based on its experience and expertise."[221]

The *Grutter* decision will be cited by institutions of higher education in support of an argument for deference, because it is post-*Martin* and involves a decision by an academic institution. The similarities between the affirmative action policy in *Grutter* and accommodation decisions in cases brought under the ADA do not end here, however. Both types of decisions involve, at their base, selection of the student body. And, although the Supreme Court has disavowed the notion that accommodation is essentially affirmative action, after *Grutter* specified that colleges and universities must engage in an individualized assessment of each applicant for admission, post-*Grutter* affirmative action should be more like post-*Sutton* accommodation decisions.[222] Colleges and universities may be successful in arguing that *Grutter* has breathed new life into the deference doctrine, and that *Martin* is inapposite.

Grutter, however, is distinguishable. Unlike *Martin*, *Grutter* was not a statute based disability case, but rather, a Fourteenth Amendment based race discrimination case. Hitherto *Grutter*, all race discrimination cases were subject to strict scrutiny. While the Court in Grutter recognized its obligation to apply strict scrutiny to the Law School's race conscious admission's policy, the Court's use of the First Amendment based deference doctrine arguably negated any real scrutiny in the case. As Justice Scalia points out in his dissent, the deference doctrine has no place in strict scrutiny analysis. Indeed, Scalia says that judicial deference is "antithetical" to strict scrutiny, in which the parties are charged with proving that the asserted interest is compelling and that the classification is necessary; and the courts are charged with determining that that burden has been discharged.[223] On

219. *Bowers II*, 118 F. Supp. at 520.

220. Grutter v. Bollinger, 539 U.S. 306, 309 (2003).

221. *Id.* at 333.

222. *See Alexander*, 469 U.S. at 300 n.20 (clarifying that affirmative action refers to a "remedial policy for the victims of past discrimination, while the later [reasonable accommodation] relates to the elimination of existing obstacles against the handicapped." For an interesting and informative discussion of this issue, see Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans With Disabilities Act*, 55 ALA. L. REV. 951 (2004).

223. *Grutter*, 593 U.S. at 362 (Scalia, J., dissenting).

the issue of judicial deference in a strict scrutiny case, *Grutter* has been the subject of volumes of scholarly debate.[224] The Court's use of the deference doctrine to displace traditional strict scrutiny analysis limits the value of the opinion as precedent in both affirmative action and accommodation cases.

Furthermore, *Grutter* is distinguishable as an opinion that celebrates *inclusion* of disadvantaged students, not *exclusion* as occurs when colleges and universities decide not to grant a requested accommodation to a disabled student. The Law School contended that it was attempting to "enroll a critical mass of minority students" to promote diversity, which the Law School had decided was beneficial to learning.[225] Many times throughout the opinion, the Court seizes this language to endorse the theme that education must be "open and available to all segments of American society, including people of all races and ethnicities."[226] The deference doctrine was used in *Grutter* to promote accessible education. But in ADA cases, when the courts defer to decisions by institutions that a requested accommodation would fundamentally alter their academic programs, they are in effect excluding disabled students. Since a decision not to accommodate means that a disabled student will not receive alterations which are considered necessary for his or her academic success, the student may be forced to withdraw. Colleges and universities relying on *Grutter* may find that the opinion is actually better suited as precedent for students seeking to set aside a determination that a requested accommodation will alter the program.

To summarize: the argument that the rationale for judicial deference to academic decisions does not apply to decisions by sports organizations, is not likely to succeed. The rationale for judicial deference is always that courts lack expertise in academic matters. This rationale has supported judicial deference outside of academia, in cases involving decisions by public health officials, and in student athlete cases involving sports organizations. As a result, the rationale for the deference doctrine does not provide a basis for distinguishing *Martin*. Furthermore, it should be noted that *Martin*, like *Grutter*, is a case about inclusion. In this sense, *Martin* as a Supreme Court precedent in an ADA case, which fosters openness and inclusion of disadvantaged individuals, appears to be a more pointed precedent for cases involving disability based discrimination.

224. *See, e.g.*, Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21 (2004); Victor Suthammanont, Note, *Judicial Notice: How Judicial Bias Impacts the Unequal Application of Equal Protection Principles in Affirmative Action Cases*, 49 N.Y.L. Sch. L. Rev. 1173 (2005); Michael A. Scaperlanda, *Illusions of Liberty and Equality: An "Alien's" View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism*, 55 Cath. U. L. Rev. 5 (2005); Paul Horowitz, Grutter's *First Amendment*, 46 B.C. L. Rev 461 (2005).

225. *Grutter*, 539 U.S. at 333.

226. *Id.* at 334.

2. Martin Can Be Distinguished Because Accommodation Decisions By Sports Organizations Are Not As Important As Accommodation Decisions Made By Academic Institutions

Colleges and universities may seek to distinguish *Martin* because it involved a professional sports organization instead of an institution of higher education. This argument would have to be based on the dubitable premise that if the body making the decision is a college or university, the decision is somehow more important than a decision made by a different entity.[227] The flaw in this reasoning is borne out by the district court's opinion in *Martin*. There, the court stated:

> It is also worth noting that the ADA does not distinguish between sports organizations and other entities when it comes to applying the ADA to a specific situation. Businesses and schools have rules governing their operations which are of equal importance (in their sphere) as the rules of sporting events. Conversely, the disabled have just as much interest in being free from discrimination in the athletic world as they do in other aspects of everyday life. The key questions are the same: does the ADA apply, and may a *reasonable* modification be made to accommodate a disabled individual?[228]

The similarity between sports and education is readily apparent. Both are based on individual talent and skill. Both involve competition. Both require vigilant administration to ensure that no individual has an unfair advantage. When it comes to accommodating individuals with disabilities, the question of unfair advantage is always present. Even in employment, accommodation decisions involve considerations of fairness. Indeed, the ADA is supposed to achieve a level playing field, in which no individual has an unfair advantage. Hence, the argument that academic accommodation decisions are somehow more important than the same decisions made by sports (and other) organizations is untenable.

B. Martin Is Precedent For Requiring Institutions To Undertake An Individualized Assessment In Making Accommodation Decisions

The second way in which *Martin* could impact disabled students is that the courts could require the individualized inquiry that was required in Martin's case. According to the Supreme Court in *Martin*, individualized assessment is required by the ADA. Citing *Sutton*, the Court stated:

> Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. As previously stated, the ADA was enacted to eliminate discrimination against "individuals" with disabilities, and to that end Title III of the Act requires without

227. Dupre, *supra* note 185, at 452–53 (examining possible reasons for the different treatment given to lower education, hypothesizing that the difference may be due to the great respect that society has for higher education, and noting that lower education is not well respected).

228. Martin v. PGA Tour, Inc., 994 F. Supp. at 1246.

> exception that any "policies, practices, or procedures" of a public accommodation be reasonably modified for disabled "individuals" as necessary to afford access unless doing so would fundamentally alter what is offered. To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.[229]

To be fair to the courts in *Martin*, it should be noted that little is said in any of the courts' decisions about the depth of the PGA's deliberations over Martin's request to waive the "no cart" rule. The district court noted in the final paragraph of its opinion that the PGA did not engage in the sort of individualized assessment that the ADA requires.[230] Instead, the court said that the PGA asserted "in this case that any modification of any of its rules would fundamentally alter the nature of its competition."[231] From this statement, it appears that the court rejected the PGA's decision either because it did not engage in an individualized assessment for Casey Martin, or in the alternative, because it did not actually deliberate.

As the above quote from *Ewing* points out, deference is not to be given—even to purely academic decisions—when the decision departs from accepted academic norms, or when professional judgment was not actually exercised.[232] In both *Wynne* and *Guckenberger*, the courts are very clear about the need for deliberation. Indeed, both universities were ordered to deliberate.[233] However, the sort of individualized assessment that the courts required in *Martin* does not appear to have been required in either case. Even so, *Wynne* and *Guckenberger* should have been precedent for allowing the PGA to deliberate (assuming that it had not done so), or even to engage in an individualized assessment. Rather, the courts simply rejected the PGA's decision out of hand.

If the Court was wrong in its interpretation of the ADA statutory language in *Martin*, it is for the United States Congress to address. Until it does, to the extent an individualized assessment is now sanctioned by the Supreme Court, it is the law of the land. Colleges and universities across the nation should be advised that individualized assessment may be required, and that their decisions regarding what is essential to a particular degree program may not receive the deference traditionally given by the courts.

X. CAROL SINGH V. THE GEORGE WASHINGTON UNIVERSITY[234]

Singh is a recent post-*Martin* case that may signal a change in the treatment of

229. PGA Tour, Inc. v. Martin, 532 U.S. at 688 (citing 42 U.S.C. §§ 12101(b)(1), 12182(b)(2)(A)(ii)).

230. Martin v. PGA Tour, Inc., 994 F. Supp. at 1253.

231. *Id.*

232. *Ewing*, 474 U.S. at 225.

233. *See supra* Part VII.

234. 368 F. Supp. 2d 58 (D.D.C. 2005), *reconsideration denied*, 383 F. Supp. 2d 99 (D.D.C. 2005).

disability based discrimination claims brought by students against institutions of higher learning. Although its value is limited because it was decided on a motion for summary judgment, the case is instructive.

Carol Singh was admitted to the George Washington University decelerated medical program, designed for students with academic shortcomings but who show promise.[235] The deceleration program allows students to take their first year of medical school over a period of two years.[236] Students are made aware that they are subject to dismissal for failing grades, receiving conditional grades, and for being one standard deviation from the mean grade.[237]

During her first semester, Singh failed "Cells and Tissue" and was more than one standard deviation from the mean grade in "Physiology."[238] The Medical School Evaluation Committee (MSEC) recommended to the dean that Singh be allowed to stay in medical school so long as she passed "Cells and Tissues" in the summer, which she did.[239] However, in the fall term, she failed "Neurobiology" and again fell below the standard deviation in yet another course.[240] Again, she was allowed to stay in school if she passed "Neurobiology" in the summer.[241] Again, she passed that course and began another semester.[242] Once again, however, she failed a course and received a conditional grade.[243]

When her case came before the MSEC for a third time, the committee unanimously voted to dismiss Singh.[244] By telephone, the associate dean informed her of the decision that evening.[245] After being notified of her dismissal, Singh visited the University's Disability Support Service (DSS) and was diagnosed with dyslexia, a mild disorder of processing speed, and a phonological disorder.[246] The DSS recommended that she be given double time on exams, access to lecture notes, tutors, and a laptop computer for typing her exams.[247] In light of her disability, Singh asked the dean to reconsider her dismissal, stating that with accommodation, she was sure to be a successful medical student.[248] The dean, however, refused to reconsider her case.[249]

Singh sued, claiming that the dean's refusal to reconsider her dismissal violated

235. *Id.* at 60.
236. *Id.*
237. *Id.* at 60–61. A conditional grade is given to students who cannot meet a minimum requirement without remedial work.
238. *Id.* at 61.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 61–62.
247. *Id.* at 62.
248. *Id.*
249. *Id.*

the ADA.[250] The University argued: (1) that Singh was not substantially limited in a major life activity as compared to persons in the general population; (2) that the dismissal decision was based on the University's determination that Singh was not qualified for its program, which was an academic decision that should receive deference; and (3) that the requested accommodation, akin to receiving a second chance, was not reasonable, and therefore, not required by the ADA.[251]

The court denied both party's motions for summary judgment on the issue of disability.[252] The court found a factual dispute as to whether Singh had a recognized impairment covered by the ADA, and further held that Singh had not shown that she was substantially limited in the major life activity of learning.[253] On the question of whether Singh's limitation was substantial as required under the ADA, the court rejected the University's contention that Singh was more advanced than the ordinary person in the general population due to her academic success.[254] The court determined that Singh should be compared to individuals of comparable experiences, finding that learning was like working, and when working is the asserted major life activity, it is a class of jobs that is considered, not all classes of jobs.[255] As a result of these findings, the court denied summary judgment, but went on to consider the University's remaining contentions under the assumption that Singh was disabled within the meaning of the ADA.[256]

The University's contention that it should be accorded deference to its decision to dismiss Singh for being unqualified for the program due to failing grades met with similar defeat. The dean testified that he dismissed Singh solely because of her failing grades; the University argued that this was an academic decision entitled deference.[257] The court, however, noted that the University had never undertaken a diligent assessment of Singh's request for accommodations in light of her disability as required by *Wynne II*.[258]

Considering the University's argument that Singh's request to be given a "second chance" was not a reasonable accommodation under the ADA, the court cited *Martin* for the proposition that discrimination under the ADA includes failing to make reasonable modifications where to do so would not fundamentally alter the

250. *Id.*

251. *Id.* at 69. The University also argued that Singh's request for reconsideration was untimely. The court found that since the letter of dismissal was actually written *after* the dean was informed of the disability, the request was in fact timely made. The court recognized that Singh had been informed by telephone before the University knew of her disability, but was persuaded that a University policy requiring dismissal by written notice rendered the telephone notice inoperable.

252. *Id.* at 68.

253. *Id.* at 63, 68.

254. *Id.* at 65–67.

255. *Id.* It is interesting to note that the court cited the *Toyota Manufacturing* case, yet this very finding by the court seems directly contrary to the Supreme Court's holding that the "class" concept in disability discrimination cases is reserved for the major life activity of working. *See supra* Part V.

256. *Id.* at 68.

257. *Id.* at 69.

258. *Id.*

University's program.[259]

The court discussed the "second chance" doctrine, and found that reconsideration as a modification was only considered unreasonable when the plaintiff had been given a prior chance to succeed *with* accommodations.[260] The court concluded that the "second chance" doctrine would not apply to Singh since she has never been given even a first chance to succeed *with* accommodations.[261] As a result, the court held that reconsideration was a reasonable modification under the ADA.[262]

Singh is a recent disability based ADA case, which cites *Martin*. It is difficult to determine the impact that *Martin* may have had on the court's ultimate holding. Still, the decision is significant. First, the court refused to defer to a purely academic decision made by a university. Singh was dismissed due to multiple incidents of failing grades at a time when the University had no knowledge that she was disabled. When the University was informed of the disability, the dean made the decision not to reconsider her dismissal. These are decisions about who may study at the medical school. Under the First Amendment deference doctrine, these are precisely the decisions to which courts traditionally defer. Under the common law doctrine in which courts defer because they lack expertise, again, these are precisely the sort of complex academic judgments that courts are ill equipped to consider.[263] Yet the court in *Singh*, like the court in *Martin*, refused to defer.

Second, as in *Martin*, the court found that the University did not undertake a *Wynne/Guckenberger* assessment, but did not order the University to deliberate. It should be recalled that in both *Wynne* and *Guckenberger*, when the courts determined that they could not give "blind deference" to an academic decision, they gave the universities time to go back and deliberate. Neither the PGA in *Martin*, nor the University in *Singh*, was given that opportunity.

Finally, once the court determined that the University did not consider Singh's request in light of her disability, it decided that reconsideration was reasonable, thus substituting its judgment for that of the University. This is exactly what happened in *Martin*. Like the court in *Martin*, the court in *Singh* determined that the requested accommodation was reasonable, and that failure to grant it amounted to discrimination. Although a summary judgment decision, *Singh* may be an example of post-*Martin* treatment of disability based discrimination claims brought by students against institutions of higher education.

XI. CONCLUSION

Depending upon one's stance in the controversy over accommodations for learning disabled students, *Martin* is either a threat or a promise. Colleges and

259. *Id.* at 70. The citation to *Martin* follows the quoted provision of the ADA on reasonable modifications.

260. *Id.* at 71.

261. *Id.*

262. *Id.*

263. In deciding the deference issue, the court made no mention of *Grutter*.

universities may err on the side of caution when they are taken to task by disabled students, attempting to prove that they not only undertook a *Wynne/Guckenberger* deliberation, but that they also conducted the sort of individualized inquiry sanctioned by the Supreme Court in *Martin*. Disability claimants may cite the case as precedent for courts to disregard decisions by institutions of higher education about whether a requested accommodation fundamentally alters an educational program. Whether *Martin* will have any real impact on higher education remains to be seen. It is a special case, involving a famous person. Special cases seldom make general law.[264] It could happen that the decision simply stands as an anomaly in which a disability plaintiff actually won, but not of any real use to ordinary disability claimants such as the learning disabled students on campuses across the nation. Depending on one's viewpoint, that may be a sad result indeed.

264. *Cf.* Bush v. Gore, 531 U.S. 98 (2000).