
DOING THE RIGHT THING: DISABILITY DISCRIMINATION AND READMISSION OF ACADEMICALLY DISMISSED LAW STUDENTS

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I. AN ILLUSTRATIVE SCENARIO

Law schools regularly deal with academically dismissed students claiming that disability resulted in their academic failure, and asserting that, perhaps with accommodations, they can be successful if readmitted. Consider, for example, the following scenario:

A law student (“Student”) with a 1.87 GPA is dismissed at the end of her first year for failing to earn her law school’s (“Law School”) minimum required GPA of 2.0. Student petitions for readmission, asserting that her just-diagnosed learning disability of dyslexia/reading disorder caused her academic failure. Student’s petition also asserts that if she is readmitted and provided with accommodations for her disability consisting of: a) tutoring, b) note taking assistance, c) elimination of the writing requirement (a graduation requirement in which students must research and write an academic paper similar to a law review article), and d) extra time on exams, she will be successful. Student’s petition notes that she always suspected she had a reading problem since she reads very slowly, and after receiving her fall grades (averaging 1.75), she suspected she might have dyslexia and considered getting tested, but decided to “tough it out.” Student’s spring grades averaged 1.92.

In support of her petition Student submits an evaluation report from a clinical psychologist (“Evaluator”), dated after Student’s dismissal. In it, Evaluator diagnoses Student with the specific learning disability of dyslexia/reading disorder, based in large part on testing that indicates Student’s reading speed and decoding skills are well below average as compared with college graduates. Evaluator concludes that Student is therefore covered by Section 504 and the ADA. The report states that Student has always had this learning disability, which has caused her great difficulty in reading, particularly in decoding words, and greatly slowed her reading speed, but Student has used her above average intelligence and self-developed coping strategies to compensate prior to law school. Evaluator recommends Student receive tutoring, note taking assistance, extra time on exams, and elimination of the writing requirement. Evaluator concludes: “In my professional opinion Student is a bright, motivated young woman who will succeed in law school if these accommodations are provided.”

Law School solicits feedback from Student’s teachers, two of whom report that Student seems not to have mastered legal analysis or many of the basic concepts. A review of Student’s file reveals she earned a B average as a political science major at a state university. Student’s LSAT score was quite low compared with those of her classmates, and Student was admitted to Law School contingent upon her beginning in the summer and taking a reduced load. Student’s tutor in the Law School’s Academic Resource Program notes that Student missed several scheduled sessions, and also that Student was extremely active in extracurricular activities. In her appearance before the committee, Student agrees that she was an active member of six student groups.

Law School’s readmission rule was adopted by the faculty and is contained in Law School’s academic rules, which are set out in the student handbook. The readmission rule requires a recommendation by a faculty committee to the faculty,

which decides the matter by majority vote. The burden is on the dismissed student to demonstrate that

- 1) the failure was caused by extraordinary circumstances, which are defined as difficulties beyond those regularly encountered by law students (such as minor illness or the end of a romantic relationship), excluding those for which the student had a reasonable opportunity to recover or obtain administrative relief prior to being dismissed, and
- 2) if readmitted, there is a convincing likelihood the student will achieve good standing in law school, and be able to pass a bar exam and practice law competently.

Law School's recent graduates have had some difficulty with its state's bar exam; in several recent administrations, Law School's graduates' pass rate has been below the state average. A recent analysis by Law School of the bar exam performance of readmitted students over the past few years indicates that few of them have passed the bar exam.

Law School must decide whether to readmit Student. That decision is always difficult and complex; it is even more so in Student's case. Deciding whether to readmit Student involves reviewing technical information concerning her learning disability, and considering: a) whether Student's learning disability is protected by federal disability discrimination statutes as Evaluator asserts, b) whether the learning disability is an extraordinary circumstance as defined by Law School's readmission rule, c) what caused Student's academic failure, d) whether the requested accommodations are reasonable, and e) whether with (or without) accommodations there is a convincing likelihood Student will succeed in law school, on the bar exam, and in practice. In Student's case, Law School also faces review of its decision beyond that available to dismissed students generally. Specifically, if Student believes Law School has acted on her petition in a way which is discriminatory, she may file an internal complaint under the school's disability policy, an administrative complaint with the Office of Civil Rights and/or a lawsuit alleging violation of federal disability discrimination laws.

This scenario is entirely fictitious, and any resemblance to any person is purely coincidental. It does, however, illustrate the kinds of situations law schools increasingly face. For example, during one recent year at the law school at which the author is a professor, five of twelve readmissions petitions asserted an impairment as the reason for academic failure. In each of these cases, the petitioning student submitted expert information concerning the existence of an impairment, requested accommodations, and claimed that with the accommodations she would be successful if offered a second chance.

II. INTRODUCTION

This article examines disability discrimination claims brought by academically dismissed law students who have been denied readmission to law school, including the claims that Student in the above scenario might bring if Law School does not

readmit her.¹ Part III of the article offers an overview of Section 504 of the Rehabilitation Act of 1973 (“Section 504”)² and the Americans with Disabilities Act (“ADA”),³ the two federal statutes that prohibit disability discrimination against covered higher education students, and under which Student may file claims concerning Law School’s decision not to readmit her. This overview pays particular attention to recent United States Supreme Court decisions that strictly interpret the “disabilities” protected by these statutes,⁴ and to recent cases in which lower courts have accordingly held that a graduate student’s impairment is not a statutorily protected disability.⁵ The statutory overview also compares the markedly different approaches of Section 504 and ADA provisions concerning disability discrimination and higher education students, to the federal preK-12 special education statute (the Individuals with Disabilities Education Act (“IDEA”)).⁶ Many such students were served under the IDEA earlier in their educational careers, which shaped their expectations about their eligibility and protection under higher education disability law.

Part IV of the article offers a cursory introduction to the Supreme Court’s tradition of deference to higher education academic decisions, recently reiterated in the University of Michigan affirmative action cases, in which higher education admissions decisions were challenged as racially discriminatory.⁷ The Court has not yet decided a case in which an academically dismissed student claims disability discrimination. The Court has, however, deferred to higher education institutions when higher education academically dismissed students made constitutional claims,⁸ and appeared to defer to a higher education institution’s decision concerning the impact of a student’s disability on her qualifications for admission to a higher education program.⁹ There is thus every indication the Court would defer to a law school’s judgment in a case where an academically dismissed law student claimed disability discrimination.

Part V of the article reviews the body of law (both court cases and Office for Civil Rights in the U.S. Department of Education (“OCR”) administrative opinions) in which academically dismissed higher education students who were

1. For other brief discussions of this issue, see Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We’ve Been and Where We May Be Heading*, 63 MD. L. REV. 122, 140–41 (2004); Laura Rothstein, *Higher Education and the Future of Disability Policy*, 52 ALA. L. REV. 241, 258 (2000); Bonnie Tucker, *Application of the Americans with Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students*, 23 J.C. & U.L. 1, 35–39 (1996); Adam Milani, *Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability Law*, 22 J.C. & U.L. 989, 1004–08 (1996).

2. 29 U.S.C. § 794 (2000).

3. 42 U.S.C. §§ 12101–12213 (2000).

4. See *infra* Section III.A.2.

5. See *id.*

6. 20 U.S.C. §§ 1401–1461 (2000).

7. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

8. See *infra* notes 108–111 and accompanying text.

9. See *infra* note 109 and accompanying text.

denied readmission have made disability discrimination claims. In the overwhelming majority of these cases and opinions, including all of the court cases involving law schools,¹⁰ schools have prevailed without going to trial, normally by receiving summary judgment.¹¹ Moreover, courts in these cases have regularly announced a policy of deferring to the school's academic decisions concerning academic dismissal and readmission.¹² Examination of the few court cases in which (non law) schools were not granted summary judgment offers helpful guidance to law schools faced with such claims.¹³ In Part VI, the article finds that the courts' deferential approach in these cases is appropriate, although no doubt frustrating to students whose planned careers may well have ended.¹⁴ Finally, Part VII offers guidelines and options for law schools trying to do the right thing (that is, to make a decision which is both principled and nondiscriminatory) when faced with readmissions petitions by Student or other dismissed students claiming a disability.¹⁵

III. APPLICABLE FEDERAL STATUTES – SECTION 504 AND THE ADA

Law schools are subject to two federal statutes which prohibit disability discrimination against covered students, as well as employees.¹⁶ Section 504¹⁷ of the Rehabilitation Act of 1973¹⁸ applies to schools, including public and private higher education institutions, which receive any federal education funds.¹⁹ The Americans with Disabilities Act ("ADA") applies to a much broader variety of institutions, and without regard to whether they receive federal funds, including state and local government-run "public entities" (including state law schools) (Title II),²⁰ and "places of public accommodation," specifically defined to include private schools (Title III).²¹ Thus, virtually all public law schools are forbidden from discriminating against covered students with disabilities by both Section 504 and

10. *See infra* Section V.B.

11. *See infra* notes 134–135 and accompanying text.

12. *See infra* notes 136, 147, 156, 184 and accompanying text.

13. *See infra* Section V.C.

14. *See infra* Section VI.

15. *See infra* Section VII.B.

16. For overviews of the statutes' applicability to higher education, see Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading*, 63 MD. L. REV. 122 (2004); Laura Rothstein, *Higher Education and the Future of Disability Policy*, 52 ALA. L. REV. 241 (2000).

17. 29 U.S.C. § 794 (2000).

18. 29 U.S.C. §§ 701–795 (2000).

19. 29 U.S.C. § 794(b)(2)(A) (2000) (defining covered "program or activity" in pertinent part as a college or university); 34 C.F.R. § 104.3(h) (2006) (defining "federal financial assistance"). Much of the meat of Section 504's obligations for schools is set out in its regulations, which include separate sections and separate standards for K-12 public schools, 34 C.F.R. §§ 104.31–38 (2006), K-12 private schools, 34 C.F.R. § 104.39 (2006), and higher education, 34 C.F.R. §§ 104.41–47 (2006).

20. 42 U.S.C. §§ 12131–12134 (2000).

21. *Id.* at §§ 12181–12189.

Title II of the ADA, and private law schools by both Section 504 and Title III of the ADA. Law schools must also comply with any applicable state laws.²²

The ADA is modeled after Section 504, and as it concerns higher education students with disabilities, the two statutes are essentially the same.²³ In fact, the ADA explicitly provides that no less than the applicable Section 504 standard shall apply to the ADA.²⁴

A. Covered Persons

1. Person with a disability; impairments

The two federal statutes define “person with a disability” essentially identically²⁵ and broadly: rather than listing covered disabilities, the statutes refer to persons with a “physical or mental impairment” (present, past, or perceived) which “substantially limits” a “major life activity” (such as learning or walking).²⁶ Learning disabilities may be the most common impairment of law students; according to one survey, more than half of law students who requested accommodations had learning disabilities.²⁷ Under Section 504 and the ADA, it is the higher education student’s responsibility to self-identify as having a disability, and to pay for and provide the school with appropriate documentation of the impairment.²⁸

22. Discussion of applicable state laws is beyond the scope of this article. It should be noted, however, that such laws might impose additional obligations on law schools, such as defining covered students more broadly than do the federal statutes, and/or imposing obligations beyond the federally required academic adjustments.

23. See Tucker, *supra* note 1, at 2 (“With one possible exception, that being in the area of safety, the ADA does not add any substantive protections for individuals with disabilities in the postsecondary education context, although in some contexts there are procedural differences.”).

24. 42 U.S.C. § 12201(a) (2000) (“Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.”), *cited in* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194 (2002).

25. 29 U.S.C. § 706(8)(B) (2000) (Section 504); 42 U.S.C. § 12102 (2000) (ADA). See *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 193 (“Congress drew the ADA’s definition of disability almost verbatim from the definition of ‘handicapped individual’ in the Rehabilitation Act, § 706(8)(B)”).

26. 42 U.S.C. § 12102(2) (2000) (ADA definition); 29 U.S.C. § 705(a) (2000) (Section 504 definition).

27. Donald Stone, *The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KAN. L. REV. 567, 570 (1996) (stating that 54% of students requesting exam accommodations have learning disabilities).

28. See BONNIE TUCKER & BRUCE GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW § 9IID (2005); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 437 (6th Cir. 1998); *Brown v. Univ. of Cincinnati*, 2005 WL 1324885 at *10 (S.D. Ohio 2005).

2. Substantial limitation – mitigators and comparison to the average person

As the Supreme Court has noted, “[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity . . . [a]nd further show that the limitation on the major life activity is ‘substantial.’”²⁹ The Court has also determined that the extent to which an impairment is limiting must be examined in light of any mitigators, such as hypertension medication, or corrective aids such as eyeglasses.³⁰ The Court rejected the argument that persons in these situations were “regarded as disabled” and thus covered by the statutes, requiring that persons must be perceived to have a condition which substantially limits a major life activity to be “regarded” as having an impairment.³¹

In a 2002 decision, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court held that “substantial” limitation involves “considerable or to a large degree”³² “permanent or long-term”³³ impairment of activities “that are of central importance to daily life,”³⁴ and further noted that “these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled.”³⁵ The Court also quoted EEOC regulations indicating that the ability to perform a major life activity must be substantially limited as compared to the average person:

According to the EEOC regulations, ‘substantially limited’ means

29. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 195 (2002).

30. *Sutton v. United Airlines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertsons v. Kirkingburg*, 527 U.S. 555 (1999).

31. The Court limited the “regarded as” prong to cases where the person is believed to have a substantially limiting disability when in truth there is either no disability, or a disability which is not substantially limiting. *Sutton*, 527 U.S. at 489–94 (1999).

32. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 196–97 (2002) (citing dictionary definitions of “substantial”).

33. *Id.* at 198 (“The impairment’s impact must also be permanent or long term.”) (citing EEOC regulations). *See, e.g.*, *Sanders v. Arneson Prods.*, 91 F.3d 1351 (9th Cir. 1996) (finding that psychological impairment lasting four months is not a statutory disability); *Ogburn v. UFCW Local 881*, 305 F.3d 763 (7th Cir. 2002) (short term depression is not a statutory disability); *Swanson v. Univ. of Cincinnati*, 268 F.3d 307 (6th Cir. 2001) (short term major depression mitigated with medicine was not a statutory disability). *See also* 29 C.F.R. Part 1630 App. § 1630.2(j) (2006) (listing examples of temporary impairments which are not statutory disabilities).

34. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 197 (“‘Major life activities’ thus refers to those activities that are of substantial importance to daily life.”) (citing the dictionary definition of “major”).

35. *Id.* at 197. The Court also held that the “substantially limiting” determination must be made on an individualized basis for each person. *Id.* at 199 (noting the wide range of severity of carpal tunnel syndrome). In an earlier case, the Court affirmed a lower court finding that an asymptomatic HIV-positive plaintiff was a person with a disability *per se* under the ADA, and specifically a physical impairment which substantially impaired the major life activity of reproduction. *Bragdon v. Abbott*, 524 U.S. 624 (1998). The plaintiff in *Bragdon* had decided not to have a child because of her condition. *Id.* at 641. The Court also noted the real and significant medical risk of transmission to the child and/or to the partner during conception. *Id.* at 639–41 (finding that “[c]onception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health”).

‘[u]nable to perform a major life activity that the average person in the general population can perform;’ or ‘[s]ignificantly restricted as to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.’³⁶

Thus, the Court noted that an employee who alleged that her carpal tunnel syndrome substantially impaired her in the major life activity of performing manual tasks, an impairment which kept her from performing assembly line work but not from performing daily living tasks such as brushing her teeth, may not in fact have a statutorily protected disability.³⁷

Following *Toyota*, several courts have found graduate students’ diagnosed mental impairments (such as learning disabilities and ADHD) not to “substantially” limit learning in the specialized graduate school context and thus not to amount to statutory disabilities. These decisions involved students with a history of academic success at least through college without accommodations, and/or a diagnosis based on test scores which documented below average performance only as compared with other highly educated persons, rather than below average performance as compared with the general population.

Most recently and notably, in *Wong v. Regents of California* (“*Wong II*”),³⁸ a case involving a dismissed medical student diagnosed with a learning disability, the Ninth Circuit affirmed a summary judgment for the school, holding that the student’s undisputed learning disability impairment was not a statutory disability as a matter of law.³⁹ The Court relied on the student’s long history of academic achievement without accommodations: a 3.5 college GPA in biochemistry,⁴⁰ a good MCAT score, successful completion of the first two years of medical school, and passing the Boards Step 1 (a national standardized test taken after two years of medical school and required for physician licensing).⁴¹ The student failed some clinical work, and then was diagnosed with a learning disability,⁴² but was dismissed,⁴³ and filed a disability discrimination claim. Most other courts that

36. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 195–96 (citing 29 C.F.R. § 1630.2(j) (2006)).

37. *Id.* at 199–203 (remanding for determination of whether the undisputed physical impairment was substantially limiting to the plaintiff and thus statutorily covered).

38. 410 F.3d 1052 (9th Cir. 2005). In an earlier decision in the same case, the court denied the school’s motion for summary judgment on a different theory (specifically that no reasonable jury could find that the requested accommodations for alternative test formats were reasonable ones), since there was not a record of the school’s accommodations/readmissions decision-making process. *Wong v. Bd. of Regents of Univ. Of Cal.*, 192 F.3d 807 (9th Cir. 1999) (“*Wong I*”), discussed *infra* at notes 222–228 and accompanying text.

39. *Wong II*, 410 F.3d at 1056.

40. *Id.* at 1056–57.

41. *Id.* at 1057.

42. *Id.* Testing revealed Wong’s reading comprehension was in the 99th percentile untimed, but at an eighth grade level under time limits. *Id.* at 1066. For the *Wong II* court the student’s testing documentation of poor timed reading speed as compared with the general population was insufficient evidence to survive summary judgment in light of the student’s long history of success without accommodations.

43. *Id.* at 1057–58. Typically in medical school third and fourth year students rotate through various hospital departments such as internal medicine and surgery. During each rotation

have addressed the issue have reached similar results.⁴⁴

This approach to defining statutory disability likely makes little difference for certain physical or sensory impairments such as deafness, blindness, and cerebral palsy. On the other hand, as several legal commentators in fact suggest, using the *Toyota* general population or “most people” standard means few if any law or other higher education students with newly diagnosed learning disabilities will be legally entitled to receive accommodations; these commentators disagree about whether this is a good result.⁴⁵

students not only perform direct patient care but also read extensively on diagnosis and treatment of conditions and diseases treated by the department in which the student is doing a rotation in preparation for an exam.

44. See, e.g., *Marlon v. W. New Eng. Coll.*, 2003 WL 22914304 (D. Mass. 2003), *aff'd*, 124 F. Appx. 15 (1st Cir. 2005) (dismissed law school student diagnosed with several physical and cognitive impairments (learning disability, depression and panic attacks) did not have a statutory disability; student had worked successfully as a paralegal without accommodations before and after her time in law school, before law school the student had been academically successful in college and professionally successful as a paralegal, all without accommodations); *Brown v. Univ. of Cincinnati*, 2005 WL 1324885 (S.D. Ohio 2005) (summary judgment for medical school in a disability discrimination claim brought by a dismissed student in his last year of medical school diagnosed with reading disorder and generalized anxiety disorder who had performed well in high school and college without accommodations); *In re Allegheny Health, Educ. and Research Found.*, 321 B.R. 776, 793–95, 797, 803–04 (Bankr. W.D. Pa. 2005) (disallowing dismissed student’s claims for more than \$8 million against bankrupt medical school, since none of the student’s three evaluations indicated below average learning abilities as compared to other adults in general or those her age, and also rejecting claim that school regarded student as having a statutory disability absent evidence the school perceived the student as having a substantially limiting impairment).

Some courts performed a similar analysis in pre-*Toyota* cases. *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974, 980 (10th Cir. 1998) (medical student with “test anxiety” anxiety disorder manifesting on certain exams does not have a substantially limiting disability; “[a]n impairment limited to specific stressful situations, such as the mathematics and chemistry exams which trigger [the student’s] anxiety, is not a disability under the Rehabilitation Act.”); *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 60 F. Supp. 2d 703 (E.D. Mich 1999) (student diagnosed with reading disorder and disorder of written expression); *Price v. Nat’l Bd. of Med. Exam’rs*, 966 F. Supp. 419 (S.D. W.Va. 1997) (three students all diagnosed attention deficit disorder, two of whom were also diagnosed with reading disorder and disorder of written expression).

Not every lower court interprets *Toyota* this way. For example, in *Singh v. George Washington University* a federal district court found that it was appropriate to compare a medical student to other college graduates to determine if her learning disability was substantially limiting. 368 F. Supp. 2d 58, 65–68 (D.D.C. 2005).

45. See, e.g., Melissa Krueger, *The Future of ADA Protection for Students With Learning Disabilities in Post-Secondary and Graduate Environments*, 48 U. KAN. L. REV. 607 (2000) (relying on public policy as well as EEOC regulations defining “substantial” limits on the major life activity of working for employees, which require comparison with other persons of similar training and experience, 29 C.F.R. § 1630.2(j)(3), to suggest that for the major life activity of learning, the substantiality of the impairment be measured with reference to a group of similar age and education level (e.g. a reference group of college graduates for law students)); Gregory Murphy, *Toyota v. William and the Late-Discovered Learning Disability*, 74 BAR EXAMINER 46, 48–49 (2004); Stuart Duhl & Gregory Duhl, *Testing Applicants with Disabilities*, 73 BAR EXAMINER 7, 10 (2004) (after *Toyota* testing accommodations for bar examinees require proof of impairment in “performing mental or physical tasks of central importance to their daily lives, and not tasks that are tied only to taking the bar examination or practicing law”).

Bar examiners have adjusted to the *Toyota* standard for statutory disabilities by training disability experts on these legal standards and having them review requests for accommodations on bar exams, including whether the examinees requesting accommodations are in fact statutorily disabled. These specially trained disability experts agree that many mental impairments (such as psychiatric disabilities, ADHD, and learning disabilities) first diagnosed in graduate students do not substantially impair learning and thus do not amount to statutory disabilities.⁴⁶

Commentary from these disability experts also provides insight into the perspective of evaluators who diagnose these impairments. One psychiatrist who works with bar examiners to review requests for bar exam accommodations from persons with psychiatric impairments notes “treating physicians, therapists and other caregivers are ethically required to act as advocates for their patients, and as a result their reports are rarely neutral or unbiased.”⁴⁷ A neuropsychologist who works with bar examiners to review requests for bar exam accommodations similarly notes concerns that evaluators often appear to be acting as advocates rather than with impartiality, are more familiar with and oriented to IDEA disability standards rather than the standards for statutory disabilities for higher education students, and “typical clinical practice involves a natural desire to be helpful to the individual requesting and paying for services.”⁴⁸

46. See, e.g., John Ranseen, *Reviewing ADHD Accommodation Requests: An Update*, 69 BAR EXAMINER 6, 10–11 (2000) (a student diagnosed with ADHD likely does not have a statutory disability “if [such] an individual has never been afforded accommodations yet has been able to complete an undergraduate education and achieve law school admittance”); Michael Gordon, Kevin Murphy & Shelby Keiser, *Attention Deficit Hyperactivity Disorder (ADHD) and Test Accommodations*, 67 BAR EXAMINER 26, 31 (1998) (“[I]t is nearly impossible to justify the [ADHD] diagnosis when symptoms suddenly arise after high school graduation. It is particularly hard when the first instance of any real problems arose after graduation from college How impaired can a person be relative to the general population if the worst of his or her problems occurs in academic settings far beyond the reach of most people? Without persuasive proof that impairment has been long-standing, consistent, and truly disruptive to normal functioning, the diagnosis is likely inappropriate.”).

47. Douglas Tucker, *Accommodations for Psychiatric Disabilities on the Bar Examination: Perspectives from an Expert Reviewer*, 71 BAR EXAMINER 14, 17 (2002) (noting the “strong incentives” for persons seeking accommodations to “distort their responses” and urging evaluators to be vigilant in ferreting out any such attempted distortion and not rely solely on information reported by the examinee to arrive at a diagnosis).

University disability services offices as well as evaluators may operate from an advocacy perspective. See Association for Higher Education and Disability (“AHEAD”) Professional Standards 2.1 (university disability services providers “[s]erve[] as an advocate for students with faculty or administrators”), available at <http://www.ahead.org/resources.php> (last visited Sept. 22, 2006); AHEAD Program Standards and Performance Indicators 1.1 (“[T]he office that provides services to students with disabilities should . . . serve as an advocate for issues regarding students with disabilities. . . .”), available at <http://www.ahead.org/resources.php> (last visited Sept. 22, 2006).

48. Ranseen, *supra* note 46, at 15–16 (urging evaluators who consider an ADHD diagnosis to rely primarily on outside evidence of attention difficulties beginning in childhood, rather than self-reported history or test scores); *id.* at 16 (citing unpublished research indicating the majority of evaluators think disability involved comparison to peers rather than the general population and

These developments do not mean there are not substantial numbers of law students with statutory disabilities. For example, the law school where the author is a professor has enrolled and graduated students with physical disabilities such as cerebral palsy and quadriplegia, sensory disabilities such as legal blindness and deafness, and mental impairments which amount to statutory disabilities such as dyslexia diagnosed in childhood and requiring special education since that time. These developments also do not mean law students should not pursue an initial disability diagnosis while in law school. Diagnosis of an impairment, even if it does not amount to a statutory disability and trigger eligibility for law school accommodations, may offer the law student an opportunity for helpful treatment (pharmacological, compensatory strategy and/or therapy) which may enhance the student's functioning, academic and otherwise. These developments do mean that many law students, law schools, evaluators, and other officials such as university disability offices need to reexamine their beliefs concerning legal disabilities.

B. "Qualified"

To be covered, students must also be "qualified"⁴⁹ for the school's program, meaning that they can "meet[] the academic and technical standards requisite to admission or participation in the recipient's education program or activity,"⁵⁰ at least if certain academic or other adjustments, often referred to as "reasonable accommodations," are made.

In its first Section 504 case, the Supreme Court held that a prospective nursing student whose deafness, even with reasonable accommodations, prevented her from being able to succeed in the clinical portions of her training,⁵¹ was not otherwise qualified and therefore not protected by Section 504.⁵² In the context of defining "qualified" for academically dismissed law students, such students' dismissal makes them not qualified to continue in law school. However, they are otherwise qualified to *apply for* readmission and have their petitions considered on a nondiscriminatory basis with the petitions of other students without disabilities.

C. Substantive Entitlements of Eligible Students

For covered students, Section 504 and the ADA also impose the same obligations on schools: nondiscrimination, making their programs physically accessible,⁵³ and making some "academic adjustments" (or "reasonable accommodations," referred to in this article as "accommodations") to their

reporting similar conclusions regarding knowledge level and orientation of evaluators).

49. See 29 U.S.C.A. § 794(a) (2002).

50. 34 C.F.R. § 104.3(l)(3) (2006).

51. Parts of the clinical training involved work in operating rooms and intensive care units where the caregivers are masked and lip-reading would thus not be possible. See *Cnty. Coll. v. Davis*, 442 U.S. 397, 403 (1979).

52. *Id.*

53. See, e.g., 29 U.S.C. § 794c (2000) (Section 504); 42 U.S.C. §§ 12146–47 (2000) (ADA Title II); 42 U.S.C. § 12183 (2000) (ADA Title III).

programs to accommodate students' disabilities.⁵⁴ On the other hand, schools are not required to alter any of the basic, essential requirements of their programs, such as minimum GPA and attendance requirements.⁵⁵

Students have the burden of documenting a disability and requesting adjustments/accommodations.⁵⁶ Schools must offer accommodations which are necessary to allow the student with a disability to participate in a nondiscriminatory basis with persons who do not have disabilities.⁵⁷ Such accommodations are to be determined on a case-by-case basis and do not include those which would pose an "undue hardship," either financially or administratively, on the school.⁵⁸ The regulations include examples of academic adjustments,⁵⁹ and explicitly exclude "devices or services of a personal nature" such as "attendants, individually prescribed devices, [or] readers for personal use or study."⁶⁰ Thus, schools are generally not required to offer tutors to students, although to the extent a school makes tutoring services available (perhaps through an Academic Resource Program or upper-class students offering weekly tutorials for 1L classes) they must be available on a nondiscriminatory basis to students with disabilities.⁶¹ Common reasonable accommodations for law students with disabilities include access to special technology (such as casebooks on CD), note-taking assistance, and extra time on examinations.⁶²

Schools are also not required to provide accommodations which would compromise the essential requirements of their programs. However, whether a

54. 34 C.F.R. § 104.44 (2006) (Section 504); 28 C.F.R. § 36.302 (2006) (ADA Title III).

55. 34 C.F.R. § 104.44 (2006) (Section 504).

56. See TUCKER & GOLDSTEIN, *supra* note 28, at § 9IID.

57. 34 C.F.R. § 104.44(a) (2006) ("A recipient 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 . . .").

58. *Id.* ("Academic requirements that the recipients 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.")

59. See 34 C.F.R. § 104.44 (2006). The regulations require that recipients of federal funding allow extra time to complete degree requirements, substitution of required courses, "adaptation of the manner in which specific courses are conducted," 34 C.F.R. § 104.44(a) (2006), waivers of rules which limit the student's participation such as allowing a student whose disability precludes effective note-taking to tape record class or waiving a no animal rule for a service animal, 34 C.F.R. § 104.44(b) (2006), evaluating students in a nondiscriminatory way, 34 C.F.R. § 104.44(c) (2006), and providing "auxiliary aids" such as "taped texts, interpreters, orally delivered materials . . . , [and] readers in libraries" 34 C.F.R. § 104.44(d) (2006).

60. *Id.*

61. Letter to: Or. State Univ., 5 NDLR 19 (OCR 1993). See also *Robinson v. Hamline Univ.*, 1994 WL 175019 (Minn. App. 1994) (so holding with regard to state discrimination law modeled on Section 504 in case brought by dismissed law student). Moreover, to the extent the school offers services beyond reasonable accommodations, it may charge for them. *Id.*

62. For a report on a law school survey regarding the kinds of accommodations law schools provide for students with disabilities, see Stone, *supra* note 27. See also Lisa Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J.L. & EDUC. 31, 34 (1997) (thorough overview of possible accommodations for students with learning disabilities).

requested accommodation would compromise the essential elements of a law school program must be determined on an individualized basis.⁶³ Examples of accommodations that have, in typical law school contexts, gone beyond reasonable ones include waiver of minimum GPA requirements,⁶⁴ waiver of class attendance requirements,⁶⁵ taking exams at home,⁶⁶ and providing an alternate format for multiple choice tests.⁶⁷ The decision whether a requested academic adjustment goes to essential academic standards is one that is given deference by both OCR⁶⁸ and the courts.

D. Enforcement

Section 504 regulations require schools to designate a Section 504 coordinator as well as to establish an internal grievance process for “prompt and equitable” resolution of disability discrimination complaints.⁶⁹ External recourse is also available. Aggrieved students may file a complaint under either Section 504 or Title II of the ADA with the OCR within 180 days of the alleged violation, or at a later time for good cause.⁷⁰ OCR investigates complaints informally (normally by an on-site visit to the school to review files and interview relevant persons, and without a hearing) and may issue an opinion letter containing a finding that disability discrimination has or has not occurred.⁷¹ Students may also file private lawsuits under both Section 504 and the ADA.⁷² Relief is normally injunctive in nature; damages are available only under limited circumstances,⁷³ and not in

63. Letter to: Cabrillo Coll., 2 NDLR 78 (OCR 1991) (“A generalized decision that . . . requirements can never be waived, without consideration of the reasons for the existence of an individual requirement, would not meet the standards set forth in Section 104.44 of the regulation.”). As another example, although generally attendance requirements are essential elements of law school programs, see *infra* note 65, if a professor set a stringent attendance requirement for her class, but made exceptions for nondisability reasons, modification of the attendance requirements for that class might be a reasonable accommodation for a student with a disability.

64. Analogously, the ADA Title II Technical Assistance Manual suggests that bar examiners and other licensing authorities need not waive bar examination requirements nor minimum passing scores as accommodations. Civil Rights Division of the Department of Justice, ADA TITLE II TECHNICAL ASSISTANCE MANUAL at 14.

65. OCR has found that waiving law school attendance requirements is beyond legally required academic adjustments. Letter to: Seattle Univ. Sch. of Law, 27 NDLR 321 (OCR 2003).

66. *McGregor v. La. State Bd. of Supervisors*, 3 F.3d 850, 859–60 (5th Cir. 1993).

67. *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794–95 (1st Cir. 1992).

68. Letter to: N. Ill. Univ., 7 NDLR 392 (OCR 1995) (“OCR grants great deference to recipients to determine which academic requirements are essential to their programs of instruction.”).

69. 34 C.F.R. § 104.7 (2006). These regulations do not require schools to make the grievance process available to applicants for admission. *Id.*

70. 34 C.F.R. § 100.7 (2006).

71. 29 U.S.C. § 794a(a)(2) (2000) (making procedures under Title VI available); 34 C.F.R. § 104.61 (2006).

72. 29 U.S.C. § 794a(a)(2) (2000).

73. See *id.* (Section 504); 42 U.S.C. § 12131 (2000) (ADA Title II); *id.* at § 12188 (2000) (ADA Title III). Punitive damages are not available under ADA Title II or Section 504. *Barnes*

private lawsuits under Title III of the ADA.⁷⁴ Attorney's fees are available to prevailing plaintiffs, although recent case law developments make it more difficult to be eligible for a fee award.⁷⁵

E. The Prima Facie Case

A prima facie claim of disability discrimination in a readmissions case under Section 504 has four elements: 1) the plaintiff is a statutorily covered person with a disability, 2) she is otherwise qualified for readmission, 3) she was denied readmission solely by reason of her disability (here the student can make out a prima facie case, the school can articulate a legitimate reason for its decision, and the student can then prove pretext) and 4) the defendant school received federal education funds.⁷⁶ It does not appear that reverse disability discrimination claims are available,⁷⁷ so schools may choose to engage in affirmative action in favor of students with disabilities without fear of liability.⁷⁸

F. The IDEA's Different Approach and the Student Expectations it Creates

Most students entering law school with (or without) an impairment are familiar with the coverage and entitlements of the IDEA,⁷⁹ the federal preK-12 special

v. Gorman, 536 U.S. 181 (2002).

74. See 42 U.S.C. § 12188(b)(2) (2000).

75. 29 U.S.C. § 794a(b) (2000) (Section 504); 42 U.S.C. § 12188 (2000) (ADA). For example, in a recent Supreme Court case, the Court indicated that a private settlement of a civil rights claim was insufficiently "prevailing" to create eligibility for reimbursement of attorney's fees. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health Res.*, 532 U.S. 598, 605 (2001). For a discussion of this case's impact on the IDEA, see Lynn Daggett, *Special Education Attorney's Fees: of Buckhannon, the IDEA Reauthorization Bills, and the IDEA as Civil Rights Statute*, 8 U.C. DAVIS J. OF JUV. L. & POL. 1 (2004).

76. See, e.g., *Zukle v. Bd. of Regents of Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999) (dismissed medical student). With regard to the otherwise qualified requirement, this court announced a burden shifting framework:

[T]he plaintiff-student bears the initial burden of producing evidence that she is otherwise qualified. This burden includes the burden of producing evidence of the existence of a reasonable accommodation that would enable her to meet the educational institution's essential eligibility requirements. The burden then shifts to the educational institution to produce evidence that the requested accommodation would require a fundamental or substantial modification of its program or standards. The school may also meet its burden by producing evidence that the requested accommodations, regardless of whether they are reasonable, would not enable the student to meet its academic standards. However, the plaintiff-student retains the ultimate burden of persuading the court that she is otherwise qualified.

Id. at 1047.

77. See *infra* note 322 and accompanying text.

78. At the law school where the author is a professor, the faculty recently reaffirmed its commitment in admissions to diversity by deciding to consider a number of forms of diversity in applicants, including disability. The law faculty does not give special consideration to disability or other diversity factors in readmissions decisions.

79. See 20 U.S.C.A. § 1411 (2000), amended by Act of Dec. 3, 2004, 20 U.S.C.A. § 1411 (West Supp. 2006) (allotting funds for special education).

education statute. Some have their own experience being served under the statute; others (at least those in public schools) likely saw the statute at work in their schools with certain of their classmates.⁸⁰ The IDEA⁸¹ took effect with the 1978-79 school year.⁸²

The statutes are set up quite differently; the IDEA is publicly funded; Section 504 and the ADA are unfunded mandates.⁸³ The IDEA applies to public preK-12 schools;⁸⁴ as applied to higher education Section 504 and the ADA apply to both public and private schools.⁸⁵ The IDEA's approach to eligibility and substantive entitlements is markedly different than that of the higher education statutes. Understandably, law students have expectations about coverage and services in law school based on their earlier experience with the IDEA.

1. Eligibility

Under the IDEA, a diagnosis of an impairment such as a learning disability or ADD is normally sufficient to qualify for services. The IDEA defines covered students as those aged 3 to 21, who are diagnosed with one or more of a statutory list of disabilities, and who need special education instruction.⁸⁶

The IDEA's approach to eligibility involves no "substantial limitation" analysis.⁸⁷ A diagnosed student is IDEA-eligible unless she functions so well that she does not need special education instruction,⁸⁸ and no level of student

80. Disability evaluators also tend to be more familiar with and oriented to the IDEA than to the laws governing higher education students. *See supra* notes 47-48 and accompanying text.

81. 20 U.S.C.A. §§ 1401-61 (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. §§ 1401-61 (West Supp. 2006).

82. The preK-12 regulations for Section 504 were modeled on and are quite similar to the IDEA. 34 C.F.R. §§ 104.31-104.38 (2006).

83. The ADA is Commerce Clause legislation. *See* 42 U.S.C. § 12101(b)(4) (2000). Section 504 is a condition on the receipt of federal education funds. *See* 29 U.S.C. § 794(a) (2000).

84. *See* 20 U.S.C.A. § 1413 (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1413 (West Supp. 2006) (requirements for local educational agencies).

85. *See supra* notes 16-21 and accompanying text.

86. 20 U.S.C.A. § 1401(3) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1401(3) (West Supp. 2006); 20 U.S.C.A. § 1412(a)(1) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1412(a)(1) (West Supp. 2006). The group of IDEA-eligible students is thus both broader and narrower than the group of higher education students covered by Section 504 and the ADA. On the one hand, Section 504 and the ADA potentially cover impairments not on the IDEA's statutory list, as well as past and perceived impairments. On the other hand, IDEA eligibility determinations are based primarily on a diagnosis, rather than the student's level of functioning, which has become primary under Section 504 and the ADA.

87. University disability services offices may similarly not do a substantial limitations analysis in reviewing an evaluation diagnosing a student with an impairment. *See* Association for Higher Education and Disability ("AHEAD") Best Practices Disability Documentation in Higher Education, *available at* <http://www.ahead.org> (last visited May 1, 2006) (referring to United Nations and other international definitions of disability but not referring to the *Toyota* average person analysis for determining whether an impairment is substantially limiting).

88. 20 U.S.C.A. § 1401(3)(ii) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1401(3)(ii) (West Supp. 2006).

functioning is too low for IDEA eligibility.⁸⁹ Thus, a gifted student with a learning disability or attention deficit disorder may well be eligible if the disability limits the student's ability to achieve her potential.⁹⁰

Schools have responsibility for identification and documentation of eligibility under the IDEA and the preK-12 Section 504 regulations; they must seek out, evaluate at school expense, and identify eligible students.⁹¹ As discussed earlier, under Section 504 and the ADA, higher education students have the burdens of identification, documentation, and requesting accommodations.⁹²

2. Protection From Punishment For Disability-Related Behavior

There is no "otherwise qualified" analysis under the IDEA limiting eligibility for students whose disabilities prevent them from meeting a school's standards. In fact, IDEA students are protected from discipline for conduct related to their disability.⁹³ An IDEA student cannot be punished, particularly in the form of suspension or expulsion, for behavior that is a manifestation of his disability.⁹⁴ While most discipline under the IDEA is nonacademic (public preK-12 schools do not academically dismiss students), this rule applies to all discipline. In contrast, Section 504 "forbids discrimination based on stereotypes about a handicap, but it does not forbid decisions based on the actual attributes of the handicap."⁹⁵

3. Substantive entitlements

In stark contrast to the "academic adjustments" required for higher education students, the IDEA (as well as the substantive Section 504 provisions for preK-12 public school students) establishes a right to a "free appropriate public

89. See, e.g., *Timothy W. v. Rochester, N.H., Sch. Dist.*, 875 F.2d 954 (1st Cir. 1989) (IDEA is a zero-reject statute; profoundly retarded and multiply handicapped student whom school's experts opine has no functioning cerebral cortex and thus cannot engage in higher order thinking is eligible under the IDEA).

90. See, e.g., *W. Chester Area Sch. Dist. v. Bruce & Suzanne C.*, 194 F. Supp. 2d 417 (E.D. Pa. 2002) (involving ADD student with high verbal IQ and much lower reading, spelling and math reasoning skills earning passing but not excellent grades who is held to be IDEA-eligible).

The typical evaluation approach for diagnosing learning disabilities under the IDEA requires a significant gap between the individual student's intellectual ability (normally via an IQ test) with the person's measured achievement. 34 C.F.R. § 300.541(a)(2) (2006). See Eichhorn, *supra* note 62, at 34 (providing a thorough overview of diagnosis, nature, and possible accommodations for students with learning disabilities).

91. 20 U.S.C.A. § 1412(a)(3) (2000), amended by Act of Dec. 3, 2004, 20 U.S.C.A. § 1412(a)(3) (West Supp. 2006) (IDEA); 34 C.F.R. § 104.32 (2006) (Section 504 preK-12 public school regulations).

92. See *supra* note 56 and accompanying text.

93. 20 U.S.C.A. § 1415(k) (2000), amended by Act of Dec. 3, 2004, 20 U.S.C.A. § 1415(k) (West Supp. 2006).

94. *Id.* at § 1415(k)(4)-(5) (2000), amended by Act of Dec. 3, 2004, 20 U.S.C.A. § 1415(k)(4)-(5) (West Supp. 2006); see also *Honig v. Doe*, 484 U.S. 305 (1986).

95. *Anderson v. Univ. of Wis.*, 841 F.2d 737, 740 (7th Cir. 1988).

education”⁹⁶ (“FAPE”) in the “least restrictive environment.”⁹⁷ Under the IDEA these obligations are met by having a team of persons, including the parents, prepare an Individual Education Program (“IEP”) for the student, in order to ensure that the student received the FAPE to which each IDEA-covered student is statutorily entitled. IEPs often include extensive personal instructional and other services such as speech and language therapy, occupational and physical therapy, and counseling, tutoring and personal aides, and sometimes even placement in a private school at the public school’s expense.⁹⁸ This experience creates expectations about eligibility and levels of required services in higher education which are at odds with what the federal disability discrimination statutes actually offer to higher education students.⁹⁹

4. Enforcement

Perhaps in part because of mistrust of schools based on their past failings in dealing with preK-12 students with disabilities, Congress chose to set up an elaborate, adversarial system in the IDEA for parents to challenge schools’ judgments.¹⁰⁰ This dispute resolution system includes an administrative hearing process for IDEA complaints presided over by impartial hearing officers trained in both law and special education.¹⁰¹ Courts hearing IDEA cases do so somewhat in the manner of hearing an administrative appeal of the hearing officer’s decision, receiving the record and decision from the administrative hearing, although in contrast to administrative appeals, courts hearing IDEA cases may take additional evidence.¹⁰² While money damages are generally not available for IDEA violations, attorney’s fees are available to prevailing parents.¹⁰³

5. Impact of the IDEA on law student perspectives

Law students, including those who participated in the IDEA, performed well enough academically to go on to enroll in and graduate from college, and did well enough there and on the LSAT to be accepted to law school. Acceptance to law

96. 34 C.F.R. § 104.33(a) (2005) (Section 504); 20 U.S.C.A. § 1412(a)(1) (2005) (IDEA).

97. 20 U.S.C. § 1412(a)(5) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1412(a)(5) (West Supp. 2006) (IDEA); 34 C.F.R. § 104.34(a) (2005) (Section 504).

98. *See* 34 C.F.R. § 300.24 (2005) (defining related services to include various therapies and counseling); 20 U.S.C.A. § 1412(a)(10) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1412(a)(10) (West Supp. 2006) (relating to placement in private schools).

99. Between their IDEA years and law school, students have been to college, where they have had experience with the reduced entitlements of higher education students with disabilities.

100. *See generally* 20 U.S.C.A. § 1415 (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1415 (West Supp. 2006). States must make a complaint process available, as well as mediation and administrative hearings.

101. 20 U.S.C. § 1415(f)(3) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1415(f)(3) (West Supp. 2006).

102. 20 U.S.C.A. § 1415(i)(2)(C) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1415(i)(2)(C) (West Supp. 2006).

103. 20 U.S.C.A. § 1415(i)(3) (2000), *amended by* Act of Dec. 3, 2004, 20 U.S.C.A. § 1415(i)(3) (West Supp. 2006).

school conveys to prospective law students that they have the ability to succeed in law school,¹⁰⁴ although law faculty are well aware that not everyone, including some very bright persons, can master the unusual mode of analysis, often referred to as “thinking like a lawyer,” that is at the heart of lawyering.

Such students enter law school with a history of academic success, some with significant support under the IDEA, and a belief that they will continue to succeed. Once in law school, the amount and level of work is significantly higher than most have encountered before, but for those with impairments, the level of support is much lower than before. Some students who were served under the IDEA in fact will not be persons with a disability under Section 504 and the ADA, perhaps because they did not self-identify and document an impairment, or perhaps because the impairment, with mitigators, does not substantially limit a major life activity and thus does not amount to a statutory disability. A number of such students are bright enough to have succeeded prior to law school without any participation in special education or accommodations. For law students who are covered by the federal disability discrimination statutes, the accommodations offered are often much more meager than the services provided under their IDEA IEP.

It is likely that at no point in their preK-12 education has such a student’s impairment been a barrier to academic participation, since the IDEA is a zero-reject statute, and special statutory rules prohibit discipline for behavior related to the student’s disability. Moreover, the vague higher education statutory language about what is required in terms of academic adjustments/accommodations, in concert with the kinds of services that were available under the IDEA, may cause frustration on the student’s part that assistance perceived to be both necessary and legally required is not being provided by the law school. Other students who have never been served or diagnosed as a person with a disability find themselves struggling, paying for an expert evaluation, and being told by the expert that they have a “disability” that has contributed to their current academic struggles. These students may well assume that the diagnosed “disability” means they are entitled to extensive services under disability laws.

When law students do not earn the minimum GPA required by the law school and are dismissed, it is devastating. Most students have taken out significant loans to finance their education.¹⁰⁵ Of course, most unhappily for the student, the dismissal means they likely will not have a career as an attorney.¹⁰⁶ Requesting

104. Law school accreditation standards limit law schools to admitting students the school believes will be academically successful. *See infra* Section VII.A.2.

105. *Cf.* Milam & Marshall, *infra* note 107, at 335 n.4 (noting that most dismissal litigation involves medical schools because of “financial investment and potential loss”).

106. *Id.* at 347 (“Presumably, students who have invested substantial time and money in a graduate or professional program, and who exhibit academic inadequacies throughout their enrollment are most likely to sue universities for academic dismissals. Such students expect to complete their education and practice their chosen profession. Indeed, the school has allowed them to continue their education in the belief that they will receive a degree. The university’s refusal to allow them to continue or to award a degree often results in litigation. On the other hand, the academically inadequate student whom the university dismisses from the program early does not have the same emotional, financial and personal investment . . . [and] is less likely to

new or different accommodations for an impairment than what they received from the law school in the past, whether the impairment is one the student has known about or is newly diagnosed as part of the readmissions process, perhaps accompanied by an evaluator's prediction of success if the accommodations are provided, offers dismissed students a concrete basis for their belief that they will be successful if readmitted. It also provides a legal basis for challenging the school's decision if it is not in their favor. However, as Parts IV and V of the article explain, in the vast majority of cases, students pursuing such claims will not get past summary judgment, as the court will defer to their school's academic judgment that the student should not be readmitted.

IV. JUDICIAL DEFERENCE TO ACADEMIC DECISIONS BY HIGHER EDUCATION AUTHORITIES

There is a tradition of Supreme Court deference to higher education authorities' academic judgments.¹⁰⁷ This tradition spans several decades and was recently reaffirmed in the University of Michigan affirmative action cases. Although the Court has not yet specifically heard a case in which a dismissed student made a disability discrimination claim, this deference has been extended to academic judgments even in the contexts of constitutional claims,¹⁰⁸ and disability¹⁰⁹ and

initiate a lawsuit.”) *Id.* In the author's experience, dismissed students rarely believe they are not capable of succeeding, if they are offered another chance.

107. For more thorough overviews of deference to higher education decisions than this article affords, see Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393 (1998) (comparing the lack of deference under the IDEA with the deference accorded universities, and arguing that, in part because of expertise, preK-12 schools also deserve the deference accorded higher education judgments); Steven D. Milam & Rebecca D. Marshall, *Impact of Regents of the University of Michigan v. Ewing on Academic Dismissals from Graduate and Professional Schools*, 13 J.C. & U.L. 335 (1987); Edward Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students In the Eighteen Months Before Grutter*, 30 J.C. & U.L. 583, 614 (2004). For a discussion of lower court deference to academic dismissal decisions not involving disability, see K.B. Melear, *The Contractual Relationship Between Student and Institution: Disciplinary, Academic, and Consumer Contexts*, 30 J.C. & U.L. 175, 196-99 (2003).

108. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding law school's race conscious admissions program was not unconstitutional race discrimination; announcing deference to law school faculty's judgment that a diverse student body was educationally desirable); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (rejecting due process claims of student who had failed the Boards Step 1 exam taken after the fourth year of his school's special six year B.A.-M.D. program); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (rejecting procedural and substantive due process claims by a medical school student who had been academically dismissed for unsatisfactory work in her clinical rotations).

109. See *Cnty. Coll. v. Davis*, 442 U.S. 397 (1979) (rejecting Section 504 claim by a student who was denied admission to a nursing program squarely because of her severe hearing impairment; agreeing with the school that this impairment prevented her from successfully and safely participating in the clinical portion of her training, as well as being successful in nursing positions such as those in the operating room or ICU where doctors and nurses are masked, and thus made her not “otherwise qualified” for admission).

other¹¹⁰ discrimination claims, as well as claims by academically dismissed students.¹¹¹ There is thus every indication that the Court would offer the same deference to a readmissions decision in the context of a disability discrimination claim.

In these cases, the Court has noted several underlying bases for deferring to academic dismissal decisions: they require “expert evaluation of cumulative information,”¹¹² they are subjective and thus unsuitable for close judicial review,¹¹³ judicial second-guessing could harm the faculty student relationship,¹¹⁴ and the educators who make these decisions normally do so on the basis of extensive observation/other personal knowledge of the student’s abilities and achievements.¹¹⁵ The Court has also noted that concerns of federalism¹¹⁶ and academic freedom¹¹⁷ counsel judicial deference.

These cases also offer insight into the triggers for and scope of the Court’s deference. In several cases (*Horowitz* and *Ewing*, as well as the faculty-established admissions standards in *Grutter*), the Court has noted the school’s careful decision-making process,¹¹⁸ suggesting that such care is a condition for judicial deference. In *Ewing*, the Court rejected the student’s attempt to use pattern evidence (i.e. pointing to allegedly dissimilar treatment of other students) as a basis for not deferring to the school’s judgment to dismiss him.¹¹⁹ The *Grutter* Court seemed to

110. *Grutter*, 539 U.S. at 317 (rejecting race discrimination claims under the Constitution and Title VI).

111. *See, e.g., Ewing*, 474 U.S. 214 (1985); *Horowitz*, 435 U.S. 78 (1978).

112. *Horowitz*, 435 U.S. at 90.

113. *Id.*

114. *Id.* (noting that “[t]he educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, ‘one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute.’” (quoting *Goss v. Lopez*, 419 U.S. 565, 594 (1975) (Powell, J., dissenting))).

115. *Ewing*, 474 U.S. at 228.

116. *Id.* at 229–30 (Powell, J., concurring).

117. *Id.* at 226 n.12. For an overview and history of the case law on academic freedom, see Cheryl A. Cameron, Laura E. Meyers & Steven G. Olswang, *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (2005).

One commentator notes that the disability discrimination statutes seem to be drafted and interpreted to protect academic freedom because of the limits on prohibited discrimination such as the otherwise qualified requirement and the idea that reasonable accommodations do not include those which alter a school’s academic standards. He suggests that without these limitations, or if disability-based affirmative action were required, academic freedom would be impaired. 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, 55–57 (1996).

118. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (referring to the detailed admissions policy written and approved by the law school faculty); *Ewing*, 474 U.S. at 216 (noting that the decision was made by a committee “[a]fter considering [the] record in some detail”); *Horowitz*, 435 U.S. at 85 (noting the “careful and deliberate” decision, which was made by a faculty committee and reviewed by the full faculty and administration).

119. *Ewing*, 474 U.S. at 227–28. With the school’s pattern and practice of allowing students a second opportunity to pass the Boards, even some students with many incomplete or low grades, the *Ewing* Court found that while “it may well have been unwise to deny Ewing a second chance,” dismissing him was “not beyond the pale of reasoned academic decision-making when

find it significant that the full faculty approved the admissions standards in question.¹²⁰ In all of the cases the decisions were made by a faculty committee or by the full faculty, rather than administrators or other officials such as the admissions officials who established the point-based undergraduate admissions found by the Court in a companion case to *Grutter* to amount to unconstitutional race discrimination.¹²¹ The Court consistently noted with apparent approval the use of context and personal knowledge to make the decisions: the students' entire academic records in *Horowitz*, *Ewing*, and *Davis*, the school's experience educating the students in *Horowitz* and *Ewing*, and the needs of the law school and society in *Grutter*. Finally, the Court appeared willing to characterize "academic" decisions and the considerations which underlie them and thus merit deference broadly: attendance and hygiene concerns in *Horowitz*,¹²² determining that handling stress, judgment, self-discipline, and setting priorities were important qualifications for successful practice as a physician in *Ewing*,¹²³ safety considerations in *Davis*,¹²⁴ and preparing future leaders of society and breaking down racial stereotypes in *Grutter*.¹²⁵

Not surprisingly, lower courts have followed the Supreme Court's lead and deferred in most cases to the academic decisions of higher education faculty, including disability-related academic decisions. Commentators reviewing these decisions offer a variety of reasons for this deference, including academic freedom,

viewed against the background of his entire career at the University." *Id.* at 227–28 (noting that a second attempt at the Boards might have averted the litigation).

120. *Grutter*, 539 U.S. at 315–16.

121. *Gratz v. Bollinger*, 539 U.S. 244, 253 (2003) (noting that the undergraduate admissions policy was promulgated by University admissions officers rather than academics, and did not rest on any specifically identified educational basis, and thus was not owed deference). One commentator aptly sums up the *Gratz* majority opinion as holding that the "undergraduate college's reliance on one single factor—race—was not the exercise of careful and deliberate educational judgment to which the judicial process might defer." Stoner & Showalter, *supra* note 107, at 614. "[T]here will be judicial deference to careful and deliberate educationally informed decision-making on campus but not to decisions in which educational judgment is not used." *Id.* at 615. This commentator contrasts the *Grutter* Law School's "multifaceted, individualized analysis of every candidate, in which the [Admissions] committee was allowed to rely on its years of experience to conduct a highly complex task" with the automatic point awards at the undergraduate level which "did not require application of any educational judgment." *Id.* at 615–16.

122. 435 U.S. at 81. As one commentator has noted, the dismissal in *Horowitz* may thus be characterized as less than purely academic, but the Court still found the decision was owed deference. Fernand Dutille, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619, 626–27 (2003) (noting that despite Supreme Court statements to the contrary in fact there is no bright line between academic and nonacademic bases for punishment; for example, the commentator asks whether a grade of F in a course for either not meeting attendance requirements or for cheating, causing a student's GPA to fall below the required minimum, is really an academic dismissal; suggesting that at least rudimentary due process be extended to academic decisions and that deference to nonacademic decisions is sometimes appropriate).

123. 474 U.S. at 228 n.13.

124. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 413 n.12 (1979).

125. 539 U.S. at 330–32.

courts' lack of expertise in academic matters, the inherent subjectivity of such decisions, the special, nonadversarial relationship between university and student, and perhaps the idea that universities are a "separate realm" whose working is not well understood by courts.¹²⁶ Review of these lower court decisions also reveals patterns: courts hearing student challenges to school academic decisions tend to defer if 1) the school used and adhered to fair processes to make its decision, including some articulated basis for the decision, 2) there is a reasonable or rational basis for the decision, and 3) there is no evidence of bad faith by the school.¹²⁷

V. ACADEMIC DISMISSAL READMISSIONS CASES AND OCR OPINION LETTERS¹²⁸

A. Law School Readmissions Process and Standards

1. Academic dismissal criteria

Law schools are governed primarily by their faculty,¹²⁹ which operate by majority vote. By vote of the faculty, law schools typically enact academic rules requiring students to maintain a minimum cumulative GPA. While the establishment of a minimum GPA is a discretionary decision, its application to specific students is objective and ministerial: students who do not achieve the minimum GPA are dismissed from the law school and are no longer enrolled students. Dismissals most often occur at the end of the first year of law school.

126. Leonard, *supra* note 117, at 57–60 (explaining basis of doctrine of academic abstention).

127. See generally Dupre, *supra* note 107 (discussing deference specifically in the context of disability claims); Dutile, *supra* note 122, at 643–48; Leonard, *supra* note 117 (involving an extended discussion of deference in the context of disability claims); Milam & Marshall, *supra* note 107.

128. This article examines disability discrimination claims in the context of readmissions requests by students who have been dismissed for academic reasons (i.e. failure to maintain minimum required grades). Discussion of disability discrimination claims by students dismissed for nonacademic reasons (e.g. misconduct) is beyond the scope of this article. For examples of such nonacademic claims, however, see Letter to: Gonzaga University, 27 NDLR 286 (OCR 2003) (university did not engage in disability discrimination when it permanently suspended law student with history of mental illness for "continued threatening and harassing behavior," including "harassing and threatening telephone calls to . . . faculty and other students," "impersonation of another student" and "threats of bodily harm" which violated university conduct code); Letter to: University of Idaho, 13 NDLR 127 (OCR 1998) (finding no disability discrimination where student with emotional, cognitive, and physical disabilities was suspended for one year for failing to disclose criminal history on his application, and penalty for nondisclosure was not inconsistent with discipline imposed on students without disabilities). These OCR opinions suggest that where the student is dismissed for violating some general conduct rule which is applied consistently to all students, with or without disabilities, and where the school considers disability information as appropriate in applying the rule (for example, in addressing relevant state-of-mind issues), it appears that nonacademic discipline does not violate disability discrimination laws.

129. See *infra* notes 348–349 and accompanying text.

Because the actual dismissal “decision” is normally a ministerial one based on a student’s failure to achieve a disability-neutral minimum GPA standard, there is generally no plausible basis for a student with a disability to challenge her dismissal as discriminatory.¹³⁰

2. Readmissions process and criteria

Many law schools offer academically dismissed students a chance to petition in writing to be readmitted to the law school, with supporting documentation of the student’s choosing.¹³¹ Other law schools provide no opportunity to dismissed students to apply for readmission, at least if their GPA falls below a certain level.¹³² The process and standards for readmission are generally established in an academic rule enacted by vote of the law school’s faculty.¹³³ Usually, a faculty committee reviews readmissions applications and other relevant information such as the student’s entering LSAT and GPA credentials, and seeks comments from the student’s teachers. Generally, there is not a formal hearing but the student has a chance to appear before the committee in order to make a statement and/or to answer questions from committee members. The law school faculty may delegate the power to make readmissions decisions to this committee, or the committee may prepare a recommendation for a full faculty vote.

Standards for readmission generally center on two issues: 1) whether the student’s failure was for a good reason or due to “extraordinary circumstances,” which will no longer be an obstacle to the student’s success, and 2) whether the student will be successful if she is readmitted. The student typically has the burden of proving she meets the readmission standard. In contrast to the actual

130. Of course, if a law school sometimes waived minimum GPA requirements and did not actually dismiss all students who did not earn the minimum required GPA, a student with a disability could claim discrimination if that same law school refused to waive the GPA requirement and dismissed her. *Cf.* Letter to: Cent. Carolina Cmty. Coll., 31 NDLR 78 (OCR 2005) (determining veterinary technician program followed its own policy of not permitting more than one readmission to any dismissed student; finding no discrimination against dismissed student with disability who was refused a second readmission).

131. *Anderson v. Univ. of Wis.*, 841 F.2d 737, 739 (7th Cir. 1988); *Scott v. W. State Univ. Coll. of Law*, 112 F.3d 517, No. 96-56088, 1997 WL 207599, at *1 (9th Cir. 1997) (table) (unpublished decision); *Marlon v. W. New England Coll.*, No. Civ.A. 01-12199DPW, 2003 WL 22914304 at *2-3 (D. Mass. Dec. 9, 2003) (awarding summary judgment to the law school), *aff’d*, 29 NDLR 139 (1st Cir. 2005); *Allison v. Howard Univ.*, 209 F. Supp. 2d 55, 63 (D.D.C. 2002) (dealing with student who submitted five readmissions petitions); *Gill v. Franklin Pierce Law Ctr.*, 899 F. Supp. 850, 852-55 (D.N.H. 1995); *Aloia v. N.Y. Law Sch.*, No. 88 CIV 3184 (CSH), 1988 WL 80236 (S.D.N.Y. July 27, 1988).

132. *See, e.g.*, Letter to: Sw. Univ. Sch. of Law, 26 NDLR 211 (OCR 2003) (finding no discrimination by school without a readmissions process); Letter to: Univ. of Akron, 26 NDLR 263 (OCR 2003) (2.0 minimum GPA; students below 1.8 have no opportunity to petition for readmission); *cf. McGregor v. La. State Univ.*, 3 F.3d 850, 855-56 (5th Cir. 1993) (school rule requiring dismissed students to sit out a year); Letter to: Tex. Wesleyan Univ., 13 NDLR 208 (OCR 1998) (same).

133. *See, e.g.*, Letter to: Univ. of Akron, 26 NDLR 263 (OCR 2003) (noting, as one of the reasons to defer to the school’s readmission judgment, that the school’s rules concerning minimum GPAs were recommended by a faculty committee and adopted by the full faculty).

dismissal, application of these readmissions standards involves discretion. Consequently, students can and have claimed that their law school's readmissions standard has been applied to them in a discriminatory way.

B. Court Cases Addressing Disability Discrimination Claims By Academically Dismissed Law Students

Eight¹³⁴ published opinions involve academically dismissed law students denied readmission claiming disability discrimination under federal statutes. Each of these eight cases reached identical procedural results: summary judgment for the school,¹³⁵ affirmed by the First, Fifth, Seventh, and Ninth Circuits in each of the appealed cases.

The cases make it clear that a disability discrimination complaint does not provide an opportunity to review the merits of a law school's decision not to readmit a student who has been dismissed for academic failure. Anti-discrimination laws such as Section 504 do not guarantee correct decisions about persons with disabilities. What they do require is a decision which is not the result of illegal discrimination. This is especially true in the context of a school's academic judgments about a student, a context in which the Seventh Circuit notes, in *Anderson v. University of Wisconsin*, that "[t]he Supreme Court has repeatedly admonished courts to respect the academic judgments of university faculties."¹³⁶

134. *Murphy*, 56 F.3d 59; *McGregor*, 3 F.3d 850; *Anderson*, 841 F.2d 737; *Scott*, 1997 WL 207599; *Marlon*, 2003 WL 22914304; *Allison*, 209 F. Supp. 2d 55; *Gill*, 899 F. Supp. 850; *Aloia*, 1988 WL 80236. For another case brought by a law student with an alleged disability who had been dismissed twice, but was offered readmission, see *Colombini v. Members of the Bd. of Dirs. of the Empire Coll. Sch. of Law*, No. C9704500CR, 2001 WL 1006785 (N.D. Cal. Aug. 17, 2001) (granting summary judgment to the school). In this case, the school and the student disagreed over the precise accommodations the school would offer to the student, but the student did reenroll and eventually graduated. *Id.* The court in this case found insufficient evidence that the student had a disability; he presented the school with letters from a psychiatrist referring to an unspecified disability. *Id.* He refused to get a second opinion at the school's expense, and he offered no evidence of failure to provide reasonable accommodations or other discrimination. *Id.* at *1, *6-7.

135. See also *Robinson v. Hamline Univ.*, No. C4-93-20741994, 1994 WL 175019 (Minn. Ct. App. May 10, 1994) (affirming summary judgment for law school in case brought by dismissed law student under state discrimination law modeled after Section 504).

136. *Anderson*, 841 F.2d at 741 (citing *Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (rejecting claim by academically dismissed student); *Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (rejecting claim by academically dismissed medical school student)). For another case where a court announced a policy of deference to a law school's readmission decision and affirmed a summary judgment for the school, see *Hash v. Univ. of Ky.*, 138 S.W.3d 123, 127-28 (Ky. Ct. App. 2004) (citing *Anderson*, *Horowitz*, and *Ewing*) (involving a student with a disability who voluntarily withdrew from first semester of law school before taking exams because of depression and then was denied readmission in part because of references in his application materials to a mentally ill law student who went on a shooting spree); *id.* at 126 n.4 (noting that "a law school is entitled to consider a candidate's psychological and emotional problems, as any mental impairment may be relevant to the . . . ability to cope with the stresses of law school, . . . to deal with constant pressures from other students and professors, and to withstand the demands associated with classroom attendance and participation"); *id.* at 129 n.11 (illustrating that where a student has not requested accommodations, a school's failure to provide accommodations does

In *Anderson*, a law student who had been academically dismissed filed several claims, including disability discrimination. The student was an alcoholic¹³⁷ with a troubled academic history,¹³⁸ which included an incident in which he “harassed and threatened his legal writing partner” while drunk and earned a D in that course.¹³⁹ The student petitioned for readmission to a committee, claiming drinking had caused his academic failure and that he was now in recovery. The committee denied the petition, finding that he still drank, he was not prepared for the stress of law school, and he would not succeed if readmitted.¹⁴⁰

The Seventh Circuit found the student not otherwise qualified because his grades did not meet the school’s required standards, although that failure may have been directly caused by the alcoholism disability.¹⁴¹ The court found no evidence of discrimination even though other students with somewhat lower grades had been readmitted, the student’s grades were quite close to the required minimum,¹⁴² and in spite of an opinion offered by the student’s counselor that the student could now handle law school.¹⁴³

The court framed the issue before it:

The question is not whether a court believes that [the student] could handle the work. It is whether the University discriminated against him because of his handicap – that is, excluded him even though it would have readmitted a student whose academic performance and prospects were as poor but whose difficulties did not stem from a “handicap”. . . . [T]he Rehabilitation Act requires only a stereotype-free assessment of the person’s abilities and prospects rather than a correct decision.¹⁴⁴

Applying this standard, and in spite of the counselor’s opinion, the appeals court affirmed a summary judgment for the school. The court explained that “[n]othing in the record suggests that the University’s decision was based on stereotypes about [the student’s disability] as opposed to honest judgments about how [the student] had performed in fact and could be expected to perform.”¹⁴⁵

not violate the law).

137. *Anderson*, 841 F.2d at 739. The school did not contest the student’s assertion that he was a statutorily covered person with a disability by reason of his alcoholism, although no accommodations were requested. *Id.*

138. *Id.* His first semester grades were below the required average. *Id.* Moreover, he had not documented receipt of an undergraduate degree, and was not allowed to finish his first year. *Id.* He was allowed to return the next year, and then to withdraw. The next year he again reenrolled, earned grades below the required minimum, and was dismissed. *Id.*

139. *Id.*

140. *Id.* The student grieved the denial to a different committee, which also declined to readmit him. *Id.*

141. *Id.* at 740 (citing *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979)).

142. *Id.*

143. *Id.* at 741.

144. *Id.* at 741 (footnote and citations omitted). The court noted that the school had allowed the student to re-enroll several times, and to take courses in its business school, *id.*, and also considered his drinking and subsequent misconduct toward a classmate as evidence of a lack of hostility toward the student. *Id.*

145. *Id.*

The court also noted that “[n]ot a shred of evidence in the record suggests that the University held a stereotypical view of [the student’s disability]. The committees and the Vice Chancellor looked, hard, at what [the student] had done and could do.”¹⁴⁶

The court specifically rejected the student’s claim that a jury should hear the matter and hopefully agree with the student’s counselor’s assessment that the student could now be successful in law school:

The [Rehabilitation] Act does not designate a jury, rather than the faculty of the Law School, to decide whether a would-be student is up to snuff. The Law School may set standards for itself, and jurors unacquainted with the academic program of a law school could not make the readmissions decision more accurately than the faculty of the Law School; the process of litigation would change the substantive standard in addition to raising the costs of litigation.¹⁴⁷

The court concluded that “[l]aw schools may consider academic prospects and sobriety when deciding whether an applicant is entitled to a scarce opportunity for an education. At all events, the University acted on the basis of Anderson’s performance rather than his condition.”¹⁴⁸

*Allison v. Howard University*¹⁴⁹ involved the unfortunate situation of a law student dismissed at the end of his third year, presumably after investing much time and money in a legal career, after failing a twelve-credit clinical course.¹⁵⁰ Various law school committees rejected an appeal of the clinic grade and five readmissions petitions.¹⁵¹ In his readmissions petitions, the student informed the law school for the first time that he had a disability, “temporary emotional distress,” beginning in the fall of his third year.¹⁵² The court granted summary judgment to the school and other defendants on all claims.¹⁵³ As to the Section 504 claim, the court found that the student “likely would have serious difficulty” proving that he was a covered person with a disability and that he was otherwise qualified for readmission.¹⁵⁴ The court also found “not even a scintilla of

146. *Id.* at 742.

147. *Id.* at 741. *See also Scott*, 1997 WL 207599 (affirming summary judgment for law school where dismissed student claimed disability discrimination; student who had been dismissed for academic failure was not otherwise qualified, and student did not even assert a disability in initial request for readmission).

148. *Id.* at 742.

149. 209 F. Supp. 2d 55 (D.D.C. 2002).

150. *Id.* at 57–58. The student had also done poorly in other courses. *Id.* at 58 (noting the D’s in three courses in the first semester of law school and a failing grade in Legal Writing III).

151. *Id.* at 58.

152. *Id.* It is unclear whether the student provided documentation of his condition or merely asserted it.

153. *Id.* at 63. The student sued the law school and the clinic professor who failed him, claiming they violated Section 504 by not readmitting him and by not offering reasonable accommodations. He also asserted constitutional and state law tort and contract claims. *Id.* at 56–57.

154. *Id.* at 63.

evidence” that the student’s readmissions petitions were denied solely by reason of his alleged disability, finding instead, citing *Anderson*, that the student was denied readmission because of his academic performance.¹⁵⁵ In granting summary judgment on the claim that failure to offer accommodations and to change the clinic grade amounted to breach of contract, the court cited *Horowitz* and *Anderson* and announced it would defer to the law school’s judgments.¹⁵⁶

In *Gill v. Franklin Pierce Law Center*,¹⁵⁷ another third year law student was dismissed after receiving poor grades. The student petitioned for readmission to a faculty committee, which denied it, as did the full faculty on appeal, citing lack of ability to succeed and an inadequate plan¹⁵⁸ to address the cause of the failure.¹⁵⁹ The student sued under Section 504, noting that on his application’s personal statement he reported that he was an adult child of an alcoholic.¹⁶⁰ The court granted the school’s motion for summary judgment.¹⁶¹ It also found no evidence that the student was otherwise qualified for readmission because he did not meet the ability-to-succeed readmission standard.¹⁶² Citing cases involving dismissed medical students, the court also found that students with disabilities’ ability to succeed if readmitted should be predicted assuming the provision of reasonable accommodations, so long as “the student . . . put . . . the school on notice of his handicap by making ‘a sufficiently and specific request for accommodations.’”¹⁶³ In another case involving the same law school, the First Circuit affirmed a summary judgment for the school in a case brought by a dismissed law student with diplopia, a vision impairment, finding no evidence that the decision to dismiss was based on disability discrimination rather than the stated reason that the student “lacked the analytic skills” necessary for law school success.¹⁶⁴

In *Scott v. Western State University College of Law*,¹⁶⁵ the Ninth Circuit

155. *Id.*

156. *Id.*

157. 899 F. Supp. 850 (D.N.H. 1995).

158. *Id.* at 854–55. The student’s plan included quitting his part-time employment, a change in diet, a study schedule, and “medita[tion] . . . to overcome my anger at whatever institutional deficiencies I see at [the law school].” *Id.* at 855.

159. *Id.* at 852. The Committee’s denial also noted other problems, from failure to timely respond to the committee’s questions to noncompliance with various law school rules. *Id.*

160. *Id.* at 851, 855. The student claimed he disclosed that he suffered from post traumatic stress syndrome on his statement, but the court’s review of the statement indicated otherwise. *Id.* at 855–56.

161. *Id.* at 857. The student was proceeding *pro se* and did not file a response to the school’s motion. The school did not dispute, for purposes of its motion, the first element of the prima facie case—the student was a covered person with a disability. *Id.* Under current law, the school would appear to have had a strong argument that the student did not have a statutory disability.

162. *Id.* at 855.

163. *Id.* at 855 (citing *Nathanson v. Med. Coll. of Pa.*, 926 F.2d 1368, 1381 (3d Cir. 1991)). The court found that the disclosure on the student’s application’s personal statement was insufficient to meet this standard. *Id.* at 855–56.

164. *Murphy v. Franklin Pierce Law Ctr.*, 56 F.3d 59 (1st Cir. 1995).

165. 112 F.3d 517, No. 96-56088, 1997 WL 207599 (9th Cir. 1997) (table) (unpublished decision).

affirmed summary judgment for the law school on an academically dismissed first year law student's Section 504 and ADA Title III claims.¹⁶⁶ The student claimed a disability for the first time in his application for readmission.¹⁶⁷ The court found that the student's academic dismissal rendered him not otherwise qualified.¹⁶⁸ Moreover, since the school had no knowledge of the alleged disability when it dismissed him, the court found that the dismissal could not have resulted from disability discrimination.¹⁶⁹ The student requested accommodations not specified in the opinion; the court found that accommodations would not be required since they would require the school to "lower or substantially modify [its] standards."¹⁷⁰

The most recent of this group of cases is *Marlon v. Western New England College*.¹⁷¹ In *Marlon*, a dismissed student was granted readmission and accommodations consisting of a reduced course load, note-taking, taped classes, and extra time for and typing of exams for newly disclosed disabilities of carpal tunnel syndrome, anxiety, depression, and panic attacks.¹⁷² Despite the accommodations and taking classes for the second time, the student again failed to earn the required grades.¹⁷³ She then obtained a diagnosis of a learning disability and requested additional accommodations, but this time was denied readmission, and sued.¹⁷⁴ As discussed earlier in this article, the court found that the student was not a covered person with a disability under the federal statutes.¹⁷⁵ The *Marlon* court also noted that the school was not on notice of the learning disability until after the student had been dismissed for the second time, and thus, it could not be the basis for illegal discrimination.¹⁷⁶ Finally, responding to the student's claim that the school regarded her as having a disability because it received a letter stating she had a disability and needed accommodations, the court found that "[t]he mere fact that an ADA defendant makes an accommodation is not evidence that it regarded the plaintiff as having a disability."¹⁷⁷

166. *Id.* at *2.

167. *Id.* at *1.

168. *Id.*

169. *Id.* The court's reasoning is unconvincing here; the claim centered on the denial of readmission rather than the ministerial "decision" to dismiss, and the school did have notice of the claimed disability when it denied readmission.

170. *Id.*

171. No. Civ.A. 01-12199DPW, 2003 WL 22914304 (D. Mass. Dec. 9, 2003) (awarding summary judgment to the law school), *aff'd*, 29 NDLR 139 (1st Cir. 2005).

172. *Id.* at *1-2.

173. *Id.*

174. *Id.* at *2-3. She made claims under Section 504, the ADA, and state discrimination laws, asserting in part that the school failed to effectively implement her accommodations. *Id.* at *4-5.

175. *Id.* at *7. *See supra* note 44 and accompanying text. The court did not reach the issue of the implementation of the accommodations for the student.

176. *Id.* at *8 & n.18. As in *Scott*, the court's reasoning is questionable here; the claim involved the denial of readmission, not the academic dismissal. Again, the school had notice of the claimed disability when it denied readmission.

177. *Id.* at *9 (citing employment cases so holding). The court also noted that the letter, from the school's disability services office, did not find and did not make a determination that the

Like *Anderson, McGregor v. Louisiana State University*¹⁷⁸ is a case in which a federal appeals court, this time the Fifth Circuit, announced a policy of deference to a law school's readmission decision. In *McGregor*, a student with neurological and spine injuries causing fatigue and pain received some accommodations from the law school but was denied others, and had continuing academic difficulty in his first year.¹⁷⁹ The next year, the student received additional accommodations as he was now wheelchair-bound, but in the spring was denied the accommodation of taking his exams at home, and again had academic difficulty.¹⁸⁰ He was offered readmission again, but to retake his spring 1L classes, and rejecting the student's requests for advanced standing, a part-time schedule, and taking his exams at home as accommodations.¹⁸¹

The Fifth Circuit affirmed summary judgment on all claims for the school.¹⁸² The court found that the accommodations requested (as well as some of the accommodations the school agreed to provide) went beyond those which were legally required and would work to alter the school's standards, specifically mentioning the school's academic decision to require full-time status.¹⁸³ The court held that "absent evidence of discriminatory intent or disparate impact, we must accord reasonable deference to the Law Center's academic decisions."¹⁸⁴ Finding no evidence of discriminatory intent, the court deferred to the school's academic decisions to require full-time status and to require that exams be taken in class, decisions that were based in part on maintaining equity among students.¹⁸⁵ The student was found not to be otherwise qualified for retention because he could not meet the school's academic standards with reasonable accommodations.¹⁸⁶

student was a statutorily covered person with a disability. *Id.* at *10.

178. 3 F.3d 850 (5th Cir. 1993).

179. *Id.* at 854–58. The school provided the student with a special parking permit and extra time on an exam but denied the student part time status as an accommodation, as the school had made an academic judgment that all first year students must be full-time. *Id.* at 854–55, 858. The student did not earn the required minimum grades in his first semester. *Id.* at 855. Nonetheless, the school allowed him to audit two classes in the spring and provided individual tutoring, and he earned passing grades. *Id.* Despite the school's rule requiring dismissed students to wait a year, he was readmitted for the next fall as a full-time probationary first year student. *Id.* at 855–56. The school's admissions and academic policies at the time resulted in a high student attrition rate. *Id.* at 854 n.3.

180. *Id.* at 856. His grades were passing in the fall but below passing in the spring. *Id.*

181. *Id.* at 857. The student and school could not agree, and the student sued not only the school, but each of the faculty committee members personally asserting Section 504, ADA, constitutional and state law claims. *Id.* at 857, 862–67.

182. *Id.* at 868.

183. *Id.* at 859–60. The court noted that not requiring alteration of academic standards reflected Section 504's balancing of the school's right to set its own academic standards and the right of students with disabilities to be free from discrimination. *Id.* at 858 (citing *Alexander v. Choate*, 469 U.S. 287, 300 (1985)).

184. *Id.* at 859 (citations omitted). The court assigned to the student the burden of demonstrating that his requested accommodations were reasonable. *Id.* at 859 n.11.

185. *Id.* at 859–60.

186. *Id.* at 860.

Finally, *Aloia v. New York Law School*¹⁸⁷ involved a third year student dismissed for low grades whose petition for readmission and request for reconsideration were denied.¹⁸⁸ The student then submitted a letter from his doctor indicating that he had central nervous system metabolic disorder.¹⁸⁹ The school again reconsidered the case and offered to allow the student to reenroll at a later time, if he supplied medical documentation that the condition was sufficiently under control so as to allow him to resume his studies.¹⁹⁰ The court initially granted a preliminary injunction allowing the student to reenroll and take exams immediately.¹⁹¹ Ultimately, however, the court granted summary judgment for the school. The court held that it would defer to the school's decision,¹⁹² and rejected the student's attempt to prove discrimination by comparing the treatment of his petition with those of other dismissed students.¹⁹³ The court also found that the school was entitled to find the student's medical documentation insufficient and require a medical statement that his condition was sufficiently under control so that he could resume his studies.¹⁹⁴

* * * * *

These cases' uniform result – summary judgment for the school – did not vary. However, the nature of the claimed disability in these cases varied greatly from physical to emotional to mental. Further, some dismissals occurred at the end of the first year and others in the third year, when the students presumably had made major investments, financial and otherwise, in preparing for a career as an attorney.

Several patterns and areas of guidance for law schools are apparent from this group of cases. First, in a number of the cases (*Anderson, Allison, Marlon, and McGregor*), the students had a long record of academic struggles in law school, and several students (*Anderson, Marlon, and McGregor*) had been given second

187. No. 88 CIV 3184 (CSH), 1988 WL 80236 (S.D.N.Y. July, 27 1988).

188. *Id.*

189. *Id.* at *3.

190. *Id.* at *4.

191. *Id.* at *5. The court said that this decision was based on the possibility of irreparable harm, rather than a showing of likely success on the merits. *Id.*

192. *Id.* at *8 n.4 (“Faculty academic evaluations of this nature are entitled to considerable deference from the courts.”).

193. *Id.* The court distinguished one other dismissed student's situation, and as to two other more similar cases in which the students were readmitted noted:

[T]he Law School's policies reserve to the Academic Status Committee the right to consider each student on an individual basis. In the case of the two students in question, they had demonstrated higher levels of academic performance than had Aloia. The Law School says, in substance, that those performances furnished sufficient evidence of potential to retain the students in question.

Id.

194. Physician statements supplied to the school indicated “this condition is treatable and has an excellent prognosis for full functioning,” and it is “imperative that Richard remain in Law School so as to facilitate” his treatment by medication, were found by the court to “stop well short of expressing an opinion that treatment has succeeded to the point where the individual is able to ‘meet all of a program's requirements in spite of his handicap.’” *Id.* at *9 n.5.

chances to succeed before the final dismissal. These long term academic struggles and prior second chances may have been considered by the courts as evidence of the absence of any hostility toward students with disabilities, as the *Anderson* court appeared to do. On the other hand, *McGregor* hints that perhaps the law school had done the student a disservice by waiving so many standards and rules.

Second, in two cases, *Anderson* and *Aloia*, the students attempted to create an inference of discrimination from pattern evidence. In both of these cases, the courts rejected an inference of bad faith from the student's proffered evidence that other dismissed students had been treated differently. Third, in *Marlon*, the only case decided after *Toyota*, the school successfully convinced the court that the student's impairments did not amount to a statutory disability, despite the opinion of the student's evaluator; in another, *Allison*, the court questioned the student's status as a person with a disability. Fourth, in several cases, for example *Anderson* and *Allison*, the court announced it owed deference to the school's decision not to readmit; in *MacGregor* this deference was extended to the school's decision as to whether providing requested accommodations would alter the school's academic standards. Fifth, in several cases (*Anderson*, *Gill*, *Scott*, *Marlon*, and *Aloia*), the student claimed a disability for the first time after the dismissal. *Aloia* suggests that, in this event, the school can request documentation beyond that supplied by the student and can condition readmission upon additional information. Finally, *Gill* indicates that the school should attempt to make a prediction about the student's ability to succeed with reasonable accommodations.

C. Court Cases Addressing Disability Discrimination Claims By Other Academically Dismissed Higher Education Students

Disability discrimination cases brought by academically dismissed students against non-law school higher education programs¹⁹⁵ show a similar pattern to those brought against law schools. In most such non-law school cases, summary judgment or dismissal was granted to the school.¹⁹⁶ Frequently, the courts in these

195. In a very early Section 504 case in which the court engaged in extensive analysis to determine such now obvious issues as whether there is a private right of action and whether administrative exhaustion is required prior to filing suit, a court addressed a disability discrimination claim by a doctor with multiple sclerosis who was rejected by a psychiatric residency program at a teaching hospital. *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1377-82 (10th Cir. 1981). While the case involves admission to a residency program rather than academic dismissal, *Pushkin* is worth noting as the court in that case determined that the doctor was rejected on the basis of stereotyped information about his disability, and in spite of a letter from the doctor's supervisor in his prior residency commenting that the doctor performed well and his condition did not impair his performance. *Id.* at 1387-88 (noting also that interview ratings by a four-person committee were the articulated basis for the denial only for that applicant, and describing stereotyped comments by committee members and assumptions by them about the effects of the doctor's condition). One commentator suggests that the court in this case performed an analysis like that of intermediate scrutiny under the Equal Protection Clause. Dupre, *supra* note 107, at 412.

196. See *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1067 (9th Cir. 2005) [hereinafter *Wong II*] (stating that a dismissed medical student with learning disability who performed well academically throughout college and two years of medical school does not have a "substantially

limiting” statutory disability); *Betts v. Rector and Visitors of the Univ. of Va.*, 30 NDLR 241 (4th Cir. 2005) (involving a premedical student with a learning disability—found in an earlier decision not to amount to a statutory disability—whose grades improved after accommodations but who did not achieve the required cumulative GPA in a special program for guaranteed entry into the medical school, and whose acceptance was rescinded because of grades); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999) (upholding the dismissal of a medical student); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432 (6th Cir. 1998) (involving a student with ADD who failed out even after being readmitted and receiving accommodations); *Wolsky v. Med. Coll. of Hampton Roads*, 1 F.3d 222 (4th Cir. 1993) (holding that the disability claims of a medical student with panic disorder are time-barred); *Pacella v. Tufts Univ. Sch. of Dental Med.*, 66 F. Supp. 2d 234 (D. Mass. 1999) (ruling that a dismissed dental student with a vision problem did not have a statutorily protected disability where the impairment was largely mitigated with corrective lenses; no discrimination involved in his dismissal); *Ferrell v. Howard Univ.*, 17 NDLR 194 (D.D.C. 1999) (medical student with ADD who failed Boards Step 1 three times; finding no discrimination where school was unaware of the disability which was not yet diagnosed at the time readmission was refused; also noting split of authority on whether ADD was an ADA disability); *Leacock v. Temple Univ. Sch. of Med.*, 14 NDLR 30 (E.D. Pa. 1998) (deciding that there is no discrimination where a medical student merely mentioned to the school after she was dismissed that she might have a learning disability and the school was unaware of a diagnosed disability at the time readmission was refused and the school employed fair procedures to allow dismissed students to appeal their dismissal; the school is not required to reconsider its decision after a disability is documented; claims are also time-barred); *Lewin v. Med. Coll. of Hampton Roads*, 910 F. Supp. 1161 (E.D. Va. 1996) (dismissed medical student); *Ellis v. Morehouse Sch. of Med.*, 925 F. Supp. 1529 (N.D. Ga. 1996) (upholding dismissal of fourth year medical student with dyslexia); *Goodwin v. Keuka Coll.*, 929 F. Supp. 90, 94 (W.D.N.Y. 1995) (occupational therapy student who was dismissed under a rule requiring automatic dismissal upon failing two field placements was later diagnosed with mental illness; finding that a “student may not challenge a particular grade or other academic matter absent demonstrated bad faith, arbitrariness, capriciousness, irrationality, or a constitutional or a statutory violation”); *Id.* (stating also that “a student who is automatically terminated from a program who brings subsequent evidence of an alleged learning disability . . . [is not] entitled under federal law to reconsideration of that decision based on new evidence”); *Riedel v. Bd. of Regents of State of Kan.*, 4 NDLR 276 (D. Kan. 1993) (ruling that a student lacked standing since he was neither enrolled nor an applicant where the medical student alleging learning disability was diagnosed two years after dismissal for failing Boards Step 1 four times); *Hanlon v. Bd. of Regents of the Univ. of Wis. Sys.*, 27 NDLR 274 (Wis. Ct. App. 2004) (asthmatic student dismissed from physician assistant training program; finding no discrimination where the school was unaware of the disability at the time of dismissal; finding no discrimination where the student merely mentioned to the school after she was dismissed that she had asthma and the school was unaware of a diagnosed disability at the time readmission was refused); *cf. Garcia v. S.U.N.Y. Health Sci. Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001) (dismissed medical student who did not earn required grades even after retaking the first year, subsequently diagnosed with attention deficit disorder and learning disability; granting summary judgment on claim seeking only damages and not injunctive relief because of limitations on the circumstances under which damages are available under Title II of the ADA and Section 504); *Amir v. St. Louis Univ.*, 184 F.3d 1017 (8th Cir. 1999) (medical student with obsessive compulsive disorder who failed his clinical work; affirming summary judgment for the school where no evidence indicated dismissal was based on discrimination rather than failing grades, but reversing summary judgment for the school on retaliation claim where dismissal and other adverse actions followed the student’s filing of a grievance); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998) (medical student with test anxiety and unsatisfactory grades who refused opportunity to repeat coursework); *Tips v. Regents of Tex. Tech Univ.*, 921 F. Supp. 1515 (N.D. Tex. 1996) (entering judgment for the school following a bench trial on a disability claim by a dismissed student in a graduate psychology program who failed her written qualifying exams).

cases deferred to the school's academic judgments surrounding the readmission.¹⁹⁷

Only one non-law school case resulted in a judgment for the student. The few non-law school cases in which the dismissed student's claim survived summary judgment offer guidance with regard to what will cause a court not to defer to a school's educational judgment not to readmit a dismissed student: primarily, affirmative evidence of discriminatory intent or bad faith.

1. Evidence of discriminatory (bad faith, stereotypical, and/or retaliatory) thinking

When a school has considered a student to be performing well until she takes a leave of absence for a disability, and only then begins to express concern about her performance, it suggests the performance concerns are a pretext for disability discrimination and will preclude judicial deference and, correspondingly, summary

197. See, e.g., *McGuinness*, 170 F.3d at 979 (according "deference with regard to the level of competency needed for an academic degree"); *Betts*, 30 NDLR 241, at 1089 (noting that the school had:

two choices: ignore years of objective evidence, . . . and allow *Betts* to matriculate based solely on good grades on five tests taken (with double time) over 18 days; or rely on *Betts*' entire academic record . . . and render its academic judgment. . . . We decline to limit the faculty's academic judgment in this fashion. 'Courts must also give deference to professional academic judgments when evaluating the reasonable accommodation requirement.'

(quoting *Kaltenberger*, 162 F.3d at 436)); *Zukle*, 166 F.3d at 1047–48 (noting:

[W]e must be careful not to allow academic decisions to disguise truly discriminatory requirements. The educational institution has a 'real obligation . . . to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation.' Once the educational institution has fulfilled this obligation, however, we will defer to its academic decisions.

(citing *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25–26 (1st Cir. 1991)); *Kaltenberger*, 162 F.3d at 436–37 (relying on *Horowitz* and *Ewing* to hold that the school's academic decisions concerning which accommodations are and are not reasonable are entitled to deference, noting "[w]e should only reluctantly intervene in academic decisions 'especially regarding degree requirements in the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession'" (quoting *Doherty v. S. Coll. of Optometry*, 862 F.2d 570 (6th Cir. 1988)); *Ferrell*, 17 NDLR at 839 (citation omitted) ("[A] judgment by a school official that a student has not performed adequately to meet the school's academic standards is a determination that usually calls for judicial deference."); *Leacock*, 14 NDLR at 131 (citation omitted) ("Where there is an academic dismissal, . . . 'courts are ill-equipped to review the largely subjective academic appraisals of the faculty[;]'") also citing *Horowitz* and *Ewing* as mandating deference); *Ellis*, 925 F. Supp. at 1539, 1541–42 (deferring even though the dismissed fourth year medical student enrolled in another medical school and was apparently successful there); cf. *Diaz v. Lehman Coll., City Univ. of N.Y.*, 11 NDLR 321 (S.D.N.Y. 1998) (college student with depression who ceased attending class and left the college with a 1.108 GPA; finding that college's minimum 2.0 GPA requirement is a reasonable decision entitled to deference); *White v. Univ. of S.C.-Columbia*, No. 3:93-1293-23, 1996 WL 276540, at *3 (D.S.C. Mar. 28, 1996) (nursing student with learning disability who was not earning required grades, who was provided with some accommodations and withdrew; deciding that absent evidence of discrimination, deference is owed to a school's determination regarding which accommodations of those recommended by an evaluator are reasonable).

judgment for the school.¹⁹⁸ A court facing this situation concluded that the school “has absolute authority to render an academic judgment, but that decision must be a genuine one.”¹⁹⁹

Similarly, evidence of retaliation against a dismissed student with a disability will likely cause a disability claim to survive summary judgment.²⁰⁰ For example, one school implemented a new clinical rotation grading policy that gave the clinic supervisor increased discretion.²⁰¹ The policy was implemented while the student was hospitalized for mental illness and after he filed a grievance that angered his clinic supervisor.²⁰² That the student was the only one to fail under the new grading policy,²⁰³ but would have passed under the old policy, may raise an

198. *Carlin v. Trs. of Boston Univ.*, 907 F. Supp. 509 (D. Mass. 1995) (deciding that normal deference to a school’s judgment would not be extended; there was sufficient evidence of pretext to deny the school’s motion for summary judgment). *Carlin* involved a student with depression in a doctoral pastoral psychology program who successfully completed three years of classroom instruction and clinical training. *Id.* at 509. She then sought a leave of absence as her depression worsened and she was ultimately hospitalized, then denied readmission to the program. *Id.* at 510.

As to deference, the court held that it would “defer[] to the institution’s decision if there is evidence that the University made a ‘professional, academic judgment that [a] reasonable accommodation [was] simply not available.’” *Id.* at 510 (citing *Wynne*, 932 F.2d at 27–28). In this event, the court noted that the burden would shift to the plaintiff to show “that ‘facts were genuinely disputed or [that] there [is] significantly probative evidence of bad faith or pretext.’” *Id.* (citing *Wynne*, 932 F.2d at 26). Applying this standard, the court found that the school had offered evidence that it had terminated the student because, based on feedback from several faculty and supervisors, she “lacked the capacity” for “psychodynamically oriented pastoral psychology,” and had offered to allow her to transfer to a different program. *Id.* at 511. The court also found that the student had offered evidence of pretext, including that no “lack of capacity” was mentioned until her leave of absence and hospitalization, that her third year clinical experience was successful according to her supervisor, and perhaps most notably, a statement by her advisor that the student was dismissed because “her history of ‘serious mental health problems’ . . . did not provide ‘the kind of environment that is conducive to a return.’” *Id.* (citation omitted).

199. *Carlin*, 907 F. Supp. at 511.

200. *Amir*, 184 F.3d 1017. *Amir* involved a medical student who had some difficulty, both academic and behavioral, in his first two years of classroom-based instruction, but was not at risk of dismissal. *Id.* at 1022. After the student entered his third year, which involved clinical rotations, his mental health difficulties escalated to the point where he was hospitalized. *Id.* at 1023 (the student believed he was being poisoned by his food, drink and medicine, and tried to purge the “poison” with forced vomiting and laxatives). During his psychiatry rotation, the student was diagnosed with obsessive-compulsive disorder and his supervisor, the chairperson of the school’s psychiatry department, convinced him to hospitalize himself. *Id.* He was then denied readmission to the rotation and filed a grievance. *Id.*

201. *Amir*, 184 F.3d at 1023–24.

202. The student’s grievance had made the supervisor admittedly angry, and soon thereafter the department that she chaired changed a grading policy that expanded discretion, and which she used to fail the plaintiff student and no others. *Id.* at 1026 & n.3. After the initial lawsuit was filed, the medical school then dismissed the student without a chance to redo the rotation, as it had allowed him and other students to do in the past. *Id.* at 1027. For a case granting summary judgment on a dismissed student’s First Amendment retaliation claim, see *Garcia*, 280 F.3d 98.

203. *Amir*, 184 F.3d at 1026 n.3. He was denied the opportunity to redo the rotation or to do it at another location or with another supervisor and was placed on leave while his possible dismissal was investigated, at which point he filed a lawsuit. *Id.* at 1023–24. Several months

inference of retaliation,²⁰⁴ particularly where the student then enrolled in and successfully completes medical school elsewhere.²⁰⁵

On the other hand, the court saw insufficient evidence, either as to the refusal to provide the requested accommodation or as to the dismissal, for the discrimination claim to survive summary judgment.²⁰⁶ The court found no evidence that the student's disability motivated his dismissal; it found that either his academic performance or retaliation against him for his grievance and lawsuit were the motives supported by some evidence.²⁰⁷ As to the refusal to grant the requested accommodations, the court cited *Ewing* and announced a policy of deference to reasonable academic judgments.²⁰⁸

2. Refusal to consider disability information

Two academically dismissed medical students' claims survived summary judgment when their school's dean, who made the readmissions decisions, announced a complete refusal to consider their disability information, which is another form of discrimination. In *Steere v. George Washington University*,²⁰⁹ a medical school committee recommended to the dean that a student with poor grades be dismissed.²¹⁰ The dean "gave no weight to plaintiff's disability report [which had not been available to the committee], stating that his decision was based on plaintiff's poor academic performance and that he was adopting the [committee] recommendation."²¹¹ The student then enrolled in medical school elsewhere, received accommodations (extended time on exams) and earned passing

later, the school dismissed the student "based on a history of poor academic performance and a long-standing history of inappropriate behavior, misrepresentations, and difficulties dealing with staff and faculty" and "failing grades in [two clinical rotations] and [being] ranked near the bottom of his class in overall performance in [another rotation]." *Id.* at 1024 (citations omitted).

204. The trial court had granted summary judgment to the school on both claims, *id.*, but the Eighth Circuit saw the retaliation and discrimination claims quite differently. The appeals court found enough evidence of possible retaliation against the student for filing the grievance and the lawsuit to reverse summary judgment for the school on the retaliation claim. *Id.* at 1026–27.

205. *Id.* at 1024. He amended his lawsuit to claim that his dismissal and refusal to implement his requests as reasonable accommodations amounted to illegal disability discrimination in violation of Title III of the ADA. *Id.*

206. *Id.* at 1028–29.

207. *Id.* at 1028.

208. *Id.* at 1029 (citing *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)) ("We will not invade a university's province concerning academic matters in the absence of compelling evidence that the academic policy is a pretext for discrimination. No such inference can be drawn in the present case." The court also noted that the school policy precluded students with academic difficulty from doing coursework elsewhere, and a request for a different supervisor was not disability-related).

209. 368 F. Supp. 2d 52 (D.D.C. 2005).

210. *Id.* at 54. The student had not identified himself as having a disability either while enrolled or to the committee, but submitted documentation of attention deficit disorder and a learning disability to the dean and requested accommodations. *Id.* at 54–55.

211. *Id.* at 55.

grades.²¹² The court found that the student may have been entitled to a “second chance,” not of readmission itself, but of reconsidering his request for readmission in light of the new impairment information, since the student was not at fault in not identifying himself as having a disability earlier, and denied the school’s motion for summary judgment.²¹³ More recently, and in essentially a rerun of *Steere* (a dismissed student at the same medical school submitted documentation of a learning disability to the dean after the committee recommended dismissal, and the dean refused to consider the new disability information), the same court again denied summary judgment to the school in *Singh v. George Washington University*.²¹⁴

3. Limited deference in the First and Ninth Circuits

As a condition of deference to the readmission decision when a disability is involved, two federal appeals courts require schools to create a factual record of their deliberations. These courts reason that this affords both deference to the school’s academic judgment and meaningful protection of the student’s rights under disability discrimination laws.

In *Wynne v. Tufts University School of Medicine*,²¹⁵ an academically dismissed student diagnosed with dyslexia requested an alternative format to multiple choice tests as an accommodation for his disability.²¹⁶ While ultimately granting summary judgment to the school,²¹⁷ the First Circuit, citing *Ewing*, announced a policy of deference to the school’s academic judgment in the context of statutory discrimination claims, with limits.²¹⁸ Specifically, the court required a “factual record” from the school demonstrating that the school had considered alternative ways for the student to meet its academic standards with reasonable accommodations.²¹⁹ The court found a “conclusory affidavit” from the medical

212. *Id.*

213. *Id.* at 56–57. The court contrasted this case, where the student provided documentation of an impairment before the decision to dismiss, with others where the student either did not mention a disability or only self-reported as possibly having a disability without submitting an actual diagnosis. *Id.* at 56.

214. *Singh v. George Wash. Univ.*, 368 F. Supp. 2d 58 (D.D.C. 2005) (stating that deference is not appropriate where the disability information has not been considered; finding also an issue of fact as to whether the dismissed medical student was a person with a disability under federal statute), *reconsideration denied*, 383 F. Supp. 2d 99 (D.D.C. 2005).

215. *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19 (1st Cir. 1991), *on appeal from remand*, 976 F.2d 791 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993).

216. *Id.* at 21–22.

217. *Wynne*, 976 F.2d at 796.

218. The court contrasted *Ewing*, in which there was no statute that limited the school’s freedom to use its academic judgment. *Wynne*, 932 F.2d at 25. The *Wynne* deference standard has been criticized as too limited. See Claire E. McCusker, *The Americans with Disabilities Act: Its Potential for Expanding the Scope of Reasonable Academic Accommodations*, 21 J.C. & U.L. 619, 634 (1995) (calling *Wynne* “an inroad into the halls of academe by calling upon professional educators to present evidence regarding the steps they have taken to verify the reasonableness of their determination”).

219. According to the court:

school's dean insufficient as it did not consider alternatives and it was not specifically clear that this was the medical school faculty's judgment.²²⁰ On remand, the court found the factual record submitted by the school, which detailed the faculty's thought process as to why a different testing format would alter its academic standards, to be sufficient as a matter of law, even as against the student's affidavits indicating that one other medical school and a national testing service offered oral versions of multiple-choice tests; the court deferred to and affirmed a summary judgment for the school.²²¹

This limited deference approach to both whether requested accommodations are reasonable and whether, with accommodation, dismissed students are "qualified" to continue their studies was adopted by the Ninth Circuit in *Wong v. Regents of University of California* ("Wong I");²²²

[D]eference is not absolute . . . : courts still hold the final responsibility for enforcing the Acts We must ensure that educational institutions are not "disguis[ing] truly discriminatory requirements" as academic decisions; to this end, "[t]he educational institution has a 'real obligation . . . to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation.'" Subsumed within this standard is the institution's duty to make itself aware of the nature of the student's disability; to explore alternatives for accommodating the student; and to exercise professional judgment in deciding whether the modifications under consideration would give the student the opportunity to complete the program without fundamentally

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

Wynne, 932 F.2d at 26. The court indicated that the sufficiency of this factual record would normally be a legal question, and thus presumably resolvable by summary judgment. *Id.*

220. *Id.* at 27–28. In a dissent authored by then-Judge Breyer, three judges agreed with the limited deference standard announced by the majority, but found that the dean's affidavit met this standard. *Id.* at 29–31 (Breyer, J., dissenting).

221. *Wynne*, 976 F.2d at 794–95. The court noted:

[T]he point is not whether a medical school is 'right' or 'wrong' in making program-related decisions. Such absolutes rarely apply in the context of subjective decision-making, particularly in a scholastic setting. The point is that Tufts, after undertaking a diligent assessment of the available options, felt itself obliged to make 'a professional, academic judgment that [a] reasonable accommodation [was] simply not available.'

Id. at 795 (citing *Wynne*, 932 F.2d at 27–28).

222. 192 F.3d 807 (9th Cir. 1999). As discussed earlier, the court later granted the school's motion for summary judgment on a different basis; namely, that the student did not have a statutorily protected disability, as his impairment was not substantially limiting in light of his history of academic success, without accommodations. *See supra* notes 38–43 and accompanying text.

or substantially modifying the school's standards.²²³

Applying this standard, the Ninth Circuit reversed the summary judgment granted by the trial court to the school on the reasonableness of the decision not to offer the requested accommodation of an eight week reading period prior to each clinical rotation.²²⁴ The decision to refuse this accommodation was made by the medical school dean without consideration of disability information or consultation with the student.²²⁵ Its initially articulated basis for refusing the reading period was not academic, but rather the student's reported desire to graduate in the normal time and the dean's belief that the student did not need the reading period.²²⁶ The dean had told the student not to mention the requested accommodation to the school's readmission committee.²²⁷

The court concluded:

The deference to which academic institutions are entitled when it comes to the ADA is a double-edged sword. It allows them a significant amount of leeway in making decisions about their curricular requirements and their ability to structure their programs to accommodate disabled students. On the other hand, it places on an institution the weighty responsibility of carefully considering each disabled student's particular limitations and analyzing whether and how it might accommodate that student in a way that would allow the student to complete the school's program without lowering academic standards or otherwise unduly burdening the institution We will not sanction an academic institution's decision to refuse to accommodate a disabled student and subsequent dismissal of that student when the record contains facts from which a reasonable jury could conclude that the school made those decisions for arbitrary

223. *Id.* at 817–18 (emphasis in original) (quoting *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1048 (9th Cir. 1999) (quoting *Wynne*, 932 F.2d at 25–26)). See *Wynne*, 932 F.2d at 26 (explaining that institution needs to submit “*undisputed facts*” showing that “relevant officials” “considered alternative means, their feasibility, [and] cost and effect on the academic program”) (emphasis added); *id.* at 28 (refusing to defer when an institution presented no evidence regarding “who took part in the decision” and finding “simple conclusory averment” of head of institution insufficient to support deferential standard of review). “We defer to the institution's academic decisions only after we determine that the school ‘has fulfilled this obligation.’” *Wong I*, 192 F.3d at 818 (citing *Zukle*, 166 F.3d at 1048).

224. *Wong I*, 192 F.3d at 818–19.

225. *Id.* at 819.

226. *Id.*

227. *Id.* at 819–20. The Ninth Circuit found an issue of fact as to whether this was a reasonable accommodation for several additional reasons: the Section 504 regulations specifically include extending the time to complete degree requirements as an example of a reasonable accommodation, the school had provided pre-clinical rotation reading periods in the past for Wong and other students, Wong had been successful with a reading period, and the reading period was being recommended by a member of the medical school faculty who was the school's Coordinator of Student Learning Disability Resource Teams. *Id.* On these facts the court found that a jury could find this faculty member to be an expert on whether the reading periods would be a reasonable accommodation. *Id.* at 820.

reasons unrelated to its academic standards.²²⁸

4. Judgment on the merits for a student

A final case, *Dearmont v. Texas A & M University*,²²⁹ actually resulted in a dismissed graduate student receiving a judgment, which included reinstatement, money damages, and attorney's fees after apparent harassment by the faculty in his department.²³⁰ After a student in a small agricultural economics doctoral program twice failed his qualifying exams, he was diagnosed with a learning disability and provided an accommodation of double time on his exams.²³¹ His department then modified the content, format and grading of the exams, which caused the student to earn an even lower score than he had previously, and gave him a "surprise oral exam" and dismissed him.²³² When the department was ordered to give him the exams in their original version,²³³ the department then changed the GPA requirements for serving as a research assistant.²³⁴ The student did not meet the new requirement and was replaced.²³⁵ Without the income for this position, the student apparently was not financially able to continue his studies.²³⁶

The court's opinion offers helpful guidance for schools on what *not* to do when dealing with an academically dismissed student with a disability:

By the time Dearmont [was diagnosed] . . . , the faculty had formed an opinion from the effects of his disability that Dearmont was a marginal student at best, and they refused to make a reasonable accommodation to his handicap. When required by outside pressure, they went through the motions of accommodation, while stepping up the pressure directly and indirectly. The actual accommodations were more than offset by the concomitant harassment.

. . . .

[Section 504] does not require institutions to engage in the expensive, empty gesture of educating people who cannot function productively in the community. It does, however, prevent this kind of casual rejection of someone who is capable and qualified because of ungenerous perceptions of the effects of a non-disabling handicap.

A vast amount of the process of higher education must be subjective. The necessity of subjectiveness does not require society to abandon the students to the mere will of the professors, the experts. If any

228. *Id.* at 826.

229. 2 NDLR 10 (S.D. Tex. 1991).

230. *Id.* at 35.

231. *Id.* at 31–32.

232. *Id.* at 32.

233. The student had appealed his dismissal to the school's graduate council, which ordered reexamination under the original content, format, and grading procedures. *Id.* at 33.

234. *Id.*

235. *Id.* at 32–33.

236. *Id.* at 33.

governmental program [ought] to be able to articulate the reason of its procedures, graduate education should. Governmental professors, with their own careers, policies, and favorites, are no less prone to abuse of the authority the community has conferred on them than the officer on the beat. . . .

. . . .

Despite making exceptions for other students who had a problem passing the qualifying examination, the faculty decided that Dearmont's performance made him unqualified. To support their decision to replace Dearmont with a more promising candidate, Dearmont's faculty advisors threw him a surprise defense of his research plan. Assuming his performance at the inquisition was deficient, it was a wholly contrived requirement. The development of Dearmont's research had never been discussed with him in any deliberate session with any of the faculty advisors before the bushwhacking.

The actions of the defendants show a rejection of Dearmont based on his handicap, followed by a series of transparent gimmicks to cloak the decision with additional evidence.²³⁷

* * * * *

The non-law school cases, most of which involve medical school or other health care professional training programs, also show a pronounced pattern of success for the school, and perhaps even more consistently announce deference to the school's decision than do the law school cases. The seven cases in which the school did not completely prevail (*Carlin*, *Steere*, *Singh*, and *Amir*, in which the school was denied summary judgment; *Wong I* and *Wynne*, in which the school lost its initial motion for summary judgment but then prevailed on a subsequent summary judgment motion; and *Dearmont*, in which a judgment was actually ordered in favor of a dismissed student against a school) show clear patterns that provide helpful guidance for schools. First, in a number of the cases the dismissal/readmission decision was made by a single person (a dean in *Singh*, *Steere*, *Wong I*) or a small and presumably close department (*Carlin*, with apparent significant influence on the decision by a single faculty member who was the student's adviser, and *Dearmont*). In such cases, the danger of a decision tainted by discriminatory intent, or at least a disputed issue of fact on intent, is likely heightened. Second, in several cases (*Singh*, *Steere*, and *Wong I*), the decision-making dean refused to consider the student's disability information. In these cases, while there was a committee that made a recommendation to the dean, it apparently had no pre-announced standards to apply to make that recommendation.

Third, in several cases, there was evidence that the decision-maker(s) engaged in discriminatory (bad faith, stereotypical, and/or retaliatory) thinking. In *Carlin*, a previously successful student was found to have a "lack of capacity" and terminated only after she was hospitalized for depression.²³⁸ In *Amir*, grading and

237. *Id.* at 33–34.

238. *Carlin v. Trs. of Boston Univ.*, 907 F. Supp. 509 (D. Mass. 1995).

other policies and practices were changed and applied to the student's detriment by a small department chaired by a person who was admittedly angry that the student had filed a disability discrimination complaint.²³⁹ In *Wong I*, the dean instructed the student not to mention the disability to a committee and did not initially articulate academic reasons for his denial of requested accommodations.²⁴⁰ Additionally, in *Dearmont* the court found that the small department engaged in harassment after the student documented a disability.²⁴¹ Fourth, in two cases (*Steere* and *Amir*), there was unusually strong conflicting evidence that the student could succeed: the dismissed student enrolled at another school, received the requested accommodations, and was academically successful.²⁴²

Finally, in some cases, the denial of readmission was contrary to the recommendation of an internal school expert. In *Wong*, for example, the decision was contrary to a recommendation by an internal faculty expert.²⁴³ Similarly, in *Carlin*, the school expert's assessment of the student's ability conflicted with the clinical supervisor's favorable assessment of the student's performance.²⁴⁴ Furthermore, in an OCR opinion discussed below,²⁴⁵ DePaul University's internal expert evaluation that a student's dyslexia impairment was significant conflicted with its law school's assessment based on the previously supplied report of an eye doctor that the dyslexia was not significant. These cases do not evidence a pattern of greater deference to schools when the disability is mental as opposed to physical, despite the contrary suggestion of one commentator.²⁴⁶

When the law school and non-law school cases are combined, a variety of patterns emerge. Most striking is the pattern of results: schools win, and do so convincingly, normally at the as-a-matter-of-law level at the summary judgment or dismissal stage, rather than going to trial. This is so in large part because courts hearing these disability discrimination claims routinely announce a pattern of deference to the school's academic judgments. Deference is specifically extended to the decisions as to, 1) whether the dismissed student meets the school's readmission standards, and 2) whether academic accommodations requested by the dismissed student are reasonable on the one hand, or would alter the school's

239. *Amir v. St. Louis Univ.*, 184 F.3d 1017 (8th Cir. 1999).

240. *Wong I*, 192 F.3d at 823.

241. *Dearmont*, 2 NDLR at 10.

242. Such conflicting evidence is less likely to be available to law students, since law school accreditation requirements require dismissed students to sit out two years before applying to other law schools. See AM. BAR ASS'N, STANDARDS: RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2005-2006, Standard 505, <http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf>. However, if a law school allows dismissed students to continue in summer courses while their petitions are pending, students' grades in those courses may amount to such evidence.

243. *Wong I*, 192 F.3d 807.

244. *Carlin*, 907 F. Supp. 509.

245. See *infra* notes 285-300 and accompanying text.

246. Tucker, *supra* note 1, at 39 (suggesting that, for academic decisions generally, more deference is given when the student's disability is mental rather than physical).

academic standards on the other.

While the courts' announcement of deference to these decisions is consistent, there is some variety in the articulated reasons for the deference, the conditions that will trigger deferral, and the exact nature of the deferral. One commentator suggests that while "[d]eference determinations under Section 504 and the ADA vary considerably, . . . the general trend . . . seems to be toward some form of rational basis review."²⁴⁷ Another commentator, Professor James Leonard, reviews the cases on disability challenges to academic decisions, including dismissal and readmission, and identifies three approaches to deference in these cases.²⁴⁸ In the first approach, in which Professor Leonard finds only one case, the court simply did not defer and instead allowed the parties to create a battle of experts, with the court ultimately imposing its own judgment.²⁴⁹ Leonard places *McGregor* and *Anderson* in a second group of cases in which, largely for reasons of lack of judicial expertise, and much in the manner of the Court in *Ewing*, courts will "defer to academic authorities whenever they can demonstrate a reasonable [educational] basis for their decisions,"²⁵⁰ and there is no evidence of discriminatory intent.²⁵¹ The third group of cases, into which Leonard places *Wynne*, supplements the reasonable basis standard of the second group of cases by adding a requirement that the school "consider any suggestions for accommodations in good faith and keep reliable records of the decisional process."²⁵²

This pattern of deference to higher education schools' academic judgments in the context of federal statutory disability claims is again in contrast to the approach taken under the IDEA. Although IDEA disputes typically involve a challenge to a school's academic judgment about what is the free appropriate public education for a given student,²⁵³ or where is the least restrictive environment to provide that program,²⁵⁴ courts do not defer to the school's judgment on these issues.²⁵⁵ This

247. Dupre, *supra* note 107, at 419.

248. Leonard, *supra* note 117.

249. *Id.* at 61–62 (citing *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981), which involved a doctor seeking a paid residency and is thus technically an employment case).

250. *Id.* at 63.

251. *Id.* at 63–68.

252. *Id.* at 68–69 (suggesting that this standard is actually the most protective of school autonomy, as whether a school engaged in good faith consideration of accommodations is normally an undisputed factual issue which can be resolved at the summary judgment stage).

253. The first U.S. Supreme Court case interpreting the IDEA involved a dispute over its free appropriate public education provision. *Bd. of Educ. of the Hendrik Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176 (1982) (deciding that IDEA's appropriate education requirement requires a program reasonably calculated to confer educational benefit; stating also as to a hearing-impaired student easily earning passing grades with tutoring and a hearing aid, IDEA is satisfied and a full-time sign language interpreter is not required).

254. *See, e.g., Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994) (finding that the least restrictive environment for a student with mental retardation to be general education).

255. 20 U.S.C.A. § 1414 (2006); 34 C.F.R. § 300.344 (2005).

lack of judicial deference exists even though the staff at public preK-12 schools, unlike higher education faculty, is formally trained in education, and the team which makes IDEA programming decisions includes at least one internal school expert in special education.²⁵⁶ However, because of the special dispute resolution system Congress established for the IDEA,²⁵⁷ and in marked contrast to the cases where courts examine higher education students' disability discrimination claims, a court reviewing a dispute under the IDEA has the benefit of the expertise not only of school authorities but also of the hearing officer who is trained in special education.²⁵⁸

D. OCR Opinions Addressing Disability Discrimination Claims By Academically Dismissed Law Students

While not binding precedent, OCR has issued numerous opinions concerning disability discrimination complaints by academically dismissed law and other higher education students. Just as with the courts, academically dismissed students have had very little success with OCR. In almost all of the law school cases, OCR has found for the school.²⁵⁹ A review of these opinions, however, indicates OCR takes a somewhat different approach than the courts.

The OCR opinions concerning academically dismissed law students do not discuss deference specifically; however, in other cases OCR has announced a policy of deference.²⁶⁰ OCR does make clear in the dismissed law student opinions that meeting the school's minimum academic standards is an essential academic requirement, and a legitimate nondiscriminatory reason for dismissing/refusing to readmit a student. As to those standards, OCR has suggested that a variety of readmissions standards are nondiscriminatory: not making a readmissions process available at all,²⁶¹ rules which limit the opportunity

256. For a comparison of the lack of deference under the IDEA with the deference accorded colleges and universities, and an argument that, in part because of expertise, preK-12 schools also deserve the deference accorded higher education judgments, see Dupre, *supra* note 107, at 393.

257. See *supra* notes 100–102 and accompanying text.

258. See *id.*

259. Letter to: Univ. of Akron, 26 NDLR 263 (OCR 2003); Letter to: Sw. Univ. Sch. of Law, 26 NDLR 211 (OCR 2003); Letter to: Univ. of Chi., 26 NDLR 187 (OCR 2003); Letter to: Villanova Univ., 16 NDLR 170 (OCR 1999); Letter to: Univ. of S.F., 17 NDLR 61 (OCR 1999); Letter to: Tex. Wesleyan Univ., 13 NDLR 208 (OCR 1998); Letter to: Hastings Coll. of Law, 4 NDLR 226 (OCR 1993); Letter to: Cleveland State Univ., 3 NDLR 198 (OCR 1992); Letter to: McGeorge Law Sch., 1 NDLR 337 (OCR 1991); Letter to: Golden Gate Univ., 2 NDLR 253 (OCR 1991); Letter to: Univ. of Ala., 1 NDLR 121 (OCR 1990).

260. Letter to: N. Ill. Univ., 7 NDLR 392, at 1359 (OCR 1995) (“OCR grants great deference to recipients to determine which academic requirements are essential to their programs of instruction.”); Letter to: Univ. of Tenn. at Martin, 14 NDLR 72, at 268 (OCR 1998) (“[A]bsent evidence of a discriminatory intent, reasonable deference must be accorded to the academic decisions of educational institutions.”); Letter to: Ind. Univ. Nw., 3 NDLR 150, at 620–21 (OCR 1992) (deference to “collective wisdom of the faculty”).

261. Letter to: Sw. Univ. Sch. of Law, 26 NDLR 211 (OCR 2003) (stating that if a process is established, it must be available on an equal basis to students with disabilities). Note that if a readmissions process is not available, dismissed students with disabilities could still use the

to petition for readmission to students in a certain GPA range, not providing a petition opportunity to students with GPAs below this range,²⁶² and requiring dismissed students to sit out a year before reenrolling.²⁶³ In applying the school's readmission standard, OCR has suggested that schools may consider a variety of information, including accreditation standards concerning admission,²⁶⁴ whether the petition is honest and truthful²⁶⁵ or is of good quality,²⁶⁶ and whether the student is effective in any presentation to—and meeting with—the committee.²⁶⁷

All of these standards and information must be applied to and considered for all students, with or without disabilities. To determine whether the decision was tainted by improper discrimination, OCR often interviews the committee members who made the readmission recommendation/decision, reviews the school's policies and practices with regard to students with disabilities,²⁶⁸ and examines statistics and individual files of other petitioning students, presumably in order to compare application of the readmissions standard and process as between applicants with and without disabilities.

Concerning specific disability information presented by a petitioning student, OCR indicates that law schools may require dismissed students to provide documentation of disability or other circumstances,²⁶⁹ and law schools must give any such submitted documentation "reasoned and informed consideration."²⁷⁰ Moreover, law schools may require expert evaluations to be submitted in writing and need not agree to have the expert appear in person to discuss the evaluation with the committee (presumably to the extent it does not allow petitioning students to present witnesses generally).²⁷¹

After duly considering disability information supplied by a petitioning student,

Section 504 grievance procedure, as well as OCR complaints and litigation, to challenge their dismissal. See *supra* notes 69–71 and accompanying text for a discussion of Section 504 internal grievances and OCR complaints. The grievance procedures under Title VI of the Civil Rights Act can be found at 34 C.F.R. §§100–101 (2006). 34 C.F.R. § 104.62 makes the Civil Rights Act procedures applicable to Section 504 cases.

262. Letter to: Univ. of Akron, 26 NDLR 263 (OCR 2003) (2.0 minimum GPA; students below 1.8 have no opportunity to petition for readmission).

263. Letter to: Tex. Wesleyan Univ., 13 NDLR 208 (OCR 1998).

264. Letter to: Villanova Univ., 16 NDLR 170, at 776 (OCR 1999). The court referred to the former ABA requirement 304 that "[a] law school shall not, either by initial admission or subsequent retention, enroll or continue a person whose inability to do satisfactory work is sufficiently manifest. . .," currently found at AM. BAR ASS'N, *supra* note 242, at Standards 501 & 505.

265. Letter to: Cleveland State Univ., 3 NDLR 198 (OCR 1992).

266. Letter to: Golden Gate Univ., 2 NDLR 253, at 941 (OCR 1991) (dealing with spelling, grammar, and other mechanical problems as well as less than "compelling . . . reasoning and arguments").

267. Letter to: Univ. of Ala., 1 NDLR 121 (OCR 1990) (concerning a student who rambled and did not answer committee's questions).

268. See Tucker, *supra* note 1, at n.22 and accompanying text, for a collection of OCR opinions on the issue of the existence and adequacy of such policies.

269. Letter to: Sw. Univ. Sch. of Law, 26 NDLR 211 (OCR 2003).

270. *Id.* at 934.

271. Letter to: Villanova Univ., 16 NDLR 170, at 776–77 (OCR 1999).

OCR has suggested that law schools may find that the non-disability reasons contained in a student's readmission petition caused her failure, rather than a disability not disclosed in the petition.²⁷² A law school may conclude that academic failure was caused by circumstances unrelated to any disability. For example, a law school may deny admission to a student with a disability because of a "very low LSAT score" and simply "[not understanding] the basic concepts of the subject matter."²⁷³ Similarly, a law school may conclude that a student's learning disability did not cause his academic failure.²⁷⁴ A law school may conclude that the student's failure was caused by lack of understanding of the material, lack of preparedness for class, lack of organization, and tardiness for an exam, rather than a disability.²⁷⁵

When a law school's readmission standard requires extraordinary circumstances, a law school need not find a dismissed student's disability to be an extraordinary or compelling circumstance,²⁷⁶ but law schools must consider dismissed students' disabilities which were "previously undisclosed or unidentifiable," to the extent the school considers other unknown or undisclosed non-disability circumstances.²⁷⁷

When considering a dismissed disabled student's potential to succeed if readmitted, a law school should evaluate "how the student's disability affected his or her performance, and whether the student has been provided with necessary [accommodations]."²⁷⁸ When petitioning students assert that they can succeed with accommodations, law schools must take failure to receive accommodations into account when making readmissions decisions if there has been reasonable documentation of a disability and a proper request for accommodations, however the "significance of the failure to receive [accommodations] would vary with the circumstances of the case."²⁷⁹

A law school may determine that certain requested accommodations are not reasonable. For example, while whether an accommodation is reasonable must always be determined on an individualized basis, OCR has found certain requests in specific cases to be beyond those which are required reasonable accommodations. Normally, for example, minimum GPA requirements are essential academic standards and waiver of them is not a reasonable accommodation.²⁸⁰ Along the same lines, a law school need not agree to a

272. *Sw. Univ. Sch. of Law*, 26 NDLR 211 (OCR 2003).

273. Letter to: Hastings Coll. of Law, 4 NDLR 226 (OCR 1993).

274. Letter to: McGeorge Law Sch., 1 NDLR 337 (OCR 1991) (concerning a student with a learning disability who succeeded on some timed exams and whose reading speed was in the normal range); Letter to: Univ. of Ala., 1 NDLR 121 (OCR 1990) (dealing with a legally blind student with a cumulative GPA of 0.533).

275. Letter to: Whittier Coll. Sch. of Law, 4 NDLR 183 (OCR 1993).

276. Letter to: Univ. of S.F., 17 NDLR 61 (OCR 1999).

277. *Sw. Univ. Sch. of Law*, 26 NDLR at 934 (OCR 2003).

278. *Hastings Coll. of Law*, 4 NDLR 226 (OCR 1993).

279. *Sw. Univ. Sch. of Law*, 26 NDLR at 934 (OCR 2003).

280. Letter to: Univ. of Akron, 26 NDLR 263 (OCR 2003) (noting also that school's judgments and resulting rules, concerning minimum GPAs and opportunities for readmission,

dismissed student's request for accommodations in the form of breaking down complex essay exam questions into parts and allowing outline format for answers, as these adjustments would modify essential elements of the law school program.²⁸¹

In two reported law school cases, each more than ten years old, OCR expressed concern about a law school's handling of a disabled student's readmission petition. In one case, OCR appeared to believe that the law school had steered a student with a potential disability toward an evaluator about whose qualifications OCR had concerns, but made no final determination as to whether the school had engaged in discrimination.²⁸² OCR noted that this evaluator had established a course of "treatment" (OCR's quotation marks) for the student's learning disability.²⁸³ The school agreed to fund "valid diagnostic testing . . . from a qualified professional."²⁸⁴ One might infer from this that OCR thought the learning disability may not have been appropriately diagnosed and could not be "treated" effectively, at least by this evaluator.

In the second case, *DePaul University*,²⁸⁵ the student also had apparently initially gotten some bad expert advice about her impairment from an unqualified "expert" that her dyslexia was quite mild and accommodations were not necessary.²⁸⁶ In her first year of law school, the student struggled and the university's program for diagnosing and evaluating students with learning disabilities²⁸⁷ tested the student and orally requested accommodations for the student, specifically a reduced course load and extra time on exams from the law school.²⁸⁸ The student received some accommodations late in the school year but did not earn the minimum required grades, was academically dismissed, and

were recommended by a faculty committee and adopted by the full faculty and were based on past successes of students with low GPAs, the school's bar pass rate, and a desire to avoid taking tuition from students whose prognosis for academic success, success on the bar exam, and competence in practice was poor).

281. Letter to: Villanova Univ., 16 NDLR 170, at 776 (OCR 1999) (noting also that an expert evaluation which stated the student needed these changes to succeed in law school actually was evidence that she could not be academically successful unless the law school program was fundamentally altered).

282. Letter to: Pepperdine Univ., 7 NDLR 62 (OCR 1995).

283. *Id.* at 201.

284. *Id.*

285. Letter to: DePaul Univ., 4 NDLR 157 (OCR 1993).

286. The student had not been formally diagnosed with, nor received any services for, an impairment prior to law school, and had maintained a B average in college. *Id.* at 604. As a college senior, an ophthalmologist (an M.D. specializing in vision care) informed her that she was dyslexic without doing any testing. *Id.* The student reported she was dyslexic on her application as a means of supporting her assertion that her LSAT score underestimated her ability. *Id.* She attached a letter from the ophthalmologist that noted that "dyslexia is minimal and [she] should not require accommodations." *Id.* at 605.

287. *Id.* at 605-06.

288. *Id.* at 605. The law school asked for written documentation before making a decision; when documentation was provided, which was near the end of the academic year, the law school implemented the bulk of the requested accommodations. *Id.*

petitioned for readmission.²⁸⁹

The school's approach to processing readmissions petitions did not appear to instill confidence in OCR. After two days of meetings to decide thirty-three readmissions petitions in which much information was not available until the members arrived at the meeting, the readmissions committee granted thirteen of the petitions.²⁹⁰ The student's petition was the only one which reported a disability and it was denied.²⁹¹ In fact, the committee could not recall any prior petitions asserting a disability.²⁹² A readmissions form for each student had a space for the committee to write the reasons for its decision, but the form was left blank or only cursorily completed in many cases, including that of the complaining student.²⁹³ No notes of the meeting were available from the law school or individual committee members.²⁹⁴ In the complaining student's case, no committee member could remember who was assigned responsibility for presenting her petition, nor could any committee member specifically recall the reason(s) for denying it, and the partial recollections were somewhat inconsistent.²⁹⁵

OCR closely second-guessed both the committee's reasoning, as much as it could be reconstructed, and its pattern of readmitting a number of students who appeared to be no more qualified than the complaining student.²⁹⁶ For example, the committee readmitted a student who attributed her failure to a personal problem which happened before starting law school but for which she did not receive counseling during her first year of law school, and others who attributed their failures to "difficulties with the academic rigors of law school" and "poor study habits," respectively.²⁹⁷ Moreover, OCR found that some of the committee members' comments to one another, particularly a statement by one member that the impairment was "now just an excuse for her poor grades," demonstrated an improper, stereotyped view of how disability might have an impact on academic performance.²⁹⁸ OCR concluded that the committee had considered the disability information in a stereotyped rather than an informed way.²⁹⁹ Under these circumstances, OCR faulted the committee for not undergoing any training, nor consulting with its own in-house experts at the university program for students

289. *Id.* at 605–06.

290. *Id.* at 606.

291. *Id.* at 607.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* Lapse of time may explain the committee members' lapse of memory. These readmissions decisions took place in the summer of 1988. *Id.* at 606. The OCR decision is dated May 1993, almost five years later. *Id.* at 603. Section 504 regulations provide that OCR complaints must be filed within 180 days of the alleged discrimination, unless OCR finds good cause for a later filing. 34 C.F.R. § 100.7 (2005). The opinion does not address the delay in filing the complaint.

296. *DePaul Univ.*, 4 NDLR at 608–09.

297. *Id.* at 609.

298. *Id.*

299. *Id.*

with learning disabilities.³⁰⁰

E. OCR Opinions Addressing Disability Discrimination Claims By Other Academically Dismissed Higher Education Students

In non-law school academic dismissal readmissions cases, OCR has also consistently found for the school.³⁰¹ In the one non-law school academic dismissal readmissions case in which OCR determined Section 504 had been violated, the school had failed to offer the student timely and reasonable accommodations.³⁰² The school agreed to readmit the student on probationary status and provide appropriate accommodations.³⁰³

VI. JUDICIAL DEFERENCE TO REASONED ACADEMIC READMISSIONS JUDGMENTS INVOLVING STUDENTS WITH DISABILITIES IS APPROPRIATE

Judicial deference to the judgment of a law school or other higher education program's faculty not to readmit an academically dismissed student is the only sound approach.³⁰⁴ The readmissions judgment is not only academic in nature, but

300. The university agreed to settle the complaint in an undisclosed manner. *Id.* In more recent cases, OCR has made it clear that under normal circumstances, schools must consider expert information in a reasoned and informed way, but are not required to seek out nor defer to expert opinions on academic issues. *See, e.g., Sw. Cmty. Coll. Dist.*, 29 NDLR 210 (dealing with a school that provided OCR with detailed record of its decision-making process, in which the school considered a letter of support provided by the university disability support services officer, but denied a readmission petition of an academically dismissed dental hygiene student, did not engage in illegal discrimination).

301. *Sw. Cmty. Coll. Dist.*, 29 NDLR 210 (pertaining to dental hygiene student); Letter to: Lourdes Coll., 29 NDLR 25 (OCR 2004) (dealing with a nursing program); Letter to: Touro Univ., Coll. of Osteopathic Med., 24 NDLR 292 (OCR 2002); Letter to: E. Va. Med. Sch., 2 NDLR 229 (OCR 1991); Letter to: Tex. Chiropractic Coll., 2 NDLR 252 (OCR 1991); Letter to: Univ. of Pa., 28 NDLR 192 (OCR 2003) (dealing with M.S.W. student); *cf.* Letter to: Cal. State Univ., 7 NDLR 96, at 321 (OCR 1995) (addressing a student who was denied readmission to teacher preparation program after withdrawal "by mutual consent" and related to her emotional disability); Letter to: Regent Univ., 27 NDLR 63 (OCR 2003) (deciding that school did not discriminate when it required an M.B.A. student with bipolar disorder, who withdrew from program after erratic and threatening behavior, to undergo a psychiatric evaluation as a consideration of readmission).

302. Letter to: Tuskegee Univ., 1 NDLR 226 (1990) (finding that the university disability office told a student with a learning disability before he enrolled that accommodations would be available; that office's director then retired, and the student was not provided with accommodations for several months until the problem was discovered).

303. *Id.*

304. Other commentators agree. *See Dupre, supra* note 107, at 466–71 (arguing that deference should extend to the academic decisions of elementary, secondary, and higher education academic decisions, with limits such as those announced in *Wynne* which she equates with intermediate scrutiny); Leonard, *supra* note 117, at 88–90 (advocating the *Wynne* limited deference approach); *id.* at 70–74 (reasoning that academic higher education decisions are particularly subjective and far outside the courts' expertise and thus, without deference, would be resolved by a battle of experts in areas in which the experts themselves disagree and in which there are no concrete standards to apply); *id.* at 74–83 (arguing that higher education academic standards and decisions are polycentric in nature, as described by Lon Fuller, *The Forms and*

is subjective, complex, context-dependent, and highly specialized. Apparently in contrast to the approach at some medical schools where a single dean makes the decision,³⁰⁵ readmissions decisions at law schools are normally made by a group of persons (a faculty committee or the entire faculty). In the case of a student claiming a disability, there are built-in statutory incentives to err on the side of the student in close cases,³⁰⁶ thus minimizing the possibility of making the decision inappropriately. In contrast even to another group of deferred-to academic decisions—initial admissions to higher education programs—the decision not to readmit a student who has been academically dismissed is made by a faculty after it has had considerable experience with the student’s academic performance and abilities. Readmission of an academically dismissed student is thus the sort of decision most inimical to the program’s academic freedom and most outside the expertise of the courts.

Deference to these decisions is also particularly appropriate at the level of professional school and similar programs, where virtually all the actual cases occurred, because of the stakes involved in wrongful readmission for the readmitted student, the school, and the public. Whether or not she has a disability, the student who wrongfully is not readmitted at least can try her luck at other schools and perhaps ultimately continue on her planned career path. For example, the many students in the court cases and OCR opinions discussed above, whose impairments are first diagnosed at the time of their dismissal, can develop learning and other coping strategies for their newly-discovered impairments and later apply for admission. In contrast, the student who is wrongfully readmitted (that is, readmitted when she is not academically capable even if reasonable accommodations are provided) is at serious risk of being unable to pass related licensing exams such as bar exams and the medical boards exams, and/or to competently practice her chosen profession. As one court has noted, by readmitting a student, a school conveys its imprimatur that the student will in fact be successful in these ways.³⁰⁷ When a student is wrongfully readmitted, the

Limits of Adjudication, 92 HARV. L. REV. 353, 394 (1978), and involve many interdependent competing interests; they are unsuited for judicial resolution, but are appropriately resolved by managerial direction, such as faculty decision-making; law school standards are school-specific, so what other schools do is not particularly probative evidence); *id.* at 83–84 (discovering how lack of deference would incentivize schools to soften their academic standards to avoid litigation and inappropriately adversarialize the student-faculty relationship); *id.* at 85–86, 88–89 (concluding that unlimited deference may not encourage schools to truly introspect and consider alternatives for students with disabilities, but *Wynne* limited deference standard addresses this concern).

One commentator suggests that the judicial deference to academic decisions generally is appropriate because it “provides for a more efficient distribution of decision-making between the courts and higher education while retaining the ability for courts to intervene in situations where the university officials may act inappropriately.” Stoner & Showalter, *supra* note 107.

305. See *Steere*, 368 F. Supp. 2d 52 (D.D.C. 2005); *Singh*, 368 F. Supp. 2d 58 (D.D.C. 2003).

306. The prospect of costly litigation, as well as the prospect of losing the litigation and becoming responsible for the student’s attorney’s fees under these fee-shifting statutes, provide incentives for schools to err on the side of the student in close cases.

307. *Kaltenberger*, 162 F.3d at 436–37 (citing *Horowitz*, 435 U.S. at 96 n.6, and *Ewing*, 474

school's integrity and reputation are harmed. Most importantly, there is obvious risk to the public if wrongfully readmitted students go on to practice their profession less than competently. In the case of health care professionals, health and safety are directly at risk. In the case of attorneys, the risk is not a physical safety one but rather puts at risk the competent resolution of clients' high stakes legal problems, including, for example, incarceration of criminal defendants and custody of children.

Deference is also consistent with the systems established by Congress for resolution of disability discrimination disputes. While the IDEA establishes a system of impartial hearing officers trained in both special education and law, who have the necessary expertise to closely review a school's judgment,³⁰⁸ no such system is in place for higher education students' disability discrimination claims. Judges hearing IDEA lawsuits receive the administrative record from this hearing, including specific findings of fact and conclusions, and may base their judgment solely on this record, treating the matter in the manner of an administrative appeal.³⁰⁹ In contrast, in higher education, Congress chose not to establish administrative hearings and chose not to involve expert hearing officers;³¹⁰ hence, the judge hearing a higher education disability discrimination case does so without an administrative record or independent expertise.

The different natures of the schools covered by the IDEA on the one hand, and the schools covered by Section 504 and ADA provisions concerning higher education students on the other, also suggest the appropriateness of deference. The IDEA essentially applies to public preK-12 schools.³¹¹ The IDEA is a government-funded program which applies to schools which are governmental entities.³¹² It is government regulating government. Moreover, IDEA-covered public preK-12 schools are not ones that are thought to possess either institutional or individual faculty academic freedom in the same way as higher education institutions and faculty members do. Students attend IDEA-regulated public preK-12 schools, at least in part, to comply with state compulsory education laws; they have not chosen to attend. However, and again unlike higher education, under state laws, there is a legal right (under state statute if not also under the state constitution) to attend public preK-12 school,³¹³ while enrollment in public or

U.S. at 225; holding that a school's academic decisions concerning which accommodations are and are not reasonable are entitled to deference, noting "[w]e should only reluctantly intervene in academic decisions 'especially regarding degree requirements in the health care field where the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession'" (quoting *Doherty*, 862 F.2d at 576)).

308. See *supra* notes 100–101 and accompanying text.

309. See *supra* note 102 and accompanying text.

310. See *supra* notes 70–72 and accompanying text (private lawsuits available without regard to whether an administrative complaint has been processed, and the result of any administrative proceedings are not given any particular role in the litigation).

311. See *supra* note 84 and accompanying text.

312. See *supra* notes 83–84 and accompanying text.

313. For an overview of state compulsory education laws, see JAMES RAPP, EDUCATION LAW § 8.03 (2005).

private higher education is a privilege. In contrast, many higher education institutions are private. Private or not, higher education institutions clearly enjoy academic freedom both at the institutional and individual faculty level.³¹⁴ Section 504 and the ADA offer no specific government funds to subsidize providing accommodations and the other costs of compliance. Higher education program enrollment is optional.

The IDEA is helpful in providing guidance in one area: the plethora of disputes concerning the application of imprecise statutory standards to specific cases that would occur if there were close judicial review of academic decisions regarding students with disabilities, rather than deference to those decisions. Like Section 504's and the ADA's imprecise terms, such as limiting coverage to impairments which "substantially" limit a major life activity and "reasonable" accommodations or adjustments, the IDEA's own imprecise terms entitle students to an "appropriate" education in the "least restrictive environment."³¹⁵ The imprecise and subjective nature of the statutes' coverage and entitlements and the "otherwise qualified" limitation also suggest that Congress meant for schools to operate with some discretion.³¹⁶ This imprecision also invites disputes over whether statutory obligations have been met. Under the IDEA, the combination of close administrative and judicial review, and the imprecise statutory standards, has in fact resulted in an enormous amount of litigation.³¹⁷

The limits courts have put on deference, particularly the "factual record of introspection" limited deference standard in the First and Ninth Circuits, provide sufficient protection for students claiming disability discrimination.³¹⁸ Requiring a school to carefully consider disability and other information concerning a student with a disability, and to create a record of those decisions, helps to ensure that a school will give disability information the reasoned and informed consideration the law requires and make a good faith readmissions decision. Whether or not this limited deference standard is applied, affirmative evidence of any discriminatory (stereotypical, bad faith, or retaliatory) thinking by a school³¹⁹ or refusal to consider disability information will likely result in a triable issue of fact precluding summary judgment, but the mere fact of denying readmission to a student with a disability³²⁰ will not be sufficient for her discrimination claim to withstand a

314. See *infra* Section VII.A.3.

315. See *supra* notes 96–97 and accompanying text.

316. See, e.g., *supra* notes 49–55 and accompanying text (setting out requirements that eligible persons be "qualified" and that they are entitled to "academic adjustments," but not those that would alter basic essential program requirements).

317. The Individuals with Disabilities Law Reporter (IDELR), a loose leaf service which collects court and hearing officer decisions under the IDEA, had forty-three volumes from 1978, when the IDEA took effect, through September 2005. Recent IDELR volumes numbered over 1000 pages each.

318. See *supra* Section V.C.3.

319. Evidence of discriminatory thinking can be obtained by the student using discovery or perhaps through the investigation process if an OCR complaint is filed.

320. Nor, apparently, will allegations that other students similarly situated were treated differently.

summary judgment motion.³²¹

VII. DOING THE RIGHT THING: GUIDELINES AND OPTIONS FOR MAKING
PRINCIPLED, NONDISCRIMINATORY READMISSIONS DECISIONS WHEN STUDENTS
CLAIM A DISABILITY

A. The Consequences of Going Beyond Statutory Requirements

Law schools may consider doing more than the statutes require in one or more of three ways. First, law schools may choose to serve some students with impairments that do not amount to statutory disabilities. Second, law schools may offer more than statutorily required reasonable accommodations to students with (statutory or nonstatutory) disabilities. Third, law schools may choose to apply the readmissions standard more leniently to dismissed students with (statutory or nonstatutory) disabilities. Some parent universities of law schools may wish to make one or more of these choices for the university, including the law school.

While choosing to go beyond statutory requirements would not appear to open law schools up to reverse discrimination claims by students without disabilities,³²² other considerations including law school accreditation requirements, issues of academic freedom, potential triggering of additional disability law obligations, and even potential tort and contract liability limit, and to some extent, caution against going beyond statutory requirements. Moreover, the equities do not clearly favor doing more than the statutes require.

1. The equities

From the perspective of the student with a statutory or nonstatutory disability, the equities weigh heavily in favor of serving students with diagnosed impairments even if they do not amount to statutory disabilities, providing academic adjustments even if they go beyond legally required ones, and applying the readmissions standard leniently to students with statutory or nonstatutory disabilities. For example, the student in *Wong* whose dyslexia has caused him to read very slowly, but whose impairment does not amount to a statutory disability, has an equitable argument that failure to offer him extra time on exams will mean that the exam will measure his slow reading speed more than his mastery of the course material. A dismissed law student with a newly diagnosed impairment and who has thus never had accommodations, such as Student in the illustrative

321. See *supra* notes 134–135 and accompanying text.

322. Other discrimination laws such as Titles VI, VII, and IX, prohibit discrimination “on the ground of” race or gender. See, e.g., 42 U.S.C. § 2000d (2000) (Title VI prohibition “on the ground of race, color, or national origin”). Such laws have been interpreted as prohibiting discrimination against either gender, and against any racial minority or majority group. See, e.g., *Gratz*, 539 U.S. 244 (holding that affirmative action program amounts to illegal race discrimination against white applicants). In contrast, the disability statutes define the group of covered persons with statutory disabilities, and prohibit discrimination against the covered group. See e.g., 29 C.F.R. § 794(a) (2006) (Section 504).

scenario, may also argue as a matter of equity that if she can demonstrate a real possibility of success with accommodations, the school should offer her a second chance even if there is not the convincing likelihood of success required by the School's readmission standard.

While these arguments are cogent ones, there are competing concerns and counter arguments also centered on equity and fairness. As a threshold matter and as discussed below,³²³ from the perspective of the law school faculty, maintaining academic standards is primary. It does no one any good, most of all the dismissed student, to readmit her if there is not a good faith belief she will succeed, not only by maintaining required grades while in law school but also by passing the bar exam and practicing competently. As one court observed in a non-law school case, granting a degree (and readmission in the shorter term) conveys the school's imprimatur that the student can and will be successful in these ways.³²⁴ As discussed below,³²⁵ accreditation standards also bar law schools from readmitting students unless they are likely to succeed the second time around.

Beyond this mandated limitation of readmission of any student to those who are likely to succeed, with or without a disability, law schools have some discretion in deciding how to apply readmissions standards to students with disabilities and still comply with disability law. The faculty may believe equity among all the school's students is best served by holding everyone to the same standards, particularly as regards extra time on exams, except when disability laws require academic adjustments, for a number of reasons: the nature of law school grades, line-drawing concerns, concerns about test validity and skills needed for successful law practice, risking future failure on the bar exam and in practice for the student provided with non-required accommodations.

As to offering academic adjustments to students without statutory disabilities, or beyond legally required reasonable accommodations, it is important to note that this decision is qualitatively different than other sorts of affirmative action that considers diversity of various kinds (race, gender, disability, etc.) in making initial admissions decisions. This latter sort of affirmative action is done in the context of deciding which qualified students will be offered an opportunity for legal education. Once such students are admitted, they are held to the same academic standards as all other students; there is no individualized adjustment of academic standards.

In contrast, offering some law students academic adjustments which go beyond legally required reasonable accommodations (for example, giving extra time on exams to a student with a reading disorder impairment primarily involving slow reading speed which is not a statutory disability) gives individual students an academic experience and in some cases an evaluation of their performance which

323. See *infra* notes 347–349 and accompanying text.

324. Cf. Milam & Marshall, *supra* note 107 (“Graduate and professional schools owe a duty to the public, the student and the respective professions to assure that they award degrees only to qualified individuals. The same obligation compels institutions to dismiss those not qualified to practice.”).

325. See *infra* Section VII.A.2.

is different than those for most students. In a graduate school program where grading is criterion-based (i.e. excellent work receives a grade of “A,” no matter how the other students perform), such a practice might affect the individual student (her grades might overestimate her performance), but would probably not have much impact on the other students. The great majority of law schools, however, have mandatory grade curves which mean that law school grades are largely normative, measuring how the student performed relative to her classmates.³²⁶ Thus, in law school there is special risk that academic adjustments beyond legally required ones unfairly disadvantage other students. A legal commentator notes “a general sense of unease . . . about whether the various accommodations afforded for learning disabilities truly ‘level the playing field’ in a meaningful and valid way, or instead serve to provide unfair advantages to some. In some cases, . . . a strong suspicion of ‘gaming the system’ arises.”³²⁷

Hence, a law school may decide not to go beyond statutory requirements because it believes the fair and equitable thing is to hold all students to the same academic standards except as required by law.

Law schools may also be concerned about the impact of the specific academic adjustment of extra time on exams on the validity of scores on those exams, and thus wish to limit that adjustment to circumstances where it is legally required. Commentary by some disability experts corroborates this concern. It is not documented, for example, that the accommodation of additional time on exams for students with disabilities does not impair test validity.³²⁸ Some research with extra time on the SAT suggests the extra time compromises its predictive validity.³²⁹ Other research suggests that extra time and quiet rooms “increases the testing scores of all test takers.”³³⁰ One commentator notes, for example, that if an exam

326. See Nancy Kaufman, *A Survey of Law School Grading Practices*, 44 J. LEGAL EDUC. 415, 417–18 (Sept. 1994) (observing that two-thirds of law schools in a national survey report some sort of grade curve).

327. Murphy, *supra* note 45, at 46.

328. See, e.g., Tucker, *supra* note 47, at 17 (assuming test anxiety is a legal disability, providing extra time as an accommodation does reduce anxiety for the examinee, creating, the “paradox . . . of a non-anxious examinee with extra time”); Ranseen, *supra* note 46, at 8–9 (empirical research has not documented the effectiveness of typical exam accommodations such as extra time for examinees with ADHD and citing an expert review of studies of extra time for examinees which found the extra time did not help those examinees differentially; also observing that “there is no evidence that an accommodation of extra time does not alter test validity,” and all examinees afforded additional time improved their performance); Gordon, Murphy & Keiser, *supra* note 46, at 35 (“Unlike accommodations such as wheelchair ramps or elevator signs written in Braille, ADHD accommodations are universal in their potential benefit even for people without the disorder.”); *id.* (“In the case of ADHD there is no scientific research nor theoretical basis to indicate that extra time on an exam is necessarily helpful.”).

329. Susan Phillips, *High-Stakes Testing Accommodations: Validity versus Disabled Rights*, 64 BAR EXAMINER 8, 23 (1995) (finding that research indicates that SAT scores of learning disabled students given extra time predicted higher freshman college grades than those students actually received).

330. Robin Ballard & Amiram Elwork, *Accommodating Learning Disabled Applicants During Bar Examinations: What is Reasonable Under the ADA?*, 74 BAR EXAMINER 31, 34 (2005).

is speeded, an extra time accommodation “would be unfair to the applicants without disabilities.”³³¹ Experts note that when diagnosing an impairment and recommending accommodations, evaluators “gear their efforts toward helping their patients feel better . . . and will not tend to worry terribly much . . . about the ultimate implications of lax standards for test integrity or simple fairness for all.”³³²

Another commentator, an education professor with a J.D. and a doctorate in psychometrics, examines the impact of test accommodations for examinees and concludes that while test accommodations for persons with physical disabilities do not reduce test validity, accommodations for examinees with mental disabilities may in fact compromise test validity.³³³ Standards of professional associations for educators and psychologists indicate that, “[u]nless it has been demonstrated that the psychometric properties of a test . . . are not altered significantly by some modification, the claims made for the test . . . cannot be generalized to the modified version.”³³⁴

More generally, other disability experts note success on exams without accommodations may correlate with skills needed by practicing attorneys, specifically suggesting that attorneys need to remain attentive for long periods, be able to “sustain mental effort” for long periods, and “work under pressure.”³³⁵ Some experts note that “some learning disabilities (e.g., reading disorders) involve mental functions that are inherently relevant and critical to the practice of law,”³³⁶ and thus accommodations “may mask certain disabilities that are important to the practice of law and simply make it easier for learning disabled applicants to pass the bar examination.”³³⁷ These experts posit that mental processing speed and distractibility, which test accommodations attempt to compensate, may in fact be relevant to law practice, which involves “researching, understanding, retaining, and applying an enormous amount of highly complex legal information. . . . [L]awyers must be able to pay a great deal of attention to detail, . . . express themselves clearly . . . often under time pressure and in emotionally charged situations, . . . [and possess] quick thinking and the ability to focus.”³³⁸ Thus, “the presence of a learning disability may impede a person’s ability to practice law.”³³⁹

331. Duhl & Duhl, *supra* note 45, at 14.

332. Gordon, Murphy, & Keiser, *supra* note 46, at 29.

333. Phillips, *supra* note 329, at 8.

334. *Id.* at 12 (citations omitted) (noting the small populations given modified exams make any empirical research on this issue difficult at best, and suggesting in deciding requests for test accommodations, the test’s purpose, skills to be measured, and inference to be drawn from the score should all be considered).

335. John Ranseen & David Campbell, *Adult Attention Deficit Disorder: Current Concepts and Controversies*, 65 BAR EXAMINER 49, 54 (1996).

336. Ballard & Elwork, *supra* note 330, at 31.

337. *Id.*

338. *Id.* at 33.

339. *Id.*

“Licensing boards should assume that some learning disabilities can significantly impede an applicant’s ability to practice law effectively. The public interest is

Returning to the student without a statutory disability but with disorder-related slow reading speed, the law school may also understand that its students' reading speed varies greatly and for myriad reasons (students' overall information processing speed, their reading skills, their temperament, their interest in the material, or their work ethic) and determine that it is not equitable to provide extra time on exams only for students whose slow reading speed is related to an impairment and not caused by other reasons. The faculty may be concerned about line drawing, specifically about how far to go in tailoring education and evaluation to each student's strengths and weaknesses. If a student has a diagnosed impairment of dyslexia that does not amount to a statutory disability, should the student have extra time for her exam? If so, does equity also require postponing the same exam for a student who is recovering from a virus, or for a student who had a fight with her significant other? A disability expert questions whether a "low-achieving student" who would likely perform better on an exam with extra time "is less deserving of the opportunity to demonstrate maximum performance than is a student who has been labeled learning disabled."³⁴⁰ Similarly, the faculty may not find it administratively, or perhaps financially,³⁴¹ workable to tailor education and evaluation beyond the ways that the statutes require, particularly given the large size of most law school classes.

A law school might also conclude that the student with a non-statutory disability is not served well by offering adjustments that will not be available later in life to the student. As earlier parts of this article make clear, bar examiners typically do not offer accommodations beyond those which are legally required, and have disability experts trained in the relevant legal standards to review requests for accommodations.³⁴² Employers are required only to offer reasonable workplace accommodations to employees with statutory disabilities.³⁴³ Some commentators and attorneys with disabilities suggest that rigorous application of academic standards, presumably including readmission, is in the best interests of students with disabilities as well as other students. One commentator, referring to the post-law school experiences and opinions of several law school graduates with disabilities, suggests that:

Schools do their students a disservice by allowing them to become dependent upon accommodations such as extra time that will not always

protected not by using measuring methods that assess the applicant's potential abilities, but by employing those methods that attempt to determine how the applicant will actually serve his or her clients."

Id. at 34.

340. Phillips, *supra* note 329, at 12. "To minimize the potential for an invalid inference, a test user may want to grant only those accommodations judged essential." *Id.* at 14.

341. Section 504 and the ADA offer no funds to cover any of the costs of compliance. *See supra* note 83 and accompanying text.

342. For commentary on accommodations approved by disability experts and used by bar examiners, see notes 94–100 and accompanying text.

343. *See* 34 C.F.R. § 104.12 (2006) (reasonable accommodations for employees required under Section 504); 42 U.S.C. § 12112(5) (2000) (reasonable accommodations for employees required under ADA).

be available in practice. As one learning disabled graduate . . . noted, ‘I thought [school] was the big hurdle. But it turns out it isn’t. . . . I really don’t see that I’m ever going to eliminate the fact that I take twice as long to do things as other people.’ This student would have been better served had he received counseling, before graduation, from someone like Paul Grossman, the OCR attorney described . . . above. [Grossman] acknowledges that he has to work on weekends, holidays, and over vacations. He does so willingly, however, because he loves his work. Similarly, many learning disabled law students succeed academically simply by studying longer and more intensely than their classmates. Of course, in law practice, in which the average non-disabled practitioner already works long hours, it is extremely demanding to self-accommodate in this way. Thus, students preparing for practice should be counseled that the demands on their time in practice will be even greater than those in law school.³⁴⁴

Another commentator suggests that “students who make individual agreements with professors to remain in the university often may be postponing academic dismissal . . . and increasing likelihood of a lawsuit when the student is eventually dismissed.”³⁴⁵ In *Ewing*, the evidence was that “[Ewing] often beguiled his professors into allowing him to postpone or retake examinations or to ignore certain of his low mid-semester scores so as to raise his overall course average.”³⁴⁶

2. Accreditation requirements

Law school accreditation requirements impose two relevant limitations: 1) law schools cannot readmit students that they do not predict will be both academically successful and capable of passing the bar exam and meeting other licensing requirements, and 2) law schools must set their own educational policy, which includes setting and applying academic standards for dismissal and readmission.

Law schools operate under ABA and AALS accreditation standards that prohibit them from readmitting students unless they believe the students will be successful.³⁴⁷ A law school cannot readmit a student, with or without a disability,

344. Lisa Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J.L. & EDUC. 31, 61–62 (1997) (citations omitted).

345. Milam & Marshall, *supra* note 107, at 350–51 & n.108.

346. Petition for Writ of Certiorari at 5, *Ewing*, 474 U.S. 214 (No. 84-1273).

347. A.B.A. Standards for the Accreditation of Law Schools provide in relevant part: “Standard 501. ADMISSIONS . . . (b) A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar.” *Standards, Rules of Practice for Approval of Law Schools*, 2005 A.B.A. SEC. LEGAL EDUC. & ADMISS. TO THE BAR, at 35. The standards further provide:

Standard 505. PREVIOUSLY DISQUALIFIED APPLICANT. A law school may admit or readmit a student who has been disqualified previously for academic reasons upon an affirmative showing that the student possesses the requisite ability and that the prior disqualification does not indicate a lack of capacity to complete the course of study at the admitting school. . . . For every admission or readmission of a previously

that the law school does not believe will be academically successful. Accreditation standards also limit admissions and retention decisions to law schools acting through their faculty and dean;³⁴⁸ thus, universities cannot readmit law students. These accreditation standards also reserve to the law school “academic standards for retention, advancement, and graduation of students,” and provide that while “[a] law school may involve alumni, students, and others in a participatory or advisory capacity; . . . the dean and faculty shall retain control over matters affecting the educational program of the law school.”³⁴⁹

Hence, to the extent academic adjustments would be involved, a law school’s parent college or university cannot unilaterally choose to go beyond statutory requirements in certain academic respects for law students. Specifically, a college or university cannot unilaterally decide to offer academic adjustments to a law student without a statutory disability (for example, unilaterally offering extra time on exams to a student whose learning disability does not substantially impair her

disqualified individual, a statement of the considerations that led to the decision shall be placed in the admittee's file.

Standards, Rules of Practice for Approval of Law Schools, 2005 A.B.A. SEC. LEGAL EDUC. & ADMISS. TO THE BAR, at 37.

AALS Standard Section 6-2(a) Admissions provides in pertinent part: “a. A member school shall admit only those applicants whose applications have been evaluated pursuant to a process consistent with Bylaw 6-3 and who appear to have the capacity to meet its academic standards.” *Bylaws and Executive Committee Regulations Pertaining to the Requirements of Membership*, AALS HANDBOOK (Aug. 2005), available at http://www.aals.org/about_handbook_requirements.php.

348. ABA Law School Accreditation Standards and interpretations provide in relevant part:

Standard 204. GOVERNING BOARD AND LAW SCHOOL AUTHORITY. a) A governing board may establish general policies that are applicable to a law school if they are consistent with the Standards. b) The dean and faculty shall formulate and administer the educational program of the law school, including curriculum; methods of instruction; admissions; and academic standards for retention, advancement, and graduation of students; and shall recommend the selection, retention, promotion, and tenure (or granting of security of position) of the faculty.

Standards, Rules of Practice for Approval of Law Schools, 2005 A.B.A. SEC. LEGAL EDUC. & ADMISS. TO THE BAR, at 12.

Interpretation 204-2: Admission of a student to a law school without the approval of the dean and faculty of the law school violates the Standards. (December 1975; 1994; August 1996).

Id.

Standard 206. ALLOCATION OF AUTHORITY BETWEEN DEAN AND FACULTY. The allocation of authority between the dean and the law faculty is a matter for determination by each institution as long as both the dean and the faculty have a significant role in determining educational policy.

Id. at 13.

Standard 207. INVOLVEMENT OF ALUMNI, STUDENTS AND OTHERS. A law school may involve alumni, students, and others in a participatory or advisory capacity, but the dean and faculty shall retain control over matters affecting the educational program of the law school.

Id.

349. *Id.*

learning or other major life activities), nor unilaterally offer academic adjustments to students with statutory disabilities which are beyond statutory reasonable accommodations (for example, unilaterally offering a waiver of attendance requirements to a student with quadriplegia). These decisions can only be made by the law school.

3. Academic freedom issues³⁵⁰

Academic freedom protects both higher education institutions and individual faculty. There are several types of academic freedom claims. For example, academic freedom claims may be made by institutions against the government, such as in the Supreme Court case in which universities unsuccessfully asserted that the Solomon Amendment limited their academic freedom.³⁵¹ In the disability context, either faculty or institutions might assert that disability discrimination laws, which uniquely among discrimination laws impose obligations to make academic adjustments for covered students,³⁵² impinge on their academic freedom. The Supreme Court has indicated, however, that academic freedom does not extend to noncompliance with discrimination laws, noting that while it generally defers to academic judgments, this “principle of respect [is] for *legitimate* academic decision-making [sic],” which the Court indicated would not include illegal discrimination.³⁵³

Finally, and most relevant to this article, there are academic freedom claims between faculty and their employing colleges or universities. Specifically, faculty who are told of academic adjustments for their students might assert infringement of their individual academic freedom. Such claims might be enforced via lawsuit,³⁵⁴ and/or by a grievance under a labor contract or faculty handbook, or a complaint to accrediting agencies or professional organizations such as AAUP. The outcome of such claims seems clear if the academic adjustments are required by discrimination laws: academic freedom does not trump the obligation to comply

350. More than a cursory discussion of academic freedom issues is beyond the scope of this article. For more extensive general discussion of academic freedom issues, see J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251 (1989). For a brief discussion of individual and institutional academic freedom issues and disability, see Claire McCusker, *The Americans with Disabilities Act: Its Potential for Expanding the Scope of Reasonable Academic Accommodations*, 21 J.C. & U.L. 619, 639–41 (1995). For a more extensive discussion, see Leonard, *supra* note 117.

351. *Rumsfeld v. Forum for Academic and Inst’l Rts., Inc.*, 126 S.Ct 1297 (2006).

352. *See supra* Section VII.A.1.

353. *Univ. of Penn. v. Equal Empl. Opportunity Comm’n*, 493 U.S. 182, 199 (1990) (noting that private university’s academic freedom does not include right to keep peer review documents from EEOC in connection with a tenure applicant’s discrimination claim); *id.* at 199 n.7 (defendant university does not assert race or gender are “academic grounds” for academic freedom purposes); *id.* at 198 (precedent cases on academic freedom involve “direct infringements on the asserted right to determine for itself on academic grounds who may teach”).

354. One commentator references a lawsuit filed by a mathematics professor who was told to provide extra time on an exam to a student with a disability. Laura Rothstein, *Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities*, 17 J.C. & U.L. 471, 473 (1991).

with such laws.

If, on the other hand, the academic adjustments go beyond those which are legally required, the outcome may be different. As one commentator notes, institutional academic freedom is protected as the collective of individual faculty academic freedoms:

[C]ourts' willingness to defer to [institutional] policies is in large part a consequence of their having been established or reviewed by duly constituted faculty bodies (e.g., course content is the province of curriculum committees; the overall level of academic rigor is ultimately traceable to decisions of faculty admissions committees). In a very real sense, then, the *institutional* academic freedom recognized in many judicial opinions may be viewed as the sum of acts of *individual* faculty academic freedom.³⁵⁵

This means that the individual faculty member's academic freedom likely does not extend to noncompliance with faculty-approved academic policies (such as, for example, a mandatory grade curve). It also means that institutional judgments by administrators rather than faculty may not have the protective armor of academic freedom and, thus, may be overridden by the individual faculty member's academic freedom. Consequently, one important issue in academic freedom claims involving nonstatutorily required academic adjustments would be who made the decision to provide the non-required academic adjustments. If the law school faculty had voted to go beyond statutory requirements, precedent cases suggest requiring compliance with faculty-approved academic policies would not violate individual dissenting faculty's academic freedom.³⁵⁶ If, on the other hand, nonacademic university officials attempted to make such a decision, the faculty member would seem to have a colorable claim of infringement of academic freedom, in addition to the violation of accreditation standards described above.

The Ninth Circuit provided helpful guidance on these issues in the context of a professor's successful challenge to his discipline pursuant to his school's sexual harassment policy.³⁵⁷ In that case, the Ninth Circuit held that higher education discrimination policies which are vague and/or overbroad "impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . . [and] discourage[] the exercise of first amendment freedoms."³⁵⁸

4. Triggering additional disability law obligations

If a law school chooses to serve students with impairments that do not amount

355. STEVEN POSKANZER, HIGHER EDUCATION LAW: THE FACULTY 102 (The Johns Hopkins University Press ed.) (2002).

356. See, e.g., *Wozniak v. Conry*, 236 F.3d 888 (7th Cir.), *cert. denied*, 533 U.S. 903 (2001) (finding that academic freedom of faculty member was not violated by requiring compliance with faculty-approved grading policies).

357. *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996).

358. *Id.* at 972.

to statutory disabilities, and/or to make accommodations beyond the statutorily required ones, additional obligations under disability law may be triggered. First, serving students with impairments that do not amount to statutory disabilities, and who therefore are not covered by disability laws, may suggest that the law school “regards” such students as having a disability within the meaning of the statute.³⁵⁹ Federal appeals courts are currently split on whether there are reasonable accommodation obligations toward persons who are regarded as having a disability. Relying primarily on the plain language of the statutes, which impose affirmative obligations equally on persons who actually have statutory disabilities and who are merely regarded as having statutory disabilities, the First,³⁶⁰ Third³⁶¹ and Tenth Circuits³⁶² have held that reasonable accommodation obligations include persons regarded as having statutory disabilities. The Fifth,³⁶³ Sixth,³⁶⁴ Eighth³⁶⁵ and Ninth³⁶⁶ Circuits have rejected accommodation obligations toward “regarded as” persons, because those courts perceive “bizarre results” would result from imposing such obligations.³⁶⁷ Thus it appears that in some circuits a law school can, by serving a student who does not have a statutory disability, assume nondiscrimination and reasonable accommodation obligations to that student. A law school may be able to avoid this scenario by documenting to such students that while the school is choosing to serve them, the school does not believe that they have statutory disabilities. For example, in the illustrative scenario, if the law school decides to readmit dismissed Student but does not believe she has a statutory disability, it might choose to offer her accommodations, while at the same time clarifying with her that it does not perceive her as having a statutory disability.

Somewhat similarly, if a law school chooses to offer services to a student with a statutory disability beyond those which are statutorily required reasonable accommodations, the school’s obligations may indirectly become enhanced. If, for example, a school offers a student with a disability a waiver of class attendance requirements (which normally would be an essential requirement for law students and thus not subject to reasonable accommodation), it does not necessarily waive

359. As discussed earlier in the article, persons who are regarded as having a disability are covered by the statutes as well as persons who actually have statutory disabilities. See *Sutton*, 527 U.S. at 489–94. The Court in *Sutton* clarified that persons “regarded as disabled” are those who are perceived as having a statutory disability when in fact they do not have an impairment, or their impairment does not amount to a statutory disability. *Id.* In *Sutton*, the employee did not fall into this category since there was no evidence that her employer perceived her as having a statutory disability. *Id.*

360. *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir. 1996).

361. *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 773–76 (3d Cir. 2004).

362. *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 675 (10th Cir. 2005).

363. *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998).

364. *Workman v. Frito-Lay Inc.*, 165 F.3d 460, 467 (6th Cir. 1999).

365. *Weber v. Strippit, Inc.*, 186 F.3d 907, 916–17 (8th Cir. 1999).

366. *Kaplan v. City of Las Vegas*, 323 F.3d 1226, 1231–33 (9th Cir. 1996).

367. See *id.* (noting that it would be a “perverse and troubling result” if “impaired [but not actually disabled] employees would be better off under the statute if their employers treated them as disabled even if they were not”).

an argument a school might make in the future about its legal obligations. As one court has noted, making concessions neither obligates a school to do something in the future, nor renders the concession legal reasonable accommodations.³⁶⁸ However, a jury may find making an accommodation to be persuasive evidence that it is a reasonable accommodation.³⁶⁹ Moreover, a law school which offers tutoring or other personal services to students must offer those services on a nondiscriminatory basis to students with disabilities.³⁷⁰ Thus, for example, making tutoring available to an impaired but not statutorily disabled law student triggers an obligation to make tutoring available on a nondiscriminatory basis to students with statutory disabilities.

5. Potential tort and contract claims

A student who is wrongfully readmitted (that is, readmitted when there is not a good faith basis for believing she will be academically successful) and who does not in fact succeed after paying the law school additional tuition rather than earning income or pursuing a different educational or training program may file tort and/or contract claims against the school. While courts have rejected claims sounding in educational malpractice for public policy reasons, claims of misrepresentation³⁷¹ (that, given the accreditation standards discussed above, readmission amounts to an affirmative representation by the law school of its belief that the student will succeed) and/or breach of the implied covenant of good faith and fair dealing in the contractual relationship between the student and the school³⁷² may be viable.

Faculty who teach students that receive nonstatutorily required academic adjustments without their consent may also have contractual claims in addition to those surrounding their academic freedom. Some faculty handbooks or labor contracts may offer faculty the opportunity to grieve not just violations of school policy, but more generally, decisions that the faculty member believes are wrong.³⁷³

368. See *Wong I*, 192 F.3d at 820.

369. See *id.*

370. See Oregon State Univ., 5 NDLR 19 (OCR 1993); *supra* notes 60–61 and accompanying text.

371. See generally JAMES RAPP, 5 EDUCATION LAW § 12.05[4] (2006).

372. See generally *id.* at § 12.05[5].

373. At the author's university, for example, the faculty handbook makes available a grievance process culminating in binding arbitration for decisions the faculty member believes to be "unfair, unjust, or in violation of University policy." GONZAGA UNIVERSITY FACULTY HANDBOOK § 307.02a.

B. Guidelines for Complying With Disability Discrimination Statutes In Readmissions Cases

1. Verify the existence of a statutory disability

It has long been clear that higher education students are responsible for self-identifying as having a disability and for providing appropriate documentation of their disability.³⁷⁴ More recently, the Court's decisions requiring that mitigators be considered in determining whether the impairment is a statutory disability, and especially its *Toyota* decision emphasizing the requirement that the impairment "substantially limit" a major life activity as compared to the average person in order to be a statutory disability, make it clear that having a diagnosed impairment is not necessarily equivalent to being a statutorily covered person with a disability.³⁷⁵

Most of the disputes in the readmissions cases precede the Court's 2002 *Toyota* decision interpreting "substantially limits." Perhaps in part for this reason, when there was a documented impairment, most of the schools in the readmission cases did not dispute whether the complaining student was a statutorily covered person with a disability.³⁷⁶ In appropriate future cases, as illustrated by *Wong II* and *Marlon*, law schools may well challenge whether a dismissed student who claims that a "disability" caused her academic failure actually has a statutory disability.

Whether a dismissed student has a physical or mental impairment is not an issue about which law school faculty normally have expertise. However, the law school can insist on documentation that the dismissed student claiming a disability has a diagnosed impairment, and that the impairment, with mitigators, does in fact substantially impair a major life activity. Commentary by both legal scholars and disability experts suggests that few law students' newly diagnosed learning disabilities or ADHD will meet the post-*Toyota* "substantially impairs" standard, since few such students' learning disabilities substantially limit their learning in comparison to the average learner.³⁷⁷ Similarly, a student with a broken (writing) arm may not have the long-term or permanent substantial limitation of writing that the *Toyota* Court appears to require.³⁷⁸ A student with a mental illness such as bipolar disorder, which is successfully treated with medication, may not have substantial impairment with the medication mitigator. On the other hand, if the medication has significant negative side effects, such as rendering the student unable to think clearly at certain times of day, those side effects must be considered in determining if the student has a statutory disability.

374. See *Wong I*, 192 F.3d at 826.

375. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. 184, 196–98 (2002).

376. See, e.g., *Anderson v. Univ. of Wis.*, 841 F.2d 737 (7th Cir. 1988) (student claiming alcoholism as disability); *Alison v. Howard Univ.*, 209 F. Supp. 2d 55 (D.D.C. 2002) (student claiming "temporary emotional distress" as disability); *Gill v. Franklin Pierce Law Ctr.*, 899 F. Supp. 850 (D.N.H. 1995) (student claiming "adult child of alcoholic" as disability).

377. See *supra* notes 45–48 and accompanying text.

378. *Toyota*, 534 U.S. at 198 (2002) (citing 29 CFR §§ 1630.2(j)(2)(ii)-(iii) (2006)).

In the illustrative scenario, Law School has undisputed evidence that Student has the impairment of dyslexia, and the readmissions committee has neither the expertise nor any informational basis to dispute the diagnosis. If the committee has questions about the diagnosis, it may consult with disability experts within the university, such as the disability services office, and in appropriate cases might ask the student for permission to speak with Evaluator, obtain additional information from Evaluator, or even obtain an additional evaluation or outside expert review (if from a person of the school's choosing at the school's expense). Otherwise, disputing the diagnosis suggests the committee is improperly operating based on stereotypes.

As discussed above, however, having an impairment and being a statutorily protected person with a disability are not the same thing; the impairment must, with mitigators, substantially impair a major life activity such as learning.³⁷⁹ The evidence provided in the illustrative scenario suggests the impairment does not amount to a statutory disability. Student has apparently used self-mitigators (coping strategies) in the past, with success; these must be considered in the analysis. With a B average in college in a subject area which involves substantial reading and without any accommodations, and an LSAT high enough to gain admittance to Law School, Student's record indicates that Student's prior learning, and thus overall learning, may not have been substantially limited. Any factual findings by Evaluator about the extent to which the impairment affected Student should normally be accepted, but to the extent the committee has additional information on this point (e.g. the undergraduate success), that additional information is also relevant.

The person with the expertise and responsibility for making the legal determination of the presence of a statutory disability will vary from one law school to another; perhaps it is the university disability services office, perhaps the committee, perhaps university counsel.³⁸⁰ What is clear is that: 1) Evaluator's diagnosis of an impairment is not necessarily sufficient, and 2) Evaluator lacks the expertise and responsibility for determining that the impairment amounts to a statutory disability.³⁸¹

2. Carefully document consideration of the case by a faculty committee and/or the full faculty

The court cases also provide substantial guidance as to what constitutes a nondiscriminatory readmissions process when a law student claiming a disability is

379. See *supra* Section III.A.2.

380. See 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, 34 (1996) (suggesting that status of dismissed student as a person with a disability is not an academic judgment and courts will not defer to school's determination on this issue).

381. The committee may decide to proceed on the explicitly stated assumption, without itself finding, that Student is a statutorily protected person with a disability. If the committee decides to do so, and/or to go beyond statutory requirements in treating a readmissions petitioner as disabled, it should note that in its report so the full faculty can engage in meaningful review.

involved, and specifically what will trigger judicial deference to the school's judgment not to readmit. The cases announce a policy of deference when the school's judgment is a careful, truly academic one; a factual record of introspection about the basis for the decision and the consideration of disability information is specifically required by some courts.³⁸² The Supreme Court decision in *Grutter* is significant in that it accords deference to a law school's academic judgment in the context of a race discrimination claim, which would otherwise require strict judicial scrutiny. Conspicuously, the *Grutter* Court deferred to a law school faculty-approved, subjective, holistic admissions policy tied to specific academic needs.³⁸³ In a companion case, the Court did not defer to an undergraduate admissions policy created by nonacademic administrators, which was neither subjective nor holistic and was not tied to specific academic needs.³⁸⁴ These cases counsel law schools, when setting and applying standards for dismissal and readmission to do so as a faculty, or as a committee with delegated authority from the faculty, rather than as a decision by a single administrator or administrative group.³⁸⁵ They further counsel that law schools should set and apply standards that are tied to the law school's academic integrity and needs, in ways which are documented by the law school.³⁸⁶ It is clear from a review of relevant authority that neither a court nor OCR will normally second guess generally applicable readmissions standards.

Most law schools appear to assign at least initial responsibility for evaluating readmissions petitions to a faculty committee, with some schools delegating actual decision making authority to the committee.³⁸⁷ While no court or OCR opinion has questioned the decision by committee approach, there are advantages to faculty-wide decisions. Reserving the decision to the full faculty, with a

382. See *infra* Section V.C.3.

383. See *Grutter*, 539 U.S. at 315–16.

384. See *Gratz*, 539 U.S. at 253.

385. See *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 149 (D. Mass. 1997) (applying *Wynne* limited deference standard to determine whether course substitutions were reasonable accommodations or altered essential academic standards; University Provost's unilateral determination, based in part on stereotype and bias, was insufficient); *id.* at 154 (ordering university to convene a faculty committee to make this determination).

386. For example, if a law school's bar passage rate is of concern, and/or its own internal research indicates recently readmitted students have largely been unsuccessful, those may be reasons to have a tough readmissions standard and to apply it strictly. A law school in such a situation should document these reasons for its approach to readmissions. *Cf.* Letter to: Univ. of Akron, 26 NDLR 263 (OCR 2003) (OCR deferring to and upholding law school's decision not to readmit student in part because school's judgments and resulting rules concerning minimum GPAs and opportunities for readmission were based on past successes of students with low GPAs, the school's bar pass rate, and a desire to avoid taking tuition from students whose prognosis for academic success, success on the bar exam, and competence in practice was poor, and were recommended by a faculty committee and adopted by the full faculty).

387. The author is unaware of any law schools that leave readmissions decisions to a single person, as was problematic for the medical schools in *Singh* and *Steere*, and unaware of law schools whose parent university has the power to overturn the law school faculty's decision on readmission. The latter would appear to violate accreditation standards as discussed earlier in Section VI.A.2.

recommendation from a committee, helps avoid the appearance of bias by individual/small groups in some of the cases discussed earlier,³⁸⁸ which posed difficulty for the schools, and ensures consistency of application of the readmission standard from one year to the next.

3. Make a decision that is holistic and considers context

The cases also emphasize that deference is appropriate when academic decisions are made holistically and in context. Thus, it is appropriate for law schools to use context, both school-wide and student-specific, to make readmissions decisions, and to document that context. At the school-wide level, for example, the law school may have data on the law school grades and/or bar exam performance of readmitted students from past years and may accordingly adjust its readmissions standards and/or how strictly it applies them to current petitions. Law schools also operate under ABA accreditation standards that prohibit them from readmitting students unless the school believes the student will be successful.³⁸⁹ Law schools may also wish to consider the extent to which faculty and other resources are available to help marginal students succeed. At the student-specific level, the law school has a wealth of information about each petitioning student, most importantly the feedback of the faculty who have actually instructed and evaluated the student, and, if applicable, the student tutors who have worked with the petitioning student, perhaps in an academic resource program. The law school also has information from the student's file including the student's LSAT score and undergraduate grades, as well as the student's actual exam answers and numerical data comparing the student's exam and course grades with those of classmates. Several decisions, including *Horowitz* and *Ewing*, teach that documentation of this complex basis for each readmission decision is crucial.³⁹⁰ While collecting and synthesizing this information and memorializing the basis for the decision is time consuming, it is crucial to assist the school in making both correct and legally defensible readmissions decisions.³⁹¹

4. Give reasoned and informed consideration to disability information, with appropriate confidentiality

To the extent a petitioning student submits disability information, it must be

388. See *supra* Section V.C.1.

389. See *supra* note 347 and accompanying text.

390. See *supra* notes 112–125 and accompanying text.

391. As discussed earlier, most law school readmissions decisions are made over the summer, when most law faculty are not on contract. Therefore, it may be tempting to do this often uncompensated work over the summer break in a less than completely thorough fashion. The author suggests that readmissions work is important and time consuming enough to compensate nine-month faculty who are willing to take time from their summer to perform it, just as faculty who teach summer school are paid, and faculty who engage in scholarship over the summer may receive a research stipend. The *DePaul* OCR opinion, discussed *supra* at notes 285–300 and accompanying text, illustrates the consequences when such decisions are made in a way which appeared to OCR to be less than careful and thorough.

considered in a reasoned and informed way. As discussed below, however, the committee need not and should not defer to the disability information to the extent it offers an opinion on an academic issue, such as the student's ability to succeed if readmitted, or a legal issue, such as whether the student has a statutory disability. Normally, the disability information submitted by a student is an evaluator's report containing a diagnosis and recommendations addressed to the committee, written so that it can be readily understood by law faculty. The court decisions and OCR opinions do not suggest that under usual circumstances the school needs to consult with technical experts in order to interpret disability information.³⁹² In fact, a policy or practice which requires all petitioning dismissed students' disability information to go to a university disability services office, with a summary report of that information prepared by that office for the committee and not the underlying disability information, may be a form of disability discrimination. Specifically, such a policy would preclude students from using unfiltered information to make a strong, documented case for readmission, a criterion which OCR has indicated is a legitimate factor in making readmissions decisions.³⁹³ On the other hand, in the event a student wishes to use the services of the university disability office in connection with her petition, she should be allowed to do so. Moreover, to the extent a law school committee is unclear about any disability information provided, or, as in *DePaul*,³⁹⁴ there is any evidence that any committee member is engaging in stereotypical or otherwise discriminatory thinking, disability experts (such as university counsel, the university disability services office, and/or the evaluator as appropriate) could be brought in.

While the ADA's employee provisions require confidentiality for employee disability information,³⁹⁵ there are no corresponding provisions concerning student disability information under Section 504 or the ADA.³⁹⁶ As student records information, however, student disability information is subject to FERPA (Family Education Rights and Privacy Act, the federal student records statute).³⁹⁷ FERPA

392. See *Marlon*, 2003 WL 22914304 (addressing a case where disability services office evaluation attached to student's petition, but office is not otherwise involved, opinion expresses no concern about this and grants summary judgment for the school); *Anderson v. Univ. of Wis.*, 841 F.2d 737 (7th Cir. 1988) (dealing with a student's counselor's report that apparently went directly to committee without involvement of disability services office, and which says that student can now handle stress of law school; committee does not agree, opinion expresses no concern about this and grants summary judgment for the school).

393. See *supra* notes 265–266 and accompanying text.

394. See *supra* notes 285–300 and accompanying text.

395. See 42 U.S.C. §§ 12112(d)(3)(B); (d)(4); 29 C.F.R. § 1630.14; EEOC Enforcement Guidelines on Pre-Employment Inquiries Under the Americans with Disabilities Act, 8 FEP Manual 405:7191, 7201–02 (BNA 1995) (requiring employers to keep ADA-covered employees' medical information in a confidential file separate from the employee's personnel file).

396. Section 504 regulations do require that under the limited circumstances in which it is permissible for schools to make pre-admissions inquiries about applicants' disabilities, such information be kept confidential. 34 C.F.R. § 104.41(c)(2).

397. 20 U.S.C. § 1232g. For more detailed discussions of FERPA, see Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. L. REP. (WEST) 469 (2001); Lynn M. Daggett, *Bucking up Buckley I: Making the Federal*

requires confidentiality of information contained in student records unless the student has given written consent for disclosure,³⁹⁸ or the disclosure is pursuant to one of FERPA's many exceptions.³⁹⁹ Most pertinent is FERPA's exception for internal sharing with school employees who have "legitimate educational interest" in the information,⁴⁰⁰ as defined in the school's student records policy. Under this exception, it is appropriate to share disability information with agents of the school, such as the committee making readmissions decisions/recommendations, and the full faculty if the readmission decision is its to make. Persons who have such information must keep it confidential; disclosure beyond that permitted by FERPA may be treated as a form of disability discrimination.⁴⁰¹

5. Defer, and refuse to defer, as appropriate: university administrators and law faculty should defer when appropriate, but the law faculty should not defer, internally or externally, on academic issues

The law school must also determine which issues and decisions regarding the readmission petition are 1) academic, such as whether a student is likely to be successful if readmitted and whether a requested accommodation would alter the law school's academic standards, and, thus, ones in which it has expertise and the responsibility for making the ultimate judgment, 2) concern the existence and nature of an impairment, for which a disability expert has expertise and should make the ultimate judgment, or 3) legal, such as whether an impairment is a substantially-limiting-with-mitigators statutory disability.

In the illustrative scenario, Evaluator recommends and Student requests accommodations consisting of tutoring, note taking assistance, elimination of the writing requirement and extra time on exams. Their recommendation by Evaluator does not necessarily mean these adjustments are legally required reasonable accommodations. At many law schools, the college or university disability office makes recommendations for reasonable accommodations, while the law school retains the final decision, primarily so that it can determine whether any proposed accommodations would alter the law school's academic standards or present an undue hardship. Here, assuming Student is a statutorily covered person with the disability of dyslexia/reading disorder, there are two proposed accommodations, note-taking and extra time on exams, which are common for dyslexic/reading disordered students and should be familiar and noncontroversial to the committee. As to the recommendation for tutoring, the statutes provide that personal services are not required, although to the extent a school makes tutoring available to students without disabilities (as this school apparently does through its academic resource program for 1Ls) it must make such tutoring available to students with

Student Records Statute Work, 46 CATH. L. REV. 617 (1997).

398. 20 U.S.C. § 1232g(b) (2000 & Supp. II 2003).

399. *Id.*

400. 20 U.S.C. § 1232g(b)(1)(A) (2000 & Supp. II 2003).

401. *Cf. Bruschini v. Bd. of Educ.*, 911 F. Supp. 104, 106 (S.D.N.Y. 1995) (asserting disclosure of disability-related records as an IDEA violation).

disabilities on a nondiscriminatory basis.⁴⁰² Finally, as to the elimination of the writing requirement, the decision as to whether this amounts to a change in academic standards is an academic one about which the law school, not Evaluator or the college or university disability office, has expertise and ultimate responsibility.⁴⁰³

Not deferring to internal or external disability experts on academic issues is expected by the courts,⁴⁰⁴ and is important for making good decisions on the merits and for preserving court and/or OCR deferral if those decisions are challenged. Consider, for example, a law school committee which defers to the opinion of its disability services office, or that of Student's Evaluator, that a newly diagnosed Student's grades would be substantially higher if she were allowed extra time on exams, when the committee really thinks that Student had not grasped legal analysis (in which event the extra time will not improve Student's exam performance). This committee's actions suggest that the decision is not such an academic one. Consequently, a court has little reason to defer to that judgment. Conversely, college or university administrators hearing internal appeals of readmissions decisions or internal disability discrimination complaints should also defer to the law faculty's academic judgments. Second guessing by college or university administrators of the law faculty's decisions on academic issues invites courts and the OCR to do so as well, intrudes upon the expertise of the law faculty, and violates accreditation standards.⁴⁰⁵

6. Apply the readmission standard in a nondiscriminatory way

The school need not make the "correct" decision, with the aid of hindsight, on a petition, but it must apply its readmission process and standards in a nondiscriminatory way. This obligation runs from the mundane (e.g. applying a deadline for documentation equally to disability and other information) to the complex (e.g. predicting a petitioning student's future success). A school decision on the more complex end of the spectrum is whether to apply its readmission standard strictly or leniently. For example, if a school's policy or practice is to be lenient about the "extraordinariness" of circumstances required if a student's GPA is very close to the required minimum, the school must be equally lenient about extraordinariness when a student with a disability's GPA is very close to the required minimum. It would be helpful for law schools to collect and periodically review the readmission decisions of all students over a several-year period to ensure that standards are being applied nondiscriminatorily, and as OCR is likely to do if it investigates a complaint.

402. See *supra* note 61 and accompanying text.

403. Of course, even if not a legally required reasonable accommodation, the law school may decide to waive it or offer an alternative adjustment.

404. See *Marlon*, 2003 WL 22914304 (disability services office report on evaluation is not an independent judgment, nor a legal finding); *Anderson*, 841 F.2d 141 (affirming summary judgment for school which denied readmission despite report from student's counselor that student "can now handle the stress of law school").

405. See *supra* Section VII.A.2.

a. *Nondiscriminatory consideration of disability as an extraordinary circumstance*

Applying the readmission standard to Student's petition in the illustrative scenario, and assuming *arguendo* that Student has a statutory disability, the committee must first determine whether Student's failure was caused by "extraordinary circumstances." The committee's determination of the cause of academic failure is an academic judgment for which the law school has expertise and responsibility. Student's asserted disability may be, but is not automatically, an extraordinary circumstance. In fact, the impairment could be an extraordinary circumstance even if it does not amount to a statutory disability.⁴⁰⁶ In the illustrative scenario, there is conflicting evidence on this issue, both about causation and about whether Student had a reasonable opportunity to obtain administrative relief prior to dismissal. As to the cause of failure, there are Evaluator's and Student's claims that an undiagnosed and unaccommodated disability is the cause. On the other hand, there is a suggestion that an unwise decision to spend inordinate time on extracurricular activities is a problem. Even more significantly, there is evidence (the "very low" LSAT score) that Student was not one for whom legal analysis would come easily, and that Student's failure to master legal analysis and some of the basic concepts (based on instructor feedback) was the cause of the failure. As to whether there was a reasonable opportunity to obtain administrative relief, the committee might reasonably conclude that Student has the legal obligation to self-identify and document a disability, and then to request accommodations. The committee might reasonably conclude that Student should have pursued disability documentation and accommodations after receiving her poor fall grades, in concert with her actual understanding that she likely has a reading disability and could be tested for it. On the other hand, the committee might reasonably conclude that a person similarly situated to Student who has always done well without accommodations is reasonable in thinking she can "tough it out" successfully. In any event, the committee must apply the extraordinary circumstances standard (with the tort-like multiple causes and reasonable person analysis as illustrated by the scenario) in the same way to Student's case as it does to other cases not asserting a disability, or at least no more harshly than it does to other cases. For example, if another student asserts her failure was caused by a nasty divorce during her first year, the committee must do an *are-the-circumstances-extraordinary/causation/reasonable-person* analysis, with the same degree of strictness to that case.⁴⁰⁷

406. In such a case, however, disability discrimination claims would not be available to the student for review of the school's readmission decision.

407. One approach the committee may want to consider is to assume without deciding that the newly diagnosed disability is an extraordinary circumstance, or alternatively to make no finding on this issue, and move on to the future success criterion.

b. *Nondiscriminatory consideration of disability and prediction of future success if readmitted*

Whether the student would be academically successful if readmitted is the ultimate academic judgment for which the law school has the expertise and responsibility. In the illustrative scenario, as discussed above, there is conflicting evidence as to the cause of the failure and thus conflicting evidence about Student's ability to succeed in the future. The law school faculty provided legal instruction to Student for a year; no one else has done so. The law school faculty collectively have decades, if not centuries, of observing law students go on to succeed or fail in law school, on the bar exam, and in practice. The law school faculty know that some students, while bright, are just not intellectually suited to do legal analysis.

In the scenario, Evaluator has opined that Student will succeed if provided with the requested accommodations. While not disputing Evaluator's good intentions, she has neither the information (she is likely not privy to Student's LSAT score, nor the instructor and tutor feedback) nor the expertise (she has not attended law school, taught law school, taken a bar exam, or practiced law) to form an opinion about likely academic success to which the law school must or should defer. Nor, in fact, do the college or university disability services office or administrators, such as provosts, have the expertise to helpfully opine on this ultimate academic judgment call. The committee must consider all of the disability information provided by the student, including Evaluator's prediction of future academic success. The actual judgment, however, in all its subjectivity and complexity, should—and must—be made by the committee. This is necessary, not only to make the best decision possible, but, somewhat ironically, to preserve the possibility of judicial deference to the decision down the road. As previously discussed, if a law school defers to the judgment of another on this issue, it risks a court later seeing the issue as not such an academic one, and thus, not deferring to the school's decision.

In predicting success, the committee should do its best to factor in legally required reasonable accommodations if the student is a person with a statutory disability. Specifically, the committee should try to predict how Student in the illustrative scenario would perform if provided with reasonable accommodations (in the scenario, likely note-taking and extra time on tests).⁴⁰⁸ In some cases where the student has received accommodations such as extra time on tests and has still not earned the minimum required grades, making this prediction is fairly straightforward. In the illustrative scenario, there is no data on Student's performance with accommodations, and the committee simply must do its best to make a prediction. The committee may, for example, find it helpful to see if Student performed better on law school assignments, such as take home exams and legal writing papers, which do not have time limits. If she did not fare better, it

408. Note that in the scenario, Student was already taking a reduced load, which is a common accommodation for students with dyslexia because they need more time to complete the assigned reading for each class.

suggests that something besides reading and writing under time limits (perhaps the problems with analysis and concept mastery identified by the instructors) is the primary cause of the student's failure, and additional time on exams is not likely to significantly improve performance. The scenario is further complicated by the fact that some of the requested accommodations may not be reasonable, as discussed above.⁴⁰⁹ On this last issue, one approach the committee may want to consider is to explicitly assume, without deciding, that the requested accommodations are reasonable, and predict success with all the requested accommodations.

In the illustrative scenario, there is conflicting evidence on Student's ability to succeed. On the one hand, the evaluation may suggest that Student's exam performance underestimates her mastery of the curriculum, and the "very low" LSAT without accommodations might cause the faculty to underestimate Student's potential. On the other hand, the LSAT score suggests Student's native legal reasoning ability may be limited, and feedback from Student's instructors suggests the problem is with legal reasoning rather than reading, which will not be cured with additional exam time. Student's extremely active role in extracurricular activities and failure to attend tutoring sessions suggests other possible causes of her failure. Student's history of academic success, including a B average in a subject area requiring much reading, suggests her reading abilities may not be severely limited. Student's suggestion in her petition that she needs tutoring and a waiver of the writing requirement to succeed might be taken to suggest that she is not otherwise qualified for readmission if those adjustments are determined to be part of the school's fundamental academic standards. The committee could reasonably decide either way; it must and can only do what it thinks is the "right thing," and can expect a court to defer to its decision if it follows the above-described guidelines.

VIII. CONCLUSION

It is an honor for college and university administrators that the Supreme Court has selected higher education as the one unique community in our society eligible for such judicial deference. Like all honors, it comes with a responsibility—a challenge to all those working in higher education: use your educational judgment carefully, deliberately, and often. If we continue to do so, we will earn judicial deference to our efforts and continue to create vibrant, living, learning environments for our students, faculty, and staff.⁴¹⁰

While this statement pertains to higher education academic decisions generally, it applies with equal force to the specific category of deciding whether to readmit academically dismissed students who claim a disability. The confluence of strict standards for defining who has a statutory disability, and the courts' largely deferential approach to disability discrimination claims by academically dismissed students, means that schools can normally make readmissions decisions about

409. See *supra* note 61 and accompanying text.

410. Stoner & Showalter, *supra* note 107, at 617.

students with disabilities without worrying about being reversed in court. Law schools thus currently have the freedom to do the right thing, as their educational judgment defines it: to “use [their] educational judgment carefully, deliberately, and often” when making readmissions decisions, including denying readmission to students with disabilities, nondiscriminatorily and in good faith. The court cases suggest that the courts believe law schools have been meeting this standard, and they must endeavor to continue to do so, or risk the judicial deference law schools currently enjoy.

