# MILLENNIALS AND DISABILITY LAW:

# REVISITING *SOUTHEASTERN COMMUNITY COLLEGE V. DAVIS*

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## INTRODUCTION

In 1979, the Supreme Court, in its first decision addressing any issue under Section 504 of the 1973 Rehabilitation Act[1] ("Section 504"), began laying the groundwork for addressing issues of students with disabilities in higher education. In *Southeastern Community College v. Davis*,[2] the Supreme Court addressed the issue of when an individual with a disability is "otherwise qualified."[3] The Court established that the individual must be able to carry out the essential requirements of the program with or without reasonable accommodation and in spite of the disability.[4] This decision also established that the institution is not required to make fundamental alterations[5] and is not required to lower standards or provide accommodations that are unduly burdensome.[6]

Though the courts did not decide many higher education disability

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1. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2000).

2. 442 U.S. 397 (1979). See Laura Rothstein, Southeastern Community College v. Davis*: the "Prequel" to the Television Series "ER," in* EDUCATION STORIES (Michael Olivas & Ronna Schneider eds., Foundation Press 2007), for a detailed discussion of this decision and the developments that evolved from this case. This is the first Supreme Court decision issued under any federal disability discrimination statute.

3. 442 U.S. at 405. The case dealt with a hearing impaired student seeking entry into a registered nursing program. *Id.*

4. *Id.* at 406.

5. *Id.* at 410.

6. *Id.* at 413.

discrimination cases in the 1980s, they did establish a number of key concepts. Much of the case law established in the 1980s from the Rehabilitation Act was adopted as part of the statutory language in the 1990 Americans with Disabilities Act[7] ("ADA"), which covers both public and private colleges and universities.

The statutory language of the ADA, judicial decisions, and opinion letters from the Department of Education's Office for Civil Rights ("OCR") provide guidance on several issues. The underlying principles include: requiring equal opportunity, not just equal treatment; providing education in the most integrated appropriate setting; providing reasonable accommodations; making individualized determinations about accommodations; allowing undue burden as a defense; and establishing further guidance on what it means to be "otherwise qualified."

A number of issues have been the focus of substantial recent judicial attention in the higher education context.[8] These issues include whether the individual meets the definition of being disabled; whether the institution is immune from damage actions under different statutes; what accommodations are required; what relationship exists between standardized admissions, professional licensing tests, and educational programs; and how behavior and conduct issues arise in a variety of contexts. Architectural barrier issues, study abroad programs, and technology access issues have also begun to receive attention.

The legal response to resolving these issues has not changed substantially in recent years. The enrollment of "millennials"—students born after 1982 who have grown up with technology and the culture that affects their generation—has brought a unique set of challenges to institutions of higher education. Millennial students present new and unusual issues ranging from wanting a companion turtle to accompany the student to exams to expecting instant responses to three a.m. emails or cell phone calls requesting unlimited time on exams. Combining these millennial behaviors with disability discrimination law makes life even more interesting. Knowing the legal requirements is only the first step in developing a proactive approach to serving this generation of students, each one of whom may truly believe that he or she is "The Time Magazine Person of the Year."[9]

Part I of this article briefly describes who millennials are and why they are different. Part II then poses several hypothetical scenarios to highlight the kinds of issues that might arise in the context of students of this generation seeking accommodations for disabilities, real or imagined. Part III includes a general discussion and overview of the response from courts and Department of Education

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7. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

8. See LAURA F. ROTHSTEIN & JULIA ROTHSTEIN, DISABILITIES AND THE LAW (3d ed. Thomson West 2006), for a comprehensive review of cases. *See also* 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, 143–44, 153, 156–57 (2004).

9. Cover, TIME, Dec. 25, 2006 (depicting a mirror as the face of a computer screen and the words "You. Yes, you. You control the Information Age. Welcome to your world," intended to indicate that everyone is the "Person of the Year"). *See also* NEIL HOWE & WILLIAM STRAUSS, MILLENNIALS RISING: THE NEXT GREAT GENERATION (2000); JEAN M. TWENGE, GENERATION ME: WHY TODAY'S YOUNG AMERICANS ARE MORE CONFIDENT, ASSERTIVE, ENTITLED—AND MORE MISERABLE THAN EVER BEFORE (2006); *How the New Generation of Well-Wired Multitaskers Is Changing Campus Culture*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Jan. 5, 2007, at B10.

guidance on key issues in this area, describing trends both in the types of situations arising and in the legal responses to these situations. Finally, Part IV offers some practical suggestions for administrators to implement and for college and university counsel to suggest as preventive measures. An appendix of resources follows the article. A proactive approach has always been advisable, but it is more important than ever to anticipate the issues and plan for them in light of this new generation of students.

## I. MILLENNIALS—WHO ARE THEY AND HOW ARE THEY DIFFERENT?

### A. Who Are They?

In current pop culture, millennials are identified as individuals born after 1982.[10] Their entire life experience has included technology—cell phones, iPods, computers, instant messaging, and email. They can be very self-absorbed and "me" oriented. Many of them have parents who have been heavily involved in their lives and ensuring that everything is okay for their children. These parents have come to be known as "helicopter" parents, because they hover and land to take care of things that they perceive as needing attention. The millennial persona has seven distinguishing traits: they are special, sheltered, confident, team-oriented, achieving, pressured, and conventional.[11]

Millennials have been described as "needy"—wanting constant reassurance and praise. Because of their experience of instant response via technology, they often do not recognize social and other boundaries in certain settings. They have set high goals and want to do whatever is necessary to be "the CEO of everything important."[12] Some of them are not accustomed to being accountable. If they make a mistake, someone (often their parents) will fix it, and things will go on as before. Often they are not as attentive to rules, regulations, deadlines, and limits, and may chafe at having to pay attention to these things. They are also used to multitasking. Because of technology, they are on information overload and may not have developed the tools to sort the critical and essential from the extraneous.

10. HOWE & STRAUSS, *supra* note 9, at 11.

11. *Id.* at 43–44.

12. Chris McGrath, Recruiting and Admitting the Millennial Generation: Back By Popular Demand, Presentation at the Law School Admission Council Annual Meeting and Educational Conference (June 1, 2007) (on file with author).

### B. Why Are They Different in the Context of Disability Issues on Campus?

What millennial students request for disability accommodations is not that different from what previous cohorts of students with disabilities requested. There are requests for accommodations for a variety of conditions—learning disabilities ("LD"), attention deficit disorder ("ADD"), attention deficit hyperactivity disorder ("ADHD"), depression and other mental health problems, substance abuse, sensory impairments (vision, hearing, etc.), mobility impairments, and other conditions. Millennials request the same types of accommodations that were requested before —extra time for exams, note takers, reduced course loads, interpreters, books on tape, readers, course waivers, auxiliary aids, etc. The data indicate that the numbers of students with disabilities on college and university campuses have not changed dramatically in recent years.[13] As discussed below, the legal mandates have not changed substantially in recent years,[14] although in some areas, changes may account for some of the recent challenges, particularly with respect to who is legally entitled to accommodations.

So why does it feel different or more troubling? Perhaps it is because of the intense approach that millennials, and sometimes their parents, take to disability issues. They want constant reinforcement and confidence building.[15] They want answers quickly. They do not always follow directions. They want someone to hold their hand to walk them through everything. Perhaps some level of sympathy is due because they are on information overload. Perhaps another factor is that millennials are so different in their approach to many issues. The administrators and faculty members with whom they are dealing, however, are not millennials and may be less sympathetic and understanding of how they think and work. There are indications, however, that millennials want more structure,[16] but it is important for administrators and faculty members to clearly communicate what that structure is and what the rules are for working within that structure.

Today, even experienced student service professionals who are accustomed to dealing with demanding students find themselves at a new level of amazement when scenarios such as the following arise. Those who work with students in counseling, advising, and teaching at colleges and universities find themselves challenged with how to respond.

## II. MILLENNIALS—RAISING DISABILITY ISSUES

In reviewing the following scenarios, consider the following questions.[17] What

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13. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2003 (2003), *available at* http://nces.ed.gov/pubs2003/2003067.pdf (reporting that approximately nine percent of all undergraduate students have a disability requiring an accommodation, an increase from about three percent in 1978).

14. Sara Hebel, *How a Landmark Anti-Bias Law Changed Life for Disabled Students*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Jan. 26, 2001, at A23.

15. Jeffrey Zaslow, *Praise Becomes Workplace Necessity*, WALL ST. J., Apr. 20, 2007, at W1.

16. HOWE & STRAUSS, *supra* note 9, at 166.

17. The hypotheticals discussed in this article are based on a composite of case law, the

additional facts are needed? What would be the next steps to address this situation? What policies, practices, or procedures might help to avoid these situations in the future? What are the legal implications? What are the practical implications?

A. Schizoaffective Disorder—Class Attendance

Student A was admitted to the university's engineering program. During the first semester, he began experiencing anxiety, panic, and depression. As a result, he missed several class sessions. Upon his return, one professor dropped him from the class and refused to accommodate his condition. The professor also ridiculed the student in front of the class. The following summer, the student attempted suicide but returned to campus the following fall. He was hospitalized briefly in the fall and again had attendance problems. He was also late for class as a result of the side effects of some of his medications. He provided the professor with a physician's certificate regarding the side effects of his medications. The professor refused to grant him additional time to complete assignments. The dean reprimanded the student for complaining about the professor on an evaluation form. The student was not permitted to enroll in the spring because of his academic standing. He has sued the university for violating Section 504 and the ADA.

B. ADD/Dyslexia—Various Accommodations

Student B enrolled as a freshman majoring in political science at state college. His long term goal was to attend law school, for which he knew good grades would be important. He initially made no requests from the college. He received C's on most exams in the first semester (one B and one D), and upon returning in January, he provided a statement from his family physician to the office for student services which confirmed that he has ADD and dyslexia. He has requested the following: unlimited time on exams, exam administration at his convenience in his residence hall room, waiver of a required statistics course, and a reduced course load. He has also indicated that he will request a single room at the double room rate because having a roommate is distracting and disturbing. Aware that a reduced course load would put him below full time status, he has also requested a waiver of the college's twelve credit enrollment requirement for eligibility for financial aid and residence hall living.

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Department of Education's Office for Civil Rights ("OCR") opinions, popular media accounts, the author's own experience, and situations of other colleagues in legal education and higher education.

C. Panic Attacks—Pets in the Residence Hall or in the Classroom

Student C enrolled as an English major at a private university. On the day she moved into the campus residence hall for freshmen, she brought her ferret. The information on the residence hall policy clearly stated that animals were not allowed. When confronted by the residence hall advisor, she provided documentation of her panic disorder and indicated that the ferret is an accommodation to reduce her anxiety. Her roommate is afraid of the ferret and also says that the room smells from the animal.

D. Learning Disability—Distance Learning Accommodations

Student D enrolled in an online university learning program and provided documentation from a psychiatrist confirming both his attention deficit disorder and depression. Participation in an online discussion accounts for a portion of the course grade. The psychiatrist recommended a tutor, printed material instead of material from the internet, extra time for tests, and extra time for assignments. Part of the course is an interactive discussion among students and the professor, with participation at any hour or day. The student service office notified the instructor of the student's disability and need for accommodations, and the office further advised the student to contact the instructor directly for specific classroom needs as they arise.

E. Asperger's Syndrome—Behavior Issues

Student E enrolled in an undergraduate program in early-childhood development. She was diagnosed with Asperger's syndrome, a condition that makes it difficult to recognize social cues and adapt to new environments. Related learning disabilities also provide challenges to her ability to organize tasks. The disability service office arranged some accommodations to her academic program, but professors, classmates, and students living in her residence hall have raised concerns about some of her behaviors. These concerns include blurting out in class without raising her hand, shouting at other students whom she thinks have slighted her in some way, and shouting at a professor who would not give her an extension on an assignment. At one campus speaking event, she shouted an obscenity at the speaker and was escorted from the room. She was advised that her enrollment may be terminated because of her behavior.

## III. MAJOR LEGAL DEVELOPMENTS

The following is an overview of the broad legal developments affecting students with disabilities in a higher education context.[18] It includes both Section 504 and ADA requirements.

### A. Who Is Protected—Definition of Disability

Pursuant to the Individuals with Disabilities Education Act, many students with disabilities entering a college or university previously received services in K–12 schools, such as tutors, special testing accommodations, and other accommodations.[19] Under this comprehensive special education statute, the school must identify the student, pay for the documentation to test the student, and provide special education and related services that are often substantially beyond the federal nondiscrimination requirements for reasonable accommodations. Colleges and universities should educate the parents of these students, informing them that the rules in higher education are different than in K–12. Otherwise, the parents' expectations will reflect prior K–12 educational experiences.

Both the ADA and Section 504 protect three classes of individuals: individuals with physical or mental impairments that substantially limit one or more major life activities; individuals who have a record of such impairment; and individuals who are regarded as having such impairment.[20] The individual must be otherwise qualified to carry out the essential requirements of the program with or without accommodations.[21] The individual must not pose a direct threat to self, to others, or to property.[22]

Courts addressed the issue of what it means to be substantially limited and what constitutes a major life activity. In 1999, three Supreme Court decisions in the context of the ADA and employment determined what it means to be substantially limited, and narrowed the definition of who is protected. In what is known as the *Sutton* trilogy,[23] the Court determined that an individual's disability was to be

18. This section is not intended to provide a comprehensive overview of all the cases and Office for Civil Rights opinions on these issues. Instead, the discussion generally discusses some interesting recent cases and a landmark decision that provides clarity to the situation. It does not address the issue of enforcement—including immunity—or remedies. The article does not cover architectural barriers and physical access issues because these are not generally the kinds of issues that are the basis of disputes related to behavior and conduct of millennial students.

19. Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400–1491 (Supp. IV 2004). See ROTHSTEIN & ROTHSTEIN, *supra* note 8, for a detailed discussion of this statute.

20. 28 C.F.R. § 35.104(2005)

21. Se. Cmty. Coll. v. Davis, 442 U.S. 397, 413 (1979). In the scenarios in Section III, Student A who failed to meet attendance requirements might not be otherwise qualified.

22. See *infra* Part IV.D, for additional discussion.

23. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding that individuals whose vision was corrected with eyeglasses or contact lenses were not disabled); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (holding that a truck driver with correctable monocular vision was not disabled); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999) (holding that an individual with high blood pressure controlled by medication was not disabled).

determined by taking into account mitigating measures such as eyeglasses or medication. The Supreme Court also provided guidance on what constitutes a major life activity. In *Toyota Motor Manufacturing Kentucky, Inc. v. Williams,*[24] the Court held that major life activities are those that are central to the daily lives of most people.[25] This employment case has been the precedent for many subsequent decisions in employment and other contexts which address the issue of major life activity.

On the same day the Court decided the *Sutton* trilogy, it remanded a case more relevant to the higher education context. The case of *New York State Board of Law Examiners v. Bartlett*[26] addressed a bar examination accommodation request. Marilyn Bartlett had been diagnosed with dyslexia,[27] but as the Second Circuit noted on remand, not every impairment is a disability entitled to protective status under federal law.[28] Ms. Bartlett had requested accommodations for her learning disability during several bar exam administrations.[29] The accommodations she requested were unlimited or extended time, tape recording of essay responses, and circling multiple choice answers in the test book instead of on the answer sheet.[30] The requests were consistently denied on the basis that her "application does not support a diagnosis of a reading disability or dyslexia."[31]

The Supreme Court remanded the case because the lower court had not examined whether mitigating measures affected whether Ms. Bartlett was "disabled."[32] On remand, the lower court reviewed the assessments and evaluations of Ms. Bartlett and determined that the record demonstrated that even with her history of self-accommodation (the mitigating measure), she was disabled.[33] The Second Circuit held that she may be disabled if her impairment substantially limited the major life activity of reading.[34] The district court found that she met that standard.[35] The Second Circuit also determined that to be substantially limited in the major life activity of working, she would have to demonstrate that her impairment caused her to be excluded or significantly restricted in a class of jobs or a broad range of jobs.[36]

For many years after the passage of Section 504 and the ADA, higher education institutions rarely challenged students on whether they were disabled or not.

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24. 534 U.S. 184 (2002).

25. *Id.* at 197.

26. 156 F.3d 321 (2d Cir. 1998), *vacated*, 527 U.S. 1031 (1999).

27. Bartlett v. N.Y. State Bd. of Law Exam'rs, 970 F. Supp. 1094, 1102 (S.D.N.Y. 1997).

28. Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 74 (2d Cir. 2000).

29. *Id.* at 75.

30. *Id.*

31. *Id.* On one occasion, the parties agreed to the granting of some accommodations but that the results would not be certified unless Bartlett prevailed in her lawsuit. *Id.* at 76.

32. *Id.* at 74, *remanded to*, Bartlett v. N.Y. State Bd. of Law Exam'rs, No. 93 CIV. 4986(SS), 2001 WL 930792, at *51 (S.D.N.Y. Aug. 15, 2001).

33. Bartlett v. N.Y. State Bd. of Law Exam'rs, No. 93 CIV. 4986(SS), 2001 WL 930792, at *51 (S.D.N.Y. Aug. 15, 2001).

34. Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 74 (2d Cir. 2000).

35. 2001 WL 930792, at *1.

36. 226 F.3d at 82.

Instead, the disputes tended to focus on two major issues. The first issue was whether the individual was otherwise qualified, i.e. able to carry out the essential requirements of the program with or without reasonable accommodation.[37] The second issue was whether the requested accommodation was itself reasonable.[38] After the *Sutton* trilogy, perhaps because of the legal basis and perhaps because of the greater demand for expensive accommodations, higher education institutions seemed more likely to raise the defense that the student was not disabled and thus had not been discriminated against or was not entitled to reasonable accommodations. The decisions in *Sutton*, *Toyota*, and *Bartlett* have guided the subsequent judicial response to this issue.

Recent challenges have favored the institutions. These decisions often include discussions about whether the activity at issue is a "major life activity," which would include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[39] For example, in the case of *Swanson v. University of Cincinnati*,[40] the court held that a surgical resident's major depression did not substantially limit any major life activities.[41] His difficulty in concentrating was temporary and was alleviated by medication.[42] His communication problems were short-term, caused by medication, and consisted of only a few episodes.[43] This case highlights the dilemma that many individuals face after *Sutton*. Taking medication for a condition may mitigate the condition, but the medication may have adverse side effects that may cause other impairments.

A number of cases have addressed whether conditions such as test anxiety, panic attacks, and post traumatic stress disorder are disabilities, and have generally found that the facts indicated that these conditions did not substantially limit a major life activity.[44] While these judicial assessments are individualized and

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37. *See, e.g.*, Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1051 (9th Cir. 1999) (holding a student was not otherwise qualified to complete a medical school's requirements).

38. *See, e.g., id.* at 1048–50 (noting that reasonableness is fact specific and that it was unreasonable to require the medical school to modify its internship because doing so "would sacrifice the integrity of its program").

39. OCR Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104.3(j)(2)(ii). *See also* Dalton v. Roane State Cmty. Coll., No. 3:04-CV-9, 2006 WL 2167242 (E.D. Tenn. July 31, 2006) (holding that dyslexia of a student seeking accommodation in a nursing program did not substantially limit the major life activity of learning).

40. 268 F.3d 307 (6th Cir. 2001).

41. *Id.* at 318.

42. *Id.* at 317.

43. *Id.* at 316.

44. *See, e.g.*, Wong v. Regents of Univ. of Cal., 410 F.3d 1052 (9th Cir. 2005) (holding that a medical student was not substantially limited by a learning disability for purposes of daily living, as compared to most people); Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620 (6th Cir. 2000) (holding that a medical student was not substantially limited in the ability to read); McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974 (10th Cir. 1998) (holding that test anxiety was not a disability for a medical student); Baer v. Nat'l Bd. of Med. Exam'rs, 392 F. Supp. 2d 42 (D. Mass. 2005) (holding that a student with learning disabilities was not disabled if impairment only limits ability to take timed, standardized tests); Witbeck v. Embry Riddle Aeronautical Univ., 184 Ed. Law Rep. 853 (M.D. Fla. 2004) (finding that a student failed to

evaluate how the condition affects that particular person, they nonetheless indicate a reluctance to find such conditions to be substantially limiting.

The third class of disabled individuals—those "regarded as" or "perceived as" having an impairment—has not been addressed in many cases. Since *Sutton*, however, more plaintiffs are arguing that based on this portion of the definition they are covered. Consistent with most decisions, however, the college or university has generally prevailed. For example, in the case of *Marlon v. Western New England College*, [45] a law student who claimed he was treated adversely and suffered from a learning disability, panic attacks, and depression[46] did not prove he was protected because he did not offer sufficient evidence for the court to determine that he was regarded as disabled.[47]

According to the court in *Davis v. University of North Carolina*, even a multiple personality disorder was not perceived as a disability.[48] Ms. Davis was enrolled in a teacher certification program and had succeeded in her academic courses.[49] Yet her aberrant behavior, resulting from her diagnosed multiple personality disorder, was disruptive to faculty members and students and caused concern.[50] Eventually these behaviors reached a level which resulted in her removal from the program.[51] The reason for the removal was failure to meet non-academic requirements, including failure to meet expectations of "professional demeanor; professional interactions with university students, faculty, staff, and administrators; . . . and adherence to school rules and ethical standards."[52] The court also noted that "there is evidence in the record from which a jury could conclude that [the] action was motivated at least in part by its apprehension about whether Davis should work with children."[53] She had admitted that she occasionally had memory blackouts.[54] The court would only concede that the institution may have perceived her as disabled by her disorder but not that it perceived her as *substantially* disabled.[55] The court noted:

> At most, Davis's evidence establishes that she was perceived as unable

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demonstrate central auditory processing disorder); *In re* Allegheny Health, Educ. and Research Found., 321 B.R. 776 (Bankr. W.D. Pa. 2005) (holding that a student with ADD was unable to show substantial limitation of her ability to learn, as compared to other adults her age). See ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.2 n.8, for additional case citations.

45. Marlon v. W. New England Coll., 124 F.App'x 15 (1st Cir. 2005). *See also Letter to Genesee Community College*, 33 Nat'l Disability L. Rep. (LRP) ¶ 199 (Mar. 8, 2006) (stating that a student banned from campus after acting strangely did not prove that campus officials perceived him as having a disability).

46. Marlon v. W. New England Coll., No. Civ.A. 01-12199DPW, 2003 WL 22914304, at *1 (D. Mass. 2003).

47. 124 F.App'x at 17.

48. 263 F.3d 95 (4th Cir. 2001).

49. *Id.* at 97.

50. *Id.* The circuit court opinion describes aggressive manner towards students and professors and aberrant behavior. *Id.*

51. *Id.*

52. *Id.* at 98.

53. *Id.*

54. *Id.*

55. *Id.* at 99.

> to perform a single job—teaching, or perhaps a very narrow range of jobs—those that require unsupervised contact with children . . . . At best, her evidence shows that UNC-W perceived her to be unable to complete one specific program—the teacher certification program . . . . UNC-W was willing to waive the certification requirement and allow Davis to apply to the master's degree program . . . . UNC-W did not prohibit Davis from attending classes . . . but simply determined that she was not suitable for the one particular program.[56]

The holding in the case indicates that even if Davis could have proven that she was "perceived as" disabled, she would probably not have been able to prove that she was otherwise qualified because of her academic conduct failures and the concerns about her fitness to work with children.

In reviewing the five scenarios illustrated above, it is probable that in at least some of these cases, a court might determine that the condition did not reach the definitional requirements of a disability. For example, Student A with schizoaffective disorder and Student C with panic attacks might not be able to demonstrate their conditions substantially affected major life activities. The same might be true for Student E with Asperger's Syndrome. The students with ADD, dyslexia, and other learning disabilities (Students B and D) might have greater success, depending on the proof offered. Thus, if the students cannot even survive a motion to dismiss based on the lack of standing, the institution would not be required to provide the accommodation.[57] It should be noted, however, that many state discrimination laws provide broader protection in applying the definitional status.

### B. Documentation Issues

One area that has received a great deal of attention is documentation.[58] The individual not only must meet the definition of having a disability but the disability must also justify the requested accommodations. In considering documentation, the issues include: who is qualified to evaluate the particular condition; what the documentation should include; and how recent it should be. The student is generally required to pay for the documentation.[59] This is a change from K-12 education, and this requirement sometimes comes as a surprise to students and their parents.

It is appropriate for the institution to require the expert who prepares the assessment and designates the requested accommodations to have the appropriate

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56. *Id.* at 100–01.

57. See Rothstein, *supra* note 2, for a discussion of the evolution of this issue in the courts.

58. *See generally* ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.2.

59. In grades K-12, the school has the obligation both to identify students with disabilities and to provide testing and other documentation to determine the appropriate special education and related services. Students coming into higher education often do not realize that the burden of requesting accommodations and the burden of paying for testing to justify the accommodations shifts to the student and the student's parents. This misunderstanding may be one source of tension between the institution and the student.

expertise.[60] The major case to address this issue is *Guckenberger v. Boston University*,[61] in which the court discussed the credentials needed for making these assessments.[62] The court differentiated the credentials needed based on the claimed disability.[63] A higher level of expertise was required to document the conditions of attention deficit disorder and attention hyperactivity deficit disorder than to diagnose learning disabilities.[64] Not only should evaluators have the appropriate professional experience, but they should also be aware of the requirements of the program the student is seeking to enter in order to determine what types of accommodations would be needed.

Highlighting the differing expectations for admissions exams, student enrollment, and licensing exams is the case of *In re Reasonable Testing Accommodations of Terry Lee LaFleur*.[65] The case involved requested accommodations for the bar examination for a student who had received accommodations in previous academic settings. The psychologist who testified about the student's need for extra time was not an expert on bar exam accommodations but was an expert on law school admissions examinations.[66] While the testimony might have been appropriate with respect to the diagnosis of the condition, it did not satisfy the requisite expertise about how that condition related to specific accommodations in a bar examination setting.[67] This case indicates that in order to ensure appropriate documentation, the evaluator should request information on the specifics of the program. This will better ensure a recommendation of accommodations appropriate to the condition. A four hour multiple choice standardized admission test is different from a series of end-of-term essay exams, and both are different from a two or three day licensing exam including both multiple choice and essay questions. Additionally, the subject matter is important—exams that require math calculations will be different than those testing reading comprehension.

There is little guidance on the issue of currency of documentation, but it seems permissible to require that the documentation be appropriately recent.[68] Because there is no specific federal regulatory guidance on this issue, institutions that set

60. Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997) (holding that a university's policy of requiring re-evaluations by certified experts every three years was impermissible); Ware v. Wyo. Bd. of Law Exam'rs, 973 F. Supp. 1339 (D. Wyo. 1997) (granting summary judgment for defendants who had denied requested accommodations for an applicant with multiple sclerosis and finding that the fact that accommodations had been granted in law school did not mean that they should be granted for the bar exam); *In re* Reasonable Testing Accommodations of LaFleur, 722 N.W.2d 559 (S.D. 2006) (holding that a psychologist testifying about extra time for a student with ADD was not an expert on bar exam accommodations, causing his testimony to be discounted).

61. 974 F. Supp. 106 (D. Mass. 1997).

62. *Id.* at 140–41.

63. *Id.* at 140.

64. *Id.*

65. 722 N.W.2d 559 (S.D. 2006).

66. *Id.* at 564.

67. *Id.* at 564–65.

68. *See Guckenberger*, 974 F. Supp. at 139 (finding that a university's policy of requiring re-evaluations by certified experts every three years was impermissible).

absolute rules, such as those institutions which use the common three year rule, are on shaky ground.

Finally, the documentation should justify the accommodations requested. The documentation should not only include the diagnosis and describe the instruments used for the evaluation but also should specify how the requested accommodations are related to the condition.

### C. Otherwise Qualified

As previously noted, students must be able to carry out the essential requirements of the program, with or without reasonable accommodation.[69] Also, a school neither needs to lower standards nor fundamentally alter the program.[70] Several judicial opinions and OCR opinions have addressed these issues.[71]

The requirements that have been found to be essential include meeting academic standards,[72] meeting attendance and classroom participation expectations,[73] complying with student honesty expectations,[74] and refraining from disruptive or injurious conduct.[75] At least one case has addressed the issue of completion of degree requirements within an expected time frame as an essential requirement that need not be accommodated.[76] One unusual case involved a student who had been given additional time to take exams other than the final

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69. Se. Cmty. Coll. v. Davis, 442 U.S. 397, 407 (1979). *See also* ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.3.

70. Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 26 (1st Cir. 1991).

71. *See, e.g.*, *Letter to Cmty Coll. of Allegheny County*, 33 Nat'l Disability L. Rep. (LRP) ¶ 48 (June 28, 2005) (upholding a college's refusal to allow a course to be taken as an independent study because class participation and attendance were integral to the political science course and could not be waived); *Letter to Univ. of Houston*, 32 Nat'l Disability L. Rep. (LRP) ¶ 74 (Apr. 8, 2005) (holding that a graduate school of social work could dismiss a student with bipolar disorder who failed an exam and that the student was not treated differently than other students).

72. McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974 (10th Cir. 1998) (holding that a medical school was not required to advance a student with marginal grades because it would constitute a substantial alteration); Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432 (6th Cir. 1998) (holding that a graduate student with ADHD did not meet the academic standards); Barbour v. Wash. Metro. Area Transit Auth., 374 F.3d 1161 (D.C. Cir. 2004) (holding that a student dismissed from medical school because of unsatisfactory academic performance was not disabled); Leacock v. Temple Univ. Sch. of Med., No. Civ.A. 97-7850, 1998 WL 1119866 (E.D. Pa. 1998) (holding that a medical student with a learning disability did not meet academic standards to continue).

73. Toledo v. Sanchez, 454 F.3d 24 (1st Cir. 2006) (upholding the attendance requirements in an architecture program for a student with schizoaffective disorder resulting in anxiety, panic and depression).

74. Childress v. Clement, 5 F. Supp. 2d 384 (E.D. Va. 1998) (holding that a student who had plagiarized was not otherwise qualified for position as a graduate student in criminal justice program because his learning disability had been taken into account in evaluating violations of the honor code and the inquiry was individualized).

75. *See infra* Part IV.D.

76. Long v. Howard Univ., 439 F. Supp. 2d 68 (D.D.C. 2006) (holding that in the case of a doctoral student with pulmonary fibrosis who required leaves of absence and requested unconditional readmission, it was valid to refuse to relax some requirements with respect to credits in core courses that the university required to be retaken because this would fundamentally alter its program).

exam.[77] The accommodation was denied during the final exam because she was observed to have fallen asleep during the time allowed for the exam.[78]

D. Direct Threat

The April 2007 shootings at Virginia Tech University raised extensive concern and elicited a reaction across the country. Everyone wanted to know how to keep dangerous people off campus. One common response was that students should be required to disclose mental health status, which should be reported to a wide variety of college and university officials and law enforcement offices to ensure the safety of these students. This is not only inappropriate in most cases under current legal doctrine[79] but also is likely to have a deterrent effect on students who might want treatment. In addition, it might violate the treating professional's confidentiality obligation as a therapist.[80]

It should be noted that most individuals with mental illness are not violent or dangerous and do not present a direct threat. Some, however, are disruptive and may seem threatening in some instances because of their behavior. This behavior may or may not be a result of the mental illness. For that reason, it is critical to focus on the behavior and conduct and not on the diagnosis or history of treatment.

Some would suggest that asking about mental health problems during the admissions process might reduce problems on campus. While the courts have upheld narrow questions about mental health status and substance abuse in the context of professional licensing certification,[81] they are unlikely to do so in the context of higher education admission. The public protection issues that arise in professional licensing are not the same as those in higher education. The appropriate and permissible questions in higher education are those relating to behavior and conduct, not those relating to diagnosis and status. While institutions need not admit or continue the enrollment of students who present a direct threat to self, others, or property, institutions should not adversely treat those who are diagnosed with a mental illness or a substance abuse problem, unless that individual's condition has raised direct threat concerns in the past or there is a justifiable basis for the likelihood of future concerns. It is also important that the institution keep this information confidential.[82]

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77. Buhendwa v. Univ. of Colo., 214 F. App'x 823 (2007).

78. *Id.* at 827.

79. See ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.5, for a discussion of the legal standards for preadmission inquiries that directly or indirectly might identify a disability.

80. *E.g.* AMERICAN PSYCHOLOGIST ASSOC., ETHICS CODE § 4.01 (2003), available at http://www.apa.org/ethics/code2002.pdf.

81. Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430 (E.D. Va. 1995) (providing a detailed discussion of mental health history questions and a review of the statutes in other jurisdictions). See Stanley Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635 (1997); Hilary Duke, *The Narrowing of State Bar Examiner Inquiries into the Mental Health of Bar Applicants: Bar Examiner Objectives Are Met Better Through Attorney Education, Rehabilitation, and Discipline*, 11 GEO. J. LEGAL ETHICS 101 (1997), for an excellent overview of *Clark*. *See also* ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 5.8 n.1.

82. *See generally* ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.21.

Misconduct and misbehavior may make a student "not otherwise qualified," thereby removing any need to be excused even if caused by a mental impairment or a substance abuse problem.[83] For example in *El Kouni v. Trustees of Boston University*,[84] a student who was dismissed from a joint medical school and Ph.D. program sought to have his academic record expunged so he would be eligible for reinstatement.[85] He had been diagnosed with clinical anxiety and bipolar disorder,[86] and he had not requested accommodations on exams before the diagnosis.[87] Once he notified the medical school, additional time on the exams was granted.[88] He was eventually terminated from the program because of unsatisfactory grades, some of which had been received before accommodations had been granted.[89] In addition, "his persistent offensive and disrupting behavior during course lectures," the poor quality of his research, and his failure to make sufficient progress in laboratory experiments were factors in the medical school's decision.[90] The court found that the university terminated his enrollment because he was not otherwise qualified, not because of his disability.[91]

Situations where a student exhibits self destructive behaviors, such as threats of suicide, eating disorders, engaging in substance or alcohol abuse, and engaging in antisocial behaviors, are difficult situations for the college or university. While there may not be a threat to others, there can be a disruption or interference with the educational process in the classroom or in a campus living situation. Such behavior may disturb and disrupt roommates, other students, instructors, and even patients in health care settings. For example, a roommate who feels the need to keep a constant eye on a student who is suicidal will be disrupted in the

83. *E.g.*, Mershon v. St. Louis Univ., 442 F.3d 1069 (8th Cir. 2006) (affirming the district court's summary judgment decision against a student with a disability who filed suit for being banned from campus after making a threat of violence against a professor); *Letter to Marietta College*, 31 Nat'l Disability L. Rep. (LRP) ¶ 23 (July 26, 2005) (stating that the dismissal of a student threatening suicide violated Section 504 because the decision was not sufficiently based on a high probability of substantial harm); *Letter to Thomas M. Cooley Law School*, 31 Nat'l Disability L. Rep. (LRP) ¶ 24 (July 26, 2005) (involving a student who was dismissed because of alcohol related conduct); *Northern Michigan University*, 7 Nat'l Disability L. Rep. (LRP) ¶ 244 (June 19, 2005) (finding no Section 504 or ADA violation when observers were placed in the classroom of a student with Tourette's Syndrome to evaluate whether placement was for the benefit of the student); *Letter to St. Thomas University, School of Law*, 23 Nat'l Disability L. Rep. (LRP) ¶ 160 (Dec. 19, 2001) (upholding the dismissal of a law student with bipolar disorder who was dismissed because of threats to "blow up the legal writing department"); *Dixie College (UT)*, 8 Nat'l Disability L. Rep. (LRP) ¶ 31 (Nov. 20, 1995) (finding no ADA or Section 504 violation in expelling a student because of stalking and harassing a professor because expulsion was not on account of perceived mental disability but rather because she posed a threat).

84. 169 F. Supp. 2d 1 (D. Mass. 2001).

85. *Id.* at 2.

86. The court held that the plaintiff was disabled within the ADA and Section 504 because his mental impairments slowed his thought processing and resulted in "cognitive blunting." *Id.* at 3.

87. *Id.*

88. *Id.*

89. *Id.* at 4.

90. *Id.*

91. *Id.*

educational process. The college or university's focus should be on documenting the destructive behavior and determining the best course of action based on the exhibited behavior. One of the challenges is to identify what code of conduct or disciplinary code is violated by such behaviors and to ensure that college and university policies that address that behavior are in place. In the scenarios in Section III, Students A, C and E might be determined to pose a direct threat or at least be found to be disruptive to others. Student A's attempted suicide, Student C's ferret's affect on the roommate, and Student E's disruptive behavior might all be found to make the student not otherwise qualified.[92]

### E. Reasonable Accommodations

#### 1. General Standards

Section 504 regulations list a number of examples of accommodations and adjustments that might be considered for a student with a disability.[93] Commonly requested accommodations include the following: additional time for exams; other exam modifications such as a separate room or extra rest time; reduction, waiver, substitution, or adaptation of course work; extensions on assignments; extension of time for degree completion; preference in registration; and permission to tape record classes. The scenarios in Section III all involve different types of accommodations. These include waiver of attendance requirements (Student A); exam accommodations, course waiver and reduction, and a single room (Student B); waiver of pets prohibition (Student C); tutoring, materials in another format, exam and assignment time extensions (Student D); and excusing disruptive behavior (Student E).

The key case setting the standard on when an institution should provide accommodations is *Wynne v. Tufts University School of Medicine*.[94] In cases involving modifications and accommodations, the burden is on the institution to demonstrate that relevant institution officials considered alternative means, their feasibility, cost, and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower academic standards or require substantial program alteration.[95] The courts have applied this standard to a

92. *See* Kaminsky v. St. Louis Univ. Sch. of Med., No. 4:05CV1112 CDP, 2006 WL 2376232 (E.D. Mo. Aug. 16, 2006); *Letter to Genesee Community College*, 33 Nat'l Disability L. Rep. (LRP) ¶ 199 (Mar. 8, 2006) (involving a student who was asked to leave a campus meeting by a security guard and finding no demonstration that the student was perceived as disabled).

93. OCR Academic Adjustments, 34 C.F.R. § 104.44 (2006).

94. 932 F.2d 19 (1st Cir. 1991). While it is not a Supreme Court decision, *Wynne* seems to have similar precedential weight based on the frequency with which it is cited as the standard. This is likely due to its sound and articulate reasoning.

95. *Id.* at 26. *See also Letter to Academy of Art University*, 33 Nat'l Disability L. Rep. (LRP) ¶ 149 (Nov. 7, 2005) (holding that a request for accommodations to an Online Distance Learning Program for a student with ADD and depression required the student to provide appropriate notification); *Letter to Bridgewater State College*, 33 Nat'l Disability L. Rep. (LRP) ¶ 150 (July 1, 2005) (holding that a college did not provide a hearing impaired student with appropriate accommodations for testing).

number of cases, generally deferring to the institution.[96] Numerous OCR opinions have deferred to the institution with regard to requests to waive or substitute courses.[97] While some institutions have engaged in special programs to assist students with Asperger's and other conditions,[98] the institution is not required to have such programs in place.

One emerging issue involves companion animals as accommodations. Unlike the assistance dog for vision, hearing, or mobility, these animals are intended for psychological or emotional support for students needing stress relief and comfort. Although there are some students for whom there is evidence that the animals do alleviate emotional problems, there also seems to be a trend towards students wanting to have small accessory size pets, such as Elle Wood's chihuahua, Bruiser,

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96. *Compare* Stern v. Univ. of Osteopathic Med. & Health Scis., 220 F.3d 906 (8th Cir. 2000) (finding that a program did not have to supplement multiple choice test answers with oral or essay responses for a dyslexic medical school student), *and* Hayden v. Redwoods Cmty. Coll. Dist., No. C-05-01785 NJV, 2007 WL 61886 (N.D. Cal. Jan 8, 2007) (denying summary judgment to a student seeking involvement in selection of interpreter to ensure effective communication), *and* Long v. Howard Univ., 439 F. Supp. 2d 68 (D.D.C. 2006) (denying summary judgment to a student claiming refusal to allow him to return where his work was well beyond the period of doctoral candidacy), *and In re* Kimmer, 896 A.2d 1006 (Md. 2006) (involving the Maryland bar's denial of accommodations to a bar applicant, who had received similar accommodations in law school, on the basis that he had not demonstrated a disability and had demonstrated above average performance), *and* Guckenberger v. Boston Univ., 8 F. Supp. 2d 82 (D. Mass. 1998) (finding that a university had demonstrated that waiving the foreign language requirement would constitute a fundamental alteration of the program) *with* Bartlett v. N.Y. State of Bar Exam'rs, 970 F. Supp. 1094 (S.D.N.Y. 1997) (ordering that a bar applicant with dyslexia be given the test over four days, receive extra time, be permitted to use a computer, and be awarded $25,000 in damages). *See also* Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448 (5th Cir. 2005) (finding that a university was not immune from a suit alleging that the denial of sign language interpreters and notetakers constituted a Section 504 action); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474 (4th Cir. 2005) (finding no Eleventh Amendment immunity and permitting a law student with intractable migraine syndrome requesting additional time on exam to pursue claim); *Columbia Basin College (WA)*, 7 Nat'l Disability L. Rep. (LRP) ¶ 188 (June 6, 1995) (finding that Title II (ADA) and Section 504 were violated when a college instructor, in good faith, went overboard in ensuring that a learning disabled student understood classroom instructions, and, though there was no violation in asking the student to confirm in writing a decision to decline accommodations, repeatedly and *publicly* asking student for reassurance of understanding instructions was a violation).

97. *See, e.g.*, *Guckenberger*, 974 F. Supp. 106 (holding that course substitution in foreign language may be a reasonable accommodation but course substitution in math was not and awarding $29,452 in damages to the students); *Letter to Hudson County Community College*, 33 Nat'l Disability L. Rep. (LRP) ¶ 198 (Mar. 27, 2006) (finding that a student's documentation did not justify course waiver or substitution in math); *Letter to New York City College of Technology*, 33 Nat'l Disability L. Rep (LRP) ¶ 173 (Feb. 9, 2006) (finding that the college had approved accomodations, including the use of a graphing calculator in class and on exams, and that the college was not required to waive the requirement to show all calculations on assignments and exams); *Letter to University of West Florida*, 33 Nat'l Disability L. Rep. (LRP) ¶ 25 (Apr. 1, 2005) (finding that there was insufficient evidence of a Section 504 violation when a university did not make adjustments to academic requirements).

98. Sara Lipka, *For the Learning Disabled, a Team Approach to College*, CHRON. OF HIGHER ED. (Wash., D.C.), Dec. 15, 2006, at A36 (discussing programs which help students with various emotional and behavioral disorders cope with higher education).

in the movie "Legally Blond."[99] One way of pursuing this is under the guise of an accommodation for an emotional disability, such as depression, anxiety, or other condition. There is little, if any, guidance from agencies and the courts on these issues, although the popular media increasingly recognizes the problem.[100] In many of these cases, courts might determine that the student is not "disabled" within the statute. Additionally, there may be issues of undue burden or direct threat with respect to some of these animals on campus. These animals may cause allergic reactions, may have cleanliness problems and strong odors, may be noisy and thus disruptive, and may bite. The burden or danger to others will be a factor in addressing these situations.

Although the regulations for higher education do not specify a requirement of an interactive process to determine reasonable accommodations, at least one court has required such a process.[101] Generally, this has been an issue addressed in the employment context, but good planning would suggest it should be a standard practice with respect to students as well.

2. Auxiliary Aids and Services

Many accommodations are not financially costly for the institution, although there may be some administrative costs. The primary reasons for denying such accommodations may be fairness, concern about setting precedent, or fundamental alteration of the program. Still, cost is the primary issue that arises with respect to auxiliary services, such as interpreters, note takers, taped texts, and similar services. Unlike many accommodations that can be provided at little or no cost, these services may be quite expensive.

For the millennial student with anxiety and similar stress concerns, the request may be for note takers or tutors. Tutors are probably considered to be personal services, and as such, the institution is not required to provide them to students.[102] If, however, there is a tutoring program available to all students, the college or university must not discriminate by denying that to a student with a disability. It is unclear to what extent a college or university might have to adapt its tutorial services to the unique learning styles of students with certain types of disabilities.

Although there has not been extensive litigation or OCR guidance on the issue

99. LEGALLY BLOND (Metro Goldwyn Mayer 2001).

100. *See, e.g.*, Bennet J. Loudon, *UR Dog Case Part of Growing Trend*, ROCHESTER DEMOCRAT & CHRON., Oct, 22, 2007; Kelly Field, *These Student Requests Are a Different Animal*, CHRON. OF HIGHER ED. (Wash., D.C.), Oct. 13, 2006, at A30–31. *See also* Sara T. Scharf, *How Much Is That Doggie in the Classroom?*, CHRON. OF HIGHER ED. (Wash., D.C.), June 1, 2007, at B5 (discussing the increase in students wanting to have their pets on campus and university policies).

101. Cutrera v. Bd. of Supervisors of La. State Univ., 429 F.3d 108 (5th Cir. 2006) (holding that a university should have engaged in an interactive process to decide what were reasonable accommodations for an employee's visual impairment). The employment requirements provide guidance on what is expected in terms of an interactive process. Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,747–49 (July 26, 1991).

102. OCR Academic Adjustments, 34 C.F.R. § 104.44(d)(2) (2006) ("Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.").

of auxiliary services, the general standard is that the institution is financially responsible for auxiliary aids and services unless it can demonstrate that the cost is an undue burden.[103] While it is permissible for the college or university to seek support from state vocational rehabilitation funding sources and other sources, it is nonetheless the responsibility of the higher education program to facilitate the provision of these services and to do so in a timely manner.[104] This does not negate the burden on the student to request these services, but the institution is obligated to ensure that whatever process or procedure is required for obtaining these services is clearly communicated to the student.

While cost might be a defense in discrimination claims, it is one that is rarely raised. Perhaps this is because colleges and universities, particularly those with expensive athletic programs, are not eager to have public awareness of their discretionary budgets through the discovery process.

### 3. Readmission as an Accommodation after Misconduct or Academic Deficiencies

The issue of readmission of students with disabilities who have not met academic standards has been addressed on many occasions by both the courts and OCR. Sometimes the student is diagnosed as having a learning or other disability after an academic failure. Sometimes students with learning disabilities attempt to succeed without making the learning disability known or without requesting accommodations. The desire to get by without assistance and concerns about stigma and discrimination are two possible reasons why the student may not request accommodations.

Institutions are only required to make accommodations for students with known disabilities.[105] Courts and OCR have consistently determined that the institution is

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103. *See* United States v. Bd. of Trs. for Univ. of Ala., 908 F.2d 740 (11th Cir. 1990). The issue has never been decided by the Supreme Court, and this circuit court opinion seems to be the best guidance available on the topic. *See also Letter to Kent State University*, 33 Nat'l Disability L. Rep. (LRP) ¶ 125 (July 14, 2005) (involving an issue of note taking services and finding that the student and the university should work in interactive process); ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.10.

104. *Bd. of Trs. of Univ. of Ala.*, 908 F.2d at 749.

105. *See, e.g.*, Garcia v. State Univ. of N.Y. Health Scis. Ctr., No. CV 97-4189, 2000 WL 1469551 (E.D.N.Y. Aug. 21, 2000) (granting summary judgment to a university because a student was dismissed from medical school for unsatisfactory performance prior to diagnosis of disability); Leacock v. Temple Univ. Sch. of Med., No. Civ.A. 97-7850, 1998 WL 1119866 (E.D. Pa. Nov. 25, 1998) (finding in favor of a university because the university dismissed the student before knowing of his disability); Tips v. Regents of Tex. Tech Univ., 921 F. Supp. 1515 (N.D. Tex. 1996) (holding that there was no violation of ADA or Section 504 because a graduate psychology student did not make her learning disability known nor request accommodation); Gill v. Franklin Pierce Law Ctr., 899 F. Supp. 850 (D.N.H. 1995) (rejecting the claim that a law school should have known that he needed accommodations because of post-traumatic stress syndrome, resulting from being the child of alcoholic parents, when student had not requested accommodations); *Elmhurst College*, 33 Nat'l Disability L. Rep (LRP) ¶ 255 (May 1, 2006) (finding that a student did not follow reasonable procedures for accommodations that the college had delineated); *Letter to University of South Florida*, 33 Nat'l Disability L. Rep (LRP) ¶ 23 (Apr. 1, 2005) (finding that a student failed to make requests for academic adjustments for unstructured course work or qualifying exam); *Letter to Moberly Area Community College*, 31

not required to lower standards or make fundamental alterations to the program.[106] As a result, where institutional procedures and practices were nondiscriminatory and appropriate, institutions are not required to raise grades, to excuse below standard performance, or readmit a student who has not met clearly mandated standards.[107]

The *El Kouni v. Trustees of Boston University*[108] case raises virtually all of these issues. The medical student, whose bipolar disorder and clinical anxiety probably affected his performance, requested accommodation to exams only after initial deficiencies.[109] He was granted additional time.[110] He did not request any accommodations for his laboratory work, and the court found that there was no causal connection between his impairments and that work.[111] Nonetheless, the court determined that he was incapable of satisfying the academic requirements to complete the program and that there were no reasonable accommodations that would enable him to do so.[112]

*El Kouni* does not address a situation where the performance deficiency was totally based on test failures before the student had realized there was a disability. There is some guidance that where there is a later discovered disability, the institution should take that fact into account in any readmission consideration.[113] An institution that does readmit a student whose prior performance deficiencies were related to a disability may be permitted to apply different standards to that student than that required of other students.[114] There is still some debate about what kind of reporting by professionals or monitoring of behavior would be permissible or advisable in these situations.

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Nat'l Disability L. Rep (LRP) ¶ 178 (Feb. 18, 2005) (finding that a student did not give notice of the need for accommodations for a math test). *See also* Laura Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Law*, 47 SYRACUSE L. REV. 931 (1997).

106. Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 26 (1st Cir. 1991). *See also* Amir v. St. Louis Univ., 184 F.3d 1017 (8th Cir. 1999) (holding that a student's request to change supervisors was an unreasonable accommodation).

107. *See* Zukle v. Regents of Univ. of Cal., 166 F.3d 1041 (9th Cir. 1999).

108. El Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1 (D. Mass. 2001). *See supra* Part IV.D.

109. *Id.* at 3.

110. *Id.*

111. *Id.* at 4.

112. *Id.* at 4–5.

113. *DePaul University*, 4 Nat'l Disability L. Rep. (LRP) ¶ 157 (May 18, 1993) (holding that an institution must at least consider the effects of a disability in evaluating a student for readmission in a case involving dismissal from law school).

114. Haight v. Hawaii Pac. Univ., 116 F.3d 484 (9th Cir. 1997) (holding that where an institution was aware of behavior or performance deficiencies or where reasonable questions are raised after dismissal, the institution may have discretion to make readmission subject to conditions not applied to students in the initial admission process).

F. Other Issues

1. Study Abroad Programs and Off Campus Programs

The issue of accommodations for study abroad programs and other off campus programs has begun to receive some attention, although there is not yet extensive guidance on this issue.[115] The standards relating to reasonable accommodation will be applied in these settings, taking into account the special issues that arise in these types of programs. Study abroad programs may provide particularly difficult challenges because although the country in which the program is located may not have architectural accessibility requirements, the United States institution must still comply with American law in implementing the program.[116] These challenges include architectural barriers as well as language barriers for students with hearing and visual impairments.[117] For the millennial student seeking accommodations for stress related or other mental health issues, the accommodation issues may include access to mental health counseling. This can present a challenge in certain countries, and the small amount of case law available seems to indicate that programs can legitimately consider whether access to such programs presents a danger to self or others or is an undue burden.[118]

Off campus programs such as student teaching and internships can cause problems if the instructor or the administration has not proactively anticipated accommodation issues. These situations might raise concerns about off campus supervisors and their need to know about a student's disability.[119] The millennial

115. *See* Arlene Kanter, *The Presumption Against Extraterritoriality As Applied to Disability Discrimination Laws: Where Does It Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL'Y REV. 291 (2003); Amy Magaro Rubin, *Students with Disabilities Press Colleges to Help Them Take Part in Foreign Study*, CHRON. OF HIGHER ED. (Wash., D.C.), Sept. 27, 1996, at A47.

116. Bird v. Lewis & Clark Coll., 303 F.3d 1015 (9th Cir. 2002) (holding that a college did not violate Section 504 or Title III of the ADA by failing to provide certain accommodations in an overseas program even though wheelchair access was not provided in some instances); *Letter to Husson College*, 31 Nat'l Disability L. Rep. (LRP) ¶ 180 (Jan. 5, 2005) (concluding that there was not enough evidence to support a student's discrimination allegation against a nursing school regarding a summer abroad program in Honduras where the student voluntarily decided not to attend after faculty expressed concerns about susceptibility to illness and the remote location of site); *Arizona State University*, 22 Nat'l Disability L. Rep. (LRP) ¶ 239 (Dec. 3, 2001) (holding that Section 504 and Title II of ADA do not require the institution to pay for auxiliary aids and services in study abroad programs).

117. *See Bird*, 303 F.3d at 102.

118. *See* Barth v. Gelb, 2 F.3d 1180 (D.C. Cir. 1993) (holding that it was an undue hardship to grant an employee a particular job placement abroad in order to accommodate his health concerns).

119. *See generally* Burns v. Slippery Rock Univ. of Pa., No. 06-318, 2007 WL 2463402 (W.D. Pa. Aug. 28, 2007) (holding that school districts operating field placements must comply with the ADA); Hartnett v. Fielding Graduate Inst., 400 F. Supp. 2d 570 (S.D.N.Y. 2005) (denying the requested accommodation of relocation of cluster group placement to a closer location because the student did not demonstrate that the commuting difference was substantially different between the placements); Raffaele v. City of N.Y., No. 00-CV-3837, 2004 WL 1969869 (E.D.N.Y. 2004) (holding that difficulty in commuting need not be accommodated); *Letter to Hampton University*, 32 Nat'l Disability L. Rep. (LRP) ¶ 173 (June 20, 2005) (finding

student, claiming a mental health stress type condition, who does not get along with a supervisor at an off campus program and who seeks reassignment complaining about supervisors in such programs, will probably not receive a positive response by the courts. There is substantial case law in the employment setting that denied reassignment of supervisors.[120]

2. Hostile Environment and Retaliation Issues

It is not unusual for a court or for the Department of Education to determine that while the underlying complaint about discrimination does not give rise to a violation, the institution has nonetheless either retaliated against the individual for making the complaint[121] or has created a hostile environment for the individual.[122] Although this does not frequently occur, colleges or universities should be mindful of this in handling or responding to complaints. The Section III scenario involving Student A who was reprimanded for complaining about the professor could give rise to a hostile environment situation if not handled carefully. While Student E's disruptive behavior resulting from her Asperger's syndrome appears to be the basis of the adverse action, the university should take care in handling this situation for the same reasons.

In *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*,[123] the Second Circuit considered a claim by a medical student who was dismissed for failure to complete the first year curriculum. After his dismissal, he was diagnosed as having attention deficit disorder and a learning disability.[124] He then sought to re-enroll, but he and the medical school could not agree on how much of the first year

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no Section 504 violation with respect to a student's failing grade because the grade was based on safety concerns not discrimination); *University of California, Los Angeles*, 8 Nat'l Disability L. Rep. (LRP) ¶ 314 (Feb. 15, 1996) (finding that there was no Section 504 or ADA violation when a student did not provide adequate notice of the need for accommodation of learning disabilities for field placement work in social work program).

120. See ROTHSTEIN & ROTHSTEIN, *supra* note 8, at § 4.20, for additional case citations.

121. *See, e.g.*, Amir v. St. Louis Univ., 184 F.3d 1017 (8th Cir. 1999) (holding that although the dismissal of a medical student with obsessive compulsive disorder was validly based on academic difficulties, the student may have had a basis for claim of retaliation); Bayon v. State Univ. of N.Y. at Buffalo, No. 98-CV-0578E, 2006 WL 1007616 (W.D.N.Y. Apr. 13, 2006) (awarding $100,000 to a graduate student in a case claiming retaliation for bringing an ADA complaint); *Letter to Alamance Community College*, 32 Nat'l Disability L. Rep. (LRP) ¶ 48 (July 21, 2005) (finding that a student's suspension was because of physical abuse of another student in violation of Student Code of Conduct, not in retaliation for requesting auxiliary aids); *Letter to Washburn University*, 32 Nat'l Disability L. Rep (LRP) ¶ 197 (June 3, 2005) (finding that there was insufficient evidence to demonstrate retaliation by a law school).

122. *See, e.g.*, Rothman v. Emory Univ., 123 F.3d 446 (7th Cir. 1997) (finding that a law school did not create a hostile environment for a student with epilepsy by sending a letter to bar examiners and other incidents did not create a hostile environment when the law school's actions were not related to student's epilepsy); Guckenberger v. Boston Univ., 957 F. Supp. 306 (D. Mass. 1997) (denying dismissal of ADA claims based on hostile environment); *Letter to Indiana University Southeast*, 31 Nat'l Disability L. Rep. (LRP) ¶ 203 (May 21, 2004) (finding that the evidence was insufficient to support a hostile environment claim and that the student needed to follow the procedures for obtaining assistance).

123. 280 F.3d 98 (2d Cir. 2001).

124. *Id.* at 103–04.

coursework he would have to retake.[125] He brought suit on a number of grounds, including retaliation for exercising his First Amendment rights in a letter "opposing SUNY's requirement that he retake gross anatomy during that summer."[126] Although the court dismissed this particular case[127] and although the availability of damages in such cases is uncertain,[128] the claim highlights the fact that institutions should be careful that their responses to disability accommodation requests do not create a basis for retaliation claims. An annoying student—who might eventually not be defined as disabled—may nonetheless be able to make out a retaliation case because a professor or administrator engages in actions that might be deemed retaliatory when the student requests an accommodation, even if the requested accommodation seems facially unreasonable. The situation of Student E with Asperger's who blurts out in class and engages in other disruptive behaviors provides an example where care should be taken.

3. Policies, Practices, and Procedures

One of most common issues raised by the OCR when investigating complaints of discrimination on college and university campuses is the lack of appropriate policies and procedures to receive accommodations. It is not unusual that after a complaint, the OCR will determine that the institution did not discriminate in its actions but that the institution nonetheless had inadequate policies and procedures or that these policies and procedures were not adequately communicated to students and others.[129] It is also important that institutions ensure that a policy exists that does not place the decision about accommodations solely in the discretion of the faculty member. While faculty members should be involved in these decisions, they should not be the final arbiter.[130]

Other common situations for an OCR investigation include the failure of the

125. *Id.* at 104.

126. *Id.* at 105.

127. *Id.* at 116.

128. Arredondo v. S2 Yachts, 496 F. Supp. 2d 831 (W.D. Mich. 2007) (holding that compensatory and punitive damages were not available under ADA sections prohibiting retaliation in an employment case).

129. *See, e.g.*, *Loyola University Chicago*, 33 Nat'l Disability L. Rep. (LRP) ¶ 256 (May 1, 2006) (finding that an effective grievance procedure should include appropriate due process standards and provide for prompt equitable resolution of complaints); *Letter to Kansas State University*, 33 Nat'l Disability L. Rep. (LRP) ¶ 124 (Jan. 23, 2006) (finding that a university's internal grievance procedures, which included substantial review of records, student submitted materials, and witness testimony, adequately addressed complaint); *Letter to Northern Oklahoma College*, 32 Nat'l Disability L. Rep. (LRP) ¶ 198 (May 31, 2005) (finding that an early complaint resolution process appropriately responded to a student's request for an interpreter service and a counseling service); *Letter to Bakersfield College*, 32 Nat'l Disability L. Rep. (LRP) ¶ 22 (Apr. 22, 2005) (involving a case where the college responded quickly to student concerns and the complaint was resolved without litigation); *Letter to Southern University and A&M College*, 31 Nat'l Disability L. Rep. (LRP) ¶ 177 (Feb. 22, 2005) (finding that a university did not provide a decision in formal grievance process and that the university agreed that its staffing of grievance process should be improved).

130. *But see* Bradford v. Bd. of Regents of the Univ. of Houston, No. H-06-2478 (S.D. Tex., filed July 27, 2006) (involving a policy of allowing a professor to deny reasonable accommodations).

student to request accommodations in a timely manner, the failure of the student to provide notice of absence when an expensive accommodation, such as an interpreter, was being provided, and the failure of the institution to promptly provide auxiliary services.[131] An issue on the horizon where more litigation and questions are likely to arise is accessible technology. The law on what is required in this area is far from well settled,[132] but institutions should be proactive in planning for accessibility in classroom technology, websites, and other technology used to communicate with students on campus.

## IV. RECOMMENDATIONS

So, if the legal requirements on disability discrimination do not apply differently to millennial students, why should any special attention be paid to this group? The courts and the OCR are still likely to reach the same conclusions in cases involving this generation. Given the behaviors of millennials, however, colleges and universities will probably save a lot of time, energy, and resources by anticipating the new behaviors that might give rise to disputes in the first place. Implementing policies, practices, and procedures that anticipate this may not eliminate all of the challenges, but it is likely that at least some of them will not occur.

As was noted in the introductory portion of the article, millennials communicate differently and are often accustomed to getting their way. The response is not to excuse their failure to meet deadlines or to act reasonably because of these behaviors. Instead, in responding to millennial students who raise disability issues, it is important to be proactive, to anticipate their behaviors, to set limits, to communicate expectations early and often and in a variety of formats, and to ensure that these communications and policies are coordinated across campus. While the institutions will generally win cases in which their actions are challenged, these strategies should minimize the challenges in the first place.[133]

131. *See*, *e.g.*, *Letter to Columbia University*, 33 Nat'l Disability L. Rep. (LRP) ¶ 172 (Mar. 3, 2006) (finding that the allegation that accommodation was not provided in a timely manner was not supported); *Whittier College (CA)*, 7 Nat'l Disability L. Rep. (LRP) ¶ 187 (June 19, 1995) (finding no Section 504 violation where college delayed in providing auxiliary aids—notetaker and computer with spell check, etc.—to an aspiring law student); *Wheaton College (MA)*, 7 Nat'l Disability L. Rep. (LRP) ¶ 330 (June 8, 1995) (finding that a student's requests for accommodations—course substitution and unlimited time—were premature); *Temple University (PA)*, 8 Nat'l Disability L. Rep. (LRP) ¶ 125 (Dec. 1, 1995) (finding no Section 504 or ADA violation when a student did not seek academic modifications for an economics class until well into the semester).

132. *See* NAT'L COUNCIL ON DISABILITY, WHEN THE AMERICANS WITH DISABILITIES ACT GOES ONLINE: APPLICATION OF THE ADA TO THE INTERNET AND THE WORLDWIDE WEB, (2003), *available at* http://www.ncd.gov/newsroom/publications/2003/adainternet.htm (last visited Nov. 12, 2007).

133. *See Harvard University*, 34 Nat'l Disability L. Rep. (LRP) ¶ 200 (July 24, 2006) (praising the university for its proactive response to a complaint about numerous access issues).

A. Policies, Practices, and Procedures

Section 504 of the Rehabilitation Act was passed in 1973[134] and the ADA was passed in 1990.[135] While in the 1970s it was understandable that a college or university did not have in place policies, practices, and procedures to address issues relating to students with disabilities, that is no longer the case. There are many models, and much technical assistance is available. Also, the requirements under the law are sufficiently well known. Thus, there is no longer an excuse not to have policies, practices, and procedures that address major disability issues in place.

Each institution of higher education is different, and as a result, each will have to develop policies, practices, and procedures that work at that institution. For example, a small liberal arts college with 2,000 students will operate very differently than a large 40,000 student campus with several graduate and professional programs. The policies should take into account academic and other unit specific issues. For example, a medical school may need to have its own internal administrative structure for addressing certain issues, such as accommodations. Although different programs may have different policies, practices, and procedures, these should be coordinated centrally with consultation from college or university counsel and other appropriate officials, such as the vice president for student affairs and the office for disability services.

"Policies" for requesting accommodations should make clear how a student requests accommodations, the timing of such requests, and the procedures for challenging a denial. The administrator responsible for each of these issues should be clearly identified. Institutional "policy" is the institution's position on an issue. For example, the overarching policy, based on federal legal requirements, should be not to discriminate and to provide reasonable accommodations. The college or university policy may prohibit animals on campus. The faculty member's policy may prohibit open book exams or tape recording of lectures.

"Procedures" developed pursuant to policy address how to receive accommodations or how to request exceptions to the policy. Policies often will, and should, clarify procedural issues. Disability discrimination law anticipates an interactive resolution, thus the institution should have policies, practices, and procedures for resolution that avoids a formal grievance or complaint. But if the interactive process does not resolve the disagreement, what is the student to do? When and how does the student request accommodations? When and how does the student complain? What are the deadlines for making such complaints?

Student D with the learning disability who is seeking accommodations, such as providing printed material instead of using the Internet and an exemption from participating in interactive discussions, might not be able to demonstrate that these accommodations are reasonable. It might be that such accommodations would be unduly burdensome due to the time delay required to print out every internet exchange. Moreover, the accommodations might fundamentally alter the program

134. *See* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2000).

135. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

if class participation on the internet is essential. The program, however, should be mindful of the *Wynne* standard and make sure that the "relevant officials" considered these accommodations and came to a rationally justifiable conclusion that the accommodation would lower standards or fundamentally alter the program. Student D's scenario also presents an issue for institutions to consider. It can be quite problematic to advise the student to contact the instructor for specific classroom needs, unless there is a clear procedure to notify the instructor that the student is eligible for accommodations and to define what types of accommodations those might be. For example, notifying the instructor that a student has a diagnosed hearing impairment and should be allowed to sit in the front row is very different from notifying the instructor that a student has a learning disability and should be given twice the allotted time on the exam. A process for interaction with the instructor or academic department is also important. The office that makes the assessment of the documentation and approves the accommodations should not have the final say if the instructor believes that use of a calculator or extra time fundamentally alters the program or lowers standards in some way. The procedures should allow for a resolution to that disagreement.

"Practices" refers to the often unwritten system of implementing policies and procedures. Is the practice to have annual training of staff members? Is the practice that student orientation includes a discussion of disability accommodations? Is the practice that faculty members generally allow pets in the classroom, even if there is no formal policy or procedure? Will faculty members allow students to listen to music on iPods during exams? What are the concerns about cheating that have not been addressed? For students accustomed to having music available constantly, this could be a major adjustment. Will faculty members require, prohibit, or be neutral about using laptops for exams?

The term "practice" may incorporate institutional and individual norms and attitudes. Is the practice to be positive and accommodating or to rigidly adhere to strict rules? Practices may be more difficult to codify and communicate comprehensively, but an institutional discussion of policies and procedures should pay attention to how they are actually implemented in practice.

### B. Record Keeping

Student records are subject to federal privacy and confidentiality laws and may be subject to additional state or institutional requirements.[136] It is critical that the utmost care be given to what information is kept in student records, where records are kept, how they can be accessed, and who has access. Unfortunately, federal guidance is not specific on some of these issues. Administrators and others who have responsibility for and access to student records should be trained about the legal requirements. The possibility that private, sensitive, and perhaps stigmatizing

136. *See* Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (2000); Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, 42 U.S.C.); OCR Privacy Act Regulations, 34 C.F.R. § 5b (2006). *See generally* ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.21.

information might be in a student record highlights the importance of ensuring privacy and confidentiality.

In the wake of the Virginia Tech shootings in April 2007, there was a great deal of discussion about why information about the individual who was known to have demonstrated behaviors of concern was not more widely shared. The emotional response of some was that student mental health records should be more accessible to others.[137] Some of the media coverage addressed the need for changes in the law, and other media coverage simply thought administrators may not have acted appropriately within the law.[138] Whenever an event such as this occurs, care must be taken not to implement policies that are reactive but not thoughtful. The incident, however, is a wake-up call to the importance of having appropriate student record policies and ensuring that all parties affected by those policies are knowledgeable about them.[139]

One of the complexities of student records is that often records are maintained at more than one location on a campus. The following example highlights why there are so many locations for student records.

Lisa Matthews is a student at state university. During her first semester, her boyfriend broke up with her, and she had a serious episode of depression. Her residence hall counselor suggested that she seek counseling at the student health center, which she did. The student health service would have a record of that treatment. Because it is a medical record, it would be subject to high levels of privacy and confidentiality.

During her second year, she and some friends got drunk at a bar off campus and were arrested and given a warning. A record of the arrest exists at the city law enforcement office. After being released, she engaged in disruptive behavior in the dorm, and she was disciplined through the university disciplinary process and given a warning that if there was another incident she would have to move out of the dorm.

After her second year of college, her grades were below standard and she was placed on academic probation. At this point, her parents had her evaluated for a learning disability. Documentation was provided to the university requesting accommodations of additional time for exams, which was granted. The university placed this documentation in her student file.

After graduation, Lisa was admitted and enrolled in law school at state university. The campus disability services office which had evaluated her learning disability documentation recommended to the law school a continuation of extra time on exams.

During her second year of law school, a professor found that Lisa had

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137. *See* Ian Urbina, *Virginia Tech Criticized for Actions in Shooting*, N.Y. TIMES, Aug. 30, 2007, at A1 (noting that "federal privacy laws would have allowed [university officials] to communicate some information about Mr. Cho's mental health problems among local, state, and campus security officials").

138. *See, e.g.*, *id.*

139. VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH, (Aug. 2007), http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf. Chapter V of the report refers to Information Privacy Laws.

plagiarized a seminar paper. At the law school honor code hearing, Lisa's defense was that her learning disability affected her judgment which caused her to plagiarize. She was found guilty of the violation and was suspended for one semester. Her learning disability was viewed as a mitigating factor in the penalty determination. In many cases, plagiarism would have resulted in permanent expulsion.

Lisa has now completed law school and is preparing to take the bar exam. She is seeking additional time on the bar exam. Information about her prior accommodations in undergraduate and law school has been requested in order to decide about accommodations on the bar exam. The professional certification process in the state where she seeks to practice requires that the law school provide information certifying her character and fitness.

It is easy to see why information on Lisa might not exist in one single location. Some would argue that this demonstrates the need for a centralized record system. Setting up central record keeping can be complex and useful, but great care should be taken in ensuring that concerns of privacy and confidentiality are considered, particularly where highly private and stigmatizing information is accessed on the internet.

There is nothing impermissible with having several locations for information on a particular student. Greater discussion of this issue is beyond the scope of this article, and greater guidance at a national level would be helpful.[140] At this point, however, college and university counsel and administrators should at least begin to consider these issues. They should also ensure that whatever policies and procedures are implemented are coordinated and communicated to the affected administrators. In addition, these policies should take into account what information is to be kept, where it is to be located, who can access it, what record should be made of that access, who is privileged to know, and how those policies are known to the students themselves and their parents.

A review of the scenarios in Section III also highlights some of the concerns. In reviewing these scenarios, consider who should have access to information about the student's disability—the individual faculty member, the dean for student services, others? How much information should they have? At what point does behavior that is potentially harmful to others allow for broader disclosure to other students and the community?

### C. Communication

One of the most important areas of attention for millennials involves communication. As was noted previously, everyone is on information overload, and most students on college campuses today are used to accessing information in a wide variety of formats, many of which involve technology such as cell phones, listservs, and text messaging. Attention to communication should consider content, format, frequency, and coordination.

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140. *Id.*

1. Content

The content of policies and procedures should include information on what is required to receive accommodations, the timing and deadlines for making a request, whom to contact, when the student can expect a response to the request, and what limits exist on when to expect responses. Information that is "educational" in nature should also be included in the content. What if students need mental health counseling? Where do they go? To the extent it is feasible to provide the information, contact information should provide email, phone and physical addresses about who to contact. Identifying the office rather than the person may keep these references current.

2. Format

Information about accommodations, counseling, and other issues affecting individuals with disabilities should be communicated through a variety of formats and vehicles. The website of the college or university or specific unit should guide the student to key information on disability services. Student handbooks or brochures (both in hard copy and on the web) should provide essential information with guidance about where to obtain additional information. The letter of acceptance to the student should invite the student to identify the need for accommodations and should highlight the fact that some accommodations, such as interpreters or signers, may take time to arrange. Orientation materials should clearly direct students to disability services. Faculty syllabi should provide information on how to obtain accommodations or services.

3. Frequency

The information in these various formats should be provided early and often. Information should be in application information, websites that applicants use, and other pre-admission communications. As noted previously, at the acceptance stage, the orientation stage, and ongoing through enrollment, this information should be provided. Faculty members should be strongly encouraged to make this information available as well.

Generally, preadmission inquiries are prohibited unless, for example, the student is applying for a program specifically for students with learning disabilities. Identifying to all students, however, the availability of disability services and the guidelines for accessing those services is allowed because it is very different than asking the student to self-identify and only then providing disability service information.

4. Coordination

Finally, it is important that communications are coordinated among various campus offices. In particular, student disability service offices, student health programs, and campus law enforcement offices need to be involved in communicating general information about disability issues to students and in the procedures about how to handle and when to share information provided by the student.

Time is at a premium for college or university administrators. A regular meeting or other means to coordinate education and information on institutional policies, practices, and procedures about disability issues, however, can go a long way to prevent miscommunications and mixed signals.

## VI. CONCLUSION

This article has provided a legal overview of current judicial and Department of Education views on whether students meet the definition of having a disability, what accommodations are being sought and granted, and what constitutes discrimination. With the exception of who is considered to have a disability, the legal interpretations have not changed substantially in recent years. Institutions of higher education seem more likely to deny requests for accommodations, and the courts and the Office for Civil Rights generally support their decisions. Nevertheless, higher education administrators seem to find themselves increasingly challenged on these issues. While the institution is likely to win cases in which challenges are raised, the resource implications and the potential negative publicity surrounding these cases should encourage institutions to re-evaluate policies, practices, and procedures to be in the best position to avoid the challenges in the first place. Institutions of higher education are in the business of helping students and facilitating their learning. Because litigation is such an adversarial process, it is important to consider its impact on that goal.

This article is not intended to provide comprehensive guidelines about exactly how each campus should handle these issues. It should, however, encourage all institutions of higher education to develop and fine-tune their policies, practices, and procedures with respect to students with disabilities. It also suggests that the unique behaviors of millennials make it even more important than ever to review and reconsider student disability issues on campus.

Millennials with disabilities will not be treated any differently by courts or the Department of Education, but their behaviors make it more likely that disability issues will be raised. For that reason, college and university attorneys can play a proactive role in encouraging a review of current handling of students with disabilities. It is much better to spend time on ensuring that the policies, practices, and procedures are good ones for all students than to spend time responding to record requests from the Department of Education or handling grievances or litigation.

Louis D. Brandeis, one of the most well known legal figures in American history, had the highest grade point average in Harvard Law School history, graduating in 1876 at age twenty.[141] Nonetheless, he had a visual impairment that required accommodation during law school.[142] He could not read for extended periods of time,[143] so a classmate read to him, in exchange for tutorial instruction. Without accommodation, we might never have had the benefit of Justice Brandeis' wisdom and example as the "people's lawyer."[144] While Justice Brandeis certainly did not have "millennial" behaviors, it is good to keep in mind that the next Louis Brandeis might well be a millennial and to ensure that institutional

141. *Justice Louis D. Brandeis: The People's Attorney* (PBS television broadcast 2007); *See also* LEWIS J. PAPER, BRANDEIS 16 (1983) (discussing Brandeis' time at Harvard).

142. *Brandeis*, *supra* note 141; PAPER, *supra* note 141, at 16.

143. *Brandeis*, *supra* note 141; PAPER, *supra* note 141, at 16.

144. *Brandeis*, *supra* note 141.

policies, practices, and procedures do not unduly create barriers excluding that individual.

## APPENDIX

Office of the Americans with Disabilities Act
Civil Rights Division
Department of Justice
P.O. Box 66118
Washington, D.C. 20036-6118
(202)514-0301; (202)514-0381 (TT); (202)514-0383 (TT)

Architectural and Transportation Barriers Compliance Board
1331 F Street, NW, Suite 1000
Washington, DC 20004-1111
(800)USA-ABLE (Voice/TT)
http://www.access-board.gov

Association on Higher Education and Disability (AHEAD)
P.O. Box 21192
Columbus, Ohio 43221-0192
(614)488-4972 (Voice/TDD)
http://ahead.org

Institute for Higher Education Policy
Higher Education for Students with Disabilities:
A Primer for Policymakers (June 2004)

Job Accommodation Network (JAN)
912 Chestnut Ridge Road, Suite 1
West Virginia University
Morgantown WV 26506
1-800-527-7234
http://janweb.icdi.wvu.edu

Technical Assistance on Technology Access
www.itpolicy.gsa.gov/coca/nii.htm
United Kingdom tests for website accessibility
(UK standards differ from US Section 508 Guidelines)
www.publictechnology.net

United States Department of Education
Office for Civil Rights
http://www.ed.gov/about/offices/list/ocr/kindex.html?src=oc

"When the ADA Goes Online: Application of the ADA to the Internet and the

Worldwide Web"
National Council on Disability
http://www.ncd.gov/newsroom/publications/adainternet.html

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