

DISABILITY LAW ISSUES FOR HIGH RISK STUDENTS: ADDRESSING VIOLENCE AND DISRUPTION

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In December 2008, a study was released in the Archives of General Psychiatry indicating that almost half of college-age students (19–25) had a psychiatric disorder in the past year.¹ Not all of these students would be “disabled” within federal discrimination law. In addition, very few will be disruptive, and even fewer will be violent.

Nonetheless, the extremely rare events at Virginia Tech, Appalachian Law School, and Northern Illinois University have created public awareness and concern about these issues. The awareness and concern are good. Overreaction and inappropriate responses (some of which may have unintended consequences of making situations worse), however, are not good.

Although some of the initial reactions to Virginia Tech were troubling—media pundits suggesting that everyone on campus should share everything with everyone about students who are troubling—later thoughtful response has brought constructive and positive guidance. This direction recognizes the importance of balancing the interests of the individual students with mental health problems with the interests of others in the community.

One of the major legal issues relevant to developing policies to respond to these concerns is disability discrimination law, including Section 504 of the Rehabilitation Act² and the Americans with Disabilities Act.³ The

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1. Carlos Blanco, Mayumi Okuda, Crystal Wright, Deborah S. Hasin, Bridget F. Grant, Shang-Min Liu, & Mark Olfson, *Mental Health of College Students and Their Non-College-Attending Peers: Results from the National Epidemiologic Study on Alcohol and Related Conditions*, 65 ARCH. GEN. PSYCHIATRY 1429, 1429 (2008), available at <http://archpsyc.ama-assn.org/cgi/content/full/65/12/1429>.

2. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2006).

3. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000), amended by ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3533

1979 Supreme Court decision in *Southeastern Community College v. Davis*,⁴ determined that to be otherwise qualified a student with a disability must be able to carry out the essential functions of the program in spite of the disability. Since then a significant body of case law has developed. It is clear that “direct threat” is a factor in determining whether a student is otherwise qualified and institutions may take that into account.⁵

Recent judicial attention in the higher education context has applied disability discrimination law to higher education students with substance abuse and/or mental health problems.⁶ Courts have addressed questions of whether the individual meets the definition of being disabled, what accommodations are required, and whether behavior and conduct deficiencies mean that the students are not otherwise qualified. The recent violence on college and university campuses has highlighted a number of additional issues including confidentiality, privacy, duty to warn, and discipline. There are many areas where legal guidance is unclear or inconsistent. This makes it challenging for higher education administrators. Nevertheless, it is important to begin with knowledge of the legal requirements, and to develop policies that take those issues into account. Disability discrimination law is one of the key areas to understand in developing these policies.

In examining these issues, it is essential to recognize the myths and stereotypes about mental illness. Not all violent or disruptive behavior is caused by individuals with mental illness. And people with mental illness should not be presumed to be violent or disruptive.⁷ This is important in developing sound and proactive policies, practices, and procedures

(2008).

4. 442 U.S. 397 (1979). For a discussion of the history and background of this case and its impact, see Laura Rothstein, *The Story of Southeastern Community College v. Davis: The Prequel to the Television Series “ER”*, in *EDUCATION LAW STORIES* (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

5. See, e.g., *Sch. Bd. v. Arline*, 480 U.S. 273 (1987) (holding a teacher is not otherwise qualified if her condition poses a direct threat to the health or safety of children attending the school); *McKenzie v. Benton*, 388 F.3d 1342 (10th Cir. 2004) (allowing a jury to consider whether sheriff’s reemployment would pose a “direct threat” to others due to the dangerous nature of law enforcement); *Robertson v. Neuromedical Ctr.*, 161 F.3d 292 (5th Cir. 1998) (holding that where doctor’s neurological condition posed a direct threat to his patients, ADA does not require an employer to accommodate where the individual poses a direct threat to others).

6. LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* (3d ed. 2006 & Supp. 2008) [hereinafter *DISABILITIES AND THE LAW*].

7. Eric B. Elbogen & Salley C. Johnson, *Study Examines Association Between Mental Illness and Violent Behavior*, 66 *ARCHIVES OF GENERAL PSYCHIATRY* 152, 152–161 (2009), available at <http://www.medicalnewstoday.com/articles/137657.php> (indicating that violence is more common among those with mental illness only when they have other risk factors such as substance abuse, physical abuse, a recent divorce, unemployment or victimization, history of juvenile detention, or being younger, male or lower-income).

preventing violence and disruption. This article draws upon the author's previous research on these issues⁸ and focuses on the importance of developing thoughtful and careful policies that take disability issues and confidentiality into account while balancing the interests of others. The unintended consequences of some policies (even though they comply with disability discrimination requirements) should be considered. In particular the professional licensing authorities for law and medicine in most states require students and the professional school to report mental health treatment and diagnosis, which may deter at least some students from getting needed treatment.

The first part of the article addresses the disability discrimination legal mandates that apply to how individuals with mental health problems are treated in various contexts where concerns about campus violence and/or disruption are at issue. It addresses what we *must* do or what we *must not* do within the law and its current interpretations. Part II briefly provides some thoughts about what we *can* do. What resources are available to assist educators responsible for providing a safe and positive learning environment for other students, faculty, and staff, and for assuring that the interests of others (professional certification boards, employers, and individuals being served in clinical or internship settings) are appropriately balanced? Part III applies the legal limits to various points in higher education settings in focusing on what we *should* do, i.e., what ethically should we consider in balancing the interests of the individual with mental health challenges and others who might be affected by conduct that relates to those challenges?

To make this analysis less abstract, the following are three scenarios that might help to highlight a range of situations that could create a potential for disruption or violence (including self-injury).

Listless Lisa. Lisa has been coming to class late or not at all. When she comes she falls asleep often. Her assignments are late. The behavior did not occur in the first semester, and has only recently begun in the spring semester. Some of her roommates and classmates have noticed alcohol on her breath and have seen her getting drunk at social events.

Irritating Ian. Ian shows up frequently to faculty offices without appointments to ask professors questions about everything. He sends daily emails (sometimes more than one a day) to confirm the next day's

8. Laura Rothstein, *Millennials and Disability Law: Revisiting Southeastern Community College v. Davis*, 34 J.C. & U.L. 169 (2007) [hereinafter Rothstein, *Millennials and Disabilities Law*]; Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531 (2008) [hereinafter Rothstein, *Law Students and Lawyers*]; Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931 (1997) [hereinafter Rothstein, *Employer's Duty to Accommodate*].

assignment or to find out if he understands the reading. He does not pick up on social cues from others and invades their physical space. In class, he often shouts out answers and sometimes ridicules or argues with other students excessively. On one occasion, he screamed an obscenity at a professor, saying the professor should be ashamed and fired for the way he was treating students.

Scary Sam. Although there was nothing in the admissions application to indicate this, Sam has a record of serious mental illness and had been hospitalized as a result of attempted suicide in the previous year. Sam's roommate just learned about this from Sam's sister, who is also a student on campus. Sam is attending law school, and is planning to enroll in the domestic violence clinic program, where under supervision he will be representing clients.

I. WHAT WE *MUST* DO—LEGAL FRAMEWORK: SECTION 504 OF THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT

A. Basic Nondiscrimination Mandate

Federal policy prohibiting discrimination on the basis of disability began in 1973 with the enactment of the Rehabilitation Act of 1973.⁹ Section 504 of the Rehabilitation Act¹⁰ (hereinafter "Section 504") prohibits programs that receive federal financial assistance from discriminating on the basis of disability against otherwise qualified individuals with disabilities. It further requires that these programs provide reasonable accommodations as part of the nondiscrimination prohibition. Because virtually all higher education institutions receive federal financial assistance through student loan programs and/or federal grants, these educational programs have been subject to Section 504 for over 35 years.

More recent extension of these mandates came with the 1990 passage of the Americans with Disabilities Act (hereinafter "ADA"),¹¹ which extends coverage to a much broader sphere. Title I of the ADA¹² applies to employers with 15 or more employees, so this affects the career services and placement offices within higher education. Title II¹³ applies to state and local governmental programs, which means that state licensing boards are covered. In addition, state and local governmentally operated higher education institutions are covered by Title II. Title III¹⁴ applies to private

9. 29 U.S.C. § 701–796 (2006).

10. 29 U.S.C. § 794 (2006).

11. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3533 (2008).

12. 42 U.S.C. §§ 12111–12117.

13. 42 U.S.C. §§ 12131–12165.

14. 42 U.S.C. §§ 12181–12189.

providers of twelve categories of public accommodations (including places of education as one of the specific categories). Major testing services (LSAC, MCAT, ACT, SAT, etc.) are also covered by Title III, so their testing and other services must ensure nondiscrimination and reasonable accommodations.¹⁵

B. Who Is Covered?—What Is a Disability?

Individuals claiming discriminatory treatment or failure to provide reasonable accommodation are only protected if they meet the definition of being disabled. The definitions of coverage under Section 504 and the ADA are virtually identical. Amendments to both statutes in 2008 clarified some issues of definition that had significant application to individuals with mental health problems.

The basic three-prong definition from the ADA protects individuals who have a physical or mental impairment which substantially limits one or more major life activities, have a record of such an impairment, or who are regarded as having such an impairment.¹⁶

The individual must not only meet this definition to be covered, but the individual must also be a qualified individual with a disability, which means that he or she can carry out the essential functions of the program, with or without reasonable accommodation.¹⁷ To be otherwise qualified also means that the individual must not be a direct threat to self or others.¹⁸

At first, courts rarely found that individuals with mental illness or related challenges were not considered “disabled” within the definition of the statute. Instead, courts focused on issues of whether the individuals were otherwise qualified and/or whether reasonable accommodations should be provided. As a result, cases involving students and individuals in the employment setting with mental health problems, such as eating disorders, depression, bipolar disorder, schizophrenia, and other conditions (as well as cases in other contexts) were not summarily dismissed on a basis that the

15. 42 U.S.C. § 12189.

16. 42 U.S.C. § 12102(2); *see* 29 U.S.C. § 705(21)(B) (2006). For a description of the mental disabilities that might be covered, and how these conditions manifest themselves, *see* Sande L. Buhai, *Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements*, 36 SAN DIEGO L. REV. 137, 155–63 (1999). This discussion describes mental illness or emotional disturbance (which could include bipolar disorder/manic depression, clinical depression, schizophrenia, and anxiety disorders), epilepsy, autism, and cognitive communication disorders (including learning disabilities), alcohol and substance abuse, and autism. It describes various behaviors that can be a consequence of the condition and the fact that in some instances a condition such as a learning disability is “compounded by other psychological problems such as low self-esteem and depression.” *Id.* at 161.

17. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 407 (1979).

18. 42 U.S.C. § 12113(b). Although this section refers only to employment, it can be expected to apply to higher education as well.

individual was not covered.

Supreme Court decisions in 1999 and 2002, however, changed that presumption. In the 1999 cases (often referred to as the *Sutton* trilogy),¹⁹ the Supreme Court narrowed coverage by holding that a determination of whether an individual is substantially limited should take into account mitigating measures, such as medication. If an individual's medication resulted in the individual not being substantially limited (as long as the individual was on the medication), then he or she was not covered. Thus, that person could not even request a reasonable accommodation that might ensure the ability to carry out the program requirements. In 2002, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,²⁰ the Court interpreted the definition of "major life activities" by holding that they were those that are "central to most people's daily lives."²¹

While these narrowing rulings had the greatest impact on employment, they also affected how students in higher education and applicants for professional licensing were protected. If the individual is not even considered to be a person with a disability, the individual cannot claim discrimination or denial of a reasonable accommodation, or even that the individual is otherwise qualified.

On January 1, 2009, Congressional amendments responding to these narrowed interpretations took effect. The ADA Amendments Act of 2008 (hereinafter "ADAAA") amended the definition of coverage to clarify that the intent of the ADA was to provide for broad coverage.²² The definition's amendment applies to the definition of coverage for both the ADA and the Rehabilitation Act. The ADAAA findings and purposes specifically state that the Supreme Court had narrowed the definition in a way that was not intended by Congress.²³

The definition of disability basically remains the same as noted above, but defines major life activities in the statute, where previously these were found in regulations. Major life activities continue to not be limited to the listed categories. Congress added a number of major life activities to the

19. *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); *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). The Court remanded that same day a professional licensing case in which an individual with a learning disability was disputing the denial of protection by the New York bar examining authorities. They had denied her accommodations on that basis. See *N.Y. State Bd. of Law Exam'rs v. Bartlett*, 527 U.S. 1031 (1999).

20. 534 U.S. 184 (2002).

21. *Id.* at 201.

22. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3533 (2008).

23. *Id.*

example list. Some of these additions and clarifications are significant for coverage of individuals with mental health challenges. They include “caring for oneself, performing manual tasks, seeing, hearing, *eating*, *sleeping*, walking, standing, lifting, bending, speaking, breathing, *learning*, reading, *concentrating*, *thinking*, *communicating*, and *working*.”²⁴

Congress further clarified the definition in ways that might also be important to individuals with mental health challenges. “Regarded as having such an impairment” means:

An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.²⁵

Furthermore, Congress provided that “disability” should be interpreted with the following rules of construction:

(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

(B) The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . medication . . . [or] reasonable accommodations . . . [or] learned behavioral or adaptive neurological modifications.²⁶

Taken together, these amendments provide support for a finding of coverage for students with mental health challenges ranging from eating and sleep disorders and depression to bipolar disorder and paranoid schizophrenia. After the ADAAA, even those students whose medication or therapy mitigates the impairment may still be covered. This is significant in light of the December 2008 study indicating that almost half of college-age students (19–25) whether attending college or not, had a

24. ADA Amendments Act of 2008 § 4(a) (emphasis added).

25. *Id.*

26. *Id.*

psychiatric disorder in the past year.²⁷ Not all of the conditions described in the study, however, would be considered disabilities within Section 504 and the ADA. The condition must still substantially limit a major life activity. The broader definition of “major life activity” to specifically include activities such as sleeping, learning, concentrating, communicating, thinking, and working, however, makes it more likely that an individual with mental health problems would be covered.

Higher education cases had not often included defenses raised by the institutions that the individual was not “disabled,” applying the *Sutton/Toyota* limiting language. These defenses were primarily raised in employment discrimination cases.²⁸ Some recent higher education cases, however, have hinted at a trend in that direction.²⁹ The 2008 amendments will likely curb this trend.

27. Blanco, Okuda, Wright, Hasin, Grant, Liu, & Olfson, *supra* note 1, at 1429, 1433 table 2. Of this population fewer than 25% sought treatment during that time. The most prevalent conditions among college students were alcohol use (about 20%) and personality disorders (about 18%). *Id.* at 1433–35.

28. See *DISABILITIES AND THE LAW*, *supra* note 6, at § 4:9 (“*Mental Impairments*”) for citations to cases in the employment setting where mental illnesses were not covered.

29. *Marlon v. W. New England Coll.*, 124 F. App’x 15 (1st Cir. 2005) (finding a law school did not discriminate against student with carpal tunnel because of insufficient evidence as to whether student was regarded as disabled); *Swanson v. Univ. of Cincinnati*, 268 F.3d 307 (6th Cir. 2001) (finding a resident with major depression was not substantially limited in ability to perform major life activities because difficulty with concentrating was temporary and alleviated by medication; communications problems were short-term, caused by medication; and there were only a few episodes); *Davis v. Univ. of N.C.*, 263 F.3d 95 (4th Cir. 2001) (finding a student with multiple personality disorder not disabled because she was not perceived as unable to perform broad range of jobs); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998) (holding test anxiety was not a disability for a medical student); *Morgan v. Nova Se. Univ., Inc.*, No. 07-60759 CIV, 2007 WL 2320589 (S.D. Fla. Aug. 10, 2007) (finding a student with seizure disorder not disabled because medication controlled her seizures); *Brettler v. Purdue Univ.*, 408 F. Supp. 2d 640 (N.D. Ind. 2006) (holding a vague narcoleptic condition claim not sufficient to demonstrate disability); *Dixon v. Univ. of Cincinnati*, No. 1:04-CV-558, 2005 WL 2709628 (S.D. Ohio Oct. 21, 2005) (holding a graduate student must establish that conditions of bipolar disorder, dyslexia, and attention deficit disorder substantially limit major life activities); Letter from Carroll, Office for Civil Rights, U.S. Dep’t of Educ., to Stewart Steiner, President, Genesee Cmty. Coll., 33 Nat’l Disability L. Rep. (LRP) ¶ 199 (Mar. 8, 2006) [hereinafter OCR Letter to Genesee Cmty. Coll.] (concluding a student asked to leave campus meeting by security guard did not demonstrate he was perceived as disabled); Letter from Rachel Pomerantz, Office for Civil Rights, U.S. Dep’t of Educ., to Joanne Romanzi Herne, Dir., Crouse Hosp. Sch. of Nursing, 35 Nat’l Disability L. Rep. (LRP) ¶ 125 (Apr. 4, 2006) (concluding a record did not support that university dismissed nursing school student with anxiety because she was perceived as being impaired; student dismissed because she performed unsafely). *But see Bartlett v. N.Y. State Bd. of Law Exam’rs*, 226 F.3d 69 (2d Cir. 2000) (holding a bar exam applicant with learning disability who had self accommodated was still substantially limited in major life activity of reading). For additional case citations, see *DISABILITIES AND THE LAW*, *supra* note 6, at § 3:2.

Even with the new amendments, however, students will be required to provide appropriate documentation of the disability. This documentation will need to be appropriately current, to be prepared by a qualified professional, and to identify not only the disability, but the accommodations that relate specifically to that condition.³⁰

Applying these definitional requirements to the scenarios, it is possible that Lisa has depression, resulting from a situation such as a boyfriend breakup, bad grades, or financial problems. Her drinking may exacerbate her problems. It is not certain that her condition would meet the definition of a disability, which would mean that she would not be legally entitled to protection against discrimination or to receive reasonable accommodations. There might be situations, however, where she is regarded as having an impairment.

Ian may have ADD, ADHD, or Asperger's Syndrome, or he may just be annoying. Even if he is diagnosed with one of those conditions, it is not a disability unless it is a substantial impairment to a major life activity. Sam does have a record of a serious mental illness, and would probably meet the definition of at least having a record of a disability.

C. Otherwise qualified

Having a disability is only the first step to demonstrating protection against an adverse action taken by an institution of higher education. The individual must also be otherwise qualified. That means that the individual must be able to carry out the essential requirements of the program, with or without reasonable accommodation.³¹ Institutions of higher education are given substantial deference in determining what those requirements are.

The key case establishing the standard for determining whether something is a fundamental alteration is *Wynne v. Tufts University School of Medicine*.³² The court, in addressing whether a medical school must provide multiple choice exams in an alternative format, held that the burden is on the institution to demonstrate that "relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration."³³ Although this is not a Supreme Court decision, the reasoning has been adopted by numerous courts in subsequent decisions.

The ADAAA incorporated judicial interpretations and the Section 504

30. See DISABILITIES AND THE LAW, *supra* note 6, at § 3:20; *supra* notes 22–26 and accompanying text.

31. See Rothstein, *supra* note 4.

32. 932 F.2d 19 (1st Cir. 1991).

33. *Id.* at 26.

regulatory language into the statutory language itself, and applied this language to both Section 504 and the ADA. The statute now provides that:

Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.³⁴

This means that institutions can apply academic, attendance, honesty, behavior, and other standards to students with disabilities. Students who pose a direct threat to self or others may also be found not to be otherwise qualified.³⁵ Courts and the Office for Civil Rights have been quite consistent in upholding academic requirements even where deficiencies might relate to a mental impairment.³⁶ Additional decisions and guidance

34. ADA Amendments Act of 2008, § 6(a)(1), Pub. L. No. 110-325, 122 Stat. 3533 (2008).

35. *Mershon v. St. Louis Univ.*, 442 F.3d 1069 (8th Cir. 2006) (addressing student with disability banned from campus because of threat of violence against a professor); Letter from L. Thomas Close, Branch Chief, Compliance Enforcement Division, Office for Civil Rights, Region VIII, U.S. Dep't of Educ., to Robert C. Huddleston, President, Dixie College, 8 Nat'l Disability L. Rep. (LRP) ¶ 31 (Nov. 20, 1995) (finding no ADA/Section 504 violation in expelling a student because of stalking and harassing a professor; expulsion was not because of perceived mental disability but because she posed a threat); Letter from Michael E. Gallagher, Office for Civil Rights, U.S. Dep't of Educ., to Jean Scott, President, Marietta Coll., 31 Nat'l Disability L. Rep. (LRP) ¶ 23 (July 26, 2005) [hereinafter OCR Letter to Marietta Coll.] (concluding dismissal of student threatening suicide violated Section 504 because decision was not sufficiently based on a high probability of substantial harm); Letter from Frederick S. Head, Office for Civil Rights, U.S. Dep't of Educ., to Don LeDuc, President and Dean, Thomas M. Cooley Law Sch., 31 Nat'l Disability L. Rep. (LRP) ¶ 24 (July 26, 2005) (addressing student dismissed because of alcohol related conduct); Letter from the Office for Civil Rights, U.S. Dep't of Educ., to John Makdisi, Dean, St. Thomas Univ., Sch. of Law, 23 Nat'l Disability L. Rep. (LRP) ¶ 160 (Dec. 19, 2001) (upholding dismissal of law student with bipolar disorder who threatened to "blow up the legal writing department").

36. *See, e.g.*, *Amir v. St. Louis Univ.*, 184 F.3d 1017 (8th Cir. 1999) (refusing to grant request to change supervisors of medical student with obsessive compulsive disorder who was later dismissed for academic deficiencies because request was unreasonable); *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999) (finding a medical student with learning disabilities did not meet academic standards); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432 (6th Cir. 1998) (finding a graduate student with ADHD did not meet academic standards); *Sherman v. Black*, 510 F. Supp. 2d 193 (E.D.N.Y. 2007) (addressing a student with depression and academic deficiencies dismissed from medical school); *Pacella v. Tufts Univ. Sch. of Dental Med.*, 66 F. Supp. 2d 234 (D. Mass. 1999) (addressing a student dismissed because of poor academic performance); Letter from Lara, Office for Civil Rights, U.S. Dep't of Educ., to Jay Gogue, Chancellor, Univ. of Houston System, President, Univ. of Houston, 32 Nat'l Disability L. Rep. (LRP) ¶ 74 (Apr. 8, 2005) (concluding Graduate

indicate support for upholding attendance requirements.³⁷ Honesty and character are often found to be valid bases for adverse actions as well.³⁸

Of particular concern for students with mental health conditions are expectations relating to behavior, including disruption, threats, suicide, and violence.³⁹ As noted in an earlier article on this topic:

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 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

School of Social Work could dismiss student with bipolar disorder who failed exam and student was not treated differently than other students); Letter from Muhammad, Office for Civil Rights, U.S. Dep’t of Educ., to Barry W. Russell, President, Midlands Technical Coll., 32 Nat’l Disability L. Rep. (LRP) ¶ 124 (OCR 2005) (deciding student’s academic performance, not bipolar disorder, was basis for dismissal since student had received poor evaluations on clinical assignments).

37. Toledo v. Sánchez, 454 F.3d 24 (1st Cir. 2006) (upholding attendance requirements for student with schizoaffective disorder).

38. Sherman v. Black, 510 F. Supp. 2d 193 (E.D.N.Y. 2007) (involving forgery of faculty initials on an official form); Bhatt v. Univ. of Vt., 958 A.2d 637 (Vt. 2008) (involving falsifying academic records). For a discussion of these cases, see discussion *infra* Part I.D.

39. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378 (S.D. Ga. 2002) (concluding dental student’s drug addiction was a threat to patients); El Kouni v. Trs., 169 F. Supp. 2d 1 (D. Mass. 2001) (finding medical student disqualified because of offensive and disrupting behavior); Letter from Carolyn F. Lazaris, Office for Civil Rights, U.S. Dep’t of Educ., to Jack M. Wilson, President, Univ. of Mass. Dartmouth, 35 Nat’l Disability L. Rep. (LRP) ¶ 75 (June 13, 2006) (addressing student with disability suspended from university housing because she assaulted another student); Letter from Rhonda Raines, Office for Civil Rights, U.S. Dep’t of Educ., to Nancy L. Zimpher, President, Univ. of Cincinnati, 35 Nat’l Disability L. Rep. (LRP) ¶ 151 (Apr. 20, 2006) [hereinafter OCR Letter to Univ. of Cincinnati] (involving a student with bipolar disorder dismissed from medical school; a refusal to readmit; and an issue of whether there was objective individualized inquiry about ability continue); Letter from Robert E. Scott, Office for Civil Rights, U.S. Dep’t of Educ., to Frances L. White, President, Coll. of Marin, 35 Nat’l Disability L. Rep. (LRP) ¶ 177 (June 30, 2006) (addressing student with psychological impairment dismissed from college because of disruptive behavior who had repeatedly been warned); Letter from Denise Thompson, Office for Civil Rights, U.S. Dep’t of Educ., to Sherry L. Hoppe, President, Austin Peay State University, 36 Nat’l Disability L. Rep. (LRP) ¶ 156 (Apr. 1, 2006) (finding student dismissed for making veiled threats against professor and posting web site with profanity targeted at another professor was not denied academic adjustments and had not provided necessary documentation of paranoid personality disorder in timely manner); *see also* Kaminsky v. St. Louis Univ. Sch. of Med., No. 4:05CV1112 CDP, 2006 WL 2376232 (E.D. Mo. Aug. 16, 2006) (holding medical school did not have to rehire resident doctor with psychosis who was dismissed for unprofessional and illegal conduct even if it was related to his conditions).

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 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 being violated by such behaviors and to ensure that college and university policies that address that behavior are in place.⁴⁰

It is important to recognize that where adverse action is taken against a student with a mental impairment, it should be based on individualized and objective standards, not on prejudice and stereotypes.⁴¹ In making decisions about qualifications, it should also be noted that courts are particularly deferential to health care professional training programs because of the importance of patient safety.⁴²

With respect to Lisa, Ian, and Sam, even if they can make the case that they have disabilities, they must still be otherwise qualified. Lisa's deficiencies with respect to attendance and deadlines may mean that she is not otherwise qualified. If other students are excused from meeting these expectations, however, she might be able to demonstrate discriminatory treatment. Ian's classroom disruptions are relevant in determining qualifications. It may be necessary for the instructor to set clear boundaries and guidelines. There may be a campus disciplinary code violation because of his inappropriate obscenities and comments to the professor. Sam may be scary, but without any specific behavior or conduct, negative treatment could be problematic. The law school, however, has understandable concerns about his handling client cases, but third-hand

40. Rothstein, *Millennials and Disability Law*, *supra* note 8, at 183–84.

41. OCR Letter to Marietta Coll., *supra* note 35 (concluding dismissal of student based on concern about suicide must be based on individualized and objective assessment); Letter from Pearthree, Office for Civil Rights, U.S. Dep't of Educ., to Bernard O'Connor, President, DeSales Univ., 32 Nat'l Disability L. Rep. (LRP) ¶ 150 (Feb. 17, 2005) (concluding removal of student from campus housing based on direct threat concerns was not based on individualized and objective assessment); OCR Letter to Univ. of Cincinnati, *supra* note 39 (concluding university did not make individualized objective determination about student's ability to return to medical school after bipolar disorder was diagnosed); *see also* Complaint, Nott v. George Washington Univ., No. 05-8503 (D.C. Super. Ct. 2005), *available at* <http://www.bazelon.org/issues/education/incourt/nott/nottcomplaint.pdf> (involving student's challenge to being barred from campus and suspended after officials learned he had been hospitalized with depression).

42. For cases involving health care professionals and disabilities, see *DISABILITIES AND THE LAW*, *supra* note 6, at § 10:3.

knowledge of a past suicide attempt would make it difficult for them to act on that basis.

D. “Known” Disability

An important requirement for protection from discrimination, including receiving reasonable accommodation, is that the individual must make the disability known.⁴³ This is significant because unlike the presumption in elementary and secondary education, where the Individuals with Disabilities Education Act⁴⁴ (IDEA) requires the educational agency to be proactive in identifying students who need special education, to pay for most educational testing, and to provide extensive services, the burden in higher education is on the individual to self identify.

The individual must also provide and pay for appropriate documentation when seeking an accommodation.⁴⁵ If the institution does not know that a student has a disability, it will not be required to excuse misconduct or failure to meet essential requirements. There is, however, some precedent for requiring the disability to be a consideration as a factor in disciplinary or academic dismissal situations, but the student may have to justify why the disability was not made known sooner. For a student with a mental

43. *Shamonsky v. Saint Luke’s Sch. of Nursing*, No. 07-1606, 2008 WL 724615 (E.D. Pa. Mar. 17, 2008) (finding school was not aware of nursing student’s learning disability which was diagnosed after dismissal for poor academic performance); OCR Letter to Genessee Cmty. Coll., *supra* note 29 (concluding student who was banned from campus after security concerns did not demonstrate that security guards knew he had a disability or suspect he had one, therefore no discrimination); Letter from Ann Moretto Cramer, Office for Civil Rights, U.S. Dep’t of Educ., to Marlene Springer, President, Coll. of Staten Island, 36 Nat’l Disability L. Rep. (LRP) ¶ 131 (Nov. 1, 2006) (concluding student responsible to provide adequate notice and documentation to justify academic adjustments or auxiliary aids); Letter from Gary D. Jackson, Office for Civil Rights, U.S. Dep’t of Educ., to Chatt G. Wright, President, Haw. Pac. Univ., 30 Nat’l Disability L. Rep. (LRP) ¶ 209 (Oct. 20, 2004) (finding student with PTSD had not requested accommodations for PTSD, only back injury); Letter from Nigro, Office for Civil Rights, U.S. Dep’t of Educ. to Evelyn E. Jorgenson, President, Moberly Area Cmty. Coll., 31 Nat’l Disability L. Rep. (LRP) ¶ 178 (Feb. 18, 2005) (concluding student must give notice of request for additional time on exams); Letter from Pollar, Office for Civil Rights, U.S. Dep’t of Educ., to Lawrence Schumacher, President, Nw. Bus. Coll., 31 Nat’l Disability L. Rep. (LRP) ¶ 252 (May 21, 2005) (finding student had not requested leave of absence in writing to accommodate post traumatic stress disorder).

44. 20 U.S.C. §§ 1400–82 (2006). For the details of the IDEA, see DISABILITIES AND THE LAW, *supra* note 6, at 91–263.

45. *See, e.g.*, Letter from Jackson, Office for Civil Rights, U.S. Dep’t of Educ. to Mike Metke, President, Lake Washington Technical Coll., 32 Nat’l Disability L. Rep. (LRP) ¶ 125 (OCR 2005) (concluding student’s documentation of PTSD, dysthymia, and depression did not provide medical documentation of macular degeneration); Letter to Fordham University, 32 Nat’l Disability L. Rep. (LRP) ¶ 49 (OCR 2005) (concluding student had not provided documentation to justify readmission); *see generally* DISABILITIES AND THE LAW, *supra* note 6.

impairment, justifications may include stigma, failure to recognize the condition, denial, and fear of adverse actions.⁴⁶

An example of a case in which some of these issues were addressed is *Sherman v. Black*.⁴⁷ The case involved a medical student who was dismissed from medical school due to academic deficiencies.⁴⁸ The Department of Education's Office for Civil Rights (OCR) investigation of his complaint that he had been dismissed because of his psychiatric disability found no violation of Section 504 or the ADA.⁴⁹ In the litigation that followed, the court noted the OCR's finding that the student had not provided documentation of disabilities to justify academic adjustments.⁵⁰ The OCR finding was that he only notified the "Promotions Committee that his poor evaluations were due primarily to his having informed two faculty members that he was repeating the Medicine Clerkship."⁵¹ The documentation did not include any "explanation for his forgery of a faculty supervisor's initials on an official . . . form."⁵²

A similar situation arose in *Bhatt v. University of Vermont*.⁵³ A medical student with Tourette's Syndrome did not succeed in his claim that his expulsion violated state disability discrimination law, modeled on the ADA.⁵⁴ The state supreme court held that the expulsion was based on falsifying surgical rotation evaluations and his undergraduate record and that the medical school had dismissed him for dishonest behavior, not the disability.⁵⁵ His claim that his Tourette's Syndrome and a related obsessive-behavior disorder caused his misconduct did not persuade the court.⁵⁶ The expulsion was upheld because it was based on the misconduct that had occurred before any claim of disability or request for accommodations.⁵⁷ The court recognized the legitimate concern about the potential risk to the public where there were questions of competency, which included character issues.

Applying these standards to Lisa, Ian, and Sam, any adverse disciplinary or other action by the institution for higher education could be discriminatory if the institution knew of the disability (or perhaps regarded the student as disabled), and took the action because of that status, rather

46. For a discussion of this issue, see Rothstein, *Employer's Duty to Accommodate*, *supra* note 8.

47. 510 F. Supp. 2d 193 (E.D.N.Y. 2007).

48. *Id.* at 195.

49. *Id.*

50. *Id.*

51. *Id.* at 195–96.

52. *Id.* at 196.

53. 958 A.2d 637 (Vt. 2008).

54. *Id.* at 638.

55. *Id.* at 644.

56. *Id.*

57. *Id.*

than because of a violation of a disciplinary or behavior requirement.

E. Reasonable Accommodation

Both Section 504 and the ADA require institutions to provide reasonable accommodations.⁵⁸ The model regulations pursuant to Section 504⁵⁹ provide some guidance on this. The key case interpreting the reasonable accommodation requirement is *Wynne v. Tufts University School of Medicine*.⁶⁰ The current language under the ADAAA and its application to Section 504 and the ADA was discussed previously.

Specifically, the regulations on postsecondary education provide for academic adjustments including “changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.”⁶¹ The regulations, however, specify, “Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory”⁶² Courts and the OCR have considered a number of accommodations. These include classroom attendance,⁶³ change in length of degree requirement,⁶⁴ and class or exam scheduling modification to accommodate the effects of medication side effects or therapy sessions.⁶⁵ There has been substantial deference to the institution, so long as these requirements are applied to all students similarly situated. OCR opinions indicate deference to the institution regarding requests to waive or

58. The ADA specifically provides for reasonable accommodations in the statute and regulations. 42 U.S.C. § 12112(b)(5) (2000); 29 C.F.R. § 1630.11 (2008). The Rehabilitation Act requirements are found in case law and regulations. See 34 C.F.R. § 104.12 (2008) (employment); 34 C.F.R. § 104.44 (2008) (postsecondary institutions). For cases, see *DISABILITIES AND THE LAW*, *supra* note 6, at §§ 3:8–3:10, 4:20, 5:5–5:6.

59. OCR Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104 (2008).

60. 932 F.2d 19 (1st Cir. 1991).

61. OCR Academic Adjustments, 34 C.F.R. § 104.44(a) (2008).

62. *Id.*

63. See *supra* note 37 and accompanying text.

64. *Long v. Howard Univ.*, 439 F. Supp. 2d 68 (D.D.C. 2006) (denying summary judgment to student claiming refusal to allow him to return where student’s work was well beyond the period of doctoral candidacy).

65. *Constantine v. Rectors & Visitors*, 411 F.3d 474, 478 (4th Cir. 2005) (holding law student with intractable migraine syndrome requesting additional time on exam could pursue claim; no Eleventh Amendment immunity); *Toledo v. Univ. of P.R.*, No. 01-1980(SEC), 2008 WL 189561 (D.P.R. Jan. 18, 2008) (holding factual questions remained as to whether student with schizoaffective disorder who claimed that professors taunted him, urged him to quit, refused accommodations, and gave failing grades was qualified with accommodations and denying claims against professors individually).

substitute courses.⁶⁶ A change in faculty assignment has not been raised often. It may be that future cases will take guidance from the employment setting. A number of judicial decisions indicate that a change of supervisor as an accommodation is not likely to be granted.⁶⁷

Issues that have received little attention are whether the institution has an obligation to inform internship or externship placements of the need for accommodations and who bears the responsibility for funding any accommodations. One of the few cases on this issue is *Herzog v. Loyola College in Maryland, Inc.*⁶⁸ The case involved a student with attention deficit hyperactivity disorder (ADHD) who had been placed in an internship.⁶⁹ The student claimed that the college should have informed the placement supervisor of the need to provide accommodations.⁷⁰ The student had behavior deficiencies in the setting, and claimed they related to his condition.⁷¹ The funding issue is more likely to arise in a situation such as a student with a hearing impairment requiring a sign language interpreter where the placement supervisor would have to address the responsibility of providing and paying for such an accommodation. A student with a mental health problem may have other issues that relate to accommodations, such as scheduling to address side effects of medication.

One article that discusses accommodations for law students in various clinical settings (free legal clinic, judicial clerkship, and district attorney's office) provides a number of useful examples about accommodations for conditions including autism, dyslexia, and obsessive compulsive disorder.⁷²

66. See, e.g., Letter from Carroll, Office for Civil Rights, U.S. Dep't of Educ., to Russell K. Hotzler, President, N.Y. Coll. of Tech., 33 Nat'l Disability L. Rep. (LRP) ¶ 173 (Feb. 9, 2006) (concluding math requirement not waived because medical documentation did not justify exemption from demonstration calculations on assignments or exams); Letter from Shields, Office of Civil Rights, U.S. Dep't of Educ., to Anita Schonberger, Assoc. Gen. Counsel, Univ. of W. Fla., 33 Nat'l Disability L. Rep. (LRP) ¶ 25 (Apr. 1, 2005) (concluding institution does not have to waive essential course and other academic requirements); see also *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82, 91 (D. Mass. 1998) (finding that waiving foreign language would be fundamental alteration of program). This case received substantial attention in the higher education national media and was one of the first cases addressing waiver of courses. For additional cases, see DISABILITIES AND THE LAW, *supra* note 6, at § 3:9.

67. See, e.g., *Amir v. St. Louis Univ.*, No. 4:95CV02132-DJS, 12 Nat'l Disability L. Rep. (LRP) ¶ 151 (E.D. Mo. Feb. 19, 1998) (finding unreasonable a request to change supervisors for medical student with obsessive compulsive disorder who was dismissed because of academic deficiencies), *aff'd in part and rev'd in part* 184 F.3d 1017 (8th Cir. 1999) (finding that a student was disabled under the ADA and a request for accommodations was not reasonable, but recognizing basis for claim of retaliation and remanding for further findings on that issue); see also DISABILITIES AND THE LAW, *supra* note 6, at 462 & n.41.

68. No. RDB-07-02416, 2008 WL 2622840, at *5 (D. Md. May 1, 2008).

69. *Id.* at *4.

70. *Id.* at *5.

71. *Id.* at *3-*4.

72. Buhai, *supra* note 16, at 186-94.

The article, however, does not provide guidance on how the supervising attorney would be apprised of the need for accommodations and whether the law school or the clinical setting supervisor would be responsible for any costs. This is not surprising in light of the lack of guidance on this from regulations or judicial interpretation. This issue would be of concern with respect to Sam. The institution has indirect information about his mental health problems and his past suicide attempt, but it does not have specific information about anything that could create a danger or concern for clients or others in the law school or the clinic setting.

A new issue involves “comfort animals” as an accommodation.⁷³ In 2008, the Department of Justice issued draft regulations on this issue for Title II and Title III entities, which would include most institutions of higher education.⁷⁴ These proposed regulations address a number of topics.⁷⁵ One of the major areas addressed involves service animals.⁷⁶ This can be an issue for many students with mental health problems, who seek to have an accommodation of a “psychiatric service animal” or “comfort animal.” The proposals respond to concerns about the trend in “the use of wild or exotic animals, many of which are untrained, as service animals.”⁷⁷ The current regulations define service animals as “any guide dog, signal dog, or other animal.”⁷⁸ The need for greater clarity and a response to concerns prompted the proposals. The proposals specifically note the following:

[S]ome individuals and entities have assumed that the requirement that service animals must be individually trained to do work or carry out tasks excluded all persons with mental disabilities from having services animals. Others have assumed that any person with a psychiatric condition whose pet provided comfort to him or her was covered by the ADA. The Department believes that psychiatric service animals that are trained to do work or perform a task . . . for persons whose disability is covered by the ADA are protected by the Department’s present

73. Kelly Field, *These Student Requests Are a Different Animal*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 13, 2006, at A30. This article discusses the confused state of law regarding animals providing comfort and companionship.

74. See Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,466 (June 17, 2008) (to be codified at 28 C.F.R. pt. 35); Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34,508 (June 17, 2008) (to be codified at 28 C.F.R. pt. 36).

75. These topics include barrier removal standards, ticketing practices for major concerts and similar events, access in recreation facilities, use of Segways® and other power driven devices in public areas, effective video communications standards, and access in prisons. See sources cited *supra* note 74.

76. 73 Fed. Reg. at 34,472–73, 34,477–81, 34,515–16, 34,520–22.

77. *Id.* at 34,472.

78. *Id.*

regulatory approach.

Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed . . . may include reminding the handler to take medicine; providing safety checks, or room searches, or turning on lights for persons with Post Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; and keeping disoriented individuals from danger.⁷⁹

The proposed regulations provide, “Animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote of emotional well-being are not service animals.”⁸⁰ The proposals also provide for proposed training standards,⁸¹ and exclusion of “wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, miniature horse, pony, pig, or goat), ferrets, amphibians, and rodents.”⁸² They also discuss tasks, documentation, and other issues.⁸³ If these regulations are approved, this could provide greater clarity to institutions of higher education faced with the trend by some students to be allowed to have “comfort animals” on campus. In the meantime, the reasonable accommodation analysis would still apply. This would mean that the extent an animal posed a direct threat, was disruptive, affected allergies, or posed other health or safety concerns to classmates and roommates could be taken into account in determining whether a requested accommodation of such an animal would be required. The student would still be required to demonstrate the existence of an ADA or Section 504 disability and the relationship of the accommodation to that condition.

One accommodation that has received inconclusive response by the courts and OCR is whether a student must be given a second chance when the student does not meet essential requirements, including conduct expectations. As noted previously, most decisions seem to indicate that where the disability was not made known, the institution has no obligation to give a second chance.⁸⁴ But what if the student is not aware of the

79. *Id.* at 34,473.

80. *Id.* at 34,478.

81. *Id.*

82. *Id.* at 34,478.

83. *Id.* at 34,478–79.

84. *Doe v. Vanderbilt Univ.*, No. 96-5561, 1997 WL 764421 (6th Cir. Nov. 26, 1997) (holding student with manic depression need not be readmitted to medical school because dismissal based on academic deficiencies and behavior problems); *Leacock v. Temple Univ. Sch. of Med.*, No. Civ.A. 97-7850, 1998 WL 1119866 (E.D. Pa. Nov. 25, 1998) (holding medical student with learning disability did not meet academic standards to continue since student had not made known the disability during first year or before dismissal); *Tips v. Regents*, 921 F. Supp. 1515 (N.D. Tex. 1996) (holding

condition because it has not been diagnosed?⁸⁵ Or if the student is justifiably concerned about privacy and confidentiality and possible stigma? Or if the student believes the institution should have known of the need to provide accommodations but did not do so?⁸⁶ There is some indication that the institutions must at least consider the effects of the disability in evaluating the student for readmission.⁸⁷ It is possible that Lisa does not realize that her serious depression is a disability that could be the basis for an accommodation, such as a leave of absence, or scheduling classes to take into account effects of medication she might be taking. Ian may know of his diagnosis of ADD, ADHD, or Asperger's, but not think it requires any accommodation until after a dismissal for his behavior toward the professor.

In situations where the institution may be willing to readmit, the decision may be affected by whether certain requirements can be placed on the student. In situations involving mental illness, the institution may want to require the student to be under treatment or at least require the treating physician to provide some type of "fitness for attendance" documentation. From the little guidance to date, there is some indication that where the readmission is granted, requirements relating to therapy are permissible, but that these decisions should be individualized.⁸⁸ For example, in *Michael M. v. Millikin University*, a student with obsessive compulsive disorder was withdrawn from the school after a panic attack episode.⁸⁹ In a

because graduate student in psychology with learning disability did not make her learning disability known nor request accommodations, no violation of ADA or Rehabilitation Act in the dismissal); *Bhatt v. Univ. of Vt.*, 958 A.2d 637 (Vt. 2008) (finding medical student with Tourette's Syndrome had not made known the condition or requested an accommodation before his dismissal); see generally Rothstein, *Employer's Duty to Accommodate*, *supra* note 8.

85. *Garcia v. State Univ. of N.Y. Health Scis. Ctr. at Brooklyn*, No. CV 97-4189(RR), 2000 WL 1469551 (E.D.N.Y. Aug. 21, 2000) (finding that a student was dismissed from medical school because of unsatisfactory academic performance since dismissal occurred before diagnosis was known).

86. *Gill v. Franklin Pierce Law Ctr.*, 899 F. Supp. 850, 856 (D.N.H. 1995) (finding that law student was not otherwise qualified under Section 504; finding student had not requested any accommodations; and rejecting claim that law school should have known he needed accommodations because of post-traumatic stress syndrome resulting from being the child of alcoholic parents).

87. Letter from Kenneth A. Mines, Regional Director, Office for Civil Rights, U.S. Dep't of Educ., to John T. Richardson, President, DePaul University, 4 Nat'l Disability L. Rep. (LRP) ¶ 157 (May 18, 1993) (concluding institution must at least consider effects of disability in evaluating student for readmission).

88. *Haight v. Hawaii Pac. Univ.*, No. 95-16810, 1997 WL 330835, at *1 (9th Cir. June 16, 1997) (mem.) (holding that where an institution was aware of behavior or performance deficiencies or where reasonable questions are raised after dismissal, institutions may have discretion to make readmission subject to conditions not applied to students in the initial admission process).

89. *Student With OCD Reinstated to Class After Agreeing to Therapy*, DISABILITY COMPLIANCE BULL., Apr. 23, 1998.

settlement agreement, the reenrollment was conditioned on receiving weekly therapy and compliance with medication regimes prescribed by a psychiatrist.⁹⁰

A 2008 report by the Jed Foundation provides some general guidance on this issue. The guide, *Student Mental Health and the Law: A Resource for Institutions of Higher Education* (“Jed Report”)⁹¹ notes the differing judicial response to whether conditional readmission based on mental health treatment is allowed.⁹² The report responds to the question of the permissibility of a higher education institution to “require a student with a disability to be assessed for risk of self-harm or harm toward others.”⁹³ It suggests that institutions are “not required to rely solely on the opinion of a mental health professional regarding a student’s readiness to return to or remain in school.”⁹⁴ The opinions of other professionals that are “fair, stereotype-free, and based on reasonably reliable information from objective sources” may be considered.⁹⁵ Although the legal standards are unclear, the report suggests, “Requiring treatment for a student whose disability-related behavior violates the conduct code, but does not rise to the level of a direct threat, as a condition of remaining in school may violate disability law.”⁹⁶

A recent case highlights the difference between the educational institution’s obligation in the K–12 setting and in higher education. The case of *Tylicki v. St. Onge*,⁹⁷ involved a community college student who had been suspended for behavioral problems, including a series of violent outbursts. The student requested a “manifestation hearing,” a procedure provided for under special education (IDEA) requirements whereby the K–12 school may be required to assess whether there is a relationship between the disability and the misconduct.⁹⁸ The court noted that such a requirement is not available or reasonable under the ADA or Section 504.⁹⁹ The court held that these statutes allow discipline for misconduct, even if it is related to a covered disability.¹⁰⁰ Notwithstanding this decision, there is an indication that institutions are expected to engage in interactive

90. *Id.*

91. JED FOUNDATION, *STUDENT MENTAL HEALTH AND THE LAW: A RESOURCE FOR INSTITUTIONS OF HIGHER EDUCATION* (2008), available at http://www.jedfoundation.org/assets/Programs/Program_downloads/StudentMentalHealth_Law_2008.pdf [hereinafter JED FOUND.].

92. *Id.* at 16–17.

93. *Id.* at 16.

94. *Id.*

95. *Id.*

96. *Id.* at 17.

97. 297 Fed. App’x 65 (2d Cir. 2008).

98. *Id.* at 67.

99. *Id.*

100. *Id.*

processes to determine whether an accommodation is reasonable.¹⁰¹

II. WHAT WE CAN DO—WHAT ARE PERMISSIBLE PRACTICES?

Disability discrimination law is the focus of this article, but laws relating to privacy (which are beyond the scope of this article) should also be taken into account.¹⁰² Applying the previous discussion of legal requirements under discrimination laws, institutions should review their practices with respect to the range of activities and assess whether they comply with legal mandates.

It should be noted that in many respects the legal framework is not entirely clear, either because there is no clear statutory and/or regulatory guidance or because there has been little judicial attention to these issues to clarify what is permissible. The discussion below, therefore, should be taken as only a broad perspective of the author. Educational institution administrators should generally seek the advice of the institution's counsel in making a determination about how to handle a specific situation, particularly where complex issues of violent or disruptive students are involved. This is important not only because the institution's counsel is in the best position to know about how that institution has interpreted federal requirements, but because there may be additional state legal requirements and/or institutional policies that are also relevant. Revisions of policy should be collaborative, including the institution's counsel, campus safety administrators, student affairs administrators, disability resource office personnel, campus counseling programs, and administrators in various academic units. Programs involving professional training affecting the public (medicine, nursing, law, teaching, etc.) may have special concerns relating to certification for licensing and internship and clinic programs that should be addressed for that program.

A. Admissions

During the Virginia Tech aftermath, some of the news commentators suggested that higher education institutions should get information about students' mental health treatment from their high schools before admitting any student. While this initial response may be understandable, it is not generally advisable for a number of reasons.¹⁰³

101. See, e.g., *Cutrer v. Bd of Sup'rs*, 429 F.3d 108, 113 (5th Cir. 2005); see also *Bhatt v. Univ. of Vt.*, 958 A.2d 637 (Vt. 2008) (noting student's situation was considered in disciplinary decision making, although he had not requested accommodation before the expulsion resulting from misconduct).

102. 73 Fed. Reg. 74,806 (Dec. 9, 2008).

103. In addition to the reasons discussed in this section, it should be noted that in many instances the student may not manifest certain conditions until early adulthood, so there would be no information to obtain from the school records. Such conditions may include the pressures of college and university, personal relationship stressors,

First, asking about mental health diagnosis and treatment in the admissions process could be viewed as an impermissible preadmissions inquiry about a disability.¹⁰⁴ It is permissible to request information about past behavior and conduct, such as a criminal record or academic dishonesty or dismissal because of disruptive behavior, because those inquiries relate to conduct, not status and diagnosis.

In addition to the legal questionability of diagnosis inquiries, there are confidentiality restrictions that may limit the permissibility of a secondary school from sending such records to a college or university or for a college or university to send those records to a graduate or professional program. Although the institution could request a waiver of access to student records, a student who knows that such records could be forwarded might well be deterred from seeking treatment.

It is not unusual, however, for a student to voluntarily raise a record of mental health treatment, particularly in applying to a graduate or professional program. This information might be placed in the student's permanent student record, and if so, like all student record information, care should be taken to ensure privacy and confidentiality and compliance with FERPA and HIPAA expectations.¹⁰⁵

It is the practice in medical programs and some other health care educational programs to require the admitted student to undergo a health examination to determine fitness, because there may be essential functions that require stamina, dexterity, and other physical attributes. Such practices must still be related to the program, and they are generally post-admission practices.¹⁰⁶

The admissions process can also be an opportunity to be proactive in ensuring that students who need accommodations for their mental health problems to self identify. By sending an outreach letter to all accepted students encouraging them to request accommodations as early as possible, issues such as whether the student is entitled to accommodations, the reasonableness of the requested accommodation, and identifying the

financial issues not relevant before college or university, and the developmental onset of certain mental illnesses. Students who are enrolling in college or university several years after high school may not have such records. Student record confidentiality requirements may also prevent sharing this information. Providing this information in the ordinary course of forwarding documentation of graduation and grades could often be unduly stigmatizing.

104. 34 C.F.R. § 104.42(c) (2008); *see also* DISABILITIES AND THE LAW, *supra* note 6, at § 3:5 (referencing cases on this issue).

105. For a general overview of student record privacy issues, see JED FOUND., *supra* note 91, at 7–11.

106. *See, e.g., Doe v. N.Y. Univ.*, 666 F.2d 761, 777 (2d Cir. 1981) (upholding the refusal to readmit a student with suicidal tendencies discovered during a post-admission health examination).

appropriate resources can be addressed at an early stage.¹⁰⁷ As noted previously, institutions are only required to provide accommodations to students who make known their disabilities. Accommodations needed for conditions such as depression might include class scheduling (to address medication side effects, for example), exam accommodations, and housing requests. These requests can then be referred to the disability resource center for documentation assessment and recommendations about appropriate reasonable accommodations.

There is little guidance to date on the college or university's obligation to act on information it does have about violent conduct and whether there is liability in such cases. In one of the few cases on this issue, a student had fatally stabbed another student, and there was a claim of negligent screening. The court denied summary judgment in *Butler v. Maharishi University of Management*,¹⁰⁸ where a university might have been on inquiry notice about a student's mental health and prior history of committing violent acts and thus could have been negligent in screening him for admission.

B. The Enrolled Student

Information about mental health status and related conduct can become an issue for the enrolled student. It can be a concern where the student has self identified in the admission process or during orientation, or where a faculty or staff member or another classmate identifies concern as part of the academic or extracurricular program.¹⁰⁹ It can be of particular concern for programs where the student is involved in clinical or externship experiences, such as student teaching, law school clinics, or medical school internships. Where members of the public may be affected, it is appropriate for an institution to take appropriate precautionary measures.

Where the enrolled student has identified a need for accommodations for ongoing mental health issues, such as class scheduling for medication for depression, bipolar disorder, or other mental conditions, the institution may be concerned about possible consequences to others, including both

107. See also JED FOUND., *supra* note 91, at 20.

108. 589 F. Supp. 2d 1150, 1169–70 (S.D. Iowa 2008).

109. The Jed Foundation suggests a practice of asking enrolled students to share information about their current or past mental health history and treatment This information . . . would be collected and maintained by the health/counseling center and remain confidential This may reduce . . . the number of urgent assessments that mental health professionals may need to make. College mental health providers may also want to engage in additional outreach to those incoming students who disclose a history of more serious mental health problems such as psychiatric hospitalizations or suicide attempts.

JED FOUND., *supra* note 91, at 20 (emphasis omitted). The Report recommends consultation with legal counsel before doing this. *Id.*

safety and disruption. Classmates or others may notice behavior that raises concerns. For example, a student may notice that a roommate or another student is not attending class or eating, or that personal hygiene is a serious problem. A faculty member may notice a student who falls asleep in class on a chronic basis. Or a student may indicate to others thoughts of suicide or threatening plans that raise concerns.

Whether it is self identified or observed by members of the community, the focus should be on behavior and conduct and on taking appropriate action based on that. As noted previously, students with disabilities can be held to the same conduct standards as other students, even if the misconduct relates to a mental impairment. The condition, however, might be a mitigating factor in determining the response, such as withdrawal from the institution or return after withdrawal. Withdrawing a student because of a perception of mental illness (not because of some specific behavior or conduct) could be a violation of Section 504 or the ADA because the action might be discrimination against someone who is “regarded as” or “perceived as” disabled.

The transfer of students from one institution to another can raise issues where the transferring institution has information about the student’s mental health. This scenario raises the question of whether it is legally permissible to report this information. The other question to be addressed is whether there is an ethical responsibility for the transferring institution to advise the transferee institution about the potential of a transferring student’s dangerous or disruptive conduct. There is little guidance on this issue. In practice the student seeking a transfer will grant the transferring institution the right to send any information in the student’s record, which could include information on misconduct and even disability status. Even without this grant of access, there is probably a privilege to disclose in this type of setting. Although there is probably no violation of disability discrimination laws or even federal privacy laws in such situations, there may still be tort claims under state law for breach of confidentiality, libel and slander, invasion of privacy, and other claims. A discussion of these issues is beyond the scope of this article, but potential liability is one of the reasons institutions should take care in how they disclose confidential student information to others.¹¹⁰

Where institutions provide career services for students and refer students to employers, it can be a concern whether the institution has an obligation to report mental health issues or troubling behavior. A prospective employer is probably not a party with a privilege to receive information under privacy laws, so only if the student has waived access to information in the student record (and where the student knows or can know that mental

110. For a general discussion of this issue and citation to cases, see *DISABILITIES AND THE LAW*, *supra* note 6, at §3:21.

health information is in the record to be shared) should information on mental health treatment or even misconduct be reported to an employer by the institution. This does not apply to clinical or externship supervisors, and the legal guidance on this is less clear.¹¹¹ Perhaps the best way to ensure that the institution can advise a clinic or externship/internship supervisor about mental health issues of concern is by ensuring that the student has given permission for such information to be provided to the supervising program.

Two issues of importance for enrolled students should be mentioned at this point. First, is that the institution should ensure that sound policies, practices and procedures are not only in place, but also that they are accessible and communicated to the students who seek access or accommodations or wish to file a complaint or grievance. Second, institutions (including their faculty and staff members) should take care not to engage in any conduct that might be viewed as retaliatory against a student who seeks accommodations or who complains about lack of access or about other discrimination. There have been a number of OCR and judicial opinions in which it was determined that while the institution had not acted on the basis of disability discrimination, the lack of clear procedures needed to be addressed. There are also cases where no discrimination has been found, but the issue of retaliation remained for the court to address.¹¹²

C. Professional Certification

Because of the unique position of trust, the process of professional certification for the legal profession involves state boards requesting that law schools provide information on character and fitness. Many require the law school to provide information about mental health treatment and diagnosis. Although these questions are controversial, many courts have upheld their legality.¹¹³ Because the law school graduate must allow access to student records, law schools that provide such information are generally privileged to provide it.

For example, if a student received mental health counseling and that information is in the student record as the basis for the law school providing an accommodation (such as a leave of absence or a reduced

111. For a general discussion of accommodation of law students in clinical settings, see Buhai, *supra* note 16. The article discusses students with mental impairments specifically. *Id.* at 155–63.

112. See generally, DISABILITIES AND THE LAW, *supra* note 6.

113. *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430 (E.D. Va. 1995). This case provides a detailed discussion of mental health history questions and a review of the status in other jurisdictions. For an excellent overview of this issue, see Stanley Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635 (1997).

course load), the law school administrator is expected to report that status. Any honor code violations or discipline for other misconduct (such as misbehavior as a result of substance abuse) must also be reported. The law school graduate will be asked a similar question in those states, so the student will have to self-report in any case. Although there is a strong indication that requiring the reporting of treatment and diagnosis is a deterrent to getting treatment,¹¹⁴ the practice continues.

There is little dispute that reporting misconduct (even if related to a disability) is not only appropriate, but should be done because of the interest of the public. Where other professional training programs, such as medicine, nursing, teaching, and other professions licensed by the state require reporting of mental health treatment, a similar issue arises. So, from a legal perspective, such reporting is probably permissible, not only because it is probably privileged, but also because the student or graduate has granted access to the student record.

III. WHAT WE *SHOULD* DO – BALANCING THE INTERESTS OF THE INDIVIDUAL AND OTHERS

Responsible and caring institutions will consider not only what is legally required or permitted, but also what they *should* do in the interest of the student. At the same time, institutions must balance the individual student's interest with others in the community. Institutions that play a role in licensing or where students are providing clinical services under supervision must also take into account the interests of those being served by those they certify. As noted in the previous section, administrators should always consult university counsel in resolving how to handle various situations at their institution.

Institutions of higher education have traditionally taken on a role of providing a positive and nurturing environment for learning for each student. Challenges arise when the behavior or conduct of one student adversely affects the learning or safety of other students. Interests of others, such as professional licensing agencies; clinic, externships, and internship supervisors (and members of the public to whom services are provided through these programs); and prospective employers can also raise challenges. For example, if the institution is concerned that a student with depression may fail to work with clients, patients, or students (in a student teacher setting) or if there are concerns about safety or disruption, these concerns must be balanced with the interest of the student.

This balancing is not an easy task, and it is important to take into account the unintended consequences of certain policies and practices. Institutions should be encouraged not only to take into account legal

114. See Rothstein, *Law Students and Lawyers*, *supra* note 8, at 553.

requirements, but they should also take into account how to handle situations where there is no clear legal prohibition or mandate. They can also provide advocacy to encourage other institutions to reconsider their requirements when the institution is aware of negative unintended consequences. As noted above, professional licensing agencies that ask about mental health treatment and diagnosis might be encouraged by the higher education institution to reconsider those questions by providing information about the deterrent effect of such questions on seeking treatment.

A recent article that provides a very good overview of this issue is *Reevaluating Privacy and Disability Laws in the Wake of the Virginia Tech Tragedy: Considerations for Administrators and Law Makers*.¹¹⁵ The article discusses current theories of institutional liability, and concludes that one obstacle to ensuring a safe environment is the current limitations under federal privacy laws and disability law. Recognizing that it is impermissible to make preadmissions inquiries about mental health status, the article advocates a post-admission, pre-enrollment screening.¹¹⁶ The author suggests that this “would avoid the type of discrimination that the ADA is designed to prevent while still putting universities on notice as to those students who have special needs.”¹¹⁷ What the author does not recognize, however, is that while the institution of higher education perhaps would not discriminate in such a situation, the student might nonetheless be forced to submit records about counseling and treatment, which in many cases would not have been related to any conduct, performance, or behavior issues. This would still have the potential for deterring students from getting treatment before enrolling in college or university because they would be concerned about having to report that treatment. Thus, such a mandatory requirement of pre-enrollment provision of student mental health records is not a policy change that is consistent with not deterring treatment.

One of the outcomes of Virginia Tech has been a great deal of attention to developing resources for how to handle situations where students have mental health challenges. As previously noted,¹¹⁸ the Jed Report is a resource providing an excellent framework for developing institutional appropriate policies, practices, and procedures.¹¹⁹ Consistent with recommendations in this article, the Jed Report recommends consultation with trained professionals, including the institution’s legal counsel. It also

115. Mary Fletcher Peña, Comment, *Reevaluating Privacy and Disability Laws in the Wake of the Virginia Tech Tragedy: Considerations for Administrators and Lawmakers*, 87 N.C. L. REV. 305 (2008).

116. *Id.* at 345–47.

117. *Id.* at 346.

118. See *supra* text accompanying note 92.

119. See JED FOUND., *supra* note 91.

provides some tools to develop awareness and to develop or revise “policies, protocols, and procedures” suitable to the institution’s unique environment. The Jed Report provides general information about privacy and confidentiality (including FERPA, clinician-client confidentiality, and HIPAA) an overview of disability law, information on delivering mental health services,¹²⁰ and information on liability for student suicide and violence.¹²¹ A number of positive practices are provided on the following issues: campus-wide communication; developing an emergency contact notification protocol; establishing a case management team; developing a leave of absence protocol; avoiding “zero-tolerance” policies for self-harm; understanding the complexities of mandating assessment and treatment; establishing re-entry requirements; encouraging students to be proactive about their mental health; providing insurance with mental health coverage; promoting appropriate boundaries; developing a memorandum of understanding for certain situations; proactively addressing potential conflicts; reaching out to affected students; establishing and following appropriate policies and protocols.

The Jed Report is consistent with this author’s philosophy of being proactive; making individualized assessments; recognizing the importance of privacy and confidentiality, communication, training and education; and balancing interests of the student with others in the community and with the legitimate concerns of licensing agencies about safety and interests of clients and patients. This author also shares the value and benefit of the team approach and the recognition of appropriate spheres of expertise, including a recognition that informal counseling by untrained faculty and staff can delay a “student’s receipt of professional services.”¹²²

The Jed Report focuses primarily on the student and the institution of higher education. One issue not addressed in the resource is the deterrent effect of the practices of some professional licensing agencies on receiving counseling. This was discussed previously, but until this issue is addressed, students in at least some higher education programs may not seek needed mental health treatment. The result may be suicide or harm to others resulting from untreated mental illness. Even if this is not the

120. *Id.* at 20–24. This section includes how a referral should be made from a health/counseling center to a community provider; how a referral should be made from a third party to the campus health/counseling center; whether to obtain past treatment records; appropriate follow-up after a student discontinues treatment or has been discharged from a hospital; how web-based screening and counseling should be provided; appropriate supervision of peer hotlines or peer counseling services; how to transport at-risk students to a hospital; and whether mental health treatment can be provided to a minor without parental consent.

121. The resource notes that the current law is “largely inconclusive regarding such responsibility” noting that “most cases settle before the courts are afforded the opportunity to make pronouncements of law.” *Id.* at 25.

122. *Id.* at 22.

consequence, there are other harms such as withdrawing from a program, severe depression, family breakups, and other outcomes that might be alleviated if the student was not concerned about the stigma or other adverse consequence of receiving treatment.

College and university counsel and higher education administrators should not only establish, review, and update their policies, practices, and procedures relating to students with mental health problems, but they should also inform policymakers at the state level (such as professional licensing agencies) about the impact of these policies on their institutions. A collaborative approach, not only at the institutional level, but at the level of others interested in the student well being and the well being of others in the community, is critical to improving the mental health of the individual and the safety and well being of the community.

A proactive approach of providing education about troubling behavior and conduct can be valuable for the entire community, but counseling and treatment should be referred to the experts.¹²³ In addition, all students should be given information about where to receive counseling and help, particularly during stressful times such as during the exam period. Recent research indicates that although about half of college-age students have psychiatric disorders, only about 25% of those individuals sought treatment. The challenges ahead include not only developing appropriate policies, practices, and procedures to respond to dangerous and disruptive behavior by postsecondary students, but also developing effective and affordable treatments and interventions that students will take advantage of without undue concern about stigma and discrimination.

Beyond the scope of this article is the significant need for attention to the availability of mental health services. Affordability may be positively affected by the recent mental health parity legislation that mandates that insurance programs provide parity between benefits for physical disorders and mental disorders. This legislation, however, does not mandate that institutions provide mental health insurance in the first place. The unintended consequence of this legislation could be a decrease in coverage for both conditions or the elimination of student health insurance entirely. This is part of a much needed national debate on access to health care, and may be addressed through that avenue. Officials in higher education should be aware of the significant need for mental health services for student populations and take care that consideration of health care access as a budget reduction does not result in longer term problems for their communities.

The hope is that with increased awareness, understanding, and interest in these issues, the campus will become a better environment for all members of its community.

123. *Id.*

CONCLUSION

This article addresses prevention, response, and liability for situations involving students with disabilities who may raise high risk concerns. By knowing not only what is legally required and permitted, but also what are recommended as good practices, institutions can balance the interests of the students with mental health problems with the interests of other members of the community. As noted throughout, handling each situation should be individualized for that student and setting. Decisions and actions should not be based on myths and stereotypes. Each institution should develop sound policies, practices, procedures, and protocols that work for that institution and for each academic or other program within the institution. Avoiding liability is most likely when college and university counsel are involved in this planning.

Prevention planning should take into account not only legal issues, but education and communication with students (and their parents in some cases), faculty, and staff to raise awareness about high risk situations, disability rights, available services, and other information. It should also include a thoughtful approach to what mental health services can either be directly provided or facilitated to ensure a positive and safe learning environment for everyone. Many of these issues were beyond the scope of this article, but they should be part of a complete approach to handling concerns about violence and disruption on campus.