COLLEGE AND UNIVERSITY STUDENTS WITH MENTAL DISABILITIES: LEGAL AND POLICY ISSUES

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INTRODUCTION

The prevalence of college and university students with mental disabilities has increased substantially over the past decade. A 2003 study found that the percentage of college and university students who sought counseling for psychological disorders doubled from 21 percent to 41 percent between 1989 and 2001.[1] During the same period, the number of students reporting problems with stress, anxiety, and learning disabilities also doubled.[2] More recently, a 2006 study by the National College Health Assessment reported that 44 percent of the nearly 95,000 college and university students surveyed replied that they "felt so depressed [that] it was difficult to function" during the previous year and 9.3 percent reported that they had "seriously considered attempting suicide" during the previous year.[3] Whether the nature of the mental disorder is a cognitive disorder (a "learning disability") or a psychiatric disorder, these impairments make a student's college or university experience more complicated and difficult, and, in some cases, affect the student's academic and/or social conduct as well.[4]

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1. Erica Goode, *More in College Seek Help for Psychological Problems*, N.Y. TIMES, Feb. 3, 2003, at A11.

2. *Id.*

3. Am. Coll. Health Ass'n, *American College Health Association National College Health Assessment Spring 2006 Reference Group Data Report (Abridged)*, 55 J. OF AM. C. HEALTH 195, 205 (2007).

4. For resources on developing accommodations for students with mental disorders, see ACCOMMODATING STUDENTS WITH LEARNING AND EMOTIONAL DISABILITIES (Ellen M. Babbit ed., 2d ed. 2005); THOMAS J. FLYGARE, STUDENTS WITH LEARNING DISABILITIES: NEW CHALLENGES FOR COLLEGES AND UNIVERSITIES (2d ed. 2002); Holly A. Currier, *The ADA Reasonable Accommodations Requirement and the Development of University Services Policies: Helping or Hindering Students with Learning Disabilities?*, 30 U. BALT. L.F. 42 (2000); Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA*

In order to ensure that discrimination on the basis of disability will not contribute to these students' troubles, federal laws require colleges and universities to provide students who suffer from mental disabilities with reasonable accommodations under certain circumstances. The Individuals with Disabilities Education Act ("IDEA")[5] requires elementary and secondary schools receiving federal funding to accommodate students with disabilities;[6] thus, college and university students with mental disabilities may have been accommodated by schools in their pre-college years. As a result, members of the current generation of college and university students are likely to have heightened expectations about receiving services at the postsecondary level.[7]

Lawsuits by students with mental disorders usually challenge either a negative academic judgment made by a college or university (such as an academic dismissal) or a disciplinary decision (such as suspension or expulsion for misconduct). Students with these disorders have also challenged college and university decisions concerning housing assignments, service animals, and other forms of accommodation. In addition, the U.S. Office for Civil Rights ("OCR") has been confronted with a flurry of administrative complaints about the use by colleges and universities of "mandatory" or "involuntary" withdrawal policies for students who are at risk of self-inflicted harm.

This article discusses the responsibilities of colleges and universities (and the responsibilities of students) when a student informs an institution that he or she has a mental disability (either a cognitive disorder or a psychiatric disorder). Section I reviews the two primary federal laws that protect students against disability discrimination and require colleges and universities to provide reasonable accommodations under certain circumstances. Section II then analyzes student challenges to academic decisions—including denials of academic accommodations, dismissals for failure to meet academic standards, dismissals for academic misconduct, dismissals for failure to meet technical standards, and denials of readmission. Section II concludes that due to the rigorous requirements of federal law as interpreted by the Supreme Court and the principle of judicial deference to academic decisions, such challenges rarely succeed. Section III moves to disciplinary dismissals and the response of courts when students claim that the discipline imposed was a form of disability discrimination, finding that while student challenges to disciplinary decisions also generally fail, courts are less deferential to these decisions than to academic ones, and the cases of students who are able to provide evidence that a disciplinary decision was motivated by

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Requirements, 32 J.L. & EDUC. 217 (2003); Marie-Thérèse Mansfield, Note, *Academic Accommodations for Learning-Disabled College and University Students: Ten Years After* Guckenberger, 34 J.C. & U.L. 203 (2007); Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act*, 111 HARV. L. REV. 1560 (1998).

5. 20 U.S.C. §§ 1400–1487 (2000).

6. *Id.*

7. For an interesting discussion of heightened expectations regarding the *nature* of such services as a result of the "enrollment of 'millennials'—students born after 1982 who have grown up" during the "Information Age," see Laura Rothstein, *Millennials & Disability Law: Revisiting* Southeastern Community College v. Davis, 34 J.C. & U.L. 169, 170 (2007).

animosity will generally proceed to trial. Section IV turns to the troubling problem of students who are at-risk of self-inflicted harm and the rights and responsibilities of institutions and students in these circumstances. This article concludes by making a variety of suggestions for college and university policy and practice when dealing with students with mental disorders.

I. WHAT THE ADA AND THE REHABILITATION ACT REQUIRE

Two federal statutes authorize discrimination suits by students against colleges and universities: the Americans with Disabilities Act of 1990 ("ADA")[8] and Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act").[9] When students allege discrimination against colleges and universities, claims under the ADA and the Rehabilitation Act are "largely the same."[10] The statutes differ in only two relevant respects: (1) a college or university must receive federal funds in order to be liable under the Rehabilitation Act, but the ADA contains no similar requirement[11] and (2) the wording of the Rehabilitation Act's causation standard differs from that of the ADA.[12]

Title II of the ADA declares: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[13] Public colleges and universities are public entities subject to Title II.[14] Title III imposes largely the same prohibition on "places of public accommodation," a term which specifically includes

8. 42 U.S.C. § 12182(a) (2000).

9. 29 U.S.C. § 794 (2000 & Supp. 2004). While this article uses the term "Rehabilitation Act" as shorthand for the disability discrimination provisions of Section 504 of the Rehabilitation Act of 1973, many cases and scholarly articles refer to the same provisions under the moniker "Section 504."

10. Brown v. Univ. of Cincinnati, No. C-1-04-164, 2005 U.S. Dist. LEXIS 40798, at *22 (S.D. Ohio June 3, 2005). *See, e.g.*, Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 536 n.12 (3d Cir. 2007); Mershon v. St. Louis Univ., 442 F.3d 1069, 1074 n.3, 1076 n.4 (8th Cir. 2006); Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7, 10 (4th Cir. 2005) ("The ADA and the Rehabilitation Act are generally construed to impose the same requirements."); Amir v. St. Louis Univ., 184 F.3d 1017, 1029 n.5 (8th Cir. 1999) ("Rehabilitation Act claims are analyzed in a manner similar to ADA claims."); Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 78 n.2 (2d Cir. 1998) (holding that Titles II and III of the ADA and the Rehabilitation Act "impose largely the same requirements"); Abdo v. Univ. of Vt., 263 F. Supp. 2d 772, 777 (D. Vt. 2003) ("[The] ADA and Rehabilitation Act 'are frequently read in sync.'" (quoting Guckenberger v. Boston Univ. (*Guckenberger II*), 974 F. Supp. 106, 133 (D. Mass. 1997))).

11. *See Mershon*, 442 F.3d at 1076 n.4 (citing Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998)). *See also* Pangburn v. N. Ky. Univ., No. 99-5474, 2000 U.S. App. LEXIS 6413, at *4 (6th Cir. Mar. 23, 2000) (per curiam) ("The 'principal distinction between the two statutes is that coverage under the Rehabilitation Act is limited to entities receiving federal financial assistance.'" (quoting McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 460 (6th Cir. 1997))).

12. *See infra* Section I.A.3.

13. 42 U.S.C. § 12132 (2000).

14. Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 84 (D. Mass. 1997) (citing Coleman v. Zatechka, 824 F. Supp. 1360, 1367 (D. Neb. 1993)).

"undergraduate or postgraduate private school[s]."[15] Title III also explicitly "prohibits discrimination against persons with disabilities in professional examinations" such as bar examinations and medical boards.[16] The Rehabilitation Act similarly states: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[17] The regulations of the Rehabilitation Act recognize its applicability to colleges and universities.[18]

Under both statutes, the disability discrimination inquiry is guided by regulations issued by the Equal Employment Opportunity Commission ("EEOC"), despite the regulations' reference to employment relationships.[19] But, "unique considerations . . . come into play when the parties to a [discrimination] case are a student and an academic institution."[20] In this setting, courts generally conduct the required case-by-case analysis with "a certain degree of deference . . . to the [judgment] of an academic institution."[21] "Universities have long been considered to have the freedom to determine 'what may be taught, how it shall be taught, and who may be admitted to study.'"[22] Thus, "when reviewing the substance of academic decisions, courts show great respect for the faculty's professional judgment," giving faculties "the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation."[23] Yet decisions made by academic institutions are by no means insulated from judicial review.[24]

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15. *Guckenberger II*, 974 F. Supp. at 133 n.24 (quoting 42 U.S.C. § 12181(7)(J) (1994)). *See Amir*, 184 F.3d at 1027–28. *See also Mershon*, 442 F.3d 1069; Scott v. W. State Univ. Coll. of Law, No. 96-56088, 1997 U.S. App. LEXIS 9089, at *4 (9th Cir. Apr. 21, 1997).

16. Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 625 (6th Cir. 2000).

17. 29 U.S.C. § 794(a) (2000).

18. *Guckenberger II*, 974 F. Supp. at 133 n.24 (quoting 34 C.F.R. § 104.41 (1990)).

19. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1387–88 (S.D. Ga. 2002).

20. Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 88 (D. Mass. 1997) (quoting Wynne v. Tufts Univ. Sch. of Med. (*Wynne II*), 976 F.2d 791, 793 (1st Cir. 1992)).

21. El Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1, 4 (D. Mass. 2001) (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)). *See Wynne II*, 976 F.2d at 792; Anderson v. Univ. of Wis., 841 F.2d 737, 741 (7th Cir. 1988); Falcone v. Univ. of Minn. & Bd. of Regents, No. Civ. 01-1181, 2003 U.S. Dist. LEXIS 15787, at *14 (D. Minn. Sept. 3, 2003), *aff'd*, 388 F.3d 656 (8th Cir. 2004) ("Courts regularly apply the academic deference rule to challenges arising under the [ADA] and Rehabilitation Act.").

22. *Guckenberger II*, 974 F. Supp. at 148 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

23. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 436 (6th Cir. 1998) (internal citations omitted).

24. *See infra* Section II.

A. The Elements of a Claim

To state a claim under the Rehabilitation Act or the ADA a student-plaintiff "must establish that: (1) she has a disability as defined by the acts; (2) she is otherwise qualified for the benefit or program at issue; and (3) she was excluded from the benefit or program on the basis of her disability."[25] The vast majority of ADA and Rehabilitation Act claims allege that a college or university failed to make reasonable accommodations to known physical or mental limitations.[26] In such cases, "there is no requirement to demonstrate any adverse action other than the failure to accommodate itself."[27] Rehabilitation Act and ADA claims may also be brought on the basis of retaliation.[28] In order to show retaliation, a plaintiff "must show that he engaged in protected activity and that there was a causal connection between that activity and the adverse action."[29] Protected activity consists of such things as "filing a charge, or testifying, participating, or assisting in any investigation or proceeding relating to discrimination."[30] A retaliation claim can succeed when a student asserts that a college or university discriminated against her in retaliation for her allegations of disability discrimination, even when the student cannot demonstrate that she is actually disabled.[31]

Some student-plaintiffs also bring actions under state disability laws. Many of

25. Davis v. Univ. of N.C., 263 F.3d 95, 99 (4th Cir. 2001). *Accord* Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 553 n.32 (3d Cir. 2007); Buhendwa v. Univ. of Colo. at Boulder, 214 F. App'x 823, 827 (10th Cir. 2007); Toledo v. Sanchez, 454 F.3d 24, 31 (1st Cir. 2006); Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7, 10 (4th Cir. 2005); Carten v. Kent State Univ., 78 F. App'x 499, 500 (6th Cir. 2003); Dicks v. Thomas More Coll., 73 F. App'x 149, 151 (6th Cir. 2003); *Kaltenberger*, 162 F.3d at 435; Brown v. Univ. of Cincinnati, No. C-1-04-164, 2005 U.S. Dist. LEXIS 40798 (S.D. Ohio June 3, 2005).

26. Under the ADA, the definition of "discrimination" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A) (2000). Both statutes prohibit such discrimination. *See* 29 U.S.C. § 794(a) (2000); 42 U.S.C. § 12182(b)(2)(A)(ii) (2000); Mershon v. St. Louis Univ., 442 F.3d 1069, 1076 (8th Cir. 2006) (citing 42 U.S.C. § 12182(a) (2000)); Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 626 (6th Cir. 2000) (quoting 42 U.S.C. § 12112(b)(5)(A) (1994)). *Accord* Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 84 (D. Mass. 1997); *Guckenberger II*, 974 F. Supp. at 145 (citing 42 U.S.C. § 12182(b)(2)(A)(ii) (1994)).

27. *Mershon*, 442 F.3d at 1077 n.5.

28. Title V of the ADA governs claims for retaliation. *See* 42 U.S.C. § 12203(a) (2000) ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.").

29. Kazerooni v. Vanderbilt Univ., No. 3:06-0183, 2007 WL 2300379, at *2 (M.D. Tenn. Aug. 8, 2007) (citing Penny v. United Parcel Serv., 128 F.3d 408, 417 (6th Cir. 1996)). *Accord Mershon*, 442 F.3d at 1074; Amir v. St. Louis Univ., 184 F.3d 1017, 1025 (8th Cir. 1999).

30. *Kazerooni*, 2007 WL 2300379, at *2 (citing McElroy v. Phillips Med. Sys. of N. Am., Inc., 127 F. App'x 161, 171 (6th Cir. 2005)).

31. Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234, 240 (D. Mass. 1999).

these state statutes parallel the federal laws and are interpreted accordingly,[32] while others contain differing language and thus provide either less or more protection against disability discrimination.[33]

1. Disabled

"The plaintiff bears the burden of proving that he or she is disabled."[34] Under both the ADA and the Rehabilitation Act, an individual is disabled "if he or she:

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32. *See, e.g.*, Pangburn v. N. Ky. Univ., No. 99-5474, 2000 U.S. App. LEXIS 6413, at *4–5 (6th Cir. Mar. 23, 2000) (per curiam) (stating that the Kentucky Civil Rights Act "mirrors the ADA and Rehabilitation Act"); Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 435 (6th Cir. 1998) (holding that a plaintiff must make the same showing under the Ohio Civil Rights Act as under the ADA and Rehabilitation Act); Marlon v. W. New England Coll., No. Civ. A. 01-12199, 2003 WL 22914304, at *10 (D. Mass. Dec. 9, 2003) (Massachusetts Equal Rights Act, Mass. Gen. Laws ch. 93 § 103 and the definition of disability in ch. 151B § 1(17) "parallel" the ADA and the Rehabilitation Act and therefore such "state law claims are subject to the same disposition as [a student's] federal claims"); Abdo v. Univ. of Vt., 263 F. Supp. 2d 772, 777 (D. Vt. 2003) (stating that Vermont's Public Accommodations Act is "to be construed so as to be consistent with the [ADA]"); *Pacella*, 66 F. Supp. 2d at 242–43; Hash v. Univ. of Ky., 138 S.W.3d 123, 125 (Ky. Ct. App. 2004); Tori v. Univ. of Minn., No. A06-205, 2006 WL 3772316, at *3 (Minn. Ct. App. Dec. 26, 2006) ("Because the statutes use similar language and promote the same purpose, Minnesota courts have relied on interpretations of the ADA, the Rehabilitation Act, and the [Minnesota Human Rights Act] to construe one another."); Columbus Civil Serv. Comm'n v. McGlone, 697 N.E.2d 204, 206–07 (Ohio 1998) ("The federal [ADA] is similar to the Ohio handicap discrimination law. . . . We can look to regulations and cases interpreting the federal Act for guidance in our interpretation of Ohio law.").

33. See, e.g., Cole v. State Farm Ins. Co., 128 P.3d 171, 176–77 (Alaska 2006), where the court noted the difference between the state disability law and the ADA:

> Cole also contends that insurance is a "public accommodation" under the Human Rights Act. He correctly notes that an insurance office is specifically listed as a public accommodation under the Americans with Disabilities Act. But similar language is absent from the Human Rights Act. In addition, the Human Rights Act dates from 1965, well before the ADA, and Cole fails to explain why it should be understood to incorporate the ADA's later definition of public accommodation.

See also Soules v. Mount Holiness Mem'l Park, 808 A.2d 863, 866 (N.J. Super. Ct. App. Div. 2002). The *Soules* court compared New Jersey's disability law with the ADA and Rehabilitation Act:

> The error in the judge's rationale, and in his reliance upon these federal and out-of-state cases, is that [the definition of handicap in New Jersey's Law Against Discrimination or "LAD"], and its scope, is not comparable to the definitions and scope of handicap or disability under the ADA, the RA, or comparable other state laws. As we have recently observed, "our statute is very broad and does not require that a disability restrict any major life activities to any degree."

Id. Cf. Haskins v. President & Fellows of Harvard Coll., No. 993405, 2001 WL 1470314, at *2–3 (Mass. Super. Ct. Sept. 18, 2001) ("[Massachusetts General Law ch. 272, § 98] prohibits discrimination based on physical disability in any 'place of public accommodation, resort or amusement' . . . . Even so, the list of examples [provided in the statute] patently does not include anything akin to educational facilities or academic programs. . . . This should be compared with the Americans [w]ith Disabilities Act, which specifically defines public accommodation to include secondary, undergraduate, and post-graduate private schools." (internal citations omitted)).

34. Wong v. Regents of the Univ. of Cal., 410 F.3d 1052, 1063 (9th Cir. 2005).

(1) has a physical or mental impairment that substantially limits one or more of the individual's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment."[35] Where there is a claim of "perceived disability," a plaintiff must prove that the college or university mistakenly believed that the student had an impairment that substantially limited her ability to learn.[36] A plaintiff qualifies under the "regarded as" prong if the plaintiff:

> (1) has an impairment that does not substantially limit a major life activity, but is treated by [a college or university] as though it does; (2) has an impairment that limits a major life activity only because of the others' attitudes towards the impairment; or (3) has no impairment whatsoever, but is treated by [a college or university] as having a disability as recognized by the ADA.[37]

"The mere fact that [a college or university] makes an accommodation is not evidence that it regarded plaintiff as having a disability."[38]

The statutes provide some exclusions defining certain categories of individuals as not "disabled." For example, the Rehabilitation Act states that "the term individual with a disability does not include an individual who is *currently* engaging in the illegal use of drugs, when a covered entity acts on the basis of such use."[39] Yet in most cases, determining whether an individual is disabled must be done pursuant to an "individualized inquiry" into each of the three prongs of the disability test: whether the individual has an impairment, whether that impairment affects a "major life activity," and whether that affected major life activity is "substantially limited" by the impairment.[40]

"'Impairment,' in addition to covering physiological disorders, includes 'any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.'"[41] Mental disorders such as clinical anxiety, depression, obsessive compulsive

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35. Davis v. Univ. of N.C., 263 F.3d 95, 99 (4th Cir. 2001). *Accord Wong*, 410 F.3d at 1063; *Pacella*, 66 F. Supp. 2d at 237–38.

36. Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7, 10 (4th Cir. 2005). *Accord Marlon*, 2003 WL 22914304, at *9.

37. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1388 (S.D. Ga. 2002) (quoting 29 C.F.R. § 1630.2(l) (1991)). *Accord* Kazerooni v. Vanderbilt Univ., No. 3:06-0183, 2007 WL 2300379, at *2 (M.D. Tenn. Aug. 8, 2007) ("[T]o succeed on a 'regarded as' claim, the perceived condition must be an 'impairment' under the ADA." (quoting EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 440 n.2 (6th Cir. 2006))).

38. *Marlon*, 2003 WL 22914304, at *9 (citing Mahon v. Crowell, 295 F.3d 585, 592 (6th Cir. 2002). *See* Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 798 (9th Cir. 2001); Plant v. Morton Int'l, Inc., 212 F.3d 929, 938 (6th Cir. 2000)).

39. *Fedorov*, 194 F. Supp. 2d at 1388 (quoting 29 U.S.C. § 705(20)(C)(i) (2000)).

40. Brown v. Univ. of Cincinnati, No. C-1-04-164, 2005 U.S. Dist. LEXIS 40798, at *22 (S.D. Ohio June 3, 2005).

41. Wynne v. Tufts Univ. Sch. of Med. (*Wynne I*), 932 F.2d 19, 23 n.3 (1st Cir. 1991) (quoting 34 C.F.R. Ch. 1, § 104.3(j)(2)(i) (1990)). *Accord Brown*, 2005 U.S. Dist. LEXIS 40798, at *23 (citing 29 C.F.R. § 1630.2(h) (1991)); Guckenberger v. Boston Univ. (*Guckenberger II*), 974 F. Supp. 106, 134 (D. Mass. 1997) (citing 28 C.F.R. § 36.104 (1994)).

disorder, and bipolar disorder are clearly "impairments" under the statutes.[42] The definition of impairment is so broad that the disability inquiry rarely turns upon the existence of an "impairment."[43] Instead, the issues of whether a life activity is "major" and "substantially limited" are generally dispositive of the disability question. The Supreme Court has emphasized that these two terms must be "interpreted strictly to create a demanding standard for qualifying as disabled."[44] While one might assume that federal disability laws extend their protective provisions to all individuals who consider themselves "disabled," the concept of "disability" as defined by the Supreme Court is significantly more restrictive. As a result, many individuals who are "impaired" are not, under federal law, "disabled."

"Major life activities" refers to those activities that are "of central importance to most people's daily lives."[45] The court must determine, after an "individualized assessment,"[46] "whether the life activity is 'major' as contemplated by the ADA, not whether the life activity is particularly important to the plaintiff."[47] Major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, sleeping, and breathing, as well as reading, writing, learning, studying, and working.[48] Yet an impairment that "interferes with an individual's ability to perform a particular function, but does not significantly decrease that individual's ability to obtain a satisfactory education otherwise, does not substantially limit the major life activity of learning."[49] Thus, "[h]andling a dental

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42. El Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1, 3 (D. Mass. 2001). *See* Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999) (obsessive compulsive disorder); Satir v. Univ. of New England, No. Civ. 04-42-P-S, 2005 WL 757576, at *6 (D. Me. Feb. 10, 2005) (depression); *Marlon*, 2003 WL 22914304, at *6 (depression and panic attacks).

43. For example, both alcoholism, see Bailey v. Georgia-Pac. Corp., 306 F.3d 1162, 1167 (1st Cir. 2002), and addiction to controlled substances, see *Fedorov*, 194 F. Supp. 2d at 1387–88, have been treated as impairments.

44. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

45. *Id.* at 198.

46. Singh v. George Washington Univ. Sch. of Med. & Health Scis., 508 F.3d 1097, 1104 (D.C. Cir. 2007).

47. Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 79 (2d Cir. 1998). *Accord Amir*, 184 F.3d at 1027 ("Major life activities do not include those activities that, although important to the individual plaintiff, are not significant within the meaning of the [statutes].").

48. *See* 28 C.F.R. § 35.104 (1991) (caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working). *See also Bartlett*, 226 F.3d at 80 (reading and working); Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 626 (6th Cir. 2000) (reading and writing); *Amir*, 184 F.3d at 1027 (eating, drinking, and learning); Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 155 (1st Cir. 1998) (learning); Kazerooni v. Vanderbilt Univ., No. 3:06-0183, 2007 WL 2300379, at *2–3 (M.D. Tenn. Aug. 8, 2007) (sleeping and studying); Abdo v. Univ. of Vt., 263 F. Supp. 2d 772, 777 (D. Vt. 2003) (walking, speaking, and working); Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234, 238–39 (D. Mass. 1999) (seeing and learning). For an extended discussion of the required showing where "working" is alleged to be a substantially impaired major life activity, see Marlon v. W. New England Coll., No. Civ. A. 01-12199, 2003 WL 22914304, at *6–7 (D. Mass. Dec. 9, 2003).

49. *Pacella*, 66 F. Supp. 2d at 239 (quoting Knapp v. Nw. Univ., 101 F.3d 473, 481 (7th Cir. 1996)). *See also Singh*, 508 F.3d at 1104 (explaining that in employment cases, the relevant question is whether the plaintiff can "'perform the variety of tasks central to most people's daily lives,' as opposed to the class of 'tasks associated with [their] specific job[s]'" (quoting *Toyota*, 534 U.S. at 200–01)); McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 979 (10th Cir.

drill and participation in the clinics and classes of a dental school are not activities 'essential' to daily living,"[50] nor is "test-taking" a major life activity.[51] The argument that a college or university prevented a student from "learning" by expelling her cannot succeed since such an interpretation "would expand the definition of 'disability' to a point unjustified by the [statutes]."[52]

The word "substantially" in the phrase "substantially limits," "suggests 'considerable' or 'to a large degree' [and] clearly precludes impairments that interfere in only a minor way" with such major life activities.[53] An individual with an impairment is only considered disabled under federal disability law "when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed."[54] "Any impairment that only moderately or intermittently prevents an individual from performing major life activities is not a substantial limitation under the ADA."[55] The "substantially limits" phrase also incorporates a causation requirement. Thus, the definition of "disability" "encompasses the requirement that it be the impairment, and not some other factor or factors, that causes the substantial limitation."[56]

An individual is substantially limited if she is "unable to perform a major life activity that the average person in the general population can perform."[57] The statutes thus compare "the performance of an individual who alleges a restriction in a major life activity to that of 'most people,'"[58] requiring that an individual be "restricted to a greater degree than a majority of people."[59]

Take, for example, two hypothetical students. Student A has average

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1998) (holding that medical student with test anxiety disorder was not an individual with a disability because the student failed to demonstrate that the condition impeded performance in a wide variety of disciplines).

50. Millington v. Temple Univ. Sch. of Dentistry, No. 04-3965, 2006 WL 2974141, at *7 (E.D. Pa. Oct. 13, 2006), *aff'd*, 2008 WL 185792 (3d Cir. Jan. 23, 2008).

51. *Singh*, 508 F.3d at 1104.

52. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1388 (S.D. Ga. 2002).

53. Wong v. Regents of the Univ. of Cal., 410 F.3d 1052, 1064 (9th Cir. 2005) (quoting *Toyota*, 534 U.S. at 197). *See* Price v. Nat'l Bd. of Med. Exam'rs, 966 F. Supp. 419, 424 (S.D. W. Va. 1997) (stating that the ADA's legislative history establishes that "substantially limiting impairments cannot be 'minor' or 'trivial'").

54. 28 C.F.R. pt. 35, app. A § 35.104 (1991).

55. Brown v. Univ. of Cincinnati, No. C-1-04-164, 2005 U.S. Dist. LEXIS 40798, at *25 (S.D. Ohio June 3, 2005) (citing Mahon v. Crowell, 295 F.3d 585, 590–91 (6th Cir. 2002)).

56. Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 84–85 (2d Cir. 1998).

57. Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 626–27 (6th Cir. 2000). *See Price*, 966 F. Supp. at 425 ("[Federal] regulations state that, '[a]n individual is not substantially limited in a major life activity if the limitation does not amount to a significant restriction when compared with the abilities of the average person.'" (quoting 29 C.F.R. pt. 1630, app. (1996))).

58. *Gonzales*, 225 F.3d at 626–27. *See id.* at 629 (holding "Gonzales's impairment simply does not meet the . . . definition of 'substantially limits,' because he can read as well as the average person"); *Brown*, 2005 U.S. Dist. LEXIS 40798, at *31 ("Dr. Layne's specific findings comparing plaintiff with other highly-educated 30 year-olds do not support a determination that plaintiff is disabled because they do not show that plaintiff is significantly restricted in the ability to learn as compared to most people or to 'the average person in the general population.'").

59. *Price*, 966 F. Supp. at 425.

> intellectual capability and an impairment (dyslexia) that limits his ability to learn so that he can only learn as well as ten percent of the population. His ability to learn is substantially impaired because it is limited in comparison to most people. Therefore, Student A has a disability for purposes of the ADA. By contrast, Student B has superior intellectual capability, but her impairment (dyslexia) limits her ability so that she can learn as well as the average person. Her dyslexia qualifies as an impairment. However, Student B's impairment does not substantially limit the major life function of learning, because it does not restrict her ability to learn as compared with most people. Therefore, Student B is not a person with a disability for purposes of the ADA.[60]

Many student plaintiffs have argued that they are "substantially limited in the major life activity of learning as compared 'with a population of similar age and education level,' or, alternatively, 'with what [they] could achieve if [they were] either free of . . . learning disabilities or [were] provided reasonable accommodations."[61] But the majority of courts have concluded that the "most people" or "general population" standard requires that where "plaintiffs are able to learn as well as or better than the average person in the general population," the court must rule in favor of the college or university.[62] As a result, when a student "has a history of significant scholastic achievement," courts will rarely find "any substantial limitation on learning ability."[63]

The most thorough examination of the issue of "substantially limited" occurred in a case related to, but not involving, postsecondary education. In *Bartlett v. New York State Board of Law Examiners*,[64] a law school graduate with dyslexia, Marilyn Bartlett, requested accommodations from state bar examiners on three occasions. On each occasion, the accommodation request was denied and Bartlett failed the bar examination.[65] She sued, claiming that denying her the accommodations violated the ADA and the Rehabilitation Act. The trial and

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60. *Id.* at 427. The ADA's legislative history provides an additional example in the physical disability context: "A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because *most people* would not be able to walk eleven miles without experiencing some discomfort." *Id.* at 425 (quoting S. REP. NO. 101-116, at 23 (1989)). For an example of a case applying this principle, see Knapp v. Nw. Univ., 101 F.3d 473, 481 (7th Cir. 1996) (playing intercollegiate basketball).

61. Singh v. George Washington Univ. Sch. of Med. & Health Scis., 508 F.3d 1097, 1100 (D.C. Cir. 2007).

62. *Price*, 966 F. Supp. at 422.

63. *Id.* at 427. For the seminal case addressing this issue, see Wong v. Regents of the Univ. of Cal., 410 F.3d 1052 (9th Cir. 2005). *See also Singh*, 508 F.3d at 1100 ("There is something poignant, in some cases even tragic, in the plight of a person cut off from exceptional achievement by some accident of birth or history. But the ADA is not addressed to that plight. Rather, it is designed to enable the disabled, as a group, to participate in mainstream society.").

64. 226 F.3d 69 (2d Cir. 1998).

65. *Id.* at 75. Bartlett took the bar examination twice without requesting accommodations. While the case was pending, she took the bar examination a sixth time with certain accommodations, but did not pass. *Id.* at 76–77.

appellate courts concluded that she was "substantially limited" and thus was protected under these laws.[66] The bar examiners appealed to the Supreme Court, and the Court, in a one-sentence opinion, vacated the appellate court's opinion, instructing it to analyze Bartlett's claims under its recent ruling in the *Sutton* trilogy,[67] a series of cases in which the Court analyzed and defined the concept of "substantially limited."[68] On remand, the appellate court stated that the proper standard is whether Bartlett's limitations on her ability to read "amount to a substantial limitation in comparison to most people or only a 'mere difference.'"[69] Given the results in *Bartlett* and the other cases discussed above, college and university students who compare themselves with other students, rather than to "most people" (who are not college or university students) will have difficulty persuading a court that they meet the disability statutes' "substantially limited" requirement.

In the *Sutton* trilogy, the Supreme Court extended the "average-person criterion,"[70] holding that an individual is only disabled under the disability statutes if her impairment substantially limits her major life activities even when she uses corrective devices or employs other mitigating measures,[71] including "*non*-artificial offsetting measures"[72] and "self-accommodations,"[73] such as "a vision-impaired person's 'learning to compensate for the disability by making subconscious adjustments to the *manner* in which he sensed depth and perceived peripheral objects.'"[74] In other words, in determining whether individuals are disabled "they should be examined in their corrected state."[75]

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66. *Id.* at 74.

67. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

68. *Bartlett*, 226 F.3d at 74–75.

69. *Id.* at 81. On remand, the trial court ruled that Bartlett was substantially limited in both reading and working, and ordered the bar examiners to give her the following accommodations: (1) double the normally allotted time, over four days; (2) use of a computer; (3) permission to circle multiple choice answers in the exam booklet; and (4) large print on both the state and multistate exams. The court also ordered the bar examiners to pay Bartlett compensatory damages. No. 93 Civ. 4986, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. Aug. 15, 2001).

70. Singh v. George Washington Univ. Sch. of Med. & Health Scis., 508 F.3d 1097, 1101 (D.C. Cir. 2007).

71. *See Sutton*, 527 U.S. 471; *Murphy*, 527 U.S. 516; *Albertson's*, 527 U.S. 555.

72. *Singh*, 508 F.3d at 1101.

73. *Bartlett*, 226 F.3d at 80.

74. *Singh*, 508 F.3d at 1101 (quoting *Albertson's*, 527 U.S. at 565) ("[M]easuring Singh's limitations by comparison to her hypothetical achievements without impairment, to her fellow medical students, or to others of similarly elite educational background (individuals selected in part on the basis of their intelligence and dedication), would place the same mitigating factors on both sides of the comparison, rendering them effectively irrelevant.").

75. Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 630 (6th Cir. 2000). *See, e.g.*, Morgan v. Nova Se. Univ., Inc., No. 07-60759, 2007 WL 2320589, at *3 (S.D. Fla. Aug. 10, 2007) ("From an examination of the four corners of Plaintiff's complaint, and when taking into account Plaintiff's mitigating measures, there is no basis for finding that Plaintiff is disabled under the ADA."); Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234, 238 (D. Mass. 1999) ("In light of *Sutton* and *Albertsons*, Pacella cannot claim a disability with respect to his eyesight because, as corrected, it does not substantially limit a major life activity.").

2. Otherwise Qualified[76]

A plaintiff who demonstrates that she is disabled must also prove that she is "otherwise qualified."[77] Being "otherwise qualified" for retention is not the same as being qualified for admission.[78] "A handicapped or disabled person is 'otherwise qualified' to participate in a program if she can meet its necessary requirements with reasonable accommodation."[79] Conversely, a college or university is "entitled to summary judgment if [it] can show that [the student] is not qualified . . . because even with the accommodation, he could not meet the institution's academic standards."[80] "Thus, in determining whether an individual meets the 'otherwise qualified' requirement . . . it is necessary to look at more than the individual's ability to meet a program's *present* requirements."[81]

However, a college or university is "not obligated to provide accommodation until [the student] provides a proper diagnosis . . . and [requests] specific accommodation."[82] An institution "does not have to accept any statement by a

76. In *Singh*, the D.C. Circuit expressed its "legal uncertainty as to whether a Title III plaintiff must be 'otherwise qualified' [since] Title III of the ADA contains neither the phrase 'otherwise qualified' nor 'qualified individual,' [as do] . . . Titles I and II, as well as . . . the Rehabilitation Act." 508 F.3d at 1105. The court noted that the First, Sixth, and Eighth Circuits have "read an equivalent requirement into Title III" but ultimately concluded that it was not presented with the issue due to a procedural point. *Id.* at 1106.

77. Falcone v. Univ. of Minn. & Bd. of Regents, No. 01-1181, 2003 U.S. Dist. LEXIS 15787, at *16 (D. Minn. Sept. 3, 2003), *aff'd*, 388 F.3d 656 (8th Cir. 2004) (citing Stern v. Univ. of Osteopathic Med. & Health Scis., 220 F.3d 906, 909 (8th Cir. 2000)).

78. McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 854 (5th Cir. 1993) ("In argument, McGregor often ignores the difference between being otherwise qualified for admission and being otherwise qualified for retention.").

79. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 435 (6th Cir. 1998). *Accord McGregor*, 3 F.3d at 855; el Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1, 4 (D. Mass. 2001).

80. *Falcone*, 2003 U.S. Dist. LEXIS 15787, at *21.

81. Wynne v. Tufts Univ. Sch. of Med. (*Wynne I*), 932 F.2d 19, 24 (1st Cir. 1991).

82. *Kaltenberger*, 162 F.3d at 437 ("That plaintiff told an academic counselor at the College that she thought she might have adult attention deficit disorder simply did not impose an obligation to offer accommodations."). *See* Singh v. George Wash. Univ. Sch. of Med. & Health Scis., 508 F.3d 1097 (D.C. Cir. 2007); Mershon v. St. Louis Univ., 442 F.3d 1069, 1077 (8th Cir. 2006) ("Mershon bears the initial burden of demonstrating that he requested reasonable accommodations and that those accommodations would render him otherwise qualified for admission to the professional degree program." (internal citations omitted)); Goldstein v. Harvard Univ., 77 F. App'x 534, 537 (1st Cir. 2003) (per curiam) ("The operative provision, 42 U.S.C. § 12182(b)(2)(A)(ii), requires a person with a disability to request a reasonable and necessary modification, thereby informing the operator of a public accommodation about the disability." (internal citation omitted)); Carten v. Kent State Univ., 78 F. App'x 499, 500 (6th Cir. 2003) (affirming grant of summary judgment where student presented no evidence sufficient to raise a material question of fact as to whether he requested accommodations); Rosenthal v. Webster Univ., No. 98-2958, 2000 WL 1371117, at *1 (8th Cir. Sept. 25, 2000) (per curiam) (affirming grant of summary judgment where "Rosenthal did not produce any valid evidence that [the university] knew of his bipolar disorder before they suspended him."); Satir v. Univ. of New England, No. Civ. 04-42-P-S, 2005 WL 757576, at *6 (D. Me. Feb. 10, 2005) ("A plaintiff pursuing a discrimination claim against an educational institution must demonstrate that she or he requested a reasonable and necessary modification, putting the defendant on notice of the

student, or even a medical professional, as to the disability of a student."[83] It "may impose certain requirements regarding the nature of the evidence demonstrating the disability."[84] Yet "a university is prevented from employing unnecessarily burdensome proof-of-disability criteria that preclude or unnecessarily discourage individuals with disabilities from establishing that they are entitled to reasonable accommodation."[85] The onus is also on the student to request specific accommodations[86] and to demonstrate that they are available[87] and reasonable.[88] Once a student asserts that she is an individual with a disability and requests reasonable accommodations, "the institution has responsibilities as well."[89]

But "discrimination laws do not require 'an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.'"[90] Where the requested accommodations would "result in a fundamental alteration of services or impose an undue burden," the ADA and Rehabilitation Act do not require them.[91] Thus, for example, a college or university "is not required to 'accommodate a handicapped individual by eliminating a course requirement which is reasonably necessary to proper use of the degree conferred at the end of a

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student's disability, be the claim be brought under Title III of the ADA or the Rehabilitation Act." (internal citation omitted)); *Falcone*, 2003 U.S. Dist. LEXIS 15787, at *17–18.

83. Abdo v. Univ. of Vt., 263 F. Supp. 2d 772, 777 (D. Vt. 2003) (citing Guckenberger v. Boston Univ. (*Guckenberger II*), 974 F. Supp. 106, 135 (D. Mass. 1997)).

84. *Id.*

85. *Id.* *See generally Guckenberger II*, 974 F. Supp. at 134–42. The type of documentation, the qualifications of the individual providing the documentation, and the age of the documentation have all been the subject of litigation. For a discussion of issues related to documentation, see Rothstein, *supra* note 7, at 179–81. *See also* LAURA F. ROTHSTEIN & JULIA ROTHSTEIN, DISABILITIES AND THE LAW § 3.2 (3d ed. 2006).

86. Brown v. Univ. of Cincinnati, No. C-1-04-164, 2005 U.S. Dist. LEXIS 40798, at *36 (S.D. Ohio June 3, 2005).

87. El Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1, 4 (D. Mass. 2001) (citing Phelps v. Optima Health, Inc., 251 F.3d 21, 27 (1st Cir. 2001)).

88. *Abdo*, 263 F. Supp. 2d at 777 (citing Stone v. City of Mt. Vernon, 118 F.3d 92, 96–97 (2d Cir. 1997)); *Guckenberger II*, 974 F. Supp. at 146.

89. Falcone v. Univ. of Minn. & Bd. of Regents, No. 01-1181, 2003 U.S. Dist. LEXIS 15787, at *20 (D. Minn. Sept. 3, 2003), *aff'd*, 388 F.3d 656 (8th Cir. 2004) (citing Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1996)). It is unclear whether these "responsibilities" include the provision of accommodations in "regarded as" or "perceived disability" cases. *See* Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7, 15 (4th Cir. 2005) ("The parties dispute whether the ADA's accommodation requirement applies with equal force to a 'regarded as' disabled plaintiff. . . . This question has not been decided by this circuit, and our sister circuits are divided on the issue."). *Compare* Shannon v. N.Y. City Transit Auth., 332 F.3d 95, 104 n.3 (2d Cir. 2003), *and* Weber v. Strippit, Inc., 186 F.3d 907, 916–17 (8th Cir. 1999), *with* Katz v. City Metal Co., 87 F.3d 26, 33–34 (1st Cir. 1996).

90. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 436 (6th Cir. 1998) (quoting Se. Cmty. Coll. v. Davis, 442 U.S. 397, 413 (1979)). *Accord* McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 858 (5th Cir. 1993); Scott v. W. State Univ. Coll. of Law, No. 96-56088, 1997 U.S. App. LEXIS 9089, at *4 (9th Cir. Apr. 21, 1997) (affirming summary judgment for university since "[e]ven assuming that Scott is disabled, any modification in WSU's practices would fundamentally alter the nature of its services") (internal citation omitted)).

91. Toledo v. Sanchez, 454 F.3d 24, 32 (1st Cir. 2006) (internal citation omitted). *See* Mershon v. St. Louis Univ., 442 F.3d 1069, 1076 (8th Cir. 2006).

course of study.'"[92] Additionally, under both the ADA and the Rehabilitation Act, a student who presents a "direct threat" to the health and safety of others, "is not 'otherwise qualified' even if the behavior was precipitated by her mental illness."[93]

Once a plaintiff has established that the request for the accomodation is reasonable, "the burden shifts to [the college or university] to demonstrate that the requested [accomodation] would fundamentally alter the nature of its . . . program,"[94] that the accommodation constitutes an "undue" burden or hardship,[95] or that a student is a "direct threat."[96] Institutions can also avoid liability for failing to provide accommodations by demonstrating that the student "failed to request any real accommodation, that further accommodations would not have been of any use, that reasonable accommodations had already been advanced, or that the requested accommodations were unreasonable under the circumstances."[97] "The contour of a postsecondary institution's affirmative duty to accommodate a [disabled] student is shaped on a case-by-case basis."[98] "[W]hat is reasonable in a particular situation may not be reasonable in a different situation. Ultimately, what is reasonable depends on a variable mix of factors."[99]

3. Causation

A student plaintiff who demonstrates that she is both "disabled" and "otherwise qualified" must also prove that she was excluded from a program or benefit *because* of her disability.[100] Here the language of the ADA and the Rehabilitation

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92. Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 90 (D. Mass. 1997) (quoting Doherty v. S. Coll. of Optometry, 862 F.2d 570, 575 (6th Cir. 1988)).

93. Ascani v. Hofstra Univ., No. 98-7756, 1999 WL 220136, at *1 (2d Cir. Apr. 9, 1999).

94. Guckenberger v. Boston Univ. (*Guckenberger II*), 974 F. Supp. 106, 147 (D. Mass. 1997).

95. Falcone v. Univ. of Minn. & Bd. of Regents, No. 01-1181, 2003 U.S. Dist. LEXIS 15787, at *20 (D. Minn. Sept. 3, 2003), *aff'd*, 388 F.3d 656 (8th Cir. 2004) (citing Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1996)).

96. *Ascani*, 1999 WL 220136, at *1.

97. Singh v. George Washington Univ. Sch. of Med. & Health Scis., 508 F.3d 1097, 1105 (D.C. Cir. 2007) (internal citations omitted).

98. McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 862 (5th Cir. 1993). *See, e.g.*, Finger v. Univ. of Wis. Sys. Bd. of Regents, No. 92-1779, 1993 WL 217161, at *1 (7th Cir. June 18, 1993). The *Finger* court held that university satisfied its duty to provide a student with educational "auxiliary aids" where the university

> completed tapings within an average of four to six weeks, although occasionally the delays were longer, . . . Finger had the option to pick up the tapes in installments, so that he did not need to wait for each book to be recorded in full. . . . Recordings for the Blind and the Milwaukee Public Library taped texts free of charge, and the Golda Meir Library at UWM housed a Kurzweil Reading machine, which Finger was trained to use.

Id.

99. Wynne v. Tufts Univ. Sch. of Med. (*Wynne II*), 976 F.2d 791, 795 (1st Cir. 1992).

100. *See, e.g.*, Buhendwa v. Univ. of Colo. at Boulder, 214 F. App'x 823, 827 (10th Cir. 2007) (affirming grant of summary judgment where "[t]he alleged discrimination she experienced was not based on language-induced test-taking anxiety, but was instead caused by the fact that she fell asleep during the examination.").

Act diverge.[101] The Rehabilitation Act requires that plaintiffs "demonstrate that the discrimination occurred 'solely by reason of' their disability,"[102] while under the ADA, plaintiffs "need only demonstrate that their disability played a motivating role in the discriminatory action."[103] In other words, under the ADA a student plaintiff must show "that but for his disability he would have been allowed to continue in the . . . program" or would have been awarded the benefit.[104] There is some debate as to how much these two standards differ, especially after recent amendments to the Rehabilitation Act.[105] It is clear that under both statutes the required showing of causation is made when a plaintiff demonstrates that the college or university dismissed the student "even though it would have graduated a student whose academic performance was as poor but whose difficulties did not stem from a disability."[106]

In both ADA and Rehabilitation Act cases, a student-plaintiff who provides no direct evidence of discrimination can still succeed under the disparate treatment model of discrimination enunciated in *McDonnell Douglas Corp. v. Green*.[107] The plaintiff must first "make a threshold showing . . . by offering indirect evidence of discrimination."[108] However, if the college or university articulates "a non-discriminatory justification for dismissing the plaintiff from the program" or denying the plaintiff a benefit, "then the plaintiff must prove that the defendant's proffered justification is a mere pretext concealing its true discriminatory motive, namely, one motivated by plaintiff's disability" and not by legitimate academic, disciplinary, or safety concerns.[109] "When pretext is at issue in a discrimination case, it is a plaintiff's duty to produce specific facts which, reasonably viewed, tend logically to undercut the defendant's position."[110]

If a plaintiff fails to provide direct evidence of discriminatory animus or offer indirect evidence of discrimination, her claims under the ADA and Rehabilitation Act must fail.[111] When a college or university learns of a student-plaintiff's

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101. Davis v. Univ. of N.C., 263 F.3d 95, 99 (4th Cir. 2001). *Accord* Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 454 (5th Cir. 2005); Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7, 10 n.2 (4th Cir. 2005); el Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1, 3 n.1 (D. Mass. 2001).

102. *Betts*, 145 F. App'x at 10 n.2 (citing 29 U.S.C. § 794(a) (2000)). *Accord* Mershon v. St. Louis Univ., 442 F.3d 1069, 1076 (8th Cir. 2006); Amir v. St. Louis Univ., 184 F.3d 1017, 1029 n.5 (8th Cir. 1999).

103. *Betts*, 145 F. App'x at 10 n.2.

104. *El Kouni*, 169 F. Supp. 2d at 3.

105. *Id.* at 3 n.1.

106. Falcone v. Univ. of Minn. & Bd. of Regents, No. 01-1181, 2003 U.S. Dist. LEXIS 15787, at *27 (D. Minn. Sept. 3, 2003), *aff'd*, 388 F.3d 656 (8th Cir. 2004).

107. 411 U.S. 792 (1973). *See Mershon*, 442 F.3d at 1074; *Betts*, 145 F. App'x at 12–13. *See also Amir*, 184 F.3d at 1025 (applying *McDonnell Douglas* framework to retaliation claim).

108. *El Kouni*, 169 F. Supp. 2d at 3 (citing Katz v. City Metal Co., 87 F.3d 26, 30 (1st Cir. 1996)). *Accord Mershon*, 442 F.3d at 1074.

109. *El Kouni*, 169 F. Supp. 2d at 3 (citing *Katz*, 87 F.3d at 30; Wynne v. Tufts Univ. Sch. of Med. (*Wynne II*), 976 F.2d 791, 796 (1st Cir. 1992)). *Accord Mershon*, 442 F.3d at 1074.

110. *Wynne II*, 976 F.2d at 796.

111. *See* Sadik v. Univ. of Houston, No. Civ.A. H-03-4296, 2005 WL 1828588, at *6 (S.D. Tex. Aug. 1, 2005) ("Plaintiff's own allegations establish nothing more than that his professor,

disability only after taking the contested action, the plaintiff cannot prove causation.[112] A college or university will also always prevail where "the uncontradicted evidence before the court establishes that [it] made extensive efforts to accommodate the plaintiff and dismissed her only after she repeatedly failed to satisfy the school's academic requirements" and thus its "decision to discontinue the plaintiff's enrollment was due to her academic failure, not her disabilities."[113] Additionally, colleges and universities are likely to successfully defend claims in true "direct threat" situations, such as cases where students threaten violence against faculty or other students.[114] In cases of both academic and disciplinary dismissal, institutions can prevail even when the academic failure or threatening behavior results from a disability. The statutes forbid "discrimination based on stereotypes about a [disability]," but do not forbid "decisions based on the actual attributes of the [disability]."[115]

B. Immunity and Other Limitations on Applicability

Students alleging disability discrimination do not always bring their claims against colleges or universities alone. Student-plaintiffs also routinely name as defendants governing boards, individual administrators, and even professors. Where private colleges and universities are concerned, "there is no colorable claim under Title III of the ADA" against an official "in the absence of a claim that an individual owns, leases, or operates a place of public accommodation."[116] "[E]mployees and administrators do not 'operate' a university so as to open themselves to ADA liability."[117] When the accused college or university is a public entity, the institution and its board are generally state agencies and its administrators are considered state officials.[118] The boards and administrators, as

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acting on an objectively reasonable suspicion of academic dishonesty, attempted to ensure that Plaintiff suffered the ordinary consequences of cheating on an exam.").

112. Scott v. W. State Univ. Coll. of Law, No. 96-56088, 1997 U.S. App. LEXIS 9089, at *4 (9th Cir. Apr. 21, 1997) ("[B]ecause Scott was dismissed before WSU knew about his alleged disability, he was clearly not excluded solely by reason of his disability.").

113. Millington v. Temple Univ. Sch. of Dentistry, No. 04-3965, 2006 WL 2974141, at *7–8 (E.D. Pa. Oct. 13, 2006).

114. *See, e.g.*, Rosenthal v. Webster Univ., No. 98-2958, 2000 WL 1371117, at *1 (8th Cir. Sept. 25, 2000) (per curiam) (affirming grant of summary judgment where the record was "quite clear that Rosenthal's suspension was not based upon his disability but upon his disorderly conduct—including, but not limited to, carrying a gun and threatening to use it.").

115. Anderson v. Univ. of Wis., 841 F.2d 737, 740 (7th Cir. 1988). *But see* Gambini v. Total Renal Care, Inc., 486 F.3d 1087 (9th Cir. 2007).

116. White v. Creighton Univ., No. 8:06CV536, 2006 WL 3419782, at *3 (D. Neb. Nov. 27, 2006) (internal citation omitted).

117. *Id.* at *3 (citing Emerson v. Thiel Coll., 296 F.3d 184 (3d Cir. 2002)).

118. This may not always be the case, however. In *Bowers v. Nat'l Collegiate Athletic Ass'n*, the Third Circuit recognized:

> Whether a public university is entitled to Eleventh Amendment immunity is a fact-intensive review that calls for individualized determinations. Although we have held in the past that the Pennsylvania System of Higher Education was entitled to Eleventh Amendment immunity, we have also held that Rutgers, the State University of New Jersey, was not.

well as the institutions, often assert Eleventh Amendment immunity defenses against ADA and Rehabilitation Act claims.[119]

The Eleventh Amendment grants States (and thus state agencies and officials) immunity from suits in federal court, including cases brought "'by citizens against their own states.'"[120] However, a plaintiff "may overcome Eleventh Amendment immunity in two ways. First, the State may waive it. Second, Congress may abrogate it."[121] Through the receipt of federal funds, state agencies and institutions waive Eleventh Amendment immunity,[122] exposing public institutions, their boards, and their administrative officials to liability under the Rehabilitation Act.[123] However, a plaintiff may seek recovery under the Rehabilitation Act against public college and university officials only in their official capacities (not as individuals), because the Rehabilitation Act prohibits discrimination only by programs and activities receiving federal financial assistance.[124]

Because the ADA's applicability is not conditioned on receipt of federal funds, no such general waiver applies to causes of action under Title II,[125] and immunity turns solely upon abrogation. In order to "abrogate immunity, Congress must clearly express an intent to do so and 'act pursuant to a valid grant of constitutional authority.'"[126] The first prong of this test is satisfied by Congress' declaration that

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475 F.3d 524, 546 (3d Cir. 2007) (internal citations omitted).

119. If, however, a State party fails to raise Eleventh Amendment immunity, "a court can ignore it." Betts v. Rector & Visitors of the Univ. of Va., 145 F. App'x 7, 11 (4th Cir. 2005) (quoting Wis. Dep't of Corrections v. Schacht, 524 U.S. 381, 389 (1998)).

120. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1386 (S.D. Ga. 2002) (quoting Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001)).

121. *Id.*

122. "Receipt of federal funds" includes those federal funds which are received by a college or university yet are earmarked for and eventually funneled to individual students (such as funds under the Federal Work Study and Pell Grant programs). *See* Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 452–53 (5th Cir. 2005).

123. *Fedorov*, 194 F. Supp. 2d at 1387 (citing Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 276 F.3d 1227, 1228–29 (11th Cir. 2001)); 29 U.S.C. § 794 (2000)). *Accord Bowers*, 475 F.3d at 545 ("[A] state program or activity that accepts federal funds waives its Eleventh Amendment immunity to Rehabilitation Act claims."); Shepard v. Irving, 77 F. App'x 615, 619 (4th Cir. 2003) ("A State may constructively waive its Eleventh Amendment immunity by voluntarily accepting federal funds when Congress expresses a clear intent to condition receipt of those funds on a State's consent to waive its Eleventh Amendment immunity." (citing Booth v. Maryland, 112 F.3d 139, 145 (4th Cir. 1997))); Doe v. Bd. of Trs. of Univ. of Ill., 429 F. Supp. 2d 930, 940 n.2 (N.D. Ill. 2006) ("[T]he Eleventh Amendment does not immunize the states from lawsuits under the Rehabilitation Act" (citing Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000))).

124. *See* Emerson v. Thiel Coll., 296 F.3d 184, 190 (3d Cir. 2002). *Accord Shepard*, 77 F. App'x at 619 n.3; White v. Creighton Univ., No. 8:06CV536, 2006 WL 3419782, at *4 n.4 (D. Neb. Nov. 27, 2006).

125. However, where a case is originally filed in state court and the state defendants remove the case to federal court, "the University waive[s] its immunity from suit in [federal court] with respect to any and all claims asserted against it, regardless of whether those claims arise under federal or state law." Sadik v. Univ. of Houston, No. Civ.A. H-03-4296, 2005 WL 1828588, at *5 (S.D. Tex. Aug. 1, 2005) (citing Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002)). *See* Meyers ex rel. Benzing v. Texas, 410 F.3d 236 (5th Cir. 2005).

126. *Fedorov*, 194 F. Supp. 2d at 1386 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62,

a State "shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."[127] With respect to the second requirement, the Supreme Court issued a seminal decision in *Tennessee v. Lane*.[128]

In that case, the Court acknowledged that in enacting Title II of the ADA Congress purported to exercise "the sweep of congressional authority, including the power to enforce the fourteenth amendment."[129] The Court noted that Congress' "power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment," while "a broad power indeed," is not "unlimited."[130] Rather, legislation invoking Section 5 is only valid "if it exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[131] Where "congruence and proportionality" are found between the "history and pattern of unequal treatment" of the disabled[132] and the means adopted by Title II, the ADA validly abrogates state sovereign immunity against both "a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment,"[133] and against "prophylactic [provisions of Title II] that [proscribe] facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[134]

Application of this test to conduct violating the Fourteenth Amendment is fairly straightforward. However, appellate courts have split on how to apply *Lane* to determine "on a claim-by-claim basis . . . insofar as [the state's alleged] misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid."[135] Some appellate courts have interpreted the case as conclusively establishing that all provisions of Title II qualify as prophylactic measures intended to prevent and deter unconstitutional conduct, leaving only the congruence and proportionality of the particular provisions of Title II at issue for future cases that concern areas of government conduct not addressed in *Lane*.[136]

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73 (2000)).

127. Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 484 (4th Cir. 2005) (citing 42 U.S.C. § 12202 (2000)). *Accord* Tennessee v. Lane, 541 U.S. 509, 518 (2004) ("The first question is easily answered in this case. . . . [N]o party disputes the adequacy of th[e] expression of Congress' intent to abrogate the States' Eleventh Amendment immunity."); Toledo v. Sanchez, 454 F.3d 24, 31 (1st Cir. 2006); Ass'n for Disabled Ams. v. Fla. Int'l Univ., 405 F.3d 954, 957 (11th Cir. 2005).

128. 541 U.S. 509 (2004).

129. *Id.* at 516 (quoting 42 U.S.C. § 12101(b)(4) (2000)).

130. *Id.* at 518, 520.

131. *Id.* at 520 (quoting Boerne v. Flores, 521 U.S. 507, 520 (1997)).

132. *Id.* at 522–29.

133. United States v. Georgia, 546 U.S. 151, 159 (2006).

134. *Lane*, 541 U.S. at 518. *Accord* Toledo v. Sanchez, 454 F.3d 24, 31 (1st Cir. 2006).

135. *Sanchez*, 454 F.3d at 31 (quoting *Georgia*, 546 U.S. at 159).

136. *Id.* at 35. *See, e.g.*, Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 554–55 (3d Cir. 2007); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 487 (4th Cir. 2005); Ass'n for Disabled Ams. v. Fla. Int'l Univ., 405 F.3d 954, 958 (11th Cir. 2005). *See also* Klinger v. Dir., Dep't of Revenue, State of Mo., 455 F.3d 888, 896 (8th Cir. 2006) ("The court's decision in *Lane* that Title II targeted a pattern of unconstitutional conduct forecloses the

However, the First Circuit has found that "the sounder approach is to focus the entire . . . test on the particular category of state conduct at issue."[137] Despite this disagreement, all appellate courts that have considered "whether Title II validly abrogates state sovereign immunity in the context of public education" have concluded that it does, since "Title II's prophylactic measures are justified by the persistent pattern of exclusion and irrational treatment of disabled students in public education, coupled with the gravity of the harm worked by such discrimination."[138] Thus, while it is still largely unclear in many circuits how courts will interpret *Lane* and its progeny, those courts that have decided the issue find that in passing the ADA, Congress exposed States, public colleges and universities, other state agencies such as boards of public colleges and universities, and state officials including public college and university administrators to ADA claims.

Yet, since the ADA "only allows institutions, not individuals, to be sued for monetary damages,"[139] claims seeking monetary recovery cannot be brought against school officials regardless of their immunity. As far as equitable relief is concerned, however, even when the Eleventh Amendment bars ADA suits against States and state agencies, under the doctrine of *Ex parte Young* "a plaintiff may receive *prospective* equitable relief against state officers."[140] To determine whether the *Ex parte Young* doctrine is applicable "a court 'need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"[141] Claims for readmission "state a violation that continues during the period the plaintiff is excluded from the benefits to which he is entitled."[142]

II. STUDENT CHALLENGES TO ACADEMIC DECISIONS

A. Deference to the Professional Judgment of Colleges and Universities

Beginning with the Supreme Court's decision in *Board of Curators of the University of Missouri v. Horowitz*,[143] courts have treated judgments of colleges and universities that are "academic" in nature with great deference.[144] In that case,

need for further inquiry.").

137. *Sanchez*, 454 F.3d at 35.

138. *Id.* at 40. *See Constantine*, 411 F.3d at 490; *Ass'n for Disabled Ams.*, 405 F.3d at 959.

139. Doe v. Bd. of Trs. of Univ. of Ill., 429 F. Supp. 2d 930, 940 (N.D. Ill. 2006) (citing Walker v. Snyder, 213 F.3d 344, 346 (7th Cir. 2000)).

140. Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1386 (S.D. Ga. 2002) (emphasis added). *Accord* Shepard v. Irving, 77 F. App'x 615, 620 (4th Cir. 2003).

141. *Shepard*, 77 F. App'x at 620 (quoting Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002)).

142. Carten v. Kent State Univ., 282 F.3d 391, 396 (6th Cir. 2002).

143. 435 U.S. 78 (1978).

144. For a discussion of judicial deference to academic judgments, see Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?* 41 AM. U. L. REV. 267 (1992). For a critical analysis of judicial deference to academic decisions, see Joseph M. Flanders, *Academic Student Dismissals at*

the Court rejected a student's challenge to her dismissal from medical school, stating that courts are "particularly ill-equipped to evaluate academic performance."[145] Seven years later, in *Regents of the University of Michigan v. Ewing*,[146] the Court again rejected a medical student's challenge to his academic dismissal, and this time used very strong language to warn courts against usurping the judgment of colleges and universities:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[147]

Under the *Ewing* rationale, courts usually refuse to second-guess the professional judgment of faculty in academic dismissals and other decisions that require academic expertise. Where disciplinary dismissals are concerned, courts have distinguished between student challenges to discipline meted out on academic grounds (such as discipline for plagiarism) and discipline meted out for social misconduct (such as assaults or drug offenses). While the line between academic and social misconduct is not always clear (such as in the area of cheating, for example),[148] courts typically defer to the judgments of faculty and administrators in cases of academic misconduct to the same extent as purely academic dismissals, while they are much less deferential to the decisions of administrators when it comes to matters of social misconduct. Thus, when required to review a purportedly academic dismissal challenged by a student who claims the dismissal was a result of a failure to accommodate her (or in retaliation for a request for accommodations), the court first determines whether the decision is solely an academic one. If it is, the court scrutinizes the institution's actions only to ensure that the institution followed the "professional judgment" dictates of the ADA and Rehabilitation Act.

However, what the "professional judgment" test actually requires has been refined over time. In an early disability discrimination case following on the heels of *Horowitz*, *Doe v. New York University*,[149] the Second Circuit exhibited great deference to the institution's judgment that a student's psychiatric disorder was incompatible with the requirements of her graduate program, and allowed the existence of her disability alone, without analyzing whether accommodations were appropriate, to justify the university's refusal to admit her.[150] A decade later, this

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145. *Horowitz*, 435 U.S. at 92.

146. 474 U.S. 214 (1985).

147. *Id.* at 225.

148. For a critique of the distinction between judicial review of academic and social misconduct, see Fernand N. Dutile, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?* 29 J.C. & U.L. 619 (2003).

149. 666 F.2d 761 (2d Cir. 1981).

150. *Id.* at 777–79.

very broad deference was criticized by the First Circuit in *Wynne v. Tufts University School of Medicine* (*Wynne I*),[151] the case that developed the standard of review of academic decisions that persists today. The *Wynne* court first explained why the broad deference approach of *Doe* is inappropriate in light of legal and technological developments.

> In the context of an "otherwise qualified-reasonable accommodations" inquiry under the Rehabilitation Act, the . . . principle of respect for academic decisionmaking applies but with two qualifications. First, . . . there is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation. Second, the *Ewing* formulation, hinging judicial override on "a substantial departure from accepted academic norms," is not necessarily a helpful test in assessing whether professional judgment has been exercised in exploring reasonable alternatives for accommodating a handicapped person. We say this because such alternatives may involve new approaches or devices quite beyond "accepted academic norms." As the [Supreme] Court acknowledged in [*Southeastern Community College v.*] *Davis*, "technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment."[152]

The *Wynne* court therefore "rejected a 'broad judicial deference resembling that associated with the 'rational basis' test'" applied in *Doe*,[153] and instead formulated a standard for courts that protects students from decisions made in bad faith, but preserves institutions' right to determine whether requested accommodations will fundamentally alter their programs' academic requirements.

> If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation. In most cases, we believe that, as in the qualified immunity context, the issue of whether the facts alleged by a university support its claim that it has met its duty of reasonable accommodation will be a "purely legal one." Only if essential facts were genuinely disputed or if there were significantly probative evidence of bad faith or pretext would further fact finding be necessary.[154]

Thus, under the *Wynne* formulation, courts should grant summary judgment in

151. 932 F.2d 19 (1st Cir. 1991).

152. *Id.* at 25–26 (citing Se. Cmty. Coll. v. Davis, 442 U.S. 397, 412 (1979)).

153. *Id.* at 25 (quoting Strathie v. Dep't of Transp., 716 F.2d 227, 231 (3d Cir. 1983)).

154. *Id.* at 26 (internal citation omitted).

favor of an institution if it has provided one or more accommodations that are reasonable within the parameters of the requirements of the academic program and demonstrated that further accommodations would either not help the student perform at an acceptable level or would require "substantial" alterations to the academic program.[155]

A district court applied *Wynne*'s reviewing criteria in a widely-publicized case brought by students with learning disabilities against Boston University. In *Guckenberger v. Boston University* (*Guckenberger I*),[156] students challenged a variety of university policies, including the requirement that they produce a recent diagnosis and update it regularly.[157] They also challenged the university's requirement that all students in the College of Arts and Sciences complete one semester of mathematics and four semesters of a foreign language, arguing that other courses (taught in English) could be substituted for foreign language courses without fundamentally altering the academic program.[158]

The court ruled that the documentation requirements imposed by the university violated the ADA.[159] With respect to the students' challenges to the math and language requirements, the court agreed that the university did not need to lower its academic standards, but found that the university had not considered the alternatives suggested by the students (or any other alternatives) that would have provided an appropriate accommodation while maintaining academic standards and programmatic integrity.[160] Instead, "the university simply relied on the status quo as the rationale."[161] The court ordered the university to develop a "deliberative procedure" for considering whether other courses could be substituted for the foreign language requirement without fundamentally altering the nature of its liberal arts degree program.[162] After the university created a faculty committee that heard the views of the students, examined the curricula of other liberal arts programs, and concluded that the foreign language requirement was "fundamental to the nature of the liberal arts degree at Boston University,"[163] the district court, applying the standards of *Wynne*, found that the process used to evaluate the language requirement was appropriate and the exercise of academic judgment was sound.

The standards articulated in *Wynne* and the "deliberative process" used in *Guckenberger* provide important guidance to institutions when dealing with

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155. For a discussion of judicial deference when reviewing a challenge brought by a student under the ADA or the Rehabilitation Act, see James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEB. L. REV. 27 (1996).

156. 957 F. Supp. 306 (D. Mass. 1997).

157. *Id.* at 311.

158. *Id.* at 317. *See also* Guckenberger v. Boston Univ. (*Guckenberger II*), 974 F. Supp. 106, 114 (D. Mass. 1997).

159. *Id.* at 114–15.

160. *Id.* at 116.

161. *Id.* at 115.

162. *Id.* at 154.

163. Guckenberger v. Boston Univ. (*Guckenberger III*), 8 F. Supp. 2d 82, 87 (D. Mass. 1998).

students with mental disabilities, whether they be cognitive or psychiatric. The fundamental issue is the consideration of the needs of the student in light of the academic and technical standards that the student must meet in order to achieve academic success. The review of the case law that follows confirms that courts generally validate the judgments of faculty and academic administrators when students challenge academic decisions.

B. Academic Deference Applied

1. Academic Dismissals and Denials of Academic Accommodations.

As noted in Section I, students challenging academic dismissals under the ADA and Rehabilitation Act typically claim that institutions either refused to sufficiently accommodate their mental disabilities or retaliated against them for seeking accommodations or challenging their denial.[164] In order to make such a claim, a student must first prove that the relevant institutional officials either knew of the disorder or regarded the student as disabled, and then satisfy a three part test, proving that (1) the student is disabled, (2) the student is "otherwise qualified" to continue in the program, and (3) the student was dismissed from the program on the basis of the disability.[165] In order to prove that she is "disabled," the student must demonstrate that the mental disorder "substantially limits" a "major life activity."[166]

Many courts have rejected students' mental disability discrimination claims after finding that while the students may be "impaired," they are not "disabled" under federal law. Students encounter the most trouble satisfying the "substantial limitation" prong of the "disabled" test. The outcome of many recent cases turns upon the finding that a student has enjoyed substantial academic success previously and thus is not "substantially limited" in learning, despite the student's current problems making satisfactory academic progress. In the seminal case *Wong v. Regents of the University of California*,[167] the Ninth Circuit affirmed the trial court's determination that a medical student's learning disabilities did not "substantially impair" his ability to learn, even though he had been dismissed on academic grounds, because he had made satisfactory academic progress during his first two years of medical school and had been academically successful in high school and college.[168] Similarly, in *Steere v. George Washington University School of Medicine and Health Sciences*,[169] a medical student who did not meet the school's academic standards was dismissed.[170] Despite becoming aware of the

164. *See supra* Section I.

165. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 435 (6th Cir. 1998).

166. Davis v. Univ. of N.C., 263 F.3d 95, 99 (4th Cir. 2001).

167. 410 F.3d 1052 (9th Cir. 2005). For a critique of the *Wong* decision, see Dylan Gallagher, Wong v. Regents of the University of California: *The ADA, Learning Disabled Students, and the Spirit of Icarus*, 16 GEO. MASON U. CIV. RTS. L.J. 153 (2005).

168. *Wong*, 410 F.3d at 1065.

169. 439 F. Supp. 2d 17 (D.D.C. 2006).

170. *Id.* at 20.

student's Attention Deficit Hyperactivity Disorder (ADHD) and other learning disabilities prior to making the final decision, the dean of the medical school decided to dismiss Steere.[171] The court ruled that Steere was not disabled because he had "enjoyed a great deal of academic success throughout his life . . . and performed extremely well in many subjects."[172]

Those student plaintiffs who succeed in convincing courts that their disorders are substantially limiting often find their claims rejected for failure to satisfy the "otherwise qualified" element of ADA and Rehabilitation Act claims. Students with mental disorders have had difficulty demonstrating that, with or without reasonable accommodation, they can meet the academic and technical standards of a program.[173] In *el Kouni v. Trustees of Boston University*,[174] for example, a student with clinical anxiety, depression, and bipolar disorder was dismissed from the M.D./Ph.D. program because he was unable to meet the program's academic standards.[175] The medical school had given el Kouni a number of accommodations, including extra time on exams.[176] In addition to his academic problems, el Kouni engaged in disruptive behavior during lectures.[177] A jury found for the medical school on el Kouni's ADA and Rehabilitation Act claims.[178] El Kouni then sought an injunction to expunge his academic record so that he could be reinstated to the medical school.[179] The court rejected his motion, accepting the university's argument that the plaintiff lacked the scientific aptitude for the M.D./Ph.D. program and ruling that he was not qualified because no reasonable accommodation could enable him to satisfy its academic requirements.[180]

Similarly, in *Falcone v. University of Minnesota*[181] a medical student with ADD and hearing loss was given all of the accommodations he requested at the time he enrolled, including part-time status, but could not earn grades that met the minimum criteria for retention in the program.[182] After providing numerous accommodations and affording Falcone four hearings to determine the source of his academic problems (after each of which additional accommodations were provided), the medical school dismissed him because he could not demonstrate that "he could synthesize data in a clinical setting to perform clinical reasoning, an essential element of functioning as a medical student and physician."[183] The court

171. *Id.*

172. *Id.* at 21–22. *See also* Marlon v. W. New England Coll., No. Civ. A. 01-12199, 2003 WL 22914304 (D. Mass. Dec. 9, 2003) (finding law student with anxiety and depression not substantially limited in ability to learn because of previous academic success).

173. 34 C.F.R. § 104.3(*l*)(1) (2006).

174. 169 F. Supp. 2d 1 (D. Mass. 2001).

175. *Id*. at 3.

176. *Id.*

177. *Id.* at 4.

178. *Id.*

179. *Id.* at 2.

180. *Id.* at 4–5.

181. No. Civ. 01-1181, 2003 WL 22076604 (D. Minn. Sept. 3, 2003).

182. *Id.* at *2.

183. *Id.* at *4. *Cf.* Lemson v. Mich. State Univ., No. 232227, 2002 Mich. App. LEXIS 1528

concluded that Falcone was not "otherwise qualified" to continue as a student.[184]

The few courts that have moved to the third step of the analysis—whether the plaintiff was dismissed *because* of the mental disability—have concluded that the institutions' attempts to accommodate were sufficient and it was the students' inability to meet academic standards that led to the dismissals. For example, in *Betts v. Rector and Visitors of the University of Virginia*[185] the court detailed the medical school's attempts to accommodate a student with short-term memory problems and a slow reading speed.[186] Ultimately, the student was dismissed for failing to maintain the requisite grade point average.[187] The court concluded that there was no causal link between the student's disability and his dismissal.[188] And in *Satir v. University of New England*[189] a medical student with depression and learning disorders was dismissed for failing to meet the medical school's academic standards.[190] The school had allowed her to repeat courses and provided all of the accommodations she requested.[191] The court concluded that the plaintiff had been dismissed for her academic failings, not because of her depression.[192] Similarly, the court in *Falcone* noted that the medical school had allowed Falcone to repeat several classes, which was forbidden by medical school policy, as a method of accommodating his learning disabilities, and that further accommodation was not required.[193]

In cases involving challenges to academic decisions, courts have shown considerable deference to the academic judgments of faculty and administrators. One reason may be that, in most of these cases, students have been provided multiple opportunities to redeem their prior academic performance, including being given the opportunity to retake classes they have failed,[194] take a lighter course load,[195] postpone certain courses so that they can study for national examinations,[196] or receive additional personalized feedback on their performance.[197] For example, in *Pangburn v. Northern Kentucky University*,[198] a

(Mich. Ct. App. Nov. 1, 2002) (deciding claim under Michigan's Persons With Disabilities Civil Rights Act, Mich. Comp. Laws §§ 37.1201–14 (2001)).

184. *Falcone*, 2003 WL 22076604, at *7.

185. 145 F. App'x. 7 (4th Cir. 2005) (per curiam).

186. *Id.* at 13–14.

187. *Id.* at 8.

188. *Id*.

189. No. 04-42-P-S, 2005 WL 757576 (D. Me. Feb. 10, 2005).

190. *Id.* at *4.

191. *Id.* at *2–4.

192. *Id*. at *7.

193. Falcone v. Univ. of Minn., No. Civ. 01-1181, 2003 WL 22076604, at *7 (D. Minn. Sept. 3, 2003).

194. Brown v. Univ. of Cincinnati, No. C-1-04-164, 2005 U.S. Dist. LEXIS 40798, at *8–10 (S.D. Ohio June 3, 2005); Marlon v. W. New England Coll., No. Civ. A. 01-12199, 2003 WL 22914304, at *2 (D. Mass. Dec. 9, 2003).

195. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 434–35 (6th Cir 1998).

196. *Brown*, 2005 U.S. Dist. LEXIS 40798, at *11.

197. *Falcone*, 2003 WL 22076604, at *2.

198. No. 99-5474, 2000 U.S. App. LEXIS 6413 (6th Cir. Mar. 23, 2000).

student with a math learning disability was permitted to take a required mathematics course six times, yet could not pass the course.[199] Although the student claimed that the university should exempt her from the math course, which was required for teacher certification, the court stated the course was a necessary requirement of the university's elementary education program.[200] "This finding was made in light of the courts' deference to educational institutions and the Kentucky Department of Education on such issues."[201]

And in *Shaboon v. Duncan*,[202] the court, reviewing the dismissal of a student with major depression and obsessive compulsive disorder, concluded that the student's refusal to cooperate with her treating psychiatrists was a "sound academic basis for her dismissal,"[203] citing *Horowitz* for its conclusion that Shaboon's dismissal was based upon the academic judgment that she was not fit to perform as a doctor.[204]

In sum, these cases demonstrate that students' challenges to academic dismissals will rarely succeed and are virtually doomed to failure where a student who has previously experienced academic success fails to satisfy academic criteria despite an institution's provision of multiple accommodations.

2. Dismissals for Academic Misconduct and Failure To Meet Technical Standards.

As the cases involving the academic dismissal of medical students attest,[205] students preparing for professional careers must not only be able to perform acceptably in the classroom but must also be able to meet the technical and conduct standards of a professional program, such as clinical observation and analysis for medical students[206] or professional behavior for prospective teachers.[207] Courts, following the lead of *Horowitz*[208] (in which the Supreme Court characterized difficulties with personal hygiene and interactions with patients and instructors as *academic* failings),[209] have viewed dismissal for failure to comply with technical standards as academic rather than disciplinary and have, accordingly, been deferential to the judgment of those making the dismissal

199. *Id.* at *2.

200. *Id.* at *6.

201. *Id.*

202. 252 F.3d 722 (5th Cir. 2001).

203. *Id.* at 731.

204. The court addressed the distinction between academic and disciplinary dismissals, concluding that Shaboon's dismissal was based upon academic grounds, not solely on conduct. *Id.*

205. *Id.* at 722 (student refused treatment for her depression, did not attend required rounds, stopped taking required medication, and allegedly threatened the children of a staff member); el Kouni v. Trs. of Boston Univ., 169 F. Supp. 2d 1 (D. Mass. 2001) (persistent offensive and disruptive behavior during lectures).

206. *See, e.g.*, *el Kouni*, 169 F. Supp. 2d 1.

207. *See, e.g.*, Davis v. Univ. of N.C., 263 F.3d 95 (4th Cir. 2001).

208. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

209. *Id.* at 91.

decision.

In *Davis v. University of North Carolina*,[210] a student who had dissociative identity disorder ("multiple personality disorder") enrolled in a master's degree program and sought certification as a special education teacher.[211] After several incidents of "inappropriate and sometimes aggressive behavior" toward several of her professors and fellow students, the student was removed from the teacher certification program in special education.[212] The program's technical requirements included "professional demeanor; professional interactions with university students, faculty, staff, and administrators; . . . and adherence to school rules and ethical standards."[213] The faculty who made the decision to withdraw the student from the certification program were also concerned about her ability to work with children, particularly those with special needs.[214] The university allowed Davis to continue in the master's program but refused to allow her to complete the requirements that would enable her to teach.[215] In ruling for the university, the court assumed, without deciding, that Davis was qualified to be a graduate student but concluded that Davis was not "substantially limited" in her ability to work.[216] At most, said the court, she might be limited in her ability to work in a job that involved unsupervised interaction with young children, but she was not limited in her ability to perform a wide range of other jobs.[217] The court noted, "neither the ADA nor the Rehabilitation Act protects 'every dream or desire that a person might have.'"[218]

Disposition of a similar claim against the California State University at Bakersfield turned upon the "otherwise qualified" and causation requirements rather than the student's failure to demonstrate substantial limitation (and thus disability). A student who had been denied entry into a special education master's program at the university filed a complaint with the OCR under the Rehabilitation Act.[219] The student needed a service dog to perform certain functions for her.[220] She did not control her service dog on several occasions during a laboratory class and the dog disrupted the work of students and staff.[221] When asked to control her service dog, the student made threatening gestures and cursed at university staff.[222] A faculty committee determined that her misconduct did not meet the professional standards of students enrolled in the special education certification program and

210. 263 F.3d 95 (4th Cir. 2001)
211. *Davis*, 263 F.3d at 96–97.
212. *Id*. at 97.
213. *Id.* at 98.
214. *Id.* at 99.
215. *Id.* at 98.
216. *Id.* at 100.
217. *Id.*
218. *Id.* (quoting Knapp v. Northwestern Univ., 101 F.3d 473, 481 (7th Cir. 1996)).
219. Cal. State Univ., Bakersfield, No. 09-02-2183, 2003 NDLR (LRP) LEXIS 920 (Off. for Civ. Rts. W. Div. May 30, 2003).
220. *Id.* at *1.
221. *Id.*
222. *Id.*

denied her admission to that program, although it did allow her to complete her master's degree.[223] The committee concluded that the student did not "possess the disposition, the character, nor the self-control which are requirements for the credential."[224] Framed through the lens of causation, OCR ruled that the university's decision was based solely upon its application of its professional standards of conduct for teachers, after the university was able to point to a second, nondisabled student who was also denied admission to the credentialing program because of similar concerns about the student's behavior.[225]

223. *Id.* at *10–11.
224. *Id.* at *11.
225. *Id.* at *14.

3. Denials of Readmission.

Although most cases involving students with mental disabilities who challenge academic decisions involve dismissal from an academic program, in some cases students challenge the refusal to readmit them rather than the dismissal decision. Courts often decide these cases at the "otherwise qualified" stage after applying the principle of academic deference. For example, in *Anderson v. University of Wisconsin*,[226] a case brought under the Rehabilitation Act, a student with alcoholism was dismissed for poor academic performance after being readmitted two times previously.[227] On the student's fourth attempt at admission to the law school, the institution denied readmission.[228] The student claimed that the law school had made its decision based upon his alcoholism. The court affirmed the lower court's award of summary judgment for the university, noting that the denial of readmission was based upon "honest judgments about how Anderson had performed in fact and could be expected to perform."[229] The court rejected the student's argument that a jury should decide his case, stating, "The Act does not designate a jury, rather than the faculty of the Law School, as the body to decide whether a would-be student is up to snuff."[230]

Similarly, academic deference played a deciding role in *Hash v. University of Kentucky*,[231] where a student with depression who had academic difficulties withdrew from the University of Kentucky Law School and then sought readmission.[232] The student's application for readmission contained information that troubled the dean, including newspaper articles about mental illness and information about a law student at another institution who had walked down a street firing an M-1 rifle.[233] The dean required Hash to obtain letters from treating psychiatrists and to be evaluated by the law school's doctor to establish that he was not a threat to himself or others.[234] The student did not provide the requested

226. 841 F.2d 737 (7th Cir. 1988).

227. *Id.* at 739.

228. *Id.*

229. *Id.* at 741.

230. *Id.* If, however, the court finds that the institution did not perform an individualized determination of whether the student could be successful in the program if accommodated, it will deny summary judgment. *See, e.g.*, Carlin v. Trs. of Boston Univ., 907 F. Supp. 509 (D. Mass. 1995) (denying summary judgment where student with depression was refused readmission despite prior record of acceptable academic performance and plaintiff provided sufficient evidence of pretext to require case to be tried).

231. 138 S.W.3d 123 (Ky. Ct. App. 2004) (deciding claim under the Kentucky Civil Rights Act, KY. REV. STAT. ANN. § 344.010–344.500 (West 2003)).

232. *Id.* at 124.

233. *Id.* at 127.

234. *Id.* at 127–28. OCR has ruled that requesting updated medical and/or psychiatric information from a student applying for readmission when the student has withdrawn, voluntarily or involuntarily, because of the psychiatric disorder, does not violate the Rehabilitation Act. *See, e.g.*, Regent Univ., No. 11-03-2022, 2003 NDLR (LRP) LEXIS 890 (Off. for Civ. Rts. S. Div. Nov. 20, 2003) (student with bipolar disorder had academic and behavioral problems while enrolled as a graduate student, including telling administrators that he would "take heads and

information and the school refused to readmit him.[235] The court ruled that the dean's concerns were legitimate and deferred to the university's judgment that Hash was not "otherwise qualified" to fulfill the academic requirements of the law school curriculum.[236]

Thus, a review of the case law regarding the types of academic decisions challenged most frequently—academic dismissals, denials of academic accommodations, dismissals for academic misconduct, dismissals for failure to meet technical standards, and denials of readmission—confirms that courts generally apply the principle of academic deference and validate the judgments of faculty and academic administrators when students challenge decisions that are primarily academic in nature.

III. STUDENT CHALLENGES TO DISCIPLINARY DECISIONS

As noted in Section II, courts are far less deferential to colleges and universities when reviewing their disciplinary decisions such as suspensions or expulsions for social misconduct.[237] Although most student challenges to disciplinary actions involve Constitutional[238] or contract[239] claims, some students with mental disorders have challenged disciplinary actions taken against them as violations of the ADA and/or the Rehabilitation Act. Despite the greater scrutiny accorded these decisions, courts have generally rejected student challenges to disciplinary dismissal. Some courts hold that a student who cannot comply with an institution's rules of conduct is not "otherwise qualified" for retention.

Childress v. Clement[240] involved the expulsion of a student for cheating and plagiarism.[241] Childress, a graduate student in the criminal justice program, had several learning disabilities of which the university was aware. He was charged with violations of the university's Honor System when he submitted the same paper for two different courses without permission and allegedly plagiarized portions of a comprehensive examination.[242] The Honor Council found him guilty of three counts of academic misconduct, and the president expelled Childress.[243]

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stick them on poles"). *See also* Cmty. Coll. of S. Nev., No. 10-02-2045, 2002 NDLR (LRP) LEXIS 938 (Off. for Civ. Rts. W. Div. Oct. 18, 2002) (student with schizophrenia stated that he had homicidal tendencies and was declared by the Department of Veterans Affairs to pose a danger to himself and others).

235. *Hash*, 138 S.W.3d at 127–28.

236. *Id.*

237. *See supra* Section II.

238. *See, e.g.*, Esteban v. Cent. Mo. State Coll., 415 F.2d 1077 (8th Cir. 1969). *See also* Sadik v. Univ. of Houston, No. Civ. A. H-03-4296, 2005 WL 1828588, at *9 (S.D. Tex. Aug. 1, 2005) (academic dishonesty); Fedorov v. Bd. of Regents for Univ. of Ga., 194 F. Supp. 2d 1378, 1388 (S.D. Ga. 2002).

239. *See, e.g.*, Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575 (Pa. Super. Ct. 1990). *See also* Harwood v. Johns Hopkins Univ., 747 A.2d 205, 209–13 (Md. Ct. Spec. App. 2000).

240. 5 F. Supp. 2d 384 (E.D. Va. 1998).

241. *Id.* at 387.

242. *Id.*

243. *Id.*

In his claims under federal and state disability discrimination law, Childress claimed the university had not taken into account his disability when it determined that he had engaged in academic misconduct.[244]

Although the court assumed without deciding that Childress was disabled, it determined that he was not "otherwise qualified" because of his academic misconduct.[245] It found that the Honor Council and various levels of appeal had taken Childress' disability into consideration as a possible mitigating reason not to punish him, but had concluded that his conduct was too serious to allow him to continue as a graduate student.[246] The court ruled that Childress could not establish that he could perform the essential functions of a graduate student because he did not comply with the requirements of the Honor Code. The court rejected Childress' argument that the university should accommodate him by not applying its Honor Code to his conduct.[247]

In defending against the claims of students with mental disorders who are dismissed for misconduct, some institutions have alleged that the student was a "direct threat" to himself or others. For example, in *Ascani v. Hofstra University*,[248] a graduate student with an unspecified "mental illness" harassed and threatened a professor, and pled guilty to harassment and trespass charges.[249] She was expelled as a result of that conduct. The sole issue addressed by the court—whether the university's determination that the student was a "direct threat" and thus not qualified to be a graduate student—was supported.[250] The court summarily determined that the university's analysis was reasonable and upheld summary judgment for the university.[251]

Other courts rejecting challenges to disciplinary decisions under the federal disability discrimination statutes hold that the student's misconduct, even if itself caused by a disability, provides a nondiscriminatory "cause" for the institution's disciplinary decision. A medical resident with ADHD and dyslexia challenged his dismissal for both academic and misconduct reasons in *Tori v. University of Minnesota.*[252] The student, a resident in the family-practice and psychiatry training program, had been accused of engaging in a sexual relationship with a patient (a serious ethical violation, according to the American Medical Association),[253] failing to attend required lectures, interacting inappropriately with female medical residents, and behaving disrespectfully to a chief resident.[254] He was also accused of inappropriately withdrawing medicine from a patient in order

244. *Id.*
245. *Id.* at 391–92.
246. *Id.* at 391.
247. *Id.*
248. No. 98-7756, 1999 WL 220136 (2d Cir. Apr. 9, 1999).
249. *Id.* at *1.
250. *Id*.
251. *Id.*
252. No. A06-205, 2006 WL 3772316 (Minn. Ct. App. Dec. 26, 2006).
253. *Id*. at *2.
254. *Id.* at *7.

to punish the patient.[255] Although the court assumed, without deciding, that Tori was "otherwise qualified," it decided that the medical school's reasons for dismissing him were nondiscriminatory and affirmed the trial court's award of summary judgment for the university.[256]

In *Mershon v. St. Louis University*,[257] another case that involved both academic and social misconduct, a student with cerebral palsy challenged the university's refusal to allow him to enroll in a history graduate program because he lacked the undergraduate preparation.[258] He had already received a number of accommodations from the university.[259] When the student learned that he would not be admitted to the graduate program, he allegedly contacted an OCR investigator and threatened to shoot the faculty director of the graduate program. The investigator contacted the Department of Homeland Security, who advised the university's director of public safety.[260] The university issued an order prohibiting the student from entering campus.[261] The student challenged his barring from campus under the ADA and Rehabilitation Act, claiming both failure to accommodate and retaliation.[262] The court rejected the student's retaliation claim, noting that the student admitted to calling the OCR investigator (although not to the threat) and that the university's prompt action to bar him from campus was a direct result of the alleged threat made by the student.[263] With respect to the accommodation claim, the court deferred to the university's judgment concerning the student's qualifications to enroll in the graduate program, as well as its history of accommodating the student in the past.[264]

In *Rosenthal v. Webster University*,[265] when a student with bipolar disorder carried a gun on campus and threatened to use it, he was suspended and given a set of conditions he had to fulfill before being readmitted.[266] Because the student did not fulfill the university's requirements for readmission, which included refraining from additional misconduct, the university refused to readmit him. The court made short work of affirming the lower court's award of summary judgment to the university, ruling that the student was not suspended because of his disability but rather because of his conduct.[267]

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255. *Id.*
256. *Id.* at *7–9.
257. 442 F.3d 1069 (8th Cir. 2006).
258. *Id.* at 1072–73.
259. *Id.* at 1071.
260. *Id.* at 1073.
261. *Id.*
262. *Id.*
263. *Id.* at 1075–76.
264. *Id.* at 1078.
265. No. 98-2958, 2000 WL 1371117 (8th Cir. Sept. 25, 2000).
266. *Id.* at *2.
267. *Id.* The prevailing view of courts interpreting the ADA in the employment context has been that an employee may be disciplined for misconduct, even if that misconduct is a result of a disability. However, the Ninth Circuit, interpreting Washington law, reached a different conclusion in *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007). The court agreed with the plaintiff's assertion that the jury, which had found for the employer who

These cases should not, however, be taken to indicate that academic deference applies with equal force in the disciplinary decision context. An interesting example of a court's refusal to defer to the finding of a student disciplinary board regarding a dismissal is *Stathis v. University of Kentucky*.[268] In *Stathis*, a medical student was dismissed for threatening a fellow student and for exhibiting "inappropriate hostile behavior on several occasions."[269] The student was not disabled but filed a number of claims, including a disability discrimination claim under Kentucky law, alleging that the medical school regarded him as having a mental impairment because the medical school required him to submit to two psychiatric evaluations as a result of the incident with the fellow student.[270] The court determined that Stathis did not meet the test of "regarded as" disabled because he did not provide evidence that the medical school viewed him as substantially limited in some major life activity.[271] Rather, "he was regarded as having a quick temper and as using poor judgment . . . by making threats toward a fellow student."[272] The court awarded summary judgment to the medical school on the disability discrimination claim, but denied summary judgment on his breach of contract claim because there was evidence that the student with whom Stathis had the dispute may have provoked the confrontation.[273]

Similarly, in *Amir v. St. Louis University*,[274] a court reviewing a dismissal for a mixture of academic and disciplinary reasons rejected the student's discrimination claim but denied summary judgment on the student's retaliation claim.[275] The medical student, with obsessive compulsive disorder, engaged in several minor incidents of misconduct for which he was not disciplined by the medical school.[276]

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dismissed the plaintiff after she engaged in a "violent outburst," should have been told that "[c]onduct resulting from a disability is part of the disability and not a separate basis for termination." *Id.* at 1093–95. The plaintiff had bipolar disorder and argued that her conduct was a result of that mental illness. *Id.*

268. No. 2004-CA-000556-MR, 2005 WL 1125240 (Ky. Ct. App. May 13, 2005).

269. *Id.* at *1.

270. *Id.* at *7.

271. *Id.* at *8.

272. *Id.*

273. *Id.* at *8–10. The court allowed the plaintiff's breach of contract claim to go forward, noting that "a fact-finder might [reasonably] believe that his conduct did not rise to the level such that he breached the conduct code of the Medical School, and, accordingly, did not breach the contract between the parties." *Id.* at *10. This ruling engendered a strong dissent by a judge who would have been more deferential to the finding of the disciplinary committee. The dissenting judge wrote: "Judicial scrutiny of the determination of disciplinary matters between a university and its students, or student organizations, is limited to determining whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions [were] arbitrary or capricious." *Id.* (Vanmeter, J., concurring in part and dissenting in part) (internal citations omitted). The dissenting judge also suggested that the "substantial evidence standard of review applicable to the decisions of administrative agencies" should be used to review the findings of fact of an internal student judicial board. *Id.* at *10–11.

274. 184 F.3d 1017 (8th Cir. 1999).

275. *Id.* at 1021.

276. *Id.* at 1022. Amir posted flyers using former students' names without their permission and offered a former student's baseball tickets to others for free without her permission. *Id.*

He also encountered academic problems during his third year and voluntarily committed himself to hospitalization when his disorder became worse.[277] Because of his absence from his clinical duties in his psychiatric clerkship, he was required to seek readmission.[278] The supervising professor, who had originally insisted that Amir obtain in-patient treatment for his disorder, at first refused his readmission request.[279] Amir filed a grievance against the professor. Later, when Amir was finally allowed to complete the psychiatric clerkship, the professor gave him a failing grade.[280] Amir was then dismissed from the university.[281] Amir sued the university, claiming both discrimination and retaliation.[282] The court awarded summary judgment to the university on Amir's disability discrimination claim, ruling that there was no evidence that the decision to dismiss him was based on his disability.[283] However, it refused to rule for the university on Amir's retaliation claim, stating that Amir had provided sufficient evidence to suggest that retaliation for filing the grievance may have been a motive for the failing grade he received in the psychiatry clerkship.[284]

A review of cases involving student challenges to disciplinary decisions demonstrates that courts often reject such claims after finding that the student is not "otherwise qualified" or that her misconduct constituted the "cause" of the decision. However, it is also clear that courts are less deferential to these decisions than to academic ones. Thus, in cases where the challenged decision is based upon a mixture of academic performance and social misconduct, students are less likely to prevail. If, however, a student is able to provide evidence that a disciplinary decision was motivated, in whole or in part, by animosity of an individual or group toward the student or is a form of retaliation, the court will generally require the case to go to trial.

277. *Id.* at 1023.
278. *Id.*
279. *Id.*
280. *Id.* at 1023–24.
281. *Id.* at 1024.
282. *Id.*
283. *Id.*
284. *Id.* at 1026.

IV. AT-RISK STUDENTS AND SELF-INFLICTED HARM

As noted in the introduction to this article, students are reporting more, and more serious, psychiatric disorders. One source estimates that 1,100 college and university students die by suicide each year.[285] Lawsuits such as those brought by the parents of Elizabeth Shin, who allegedly committed suicide while attending the Massachusetts Institute of Technology,[286] have motivated some institutions to be proactive and to attempt to prevent on-campus suicide by barring suicidal students from campus. In some instances, colleges and universities have required students to withdraw until they can present a psychiatrist's assurance that the student is not a risk to himself or others. These "mandatory withdrawal" or "emergency withdrawal" policies have engendered a number of OCR complaints and, in at least one case, a lawsuit. Other institutional decisions such as barring at-risk students from campus housing or requiring supervised housing have also prompted OCR complaints.

A. Mandatory Withdrawals

Most student challenges to mandatory withdrawals have involved complaints to OCR rather than litigation under the ADA or the Rehabilitation Act. This strategy may be an attempt to obtain resolution faster than the judicial process allows. The Rehabilitation Act authorizes OCR to investigate alleged violations of that law through review of relevant documents and interviews with the complainant, the complainant's parents (if relevant), and college and university faculty and staff.[287] In response to complaints challenging a mandatory withdrawal, the college or university typically argues that the student was a "direct threat" to himself or others, and that the institution could not provide a reasonable accommodation that would reduce or remove that threat.

Under OCR interpretation, in order to demonstrate that an individual is a "direct threat," a college or university must determine that there is a "high probability of substantial harm and not just a slightly increased, speculative, or remote risk."[288] The college or university must make an "individualized and objective assessment" as to whether the student can continue to participate in the institution's programs safely, "based on a reasonable medical judgment relying on the most current

285. NAT'L MENTAL HEALTH ASS'N & JED FOUND., SAFEGUARDING YOUR STUDENTS AGAINST SUICIDE (2002), *available at* http://www.jedfoundation.org/articles/SafeguardingYourStudents.pdf. For a discussion of the prevalence of suicidal students on campus and the law and policy issues relevant to this problem, see Peter Lake & Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, 32 STETSON L. REV. 125 (2002).

286. Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101 (Mass. Sup. Ct. June 27, 2005).

287. 34 C.F.R. § 105.41 (1990).

288. Letter from Rhonda Bowman, Team Leader, U.S. Dep't of Educ., Off. for Civ. Rts., to Lee Snyder, President, Bluffton Univ. (Dec. 22, 2004), *available at* http://www.bazelon.org/pdf/OCRComplaintBluffton.pdf [hereinafter *Bluffton*].

medical knowledge or the best available objective evidence."[289] The assessment "must determine the nature, duration, and severity of the risk; the probability that the potentially threatening injury will actually occur, and whether reasonable modifications of policies, practices, or procedures will sufficiently mitigate the risk."[290]

In a complaint brought against Guilford College,[291] a student with post-traumatic stress and disassociative disorder complained that the college required her to withdraw because of her disabilities.[292] The college was on notice of her disorders and the student had sought assistance from the college's director of counseling services on two occasions. The counselor knew that the student was "a cutter."[293] The student cut herself shortly before her parents were scheduled to visit for parents' weekend and was taken to the emergency room by another student.[294] After a second and then a third cutting incident, the student was committed involuntarily to a hospital, but doctors there determined that she was not a suicide threat.[295] Upon her return to campus, she was informed that the college was requiring her to withdraw for medical reasons.[296] Although the student requested a hearing to appeal the withdrawal decision, the college refused, stating that the withdrawal was not disciplinary.[297] She was required to leave campus that day. Approximately ten days after the student left campus, the associate dean, who had not been involved in the decision to impose the involuntary withdrawal, reviewed the student's appeal and the college's actions. He upheld the college's decision.[298]

OCR found that the decision to impose involuntary withdrawal was made prior to the student's second serious cutting incident and prior to her involuntary hospitalization.[299] OCR criticized college staff for not contacting the student's previous psychologist to ask for his opinion and for inviting the student's parents to parents' weekend despite the student's repeated statements that she was estranged from them and did not want to see them.[300] Most importantly, the college "did not consider any alternatives less severe than withdrawal from all College programs as a modification for the [student], such as whether she was still qualified to participate in the academic program even if she may not have been qualified to participate in the College's housing program."[301] There was no

289. *Id.*
290. *Id.*
291. Guilford Coll., No. 11-02-2003, 2003 NDLR (LRP) LEXIS 627 (Off. for Civ. Rts. S. Div. Mar. 6, 2003).
292. *Id.* at *1.
293. *Id.* at *10.
294. *Id.*
295. *Id.* at *12–14.
296. *Id.* at *13–14.
297. *Id.* at *14.
298. *Id.* at *16–17.
299. *Id.* at *26–27.
300. *Id.* at *28.
301. *Id.* at *28–29.

evidence that the academic environment was the cause of the student's cutting behavior, according to OCR, and the college had not provided the student with due process in making a determination that the student was a direct threat to herself or other students.[302] Furthermore, the college did not provide rudimentary due process protections to the student such as a notice of its intent to impose mandatory withdrawal and an opportunity for the student to be heard prior to her exclusion from campus.[303] Finally, OCR criticized the college for imposing certain conditions on the student if she wished to return, such as requiring her to demonstrate that she was no longer engaging in self-injurious behavior since not all "self-injurious behavior may be sufficiently serious as to constitute a direct threat."[304] OCR required the college to revise its policies to reflect the concerns that arose in the case.[305]

In a case brought against Bluffton University, OCR again found for the student, who was required to withdraw after she attempted suicide.[306] After the attempted suicide, the student was hospitalized for a week, during which she was diagnosed with bipolar disorder, a condition previously unknown to the student, her family, or the university.[307] Before her release, a university official contacted the student's mother and informed her that the student would be withdrawn.[308] The university did not contact the student's treating professionals or others before making this decision and refused to consider documentation from the student's mental health counselor indicating that she was no longer suicidal and could return to campus.[309] Shortly after she was told to leave campus, the student and her mother met with the administrator who made the withdrawal decision, asking him to allow the student to return to campus. The official refused and rejected further requests by the student's mother to reconsider or modify his decision.[310]

OCR criticized the staff member responsible for making the withdrawal

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302. *Id.* at *29.

303. *Id.* at *33–34.

304. *Id.* at *35.

305. OCR required the college to:

1. Revise its policies regarding students with mental or psychological disabilities.
2. Develop and publicize procedures for disability discrimination complaints.
3. Establish a policy for assessment for students who are suspected of being a "direct threat."
4. Establish reasonable conditions for readmission based upon "direct threat" standards.
5. Train personnel on the new policies and procedures.
6. Remove references to involuntary withdrawal from the complaining student's records.
7. Consider the complaining student's application for readmission in a nondiscriminatory manner, if submitted.

Id. at *2–3.

306. *Bluffton*, *supra* note 288.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

decision, saying that the official "did not consult with medical personnel, examine objective evidence, ascertain the nature, duration and severity of the risk to the student or other students, or consider mitigating the risk of injury to the Student or other students."[311] Instead, "the evidence showed that the University made a determination to withdraw the Student within forty-eight hours of her attempted suicide based on a conversation between the Official [who made the decision] and [the university president]."[312] OCR determined that the university regarded the student as disabled as a result of her suicide attempt and that it had denied her due process by refusing to reconsider the withdrawal decision once the student provided information from mental health professionals stating that she could return to campus.[313]

Likewise, in a complaint brought against Marietta College,[314] a student who had been admitted to the college claimed that the college had dismissed him one month after the beginning of his freshman year when it learned that he had a history of depression and suicide attempts.[315] The college explained that it had made the mandatory withdrawal decision because, during his month on campus, the student had resisted meeting with his psychologist as frequently as the psychologist believed necessary and had talked to his roommate about death.[316] OCR determined that college officials had not obtained enough information to determine whether the student was a direct threat to himself.[317] According to OCR, the college

> never conducted an individualized and objective assessment of the Student's ability to safely participate in the College's program, based on a reasonable medical judgment, and did not consider whether the perceived risk of injury to the Student could have been mitigated by reasonable modifications of College policies, practices, or procedures.[318]

Furthermore, the parents were never advised of their right to appeal the college's decision.[319]

Jordan Nott, a student who was similarly subjected to his university's mandatory withdrawal policy, brought a lawsuit rather than filing a complaint with OCR.[320] Nott, who suffered from depression, had checked himself into the George

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311. *Id.*

312. *Id.*

313. *Id.*

314. Marietta Coll., No. 15-04-2060, 2005 NDLR (LRP) LEXIS 371 (Off. for Civ. Rts. Midwestern Div. July 26, 2005).

315. *Id.* at *4–5.

316. *Id.* at *9–10.

317. *Id.* at *12–13.

318. *Id.*

319. *Id.* at *13.

320. Brittany Levine, *University, Nott Reach Settlement*, DAILY COLONIAL (Wash., D.C.), Nov. 1, 2006, *available at* http://www.dailycolonial.com/go.dc?p=3&s=3334. For background on the Nott situation, see Eric Hoover, *Dismissed for Depression*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 24, 2006, at A44.

Washington University hospital because he was having suicidal thoughts.[321] Several hours after his hospitalization, the university sent Nott a notice barring him from his residence hall and the following day he was told that he had violated the university's code of student conduct. He was barred from campus and was told that if he did not leave he would be suspended or expelled.[322] He was given the opportunity to appear before a student judicial board to contest the university's actions but withdrew instead and sued the university.[323] Nott filed claims against George Washington University under the ADA, the Rehabilitation Act, the District of Columbia Human Rights Act,[324] and the Fair Housing Act,[325] asserting that the university's mandatory withdrawal policy was unlawful.[326] The case settled. As part of the settlement agreement the university pledged to revise its policies for dealing with at-risk students.[327]

In every one of the OCR cases involving mandatory withdrawal reviewed for this article, the agency found for the student, often concluding that the university failed to satisfy the "direct threat" standard by neglecting to conduct an "individualized and objective assessment" and consider reasonable modifications that would mitigate risk.

B. Campus Housing Refusals

Students with mental disabilities have also challenged institutional decisions that, short of mandating their withdrawal from school, bar them from on-campus housing for engaging in self-injurious activity. In a complaint against DeSales University,[328] a student with depression reported that the university had required him to leave campus for three days[329] and denied him on-campus housing for one semester.[330] The university had barred the student from campus after several incidents, including self-cutting, persuaded university staff that the student needed to be seen by a doctor.[331] He was told that he could return when a doctor cleared him. The student obtained the note and was allowed to return to campus and to his residence hall.[332] After his return to campus, the student engaged in questionable behavior on two occasions, including visiting the campus health center and requesting a tranquilizer dart to use on certain emergency room staff.[333] These

321. Levine, *supra* note 320.

322. *Id.*

323. Nott then enrolled at the University of Maryland–College Park and has since graduated. He was represented in his lawsuit by the Bazelon Center for Mental Health Law. *Id.*

324. D.C. Code § 2-1401–11 (2007).

325. 42 U.S.C. § 3601–31 (2000).

326. Levine, *supra* note 320.

327. *Id.*

328. DeSales Univ., No. 03-04-2041, 2005 NDLR (LRP) LEXIS 568 (Off. for Civ. Rts. Feb. 17, 2005).

329. *Id.* at *6–7.

330. *Id.* at *10.

331. *Id*. at *6–7.

332. *Id.* at *7.

333. *Id.* at *8–9.

additional incidents persuaded the university to prohibit the student from living in campus housing the following semester until his mental disorder was under control. The student returned as a day student and filed a complaint with OCR.[334]

OCR ruled that the university was justified in removing the student from campus for three days until he obtained medical clearance because it was concerned for his safety and the safety of others.[335] But the university's denial of on-campus housing violated the student's rights under the Rehabilitation Act because the university did not make an individualized determination as to the student's ability to participate safely in campus housing.[336] OCR criticized the university for failing to consult with the student's doctor or require the student to develop a treatment plan as a condition of returning to campus housing.[337] In addition, the university's decision to allow the student to attend classes and other activities was inconsistent with its position that the student might pose a threat and consequently could not live in campus housing.[338] OCR required the university to develop a grievance procedure that would enable students to challenge decisions on accommodations.[339]

Yet in a similar complaint against Vassar College,[340] OCR ruled in favor of the college.[341] The complaining student had been hospitalized after she was evaluated as a suicide risk by two treating physicians.[342] The college made the required individualized assessment of the student's ability to continue attending classes, reviewing her medical history and consulting with the team of doctors who had treated her at the hospital. It concluded that she could continue attending classes, but only if she lived in supervised housing to ensure that she would take her medication.[343] After living in supervised housing for several months, the student asked to return to campus housing. The college demanded updated medical information before it would respond to her request.[344] When the student failed to supply the requested information and the college did not allow her to return to unsupervised campus housing, OCR concluded that no violation of the Rehabilitation Act had occurred.[345]

OCR's treatment of these two housing refusal claims indicates that institutions may take steps to reduce the risk that self-injurious students will commit suicide on campus. However, they clarify that prior to excluding a student, a college or university must make an individualized determination as to the student's ability to

334. *Id.* at *10–11.
335. *Id.* at *16.
336. *Id.* at *17.
337. *Id.* at *18.
338. *Id.*
339. *Id.* at *22–23.
340. Vassar Coll., No. 02-95-2121, 1996 NDLR (LRP) LEXIS 709 (Off. for Civ. Rts. Region II Jan. 24, 1996).
341. *Id.* at *3.
342. *Id.* at *4.
343. *Id.* at *4–5.
344. *Id.*
345. *Id.* at *5–6.

participate safely in campus housing.

C. Model Policies

The Bazelon Center for Mental Health Law, which represented Jordan Nott in his lawsuit against George Washington University, released a "Model Policy for Colleges and Universities" to consider when developing or revising their policies for dealing with at-risk students.[346] The Model Policy covers the availability of counseling and mental health services and under what circumstances students will be referred to these services; assurances of the confidentiality of counseling and mental health services; the accommodation process for students with mental health disorders; and the process by which voluntary and involuntary leaves of absence will be granted.

With respect to involuntary leave, the Model Policy requires that only if the student cannot remain on campus safely, even with accommodations and other supports, will such a leave be considered,[347] and it tracks the "direct threat" evaluation language used in the OCR decisions discussed above.[348] The Model Policy also provides (1) an opportunity for the student and/or the student's representative to appear before the committee making the decision concerning involuntary leave and (2) a process for returning from leave that does not penalize the student because the reason for the leave was a mental health reason rather than a physical health reason.[349]

The Model Policy also states that students who engage in self-injurious behavior—i.e., students who attempt suicide, have suicidal thoughts, or engage in self-cutting—will not be disciplined.[350] However, if a student violates the disciplinary code and then takes a voluntary leave for mental health reasons, the Model Policy provides that the relevant disciplinary proceedings will be stayed until the student returns rather than suspended entirely.[351]

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346. BAZELON CTR. FOR MENTAL HEALTH L., SUPPORTING STUDENTS: A MODEL POLICY FOR COLLEGES AND UNIVERSITIES (2007), *available at* http://www.bazelon.org/pdf/SupportingStudents.pdf.

347. *Id.* at 7.

348. *Id.* at 8.

349. *Id.* at 7–8.

350. *Id.* at 9. This provision of the model policy raises the issue of the institution's responsibility to other students, such as roommates of the troubled student, whose lives and studies may have been disrupted by the self-injurious behavior. Administrators and counsel may wish to review their student codes of conduct to see if they allow, or require, the institution to hold a self-injurious student responsible for harm to fellow students affected by their behavior.

351. *Id.* For a discussion of the legal and policy issues related to disciplining suicidal college and university students, see Gary Pavela, QUESTIONS AND ANSWERS ON COLLEGE STUDENT SUICIDE: A LAW AND POLICY PERSPECTIVE (2006). For a review of litigation regarding student suicide and a proposal that colleges and universities implement a "mandatory counseling" policy for suicidal students, see Valerie Kravets Cohen, Note, *Keeping Students Alive: Mandating On-Campus Counseling Saves Suicidal College Students' Lives and Limits Liability*, 75 FORDHAM L. REV. 3081 (2007).

CONCLUSION

Despite the prevalence of students with mental health problems on college and university campuses, most such students avoid the serious problems and conflicts discussed in this article.[352] Colleges and universities have been successfully evaluating and accommodating students with mental disabilities for decades.[353] A review of federal laws and cases interpreting them indicates that the key to dealing with students with mental disorders whose academic or social misconduct violates institutional policies is to make the process governing their conduct the same as that used for students whose misconduct is not linked to a mental disorder. Although institutional staff should make sure that the student is not being disciplined (or dismissed) because of the disability itself (such as self-inflicted harm), students who cannot meet academic standards or who cannot follow the rules for living in campus housing, for example, may be treated in the same manner as nondisabled students.

The important caveat to this approach, however, is that institutional staff must make an *individualized determination* about the student prior to enforcing academic or disciplinary standards. Is the misconduct or failure to meet academic standards a manifestation of the disorder or is it independent? Is there an accommodation that would mitigate the effect of the disorder and result in an improvement in academic performance or social conduct? Does the accommodation require the institution to lower academic or conduct standards? If it does, the accommodation may not be a reasonable one. If the student's behavior is considered threatening to himself or others, have the proper steps in the "direct threat" review been followed? Has the student's treating psychiatrist or other provider been consulted and has that information been considered? Have all the staff members who potentially have information about this student been consulted? If the student is not emancipated, have the student's parents been contacted and their opinions considered? Is the student enrolled in a program where children, patients, or other vulnerable populations may be exposed to erratic or unprofessional behavior? Does the institution have a grievance procedure for students who wish to challenge the institution's decision to discipline or dismiss them or who object to the denial of requested accommodations? Has the institution disseminated this information to students and made it easily accessible to them?

The review of litigation by students with mental disorders, both in court and before OCR, suggests that if an institution follows the steps outlined above, it will have complied with the dictates of the ADA and the Rehabilitation Act (and very likely with state law as well). More importantly, the institution will have used the ultimate sanction of exclusion as a last resort and only when other possibilities have been considered and rejected as unworkable.

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352. Furthermore, research has shown that individuals who are mentally ill are no more likely to engage in violence than individuals who are not mentally ill. SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., UNDERSTANDING MENTAL ILLNESS (2007), *available at* http://www.samhsa.gov/MentalHealth/understanding_MentalIllness_Factsheet.aspx.

353. The Rehabilitation Act was enacted in 1973.