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In August 2020, NACUA assumed full responsibility for the journal under the editorship of Dr. Barbara A. Lee. From 2016-2020 Rutgers Law School published the *Journal*. Prior to Rutgers, the *Journal* was published by Notre Dame Law School from 1986 to 2016, and the West Virginia University College of Law from 1980-1986.

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THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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ARTICLES

Doing Education Business in China

Roberta Chang, Sherry Gong,
Ogechi Muotoh, and Steven Robinson

Since higher education in China first began to open up in the late 1980s with the launch of the Johns Hopkins University-Nanjing University program in 1986, the overarching theme of China's market for higher education has been one of increasing demand, sophistication, and openness. pg 172

Does The First Amendment Protect Academic Freedom

Lawrence Rosenthal

Whatever the strength of the case for academic freedom, it remains the case that academic freedom can be granted or withheld at the discretion of the leadership of universities and colleges, and the elected officials entitled to dictate policy at those institutions, unless academic freedom enjoys constitutional protection. The constitutional status of academic freedom, in turn, is a matter of some dispute. This article offers an account of the relationship of the First Amendment to academic freedom. Part I explores the precedents and concludes that none support a doctrinal conception of academic freedom as a constitutional right of an individual scholar. Part II considers the normative case for a conception of academic freedom as a constitutional right of individual academics and finds it wanting. A First Amendment jurisprudence that would permit courts to override bona fide academic judgments made by universities to protect the "academic freedom" of individual teachers and scholars would be deeply problematic. Debates over the merits of pedagogy and scholarship, as long as they are fought on academic and pedagogical grounds, should occur within the university, not in the courts. pg 223

**Medical Education and Individuals With Disabilities:
Revisiting Policies, Practices, and Procedures in Light
of Lessons Learned From Litigation**

Laura Rothstein

In the thirty plus years since the Americans with Disabilities Act was passed, there have been a significant number of lengthy and costly judicial disputes involving medical school admission and enrollment of individuals with disabilities. This article reviews the history of medical education and provides a description of the evolution of the educational curriculum for medical school and how it has changed in recent years. It provides the legal framework of statutory and regulatory requirements for the application of federal disability discrimination law to medical school applicants and enrolled students. A synthesis of these cases (many lasting several years from incident to resolution) sheds light on what must be done, what can be done, and what should be done by medical school policy makers and administrators in response to the admission and enrollment of individuals with disabilities. The article suggests ways that medical schools could revise their evaluation procedures and practices both at the admissions stage and during medical school. The article stresses the importance of key top medical school leadership and medical school legal counsel in ensuring that this framework is implemented. The primary audience for this article are top administrators and legal counsel in institutions that set these policies and implement them.

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STUDENT NOTE

**Vulnerable Integrity: Two Whistleblower Cases
in Public Universities**

Nora Devlin

This note analyzes two state higher education whistleblowers' freedom of speech cases under state and federal laws: the 2018 case *Bradley v. West Chester University* and the ongoing case of *Khatri v. Ohio State University*. These cases serve as windows into the post-*Garcetti v. Ceballos* era, characterized by a lack of constitutional protection for whistleblowers in the public sphere, especially in public universities. My analyses of *Bradley* and *Khatri* raises questions about public trust in state institutions and the integrity of public officials, competing organizational and public values, and the problematic federal jurisprudence when it comes to First Amendment protections for higher education employees. The distinction between the roles of administrative staff like *Bradley*, and contingent research faculty like *Khatri* also raises important questions about whether staff and contingent faculty ought to have the same or different speech protections. This article argues that both cases have instructive value to not only higher education attorneys, but also educational researchers, and organizational stakeholders.

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BOOK REVIEWS

**Review of George McClellan and Neal H. Hutchens's
"Shared Governance, Law, and Policy in Higher Education:
A Guide for Student Affairs Practitioners"**

Kevin Pitt

Much of the classic scholarship on campus governance, such as Robert Birnbaum's *How Colleges Work*, have failed to create substantive connective tissue between student affairs practice and campus governance. To address this gap, McClellan and Hutchens have crafted a thoughtful and practical guidebook for student affairs professionals to help expand their understanding of university governance and how it correlates with their daily practice. Most importantly, the authors present a forward-thinking vision of campus governance founded upon inclusivity, shared power, ethics, trust, and engaging with purpose. As central as this text will become to the campus governance conversation the authors' framing of power and privilege inadequately addresses how the lack of inclusion in many university governance structures has hindered and may continue to hinder the refreshing new vision for inclusive campus governance the authors passionately advocate for. This lack of diversity and inclusivity in campus governance has led to campus unrest and a loss of faith in traditional university governance structures. McClellan and Hutchens open the door to the critical conversation of rethinking campus governance to address these modern challenges but fall just short of giving student affairs practitioners all the tools needed to politically deconstruct traditional campus power structures and to rebuild a new campus governance edifice they sketch the blueprint for.

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**Review of George S. McClellan and Neal H. Hutchens's
"Shared Governance, Law And Policy In Higher Education:
A Guide For Student Affairs Professionals"**

Michael Baughman

"Shared governance is one of the basic tenets of higher education, and yet there is considerable evidence that it is not generally understood by its primary participants—faculty members, presidents, and members of boards of trustees." The same can fairly be said about lawyers who practice in the area of higher education law. In *Shared Governance, Law and Policy in Higher Education*, authors George S. McClellan and Neal H. Hutchens seek to teach student affairs professionals about this challenging area, as part of the "American Series in Student Affairs Practice and Professional Identity." But the book is also a useful exploration of the topic for college and university lawyers who must advise clients in navigating these challenging waters.

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DOING EDUCATION BUSINESS IN CHINA

ROBERTA CHANG, SHERRY GONG, OGECHI MUOTOH,
AND STEVEN ROBINSON*

Abstract

Since higher education in China first began to open up in the late 1980s with the launch of the Johns Hopkins University-Nanjing University program in 1986, the overarching theme of China's market for higher education has been one of increasing demand, sophistication, and openness.

However, foreign universities and businesses seeking to access this market are often perplexed by the Chinese government's complex and frequently ambiguous education policies and law. Operating educational activities in China involves navigating many different areas of Chinese law. This article highlights key Chinese laws that apply to higher education institutions in the areas of tax, intellectual property, research, student recruitment, immigration, cybersecurity, and online programs. The article also examines the legal framework and operational structures within which foreign participants can participate in China's education sector.

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INTRODUCTION

Since higher education in China first began to open up with the launch of the Johns Hopkins University-Nanjing University program in 1986, the overarching theme of China's market for higher education has been one of increasing demand, sophistication, and openness.

However, foreign universities and businesses seeking to access this market are often perplexed by the Chinese government's complex and frequently ambiguous education policies and law. A series of recent developments, ranging from the unveiling of the Double-First Class project in 2015 to the heavy emphasis on education by the Nineteenth Chinese Communist Party Congress, not only promises to streamline regulatory requirements for foreign schools in China, but also encourages foreign universities to tap into the market.¹

The Chinese government recognizes the importance of Chinese-foreign cooperation in improving the quality and standing of China's education system. However, the Chinese government is wary of the potential impact of foreign influences on Chinese society at large and thus has firmly insisted that Chinese-foreign education cooperation remains under its control. On the other hand, contrary to this encouragement, the Chinese government has implemented Circular of the State Administration of Taxation on Certain Issues relating to the Implementation of Tax Treaties (Bulletin 11), which imposes a higher tax burden on certain educational activities by foreign universities.

Given that the most significant activity by foreign participants has been in higher education, this article largely focuses on issues related to higher education. Operating educational activities in China involves navigating many different areas of Chinese law. This article highlights key Chinese laws that apply to higher education institutions (HEIs) in the areas of tax, intellectual property (IP), research, student recruitment, immigration, cybersecurity, and online programs. The article also examines the legal framework and operational structures within which foreign participants can participate in China's education sector.

I. Legal Frameworks Regulating Foreign Participants Doing Business in China

A. Regulations on Foreign Investment in Education Sector

In December 2001, China became a member of the World Trade Organization (WTO) setting the stage for the opening up of China's education sector to foreign involvement. However, China's WTO commitments in the education sector were relatively limited, primarily restricting foreign involvement to working in cooperation with Chinese parties.

1 In October 2015, the State Council released the Overall Plan for Coordinating and Promoting Establishment of World-Class Universities and First-Class Disciplines, aimed at providing guidance and support for Chinese universities to become world-class universities offering first-rate disciplines; Kevin Prest, *China's Ambitions for Education Development: key takeaways from the 19th Party Congress*, The British Council, <https://education-services.britishcouncil.org/insights-blog/chinas-ambitions-education-development-key-takeaways-19th-party-congress>, last visited on May 7, 2021.

As confirmed by the Foreign Investment Law (FIL), currently the regulatory approach of foreign direct investment is “pre-[market] national treatment plus the negative list administrative regime.”² Hence, entry into the Chinese market for foreign investors is subject to the negative list—Special Administrative Measures for the Access of Foreign Investment (Negative List)—which has been updated each year by the Ministry of Commerce (MOFCOM) and the National Development and Reform Commission (NDRC) since 2017.³ In general, foreign investors cannot invest in the fields that are prohibited under the Negative List, unless they obtain market entry approval and comply with certain restrictions, including a foreign shareholding cap; however, the national treatment will apply when investing in the industries not listed on the Negative List.

Under the 2020 Negative List, foreign investors are not allowed to engage in compulsory education institutions or religious education institutions, and foreign investment and engagement in preschools, senior high schools, and HEIs are restricted to Chinese-foreign cooperative education and must be under the control of the Chinese partner (namely, the principal or the principal administrative officer of a Chinese-foreign cooperative education shall be a Chinese citizen and the Chinese members shall not be less than half of all members of their councils, boards of directors, or joint management committees).

China has set up twenty-one free trade zones (FTZs), which generally have more liberal foreign investment policies. However, the Special Management Measures for the Market Entry of Foreign Investment in Pilot Free Trade Zones (FTZ Negative List) contain similar restrictions to those in the Negative List.⁴

B. General Regulatory Framework of Chinese-Foreign Cooperative Education

The fundamental laws of the Chinese education sector are (1) the Education Law,⁵ (2) the Higher Education Law,⁶ (3) the Compulsory Education Law,⁷ (4) the Law on Promotion of Privately-Run Education (Private School Law),⁸ and (5) the Vocational

2 FIL, art. 4.

3 In 2017, the Negative List was first introduced via the update of the 2017 Foreign Investment Industry Guidance Catalogue, and starting from 2018 the MOFCOM and the NDRC jointly issued the Negative List yearly for 2018, 2019, and 2020. The currently effective Negative List is the 2020 Negative List, which was published on June 23, 2020, and became effective on July 23, 2020.

4 The Special Management Measures for the Market Entry of Foreign Investment in Pilot Free Trade Zones (FTZ Negative List) is applicable to pilot free trade zones established by the State Council. There are twenty-one FTZs in mainland China as of September 2020, including the Shanghai FTZ, Guangdong FTZ, Tianjin FTZ, Fujian FTZ, Liaoning FTZ, Zhejiang FTZ, Henan FTZ, Hubei FTZ, Chongqing FTZ, Sichuan FTZ, Shanxi FTZ, Hainan FTZ, Shandong FTZ, Jiangsu FTZ, Guangxi FTZ, Hebei FTZ, Yunnan FTZ, Heilongjiang FTZ, Beijing FTZ, Hunan FTZ, and Anhui FTZ,

5 Effective Sept. 1, 1995, amended Dec. 27, 2015.

6 Effective Sept. 1, 1999, amended Dec. 27, 2015.

7 Effective Sept. 1, 2006, amended Apr. 24, 2015.

8 The Private School Law was issued on December 28, 2002, and was amended on June 29, 2013, November 7, 2016, and December 29, 2018. The new version took effect beginning December 29, 2018. The Private School Law does not allow foreign involvement in private schools that offer compulsory education at the primary or junior high school level and severely restricts foreign participation in this aspect.

Education Law.⁹ These laws form the basic legal framework for all activities in China's education system.

Echoing China's WTO commitment to open the education sector to foreign investment via a form of cooperation,¹⁰ in 2003 the State Council issued the Regulations of the People's Republic of China on Chinese-Foreign Cooperative Education (2003 Cooperative Education Regulations),¹¹ which emphasizes the introduction of high-quality educational resources in China, the protection of the legitimate rights and interests of all parties involved in Chinese-foreign cooperative education, and the strengthening of the approval and supervision of Chinese-foreign cooperative education institutions. The 2003 Cooperative Education Regulations also provide application approval procedures for the establishment of a Chinese-foreign cooperative education institution (CEI), which is an educational institution established by both a foreign education institution and a Chinese education institution and mainly target Chinese students¹² as well as the management and supervision systems, financial management, and teaching-related requirements of CEIs. Moreover, the 2003 Cooperative Education Regulations delegate the authority to regulate the Chinese-foreign cooperative education programs (CEPs)¹³ and overall planning, coordination, and management of Chinese-foreign cooperative education nationwide to the Ministry of Education (MOE).¹⁴

To implement the 2003 Cooperative Education Regulations, in 2004 the MOE issued the Implementation Measures for the Regulation of the People's Republic of China on Chinese-Foreign Cooperative Education (2004 Cooperative Education Measures),¹⁵ which provide specific rules for the establishment, activities, and management of CEIs and the rules in the approval and management of CEPs.

Although the 2003 Cooperative Regulations, together with the 2004 Cooperative Measures (Regulations), try to provide rules and norms to better serve the opening up of the education sector in China, there is still ambiguity in some language of the Regulations that hinders the implementation of the policies.¹⁶ As stipulated in article 3

9 Issued on May 15, 1996, effective Sept. 1, 1996. An amendment to the Vocational Education Law (draft for comments) was issued by the MOE on December 5, 2019, and the period to solicit public comments expired on January 5, 2020.

10 Cao Xingguo, Interpretation of the Regulations on Chinese-Foreign Cooperative Education and Its Implementation Rules, Collected Papers of China Education Association for International Exchange 2003 International Forum on Education (2003). Cao Xingguo was from the Department of International Cooperation and Exchange, Ministry of Education.

11 The 2003 Cooperative Education Regulations came into effect on September 1, 2003, and were amended on July 18, 2013, and March 2, 2019.

12 2003 Cooperative Education Regulations, art. 2.

13 2003 Cooperative Education Regulations, art. 61.

14 See http://www.moe.gov.cn/s78/A20/gjs_left/moe_861/tnull_8646.html, last visited on May 7, 2021. 2003 Cooperative Education Regulations, art. 8. Under article 8 of 2003 Cooperative Education Regulations, such power is also delegated to the administrative department of labor, that is, the Ministry of Human Resources and Society Security (MHRSS); however, according to the 2004 Cooperative Education Measures issued by the MOE and the Measures of Chinese-Foreign Cooperation in Vocational Skills Training issued by the MHRSS in 2015, the MHRSS is responsible for vocational skill training institutions, while the MOE is in charge of educational institutions.

15 The 2004 Cooperative Education Measures came into effect on July 1, 2004.

16 Wang Pu, Li Lingling, *The Historical Development and Future Prospects of Chinese-Foreign Cooperative Education Policies*, 4 SE ACAD, 242-248 (2013).

of the 2003 Cooperative Regulations, “[t]he State encourages the introduction of foreign high-quality educational resources of Chinese-foreign cooperative institutions.” But it is not clear under the Regulations what “quality educational resources” are, and instead it is simply a general vague concept since there is no specific and unified standard.¹⁷ Some scholars are concerned that lacking specific regulations on quality/standards of foreign partners, many foreign universities that are not good enough, even those that could not grant degrees, have flocked to China under the temptation of high economic benefits.¹⁸ This concern is also reflected by the MOE’s 2017 Notice on Further Regulating the Order of Chinese-Foreign Cooperative Education (2007 MOE Notice)¹⁹, which points out that in practice there are duplicated low-quality cooperation education projects and cases where the qualification and capacity of the foreign parties in a cooperative education project were not carefully verified by the Chinese parties.

It is also worth noting that the 2003 Cooperative Education Regulations restrict the social influence of CEIs and CEPs, and require Chinese control over such foreign cooperative education arrangements. For example, the Regulations prohibit the setting up of religious CEIs or CEPs in China and prohibit CEIs from providing education of a “special nature” such as compulsory education (G1–G9), politics, policing, and military affairs. The specific requirements of CEIs and CEPs are detailed in the sections below.

C. Restrictions on Activities of Foreign Nongovernmental Organizations (NGOs) in China

Though China has opened certain areas of higher education to foreign investors, investors, such as foreign universities or other nongovernmental and nonprofit organizations, should also pay close attention in conducting activities in China before they have established any entity in China, since China has enhanced its monitoring and control over activities conducted by foreign NGOs.

Pursuant to the Law of the PRC on Management over Foreign NGOs’ Activities in China (the Foreign NGO Law),²⁰ foreign NGOs are prohibited from conducting activities within China, unless they have (1) set up a Representative Office (RO) after obtaining the approval from their professional supervisory authority and registering with the local office of the Ministry of Public Securities (MPS) or (2) filed for approval of the temporary activities with the local MPS by cooperating with a domestic counterpart. Only four types of Chinese organizations are allowed to act as domestic counterparts under the Foreign NGO Law, namely, government agencies, people’s organization, public institutions, or social organizations of China.

In particular, article 53 of the Foreign NGO Law provides a carve-out from the Foreign NGO Law to overseas schools, hospitals, natural sciences and engineering technology research institutes, or academic organizations wishing to engage in

17 *Id.*

18 *Id.*

19 2007 MOE Notice issued on Apr. 6, 2007, effective on the same date.

20 The Foreign NGO Law was issued by Ministry of Public Security on April 28, 2016, and came into effect on January 1, 2017.

exchanges and cooperation with schools, hospitals, natural science and engineering technology research institutes, or academic organizations in mainland China. CEIs, CEPs, and other collaboration programs or exchange activities between a foreign university and a Chinese university do not need to register or file with the local under the Foreign NGO Law.

However, according to the local MPS's interpretation, this carve-out should be applicable to exchange and cooperative activities between organizations of the same type, for example, between a foreign school and a Chinese school, or between a foreign hospital and a Chinese hospital. Exchanges and cooperation between a foreign university and a Chinese hospital, or vice versa, are not exempted per se. Cooperation between two different types of organizations mentioned above may be exempted on a case-by-case basis.

Notwithstanding the carve-outs under article 53, foreign NGOs, including foreign universities, are prohibited from directly or indirectly conducting or funding for-profit activities, political activities, or religious activities. Moreover, foreign NGOs, whether they set up a RO or file for temporary activities, are not allowed to develop membership or proactively raise money or solicit donations within China.

After the Foreign NGO Law became effective, there have been compliance concerns related to having foreign universities sign a service agreement with its wholly foreign owned enterprise (WFOE) or a third party and assign its personnel to perform the service in China. Some local MPSs hold the view that such actions would be deemed conducting activities within China by foreign universities, which should be subject to the Foreign NGO Law, but some local MPSs hold the view that such activities should not be regulated under the Foreign NGO Law. If the services are provided by foreign universities outside of China, then the service agreement between foreign universities and Chinese parties will not be affected by the Foreign NGO Law.

Considerable uncertainty and unpredictability exist under the Foreign NGO Law because there is little formal guidance, and informal interpretations of the Foreign NGO Law are different and not final, and might change from time to time. Different foreign NGOs are taking different approaches: some keep the status quo, while others have become more vigilant about potential noncompliance.

The Foreign NGO Law sets up liabilities and punishments for noncompliance. The authors have not seen any reported cases regarding the enforcement of the Foreign NGO Law on foreign universities. However, the authors are aware of nonpublished information that the Beijing MPS has imposed some penalties on foreign universities for violations of the Foreign NGO Law.

II. Forms of Foreign Engagement in the Education Section

A. Overview of Forms of Foreign Engagement in the Education Section

There are several options for foreign HEIs to consider when entering into the Chinese education market. These options include setting up CEIs, CEPs, executive education programs, collaboration programs, online programs, WFOEs, or commercial ROs.

B. CEIs

As mentioned above, a CEI refers to an educational institution established by both a foreign education institution and a Chinese education institution. A CEI mainly targets Chinese students.²¹

An increasing number of foreign education institutions have become involved in the higher education sector in China. Thus far, the MOE has approved ten higher education CEIs with independent legal person status including the University of Nottingham Ningbo China, Xi'an Jiaotong-Liverpool University, the NYU Shanghai, Cheung Kong Graduate School of Business, the Wenzhou-Kean University, the Duke Kunshan University, the Chinese University of Hong Kong (Shenzhen), BNU-HKBU United International College, Guangdong Technion-Israel Institute of Technology, and Shenzhen MSU-BIT University.²² As of June 2020, there are approximately 1200 CEIs and CEPs offering undergraduate education and graduate education in China.²³

If a CEI grants the degrees of the Chinese HEI, it must do so in accordance with Chinese laws and regulations. Degrees of the foreign HEI granted by the CEI should be the same as the ones granted overseas and must be recognized in the foreign school's country.²⁴

While many CEIs have been developed to offer degree education, it is not a requirement that a CEI be a degree-granting institution. There are a wide range of educational offerings of CEIs. CEIs can be established at the higher education, senior high school, and preschool education level, but not for compulsory education (G1–G9).

There are two types of CEIs. A CEI can either have independent legal person status or not have independent legal person status. For a CEI with legal person status, the MOE prefers that the CEI offer undergraduate programs, even if the CEI's primary objective is to offer masters and/or doctorate degrees. The MOE encourages the joint college model or CEI without independent legal person status because of the joint colleges' close affiliation with the Chinese partners, which it perceives to have less of an impact on the current education system, in large part because such CEIs are more dependent upon the Chinese partner to operate and are subject to more control by the Chinese partner.

Below are common issues that CEIs and their foreign and Chinese partners encounter in the formation and operation of the CEI:

- There is often an asymmetry of information available to the Chinese party and foreign party from the MOE. It is not uncommon for the Chinese party to receive more information from the MOE. This may

21 2003 Cooperative Education Regulations, art. 2.

22 China Ministry of Education, http://www.moe.gov.cn/jyb_xwfb/s5147/202010/t20201027_496773.html, last visited on May 7, 2021.

23 *Id.*

24 2003 Cooperative Education Regulations, art. 23.

cause the foreign party disappointment and frustration, and result in the perception that the MOE is negotiating in favor of the Chinese party;

- The establishment or operation of the CEI may be affected by the Chinese party's internal politics. It is not uncommon that a change in leadership in the Chinese HEI can affect the resources that the Chinese HEI puts into the CEI project. Therefore, it is important to make sure that the parties' leadership shows long-term support to the CEI;
- There are often challenges with the employment of teachers for CEIs due to immigration and compensation issues. Faculty members from outside of China who plan to work at the CEI may experience difficulties in receiving visas to teach in China due to factors such as age and country of origin. Also, CEIs sometimes face challenges in attracting quality faculty because of compensation concerns, including pay disparity between expats and local hires;
- The partners are not able to recruit a sufficient number of students as expected or planned for the CEI; and
- There are changes in joint venture (JV) university-related laws and policies, including tax treatment that may affect the CEI's development or daily operations.

C. *CEPs*

A CEP refers to the cooperative education and teaching activities between a Chinese education institution and a foreign education institution. According to Article 2 of the Regulations of the People's Republic of China on Chinese-foreign Cooperative Education, Chinese students should be the main targets for a CEP.²⁵ A CEP does not involve the establishment of an educational institution.

The CEP is the most popular model adopted by foreign institutions for education cooperation in China. For CEPs, the Chinese party and foreign party should be in the same education level and type. The procedures and requirements that apply to CEPs are substantially similar to those that apply to CEIs under the regime of Chinese-foreign cooperative education.

A CEP needs the approval of the MOE. Also, a CEP should meet the following standards:

- The total number of courses introduced by the foreign university shall account for no less than one-third of the total program courses;
- The total number of the core major courses introduced by the foreign university shall account for no less than one-third of the total program core major courses;

²⁵ Regulations of the People's Republic of China on Chinese-foreign Cooperative Education, Art.2, See http://www.moe.gov.cn/s78/A20/gjs_left/moe_861/tnull_8646.html, last visited on May 7, 2021.

- The total number of the core major courses taught by teachers from the foreign university shall account for no less than one-third of the total program core major courses; and
- The teaching hours carried out by teachers from the foreign university shall be no less than one-third of the total program teaching hours.²⁶

1. Differences Between CEIs and CEPs

Table 1 is a summary chart of the key differences between (1) CEIs with independent legal person status, (2) CEIs without legal person status, and 3) CEPs.

Table 1: Differences between CEIs and CEPs

Differences	CEI With Independent Legal Person	CEI Without Independent Legal Person	CEP
Legal Status and Liability Status	An entity with independent legal personality with the capacity to operate in its own name and to be liable to third parties (with limited liability for its owners).	A new college within the Chinese partner institution that has no independent legal personality. The parties have liability to third parties for the CEI's operation, and the parties can allocate liability among each other by contract.	No independent legal personality. CEPs are subject to the Chinese partner's management. The Chinese partner is usually liable for any external debts to third parties. The foreign partner usually limits its liability to the Chinese partner by way of contractual agreement.
Approval Process	Typically, there is a two-stage approval: (1) preparatory approval from the MOE and (2) final/formal approval from the MOE. Registration is required with the Ministry of Civil Affairs or its local counterparts or an Independent Non-profit Institute if local practice permits.	Typically, one stage MOE formal approval.	One stage MOE approval only.
Capital Contributions	Required	Required	Not required

Reasonable Return	Permitted	Permitted	Usually not permitted
Management Body	Council or board of directors	Joint management committee	Joint management committee
Cost	Costs are significantly higher as the CEI requires an independent infrastructure	Depends on whether an independent infrastructure is required	Costs are generally lower because the CEP is usually based on the existing facilities and infrastructure of the Chinese partner(s)
Others	Higher profile and probably easier to market as an institution in its own right	Lower profile but appears to be encouraged by the MOE	Lower profile (but high success rate)

2. MOE Application and Approval Processes for CEIs and CEPs

In order to set up a CEI or CEP, the MOE or its local counterpart's approval must be obtained.

More specifically,

1. for CEIs and CEPs granting degrees at the bachelor level or above, they should obtain the provincial MOE's preliminary approval first and the MOE's final approval;
2. for CEIs and CEPs granting degrees of associate bachelors, no-degree higher education, or other academic education programs, they should obtain the final approval from the provincial MOE and file with the MOE for record; and
3. for CEIs and CEPs offering occupational education, they should obtain the provincial labor authority's approval.²⁷

The MOE has a cycle for approvals that require submission of applications for setting up CEIs and CEPs each March and September. In practice, for CEIs with independent legal person status, the timing for submission of the application for the MOE's approval may be more flexible, but this is subject to the local and central MOE's discretion.

There are two CEI application options:

1. Separate the approval process into two steps: (a) preparation approval and (b) establishment approval; or
2. Apply directly for establishment approval.²⁸

²⁷ 2003 Cooperative Education Regulations, art. 12.

²⁸ *Id.*, art. 13.

CEIs with independent legal person status usually take the two-step approach because of the considerable time that is needed to build a new campus and hire faculty members. CEIs without independent legal status usually apply directly for establishment approval.

The approval authority is to make a decision on whether it will grant a preparation approval for a CEI within forty-five working days upon the acceptance of the application.²⁹ The timeframe of the approval authority's grant of an establishment approval for a CEI offering nondegree education is within three months, and for CEIs offering diploma education the timeframe is within six months.³⁰

The approval process usually takes longer than the statutory timelines because of expert panel review. Expert panels are organized to review and comment on the application in the preparation approval phase as well as the establishment approval phase. In practice, the approval process timeline for CEIs with a legal person status can range between six months and one year to seek the preparation approval and another two to three years for the establishment approval. There is a statutory requirement that the establishment approval must be applied for within three years upon the receipt of the preparation approval; otherwise a new application should be made.³¹

CEIs without an independent legal person status and CEPs will typically apply for establishment approval directly, and the timeline is relatively shorter, normally ranging from four to six months or longer. Before the establishment approval is granted, CEIs and CEPs are not permitted to engage in student recruitment, including accepting applications and application fees, and their marketing activities should be limited.³²

The major required documents for applying for the MOE *preparation approval* on setting up a CEI include the following:³³

1. Application report;
2. Cooperative Education Agreement (CEA);³⁴
3. Valid documents verifying sources of assets and the amount of capital with clear statements of ownership;
4. Donation agreements where any assets have been donated;

29 *Id.*, art. 15.

30 *Id.*, art. 18.

31 *Id.*, art. 16.

32 According to article 33 of the 2003 Cooperative Education Regulations, the prospectus and advertisements of CEIs should be filed with the approval authority for record.

33 2003 Cooperative Education Regulations, art. 14.

34 Only the CEA between the foreign HEI and the China HEI will be submitted to the MOE. The agreement with the financing party does not need to be submitted to the MOE.

5. Certificate that fifteen percent of the initial investment is in place.³⁵

When applying for the MOE *establishment approval*, the key required documents include the following:³⁶

1. Establishment application report;
2. MOE preparation approval;
3. Articles of Association;
4. List of members on its first board of trustees or directors or joint managerial committee and their relevant documentation;
5. Valid documents verifying the assets of the CEI;
6. Documents verifying the qualifications of the president or principal administrator, the teachers (including foreign teachers), financial staff, and any foreign administration personnel employed by the JV university.

The application procedures and required documents for establishment of CEPs are similar to the above, although the required documents may differ slightly, which include the following:³⁷

1. A Chinese-foreign Cooperative Education Program Application Form;
2. The CEA;
3. Certificates of legal person status for both foreign and Chinese institutions (should be notarized and authenticated);
4. Certificates of capital verification (if there are any assets or funding investment);
5. The donation agreement and relevant documentation (if there is a donation involved);
6. If the foreign university has another joint program approved by the MOE, the evaluation report issued by the approval authority or the authorized appraisal should also be submitted.

3. *Other CEI Registration Requirements*

After obtaining MOE approval, a CEI with independent legal person status should be registered as a Private Non-Enterprise Unit (PNEU) with legal person status with the local Civil Affairs Bureau, or Independent Non-Profit Institute (INPI)

35 In practice, the application documents would also include certified accreditation documents for the foreign HEI, diploma samples, and the proposed education plan.

36 2003 Cooperative Education Regulations, art. 17; 2004 Cooperative Education Measures, art. 18.

37 2004 Cooperative Education Measures, art. 37.

with the local Civic Organization Registration Management Bureau. After completion of this registration, a CEI will receive a registration certificate as its business license.

Also, a CEI must obtain an Organization Code Certificate with an official number and carve official chops³⁸. A CEI will also need to open a bank account and complete applicable tax and foreign exchange registrations. After completing these after-licensing formalities and with the MOE approvals, the CEI can operate independently.

CEIs without independent legal person status should be registered as a PNEU with a partnership status.³⁹ It should be noted that the registration regulations have not been strictly implemented. A majority of CEIs have not been registered and exist as an affiliated college of the Chinese education institution. CEIs that are not registered often do not have separate bank accounts and use the Chinese education institutions' bank accounts.

For CEPs, there are no registration requirements because they do not have an independent status. Moreover, CEPs cannot open bank accounts and must use the Chinese education institutions' bank account.

4. *CEI Institutional Governance and Board*

A CEI with legal person status must establish either a board of trustees or board of directors. A CEI without legal person status or a CEP must establish a joint management committee (collectively the Board).⁴⁰ The Board is the highest governance authority of the CEI or CEP.

It is required that Chinese members hold at least half of the Board seats out of a minimum requirement of five members. In addition, each Board must have a chairperson and vice chairperson, or the joint management committee must have a director and deputy director. The legal representative of a CEI with legal person status must either be the chairperson or the chancellor of the CEI. The party holding the chair or director seat shall not hold the vice or deputy seat. The list of board member names should be filed with the competent MOE approval authority.

The Board members must be composed of representatives of the parties to the CEI. The chancellor or principal administrator and at least one-third of the Board members must have five or more years of education or teaching experience.⁴¹ None of the Board members may be a Chinese government employee.⁴²

38 In China, the official chop is equivalent to the signature of an authorized representative of a CEI, which has the power to bind such CEI. For example, the official chop can be affixed on a contract, an agreement or other legal documents to show the CEI's intention to be bound by these documents.

39 Circular on Relevant Issues Concerning the Registration of Sino-Foreign Cooperative Education Institutions, issued by Ministry of Civil Affairs on December 12, 2003, and effective from the same date, art. 4.

40 2003 Cooperative Education Regulations, art. 21.

41 *Id.*, art. 22.

42 2004 Cooperative Education Measures, art. 24.

The Board must hold at least one meeting a year, and Board members must be allowed to request interim meetings if one-third of its members seek one. The Board must hold the following rights and powers:⁴³

1. Reelection or by-election of members of the Board;
2. Appointment or dismissal of the chancellor or principal administrator;
3. Modification of the articles of association and formulation of the CEI rules and regulations;
4. Formulation of development plans and approval of the annual operations plans;
5. Raising funds for the CEI and auditing budgets and accounts;
6. Determination of the number of faculty needed and salary for such faculty; and
7. Determination on dissolution, mergers, or termination of the CEI.

Other rights that are not included above but are desired may be included in the CEI's articles of association. In addition, the adoption of the following matters must be approved by at least two-thirds of its members:⁴⁴

1. Appointment or dismissal of the chancellor or principal administrator;
2. Modification of the articles of association;
3. Formulation of development plans; and
4. Determination on dissolution, mergers, or termination of the CEI.

Although at least half of the Board must be appointed by the Chinese party, there are ways to structure the Board to provide the maximum safeguards to the foreign party; for example, the foreign party may have the right to nominate the chairperson or give the chairperson a casting vote.⁴⁵

The Communist Party of China (CPC) has requested that CEIs set up CPC organizations within the schools. Also, the CPC has requested that the CPC organization leader must have a similar position as the CEI's chancellor and a seat on the CEI's Board. It is required that the articles of association of the CEI include the CPC organization's establishment and provide that it has the power to oversee the operation of the CEI and participate in the decision-making process of the CEI. These CPC requirements should be seriously considered when setting up the governance of the CEI.

43 2003 Cooperative Education Regulations, arts. 23, 24.

44 *Id.*, art. 24.

45 The MOE may deny such a proposal on a case-by-case basis.

5. *CEI Chancellor or Principal Administrator*

The CEI chancellor/president or principal administrator (collectively the Chancellor) must be of Chinese nationality and reside in China. Also, the Chancellor must be approved by the approval authority. Other requirements for the Chancellor include that he or she must have teaching experience, have integrity, and meet the required standards of professionalism.⁴⁶ The Chancellor normally must not hold any other posts during his tenure.⁴⁷

The Chancellor must have independent authority over educational and administrative matters of the CEI and is responsible for preparing plans for the internal organizational structure of the CEI, which must be approved by the Board.

The Chancellor must hold the following duties and powers:⁴⁸

1. Execution of decisions made by the Board;
2. Implementation of the development plans and drafting of the annual operation plans, financial budgets, and rules and regulations;
3. Hiring or dismissal of staff members and implementation of awards and discipline;
4. Organization of education, teaching, and scientific research activities, and guaranteeing the quality of the education and teaching; and
5. Handling day-to-day administrative work.

Additional duties and powers of the Chancellor can be specified in the CEI's articles of association. The Chancellor can delegate the decision-making and implementation of such decisions to other officers, although the Chancellor retains responsibility and accountability for such decisions.

Theoretically, either the Chinese party or the foreign party can nominate the Chancellor. Because the Chancellor must have Chinese nationality, he or she is often nominated by the Chinese party and the foreign party consents to the nomination in consultation with the Chinese party.

6. *CEI Executive Vice Chancellor*

The Executive Vice Chancellor is usually a person nominated by the foreign party and serves as the foreign party's key leader within the CEI administrative structure. The Executive Vice Chancellor typically assumes the management power and is responsible for academic matters, with the assistance from the Academic Vice Chancellor and/or the Academic Committee. The CEI can establish the decision-making authority of the Executive Vice Chancellor in its articles of association, including that the Executive Vice Chancellor can have veto power

46 2003 Cooperative Education Regulations, art. 25.

47 2004 Cooperative Education Measures, art. 24.

48 2003 Cooperative Education Regulations, art. 26.

over decisions by the Chancellor, which can be a means for the foreign party to exert negative control.

D. Executive Education Programs

Executive education programs usually refer to academic or training programs for executives, business leaders, and functional managers. These programs focus on improving the knowledge and skills needed to become an effective leader such as accounting, finance, business strategy, or negotiation. Executive education programs can be degree granting or nondegree granting, long term or short term.

For degree-granting executive education programs, most of them take the form of a CEI or CEP. If the program has MOE approval, then the degrees granted by the foreign universities can be accredited in China. However, some programs do not have MOE approval, and therefore the degrees granted by the foreign universities cannot be accredited in China. The lack of accreditation may negatively affect students who wish to seek a job with Chinese government agencies or state-owned enterprises.

WFOEs set up by foreign universities are also actively involved in executive education programs, although this activity requires careful structuring. Although such WFOEs are not able to obtain a business license for education and training activities, customized executive education programs for companies in China are structured based on a business-to-business model and characterized as consulting services. If an open enrollment program is involved, these programs should be organized by a Chinese partner who has the proper teaching or training license meaning a Chinese school or company that has a training license or training within its business scope.

Until the Chinese Foreign NGO Law came into effect,⁴⁹ WFOEs would usually contract with its client company for delivery of the services and, in turn, outsource the provision of the executive education programs to their affiliated foreign university. However, under the Foreign NGO Law, the service agreements between the WFOEs and the foreign universities have become less clear in terms of their legality.

E. Education and Research Collaborations

According to the Higher Education Law, international exchange and cooperation in higher education are encouraged. Since China's accession in 2001 to the WTO, there have been many forms of collaboration between Chinese schools and foreign education institutions, including student and faculty exchange programs, distance education initiatives, joint research and development laboratories, joint degree programs, and Chinese-foreign cooperative educational institutions.

⁴⁹ See discussion above regarding the Foreign NGO Law in section I.C. In brief, the Foreign NGO Law treats foreign nonprofit entities, which comprise the vast majority of foreign HEIs, as foreign NGOs and, as such, subject to extensive restrictions on their activities in China. While there is an express carve-out (article 53) from these restrictions for CEIs and CEPs, the Foreign NGO Law restricts the other activities engaged in by foreign HEIs.

Whether a collaboration program needs MOE approval depends on the nature and scope of the program. The MOE holds the view that if the cooperation between the foreign education institution and the Chinese institution does not involve introducing substantial education resources of the foreign education institution, then MOE approval is not required. Moreover, if the foreign institution does not assign its teachers to teach in China, is not involved in the syllabus design, and does not provide teaching materials for the program, such a collaboration program is not deemed to be subject to the Cooperative Education Regulations.

Article 14 of the PRC Law on Progress of Science and Technology stipulates that the Chinese government encourages international scientific research and technological development cooperation and exchange. On March 17, 2018, the State Council released the Scientific Data Administrative Measures. These measures introduced rules with the aim of collecting and making public the results of government-funded scientific research. The measures have serious and far-reaching consequences for organizations in China carrying out scientific research, regardless of whether they are publicly or privately funded. Privately funded research institutions are required to submit scientific data to the Chinese government if they concern state secrets, national security, or are in the social and public interest. There is also a requirement that any data deemed to fall under the open-ended list of broad categories such as “government policy-making, public safety, construction of national defense, environmental protection, fire prevention and control, public benefit scientific research and so forth” must be handed over to the Chinese government on request free of charge. The measures also have implications for the sharing of research results by Chinese researchers with their overseas counterparts and scientific exchanges. Due to these broad measures that apply to both public and private sector research, there is the danger that the Chinese government will be able to claim “data sovereignty” over a foreign education institution’s valuable research results and potentially trade secrets.⁵⁰ See also the discussion below in section IV with regard to policy concerns during the U.S.-China trade war that are affecting research collaborations.

F. Online Programs

The delivery of online education courses internationally is a hot growth area in higher education. In China, online courses offered by a foreign institution operated from outside of China are generally beyond the MOE’s jurisdiction. As such, any degrees granted to Chinese students that are substantially based on online courses cannot receive the MOE’s accreditation. Also, there is a potential risk that the MOE, together with Chinese regulators with authority over the Internet in China, could block access to online education courses and restrict Chinese nationals from making course payments abroad.

If the online course website or server is located in China, no MOE approval is required. However, the entity operating the website would need to complete an Internet Content Provider (ICP) filing with the local office of the Ministry of

⁵⁰ *New Scientific Data Rules in China: China Claims “Data Sovereignty”* (June 4, 2018), HOGAN LOVELLS, <http://ehoganlovells.com/rv/ff003c7f0ed866718b0bbf11af46acf0f4e5122a>.

Industry and Information Technology (MIIT). If the online programs are offered on a fee basis, the website entity would also need to receive an ICP license issued by the MIIT. This is recently confirmed by the Implementation Opinions of Six Departments Including the Ministry of Education on Off-Campus Online Training (Online Training Opinions)⁵¹. The Opinions are specifically applicable to the online programs of school subjects targeting primary and high school students, and it requires a record filing with the MOE with related materials after obtaining the ICP filing (or other applicable license granted by MIIT such as an ICP license), cybersecurity protection grading filing, and rating report. The local authorities are exploring the formulation of guidelines to further regulate such programs.

Currently, an ICP license is not generally available to foreign investors. As such, the ability of foreign institutions to provide online courses in China is typically conducted from outside of China, or structured with a rather complex relationship.

In order to address the ICP license requirement, foreign investors may consider one of the following structures:

1. *The Closer Economic Partnership Arrangement (CEPA) structure.* Under the CEPA structure, Hong Kong and Macao-qualified service suppliers are allowed to establish a JV (50/50) to apply for the ICP license.⁵² This limitation on ownership generally makes this approach less attractive to a foreign university.
2. *JV in the FTZ.* China's telecommunication sector is further opening in the FTZs. In an FTZ, a foreign investor can establish with a Chinese partner a JV company to apply for the ICP license. The foreign investment ratio would be capped at 50 percent.
3. *Variable Interest Entity (VIE) structure.* The use of the VIE concept was first introduced to enable businesses that required an ICP license to operate, and such concept underlies most online businesses in China.

If the online courses are delivered through applications developed and operated in China, filings with the MOE are required. Under the Administrative Measures on Education Mobile Applications (Education APP Measures),⁵³ the education applications refer to the mobile applications of which major users are teachers and faculties, students, and parents. The main contexts of use are for educating and studying, and the main purposes are to serve the teachers and administration, studying and life activities of students, and the interaction between schools and parents, which cover a wide range of applications, not limited to the applications providing online courses or programs. The education application

51 The Online Training Opinions were issued on July 12, 2019, and took effect on the same day.

52 The CEPA refers to the Closer Economic Partnership Arrangement between the China government and Hong Kong/Macau government, which provides more favorable market entry policies for qualified Hong Kong/Macau service providers. To be a qualified Hong Kong/Macau service provider, the Hong Kong/Macau company needs to meet various conditions.

53 The Administrative Measures on Education Mobile Network Applications were published by the MOE on November 11, 2019, and took effect on the same day.

providers, including Chinese education authorities, schools, companies, and other organizations, must submit the required information of the education applications for a filing with the MOE (Provider Filing). On the other hand, Chinese education institutions and education authorities using the education applications must submit information for a filing with the MOE (User Filing), and must only use the education applications that have gone through the Provider Filing.

G. WFOE and RO

Generally, a foreign investor has two options to set up a legal presence in China: a representative office (RO) or WFOE. An RO and WFOE must be established under the State Administration of Market Regulation (the SAMR)⁵⁴ The discussion below mainly focuses on the scenario in which a Limited Liability Company (LLC) of a foreign university considers setting up an RO or a WFOE, due to the impact of the Foreign NGO Law. As foreign universities are likely to be deemed NGOs, they are not permitted to establish a WFOE, but it is feasible to have their offshore not-for-profit LLC set up a WFOE, given that the WFOE will conduct business within its registered business scope instead of carrying out non-commercial activities for or on behalf of the foreign NGO.

ROs are generally intended for liaison and market research activities. An RO may be a useful transitional vehicle for businesses initially exploring the Chinese market. Relevant laws and regulations governing the operations of ROs in China prohibit ROs from being used to conduct operational and business-generating activities. ROs are not independent Chinese legal entities. The establishment of a RO is usually only subject to the SAMR registration requirements.

Typically, setting up a WFOE is more desirable than a RO, particularly in the education sector. One of the key advantages of setting up a WFOE is that the WFOE is able to employ personnel in China. Also, the WFOE can serve as the entity for the secondment of the foreign university's personnel who teach in China for a prolonged period.

China's current regulatory policy limits the scope of educational activity in which a WFOE can engage. A WFOE can only conduct activities within its approved business scope. If a WFOE hires faculty to teach, the WFOE would require a business scope for education or training, which is usually difficult or impossible for a WFOE to obtain.⁵⁵

Setting up a WFOE can also facilitate financial matters. As an independent legal entity established under Chinese law, a WFOE can open its own bank accounts. A WFOE can also enter into contracts and agreements to receive Chinese currency payments. The WFOE can make payments in Renminbi (RMB) to Chinese entities, including to and from Chinese parties or the LLC of the foreign university, which can help facilitate cash flow.

54 The State Administration of Market Regulation (the SAMR) is the company registry authority in China.

55 The scope of activities in the education context that are permissible to a WFOE may expand as a result of recently proposed amendments with regard to for-profit vocational education, which may undergo liberalization as a result of proposals made by the MOE in December 2019.

A WFOE may also assist the personnel of the foreign university in applying for work visas, residence permits, and business visas. The WFOE can rent office space, equipment, mobile phones, and other supplies. The WFOE may help in liaison with Chinese parties, the promotion of educational programs, and enhancement of the visibility of the foreign university's programs in China.

1. *WFOE Business Scope and Formation*

Chinese laws require any foreign invested enterprise, including a WFOE, to act within its business scope as approved by the local registration authority. Certain business scopes are subject to special approval by relevant government authorities. For example, setting up a language training WFOE is subject to the approval of the local MOE, which is the prerequisite of applying for the business license with the local SAMR.⁵⁶ Because a WFOE cannot obtain a business scope for training easily, the typical university WFOE has a consulting business scope instead, which does not require any special approvals.

For the purpose of receiving funds for services rendered, which is sometimes used to receive donation/sponsorship funds and to transfer money in the form of service fees, the WFOE can be established as a consulting WFOE.

A general consulting WFOE may conduct the following business:

Educational consulting; business management consulting; investment consulting; economics information consulting; market planning; cultural information consulting (excluding agency services); organizing cultural exchanges (excluding performance agency services); conference services; overseas study agency; technology research and development; technology consulting; technical services; provision of cultural commodities and souvenir to clients.

On the other hand, a consulting WFOE should not conduct any activities that are reserved by law and policy for educational institutions. Specifically, a WFOE may not conduct the following activities: (1) issue degrees to students; (2) collect tuition directly from the students; (3) teach; (4) conduct research in social and humanities science; or (5) act as a sales agent, investment broker, or other specialized agency role when conducting consulting services.

The WFOE must choose a location where it is registered, but it can support programs of the foreign universities in different cities in China. However, if the WFOE needs to lease an office and carry out business activities on a regular business in another city, it should register a branch in that city or set up another WFOE, depending on its needs.

The formation of a WFOE in China involves an intensive process with significant paperwork. The process consists of the following steps: (1) name self-

⁵⁶ Circular on Duly Carrying Out the Work in Relation with the Examination, Approval, and Registration of Foreign Invested for-Profit Non-Degree Language Training Institutions. It was issued by the MOE, MOFCOM, and SAMR on July 24, 2019, and took effect on the same day.

filing⁵⁷; (2) record filing with the local office of the MOFCOM; (3) registration with the Local SAMR for enterprise establishment and the business license; (4) post-establishment registrations, including carving company chops (i.e., seal or stamp), opening bank accounts, and registrations with other authorities such as tax and foreign exchange. The entire process typically takes two to three months.

III. Operation of Chinese-Foreign Cooperation Education

A. *Operational Readiness Overview*

Gaining the MOE approval for a Chinese-foreign educational venture is a major and indispensable milestone; reaching it, however, is just the beginning. There are many essential tasks between approval and the arrival of the first students. The following sections will discuss many of the steps necessary for operational readiness. As is typical in China, this general framework can have many local variations depending on the character and influence of the foreign institution's Chinese partner and the attitudes of municipal and provincial authorities. With MOE approval secured, however, the variations are likely to affect *how* not *whether* the major steps toward operational readiness can be achieved.

In addition, when the foundations are in place—MOE approval, civic registration, fiscal and human resources capabilities—the partner institutions can turn their attention to the specific tasks associated with offering higher education, including curriculum development and student recruitment and pricing. While these activities must take place within the Chinese national, provincial and local jurisdictional frameworks that apply to all enterprises, there are a number of requirements distinctive to higher education, which are explained in the next sections.

B. *U.S. Approvals and Accreditation of Chinese-Foreign Degree Programs*

It is important to note that operational readiness is likely not just a question of preparation in China but will likely also require home country and perhaps even home campus preparations. Before turning to the China side, let's consider home country implications, assuming a U.S. institution.

Chinese regulations on JV higher education programs require that graduates be awarded a diploma from the foreign institution identical to the degree offered by the foreign institution to its students at home.⁵⁸ Moreover, this degree must be recognized as fully valid and accredited by the foreign jurisdiction.⁵⁹ In the United States, satisfying this expectation requires that the governing authorities within the partnering institution take the formal steps necessary to approve the awarding of the institution's degree for completion of the program in China. Chinese authorities

57 According to the Notice of the Fluent Transition After Cancellation of the Administrative Approval of Enterprise Name Pre-Registration by the State Administration for Market Regulation on April 1, 2019, the WFOE itself could file for the company name without any approval.

58 2003 Cooperative Education Regulations, art. 34.

59 This expectation assumes that the program offered in China has a direct analogue at the home institution, which may not be the case.

will expect to see facsimile copies of the diplomas to be awarded as well as evidence of governing board approval. Given faculty governance norms in American higher education, securing this institutional approval may require considerable discussion, so this should begin at an early stage of the project.

U.S.-side readiness also involves conversations with an institution's regional accreditor. Accreditation in the United States is decentralized and effectively delegated to six self-governing member organizations that cooperate closely with the Department of Education to ensure regionally accredited institutions meet U.S. eligibility standards for federal programs. Embarking on a new program in China with a Chinese partner that leads to an accredited U.S. degree will require that the partnering institution comply with the accreditation standards established by its regional accreditors. In general, accreditors will expect that the quality control and educational effectiveness policies and procedures in place on the U.S. campus are applicable to the JV program in China. This quality assurance is necessary to warrant the awarding of a degree of a U.S.-accredited institution. Depending on the accreditor and the nature of the educational partnership, the U.S. institution may only be required to give notice of the intended program, or it may be required to seek formal approval, which entails a vote by the regional accreditor's membership delegates.⁶⁰ In either case, extensive documentation will be required.

Accreditors emphasize that approval of a U.S. degree for a program in China does not constitute accreditation of the Chinese partner institution. Indeed, accreditors may require that explicit disclaimers be published in official bulletins, recruiting materials, and websites to prevent any misunderstandings on that point. The situation may seem paradoxical: the U.S. degree is from a regionally accredited institution but the program in China is not itself accredited. This situation places great responsibility on the U.S. institution for assuring academic quality and compliance with accreditation standards, even though it cannot exercise full control of the educational program given its geographical locus in China, the jurisdiction of Chinese education authorities, and the body of Chinese regulation pertaining to JV programs.

C. U.S. Education Cooperation Models

The paradox created by this regulatory duality must be navigated by carefully choosing the mode of cooperation under which U.S. accreditation will be sought. Several forms are available in the conceptual armature and nomenclature of U.S. accreditors, none of which offers a perfect fit for what U.S. institutions will want to accomplish in China and none of which fully resolves the paradox. The options fall across two dimensions: relationship type (branch, site) and degree type (joint, dual):

- *Branch Campus v. Additional Site.* In relationship terms, the obvious fact is that education is taking place far from the U.S. institution's primary and

⁶⁰ For example, Middle States Commission on Higher Education and Southern Association of Colleges and Schools Commission on Colleges have "Substantive Change" policies that require the U.S. institution to obtain prior approval from the Commission for the establishment of additional locations and branch campuses outside of the United States. See <https://www.msche.org/policies/>, last visited at May 7, 2021; <http://www.sacscoc.org/pdf/081705/SubstantiveChange.pdf>, last visited on May 7, 2021.

historically established campus. A formal description of the relationship between the U.S. partner institution and the legally independent Chinese joint venture has to be established, which will be consistent with the goal and requirement of awarding an accredited U.S. degree. The categories available are “branch,” which is generally an independent, self-sufficient operating entity under the ultimate jurisdiction of the U.S. institution’s governing board, or a “site,” which is generally a remote location with facilities and services adequate to supporting program goals at a level of quality consistent with home institution standards.⁶¹

- *Dual Degree v. Joint Degree.* In degree terms, the important fact is that educational content is a joint responsibility under the partnership agreement rather than the sole responsibility of the U.S. institution (particularly if a Chinese degree is involved), which would not be authorized to operate independently in China. U.S. accreditors recognize two variants on the traditional single institution degree.⁶² A joint degree is a single diploma signed by two cooperating institutions that is distinct from the degrees either institution offers on its own, though the fields of study may be the same. A dual degree program awards two separate diplomas, each duly authorized and accredited, with each institution recognizing specific credits earned at the counterpart institution as meeting its own degree requirements.

The limited number of cases to date suggest that U.S. accreditation practice will recognize Chinese JV universities as “sites” for U.S. educational programs, since the U.S. institutions do not have the level of control entailed by the “branch” designation. And since the relevant regulatory requirements applicable to JV universities require the awarding of a degree as nearly identical as possible to the U.S. institution’s other degrees, a dual degree framework is the nearly inevitable form, since a joint degree would be clearly differentiated from the U.S. institution’s other degrees.

Regardless of these formal categories, U.S. institutions may have internal reasons for presenting the relationship between their Chinese JVs and with their U.S. flagship operations as more or less integrated. For example, under former president John Sexton, New York University (NYU) began to present itself as a networked global campus with major branch campuses in Abu Dhabi and Shanghai and a variety of study away sites all connected to the main campus in New York City. In its operations and branding, NYU has emphasized the integration of NYU Shanghai within the larger institution. On the other hand, Duke University has chosen to recognize more independence for its affiliated JV university in China, Duke Kunshan University. Formally, both are recognized by their regional accreditors as operating at an approved remote site and as participating in a dual degree program with their JV campus. And in China, it is the JV university and not the U.S. partner institution that is licensed to operate.

61 Chinese regulators do not like the terms “branch” or “branch campus” due to the education sovereignty concern. In the MOE application documents and other official documents, this term should not be used, and a more acceptable term could be “joint venture university” or “joint venture institute.”

62 If there is no Chinese degree involved, it is possible for the U.S. HEI to have 100 percent teaching responsibilities.

While the JV universities are designed to capitalize on the reputations and know-how of their US partners, fostering some mutually beneficial ambiguity, when it comes to contractual obligations, employment and immigration law, taxation and regulatory compliance, institutions must strive for clarity and consistency on such basic questions as: Whose students are they? Which institution is responsible for their health and safety? Which institution is responsible for ensuring academic integrity and responsible conduct? What regulatory regime – US or China – applies on such matters as sexual misconduct and confidentiality of student records? These matters are best addressed in detailed operating agreements between the US institution and their legally independent affiliated campus in China.

Finally, it should be recognized that no matter how independent and capable the JV institution may be in China, the US partner institution will need a significant infrastructure to provide academic and administrative oversight and assistance to the Chinese campus. Careful attention must be given to trans-border financial transactions, immigration and visas, individual and institutional tax obligations, IT interfaces, and student records. Set up and maintenance of these capabilities requires dedicated staff as well as a variety of professional legal, tax and accounting services.

D. JV University Registrations in China

There are several steps, including additional registrations, following MOE approval of a Chinese-foreign JV university.

1. Civic Organization Registration Management Bureau Registration

As discussed above in section III.A, gaining MOE approval is the most important foundational task and a prerequisite for all that follows. The second most important foundational task is registration with the Civic Organization Registration Management Bureau. The JV entity must take a recognized legal form before it can secure a bank account, hire employees, or actually engage in the activities the MOE has authorized. There are several organizational forms available to educational endeavors, none of which is precisely parallel to the U.S. 501(c)(3) nonprofit form that is typical in American higher education.

In the United States, there is a tendency to equate nonprofit with tax exempt. However, in China, there is no organizational form that guarantees tax exemption, though tax exposure and opportunities for relief are affected by organizational form. Registration is processed through the relevant provincial civil affairs bureau and must be renewed annually. As part of the registration process, the entity will file its Articles of Association, which defines its purpose and scope of operation together with its internal governance and administration.

With registration achieved, a Certificate of Civic Organization Legal Person will be issued, essentially a business license. Additional steps follow with the certificate as a prerequisite.

2. *Organization Code Certificate*

Obtaining an Organization Code Certificate, which provides a national identification number, establishing a bank account, tax registration and registration with the State Administration of Foreign Exchange are the next steps.

3. *Banking*

Banking in China is highly regulated, and there are several large Chinese banks as well as several international banks operating in China. Proximity and service orientation are important criteria because foreign currency transactions are likely to be involved in an international educational endeavor. Such transactions require approval of the State Administration of Foreign Exchange and may require walking paperwork from office to office. The taxation systems, both national and local, are closely entwined with the banking system as a means of insuring that taxes are appropriately withheld and paid when foreign currency payments are made.

E. Employment

A foundational task of establishing a Chinese-foreign educational program involves employment. Typically, there are two options for employment of the faculty or staff members. One option is having the CEI hire them directly. The advantage of this option is that there is no permanent establishment (PE) concern for the foreign university resulting from having its employees on the ground in China for substantial periods. The disadvantage is that the employment relationship is subject to China labor laws, which are employee friendly, and it is not easy to do a termination without a stipulated ground. In this case, the new organization must adopt clear employment policies published in an employee handbook that conforms to Chinese labor law and becomes part of individual employment contracts. In addition, the organization must establish appropriate accounts with social agencies to remit required social contributions. This approach is more frequently used for hiring local Chinese.

Another option is to keep the employment relationship with the foreign university and seconding the faculty or staff members to work at the new organization. The advantages of this option are that many foreign faculty and staff members prefer to keep their employment benefits with the home university and the employment relationship will still be subject to foreign laws, which permits “at will” employment status. For this option, it is important to draft the secondment agreement carefully to make sure the new organization has control of the secondees to avoid the PE concern for the foreign university.

F. Data Communication Services

In general, universities operating in China obtain their data communication services through the China Education and Research Network, or CERNET. A JV university will need to register with this service provider and establish connectivity to this network in order for the university to have access to global websites within the framework of national regulation.

G. Curriculum and Degree Majors

In principle, schooling of Chinese-foreign Cooperative Education must abide by Chinese laws, implement China's educational policy, conform to China's public morality, and not harm China's national sovereignty, security, and social public interests.⁶³

MOE approval of a JV university provides general authorization to operate as a recognized institution of higher education. Subsequent approvals are required for particular majors and degree programs. Applications are accepted once a year, in July, with a decision rendered by the following spring. Applications for specific majors require documentation to justify the need and demand for the major, the qualifications of the institution and its faculty to offer the major, the course syllabi that will constitute the major, and a demonstration of the career prospects of graduates of the major. A list and description of the teaching materials and periodic reports on student enrollment, curriculum, faculty, teaching quality, financial status, etc. are also required.⁶⁴

The MOE is the authority that evaluates Chinese-foreign Cooperative Education in terms of schooling and teaching quality. Problems have come to the MOE's attention including the oversupply of courses in business, management, and computer science; the insufficient inclusion of core foreign courses and faculties; and the provision of courses that are in violation of Chinese laws, etc.⁶⁵ In 2018, the MOE terminated 234 CEIs and CEPs for "low teaching quality and professionalism," showing its commitment to enhance the supervision and exit mechanism of Chinese-foreign Cooperative Education.⁶⁶

H. Student Recruitment

The recruitment and admission of undergraduate Chinese students takes place in a hybrid form that takes into account the context of the Chinese national system of college entrance, which includes the famous *Gaokao* entrance exam and other requirements determined by provincial authorities, and the JV university's own holistic criteria that closely follow the U.S. university's approach at home. The hybrid model is designed in principle to reward merit (as demonstrated by the *Gaokao* and related tests) and to find the right students to match the JV university's holistic admissions criteria. The new institution will have to seek authority to recruit and enroll students province by province and will be given a recruitment quota by major,⁶⁷ which is a legal ceiling and a practical floor.⁶⁸ Student recruiting

63 2003 Cooperative Education Regulations, art. 5.

64 2004 Cooperative Education Measures, art. 44.

65 Notice of the MOE on Further Regulating the Order of Chinese-Foreign Cooperative Education issued Apr. 6, 2007, effective on the same day.

66 Notice from General Office of the MOE on Approval of Termination of Some Chinese-Foreign Cooperative Education Institutions and Programs on June 19, 2018, and took effect on the same day.

67 Once students are matriculated at the JV university, they are free to choose any major and are not restricted by the original admissions quota.

68 Practically speaking, it is acceptable if the enrollment is below the approved quota. However, in the long term, a low enrollment rate may cause the Ministry to revoke the approval or not permit a renewal.

materials, such as publications and websites and admissions criteria, all must be approved by the education bureau of the province where the new institution resides.

I. Tuition and Fees Pricing

Chinese-foreign cooperative education is characterized as a “public welfare undertaking” in the 2003 Cooperative Education Regulations. It is the MOE’s policy to prohibit charging indiscriminate and high fees in the name of Chinese-foreign cooperative education, and prevent the tendency of industrialization of education.⁶⁹ Notwithstanding, the 2004 Cooperative Education Measures explicitly allow investors to have a reasonable return.⁷⁰

The provincial price management bureau approves the tuition and all fees charged to students that are Chinese citizens. Proposed pricing must be justified in terms of the cost of delivering the educational services, market demand, and relevant market benchmarks. Maximum prices are approved for several years; institutions generally do not raise their prices each year as is typically the case in the United States. The prices charged to foreign students are not regulated but are filed with the price management bureau and are typically higher than the prices charged to Chinese citizens.

Once operational, the new university will have ongoing interactions with a variety of regulatory agencies at the local, provincial, and national levels. The scope ranges from transactions processing through annual reports, audits, and periodic inspection and review visits. Managing these interactions in a coordinated and efficient way takes expert staffing and forethought.

J. Tax and Permanent Establishment Issues

The first and foremost thing to keep in mind as U.S. colleges and universities rapidly internationalize is that while many colleges and universities are tax-exempt entities in the United States, their tax-exempt status does not automatically carry over to their operations outside the United States. Chinese tax authorities are becoming increasingly more sophisticated in uncovering alleged tax violations and collecting additional taxes and fines. Adding to the complexity of complying with higher education regulations, a tax notice issued in 2018 titled Circular of the State Administration of Taxation on Certain Issues relating to the Implementation of Tax Treaties (Bulletin 11) has resulted in a groundbreaking tax development for CEIs and CEPs.

According to Bulletin 11, CEIs without legal person status, and premises used to carry out academic and teaching activities in connection with a CEP, will constitute a permanent establishment of the foreign university in China. It appears from Bulletin 11 that the Chinese tax authorities have taken the view that a Non-Independent CEI or CEP will result in a per se fixed place of business PE for a foreign university engaging in either of these two forms of Chinese-foreign cooperative education activities.

69 Opinions on Current Sino-Foreign Cooperative Education, arts. 1, 6.

70 2004 Cooperative Education Measures, art. 31.

Bulletin 11 does not provide any guidance on how a foreign university's PE will be taxed in China. Reported tax cases and other available guidance suggest that

- Once a foreign university is deemed to have a PE in China, there are two ways that the PE can be taxed:
 - a. based on its actual profit from the activities constituting the PE or
 - b. based on the deemed profit approach using its revenues or costs/ expenditures derived from or generated in China;
- Taxation on a "deemed profit basis" can result in a foreign nonprofit university being taxed in China, even where it is not making an actual profit from its activity in China and is using the funds consistent with its nonprofit mission;
- To be taxed on an actual profit basis requires the foreign university to keep accurate accounting records and books for its activities in China.

An area that is often overlooked by foreign taxpayers who are found to have PE in China is the implication of its PE status on its employees' individual income tax (IIT) liabilities in China. Under most tax treaties between China and other countries, an individual who is employed by a non-Chinese employer to work in China under a temporary assignment is exempt from IIT in China in any calendar year, if all of the following three conditions are met:

- The individual stays in China in the aggregate for 183 days or less during the calendar year;
- The individual's income is not paid by or on behalf of a Chinese employer; and
- The individual's income is not borne by the PE of the overseas employer.

If a foreign entity is found to have a PE in China, the 183-day exemption is *not* available and the foreign employees who travel to China on behalf of the foreign entity that has a PE will be subject to IIT, even if they spend less than 183 days in China. In fact, the Beijing local tax bureau reported a case whereby the foreign shareholder of a Chinese-foreign JV company was ordered to pay RMB 23 million (roughly USD 3.6 million) of IIT on behalf of its employees after it was found to have a PE in China. A recently issued tax notice titled Announcement of the Ministry of Finance and the State Administration of Taxation on Relevant Individual Income Tax Policies for Non-Resident Individuals and Resident Individuals without Domicile (Announcement 35) stipulates that the PE of a foreign entity shall be treated as a Chinese employer for IIT purpose. It further provides that, for the PE adopting a deemed profit taxation approach or having not paid any enterprise income tax due to no business income, the wages and salaries obtained by its nonresident employees without a domicile in China (usually foreign employees) from working for the PE shall be deemed as being paid or assumed by the PE, regardless of whether such wages and salaries have been recorded in PE's accounting records. In this case, once the foreign university is found to have a PE in China under a Non-Independent CEI or CEP, its employees who travel to China would not be

able to enjoy a treaty benefit for IIT exemption, since their income will be treated as being borne by the PE. Under Announcement 35, employees' income derived from working in China will be subject to IIT, even if the employees stay in China for less than ninety days. In light of Bulletin 11 and Announcement 35, foreign universities with a Non-Independent CEI or CEP in China need to pay special attention to its employees' IIT liabilities in China.

Separately, foreign universities are only exempt from value-added tax (VAT) for the income derived from offering "degree education" in Chinese-foreign cooperative education according to a tax notice titled Announcement of the State Administration of Taxation on Clarifying Several Issues concerning Collection and Administration of Value-added Tax on Chinese-Foreign Cooperative Education and Others published in 2018. A positive development is that the draft VAT Law released in 2019 proposed to extend the VAT exemption scope to educational services provided by schools, and other educational institutions, without specifying "degree education." Therefore, there is a possibility that, with the introduction of the VAT Law, income derived by foreign universities from "nondegree education" in CEI or CEP will be exempt of VAT in the future. Foreign universities are advised to keep an eye on the development and introduction of the China VAT Law.

Due to the outbreak of COVID-19, the delivery of online courses internationally has been a bridge mechanism for quite a few foreign institutions during school closures and may quickly grow in popularity worldwide for the foreseeable future. In terms of VAT taxation for online courses provided by non-Chinese universities to students in China, the latest development focuses on (1) whether a non-Chinese university will be subject to VAT on tuition collected from online courses provided to students in China and (2) if taxable, which tax bureau in China to file and pay the VAT with.

Generally speaking, tuition collected for courses conducted before March 31, 2021 can enjoy VAT exemption in China under the preferential VAT policies issued by the Chinese tax authority in response to COVID-19. No VAT filing is needed to claim this VAT exemption. This preferential VAT policy did not extend beyond March 31, 2021, and there is no change to the current VAT law, thus legally speaking, tuition collected for courses conducted after March 31, 2021 will be subject to VAT and local surcharges in China.

For cross-border services where the service recipient in China (i.e., the students) needs to pay a service fee to the overseas service provider, VAT payment works on a withholding basis. This means that the payor in China will need to withhold VAT and local surcharges from the total service fee and settle these taxes with the Chinese tax authority either before or after (depending on the amount of remittance) remitting the service fee. Therefore, legally speaking, Chinese students are obliged to withhold and settle VAT for the tuition paid to the foreign universities for the online classes. However, this is rarely the case in practice.

The relevant VAT regulations do not clarify what happens when the withholding agent fails to withhold, and if the taxpayer chooses to file and pay the VAT on its own, which tax bureau the taxpayer should file with. Generally speaking, the tax filing should be done with the tax bureau where the income is

derived, but as with the case of online transactions, this would be impossible as the consumers/students can be all over China. Based on our experience, some local tax authorities may require that there must be students from the local city enrolled in the program for the tax bureau to accept the VAT filing/payment; and some local tax authorities are more relaxed and said that as long as the non-Chinese university has an authorized agent in the city, the tax bureau can accept the VAT filing/payment.

K. Immigration and Visa Rules

According to the Exit and Entry Administration Law and the Regulation on Foreigner Exit and Entry Administration (the 2013 Visa Regulations), there are currently twelve types of visas issued by the Chinese government to aliens entering China. Table 2 is a brief introduction to the seven types that are most relevant to education activities.

Table 2: Introduction of Visas in China

Type	Description
F (Visiting Visa)	The F visa is issued to aliens who come to China for academic and cultural exchanges, visits, and research activities. The key supporting document for the F visa application is a letter of invitation issued by an entity in China.
L (Tourist Visa)	The L visa is issued to aliens who come to China for sightseeing. The key supporting document for the L visa application is the applicant's travel itinerary. Foreign citizens may apply for a single-entry, double-entry, or multiple-entry L visa that is valid for six months or one year. Aliens who come to China for group travel can be issued Group L visas.
M (Trading Visa)	The M visa is issued to aliens who come to China for commercial and trade activities. The key supporting document for an M visa application is a letter of invitation issued by the applicant's commercial or trade partner within China.
R (Specialist Visa)	The R visa is issued to foreigners whose specialized skills are urgently needed in China. The key supporting document is the Confirmation Letter for Top Level Overseas Qualifying Personnel issued by the State Administration of Foreign Expert Affairs. Aliens in possession of an R Visa will still need to procure work and residence permits to work and live in China.
S Visa (Private Visa; S1 and S2 Visas)	The S1 visa is issued to the spouses, parents, and children under the age of eighteen or parents-in-law of aliens residing long term (more than 180 days) in China as well as for aliens who reside in China for other personal matters. The S2 visa is for family members of aliens staying short term (less than 180 days) in China for work as well as for persons staying in China for other personal matters.

X (Student Visa; X1 and X2 Visas)	The X1 visa is issued to aliens who come to China for long-term study (more than 180 days). The X2 visa is issued to aliens who come to China for short-term study (less than 180 days). Both X1 and X2 visas require an admission notice from a Chinese educational institution. X1 visa holders must apply for a residence permit with the local public security authorities within thirty days of entry into China.
Z (Work Visa)	The Z visa is issued to aliens coming to China for work. The key supporting document for a Z visa application is the applicant's Chinese work permit or a document confirming his or her expertise. Z Visa holders must apply for a residence permit with the local public security authorities within thirty days of entry into China. In accordance with a 2014 China-U.S. visa arrangement, U.S. citizens may be eligible for a ten-year multiple entry visa.

The 2013 Visa Regulations emphasize that the visa holder can only engage in the activities corresponding to the visa he or she has.

Foreign faculty may hold either an F visiting visa or L tourist visa to enter into China for a short-term trip related to a Chinese-foreign joint educational program. Faculty members may be able to obtain a multiple-entry F visa in order to teach in China for more than three months. Under the 2013 Visa Regulations, the F visiting visa is more appropriate than an L tourist visa, if the faculty member is engaged in teaching or research activities in China for a term of less than three months. If the activities are deemed related to business or trading, the Chinese authorities may issue an M trading visa rather than an F visa. Although it is not uncommon in practice that faculty and staff members use an L visa to come into China for meetings or conferences, an F or M visa will likely be more appropriate for compliance purposes. If a faculty member intends to stay in China for more than three months to teach or to conduct research, the faculty member should apply for a Z work visa. An F or M visa may be considered to be inappropriate for such a stay.

For students, both X1 and X2 visas require an admission letter from a Chinese educational institution. Generally speaking, an international student studying in China with an X1 visa may do an internship in China. For foreign students studying in overseas universities and international students holding an X2 visa to do an internship in China, the most legitimate way would be applying for an S2 visa marked with an "internship" stamp. The S2 visa, as mentioned above, is normally issued to those who intend to visit China for short-term private matters, including visiting their immediate family members who are non-Chinese working or studying in China. The S2 visa marked with an "internship" stamp that we describe here is a new pilot project that just started to be implemented in specific areas such as Shanghai, Zhongguancun District of Beijing, Guangdong FTZ, Hangzhou, Sichuan FTZ, Chongqing, Anhui Province, Changchun New Area, and Tianjin, etc.

This S2 visa cannot be applied for at the Chinese embassy/consulate at the students' home country. There are two ways of application, both of which, however, are subject to the discretion of the visa official in charge, who reviews and grants approval on a case-by-case basis, and are not easy to acquire in practice:

1. The local invitation entity could apply on behalf of the student online through a platform administered by the local Exit-Entry Administration Bureau. Once it has been approved, the student may directly get an S2 visa at the airport when they arrive in China.
2. The students may first come into China holding a different visa, such as L visa or M visa, and apply for “switching” the visa to an S2 visa marked with an “internship” stamp inside China at the local Exit-Entry Administration Bureau.

For both approaches above to work, assistance of a top-ranking domestic university and/or sponsor company would be really helpful. If such assistance cannot be procured, we note that in practice some students did enter China with an F or M visa (more often an M visa) by describing their short-term internship as “field study.” No compensation can be obtained for this kind of “field study.”

In addition to the 2013 Visa Regulations, Chinese authorities have issued certain implementing rules clarifying applicable targets of certain visa types. For example, the Circular on Relevant Handling Procedures for Foreigners Entering China for the Accomplishment of Short-Term Work Assignments (Trial) (Trial Procedures)⁷¹ provides that if foreigners come to China for the following work activities for less than ninety days, they need to apply for a short-term Z visa and residence permit (if staying for more than thirty days): (1) completion of technical work, scientific research, management or provision of guidance; (2) training in a sports agency in China; (3) filming; and (4) engaging in foreign-related commercial performances.⁷² However, the Trial Procedures have not been strictly enforced in practice.

Also, the Visas System for Overseas Qualifying Personnel Implementing Procedures (Overseas Qualifying Personnel Visa Rules) further clarify that R visas are, broadly speaking, available to two groups: (1) top-level overseas qualifying personnel and (2) overseas qualifying personnel whose talents are urgently needed for China national development. More specifically, this refers to scientists, leading figures in science and technology, international entrepreneurs, and specialist or highly skilled professionals.⁷³ The Overseas Qualifying Personnel Visa Rules greatly simplified the application procedures and shortened the processing time for R visas, with the aim of attracting more foreign talent to China.

If the foreigners are illegally employed or engage in activities that are not consistent with their visa types, the Chinese authorities may impose a fine on the foreigners ranging from RMB 5,000 to RMB 20,000 (approx. USD 700–3,000). In

71 Trial Procedures were jointly issued by the Ministry of Human Resources and Social Security, Ministry of Foreign Affairs, Ministry of Public Security, and Ministry of Culture on November 6, 2014, and were made effective on January 1, 2015.

72 To avoid doubt, being sent to a branch, subsidiary, or representative office in China to complete a short-term work assignment or participating in sports event in China are not deemed as short-term work here.

73 Overseas Qualifying Personnel Visa Rules were jointly issued and made effective by the State Administration of Foreign Expert Affairs, the Ministry of Foreign Affairs, and the Ministry of Public Security on November 28, 2017.

serious situations, the foreigners may even be subject to detention for five to fifteen days. Entities that illegally employ foreigners or assist foreigners to violate the visa rules may also be exposed to fines, penalties, confiscation of illegal earnings, and detention orders.

L. State Foreign Exchange Administration (SAFE); Foreign Exchange Restrictions

Although the internationalization of the RMB is a continuing trend, RMB is still not freely convertible into other currencies. China still applies foreign exchange controls through the SAFE in relation to foreign investment in China and cross-border transactions. For every transaction involving foreign currency, a genuine and lawful ground is necessary.

China divides cross-border payments into two categories: (1) current account items, such as the foreign exchange incomes and expenditures incurred in international trade transactions; and (ii) capital account items, such as foreign currency loans or equity investments.

1. *Current Account Items.* Current account transactions normally only require proof to be shown to the remitting/receiving bank in China of a genuine and lawful underlying transaction. There is a quota for both Chinese individuals and entities per year to make and receive payment in foreign currencies under the current account: USD 50,000 for Chinese individuals, USD 50,000 for Chinese registered entities to pay overseas entities, and USD 5,000 for Chinese registered entities to pay overseas individuals. Payment within such quota can be remitted easily, since the bank will generally only review the personal ID card of the individual or the transaction contract and/or invoice of the entity when making the remittance. For payment beyond such threshold, the underlying transaction needs to be examined by the bank with more supporting documentation pursuant to SAFE's instructions.
2. *Capital Account Items.* Capital account transactions are usually subject to stricter regulation and administration and may, in some cases, require SAFE's approval.

Due to capital flight concerns, China has strengthened its foreign exchange controls. Chinese banks now require more supporting documentation for large amount payments for service fees and may review invoices and contracts. This has significantly impacted the education-related service fee transfers from Chinese universities to foreign universities and makes it more complicated for Chinese individuals or entities to make large donations to foreign universities.

There is a requirement that a single purchase or payment of foreign exchange and RMB/foreign currency disbursement in an amount equivalent to or greater than USD 5 million for capital account transactions must be first reported to the Beijing SAFE via the SAFE internal information platform as a large transaction. Also, such purchase or payment is subject to approval of the SAFE, the People's Bank of China (PBOC), the National Development and Reform Commission (NDRC), and the MOFCOM. If the transaction amount exceeds USD 50 million, a stricter level of scrutiny applies, involving direct monitoring and review by the

central SAFE. Splitting up transactions into smaller amounts to circumvent such reporting requirement is forbidden.

M. Health and Safety

Safety and health are important topics for the operation of CEIs and CEPs in China. The Education Law generally provides that the educational premises, facilities, and equipment must conform to relevant standards.

The Implementing Regulations for the Private School Law⁷⁴ provide that in the case of an educational institution's failure to take timely measures when there is a serious potential safety hazard on its facilities, to the extent that a severe casualty accident occurs, the cooperative parties of the CEIs will not be allowed to obtain reasonable returns from the CEIs.⁷⁵

The PRC Civil Code⁷⁶ also requires educational institutions to be liable for personal injury suffered by a person with no capacity for civil acts (i.e., a minor under the age of eight or an adult with limited capacity) during the course of studying or living at the educational institution, unless the educational institution can prove the fulfillment of its education or management responsibilities. For personal injury suffered by a person with limited capacity for civil acts during the course of studying or living at the educational institution, the education institutional shall be liable in the case of its failure to fulfill its education and management responsibilities.⁷⁷

In practice, the cooperative education agreement for a CEI usually will contain provisions to address this topic such as that

- The CEI shall be responsible to ensure as part of a systematic health, safety, security, and environment (HSSE) management system that
 - the campus buildings are designed, constructed, maintained, and operated in accordance with the HSSE standards within the education industry, which shall not be less than the HSSE standards required by applicable Chinese law; and

74 The Implementing Regulations for the Private School Law, issued Mar. 5, 2004, effective Apr. 1, 2004.

75 According to article 45 of the Implementing Regulations for the Private School Law, the amount of returns should be in proportion to the surplus of the CEIs that is determined based on (1) items and rates of fee collected, (2) the proportion of expenses used for educational and teaching activities and improvement of conditions of the operation of CEI to fees collected, and (3) the level of school operation and quality of education. The exact amount or scope of returns that should be withheld is subject to severity of the accident occurred.

76 The PRC Civil Code, May 28, 2020, effective Jan. 1, 2021.

77 According to article 9 of the Measures for the Disposal of the Student Injury Accidents and court cases, the education and management responsibilities of an educational institution include without limitation (1) ensuring the school premises, site, and other educational, teaching, and daily facilities meet relevant safety standards; (2) ensuring drugs, foods, drinking water, etc. supplied by the education institution to students meet relevant national and/or industrial safety standards; (3) launching necessary education on safety, self-protection, and self-rescues training programs for students; and (4) taking immediate measures to provide relief to the injured students when injury accidents take place.

- an emergency response program is established under which the president of the CEI shall promptly advise the board of trustees and each of the cooperative parties of any accidents arising out of or in connection with the operations of the CEI that causes casualties or serious injuries or that may have a material negative effect on the environment; and
- a report on all HSSE matters shall be made by the Board president at least quarterly for safety matters and annually for other matters.
- The president, executive vice president, or any of the trustees may require a special Board meeting to be held to discuss ways to deal with and prevent any accident or incident.

N. IP as a Capital Contribution

An important element in foreign participation in education is the licensing of IP rights to the CEIs and CEPs.

Article 10 of the 2003 Cooperative Education Regulations provides the following:

The Parties may use cash, in-kinds, land use rights, IP rights and other assets as their capital contribution. Investment made in the form of intellectual property rights by the Chinese and Foreign Parties shall not exceed one third of their respective total investment. However, in the case of a foreign education institution invited by the State Council's education administrative department or labor administrative department or a people's government of a province, autonomous region, or municipality directly under the Central Government to cooperatively operate an educational institution in China, its investment in the form of intellectual property rights may exceed one third of its total investment.

Articles 10 and 11 of the 2004 Cooperative Education Measures further provide that

... The Chinese and Foreign Parties shall, according to the principles of fairness and reasonableness, determine through consultation the valued price of the intellectual property rights invested in the operation of an educational institution by the Chinese and Foreign Parties, or through appointing a social intermediary organization that both parties agree to make an evaluation, and shall go through the relevant procedures in accordance with the law.

Where a Chinese or Foreign Party makes investment in the operation thereof with any intellectual property right, the Chinese or Foreign Party shall submit the materials related to such intellectual property right, including a photocopy of the intellectual property right certificate, the validity status thereof, the practical value of the right, the calculation basis for valuation and pricing of the right, the valuation and pricing agreement entered into by the two parties, and other relevant documents.

For foreign invested enterprises in the commercial context, only a transfer of ownership of the IP rights can be used as a capital contribution. For CEIs, each party is permitted to also use IP licenses for its capital contribution, subject to percentage limits on intangible contributions of 33 percent. There is a greater degree of flexibility by the parties in determining their respective contributions in the educational context. For example, foreign universities may use their IP rights as their entire capital contribution, if the statutory conditions are met. As a practical matter there are difficulties in valuing such IP contributions because the valuation process requires the sign-off on the IP valuation by a Chinese valuation company, notwithstanding what the parties may agree regarding valuations. There is a wide range in quality and understanding of international valuation practices by Chinese valuation companies.

Even if the IP rights are not used as a capital contribution, IP licenses remain common to enable the CEIs and CEPs to operate (e.g., for its name and curriculum), and as a way to obtain royalty payments from the CEIs and CEPs in China. Unlike a capital contribution of IP rights, the licensing for the use of a name or curriculum is a commercial matter that can be negotiated between the parties.

O. Trademarks, Copyrights, and Domain Names

The IP rights most relevant to foreign participation in the Chinese education sector are trademarks that protect the name of the school and copyrights that protect the curriculum, syllabi, and teaching materials.

1. Trademarks

China adopted the first-to-file rule, which means that the first entity to validly apply for a trademark obtains it. Prior use is not required. It is essential to file trademark applications in China as early as possible.

For educational institutions, Classes 41 (education and entertainment services) and 16 (paper goods and printed matter) are the core trademark classes. Additionally, defensive filings are advisable for Classes 9 (for software, etc.), 25 (clothing), 35 (for advertising) and 42 (for different kinds of research).⁷⁸ These defensive filings can be used to prevent “trademark squatters” or other bad faith infringers, which are notorious in China, from abusing or squatting on the education institution’s marks.

For educational institutions whose names incorporate the name of the city or region where they were founded, registering the institution name as a trademark is usually problematic because of article 10 of PRC Trademark Law.⁷⁹ Article 10

⁷⁸ A full overview of all Nice Classes is available at <http://www.wipo.int/classifications/nice/en/>, last visited on May 7, 2021.

⁷⁹ PRC Trademark Law (as amended on Aug. 30, 2013, <http://www.wipo.int/wipolex/en/details.jsp?id=13198>). Article 10 provides, “Names of administrative districts at or above the county level and commonly-known foreign place names may not be used as trademarks, except where such names have other meanings or are an integral component of a collective mark or certification mark.”

provides that certain foreign geographical names cannot be used as trademarks due to “lack of distinctiveness.” Educational institutions can overcome this restriction by registering the institution’s name combined with a distinctive logo or as an abbreviated name of the institution.

2. *Copyrights*

For educational institutions, copyright protection is often one of their most important IP rights. Many of the most crucial materials used by educational institutions in China will qualify for copyright protection such as curriculum, books, and materials.⁸⁰

In China, the term of copyright protection is the life of the author plus fifty years. In the case of a work created by a school or university, the term expires on December 31 of the fiftieth year after the work’s first publication. Copyright ownership arises automatically on the date of completion of the works, so it is not mandatory to register the copyright.

Although copyright registration is not mandatory, it is advisable for copyright owners to use the “©” symbol, in combination with the name of the copyright owner and the year of publication on all published works. An explicit demonstration indicating that a work is copyrighted can help if there are disputes about the copyrighted material.

Also, copyright registration with the Copyright Protection Center of China usually will strengthen the position of the copyright owner, since a copyright registration can be used as prima facie evidence of ownership in a dispute.

3. *Domain Names*

Registering a “.cn” domain name can be an issue for foreign education institutions. The China Internet Network Information Center (Center), the registrar for “.cn” domain names, requires that an educational institution has an official Chinese company registration certificate in order to hold a “.cn” domain name in China. The Center also requires a letter of commitment, signed by the legal representative of the Chinese company.

P. IP Licensing in China

When foreign education institutions provide an IP license to their Chinese partners, CEIs or CEPs in China, copyright is the major right that they wish to protect. The most common issues to consider are the following:

- *Adaptations and translations.* The right to adapt is one of the property rights included in copyright. This means that foreign education institutions

Trademarks using place names that have already been registered shall remain valid.”

80 PRC Copyright Law, art. 3 (Feb. 26, 2010, <http://www.wipo.int/wipolex/en/details.jsp?id=6062>).

can allow or forbid their works to be translated. Moreover, if a work is translated, the institution will still own the basic copyright in such materials. However, the translator may at the same time acquire a *secondary* copyright in the translation itself. It is advisable to include a copyright assignment arrangement in an agreement regarding the translation of works.

- *Works created in the course of employment.* According to the China Copyright Law (article 16), works created in the course of employment are in principle owned by the author of the work, not by the employer. It is therefore essential to include a copyright assignment in all employment agreements with the education institution's faculty and staff.
- *Exception for education and teaching.* The China Copyright Law (articles 22 and 23) provides for an exception to copyrights for education and teaching purposes (also called "fair use"). This limited exception means that it is generally permissible to reproduce, without the payment of compensation, part of a work on a limited scale, for education, teaching, and classroom use, as long as the work was already published, the author is mentioned, and such use does not adversely affect the rights of the copyright owner. This means that education institutions can use copyright protected works on a limited basis during their classes.
- *Improvements.* Unless the license agreement grants the licensee the right to improve the licensed IP, the licensee has no right to improve and modify the licensed IP. It is advisable to include a provision on improvements in IP license agreements.

Q. IP Enforcement in China

For educational institutions in China, the major infringements often involve (1) the unauthorized use of trademarks or institution names and (2) unauthorized use of curriculum materials. These are regulated by several laws, including the China Trademark Law, Copyright Law, and Anti-Unfair Competition Law.

Below are common enforcement options against IP infringements.

- *Administrative action.* SAMR and its local branches regulate trademark infringement and unfair competition acts. The National Copyright Administration (NCA) and its local offices regulate cases of copyright infringement. Once a complaint is filed and accepted, the agency can take a range of actions, including visiting the infringer's premises; inspecting and sealing or seizing the infringing goods; and/or confiscating those documents, which relate to infringing acts. Also, the agency can arrange for the destruction of all infringing products and impose a fine.
- *Civil action.* Chinese courts retain the ability to issue preliminary and permanent injunctions, and to order compensation payments for any prejudice the claimant may suffer due to infringement. The maximum

statutory compensations are RMB 5,000,000 for trademark infringement⁸¹ and RMB 500,000 for copyright infringement.⁸²

- *Criminal action.* Criminal action is available for dealing with counterfeit goods and copyright piracy.⁸³ Unfortunately, unauthorized use of a service mark, including an educational service mark, does not constitute a crime in China. The Public Security Bureau (PSB) is responsible for IP-related crimes. The PSB conducts investigations of infringing activities and can transfer a case to the Procuratorate, which decides whether to prosecute the infringer in a People's Court. If an IP owner has initial evidence to prove the infringer's criminal offense, it may directly bring a criminal action before the court, without involving the PSB.

R. *Cybersecurity Regulatory Framework*

China's Cyber Security Law, the fundamental law on the regulation and supervision of cyber activities, became effective on June 1, 2017.⁸⁴ To facilitate the implementation of the Cyber Security Law, a number of supporting rules have been adopted or are pending finalization, including the Measures for Security Review of Network Product and Services,⁸⁵ the Personal Information Specification,⁸⁶ the Provisions on Online Protection of Children's Personal Information,⁸⁷ the Provisions for Security Protection of Critical Information Infrastructure,⁸⁸ the Measures for Security Assessment on Cross-Border Transfer of Personal Information,⁸⁹ and the Data Security Measures.⁹⁰ The Cyber Security Law, together with its supporting rules, promotes a more heavily regulated Chinese Internet and technology sector.

81 PRC Trademark Law, art. 63, <http://www.wipo.int/wipolex/en/details.jsp?id=13198>, last visited on May 7, 2021.

82 PRC Copyright Law, art. 49, <http://www.wipo.int/wipolex/en/details.jsp?id=6062>, last visited on May 7, 2021.

83 PRC Copyright Law, art. 48; PRC Trademark Law, arts. 61, 67 and 68.

84 The Cyber Security Law was issued by the Standing Committee of the National People's Congress on November 7, 2016.

85 Issued by the State Internet Information Office on May 2, 2017, effective June 1, 2017.

86 Issued by the Administration of Quality Supervision, Inspection and Quarantine (whose duties have been merged into SAMR) on December 29, 2017, effective May 1, 2018. The amended version of the Personal Information Security Specification, was issued on March 6, 2020, and took effect on October 1, 2020.

87 Issued by the Cyberspace Administration of China on Aug. 22, 2019, effective Oct. 1, 2019.

88 Issued by the State Internet Information Office on July 11, 2017 but currently is still a draft.

89 Issued by the State Internet Information Office on June 13, 2019 but currently is still a draft.

90 Issued by the State Internet Information Office on May 28, 2019 but currently is still a draft.

S. Network Operators and Data Controllers

1. Obligations of Network Operators

Under the Cyber Security Law, network operators are broadly defined as the owner and administrator of networks and network service providers. This definition covers almost all businesses with operations that use networks in China.

When a foreign education institution via CEI and WFOE, makes use of network or network-related tools to provide services in China, it is very likely that it will be treated as a network operator. Obligations for network operators under the Cyber Security Law include the following:

- *The obligation for network operational security:* establishing an internal security management system; operating procedures and technical measures against security breach incidents; appointing person responsible for network security; retaining a relevant weblog for not less than six months; and adopting data protection measures, including data classification, important data backup, and data encryption.
- *The obligation for network information security:* establishing a robust user data protection system; publishing rules concerning the collection and use of personal data, and expressly stating the purpose, method, and scope of data collection and use; obtaining users' consent for data processing activities; and reporting to relevant authorities if a data security incident takes places or is likely to take place.
- *The obligation to cooperate with authorities:* initiating relevant emergency response plans upon the occurrence of cyber security incidents and reporting to the relevant authorities; and providing technical support and assistance in national security and criminal investigations.

2. Obligations of Critical Information Infrastructure Operators (CIIO)

The Cyber Security Law does not provide a clear definition of critical information infrastructure (CII). One of its implementing rules, the Provisions for Security Protection of Critical Information Infrastructure, which is still at the draft stage, provides that an education institution can be a CIIO if it operates network facilities or has information systems that, if they are destroyed or experience a loss of functionality or data leakage, may result in damages to the national security, the national economy, and people's livelihood or the public interest of China. The risk for a CEI to be considered a CIIO in China is relatively low.

CIIOs are subject to stricter obligations. For example, CIIOs will be subject to certain China data localization requirements and security management obligations. CIIOs also have an obligation to assess network security and report potential risks as well as enter into security and confidentiality agreements with product and service suppliers when purchasing network products and services.

3. *Obligations of Data Controllers*⁹¹

CEIs or the WFOEs that collect and use personal data (including personal data of students and faculties) in China will be subject to Chinese data protection laws and regulations. The Cyber Security Law provides a series of high-level data protection rules. In addition to the Cyber Security Law, a few implementing rules provide further guidance on data handling activities, which include the Personal Information Security Specification (Specification) and the draft of Measures for Security Assessment on Cross-Border Transfer of Personal Information (Data Export Measures). The Specification is a nonbinding national standard and became effective May 1, 2018 (and amendment to which became effective on October 1, 2020). The Specification gives detailed guidance on the collection, use, sharing, and disclosure of personal data. It is highly recommended that data controllers, when engaging in personal data handling activities in China, should be in compliance with this Specification. The Export Measures are currently still a draft. There has been some back-and-forth with respect to the regulatory requirements in connection with the cross-border transfer of personal data in prior versions of drafts. The most recent draft Data Export Measures issued on June 13, 2019, require all network operators to (1) enter into a cross-border data transfer agreement with foreign data recipients, which shall contain standard clauses as provided in the draft; (2) conduct a security assessment before transferring personal data overseas and outline how a security assessment should be performed; and (3) assume ongoing obligations to ensure the security of transferred personal data.

Personal data is classified into two categories in China: (1) personal general data and (2) personal sensitive data. Personal data is broadly defined as information that is recorded in an electronic or other manner and may independently, or in combination with other information, identify an individual or reflect the activity status of an individual. Personal sensitive data means personal data that may cause reputational, physical, or mental damages or discriminatory treatment, if divulged, illegally provided or abused. Personal data that does not fall within the scope of personal sensitive data is automatically deemed personal general data.

If a CEI or a WFOE collects general personal data in China, its key obligations under the current legal regime is to obtain consent from data subjects. In the consent request form, data controllers must specify the type of data collected, the purpose of the data collection, storage time period and location, and data security capability. Chinese law does not expressly require, but encourages, data controllers to obtain an explicit consent for collection of general personal data.

For personal sensitive data, data controllers should obtain explicit consent from data subjects. Personal data of children under the age of fourteen is treated as personal sensitive data, and eligible consent must come from the child's legal guardian. An explicit consent is an affirmative act of the data subject. The valid forms of an explicit consent include giving a written statement, clicking a checkbox to show consent, and sending a consent message.

⁹¹ Data controllers are defined in the Specification as entities or individuals who have the right to decide the purposes and methods of personal data processing.

A notable update is that China's first Personal Information Protection Law will very likely be introduced within the year of 2021. On 29 April 2021, China's National People's Congress released on its official website the second consultation draft of the Personal Information Protection Law ("Draft PIPL").⁹² Key highlights in the Draft PIPL include:

1. providing additional legal bases for processing personal data in addition to consent, such as contractual performance, compliance with applicable laws, processing of publicly available personal data, processing for public health and public interest purpose;
2. providing a legal basis for extraterritorial enforcement, which would cause the law to apply to the entities located outside of China, if they collect personal data of data subjects resident in China with an aim to provide services or products to or analyse or evaluate the behaviour of such data subjects in China;
3. providing multiple pathways for cross-border transfer of personal data, such as security assessment, certification, conclusion of contract containing certain standard contractual clauses, which in a way reshapes the mechanism proposed under the Data Export Measures;
4. reinforcing the obligations of mega basic internet platform services operators; and
5. significantly increasing monetary fines for breaches, which could amount to RMB 50 million or 5% of the company's total turnover in the preceding year.

T. Financing of CEIs

It is critical for CEIs to have sufficient financing to establish successful operations in China. The issue of financing can be tricky because CEIs often face difficulties with obtaining consistent financial support from the Chinese government (typically, from the local government) and are confronted with strict foreign exchange controls of China that can make it difficult to bring foreign capital into China. This section explains three methods for foreign participants to raise money for the establishment and operation of CEIs: (1) partner financing, (2) tuition and fees, and (3) philanthropy.

1. Partner Financing

Pursuant to article 10 of the 2003 Cooperative Education Regulations, a Chinese or foreign education institution may contribute with funds, in kind or in the form of land-use rights, IP rights or other assets to establish a CEI. Specifically, Chinese or foreign education institutions are required to make payments in full within a

⁹² A full copy of this draft PIPL is available at <http://www.npc.gov.cn/flcaw/flca/f80818178f9100801791b35d78b4eb4/attachment.pdf>, last visited on May 19, 2021.

specified time period and are prohibited from withdrawing the registered capital or misappropriating the operating funds during the existence of the CEIs.

In practice, the Chinese education institutions provide the facilities, such as the premises, land, and funds, and the foreign education institutions largely provide its teaching resources and IP and faculty. As a general matter, foreign education institutions have been reluctant to commit capital funding to CEIs. Typically, most of the CEI funding is provided by the Chinese education partner or in some cases, a business or government agency where the CEI is located. In general, where there is a high-quality foreign education partner, either the Chinese or foreign institution may receive capital contributions through contracting with a third-party entity or an individual in accordance with article 8 of the 2004 Cooperative Education Measures. Such third-party entity or individual may, as the representative of either of the Chinese or foreign institution, be a member of the Board of the proposed CEI but not the Chairman. Under these Measures, Chinese companies can provide funds and other facilities for the benefit of the CEI through contracting with either the Chinese or the foreign institution, or both.

Chinese local governments can also play an important role in providing financial support or subsidies in the establishment of CEIs. For example, University of Nottingham Ningbo China, which operates a successful CEI in China, has been strongly supported by the Zhejiang and Ningbo governments. The Ningbo government allocated special funds for the development of the CEI. A potential risk of CEI financial support from the Chinese government is that it may make the CEI an educational institution run by the government and thus the use of governmental funding of CEIs may subject the CEI to an annual audit required by the local government. Although as a practical matter, a CEI is likely to be subject to some form of audit by the Chinese tax authorities. In general, CEIs need to be audited according to Chinese accounting principles and are Chinese taxpayers subject to tax audit.

2. *Tuition and Fees*

Based on articles 38 and 39 of the 2003 Cooperative Education Regulations and article 43 of the 2004 Cooperative Education Measures, all tuition and fees collected by CEIs are major financial sources for CEIs. Tuition and fees are required to be used for educational and teaching activities as well as improving school operations. The standards governing the fees that the CEI can charge are determined in accordance with the relevant provisions of the governmental authorities of the province or municipality in which the CEI is located. Also, tuition and fee rates are required to be disclosed in the recruitment information.

There is currently no national Chinese rule that provides overall guidance on tuition and fees of CEPs and CEIs. Various local authorities, such as Shanghai, Jiangsu, Guangzhou, and Shandong, have different local rules on tuition and fees. As a general rule, the tuition and fees of CEPs and CEIs are guided by the local government, and for those offering diplomas and degrees, their tuition standards require approval from the local MOE and the pricing authorities. For other CEIs and CEPs, tuition standards only require a record filing with the local MOE and the pricing authorities.

3. *Philanthropy*

a. *Contributions to Foreign Universities.*

The legal and practical framework for philanthropy with regard to foreign universities in China has two aspects: (1) seeking funding for the foreign university from Chinese supporters, such as alumni, parents, and friends of the university, and (2) seeking funding for the CEI or CEP to help offset the costs of operations.

The topic of fundraising by foreign universities has become more complex as a result of a combination of factors. The first development was less of a legal concern, but rather a practical concern that arose from a well-known donor family making substantial unrestricted gifts to two U.S. universities several years ago.⁹³ There was considerable criticism by the Chinese public, who complained that the donors were abandoning the educational needs in China. Since this development, there has been a trend by Chinese donors who are making substantial contributions to foreign universities to require some of the funds to benefit China such as programs for scholarships for Chinese students, development of centers in China, and the funding of studies to benefit China.

More recently a combination of the Foreign NGO Law and a tightening of capital outflows due to capital flight and corruption concerns have made it more difficult to make contributions to foreign universities.⁹⁴ If a Chinese donor wants to make a donation or sponsorship in RMB and wishes not to go through the difficulty of applying to make an overseas payment, then the WFOE is the most logical choice as the recipient of the payment. Once the WFOE receives the RMB funding, it can (1) use the funds consistent with the intent of the donation or sponsorship and (2) transfer funds to the foreign institution through a service agreement for any services or benefits to be provided by the foreign institution. To the extent that the funds are not used by the WFOE or paid to the foreign institution pursuant to a service agreement, the remainder of any donation or sponsorship would be treated as revenue of the WFOE. The surplus over expenses would be income that can be distributed as a dividend to its shareholders after paying taxes and other necessary expenses.

93 In 2010, Zhang Lei, a Chinese fund manager who earned an MBA at Yale University, donated USD 8,888,888 to Yale University, which triggered a fiery debate on why the Chinese individual made a donation to a foreign university. Sue Feng, *Chinese Gift to Yale Earns Big Controversy at Home* WALL ST. J. (Jan. 14, 2010), <https://blogs.wsj.com/chinarealtime/2010/01/14/chinese-gift-to-yale-earns-big-controversy-at-home/>. In 2014, a Chinese couple, Pan Shiyi and Zhang Xin, signed a gift of USD 15 million to Harvard University and later made gifts to other colleges in the United State and United Kingdom, with a grand total scholarship fund of USD \$100 million to foreign universities. Zheyang Ni, *SOHO China's \$15M Harvard Gift: Is the Money Better Spent in China* FORBES (July 24, 2014), <https://www.forbes.com/sites/zheyanni/2014/07/24/soho-chinas-15m-harvard-gift-is-the-money-better-spent-in-china/#213df52f2ebd>.

94 Article 21 of the Foreign NGO Law provides that "funding for activities of overseas NGOs in the mainland of China include the following: (1) Legal sources of funds overseas; (2) Interest on bank deposits in the mainland of China; (3) Other funds legally acquired in the mainland of China. Operations of overseas NGOs in the mainland of China shall not involve the acquisition or use of funds other than those stipulated in this article. Overseas NGOs and their representative offices shall not solicit donations in the mainland of China."

If a donor wants to make a donation or sponsorship from onshore in China directly to a foreign institution, there are often considerable administrative difficulties in making such payments from onshore to offshore. Typically, a donor would need to enter into a service agreement to accomplish those objectives.

A potential challenge is that the donor may need to convince the Chinese bank that the contract is appropriate and not a guise for money laundering or capital flight before the bank will approve the payment. Chinese individuals who wish to make donations or sponsorships tend to do so through one of the companies that they own rather than as an individual because of the difficulty for an individual to obtain a tax-deductible donation or sponsorship, whereas a services agreement for a company can be a deductible expense. Describing the funding from Chinese companies as service fees or sponsorship fees, rather than as a gift, may help facilitate the payment of such funds from outside of China.

b. Foundation Formation by CEIs.

For a CEI with an independent legal person status, it may consider setting up an education foundation to raise funds in China. An education foundation enjoys certain tax benefits, including providing tax deduction invoices to its donors.

The Charity Law, which took effect on September 1, 2016, is the first legislation to regulate charitable activities in China. Under the Charity Law, only charitable organizations are qualified to raise funds in China. Unlike the legal framework in many countries in which universities are eligible to receive charitable giving directly, in China, neither the Chinese university that partners to form the CEI or host the CEP is a charitable organization, nor is the CEI or CEP. As such, the Chinese CEI partner and the CEI itself are restricted from raising charitable donations.⁹⁵ Many JV universities in China have set up foundations so they can engage in fundraising activities in China. Examples include the NYU Shanghai Foundation, DKU Foundation and CKGSB Foundation.

Most of the foundations established after September 1, 2016, applied to become charitable organizations at the time of their establishment.⁹⁶ For the first two years after establishment, a foundation is only allowed to raise funds from specific persons, namely, the applicants and directors, and potentially from other entities

⁹⁵ Although the CEI and its Chinese partner are generally not allowed to engage in fundraising activities, they can still receive donations in China. However, unlike a foundation, they cannot issue invoices to enable the donors to receive a tax benefit which is not the most tax efficient.

⁹⁶ Subject to Ministry of Civil Affairs (MCA) requirements, establishing a foundation, whether a public foundation or a nonpublic foundation as classified under the current Foundation Administration Regulation must meet certain requirements, including that it be established for a specific public welfare purpose, it must have a certain amount of initial capital, and have a formal name, articles of association, organizational structure, and full-time personnel qualified for the activities that it conducts. The MCA is responsible for the registration and management of (1) national public foundations; (2) foundations whose legal representatives are non-Chinese residents; (3) nonpublic foundations, with an initial capital exceeding RMB 20 million yuan; and (4) representative offices established in the China mainland by overseas foundations. The local branches of MCA are responsible for the registration and management of local public foundations and nonpublic foundations with initial capital not exceeding RMB 20 million.

having an interest in the foundation. After the first two years, the foundation can apply for the qualification for raising funds from the public.

After obtaining permission for public fundraising from Ministry of Civil Affairs (MCA) or its local branch, the foundation should make a plan for public fundraising that should include the geographical regions, donation options, beneficiaries, the uses of donations, and the costs and expenses of fundraising. This plan should be filed with the MCA registration authority for record.

For those foundations that registered with the provincial MCA, their public fundraising activities are supposed to be conducted within the province where they are located. If the local foundation needs to conduct fundraising activities outside of the province, the foundation may need to report its fundraising activities to the local MCA branch in advance. The Charity Law does not place restrictions on persons or entities from outside of the local foundation's province from donating to the foundation. Another trend is that foundations are establishing support organizations in the United States and other countries that can receive donations from donors in the specific country in order to support the activities of the JV university.

IV. Influence of the China-U.S. Trade War on Education

At the end, it is inevitable to bring up the heated topic—the China-U.S. trade war. Although the trade war initially focused on commercial aspects, it has now expanded to include higher education and scientific research, mainly hindering the cooperation and exchange between these two world powers.

A. U.S. Trade Sanctions

Institutions of higher education from mainland China have been added to either the Entity List⁹⁷ or the Unverified List⁹⁸ administered by the Bureau of Industry and Security (BIS), which is an agency of the United States Department of Commerce.

The BIS has in the past presented a singular reason for putting Chinese universities on its Entity List: engaging in research and development related to nuclear and/or military technologies. For example, National University of Defense Technology was

97 The Entity List contains foreign entities “reasonably believed involved, or to pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States” as outlined in sections 15 C.F.R 744 and 746 of the Export Administration Regulations (EAR). No person (U.S. or non-U.S.) may export, reexport or transfer any items subject to the EAR to a party on the Entity List without an export license. Here, “items subject to the EAR” include all U.S.-origin items and certain non-U.S. items that contain more than a de minimis percentage of controlled U.S.-origin parts.

98 The Unverified List contains foreign entities whose bona fides (i.e., legitimacy and reliability relating to the end use and end user of the items subject to the EAR) are unable to be verified by the BIS through an end-use check. Entities on the Unverified List cannot receive items subject to the EAR by means of a license exception. Furthermore, before exporting, reexporting, or transferring technology or items subject to the EAR to a listed entity, exporters must (1) file an Automated Export System record for all exports to the entity; and (2) obtain a statement from the listed entity, regardless of whether the export requires a license under the EAR classification. Unlike institutions on the Entity List, those on the Unverified List are not subject to embargo.

listed for its use of American-origin parts in the construction of the supercomputer TianHe-1A and TianHe-2, which was used to conduct “nuclear explosive activities” according to the BIS.⁹⁹ Chinese universities conducting research related to military and nuclear-related technologies involving American-made products may expect the increasing likelihood of their names being added to the Entity List, considering that the United States is alert to technology development in China. On the other hand, U.S. parties seeking to collaborate with a Chinese partner should ensure that any collaboration, partnership, exchange, or any other kind of project with any Chinese institutions must undergo significant due diligence in advance and should also place heavy emphasis on ensuring that the end use or end users of any U.S.-origin products or technology involved in the project will not violate 15 C.F.R. sections 744 or 746 of the Export Administration Regulations.

B. NIH Investigation

In the meantime, U.S. government officials have increasingly voiced their concern about international students’ and scholars’ exploiting America’s academic openness for their nations’ illicit gain. In 2018, the National Institutes of Health (NIH) sent a letter to more than 10,000 research institutions across the United States urging them to ensure their NIH grantees are properly reporting their foreign ties. The head of the NIH said that universities would soon announce action against scientists who broke NIH rules. Meanwhile, there were speeches from U.S. government officials several times, which threatened to limit Chinese students from studying and researching in the United States, so as to prevent China from “steal[ing] the fruits of [US] government-funded research.”¹⁰⁰

In response to the actions of the U.S. government, the MOE issued a Warning on June 3, 2019, at a press conference in Beijing, calling attention to visa restrictions placed by the United States on Chinese students and scholars such as the prolonged review time, shortened validity period, and a rising rate of visa rejections. According to statistics from the China Scholarship Council, in 2018, the Chinese government planned to fund 10,313 students studying in the United States, among which 331 had their trip canceled due to visa issues, accounting for 3.2 percent of the total. From January to March 2019, the Chinese government planned to fund 1353 students studying in the United States, among whom 182 had their trip canceled due to visa issues, accounting for 13.5 percent of the total. Since 2018, United States has revoked or rereviewed the U.S. visas of Chinese people for anti-espionage reasons, which has spread from the field of natural science to social science. Recently, the United States has also canceled ten-year visas for a group of

99 <https://www.federalregister.gov/documents/2015/02/18/2015-03321/addition-of-certain-persons-to-the-entity-list-and-removal-of-person-from-the-entity-list-based-on-a-last-visited-on-May-7-2021>

100 In December 2017, the Trump Administration floated the possibility of limiting visas for STEM (science, technology, engineering, math) students from certain countries (namely China) to stem intellectual property theft. In February 2018, FBI Director Christopher Wray stated before the Senate Intelligence Committee that China’s exploitation of America’s open research and development environment would require “a whole-of-society response” involving not just the intelligence sector, but the academic and private sectors as well, inciting backlash from Asian American civil rights groups. In April 2019, Wray reiterated Washington’s determination to prevent China from “steal[ing] the fruits of [US] government-funded research,” especially in universities and research institutes.

Chinese scholars whose research field is Chinese-U.S. relations.

These actions almost certainly will lead to greater tension in relation to Chinese-U.S. research cooperation. Despite all the controversies on whether the links to China are legal or not, it is noted that “prosecutors in most of the cases have not alleged any technology transfers, and were focused instead on the scientists’ failure to disclose grants.”¹⁰¹ Any university, institution, or person that might be involved needs to at least be more thorough in the reporting of funding sources.

V. Impact of the COVID-19 Pandemic

Due to the outbreak of COVID-19 and the resulting restrictions on border entry, visas, and flights from various countries and regions, many students have to change, delay, or even cancel their plans to study abroad for higher education.

In response, the MOE has allowed, as a special arrangement during the pandemic, some CEIs and CEPs to expand their enrollments by admitting such students under the premise of educational equity.¹⁰² Only students already admitted to undergraduate or graduate programs for fall 2020 abroad were eligible. Admission is merit based, with standards not lower than that of the CEI/CEP foreign partner’s admission abroad, and in an appropriate form of an exam. The enrollment of such students is separate from the national unified enrollment plan, does not take up the original enrollment quota, and does not affect other types of enrollment in the colleges and universities. Only degrees of the CEI/CEP foreign partner may be granted.

For students already enrolled in foreign universities but not able to study abroad due to the pandemic, the MOE has also provided more tolerant measures in regard of accreditation of a degree. According to the press release issued by the MOE on February 12, 2020, and the notice issued by the Chinese Service Center for Scholarly Exchange (CSCSE, the agency delegated by the MOE to conduct accreditation of foreign-related degrees) on April 3, 2020 (“CSCSE Notice”), the MOE/CSCSE confirmed that the accreditation of a degree awarded by foreign universities will not be adversely affected by offering some online courses to students in China that is made necessary as a result of the institution’s efforts to prevent and control the spread of the pandemic. That is to say, the MOE permits foreign universities to offer online courses to Chinese students stuck in China due to the COVID-19, and the online courses will not affect the China recognition/accreditation of the degree granted by foreign universities. There are no registration, approval, or other requirements under Chinese education rules for such offering.

As a follow up to the CSCSE Notice, on March 19, 2021, the CSCSE issued the Supplemental Notice on the Authentication of Foreign Degrees Received by

101 See Ellen Barry and Gina Dakota: China’s Lavish Funds Lured U.S. Scientists. What Did It Get in Return?, the New York Times, Feb 6, 2020. Full text available at <https://www.nytimes.com/2020/02/06/us/chinas-lavish-funds-lured-us-scientists-what-did-it-get-in-return.html>, last visited on May 7, 2021.

102 MOE Takes Active Measures to Address Difficulties in Studying Abroad During the Epidemic released by the MOE: http://www.moe.gov.cn/jyb_xwfb/gzdt_gzdt/s5987/202009/t20200916_488192.html, last visited on May 7, 2021; and the answers to journalists’ questions: http://www.moe.gov.cn/jyb_xwfb/s271/202009/t20200916_488189.html, last visited on May 7, 2021.

Chinese International Students through Online Learning During the COVID-19 Pandemic (“Supplemental Notice”)¹⁰³. The Supplemental Notice restates that the recognition/accreditation of Chinese students’ diploma or degree granted by foreign universities will not be adversely affected by the fact that part or all of the courses were taken online due to the pandemic. But it is understood that this should still be a temporary arrangement, and it is not clear how long this temporary arrangement will be permitted, which may largely depend on how long the global pandemic will last. On the other hand, the Supplemental Notice criticizes some foreign institutions’/intermediary agencies’ drastic expansion of online courses driven by profit-making but using the pandemic as an excuse, and indicates that the CSCSE will not grant an accreditation to such diplomas and degrees.

VI. Conclusion

Since the partial opening up of China’s education sector as part of the WTO accession, there has been considerable activity by foreign HEIs and other parties bringing sought-after education resources to China to help meet the massive need to improve China’s education capabilities. Clearly, education remains a high priority for China and its people, and the government as well, and parents and students are willing to invest considerable resources in education.¹⁰⁴ More than 150 years after the first Chinese students attended schools in New England as part of the earliest foray of Chinese overseas studies¹⁰⁵ and one hundred years after the second wave of Chinese students studying abroad,¹⁰⁶ there is a strong desire by many students in China to obtain a “Western quality” education, whether through overseas study, or by China attracting such resources to China. After an initial flurry of activity accompanying the approvals for some of the early CEIs with legal person status, there has been a tightening of the approvals and a slowdown in the pace of new entrants as well as a recent purging by the MOE of CEPs that have not been as active or successful as had been envisioned when they were approved. These trends by the MOE, together with an overall tightening of control by the CPC and an increased focus on taxation of foreign HEIs, has posed a challenge for current foreign participants and has caused a number of new entrants to hold off on their plans to enter China. At the same time, China has further pushed the reforms and movements in the education sector pertaining to private schools, preschool education, off-campus training, vocational education, etc. It remains to be seen whether there will be a resumption of the rapid growth and wide participation of foreign involvement in China’s education sector or if there will be a pull back of existing participants.

103 CSCSE issued the Supplemental Notice on March 19, 2021: <http://jsj.moe.gov.cn/n2/7001/7001/1566.shtml>, last visited on May 7, 2021.

104 Chinese students are among the most numerous foreign students at many U.S. HEIs and there is a growing trend to send students to U.S. and U.K. secondary schools. In addition, many members of the Standing Committee of the CPC have sent their children to attend universities in the United States and other foreign universities, with the daughter of Xi Jinping having recently graduated from Harvard University.

105 The first Chinese student to graduate from Yale University was Yung Wing, who graduated in 1854 in the same class as the great-great-grandfather of one of the authors of this article, Steven Robinson.

106 In the beginning of the twentieth century, there was a renewed interest in overseas education, led in part by the foreign missionaries in China. Li Da Zhao, one of the founders of the CPC, attended Waseda University in Japan, where his faculty advisor was the grandfather of Steven Robinson.

DOES THE FIRST AMENDMENT PROTECT ACADEMIC FREEDOM?

LAWRENCE ROSENTHAL*

Abstract

Whatever the strength of the case for academic freedom, it remains the case that academic freedom can be granted or withheld at the discretion of the leadership of universities and colleges, and the elected officials entitled to dictate policy at those institutions, unless academic freedom enjoys constitutional protection. The constitutional status of academic freedom, in turn, is a matter of some dispute. This article offers an account of the relationship of the First Amendment to academic freedom. Part I explores the precedents and concludes that none support a doctrinal conception of academic freedom as a constitutional right of an individual scholar. Part II considers the normative case for a conception of academic freedom as a constitutional right of individual academics and finds it wanting. A First Amendment jurisprudence that would permit courts to override bona fide academic judgments made by universities to protect the “academic freedom” of individual teachers and scholars would be deeply problematic. Debates over the merits of pedagogy and scholarship, as long as they are fought on academic and pedagogical grounds, should occur within the university, not in the courts.

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INTRODUCTION

Perhaps unsurprisingly, among academics, there is wide agreement on the importance of academic freedom, though they often disagree about its application.¹ In one leading formulation, that of the American Association of University Professors (AAUP), “academic freedom” means

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties
2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline²

Notably, while the final sentence of paragraph 2 hedges on the status of academic freedom at private colleges and universities, the AAUP offers no such qualification when it comes to public institutions.

Whatever the strength of the case for the AAUP’s or any other conception of academic freedom, it remains the case that academic freedom at public institutions can be granted or withheld at the discretion of their leadership, and the elected officials entitled to dictate policy at those institutions, unless academic freedom enjoys constitutional protection.

The constitutional status of academic freedom, in turn, is a matter of some dispute. Academic freedom has many times been invoked in constitutional litigation in the U.S. Supreme Court, as in cases involving efforts to root out academics thought to be disloyal or subversive from public employment,³ state laws governing what may be taught in public schools,⁴ and investigations of tenure decisions alleged to have been discriminatory.⁵ In the lower courts, an

1 See, e.g., Jonathan R. Cole et al., *Academic Freedom: A Pilot Study of Faculty Views*, in WHO’S AFRAID OF ACADEMIC FREEDOM? 343, 343–46, 348–64 (Akeel Bilgrami & Jonathan R. Cole eds., 2015) (discussing empirical evidence regarding academics’ high commitment to academic freedom in the abstract but high levels of disagreement about how it applies in particular contexts).

2 Am. Ass’n of Univ. Professors, *1940 Statement on Academic Freedom and Tenure (With 1970 Interpretive Comments)*, in AAUP POLICY DOCUMENTS AND REPORTS 13, 14 (11th ed. 2015) (footnotes omitted) [hereinafter AAUP POLICY DOCUMENTS AND REPORTS].

3 See, e.g., *Keyishian v. Bd. of Reg. of St. Univ. of N.Y.*, 385 U.S. 589 (1967) (statutes and implementing regulations barring individuals who make “treasonous” statements or who advocate the overthrow of the government by force from public employment).

4 See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (state statutes barring teaching of evolution).

5 See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (subpoena seeking confidential peer review

even wider variety of cases have been treated with the constitutional status of academic freedom, from litigation over state statutes governing what material may be accessed over computers provided by the state,⁶ to cases involving statements by academics alleged to constitute sexual harassment or retaliation against students who have complained about such harassment.⁷ Nevertheless, the Supreme Court has never issued a square holding on the question whether academic freedom is constitutionally protected. The Court has, however, referred to academic freedom as “a special concern to the First Amendment.”⁸ On the basis of this and similar statements, some commentators have argued that academic freedom is constitutionally protected under the First Amendment’s prohibition on abridgements of free speech.⁹

Then came *Garcetti v. Ceballos*.¹⁰ In that case, the Court held that a prosecutor’s expressions of doubts about the merits of a pending case were unprotected by the First Amendment because “his expressions were made pursuant to his duties”¹¹ This holding has considerable import for academic freedom as a constitutional matter; if public employees lack First Amendment protection when they speak pursuant to their duties, it could well follow that academics at public institutions, to the extent they teach, research, publish, and speak as part of their duties, lack constitutional protection as well. Acknowledging this possibility, in *Garcetti*, the Court wrote that “today’s decision may have important ramifications for academic freedom, at least as a constitutional value,” but added, “There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”¹² The Court ultimately reserved decision on the point: “We need not ... decide whether the analysis we conduct today would apply in the same manner ... to a case involving speech related to scholarship or teaching.”¹³

Most legal scholars to address the implications of *Garcetti* for academic speech

materials in connection with tenure denial alleged to have been discriminatory).

6 See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (state statute barring use of computers owned or leased by the state to access sexually explicit material as applied to college and university professors who access such materials for academic purposes).

7 See, e.g., *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001) (professor’s use in class of vulgar language and subsequent circulation of harassment complaint filed against the professor).

8 *Keyishian*, 385 U.S. at 603.

9 See, e.g., David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., Summer 1990, at 227, 246–47 (“The distinctive functions of professors and universities provide a convincing justification for the Court’s ambiguous incorporation of academic freedom as ‘a special concern’ of the first amendment The argument for a constitutional right of academic freedom can be substantially strengthened by viewing it not primarily as a special right unique to professors, but as a specific application of the broader principle that the institutional context of speech often has first amendment significance.”).

10 547 U.S. 410 (2006).

11 *Id.* at 421.

12 *Id.* at 425.

13 *Id.*

have opined that *Garcetti* should not be understood to limit the First Amendment rights of university faculty engaged in core academic functions such as teaching and scholarship.¹⁴ The federal appellate courts to consider the question have, for the most part, agreed.¹⁵

A good example is provided by *Meriwether v. Hartop*. In that case, a philosophy professor at a state university, “a devout Christian” who “believes that God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual’s feelings or desires,”¹⁶ was informed that professors would be disciplined if they “refused to use a pronoun that reflects a student’s self-asserted gender identity,” and when subsequently asked by a student Professor Meriwether believed to be male to refer to her with feminine pronouns, instead referred to the student only by last name, ultimately provoking the university to place a formal warning in the professor’s file.¹⁷ The district court dismissed the professor’s free-speech claim on

14 See, e.g., ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 84 (2012) (“First Amendment coverage should be triggered whenever the freedom of the scholarly profession to engage in research and publication is potentially compromised.”); Judith C. Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *GEO. L.J.* 945, 994 (2009) (“First Amendment protection for the speech of individual faculty members [should be afforded] as long as the speech concerned research, teaching, or faculty governance matters.”); Bridget R. Nugent & Julee T. Flood, *Rescuing Academic Freedom from Garcetti v. Ceballos, An Evaluation of Current Case Law and a Proposal for the Protection of Core Academic, Administrative, and Advisory Speech*, 40 *J.C. & U.L.* 115, 152 (2014) (“Without the assurance of an exception for core academic speech, many faculty members will be discouraged from taking novel or unpopular positions. Important ideas will never be advanced; intellectual debate and advancement will suffer. Scholarship cannot flourish in an atmosphere of chilled speech.” (footnote omitted)); Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 *FIRST AMEND. L. REV.* 54, 68 (2008) (“[A] lack of First Amendment protection would be inconsistent with the democracy-promoting purposes of higher education: the ability to engage in moral reasoning or, more broadly, the development of critical intellectual faculties and the advancement of knowledge. Classroom speech in the university and professorial scholarship are high-value speech deserving maximum First Amendment protection.” (footnote omitted)); Larry D. Spurgeon, *The Endangered Citizen Servant: Garcetti versus the Public Interest and Academic Freedom*, 39 *J.C. & U.L.* 405, 460 (2013) (“The starting point for reform is for the Supreme Court to hold that academic speech is exempted from *Garcetti* and the public employee speech analysis.”); Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos To Public University Faculty*, 59 *CATH. U.L. REV.* 125, 156–67 (2009) (arguing that academic freedom should protect professors when engaged in faculty governance, teaching, or scholarship).

15 See, e.g., *Meriwether v. Hartop*, 992 F.3d 492, 504–07 (6th Cir. 2021) (“[P]rofessors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.” (citation omitted)); *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014) (“We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed “pursuant to the official duties” of a teacher and professor.”). *But cf.* *Evans-Marshall v. Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 344 (6th Cir. 2010) (“[T]o the extent academic freedom, as a constitutional rule, could somehow apply to primary and secondary schools, that does not insulate a teacher’s curricular and pedagogical choices from the school board’s oversight In the context of in-class curricular speech, this court has already said in the university arena that a teacher’s invocation of academic freedom does not warrant judicial intrusion upon an educational institution’s decisions.” (citing *Parate v. Isabore*, 868 F.2d 821, 827 (6th Cir. 1989)).

16 *Meriwether*, 992 F.3d at 498 (internal quotations omitted).

17 *Id.* at 498–502. Specifically, Professor Meriwether’s practice was to “address[] students as

the strength of *Garcetti*, but the court of appeals reversed, holding that “professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.”¹⁸

Meriwether illustrates the dual character of academic freedom. Vindicating the professor’s claim to academic freedom would necessarily constrain the academic freedom of responsible university officials to make and enforce their best pedagogical judgments about how teachers should interact with students. To be sure, in the AAUP’s conception, academic freedom is held by individual professors, who are “entitled to freedom in the classroom in discussing their subject.”¹⁹ This conception, however, is contested. Academic freedom can also be framed as the prerogative of a university to make and enforce academic judgments free from external interference; in the words of Justice Frankfurter, academic freedom consists of “the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”²⁰ On this view, a judicial decision that prevents a university from enforcing its view about how its faculty best interacts with students could be regarded as a form of external interference that infringes on academic freedom in this institutional sense.

Cases like *Meriwether* illustrate the Janus-faced character of academic freedom, which is plausibly framed as both an individual and an institutional right.²¹ This

Mr. or Ms. He believes this formal manner of addressing students helps them view the academic enterprise as a serious, weighty endeavor and foster[s] an atmosphere of seriousness and mutual respect.” *Id.* at 499 (internal quotations and citations omitted and second brackets in original). After a dean “‘advised’ that he ‘eliminate all sex-based references from his expression,’” Professor Meriwether “proposed a compromise: He would keep using pronouns to address most students in class but would refer to Doe [the student] using only Doe’s last name. Dean Milliken accepted this compromise, apparently believing it followed the university’s gender-identity policy.” *Id.* (citations omitted). After the student again complained, the dean instructed Professor Meriwether that if he did not address the student as a woman, “he would be violating the university’s policy.” *Id.* at 500. Professor Meriwether subsequently inquired whether he could “use students’ preferred pronouns but place a disclaimer in his syllabus noting that he was doing so under compulsion and setting forth his personal and religious beliefs about gender identity.” *Id.* (internal quotations and citation omitted). After this proposal was rejected, Professor Meriwether continued to refer to the student by last name only. *Id.*

18 *Id.* at 505. Meriwether also advanced a claim under the First Amendment’s Free Exercise Clause, and on this claim, the court observed that government action that burdens the exercise of religious beliefs are valid if they are “neutral and generally applicable,” *id.* at 512 (citing *Employment Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877–78 (1990)), the court held that Meriwether had plausibly alleged that the university’s policy was not neutral and generally applicable based on his allegations that university officials had exhibited hostility to his religious beliefs as well as a variety of procedural irregularities in the University’s administration of policy that raised an inference of nonneutrality. *Id.* at 512–17.

19 See *supra* text accompanying note 2.

20 *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring in the result) (emphasis supplied) (internal quotations omitted).

21 *Cf. Reg. of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 ((1985) (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself.” (citations omitted)).

duality is at the heart of the difficulty in fashioning a First Amendment right of academic freedom.

This article breaks with the scholarship to date and offers a different account of the relationship of the First Amendment to academic freedom. Part I explores the precedents and concludes that none support a doctrinal conception of academic freedom as a constitutional right of an individual scholar. Part II considers the normative case for a conception of academic freedom as a constitutional right of individual academics and finds it wanting. Debates over the merits of pedagogy and scholarship, as long as they are fought on academic and pedagogical grounds, should occur within the university, not in the courts.

I. The Doctrinal Case for Academic Freedom as a First Amendment Right

An exploration of the doctrinal basis for a First Amendment right of academic freedom requires consideration of both the First Amendment rights of public employees and the place that academic freedom occupies in First Amendment jurisprudence.

A. *First Amendment Rights of Public Employees*

The doctrinal landscape that contours the constitutional status of academic freedom starts with the First Amendment rights of public employees.

1. *The Pickering Balancing Test*

Prior to *Garcetti*, a public employee's speech was eligible for First Amendment protection when it "addresses a matter of public concern," an inquiry "determined by the content, form, and context of a given statement."²² This "public concern" test endeavors to distinguish workplace grievances from speech of broader concern, asking whether a public employee's statements are "fairly considered as relating to any matter of political, social, or other concern to the community," or, instead, "employee complaints over internal office affairs."²³ The fact that a statement is disseminated solely within the workplace is not determinative; statements of public employees implicating matters of public concern are eligible for constitutional protection even when conveyed privately to colleagues at the workplace.²⁴ For example, the Court has held that a clerical employee of a

22 *Connick v. Myers*, 461 U.S. 138, 147–48 (1983). *Accord, e.g., Rankin v. McPherson*, 483 U.S. 378, 384–85 (1987).

23 *Connick*, 461 U.S. at 146, 149. For a useful illustration, see *United States v. Nat'l Treas. Emp. Union*, 513 U.S. 454, 466 (1995) ("Respondents' expressive activities in this case fall within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace. The speeches and articles for which they received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment.")

24 *See, e.g., Givhan v. Western Line Cons. Sch. Dist.*, 439 U.S. 410, 414 (1979) ("This Court's decisions ... do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly.")

county constable's office spoke on a matter of public concern when she remarked to a coworker, after hearing of the attempted assassination of President Reagan, "[I]f they go for him again, I hope they get him."²⁵ Similarly, the Court held that matters of public concern were implicated by a questionnaire circulated by a local prosecutor to colleagues asking whether they feel pressure to work on political campaigns,²⁶ and a teacher's private comments to a school principal criticizing the school's desegregation policies.²⁷

In light of the breadth of the concept of speech on a matter of public concern, academic speech will frequently implicate matters of public concern.²⁸ Thus, in *Meriwether*, the court held that the professor's expressions of his views on gender preferences and pronouns raised a matter of public concern.²⁹ Under the approach taken in the Supreme Court's decisions on the public-concern test, it is difficult to quarrel with that conclusion.

When the speech of a public employee implicates a matter of public concern, it is assessed under a test, first announced in *Pickering v. Board of Education of Township High School District 205*,³⁰ that requires a court to "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."³¹ In striking the balance, the Court has "recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."³² In undertaking this inquiry, "the government bears the burden of justifying its adverse employment action."³³ Accordingly, the court wrote in *Meriwether*: "The mere 'fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.'"³⁴

25 *Rankin*, 483 U.S. at 381, 385–87.

26 *Connick*, 461 U.S. at 149.

27 *Givhan*, 439 U.S. at 415–16.

28 *See, e.g.*, *Hardy v. Jefferson Comm. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) ("Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.' Hardy's lecture on social deconstructivism and language, which explored the social and political impact of certain words, clearly meets this criterion. Although Hardy's in-class speech does not itself constitute pure public debate, it does relate to matters of overwhelming public concern—race, gender, and power conflicts in our society." (citation omitted)).

29 992 F.3d 492, 508–09 (6th Cir. 2021).

30 391 U.S. 563 (1969).

31 *Id.* at 568. *Accord, e.g.*, *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam); *United States v. Nat'l Treas. Emp. Union*, 513 U.S. 454, 465–66 (1995); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick v. Myers*, 461 U.S. 138, 142 (1983).

32 *Rankin*, 483 U.S. at 388 (citation omitted).

33 *Nat'l Treasury Emp. Union*, 513 U.S. at 466. *Accord, e.g.*, *Rankin*, 483 U.S. at 388.

34 *Meriwether*, 992 F.3d at 511 (citation omitted) (quoting *Tinker v. Des Moines Indep. Sch.*

To be sure, the balancing test does not require “an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.”³⁵ Moreover, “[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate,” though “a stronger showing may be necessary if the employee’s speech more substantially involve[s] matters of public concern.”³⁶ Thus, in *Meriwether*, there were plausible arguments on both sides of the *Pickering* balance. On his side of the scale, Professor Meriwether’s expressions of his views on gender identity likely implicated a matter of considerable public concern.³⁷ On the other, although the university need not have waited until a student’s education has been compromised to enforce its gender-identity policy, as the court of appeals observed, that “[a]t this stage of the litigation, there is no suggestion that Meriwether’s speech inhibited his duties in the classroom, hampered the operation of the school, or denied [the student] any educational benefits.”³⁸ Thus, Meriwether’s plausible allegation was sufficient to obligate the university to mount what was likely to be an expensive defense of the litigation. Moreover, proving that a professor’s refusal to use gender-neutral pronouns—or indeed a professor’s failure to adhere to most pedagogical or curricular policies—subsequently impeded students’ educational attainment would likely be a tall order.

In this fashion, the *Pickering* test grants courts considerable leeway to discount a public employer’s concerns about its employee’s duty-related speech and likely obligates universities to incur substantial litigation expenses if it decides to defend a contested pedagogical or scholarly decision. But the question remains, what of *Garcetti v. Ceballos*?

2. *The Impact of Garcetti*

Richard Ceballos, a “calendar deputy” or supervisory prosecutor in the Los Angeles County District Attorney’s Pomona office, was alerted by a defense attorney to a motion in a pending case attacking a search warrant on the ground that it had been obtained by deputy sheriffs through misrepresentation of material facts.³⁹ After examining the affidavit in support of the warrant application and visiting the location that it described, Ceballos wrote a memorandum recommending

Dist., 393 U.S. 503, 508 (1969)).

35 Connick, 461 U.S. at 152 (footnote omitted).

36 *Id.* at 151–52.

37 In this connection, the court wrote: “Taken in context, his speech concerns a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes. That is, his mode of address *was* the message. It reflected his conviction that one’s sex cannot be changed, a topic which has been in the news on many occasions and has become an issue of contentious political . . . debate.” *Meriwether*, 992 F.3d at 508 (citations and internal quotations omitted). The court added, “[T]he First Amendment interests are especially strong here because Meriwether’s speech also relates to his core religious and philosophical beliefs.” *Id.* at 509.

38 *Id.* at 511.

39 *Garcetti v. Ceballos*, 547 U.S. 410, 413–14 (2006).

dismissal of the case.⁴⁰ After a “heated” meeting with sheriff’s personnel, higher-ranking supervisors in the district attorney’s office decided to proceed with the case, and a judge subsequently rejected the challenge to the warrant.⁴¹ Ceballos then brought suit alleging that he had been subjected to a series of retaliatory actions based on his memorandum, in violation of his First Amendment rights.⁴²

Rejecting Ceballos’s claim, the Supreme Court concluded that “[t]he controlling factor in Ceballos’ case is that his expressions were made pursuant to his duties as a calendar deputy.”⁴³ The Court explained that Ceballos’s employer was entitled to act on the basis of its assessment of Ceballos’s duty-related speech: “When he went to work and performed the tasks that he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.”⁴⁴ Thus, the Court held, “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁴⁵

Much of *Garcetti*’s reasoning seems inarguable. It is difficult to believe, for example, that prosecutors’ closing arguments—or their prosecutive recommendations—are protected by the First Amendment against criticism by their superiors. Surely prosecutors can be reassigned, demoted, or even fired when their superiors conclude that the arguments that they present to courts or juries, or the prosecutive recommendations they make to superiors, are wanting. Public employers doubtless have ample authority with respect to their employees’ duty-related speech; to use an example once employed by Justice O’Connor, “surely a public employer may, consistently with the First Amendment, prohibit its employees from being ‘rude to customers,’ a standard almost certainly too vague when applied to the public at large.”⁴⁶ Bad employees can be demoted or terminated by public employers based on what they write or say in the execution of their speech-related duties—even if those utterances would, outside of the employment context, be protected by the First Amendment.⁴⁷

40 *Id.* at 414.

41 *Id.* at 414–15.

42 *Id.* at 415.

43 *Id.* at 421.

44 *Id.* at 422. To similar effect, see *id.* at 422–23 (“Supervisors must ensure that their employees’ communications are accurate, demonstrate sound judgment, and promote the employer’s mission . . . If Ceballos’ superiors thought his memo was inflammatory or misguided, they had the authority to take corrective action.”).

45 *Id.* at 421.

46 *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion) (citation omitted).

47 For arguments along these lines, see Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 44–52 (2008); and Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense*, 14 *U. PA. J. CONST. L.* 631, 645–54 (2012).

To be sure, one might argue that *Garcetti* is unnecessary to protect legitimate managerial prerogatives because the ordinary *Pickering* balancing test accommodates employer assessments of employee's duty-related speech. But, because the *Pickering* test places the burden of justification on the employer, it could give courts enormous leeway to micromanage the public workforce and thereby undermine the public's ability to hold those employers accountable for their performance. If, on the other hand, the *Pickering* balance were understood to require great deference to the judgments of public employers with respect to duty-related speech, then in practice that test would offer not much in the way of meaningful First Amendment protection, while potentially generating a great deal of likely meritless but costly and burdensome litigation.

Other aspects of *Garcetti* are more controversial. The decision has drawn considerable fire from commentators concerned with the potential its holding creates for the government to punish "whistleblowers"—those who bring official misconduct to light.⁴⁸ That seems a rather odd attack on *Garcetti*, however, since the Court denied protection only for Ceballos's prosecutive recommendations made entirely within the district attorney's office, rather than any effort to alert the public, or even anyone outside the district attorney's office, to his concerns. Even for employees whose duties include ferreting out misconduct, when they disclose evidence of misconduct not to their superiors, but outside the workplace, in an effort to alert the public or others, their speech is not denied constitutional protection under *Garcetti*.⁴⁹

In any event, *Garcetti*'s implications for academic freedom as a constitutional right remain; because the duties of academics ordinarily include teaching and scholarly writing, *Garcetti* could deny academics constitutional protection from employer discipline for what they say and write pursuant to those duties.⁵⁰ Thus, as we have seen, in *Garcetti*, the Court acknowledged that its holding "may have important ramifications for academic freedom" ⁵¹ Still, *Garcetti*'s reach is not unlimited; when academics address nonscholarly audiences in what is sometimes

48 For critiques of *Garcetti* along these lines, see, for example, Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 144–53; Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 U.C.L.A. L. REV. 1463, 1470–74 (2007); Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 U.C.L.A. L. REV. 1635, 1649–52 (2007); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 569–81 (2008); Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RIGHTS J. 1173, 1192–1202 (2007); Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 U.C.L.A. L. REV. 1767, 1809–13 (2007); Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 57 AM. U. L. REV. 523, 572–75 (2008); Jeffrey W. Stempel, *Tending to Potted Plants: The Professional Identity Vacuum in Garcetti v. Ceballos*, 12 NEV. L.J. 703, 713–20 (2012).

49 See *Lane v. Franks*, 573 U.S. 228, 238–42 (2014) (public employee's testimony at criminal trials discussing financial misconduct the employee had discovered in the course of his auditing duties protected by the First Amendment).

50 See, e.g., *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) ("[T]eaching and academic writing are at the core of the official duties of teachers and professors.").

51 *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

referred to as their “extramural utterances,”⁵² it is likely the case, even after *Garcetti*, they will be treated as citizens speaking on a matter of public concern and therefore eligible for First Amendment protection.⁵³ Classroom speech and scholarly writing, however, may be a different matter.

3. *The Constitutional Status of Academic Freedom*

The courts that have rejected *Garcetti*'s application to claims of academic freedom have reasoned that the Supreme Court's First Amendment jurisprudence affords specific protections for academic freedom beyond those afforded to other public employees.⁵⁴ This view of precedent, however, is based almost entirely on two cases—the only instances in which the Supreme Court has treated substantively with the constitutional status of academic freedom.⁵⁵

52 Am. Ass'n Univ. Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, in AAUP POLICY DOCUMENTS AND REPORTS, *supra* note 2, at 3, 11 (“In their extramural utterances, it is obvious that academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression. But subject to these restraints, it is not, in this committee's opinion, desirable that scholars should be debarred from giving expression to their judgments upon controversial questions, or that their freedom of speech, outside the university, should be limited to questions falling within their own specialties.”).

53 See, e.g., *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 563–64 (4th Cir. 2011) (“[T]he scholarship and teaching in this case, Adams' speech, was intended for and directed at a national or international audience on issues of public importance unrelated to any of Adams' assigned teaching duties at UNCW or any other terms of his employment found in the record. Defendants concede none of Adams' speech was undertaken at the direction of UNCW, paid for by UNCW, or had any direct application to his UNCW duties.”). Cf. *Lane*, 573 U.S. at 240 (“The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.”).

54 See, e.g., *Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021) (“[O]ur job as lower court judges is to apply existing Supreme Court precedent unless it is expressly overruled. And here, the Supreme Court has not overruled its academic-freedom cases.”); *Demers*, 746 F.3d at 411 (“We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.”).

55 The Supreme Court's other references to academic freedom in its free-speech jurisprudence have been brief and unilluminating. See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182, 198, 200–01 (1990) (Rejecting a university's First Amendment defense to subpoenas seeking peer review materials considered in connection with an allegedly on discriminatory tenure denial because “the infringement the University complains of is extremely attenuated,” and “also speculative Although it is possible that some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or unfairness.”); *Healy v. James*, 408 U.S. 169, 180–81 (1972) (“The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.” (citation omitted)); *Whitehill v. Elkins*, 389 U.S. 54, 61–62 (1967) (“[A]s we read §§ 1 and 13 of the Ober Act [requiring a loyalty oath], the alteration clause and membership clause are still befogged [W]e find an overbreadth that makes possible oppressive or capricious application as regimes change. That very threat, as we said in another context, may deter the flowering of academic freedom as much as successive suits for perjury.” (citation and footnote omitted)); *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) (“When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher.”).

The first case is *Keyishian v. Board of Regents*, which contains the Court's most expansive discussion of academic freedom as a concept of constitutional dimension, although it occupies not even a paragraph of the opinion: "[A]cademic freedom ... is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."⁵⁶

It is far from clear, however, that this observation was necessary to the Court's holding; in *Keyishian*, the Court held invalid state regulations authorizing the removal of university faculty from public employment for "treasonable" or "seditious" utterances or acts on the ground that they were impermissibly vague; these words, the Court reasoned, "were wholly lacking in 'terms susceptible of objective measurement.'"⁵⁷ This prohibition on unduly vague regulation of speech, however, does not rest on a distinctive First Amendment right of academic freedom; the case on which the Court primarily relied in *Keyishian* to condemn the regulations at issue, *Cramp v. Board of Public Instruction of Orange County*, placed no reliance on academic freedom as it invalidated as impermissibly vague a requirement that public employees take a loyalty oath.⁵⁸

Since *Keyishian*, the Court has continued to condemn vague regulations of speech, even outside the context of public employment or academic speech, because of their tendency to inhibit the exercise of First Amendment rights.⁵⁹ Thus, it is difficult to conclude that the Court's holding in *Keyishian* rested on academic freedom, as opposed to a general rule condemning vague regulation of speech.⁶⁰

56 *Keyishian v. Bd. of Reg. of St. Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

57 *Id.* 604 (quoting *Cramp v. Bd. of Pub. Instruction of Orange Cnty*, 368 U.S. 278, 286 (1961)).

58 *See Cramp*, 368 U.S. at 386–88 (discussing impermissible vagueness when regulating the speech of public employees).

59 *See, e.g., Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 871–72 (1997) (noting that the Communications Decency Act is "a content-based regulation of speech" and adding that "[t]he vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech").

60 In *Keyishian*, the Court also invalidated a statute making membership in the Communist Party prima facie evidence supporting disqualification from employment, explaining that "legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations." *Keyishian*, 385 U.S. at 608. A long line of cases laws invalidates laws that prohibit public employees from membership in advocacy organizations without proving that the employees shared the unlawful objectives of the organization without placing reliance on academic freedom. *See, e.g., United States v. Robel*, 389 U.S. 258, 262–68 (1967) (invalidating statute making members of communist organizations ineligible for employment in defense facilities); *Elfbrandt v. Russell*, 384 U.S. 11, 15–19 (1966) (invalidating statute prohibiting teachers from joining organizations that have as one of their purposes overthrow of the government). Even outside the context of teaching or public employment, the Court has concluded that the government may not impose sanctions or deny rights or privileges solely because of an individual's association with a group absent proof that the individual intended to advance the group's unlawful objectives. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919–20 (1982) ("[T]he Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims" (internal quotations and citations omitted)). Thus, this aspect of *Keyishian* likewise rests on principles that do not rest on a right of academic freedom.

The second case is *Sweezy v. New Hampshire*.⁶¹ There, a professor at a state university was held in contempt for his refusal to answer questions propounded in a statutorily authorized investigation by the state's attorney general regarding Sweezy's knowledge of various political organizations and their members, the contents of a lecture that Sweezy had given to his students at the University of New Hampshire, and whether he believed in communism.⁶² In a plurality opinion joined by four justices, Chief Justice Warren, opined that there had been "an invasion of [Sweezy]'s liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread," and adverted to "[t]he essentiality of freedom in the community of American universities"⁶³ Yet, this conclusion rested on the lack of an indication that the legislature had any interest in the information being sought:

The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority. It follows that the use of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment.⁶⁴

Thus, for these justices, *Sweezy* turned on the absence of an actual delegation of legislative power to the attorney general to seek the information at issue from Sweezy. It is difficult to divine a general First Amendment right of academic freedom flowing from this conclusion.

Academic freedom plays more of a role in the separate opinion of Justice Frankfurter; he adverted to "the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university."⁶⁵ This passage suggests that universities enjoy First Amendment protection against external interference. Yet, it is unclear whether Justice Frankfurter was recognizing a distinctive right of academic freedom or a more general right of public employees to freedom of political belief and action, since his opinion conflates the two: "In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority."⁶⁶ Perhaps Justice Frankfurter was recognizing a First Amendment right unique to academics in *Sweezy*; but the matter is not free from doubt. Moreover, as we have

61 354 U.S. 234 (1957).

62 *Id.* at 236–45 (plurality opinion).

63 *Id.* at 250 (plurality opinion).

64 *Id.* at 254–55 (plurality opinion).

65 *Id.* at 262 (Frankfurter, J., concurring in the result). To similar effect, see *Wieman v. Updegraff*, 344 U.S. 183, 196–97 (1952) (Frankfurter, J., concurring) ("It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.").

66 *Sweezy*, 354 U.S. at 266 (Frankfurter, J., concurring in the result).

seen, his reference to “the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study,”⁶⁷ suggests that he was referring to a right held by the university to be free from external interference rather than a First Amendment right of individual scholars.⁶⁸

In any event, whatever the import of the intimations in *Sweezy*, within a few years, the Court came to hold that the right of teachers to be free from official scrutiny into the political beliefs was rooted in general First Amendment doctrine, not a specific right of academic freedom. In *Shelton v. Tucker*,⁶⁹ for example, the Court wrote, “[T]o compel a teacher to disclose his every associational tie is to impair that teacher’s right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.”⁷⁰

Beyond that, the Supreme Court has subsequently described *Keyishian* and *Sweezy* as cases in which “government was attempting to control or direct the content of the speech engaged in by the university or those affiliated with it,” adding that they have no application absent governmental efforts to “direct the content of university discourse toward or away from particular subjects or points of view.”⁷¹ This suggests that *Keyishian* and *Sweezy* are best understood as forbidding the government from regulating the content of speech at a university, rather than as recognizing a right of individual academics to be free from regulation of their duty-related speech by the university that employs them. Moreover, the rule prohibiting the government from discriminating on the basis of the content of speech is hardly unique to higher education; First Amendment doctrine generally resists governmental efforts to draw distinctions between speech on the basis of its content or viewpoint.⁷² Thus, it is far from clear that *Keyishian* and *Sweezy* can

67 *Id.* at 262.

68 *See supra* text accompanying note 20. Notably, Justice Frankfurter subsequently wrote an opinion suggesting that individual academics enjoy no First Amendment protection against being compelled to disclose their political beliefs and associations. *See Shelton v. Tucker*, 364 U.S. 479, 495–96 (1960) (Frankfurter, J., dissenting) (“[I]t is not that I put a low value on academic freedom. It is because that very freedom, in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers Because I do not find that the disclosure of teachers’ associations to their school boards is, without more, such a restriction upon their liberty, or upon that of the community, as to overbalance the State’s interest in asking the question, I would affirm the judgments below.”).

69 364 U.S. 479 (1960).

70 *Id.* at 485–86. The Court subsequently expanded this holding to reach the right of students and student organizations to free association, despite the absence of any claim involving the academic freedom of teachers. *See Healy v. James*, 408 U.S. 169, 181 (1972) (“Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right.” (citations omitted)).

71 *University of Pa. v. EEOC*, 493 U.S. 182, 197, 198 (1990).

72 *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“[A] government, including a municipal government vested with state authority, ‘has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’”).

be understood as recognizing special First Amendment protection for academic freedom or speech.

Perhaps most important, since *Keyishian* and *Sweezy*, the Court has articulated a general First Amendment rule that ideological conformity may not be demanded from public employees—a rule broad enough to encompass the holdings in *Keyishian* and *Sweezy* without need to rely on a distinctive right of academic freedom. In *Branti v. Finkel*,⁷³ for example, the Court concluded that “the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs”⁷⁴ and for that reason held that public employees, such as the deputy public defenders facing discharge in that case, may not be terminated “solely for the reason that they were not affiliated with or sponsored by the Democratic Party,” unless “party membership was essential to the discharge of the employee’s governmental responsibilities.”⁷⁵ The Court later extended that holding to hiring: “[C]onditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. We find no such government interest here, for the same reasons that we found that the government lacks justification for patronage promotions, transfers, or recalls.”⁷⁶

Thus, although *Keyishian* characterized academic freedom as of constitutional concern because “the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom,”⁷⁷ since then, the Court has made clear that all public employees—not just academics—have a First Amendment right to speak on matters of public concern and resist governmental demands for political or ideological conformity, as long as they hold positions for which such loyalty is not an appropriate criterion for employment, as is true of most (if not all) scholars.⁷⁸

It is, therefore, far from clear that there is a doctrinal basis for recognizing a First Amendment right of academic freedom beyond the more general First

73 445 U.S. 507 (1980).

74 *Id.* at 516–17 (citation and internal quotations omitted). The Court also held that “the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government.” *Id.* at 519.

75 *Id.* at 517, 518.

76 *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78 (1990) (citations omitted). The Court subsequently extended this rule to forbid denying public contracts on the basis of the contractor’s political affiliations or beliefs. *See O’Hare Trucking Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (company impermissibly removed from list of those eligible to perform city towing services when owner refused to contribute to mayor’s reelection campaign); *Bd. of Cnty Comm’rs of Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668 (1996) (contract to haul trash impermissibly terminated based on contractor’s criticism of county board).

77 *Keyishian v. Bd. of Regents of St. Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

78 *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (holding that a professor’s claim that his contract had not been renewed because of his criticism of the college administration could go forward, citing *Pickering* and without reliance on a right of academic freedom, reasoning that “a teacher’s public criticism of his superiors on matters of public concern may be constitutionally protected, and may, therefore, be an impermissible basis for termination of his employment.”).

Amendment rights of all public employees to be free from official demands for ideological or partisan loyalty.⁷⁹

B. The Doctrinal Obstacles to Constitutionalizing a First Amendment Right of Academic Freedom

The difficulties with the doctrinal case for a First Amendment right of academic freedom go beyond the lack of precedent to support it. Extant First Amendment doctrine erects serious obstacles to a First Amendment right of academic freedom.

At the outset, First Amendment doctrine has long been hostile to granting special protections based on the identity of the speaker.⁸⁰ This suggests that an effort to grant academics special First Amendment rights unavailable to other public employees under *Garcetti* would be problematic.⁸¹ A claim that academic freedom deserves special constitutional protection because of its asserted social import is equally problematic; First Amendment doctrine has never embraced a balancing test in which the perceived value of speech determines how much constitutional protection it will receive.⁸²

The problems with a First Amendment right of academic freedom that could limit the sweep of *Garcetti*, however, run deeper than these. At least when the effort to regulate teaching and scholarship is undertaken by the university itself, First Amendment doctrine teaches that deference to the university's pedagogical and scholarly judgments is appropriate.

79 For a judicial opinion concluding that the First Amendment offers no special protection for academic freedom, see *Urofsky v. Gilmore*, 216 F.3d 401, 409–15 (4th Cir. 2000). For a scholarly analysis along these lines, see Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 150–64 (2007).

80 See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 340–41 (2010) (“[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”); *Simon & Schuster, Inc. v. N.Y. St. Crime Victims Bd.*, 515 U.S. 105, 117 (1995) (“The government’s power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker.”); *First Nat’l Bank of Boston v. Belotti*, 435 U.S. 756, 784–85 (1978) (“In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.” (citation omitted)).

81 See, e.g., Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L. REV. 677, 740 (2014) (“If the underlying structure of First Amendment doctrine is one of neutrality toward speakers, content, and viewpoints, then it seems that structure has no room for academic freedom, which requires that the First Amendment recognize that some speakers are entitled to more protection than other speakers similarly situated in their relationship with the government . . .”).

82 See, e.g., *United States v. Stevens*, 559 U.S. 460, 470 (2010) (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”). Cf. Nugent & Flood, *supra* note 14, at 151 (“Academic freedom is worth protecting not because it is exceptionally important to our national well-being; that standard alone would create enhanced First Amendment protection every time speech furthers an important national interest.”).

Recall that in *Sweezy*, Justice Frankfurter characterized academic freedom in terms of “the four essential freedoms of a university—to determine *for itself* on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁸³ In this fashion, Justice Frankfurter characterized academic freedom as an institutional right of the university itself, implicated in that case because the state’s attorney general attempted to intervene in the university’s relationship with one of its academic employees.⁸⁴ This characterization of academic freedom in institutional and not individual terms has taken root in constitutional doctrine.

For example, since *Sweezy* and *Keyishian*, the Supreme Court has “stressed the importance of avoiding second-guessing of legitimate academic judgments.”⁸⁵ Similarly, in a case involving a student’s claim that he was unconstitutionally dismissed from an academic program, the Court cautioned that courts “should show great respect for the faculty’s professional judgment [T]hey 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.”⁸⁶ The Court elaborated:

Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, a special concern of the First Amendment. If a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.⁸⁷

83 *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result) (internal quotations omitted and emphasis supplied).

84 *See supra* text accompanying notes 66–68. For a helpful discussion of the manner in which the constitutional conception of academic freedom is properly characterized in terms of deference to universities’ pedagogical and educational judgments, see PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 112–40 (2003).

85 *University of Pa. v. EEOC*, 493 U.S. 182, 199 (1990). *Cf. Bd. of Regents of Univ. Wis. Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring in the judgment) (“Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (“Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.”).

86 *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

87 *Id.* at 226 (citations and internal quotations omitted) (brackets in original). *Cf. Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (“The Law School’s educational judgment that such diversity [in the composition of its student body] is essential to its educational mission is one to which we defer Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.” (citations omitted)). For a scholarly defense of highly deferential judicial review of academic decision-making as an aspect of academic freedom, see Rabban, *supra* note 9, at 287–94.

Although these cases do not involve a university's effort to discipline a faculty member, they suggest that academic freedom is rooted in a right of an academic institution to be free from external interference with a university's administration of scholarly norms, rather than a right of individual teachers.⁸⁸ Indeed, even those who argue that *Garcetti's* sweep is limited by an individual right of academic freedom acknowledge that a university's scholarly and pedagogical judgments are entitled to great deference.⁸⁹ And, when it comes to a university's authority to supervise faculty members, it is notable that in *Central State University v. American Association of University Professors, Central State University Chapter*,⁹⁰ the Court summarily reversed a decision invalidating, on equal protection grounds, a statute requiring state universities to develop standards for faculty workloads without use of collective bargaining, concluding that the statute infringed neither "fundamental rights nor proceeding along suspect lines" and therefore should be upheld as having "a rational relationship between disparity of treatment and some legitimate governmental purpose" because it "increase[d] the time spent by faculty in the classroom."⁹¹

To be sure, it is unclear from these cases whether they recognize a First Amendment right of institutional academic freedom, or instead counsel judicial deference to the academic judgments of universities in light of their expertise in pedagogical and scholarly norms. But whether the institutional prerogatives of universities are based on their own First Amendment rights or judicial prudence, an academic who wished to challenge a university's assessment of the quality of that academic's duty-related teaching or scholarship as an interference with a constitutional right of academic freedom would face serious doctrinal hurdles.

There may be cases in which a university's claimed pedagogical or academic judgments about teaching or scholarship can be proven to be pretextual.⁹² For example, consider a state university's rule that forbids academics to teach or study

88 For scholarship taking the view that the constitutional conception of academic freedom is rooted in the right of a university to be free from external interference with its scholarly mission, see, for example, Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 877–83 (2008); William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER, RACE & JUST. 213, 230–62 (1999); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 97 YALE L.J. 251, 304–11, 323–27 (1989); Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 472–501 (2005); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1310–22 (1988); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 919–26 (2006); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS., Summer 1990, at 79, 135–43.

89 See, e.g., Areen, *supra* note 14, at 995–99 (advocating the deferential *Ewing* standard for decisions made on academic grounds); Spurgeon, *supra* note 14, at 456–64 (same).

90 526 U.S. 124 (1999) (per curiam).

91 *Id.* at 127–28 (citations, ellipsis in original and internal quotations omitted). Only Justice Stevens, in dissent, perceived any potential infringement on academic freedom, and he dissented only to the extent of disagreeing with the Court's decision to decide the case summarily. *Id.* at 130–33 (Stevens, J., dissenting).

92 Compare Rabban, *supra* note 9, at 283–94 (arguing that a university's academic judgments should be set aside if pretext can be proven); with Byrne, *supra* note 88, at 301–11 (arguing that good-faith academic judgments of a university should not be set aside).

critical race theory, promulgated in the face of threatened state legislation to forbid the same.⁹³ Without need to rely on a First Amendment right of academic freedom, it might be easy for an individual professor to prove that the prohibition on teaching critical race theory is a pretext for ideological suppression rather than a bona fide pedagogical judgment.⁹⁴ After all, it is a general principle of First Amendment law that “[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.”⁹⁵ Moreover, to the extent that such a rule was produced as a result of threatened or enacted legislation, this type of prohibition could well constitute external interference with a university’s academic mission that is forbidden by the institutional conception of academic speech reflected in Justice Frankfurter’s opinion in *Sweezy*, although as we have seen, it is far from clear that the First Amendment protects academic freedom in this institutional sense.⁹⁶ None of this, however, suggests that academics hold a First Amendment right of academic freedom that permits them to contest the bona fide pedagogical or academic judgments of the universities that employ them.

Accordingly, there is little support in current doctrine for limiting *Garcetti*’s application to the academy. Of course, there may be reason to construct new doctrine limiting the reach of *Garcetti*. It is to that question that we next turn.

93 For a helpful and brief overview of critical race theory as a field of scholarship and study, see Adrien K. Wing, *Is There a Future for Critical Race Theory?*, 66 J. LEG. EDUC. 44 (2016).

94 Cf. *Edwards v. Aguillard*, 482 U.S. 578, 588–89 (1987) (“If the Louisiana Legislature’s purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind. But under the Act’s requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so. Moreover, the Act fails even to ensure that creation science will be taught, but instead requires the teaching of this theory only when the theory of evolution is taught. Thus we agree with the Court of Appeals’ conclusion that the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting ‘evolution by counterbalancing its teaching at every turn with the teaching of creationism’” (footnote and citation omitted and ellipsis in original)).

95 *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 309 (2012) (citations omitted).

96 See *supra* text accompanying notes 65–68. The scope of institutional academic freedom is, to be sure, in some tension with the broad discretion that state and local governments likely enjoy under the First Amendment to make pedagogical judgments about appropriate curriculum in the public schools they fund. Cf. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870–71 (1982) (plurality opinion) (“Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners’ removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners’ actions.”). If a state legislature, under budgetary pressure, decided to stop funding what it regarded as unnecessary liberal arts programs in a public university, it is doubtful that the university could claim constitutional protection against the legislature’s prerogative over the allocation of scarce public resource; while a legislative prohibition on teaching critical race theory may be more plausibly characterized as external interference with a university’s pedagogical judgment about the content of its curriculum. Cf. *Edwards v. Aguillard*, 482 U.S. 578, 586 (1982) (“The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.”). Yet, it may unnecessary to recognize any special right of institutional academic freedom when general First Amendment principles suggest that a prohibition on teaching critical race theory, even if framed as a pedagogical judgment, is actually a pretext for ideological suppression. A full consideration of the scope of institutional academic freedom, however, is well beyond the scope of the present discussion.

II. The Problematic Case for Academic Freedom as a First Amendment Right

Some commentators argue that *Garcetti's* discussion of duty-related speech has little application to university teaching, research, and scholarship, which is not undertaken to serve a public employer's purposes, but instead represents an academic's own effort to participate in a scholarly marketplace of ideas.⁹⁷ The point can also be made by treating the university as what has come to be known as a public forum.⁹⁸ A public university, the argument goes, is best characterized not as a collection of scholar-employees executing speech-related duties on behalf of a public employer, but rather as a metaphorical forum created by the government to facilitate professorial speech, undertaken for scholarly and not governmental purposes.⁹⁹

This account, however, must come to grips with the role that the university-as-employer plays in overseeing the speech-related duties of the professorate. Or, to frame the problem in terms of the public forum doctrine, even in a forum created to facilitate individual and not governmental speech, speech may be restricted to ensure that it is consistent with the purpose of the forum: "In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."¹⁰⁰

Even the advocates of academic freedom acknowledge that universities necessarily assess scholarly speech to ensure that it is consistent with the objective

97 See, e.g., Post, *supra* note 14, at 92 ("[F]aculty serve the 'public' insofar as they serve the public function of identifying and discovering knowledge. It is this function that triggers the function of democratic competence. Were faculty to be merely employees of the university, as *Garcetti* conceptualizes employees, their job would be to transmit the views of university administrators."); R. George Wright, *The Emergence of Academic Freedom*, 85 NEB. L. REV. 793, 824–25 (2007) ("[T]he *Garcetti* model of university faculty as proxies, instruments, or agents expressing views approved of, if not specified by, the state paying for their performance undermines the mission and purposes of the worthy state university. Adding broadly to the treasury of scholarly knowledge simply cannot be reduced to carrying out anyone's wishes or preferences, whether of any sitting government or of trustees or of university faculty themselves." (footnotes omitted)).

98 Cf. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) ("This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum." (citations omitted)).

99 See Nahmod, *supra* note 14, at 69 ("The university classroom is an intentionally created educational forum for the enabling of professorial (and student) speech Similarly, professorial scholarship is an intentionally created metaphorical educational forum for the dissemination of knowledge by academics." (footnotes omitted) (citing *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995)).

100 *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (citation and internal quotation omitted). For a similar observation in a case involving a state university's student activity fund, see *Rosenberger*, 515 U.S. at 829–30 ("[W]e have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." (citing *Perry Educ. Ass'n*, 460 U.S. at 46)).

of providing high-quality teaching and scholarship; thus, as one of the leading advocates of a constitutional right of academic freedom has acknowledged:

[U]niversities are free to evaluate scholarly speech based on its content—to reward or regulate scholarly speech based on its professional quality. Universities make these judgments when they hire professors, promote them, tenure them, or award them grants.¹⁰¹

Another advocate of academic freedom acknowledged, even as he argued that universities are properly characterized as fora for professorial speech, that universities necessarily impose constraints on that speech, such as, in the classroom, a requirement that there be “some relation between professorial speech and the subject matter that is being taught, as well as a prohibition against disruptive tactics that interfere with the educational process,” as well as “legitimate educational constraints on professorial scholarship Perhaps the main constraint is scholarly standards.”¹⁰²

It is difficult to quarrel with these commonplace observations; a university concerned about the quality of teaching and scholarship will endeavor to maintain high standards when it comes to both. Yet, even if public universities are properly characterized as fora for the speech of scholars, it follows that universities—to the extent that they endeavor to facilitate high-quality teaching and scholarship—cannot be indifferent to the nature and quality of teaching and scholarship. Instead, a central function of the university is to assess—through whatever organs the university creates to exercise this function—the quality of the work done by faculty members, as well as those who aspire to join their faculties. To be sure, university faculty frequently plays a role in these assessments, though even the AAUP acknowledges that ultimate authority lies with the university’s administration,¹⁰³ and, as a matter of First Amendment law, university faculty has no right to participate in university governance.¹⁰⁴

Thus, ultimately the university itself, through its designees, assesses the quality of professorial speech. Universities engage in these assessments to ensure

101 *Post*, *supra* note 14, at 67 (footnotes and internal quotations omitted).

102 *Nahmod*, *supra* note 14, at 72, 73 (footnotes omitted). *Cf. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (“[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” (footnote omitted)).

103 *See Am. Ass’n Univ. Professors, Statement on Government of Colleges and Universities*, in *AAUP POLICY DOCUMENTS AND REPORTS*, *supra* note 2, at 117, 120 (“The faculty has primary responsibility for such matters as curriculum, subject matter and methods of instruction, research, faculty status, and those matters of student life which relate to the educational process. On these matters, the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional cases, and for reasons communicated to the faculty.” (footnote omitted)).

104 *See Minn. St. Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 288 (1984) (“Even assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting, they do not require government to allow teachers employed by it to participate in institutional policymaking. Faculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution.”).

that those to whom they assign academic duties will exercise those responsibilities consistent with the mission of the university to provide high-quality teaching and scholarship. This uncontroversial point has important implications.

A. *Classroom Speech and the First Amendment*

Consider a professor's speech in the classroom. Professors are not hired to teach whatever piques their interest; they are expected to cover the courses and material to which they are assigned. Even the AAUP acknowledges that professors "should be careful not to introduce into their teaching controversial matter which has no relation to their subject."¹⁰⁵ Yet, this understates matters. There is no conception of academic freedom in which a professor hired to teach biology may instead convert the course to one about the Civil War, at least as long as the professor says nothing controversial. Brief digressions may be unremarkable, but a biology course surely can be expected to focus on biology.¹⁰⁶ Permitting universities to regulate classroom speech in this manner is uncontroversial as a matter of First Amendment law; the lower courts have consistently held First Amendment permits a university, as employer, to insist that a professor teach the subject the professor has been hired to teach.¹⁰⁷

A university's pedagogical prerogatives go beyond insisting that professors teach their assigned subject. Universities are also entitled to hold teachers accountable for bad teaching, just as they may reward good teaching. To pick what is perhaps the most obvious example, nothing in the concept of academic freedom permits teachers to harass or bully students.¹⁰⁸ The authority of universities to sanction teachers on this basis is routinely upheld by the courts over First Amendment objection.¹⁰⁹

105 Am. Ass'n of Univ. Professors, *supra* note 2, at 14.

106 See, e.g., HORWITZ, *supra* note 84, at 124 ("[I]ndividual professors cannot have the same liberty to make these decisions that an individual speaker has within public discourse. A philosophy professor who teaches the dialogues of Plato must have some leeway to decide which dialogues to teach and how to teach them. But she cannot decide to spend all her time in that class talking about astrology or the war in Iraq. A philosophy department, as a department, may not dictate the thoughts its members think, but it can insist that they teach philosophy.").

107 See, e.g., Bishop v. Aronov, 926 F.2d 1066, 1076 (11th Cir. 1991) ("The University's conclusions about course content must be allowed to hold sway over an individual professor's judgments.").

108 See, e.g., Am. Ass'n of Univ. Professors, *Freedom in the Classroom*, in AAUP POLICY DOCUMENTS AND REPORTS, *supra* note 2, at 20, 23 ("An instructor may not harass a student nor act on an invidiously discriminatory ground toward a student, in class or elsewhere. It is a breach of professional ethics for an instructor to hold a student up to obloquy or ridicule in class for advancing an idea grounded in religion, whether it is creationism or the geocentric theory of the solar system. It would be equally improper for an instructor to hold a student up to obloquy or ridicule for an idea grounded in politics, or anything else." (footnote omitted)).

109 See, e.g., Wozniak v. Adesida, 932 F.3d 1008, 1010 (7th Cir. 2019) ("[H]ow faculty members relate to students is part of their jobs, which makes *Ceballos* applicable. Professors who harass and humiliate students cannot successfully teach them, and a shell-shocked student may have difficulty learning in other professors' classes. A university that permits professors to degrade students and commit torts against them cannot fulfill its educational functions." (citation omitted)); Bonnell v. Lorenzo, 241 F.3d 800, 823–24 (6th Cir. 2001) ("While a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of

Bullying and harassment are the most extreme forms of bad teaching; they do not exhaust the category. There is no serious claim that universities are obligated to hire, assign, and promote teachers without regard to their ability to teach; nor is there any serious claim that universities are unable to discipline, terminate, or deny promotion or tenure to those who prove to be poor teachers.¹¹⁰ Even the AAUP agrees; it makes no claim that universities must be indifferent to the quality of teaching; its policy on tenure instead states, “After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause”¹¹¹ “Adequate cause,” in turn, can include poor teaching; it need only be “related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers.”¹¹² Courts routinely uphold disciplinary action against those who prove to be inadequate teachers against First Amendment attack.¹¹³

Then there is the question of pedagogical policy. Consider an example pertinent to legal education—the use of formative assessment, which is now required by the accreditation standards for law schools.¹¹⁴ Formative assessment involves “measurements at different points during a particular course or at different points over the span of a student’s education that provide meaningful feedback to improve student learning,” while “[s]ummative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student’s legal education that measure the degree of student learning.”¹¹⁵ There is both a theoretical case for and empirical evidence of the efficacy of formative assessment

compromising a student’s right to learn in a hostile-free environment. To hold otherwise under these circumstances would send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to sexually harass students secure in the knowledge that *whatever* they say or do will be protected. Such a result is one that a state college or university is legally obligated to prevent, and such a result would fail to consider the countervailing interests.” (citation omitted)).

110 See, e.g., Rabban, *supra* note 9, at 286 (“[A] constitutional right of individual academic freedom would force courts to overturn administrative sanctions against professors who deviate from prescribed curricular coverage or who receive poor teaching evaluations from students. But no accepted theory of individual academic freedom, and certainly not the one developed by the AAUP, would identify these professors as engaging in speech to which academic freedom should attach. Academic freedom is not the freedom to be a poor teacher” (footnote omitted)).

111 Am. Ass’n of Univ. Professors, *supra* note 2, at 14.

112 Am. Ass’n Univ. Professors, *Recommended Institutional Regulations on Academic Freedom and Tenure*, in AAUP POLICY DOCUMENTS AND REPORTS, *supra* note 2, at 79, 83.

113 See, e.g., *Martin v. Parrish*, 805 F.2d 583, 585–86 (5th Cir. 1986) (“Repeated failure by a member of the educational staff of Midland College to exhibit professionalism degrades his important mission and detracts from the subjects he is trying to teach To the extent that Martin’s profanity was considered by the college administration to inhibit his effectiveness as a teacher, it need not be tolerated by the college”).

114 See ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2020–2021, Std. 314 (2020) (“A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.”).

115 *Id.* Interp. 314–1.

in legal education.¹¹⁶ If a law school required those who teach required courses to utilize formative assessment, perhaps a teacher might resist—doubting the efficacy of formative assessment and wishing to devote more time to scholarship and less to teaching.¹¹⁷ Yet, if all teachers at law schools enjoyed a First Amendment right of academic freedom to resist formative assessment, law schools would find it impossible to comply with applicable accreditation standards. It would be quite a task to develop a First Amendment right of academic freedom that entitles professors to refrain from using an assessment mechanism that the applicable accrediting body has found essential for a minimally adequate education.

In short, it is hard to explain why, under the First Amendment, academics can never be held accountable for incompetence or misconduct as long as it is reflected in what they say or write to students. Even the AAUP has not taken this position; instead, it acknowledges that academics should be expected to defend allegations of misconduct, though such allegations should be resolved under procedures designed to offer academic a fair opportunity to defend themselves.¹¹⁸

This survey of the pedagogical prerogatives of universities over the classroom speech of professors suggests that *Garcetti's* rationale about the prerogatives of public employers over duty-related speech has considerable applicability to higher education; when a university hires a scholar to teach, it has the corresponding prerogative to assess the quality of that teaching—to reward good teachers and discipline bad ones.

One might argue that the ordinary *Pickering* balancing test is sufficient to permit universities to discipline poor teachers without need of the blanket exception from First Amendment review for duty-related speech announced in *Garcetti*. Recall, however, that the concept of speech on a matter of “public concern” is quite broad,¹¹⁹ and the burden of justifying an adverse employment action under the balancing test falls on the employer.¹²⁰ The *Pickering* balancing test, accordingly, would give courts ample room to displace the pedagogical judgments of universities were it to be applied to classroom speech. It could therefore produce so robust a judicial supervisory role over pedagogy in higher education that that judicial review might itself threaten the independence of universities. If, conversely, courts were

116 For some of the leading discussions, see Andrea A. Curcio et al., *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271 (2008); Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law School Student Performance*, 67 J. LEG. EDUC. 139 (2017); and Carol Springer Sargent & Andrea A. Curcio, *Empirical Evidence that Formative Assessments Improve Final Exams*, 61 J. LEG. EDUC. 379 (2012).

117 Indeed, a frequently voiced objection to formative assessment is along these lines. E.g., Olympia Duhart, *The ‘F’ Word: The Top Five Complaints (and Solutions) About Formative Assessment*, 67 J. LEG. EDUC. 531, 537 (2018).

118 See Am. Ass’n Univ. Professors, *supra* note 112, at 83–88 (describing recommended procedures for identifying and resolving allegations of misconduct). For a helpful discussion of the procedural protections generally available to academics accused of misconduct, see Nancy Chi Cantalupo & William C. Kidder, *Systemic Prevention of a Serial Problem: Sexual Harassment and Bridging Core Concepts of Bakke in the #MeToo Era*, 52 U.C. DAVIS L. REV. 2349, 2398–403 (2019)

119 See *supra* text accompanying notes 22–29.

120 See *supra* text accompanying notes 30–33.

obligated to defer to the pedagogical judgments of universities, the *Pickering* test would have little bite.

Pickering accordingly seems either too strong or too weak to provide a satisfactory test for a constitutional right of academic freedom enforceable by academics against the universities that employ them.

B. Scholarly Speech and the First Amendment

Even if the problems with a First Amendment right of academic freedom can be overcome when it comes to classroom speech, the problems of recognizing such a right when it comes to scholarly speech are even greater.

Even the advocates of academic freedom acknowledge that universities, when deciding who to hire or promote, properly consider the quality of their scholarship. As Robert Post and Matthew Finkin put it,

[N]o university currently deals with its faculty as if academic freedom of research and publication were an individual right to be fully free from all institutional restraint. Universities instead hire, promote, grant tenure to, and support faculty on the basis of criteria of academic merit that purport to apply professional standards. Individual faculty have no right of immunity from such judgments.¹²¹

The review of scholarship undertaken by universities frequently extends to both its content and even the viewpoint advanced therein. For example, an aspiring law professor who advanced racist legal views in the materials supporting an application for employment surely could be refused for that reason,¹²² even though the government, when promulgating generally applicable regulations, is forbidden under the First Amendment from discriminating against racist viewpoints, even in categories of unprotected speech such as so-called “fighting words.”¹²³ Or, a university’s history department could surely refuse to hire an applicant who advanced in the “great man” theory of history on the ground that this view had fallen into disrepute as a matter of prevailing professional norms.¹²⁴ Similarly, a

121 MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 58–59 (2009).

122 See, e.g., Schauer, *supra* note 88, at 918 (“Consider the case in which, whether in class or in an academic book or article, a professor argues that the decision in *Brown v. Board of Education* was the product of a conspiracy among the Communist Party, the NAACP, and the Jews. There should be little doubt that espousing such a viewpoint would be permissible grounds for non-hiring, and permissible grounds for non-tenuring.”).

123 See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992) (“[T]he ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But ‘fighting words’ that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”).

124 For a helpful discussion of the manner in which historians have come to view the various

biology department could refuse to hire an applicant who rejected evolution in favor of a biblical theory of creation,¹²⁵ even though discrimination on the basis of religious belief is ordinarily considered a form of impermissible viewpoint discrimination forbidden by the First Amendment.¹²⁶

Accordingly, while, under First Amendment doctrine, content and viewpoint discrimination is ordinarily forbidden, it is commonplace in the academy. When it comes to society at large, the First Amendment may well represent, as Justice Brennan famously wrote, “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,”¹²⁷ but the academy is not a forum in which all voices must be heard. Only those who survive the rigorous process of vetting scholarship to assess its merit are granted entry, and their continued employment through tenure (at least) depends on similar assessments.¹²⁸ The expression of views that have come into academic disrepute for one reason or another frequently are the basis on which aspiring academics fail to gain employment, promotion, or tenure. In this fashion, the prerogative to assess an employee’s duty-related speech that is at the heart of *Garcetti* has clear application to higher education. Even the advocates of constitutional protection for academic freedom acknowledge that this right is necessarily subject to compliance with professional norms for scholarship.¹²⁹

viewpoints reflected in competing views of history, see Peter Burke, *Overture: The New History, Its Past and Future*, in *NEW PERSPECTIVES ON HISTORICAL WRITING* 1, 1–23 (Peter Burke ed., 1991).

125 See, e.g., Horwitz, *supra* note 88, at 506 (“A university may reasonably determine that the kind of speech covered by a discrimination policy or other code affecting campus speech is simply not of the intellectual quality demanded in an environment of scholarly inquiry—just as it would not hesitate to conclude that a professor teaching creationism in a biology class may be subject to discipline or dismissal, or that a student pursuing an argument in favor of Holocaust revisionism may receive a failing grade in a history class.”).

126 See *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (“[V]iewpoint discrimination is the proper way to interpret the University’s objections to *Wide Awake*. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”).

127 *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

128 See, e.g., STANLEY FISH, *THE FIRST: HOW TO THINK ABOUT HATE SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP* 64 (2019) (“Freedom of speech is a democratic value. It says that in a democracy government should neither anoint nor stigmatize particular forms of speech In the academy, on the other hand, free inquiry, not free speech, is the reigning ethic, and academic inquiry is engaged in only by those who have been certified as competent; not every voice gets to be heard Determining who will *not* be allowed to speak is the regular business of departments, search committees, promotion committees, deans, provosts, presidents, and editors of learned journals.”); *Post*, *supra* note 14, at 67 (“In contrast to the marketplace of ideas . . . academic freedom protects scholarly speech only when it complies with professional norms.” (footnote and internal quotations omitted)); JOAN WALLACH SCOTT, *KNOWLEDGE, POWER, AND ACADEMIC FREEDOM* 118 (2019) (“Free speech makes no distinction about quality; academic freedom does. Are all opinions equally valid in a university classroom? Does creationism trump science in the biology curriculum if half of the students believe in it? Do both sides carry equal weight in the training of future scientists? Are professors being ‘ideological’ if they refuse to accept biblical accounts as scientific evidence?”).

129 See, e.g., *Post*, *supra* note 14, at 67 (“Although the First Amendment would prohibit government from regulating the *New York Times* if the newspaper were inclined to editorialize that the moon is

As with classroom speech, one might argue that a university's prerogative to assess the quality of the scholarly speech can be accommodated by the *Pickering* balancing test, rather applying *Garcetti*. But the same objections to *Pickering* when it comes to an assessment of classroom speech apply with even greater force to scholarship. If the *Pickering* balancing test applies, the burden would be on the employer justify its judgments about an applicant or incumbent professor's scholarship, thereby give the judiciary ample room to displace scholarly judgments. Conversely, to the extent that great deference to a university's scholarly judgment is required, it becomes doubtful whether an individual professor's right of academic freedom would, in actual effect, have meaningful bite.

Beyond that, an effort to pigeonhole scholarly judgments about the quality of scholarship into the workplace-efficiency metric of the *Pickering* balancing test misconceives the nature of scholarly inquiry. *Pickering* weighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹³⁰ A university seeks to hire, promote, and encourage outstanding scholarship, however, not in a quest for efficiency on any conventional metric; rather, as we have seen, scholarship is properly assessed in terms of professional norms.¹³¹ One struggles to fit a university's judgments about the quality of scholarship into this workplace-efficiency metric of the *Pickering* balancing test.

Perhaps even more important, universities are most likely to face political pressure to deviate from scholarly norms when academics take unpopular positions.¹³² The *Pickering* balancing test, however, is concerned with workplace

made of green cheese, no astronomy department could survive if it were prevented from denying tenure to a young scholar who was similarly convinced. Academic freedom thus depends upon a double recognition: that knowledge cannot be advanced in the absence of free inquiry, and that the right question to ask about a teacher is whether he is competent."); Byrne, *supra* note 88, at 283 ("[A]cademic freedom does not insulate speakers from being penalized for the content of their speech. Academic freedom only requires that speakers be evaluated by their peers for relative professional competence and within the procedural restraints of the tenure system."); David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1409 (1988) ("[A]cademic freedom limits the autonomy of professors by requiring adherence to professional norms An individual professor who departs from the scholarly standards that justify academic freedom can be disciplined or even dismissed."); William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59, 75–76 (Edmund L. Pincoffs ed., 1975). ("[I]n respect to his academic freedom, the teacher or scholar is simultaneously under more constraint as well as under less constraint than would ordinarily obtain."). Even with respect to speech outside of academic contexts, the concept of academic freedom frequently is conjoined with the correlative obligation of academics to exercise appropriate restraint. See, e.g., Am. Ass'n of Univ. Professors, *supra* note 2, at 14 ("College and university teachers are citizens, members of a learned profession, and officers of an educational institution [T]heir special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.").

130 *Pickering v. Bd. of Educ. of Township High Sch. Dist.* 205, 391 U.S. 563, 568 (1969).

131 See *supra* text accompanying notes 121–29.

132 See, e.g., Am. Ass'n of Univ. Professors, *Ensuring Academic Freedom in Politically Controversial Academic Personnel Decisions*, in AAUP POLICY DOCUMENTS AND REPORTS, *supra* note 2, at 32, 32–33

efficiency, not protecting unpopular speakers or viewpoints. Using the *Pickering* balancing test to protect the academic freedom to articulate unpopular views is rather an exercise in fitting square pegs into round holes.

In this regard, consider the question whether the academy itself is tainted by ideological bias. There is ample evidence that American college and university faculty are predominantly liberal.¹³³ There is less evidence that this ideological skew affects hiring decisions, but the cupboard is far from bare. One study, for example, found that conservative scholars have less prestigious academic appointments than liberal scholars with equivalent publication records.¹³⁴ There are also a series of studies that survey academics and strikingly find they acknowledge that they are willing to discriminate in hiring and other respects against conservative academics.¹³⁵ If *Garcetti* were held inapplicable to duty-related scholarship, perhaps an unsuccessful academic candidate for hiring, promotion, or tenure could advance a plausible claim the candidate's conservative ideology was the reason for the candidate's lack of success.

Yet, disentangling ideology in academic hiring and promotion from scholarly norms is an enormously tricky business; as we have seen, academics frequently reject scholarship reflecting a viewpoint that has come into academic disrepute for one reason or another.¹³⁶ A right of academic freedom that permitted courts to police hiring decisions for evidence of ideological discrimination would be fiendishly difficult to apply.¹³⁷ Separating permissible from impermissible viewpoint discrimination in

("Political intrusion . . . usually arises out of controversies over political ideology, religious doctrine, social or moral perspectives, corporate practices, or public policy—not more narrowly professional disagreements and disputes among academics.").

133 See, e.g., Emily Burmila, *Liberal Bias in the College Classroom: A Review of the Evidence (or Lack Thereof)*, 54 PS: POLITICAL SCI. & POLITICS 598, 599 (2021) ("Higher Education Research Institute data show that 60% of California university faculty across all institutions self-identified as liberal or left in 2014. Carnegie Foundation survey data reached an identical figure (60%) in similar nationwide studies." (citations omitted)).

134 See Stanley Rothman & S. Robert Lichter, *The Vanishing Conservative—Is There a Glass Ceiling?*, in *THE POLITICALLY CORRECT UNIVERSITY: PROBLEMS, SCOPE AND REFORMS* 60, 71–72 (Robert Maronto et al. eds., 2009). Cf. James C. Phillips, *Why Are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses*, 39 HARV. J.L. & PUB. POL'Y 153, 193–204 (2016) (finding conservative and libertarian law professors have higher publication and citation rates).

135 For leading surveys, see ERIC KAUFMAN, CTR. FOR STUDY OF PARTISANSHIP AND IDEOLOGY, *ACADEMIC FREEDOM IN CRISIS: PUNISHMENT, POLITICAL DISCRIMINATION, AND SELF-CENSORSHIP* 136–68 (Rpt. No. 2, Mar. 1, 2021) (survey of academics across disciplines in the United States and Britain); GEORGE YANCEY, *COMPROMISING SCHOLARSHIP: RELIGIOUS AND POLITICAL BIAS IN AMERICAN HIGHER EDUCATION* 39–76 (2011) (survey of academic sociologists); Nathan Honeycutt & Laura Freberg, *The Liberal and Conservative Experience Across Academic Disciplines: An Extension of Inbar and Lammers*, 8 PERSP. PSCHOL. SCI. 115, 118–19 (2017) (academics from a variety of disciplines at four California State University campuses); Yoel Inbar & Joris Lammers, *Political Diversity in Social and Personality Psychology*, 7 PERSP. PSYCHOL. SCI. 496, 500 (2012) (survey of social and personality psychologists); Uwe Peters et al., *Ideological Diversity, Hostility, and Discrimination in Philosophy* 33 PHIL. PSYCHOL. 511, 523–29 (2020) (international survey of philosophers).

136 See *supra* text accompanying notes 122–26.

137 Cf. Byrne, *supra* note 88, at 307 ("[I]t would be most difficult for a court to separate legitimate from illegitimate academic decision-making. The court would have no guiding principles enabling it to determine which academic grounds are consistent with the First Amendment and which are

higher education would be no easy task, yet *Pickering* seemingly demands an effort to balance a scholar's liberty interest against the university's interest in enforcing maintaining high standards of scholarship.

Pickering would likely prove unworkable if courts were required to evaluate the quality of scholarship to determine if a candidate was not hired, promoted, or tenured as a consequence of professional norms, or as retaliation for scholarship expressing conservative views on matters of public concern. Judicial surveillance of the role of ideology in academic hiring and promotion, moreover, would threaten the academic freedom of universities themselves. There is, in short, no easy way to apply *Pickering* to judgments about the quality of scholarship.

C. Academic Freedom and Scholarly Accountability

There are accordingly serious problems with applying *Pickering's* balancing test to higher education. A robust judicial role would threaten the independence of public universities, while a highly deferential approach to the test would render academic freedom largely illusory.

Nor is a purely procedural approach to *Pickering* more satisfactory. If *Pickering* were understood to require no more than a university to announce clear pedagogical and scholarly policies, academic freedom would be reduced to a principle of fair notice offering little in the way of substantive protection. As we have seen, academic freedom is generally characterized as a substantive rather than a procedural protection, whether on the AAUP's view that academics are entitled to "freedom" in teaching and scholarship, or the institutional conception of academic freedom as freedom from external interference advanced by Justice Frankfurter.¹³⁸ It is unclear at best why First Amendment right academic freedom should be converted into a procedural doctrine.¹³⁹ Moreover, if conceived in procedural terms, *Pickering* would function in a manner quite different from the fashion in which it has been applied to other public employees.¹⁴⁰

not. This is so because ... the only intelligible purpose for constitutional academic freedom is to protect academic values and practices from conformity to general social demands."); Rabban, *supra* note 9, at 291 ("It is often impossible, moreover, to separate ideological from disciplinary objections to academic work. Does a liberal law professor oppose critical legal studies or the Chicago school of economics because he has political objections to radical and conservative positions, or because he finds little merit in their intellectual approaches to legal issues? Does a radical law professor favor critical and feminist legal theory over traditional doctrinal analysis for intellectual or political reasons?").

138 See *supra* text accompanying notes 65–68.

139 Procedural protections are generally offered not by the First Amendment but the Due Process Clause. On that score, academics with a contractual right to tenure or some other type of legitimate claim of entitlement to continued employment enjoy a property interest within the meaning of the Due Process Clause, and are therefore entitled to notice and opportunity for hearing when their employment is threatened by allegations of misconduct. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972) ("[T]he respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent 'sufficient cause.' ... Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.").

140 See, e.g., *Connick v. Myers*, 461 U.S. 138, 150–54 (1983) (upholding termination of prosecutor

To be sure, as we have seen, the First Amendment forbids impermissibly vague regulation of speech, including the speech of public employees.¹⁴¹ That said, it is doubtful that ordinary vagueness doctrine applies when the government acts as an employer overseeing the performance of public employees' speech-related duties. *Garcetti*, of course, denies any protection to a public employee's duty-related speech.¹⁴² Even putting *Garcetti* aside, as Justice O'Connor once observed, surely "a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large,"¹⁴³ and it is unclear why it is not equally apparent that a university may refuse to hire or promote an applicant because it found that scholar's work deficient in terms of professional norms under broadly framed standards demanding something like "high-quality scholarship" of those seeking academic positions or promotions, even if those standards were impermissibly vague if applied to regulate speech outside of public employment. Thus, it is unclear why academics should be entitled, under the First Amendment, to some sort of special procedural protection unavailable for any other public employee's duty-related speech, even if it would be practicable to formulate precise rules governing university's assessments of classroom and scholarly speech.

Once the *Pickering* balancing test is put aside, the difficulties only multiply for a First Amendment right that would not insulate the incompetent or the venal from accountability—at least as long as their incompetence or venality is manifested in what they say or write.

Those who have attempted to erect a First Amendment theory of academic freedom that stands apart from *Pickering* have encountered just this difficulty. The advocates of a First Amendment right of academic freedom distinct from *Pickering*, while varying in the particulars, contend that the First Amendment should protect academics when they speak or write in their professional capacity as teachers and scholars.¹⁴⁴ This view, however, must still address the extent to which academics

who had circulated a questionnaire asking whether colleagues felt pressure to work on campaigns of office-supported candidates under the *Pickering* balancing test, although "Myers did not violate announced office policy" because the questionnaire "carries the clear potential for undermining office relations," "the fact that Myers, unlike *Pickering*, exercised her rights to speech at the office supports Connick's fears that the functioning of his office was endangered," and "[w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office.").

141 See *supra* text accompanying notes 56–60.

142 See *supra* text accompanying notes 39–45.

143 *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion) (citation omitted).

144 See, e.g., POST, *supra* note 14, at 84 ("First Amendment coverage should be triggered whenever the freedom of the scholarly profession to engage in research and publication is potentially compromised."); Areen, *supra* note 14, at 994 ("First Amendment protection for the speech of individual faculty members [should be afforded] as long as the speech concerned research, teaching, or faculty governance matters."); Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1333 (1988) ("The core claim of academic freedom concerns not speech as a citizen—the liberty of a professional utterance the academic enjoys in common with his fellow citizens—but freedom of professional utterance not shared with the citizenry at large."); Rabban, *supra* note 9, at 300 ("Individual academic freedom should cover expression within a professor's scholarly expertise

can be held accountable for poor teaching or scholarship. After all, no one thinks that academic freedom amounts to a license to teach, speak, or write ineptly, irresponsibly, or free from meaningful accountability.¹⁴⁵

On this point, as we have seen, the advocates of a constitutional right of academic freedom universally acknowledge that academics can be disciplined—or denied employment or promotion—based on what they say and write, at least when these employment decisions are justified in terms of professional norms, and they agree that deference is owed to the academic judgments of the university.¹⁴⁶ These concessions, of course, greatly circumscribe the scope of any asserted First Amendment right of academic freedom. On this view, a constitutional right of academic freedom would, at best, be doomed to the status of a grossly underenforced constitutional norm.¹⁴⁷

Moreover, the acknowledgment that academic freedom cannot be secured without deference to the academic judgments of universities itself reflects the type of managerial prerogative embraced in *Garcetti*. As we have seen, that decision is rooted in the prerogative of an employer to assess the quality of its employees' duty-related speech.¹⁴⁸ The view that universities' assessments of the quality of teaching and scholarship are entitled to deference is based in the same conception of managerial prerogative. Accordingly, it is not so easy to dismiss the applicability of *Garcetti*, and its conception of a managerial prerogative, to higher education.

Even if *Garcetti* applied to the professorate at public universities, it would not render the First Amendment nugatory at those institutions. As we have seen, public employers cannot demand ideological or partisan loyalty from those who hold positions for which such loyalty is not an appropriate criterion such as most (if not all) academics.¹⁴⁹ Accordingly, neither the government nor the public university that employs a scholar can demand ideological or partisan loyalty as a criterion for employment.

It follows that, even if applied to higher education, *Garcetti* would not eliminate all constitutional protection for classroom or scholarly speech. As a matter of general First Amendment doctrine, allegations of scholarly incompetence or professional misconduct that are mere pretexts to retaliate against an academic for protected speech unrelated to the performance of academic duties or a breach of professional norms run afoul of the First Amendment; after all, all public employees enjoy a First Amendment right to be free from retaliation motivated by their protected

and intramural speech on matters of educational policy.”).

145 See, e.g., David M. Rabban, *The Regrettable Underenforcement of Incompetence as a Cause to Dismiss Tenured Faculty*, 91 IND. L.J. 39, 56 (2015) (“While the job functions of a professor justify the special protection of academic freedom, they do not justify special protection for incompetence.”).

146 See *supra* text accompanying notes 89, 101–02, 121–29.

147 For helpful discussions of the concept of underenforced constitutional norm, see LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES, A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 86–128 (2004).

148 See *supra* text accompanying notes 39–49.

149 See *supra* text accompanying notes 73–79.

speech or conduct.¹⁵⁰ Thus, to the extent that allegations of teaching or scholarly misconduct are actually motivated not by concerns about the quality of teaching or scholarship, but instead are intended as retaliation against an academic for what is regarded as partisan or ideological nonconformity, the academic retains First Amendment rights.

Nothing in *Garcetti* is to the contrary. Recall that Ceballos was allegedly disciplined because of his duty-related speech—his assessment of the prosecutive merit of a pending case.¹⁵¹ Nothing in the Court's decision entitled the district attorney's office to discipline Ceballos for any reason other than its assessment of the quality of his duty-related speech. Had the discipline been pretextual—for example, had the prosecutor's office actually disciplined Ceballos based on some sort of non-duty-related speech critical of the district attorney's actions on a matter of public concern—Ceballos would have been free to challenge the discipline.¹⁵²

Garcetti, in other words, permits an employer to evaluate duty-related speech consistent with pertinent professional norms, not to use it as pretext. Notably, it is far from clear that there is any meaningful difference between that conclusion and the concession of the advocates of a constitutional right of academic freedom that universities may assess academic speech consistent with pertinent professional norms.

Accordingly, even if applied to higher education, *Garcetti* does not leave a professor without constitutional recourse in the face of retaliation for the expression of unpopular views that are nevertheless consistent with prevailing scholarly norms. If a university seeks to discipline a teacher or scholar—whether tenured or not—not because that individual's work is inconsistent with professional norms, but because it is politically unpopular, the teacher would be able to challenge the assertedly scholarly judgment as pretextual, either as an aspect of institutional academic freedom or under generally applicable principles of First Amendment

150 See, e.g., *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1419 (2016) (“The constitutional harm at issue in the ordinary case consists in large part of discouraging employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities The upshot is that a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake.”)

151 See *supra* text accompanying notes 39–45.

152 See, e.g., *Lane v. Franks*, 573 U.S. 228, 238–42 (2014) (First Amendment prohibited retaliation against public employee for testimony at criminal trials discussing financial misconduct the employee had unearthed in the course of his duties on the ground that the testimony was non-duty-related speech on a matter of public concern). Cf. *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 572–73 (1969) (“What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally [T]he interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.” (footnote omitted)).

law.¹⁵³ To be sure, it will often be difficult to prove pretext; and in the academic context in particular, it will be difficult to separate impermissible discrimination against disfavored viewpoints with the appropriate administration of professional and scholarly norms. There is no proposal to erect a constitutional right of academic freedom, however, that avoids this difficulty.

Beyond the realm of pretext, however, it is unclear why the First Amendment immunizes academics against the need to face allegations of teaching-related misconduct. After all, if teachers were never accountable for poor teaching or scholarship, the academy would become a safe harbor for the incompetent and the venal. Nor could universities decide to hire, promote, or tenure based on its assessment of the quality of their teaching and scholarship. Perhaps most important, an individual right of academic freedom that would render scholars immune from bona fide professional judgments of the universities that employ them threatens to leave universities helpless in the face of writing or speech that raises legitimate questions about a scholar's professional competence.

III. Conclusion

There is little more reason to believe that an academic's duty-related speech is protected by the First Amendment is immune from scrutiny by a public employer than it is to believe that a prosecutor's duty-related speech enjoys the same protection—the position rejected in *Garcetti*. Indeed, some might conclude that prosecutors exercise far more critical responsibilities than academics; after all, they have the power to seek to deprive others of life, liberty, or property. Yet, the soundness of prosecutive recommendations may surely be evaluated by supervisors, and prosecutors whose recommendations are found wanting—because they seek to prosecute the innocent or fail to prosecute the guilty—surely have no immunity from discipline under the First Amendment. Similarly, academic speech is necessarily assessed by universities in terms of prevailing professional norms, as even the advocates of a constitutional right of academic freedom acknowledge.¹⁵⁴

There is undoubted appeal to the notion that academics ought to be free to teach or write without risk to their jobs if they offend prevailing political sentiment. Yet, academics enjoy a protection available to no other public employee—they work not for a public official who must take heed of public opinion to remain in office, but for universities, which ordinarily operate outside of the political fray, applying scholarly and not political norms. To be sure, universities are sometimes subject to political pressure when professors express unpopular views, but general First Amendment doctrine forbids government from demanding ideological conformity. That should offer academics protection enough from prevailing political winds.

153 Cf. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (“[T]his is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing; the District Court found that the Regents acted in good faith.”).

154 See *supra* text accompanying notes 121–29.

When individual academics are granted a constitutional right of academic freedom to resist the university's conception and application of professional norms, however, academic freedom wages war with itself. A university that cannot hold its teachers to appropriately demanding pedagogical and scholarly standards is doomed to mediocrity or worse. A First Amendment right of academic freedom, in short, paves the road to a destination that the no university—or the academics in its employ—should want to reach.

MEDICAL EDUCATION AND INDIVIDUALS WITH DISABILITIES: REVISITING POLICIES, PRACTICES, AND PROCEDURES IN LIGHT OF LESSONS LEARNED FROM LITIGATION

LAURA ROTHSTEIN*

Abstract

In the thirty plus years since the Americans with Disabilities Act was passed, there have been a significant number of lengthy and costly judicial disputes involving medical school admission and enrollment of individuals with disabilities. This article reviews the history of medical education and provides a description of the evolution of the educational curriculum for medical school and how it has changed in recent years. It provides the legal framework of statutory and regulatory requirements for the application of federal disability discrimination law to medical school applicants and enrolled students. A synthesis of these cases (many lasting several years from incident to resolution) sheds light on what must be done, what can be done, and what should be done by medical school policy makers and administrators in response to the admission and enrollment of individuals with disabilities. The article suggests ways that medical schools could revise their evaluation procedures and practices both at the admissions stage and during medical school. The article stresses the importance of key top medical school leadership and medical school legal counsel in ensuring that this framework is implemented. The primary audience for this article are top administrators and legal counsel in institutions that set these policies and implement them.

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INTRODUCTION

When section 504 of the Rehabilitation Act was enacted in 1973, almost all medical schools became subject to the mandate not to discriminate on the basis of disability and to provide reasonable accommodations because medical schools were almost all recipients of federal financial assistance from research and other grants and student loan support. It has been almost fifty years since that mandate. Over that time, medical schools and other health care institutions have struggled with the challenges of implementing the section 504 mandates and the even more comprehensive requirements of the 1990 Americans with Disabilities Act (ADA) in carrying out their educational programs.

The fact that there have been a significant number of lengthy and costly judicial disputes involving medical school admission and enrollment of individuals with disabilities is a reflection of the high stakes involved in such programming.¹ Medical school involves perhaps the highest stakes of all higher education programs, as described in more detail below.

This article reviews the history of medical education and provides a description of the evolution of the educational curriculum for medical school and how it has changed in recent years. It describes the admission and enrollment process and connection to licensing, and provides an overview of the accreditation and other professional entities that set the framework for medical education and licensing. The article also provides the legal framework of statutory and regulatory requirements for the application of federal disability discrimination law to medical school applicants and enrolled students, and reviews and synthesizes the lengthy litigation addressing disputes by applicants and students who have been rejected or dismissed. A synthesis of these cases (many lasting several years from incident to resolution) can shed light on what *must* be done, what *can* be done, and what *should* be done by medical school policy makers and administrators in response to the admission and enrollment of individuals with disabilities.

This is a particularly good time to do that examination because of issues that have been highlighted by the COVID epidemic and the changes in the last decade regarding approaches to medical school education. The case law synthesis will analyze what guidance there is from the judicial interpretation, and whether a framework is possible to guide decisions at the admissions stage,² at the educational

1 The primary focus of this article is on medical school (including osteopathy). The analysis can be a framework for other health care professional programs. Additional study of other health care professional programs, particularly nursing, may well raise the same issues, but the stakes are highest in medical/osteopathy school settings. The cases discussed in this article are primarily drawn from medical school contexts, but other health care professional program judicial decisions also provide insights.

2 It considers whether medical schools (and other health care professional programs) can or should base their decisions about whether to admit a student with a known impairment/disability on whether that individual could be licensed to engage in practice. The question is about whether an existing impairment (or a potential impairment in the future) would or might prevent the licensing of the individual after completion of the program or result in an undue burden or fundamental alteration of the educational program after admission.

enrollment stage,³ at the readmission stage,⁴ and at the licensing stages⁵ of such programs.⁶

Finally, the article suggests ways that medical schools could revise their evaluation procedures and practices. Revisions are needed at both the admissions stage and during the educational process in light of the lengthy and costly dispute history.

The framework will be not only on what is likely to be legally permissible (what *must* be done), but also on whether policy, practice, and procedure change should address some of these issues (to respond to what *can* be done and what *should* be done). The conclusion of the article highlights two documents that suggest a framework for professional education programs and adds the importance of key top medical school leadership and medical school legal counsel in ensuring that this framework is implemented.

This analysis and synthesis may guide policymakers in health care professional programs to make changes that not only ensure the goals of nondiscrimination and reasonable accommodation, but also patient safety, while avoiding protracted litigation that could be prevented by changes in policies, practices, and procedures. The primary audience for this article are top administrators and legal counsel in institutions that set these policies and implement them. It is written from the personal perspective of the author's having focused broadly on issues of higher education and disability since 1980 and particular focus on medical education for much of that time.

I. Complexity and Importance of the Topic

This is a complex topic for a number of reasons. First, professional health care education is in a state of flux in terms of infusing clinical training (involving direct patient contact) earlier in the educational process. Second, the limitations of some impairments (particularly sensory impairments) can be addressed through new technology.⁷ Third, impairments/disabilities include a wide variety of conditions—sensory (vision/hearing); mobility; substance use/abuse; HIV and other contagious and infectious diseases; learning disabilities; mental health conditions (including

3 This analysis considers what procedures should be in place at all stages to ensure appropriate decision making about these individuals and the impact of their disabilities on their ability to function as a medical professional. In considering these procedures, how does a program ensure that individuals with disabilities are treated fairly and with consideration, while balancing the interests of patient safety and maintaining institutional standards?

4 As the cases demonstrate it is often in the third year of medical school when the student begins to show deficiencies in performance in the context of some disabilities.

5 This discussion addresses the responsibilities of institutions related to the National Board of Medical Examiners (NBME) testing process that are intertwined throughout medical education in terms of accommodating students with disabilities.

6 These stages in medical education and entry into the profession raise issues about notice before application, notice upon admission, educational programming during the academic coursework, clinical rotations, and residency placements.

7 This is an area where artificial intelligence developments can be relevant to consider because they may ease some performance requirements.

depression, bipolar disorder); neurological impairments (including seizure disorders); neuroendocrine impairments (toxic stress); neurodevelopmental impairments (including autism spectrum conditions); psychological (such as depression); and health impairments (such as chemical sensitivities)—which manifest themselves in different ways that might affect the ability to be licensed. Toxic stress can also have an impact. That term usually refers to experiences during childhood, which could continue to affect students while they are in medical school. It is also noteworthy that toxic stress is created by the medical school experience. Fourth, licensing is a critical aspect of health care professional practice, but hospital privileges,⁸ continuing qualification, and later employment are also relevant to this discussion.⁹ Finally, the “history of medical education [shows] that it is inextricably intertwined with healthcare delivery and broader societal norms,”¹⁰ making consideration of these complex market forces a critical aspect of this analysis.

II. Scenarios That Frame the Issue

Before providing the institutional and legal framework for the issue, it is useful to consider the types of situations that might arise. The following are only some examples but can make the review of the material in the article less abstract.

Doctors and medical students with disabilities are found in television and movies.¹¹ Stories about real individuals are also highlighted in the media.¹² Events occurring during COVID highlighted the need for more physicians as a result of front-line challenges during peak pandemic periods, and raised the question about the impact of current practices that exclude individuals with disabilities who could offset some of those deficiencies.

8 Hospital privileges are increasingly becoming linked to state medical board certification.

9 For example, if a blind applicant to medical school can be denied admission because vision is determined to be an essential requirement for licensing, how does this impact a physician who becomes blind after receiving a license to practice medicine? Should it matter at what stage one becomes impaired?

10 L. Maximilian Buja, *Medical Education Today: All That Glitters Is Not Gold*, 19 BMC MED. EDUC. 110 (2019), <https://bmcmededuc.biomedcentral.com/articles/10.1186/s12909-019-1535-9>.

11 Although many of these are unrealistic portrayals, they can give a sense of what doctors do and how an impairment might impact their work. *The Good Doctor* (ABC 2017–21); *ER* (NBC 1994–09); *House* (Fox 2004–12); *Grey’s Anatomy* (2005–21); *Chicago Med* (NBC 2015–21).

12 See Elana Gordon, *Doctors with Disabilities Push for Culture Change in Medicine*, NPR (Aug. 6, 2018, 5:38PM), <https://www.npr.org/sections/health-shots/2018/08/06/635414552/doctors-with-disabilities-push-for-culture-change-in-medicine>; Dhruv Khullar, *Doctors with Disabilities: Why They’re Important*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/upshot/doctors-with-disabilities-why-theyre-important.html>; Jack Wolstenholm, *Empowering Doctors with Disabilities: Essential Resources in 2021*, <https://www.leveragerx.com/blog/doctors-with-disabilities/>; Tim Gilmer, *Disabled Doctors: Healing the Medical Model?*, NEW MOBILITY (Mar. 1, 2019), <https://www.newmobility.com/2019/03/disabled-doctors/>; Cheri Blauwet, *Are You My Doctor? Toward a World Where a Physician in a Wheelchair Is No Big Deal*, STAN. MED. (Spring 2018), <https://stanmed.stanford.edu/listening/time-that-doctor-with-disability-seen-ordinary.html>; Stacy Weiner, *Paving the Way for Physicians with Disabilities*, ASS’N OF AM. MED. COLLS. (Nov. 25, 2019), <https://www.aamc.org/news-insights/paving-way-physicians-disabilities>; Ace Ratcliff, *America Needs More Doctors with Disabilities*, HUFFINGTON POST (Oct. 19, 2018, 12:32 PM), https://www.huffpost.com/entry/opinion-america-needs-more-doctors-with-disabilities_n_5bc9e59de4b055bc947feebd; SOC’Y FOR PHYSICIANS WITH DISABILITIES, <https://www.physicianswithdisabilities.org/> (last visited Aug. 17, 2021).

The following scenarios, based on both fictional and actual settings, provide a context for the types of issues that can arise involving medical school applicants and students with disabilities. These are provided to highlight the range of issues (for example, cost, fundamental alteration, safety, and practicality) that arises in these settings.

Scenario 1: **Deaf applicant** seeks interpreters for classes (similar scenario for **blind** applicant).

- Such a service might be costly.
- It might have an impact on speed of processing information and acting on it in patient treatment and diagnosis settings.
- It might raise questions about whether an individual would be able to perform the essential requirements of the program, even if the service were to be provided.
- Must this service be provided if student cannot be licensed ultimately?
- Must this accommodation be provided if no clinical placement will accept these students and, thus, they can never complete the academic requirements?

Scenario 2: Medical school applicant with **learning disability** or **autism** can be accommodated in academic programs (primarily during the first two years of medical school), by providing additional time for exams or providing a reader.

- Can the student be accommodated in clinical rotations?
- Or be admitted to practice?
- To what extent is “speed” of processing information and acting on that an essential function? Is the ability to read and synthesize information quickly essential? In all settings or only in some settings? Does that matter?
- To what extent is the ability to engage in critical analysis of information required as essential?
- Who makes that determination?

Scenario 3: Medical school student with **mobility impairment**¹³ meets academic requirements. After two years, upon entering clinical rotations, limitations may affect certain abilities.

- Are these disqualifying? Can they be accommodated?
- Is it permissible to consider those at the point of admission?

Scenario 4: Medical school student with **psychological, neurological, or related impairments**¹⁴ meets academic requirements.

13 This could be quadriplegia, paraplegia, other partial limitations in range of motion, etc.

14 This could include borderline personality, narcissistic personality disorder, Aspergers/autism, depression, attention deficit disorder, attention deficit hyperactivity disorder.

- After two years, upon entering clinical rotations, behaviors and conduct (including problems interacting with patients and other staff members) become significantly troublesome.
- Should medical schools include **personality** qualifications for admission?¹⁵
- Are such conditions even “disabilities”?

Scenario 5: Medical student who becomes **HIV positive** seeks to enter a surgical residency program.¹⁶

- Are the potential risks of transmission to patients valid reasons for denying admission to that residency?

III. High Stakes Issues

Professional education in health care areas (particularly for medical school) generally involves high stakes for both the individual and the institution providing the professional training—in terms of money,¹⁷ time,¹⁸ and societal benefit.¹⁹ The potential risk or threat to patients by health care professionals resulting from impairment or competency is an essential consideration in training and licensing health care professionals. Providing reasonable accommodations for disabilities to medical school students can be burdensome (costly in finances and administrative time and the burden on supervising faculty members) particularly for certain conditions. Such accommodations might also be a fundamental alteration of the program.

A. Cost to the Individual—Time and Financial

A medical school education generally takes a minimum of four years. Individuals enrolled in medical school forgo other opportunities to work and do

15 There are challenging ethical questions about personality testing at any stage and care to be taken to avoid self-fulfilling prophecy. This issue is discussed in the 2021 HBO documentary *Persona: The Dark Truths behind Personality Tests*, <https://www.imdb.com/title/tt14173880/> (last visited December 1, 2021).

16 While this is not as significant an issue as it was in the past, it is still important to consider.

17 Appreciation is extended to Kathryn Meador, Brandeis School of Law graduate class of 2020) for her research on this issue.

18 See Section VI. Judicial Interpretation (by Type of Impairment) which demonstrates that these cases often take as long as ten years to resolve, and even if the medical school wins the case (which they generally do), it has expended enormous resources in time and litigation costs, and sometimes even reputation of the school is affected.

19 While not the primary focus, this article raises the issue of whether medical professional licensing agencies can/should/must change their requirements for admission to practice as an accommodation to health care professional program students with disabilities? Also noted, but not the primary focus, are the following issues: the increased need for physicians (particularly in certain fields, such as rural medicine) and the model of financing health care that impacts how medical education programming is delivered. Many family medicine programs have added a rural track curriculum that is separate from the traditional residency track. This article was written during the spring 2020 COVID pandemic outbreak. During that time, the importance of health care professionals as essential workers in American society (as well as throughout the world) became front-page news.

other things. Generally, they have made the calculation that the “lost time” is worth it because treating patients can provide significant personal and financial benefits.

The financial investment (and lost opportunities to engage in other employment) is significant. In 2018, the median educational debt reported for students who graduated in 2017 was \$192,000.²⁰ The cost of attendance of medical school includes tuition, fees, and living expenses. Additional costs to students include the cost of applying to medical school, cost of licensing exams, and cost of applying to residencies.²¹

Medical school students must also take a series of exams in order to become licensed physicians. That involves an additional cost in both time and money.²² While not as high, other health care programs also involve high costs for both the individuals and the institutions providing the programming.²³

20 Education debt includes the combined debt students incur in both undergraduate and graduate school. James Youngclaus, *An Exploration of the Recent Decline in the Percentage of U.S. Medical School Graduates with Education Debt*, ASS'N OF AM. MED. COLLS. 18 ANALYSIS IN BRIEF (2018), <https://www.aamc.org/system/files/reports/1/september2018anexplorationoftherecentdeclineinthepercentageofu.pdf>.

According to a survey conducted by the Association of American Medical Colleges (AAMC), the average cost of tuition, fees, and health insurance to a first-year student in 2019–20 was \$37,556 for a student attending an in-state public medical school, \$60,655 for a student attending a private school, and \$62,194 for an out-of-state student attending a public university. Additionally, these numbers were a 2.2%–2.7% increase from the previous year and are expected to rise in the upcoming years as well., *Tuition and Student Fees for First Year Students Summary Statistics for Academic Years 2012–2013 through 2019–2020*, ASS'N OF AM. MED. COLLS. <https://www.aamc.org/data-reports/reporting-tools/report/tuition-and-student-fees-reports>.

21 Before applying for admittance, students must perform well on the Medical College Admissions Test (MCAT), which cost \$318 to register in 2018. This does not include any courses or supplemental materials students may wish to purchase to help them study for the MCAT. In order to be accepted, students must go through two rounds of applications and a round of interviews per school. The average primary application fee is \$170 for the first school and \$39 for each additional school. Secondary application fees typically range from no cost to \$200 per application. Ken Budd, *7 Ways to Reduce Medical School Debt*, ASS'N OF AM. MED. COLLS. (Jan. 30, 2020, 9:27 AM), <https://www.aamc.org/news-insights/7-ways-reduce-medical-school-debt>. If the student is invited to interview, they must pay their own travel and lodging fees as well. Thus, the cost of the application process can easily rise to \$500 or above and likely reaches upward of \$1,000.

22 These exams are Step 1, Step 2, Step 1 and 2 Clinical Knowledge, and Step 3, and are taken at various points throughout medical school and during a student's residency. The registration costs for these exams are \$645, \$645, \$70, and \$895 respectively. *USMLE Examination Fees*, NAT'L BD. OF MED. EXM'RS (Jan. 29, 2020, 9:23 AM), <https://www.nbme.org/students/examfees.html>; , *USMLE Step 3*, FED'N OF STATE MED. BDS. (Jan. 29, 2020, 9:43 AM), <https://www.fsmb.org/step-3>. These costs do not include cost of additional study materials students may wish to purchase. *The Cost of Applying for Residency*, ASS'N OF AM. MED. COLLS. (Jan. 29, 2020, 9:45 AM), <https://students-residents.aamc.org/financial-aid/article/cost-applying-medical-residency/> (last visited December 1, 2021). These costs include the cost of applications, payment for travel expenses incurred in the interview process with residency programs. According to the AAMC, these costs can vary from \$1,000 to \$7,300 with the median cost being \$3,700.

23 For nursing schools, bachelor's degree costs are similar to most bachelor's degrees. The average total cost (including tuition and other costs) of a bachelor's degree in 2018–19 was around \$86,000 for public in-state universities, \$150,000 for public out-of-state universities, and \$193,000 for private universities. For average published charges in 2018–19 and 2019–20 (Jan. 30, 2020, 3:39 PM), see <https://research.collegeboard.org/trends/college-pricing/figures-tables/average-published-charges-2018-19-and-2019-20>. Nursing students pay additional lab fees as well as equipment costs for scrubs and

B. Cost to the Institution

The cost to the institution for educating medical students is similarly high.²⁴ These costs include instructional costs, support for research, providing scholarships, patient care, and facility maintenance. There is also, of course, the initial cost of constructing the facilities. Because of the intensive supervision by medical school teaching faculty, which results in a low faculty to student ratio, there is a high cost for each student admitted and enrolled.²⁵ When comparing this to legal education, the addition of several more students to an entering law school class, for example, may not present significant additional costs to the institution. The institution covers the cost of medical education in a complex variety of ways that include tuition and also federal government support through Medicare and Veterans Administration (VA) programs.²⁶ Patient paid services also support the cost.

Costs for accommodations in an educational setting vary widely depending on the disability and type of accommodations. Auxiliary aids and services, such as interpreters, readers, and adapted educational materials, can be quite expensive. Allowing for additional time on an exam is primarily an administrative cost. It is beyond the scope of this section to flesh out those costs, but in considering the education of a student with a disability, there may well be additional costs beyond the traditional costs allocated to each student. While the costs for the academic portions of the program may be easier to estimate, during the clinical rotations, it is much more difficult to anticipate and plan for what these costs might be because of the individualized issues for varying impairments and the type of clinical program.

other tools such as stethoscopes. Many nurses who receive their bachelor's degree go on to earn their master's degree in nursing as well. Some choose to attend school online. In 2012, online nursing master's programs ranged in tuition from \$35,000 to \$60,000. See Kelsey Sheehy, *Weighing Costs of an Online Master's in Nursing*, U.S. NEWS (Jan. 30, 2020, 3:40 PM), <https://www.usnews.com/education/online-education/articles/2012/01/12/weighing-costs-of-an-online-masters-in-nursing>. The median cost per year for private optometry schools in 2018 was \$40,421, which included tuition and fees. The median cost for public schools was \$27,839 for regional students and \$41,525 for non-regional students. Southern College of Optometry, USA Optometry Schools (Jan.30, 2020, 3:46 PM), <https://www.sco.edu/optometry-schools-in-usa>.

24 For information on the costs of medical education, see <https://students-residents.aamc.org/financial-aid-resources/top-10-questions-premeds-should-ask-medical-school-financial-aid-officers> (last visited December 1, 2021). Instructional costs include professor salaries and other costs related to teaching. In implementing the teaching in clinical settings, there are additional costs that include supporting research, providing scholarships, providing patient care, and maintenance of facilities.

25 The complexity of funding sources makes it difficult to determine actual costs because institutions receive funding from grant entities and other sources. Jessica Townsend, *Financing Medical Education*, MEDICAL EDUCATION AND SOCIETAL NEEDS: A PLANNING REPORT FOR THE HEALTH PROFESSIONS ch. 10 (1983) <https://www.ncbi.nlm.nih.gov/books/NBK217691/>.

26 Medicare subsidizes all graduate medical education. In 2015, the federal government spent over \$10 billion through Medicare and over \$2 billion through Medicaid on graduate medical education training. The federal government also spent nearly \$1.5 billion in graduate education through the VA program and nearly \$250 million on training in children's hospitals. In total, the federal government spent a little over \$14.5 billion on graduate medical education.

Residency and fellow costs are paid by Medicare, the VA, and the military. FEDERAL SUPPORT FOR GRADUATE MEDICAL EDUCATION: AN OVERVIEW (Congressional Research Service Report, updated Dec. 27, 2018), <https://sgp.fas.org/cts/misc/R44376.pdf>.

The standard for when an institution may take cost into account in deciding whether to admit a student can apply an undue burden analysis. The cases that address cost issues may consider both administrative and financial burden. Cost is rarely discussed, however, in most of the judicial decisions because the institution rarely raises it as an issue.

C. Costs and Benefits to Patients

The patient's primary interest, of course, is to obtain quality health care services and to do so at an affordable cost. The complex issue of health care costs to individuals is beyond the scope of this article, but it should be recognized that whatever charges are paid by patients incorporate costs for malpractice insurance.²⁷ Such insurance costs are risk spreading, and insurers will be concerned about the possibility that a physician with an impairment might be more likely to commit medical malpractice. That may be a factor taken into account by entities that employ or allow admitting privileges to physicians, and those costs will be passed on to patients. This increased malpractice insurance rate is possibly more likely for physicians with impairments related to substance abuse. It would be quite difficult to make an assessment of the increased cost of malpractice insurance due to physicians with disabilities.

There are significant benefits (both to the individual and to patient care) in having medical professionals with disabilities.²⁸ For example, for a deaf patient having a deaf physician might be life changing. Similar benefits have been raised with respect to other diversity areas—gender, race, ethnicity, sexual orientation.²⁹ While this is an important issue, it is beyond the scope of this article to discuss in depth.

IV. Medical School Education, Licensing, and Regulatory Framework

As noted at the outset, the primary focus of this article is how disabilities can impact the educational and placement experiences of a medical student and how a medical school should plan for and anticipate that in its policies, practices, and procedures. Related to that is how the relationship of professional licensing and

27 See Michelle M. Mello et al., *National Costs of the Medical Liability System*, HEALTH AFFS. (Sept. 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3048809/>. A 2020 study on the cost of the malpractice system reported that preventable medical injuries are estimated to cost \$17–\$29 billion per year. *Id.*

28 See generally Lise Mogensen & Wendy Hu, "A Doctor Who Really KnowsæΩ..." *A Survey of Community Perspectives on Medical Students and Practitioners with Disability*, 19 BMC MED. EDUC. 288 (2019); (study of attitudes in Australia regarding inclusion of individuals with disabilities in medical school); Bonnielin Swenor & Lisa M. Meeks, *Disability Inclusion—Moving beyond Mission Statements*, 380 NEW ENG. J. MED. 2089 (2019) (advocating for more proactive steps to include physicians with disabilities in medical education and in the profession); Lisa M. Meeks & Neera R. Jain, *Accessibility, Inclusion, and Action in Medical Education*, ASS'N OF AM. MED. COLLS. (Mar. 2018), <https://sds.ucsf.edu/sites/g/files/tkssra2986/f/aamc-ucsf-disability-special-report-accessible.pdf>.

29 Anjali B. Thakkar et al., *Addressing Mistreatment in Medical Education*, 180 JAMA INTERN. MED. 665 (2020).

employment to the professional education of doctors³⁰ affects individuals with different types of disabilities at all points in the process. To understand this issue, it is essential to set out the history of medical education and then to clarify the general framework for each stage of medical training and licensing and practice, including recent trends that might also be relevant.

A. General Framework for Medical Education and Residencies

1. The Flexner Model

The current model for medical school was developed in the early 1900s. Abraham Flexner is known as the architect of medical education for his model developed in 1905 that recommends university-based medical education that contemplates “minimum admission requirements, ... a rigorous curriculum with applied laboratory and clinical science content, and ... faculty actively engaged in research.”³¹ William Osler was the other early influence with the added guidance encouraging “bedside teaching, bringing medical students into direct contact with patients, and learning medicine from ... direct experiences under the guidance of faculty clinicians.”³² The model adopting these two components (basic science and clinical education) was closely followed for almost a century.

The report about the 1905 original model for medical school education was issued by the Carnegie Foundation in 1910.³³ It was based on research by Abraham Flexner and is often referred to as “The Flexner Report.” Although not a physician himself, Flexner’s model was based on his model of educational principles and the general practice of medicine at that time.³⁴

The Flexner Report model only began to change in 2010. The report evaluating changes to medical education was released by the Carnegie Foundation in 2010, almost exactly a century after it released its initial report about the 1905 Flexner model. The original model was a two-year basic scientific foundational classroom-

30 There are currently approximately 155 schools of medicine. *Enrollment Up at U.S. Med Schools*, ASS’N OF AM. MED. COLLS. (Dec. 16, 2020), <https://www.aamc.org/news-insights/press-releases/enrollment-us-medical-schools>. Additionally, there are thirty-seven schools of osteopathy in the United States. *Osteopathic Medical Schools, 1 in 4 Medical Students Attends an Osteopathic Medical School*, AM. OSTEOPATHIC ASS’N, <https://osteopathic.org/about/affiliated-organizations/osteopathic-medical-schools/> (last visited Aug. 20, 2021). There are also a number of foreign schools from which individuals seek to be licensed.

31 Buja, *supra* note 10.

32 *Id.*

33 ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING (1910)*, [HTTP://ARCHIVE.CARNEGIEFOUNDATION.ORG/PUBLICATIONS/PDFS/ELIBRARY/CARNEGIE_FLEXNER_REPORT.PDF](http://archive.carnegiefoundation.org/publications/pdfs/elibrary/carnegie_flexner_report.pdf).

34 The Flexner Model has been criticized for its impact on access to medical education by minority students and its related impact on access to health care for minorities Anna Flagg, *The Black Mortality Gap and a Document Written in 1910*, N.Y. TIMES (Aug. 30, 2021) <https://www.nytimes.com/2021/08/30/upshot/black-health-mortality-gap.html>. That discussion is beyond the scope of this article, although some of the same criticisms about the impact of the Flexner model on minority students can be applied to potential medical students with disabilities.

type program, which would be followed by two years of clinical education where students would apply what they had learned in the previous two years.³⁵ Notable is that these two types of experiences would often mean different types of accommodations for various disabilities.³⁶

This four-year model was adopted by most medical schools between 1910 and 2010,³⁷ although some medical schools allowed the first two years to become three-year programs earlier than 2010.³⁸ Under the Flexner model, after the first two (or three years) of taking academic-type courses, students would begin to integrate their education and basic knowledge into clinical experience. Notably, the academic evaluation and the licensure evaluation are interwoven throughout the medical school experience. At the end of these two (or three) years of academic work, students take what is known as the Step 1 exam. This is a comprehensive knowledge-based exam (multiple choice questions) designed to assess understanding of the basic information learned during the first two years. It is the first step in the licensure process. It is intended to evaluate basic scientific knowledge. The test is created and administered by the National Board of Medical Examiners (NBME).³⁹ The score for that test not only assesses whether the student has achieved the requisite basic knowledge, it is also a significant factor in the application for highly competitive residency programs.⁴⁰

Students then enter the next two-year phase where they apply the basic knowledge in clinical settings to patients.⁴¹ The first year of this stage (the third year of medical school) generally consists of several “clinical rotations” or “clerkships.” These are done at teaching hospitals connected to the medical school. Although there is no mandatory national standard, generally, there are several “required” rotations that are considered to be the “core” disciplines of medical practice. These are family medicine, internal medicine, obstetrics and gynecology, pediatrics, psychiatry, and surgery. Evaluation for each rotation is done through what is known as a “Shelf Exam,” which simulates licensing exams administered by the NBME. Many rotations also incorporate oral evaluations with supervising faculty physicians. Notable is the fact that the evaluations consist of both “traditional”

35 At this stage, the delivery of the education and the evaluation of performance by students becomes quite complex and often team based, making it challenging to place specific accountability for certain assessments on the institution and faculty and staff making decisions about performance.

36 Molly Cooke, et. al, *A Summary of Educating Physicians: A Call for Reform of Medical School and Residency* (Feb. 3, 2020, 1:53 PM), http://archive.carnegiefoundation.org/pdfs/elibrary/summary_educating_physicians.html.

37 *What to Expect in Medical School*, ASS'N OF AM. MED. COLLS., <https://students-residents.aamc.org/choosing-medical-career/article/what-expect-medical-school/> (last visited Apr. 4, 2020) (describing what is learned, how it is evaluated, interaction with patients, and specialization by the AAMC).

38 *Id.*

39 See <https://www.nbme.org/> (last visited July 30, 2021).

40 Buja, *supra* note 10. Failure is a significant factor in any residency program. Failing to meet requirements the first time could lead to failure to match at all, even if the student passed the second time.

41 Although legal education also increasingly incorporates the expectation that students engage in experiential education, many of the experiences in law school are based on simulations and not live client representation.

testing procedures and more subjective individual evaluations, usually by more than one supervising clinical faculty member.⁴²

At the end of the first year of clinical education (the third year of medical school), students generally move on to a series of both elective and selected clinical educational programs. Required courses at this level often include ambulatory medicine, critical care, emergency care, and subinternships, although most fourth-year rotations are elective. Again, this aspect of the program contemplates actual patient contact under the supervision of the teaching faculty and evaluation by them. During the time when it was required, students prepared for their Step 2 exam during this time, and have flexibility to schedule residency interviews. Step 2, also referred to as “Step 2 Clinical Knowledge,” was the required second step for licensure. This test measures clinical knowledge.⁴³

At the end of the second or third year of medical school, some students decide to move to a slightly different track, at least temporarily, to obtain a dual degree (MD-MPH).⁴⁴ This program might include either additional clinical work and/or other educational programming.

In the second half of the fourth year, medical students engage in what is known as the “matching process” where they seek to be accepted into a residency program at a specific teaching hospital. It is during the residency stage that the student must complete the Step 3 exam as the final requirement for licensure. It generally must be completed during the first or second year of residency. Many medical trainees choose to complete a fellowship program after completing residency in order to receive subspecialty training. Accreditation of residency and fellowship programs is determined by the Accreditation Council for Graduate Medical Education (ACGME).⁴⁵

Residency and fellowship programs incorporate aspects of both educational and employment experiences, and as such, disability discrimination laws applicable to these different aspects are relevant. The trainee is in a hybrid-type situation because the trainee is now being compensated for work but is being evaluated as a student by clinical teaching faculty. Unlike employment in other settings, however, the student/employee has no leverage or choice related to conditions of employment.⁴⁶ The ability of the trainee to decide that the conditions are not satisfactory and seek another residency or fellowship are significantly constrained.⁴⁷

42 The involvement and interest of the teaching faculty is a topic worthy of much greater focus, but it should be noted at this point that because medical school expects that teaching faculty themselves provide clinical services and/or engage in research (both of which can provide financial benefits to the medical school), those individuals who are teaching do not necessarily have a focus on pedagogy, including knowledge about formative assessment. While there are many gifted medical educators, the model of medical education does not necessarily ensure high teaching quality.

43 See text accompanying note 84, *infra*, regarding the 2021 decision to eliminate Step 2 exams.

44 Some medical schools offer a Howard Hughes–sponsored PhD degree to complement the MD degree.

45 See <https://www.acgme.org/> (last visited Sept. 22, 2021).

46 There are some states in which trainees have some union bargaining rights, but that is not the general situation.

47 Residents and fellows switch training programs occasionally. However, to do so, a resident

2. Reform in Medical Education

The previous section describes the 1910 Flexner model traditional program. In 2010, the Carnegie Foundation released a report calling for reform of medical school and residency.⁴⁸ The basic finding of the report on “Educating Physicians: A Call for Reform of Medical School and Residency”⁴⁹ was that medical students needed more patient contact at earlier stages of their education in order to integrate formal knowledge learned in the classroom setting.⁵⁰ The American Medical Association (AMA)⁵¹ response came in 2013, when it created the “Accelerating Change in Medical Education Initiative.”⁵² One of the priorities of the revision was educating students on health systems through earlier clinical experiences with patients.⁵³

Some of the adopters of these programs incorporate initiatives that focus on providing service to underserved populations, seek to provide service in underserved types of practice (such as family practice), and include components of cultural competence in recognition of expectations in those underserved areas. Others prioritize areas of high need (such as emergency care).⁵⁴ Still others incorporate

or fellow must find an alternative program willing to take them. They would not have to go through the match again.

48 *Educating Physicians: A Call for Reform of Medical Schools and Residency*, http://archive.carnegiefoundation.org/pdfs/elibrary/summary_educating_physicians.html (summary).

49 *Id.* This report was based on a study at eleven medical schools in the United States. AMA Consortium Medical Schools, *Accelerating Change in Medical Education: AMA Reimagining Residency initiative*, AMA, <https://www.ama-assn.org/education/accelerating-change-medical-education/ama-reimagining-residency-initiative> (last visited Aug. 18, 2021).

50 *Id.* This approach is similar to the move within legal education to infuse more practical skills (experiential education) into the entirety of the program.

51 The AMA is responsible for accreditation of medical schools; see <https://www.ama-assn.org/>.

52 *Accelerating Change in Medical Education: Member Schools in the Consortium*, AMA (Jan. 30, 2020, 9:17 AM), <https://www.ama-assn.org/education/accelerating-change-medical-education/member-schools-consortium>. The AMA provided grants to eleven medical schools to fund the changes and began the Accelerating Medical Education Consortium (the Consortium). *Id.* In 2016, twenty-one more medical schools were added to the Consortium and now includes at least one-fifth of all allopathic and osteopathic medical schools.

53 AMA, *CREATING A COMMUNITY OF INNOVATION 12* (2017), <https://www.the-hospitalist.org/hospitalist/article/206173/leadership-training/changing-landscape-medical-education> (last visited December 2, 2021).

54 The University of California Davis program implemented a three-year accelerated program for those who know they want to enter primary care. In that program, students begin clinical work the first week of class. *Id.* The University of California, San Francisco, includes a placement in “clinical microsystems” in students first and second year, in which they are part of the patient’s clinical care team. *Id.* at 8. One particularly innovative program is at Florida International University Herbert Wertheim College of Medicine. The program is called NeighborhoodHELP, and it “focuses on the social and behavioral determinants of health to provide a longitudinal, interprofessional community-based experience for medical students.” *Id.* at 9. The learning goals for this program include cultural competence, interviewing skills, and understanding social and behavioral aspects of health. *Id.* This program has begun to incorporate mobile health centers to provide health screenings and other services to household members. *Id.* The University of South Carolina (Greenville) has implemented a program that trains students to become emergency medical technicians within the first seven weeks of enrollment. These students work a twelve-hour shift each month within the county’s ambulance services. They learn the critical skills of taking a patient history and assessing vital signs, and they receive valuable patient interaction in early years. *Id.*

more learning about team building, and others ensure that cultural competency issues are incorporated.⁵⁵ There have also been some variations in the traditional timing of education, allowing for both shorter and longer time frames.⁵⁶ Use of technology in providing treatment has been the subject of discussion.⁵⁷ The experiences of 2020 during the COVID emergency care crisis highlighted the importance of physicians on the front lines and also concerns about deficiencies in the number of physicians.⁵⁸

Implementation of the changed approach occurred through grant programs to members of the Accelerating Change in Medical Education Consortium (the Consortium).⁵⁹ Since their founding in 2013, one of the priorities of the Consortium has been educating medical students on “health systems,” which includes earlier clinical experiences and access to patients.⁶⁰

A number of commentaries have addressed the changing programs.⁶¹ All of

55 *Teamwork: The Heart of Healthcare*, ASS'N OF AM. MED. COLLS. (Sept. 27, 2016), <https://www.aamc.org/news-insights/teamwork-heart-health-care>; Office of Diversity Programs, *Cultural Awareness*, WASH. UNIV. SCH. OF MED. IN ST. LOUIS, <https://mddiversity.wustl.edu/cultural-awareness/> (last visited Aug. 18, 2021).

56 Kristen Moon, *From Freshman to Resident: BS/MD Programs You Can Complete in Only 6 Years*, FORBES (June 18, 2018, 4:52 PM), <https://www.forbes.com/sites/noodleeducation/2018/06/18/3-bsmd-programs-only-6-years/?sh=3e56c78b6c59>; Stacy Weiner, *Med School in 3 Years: Is This the Future of Medical Education?*, ASS'N OF AM. MED. COLLS. (Mar. 29, 2019), <https://www.aamc.org/news-insights/med-school-3-years-future-medical-education>.

57 Eui-Ryoung Han et al., *Medical Education Trends for Future Physicians in the Era of Advanced Technology and Artificial Intelligence: An Integrative Review*, 19 BMC MED. EDUC. 460 (2019), <https://bmcmededuc.biomedcentral.com/articles/10.1186/s12909-019-1891-5#citeas>.

58 Michael Dill, *We Already Needed More Doctors and Then COVID-19 Hit*, ASS'N OF AM. MED. COLLS. (June 17, 2021), <https://www.aamc.org/news-insights/we-already-needed-more-doctors-then-covid-19-hit>.

59 *Id.* These went from eleven in 2013 to twenty-one in 2016 to currently being applied at one-fifth of all allopathic and osteopathic medical schools. *Id.*

60 AMA, *supra* note 53, at 12. One of the Consortium schools, The University of California, Davis, School of Medicine created a three-year accelerated track for primary medicine. Students who are accepted to the program begin school six weeks earlier than other students and receive training to help them prepare to do clinical work. In their first week of medical school, students are placed within a local clinic or other patient-care setting and begin working with a clinician to provide patient care. Students must be accepted into this program before beginning medical school and must therefore know they are interested in primary care. University of California, San Francisco, School of Medicine has also incorporated early patient care into its curriculum. In students' first and second years, they are placed within “clinical microsystems” where they become part of a patient's clinical care team. Once they demonstrate their ability to address the needs of both the patient and their care delivery team, they begin directly caring for the patient and learning patient skills. Florida International University Herbert Wertheim College of Medicine initiated a program called NeighborhoodHELP. In their first year, each student is assigned an interprofessional team consisting of nursing, social work, and/or physician assistant students. These teams are assigned to households within underserved communities. See <https://medicine.fiu.edu/about/community-engagement/green-family-foundation-neighborhoodhelp/> (last visited December 1, 2021).

61 Brian Kwan et al., *The Changing Landscape of Medical Education*, HOSPITALIST (Aug. 9, 2019), <https://www.the-hospitalist.org/hospitalist/article/206173/leadership-training/changing-landscape-medical-education>; Timothy M. Smith, *Not Your Grandfather's Med School: Changes Trending in Med Ed*, ASS'N OF AM. MED. COLLS. (Feb. 7, 2017), <https://www.ama-assn.org/education/accelerating-change-medical-education/not-your-grandfather-s-med-school-changes-trending> (referencing the

this is set against the backdrop of the awareness that the medical services delivery model, which is driven by health insurance, hospital certificates of need, how teaching hospitals and medical students are critical to many types of health care service and research, and other external factors. The attention given to health care delivery and its financing during the COVID crisis highlighted many of the overarching deficiencies in the U.S. health care delivery system.

It is against this backdrop that medical education of individuals with disabilities arises. Medical education is long and difficult, both for the student and for the institution. For that reason, it is not surprising that many judicial decisions have addressed disputes that have arisen in this context. It can be challenging to provide insights from past judicial disputes involving medical students with disabilities when the content and evaluation of performance is in a state of flux. Some themes have arisen, however, from many of these cases that highlight medical student issues to consider regardless of what medical education model is in place.

These themes from judicial disputes will be discussed more fully below, but at this point, the following topics should frame the consideration of this issue. They are essential functions and criteria for admission and continued education at all points; the content of the curriculum and how it is presented and by whom (e.g., basic knowledge and/or practical skills); the means of evaluation and who is doing the evaluation; the procedures for requesting accommodations at various points and the individuals involved in that process; the policies, practices, and procedures for challenging determinations that a student's performance has been deficient and who is involved in that process; and the transparency and proactive approach to all of the above.

B. Medical School Application Process and Enrollment

In order to evaluate issues for applicants and students with disabilities, it is necessary to set out the application and enrollment process.⁶²

1. Common Application

The American Association of Medical Colleges (AAMC)⁶³ maintains a common application for member medical schools.⁶⁴ The common application does not ask

American Medical Association Council on Long Range Planning and Medical Education 2016–17. The new curriculum would incorporate “values based care, patient safety, quality improvement, team work and team science, leadership, population health, socio-ecological determinants of health, and health care policy and economics.” The report also addresses attention to work-life balance issues including attention to mental health among students and trainees—“earlier exposure to patient care, growing focus on the science of the health systems, more team-based learning opportunities, shorter times to completion, and greater emphasis on new technology.” Kevin Truong, *What Needs to Change in Medical Education to Prepare Clinicians of the Future*, MED. CITY NEWS (Oct. 10, 2018, 11:47 PM), <https://medcitynews.com/2018/10/what-needs-to-change-in-medical-education-to-prepare-clinicians-of-the-future/>; Buja, *supra* note 10.

62 Kathryn Meador, Brandeis Law School graduate class of 2021, provided extensive research and content for this section.

63 ASS'N OF AM. MED. COLLS., <https://www.aamc.org/> (last visited June 26, 2021).

64 Aspiring Docs, *Applying to Medical School*, ASS'N OF AM. MED. COLLS., <https://students-residents>.

applicants about disability.⁶⁵ The only thing the application asks about from the student's background is where they grew up, if they believe the area was medically underserved, and questions about the student's socioeconomic status during their childhood. The application asks about misdemeanor and felony convictions. The application also asks whether the student would like to be considered a "disadvantaged applicant so that medical schools can consider social, economic, or educational factors." The factors that the AAMC suggests the applicant should consider when determining whether they will self-report as "disadvantaged" include living in a household receiving government aid and if their area was medically underserved.

In addition, each medical school has a school-specific application. These ask questions about why the applicant is interested in that particular school, what they would contribute to the school, and how their goals and experiences align with the school's mission.⁶⁶

2. *Physical Requirements for Prospective Students (Technical and Academic Standards)*

Students are not generally required to undergo a physical exam before entering medical school. The Liaison Committee on Medical Education (LCME), however, has accreditation standards requiring that medical schools set "technical standards."⁶⁷ Technical standards are defined as "[a] statement by a medical school of the: 1) essential academic and non-academic abilities, attributes, and characteristics in the areas of intellectual-conceptual, integrative, and quantitative abilities; 2) observational skills; 3) physical abilities; 4) motor functioning; 5) emotional stability; 6) behavioral and social skills; and 7) ethics and professionalism that a medical school applicant or enrolled medical student must possess or be able to acquire, with or without reasonable accommodation, in order to be admitted to, be retained in, and graduate from that school's medical educational program."⁶⁸ While medical schools are allowed to set their own technical standards, most follow the same basic format and contain the same standards. Many have identical wording.⁶⁹ Examples from Harvard Medical School and the University of Kentucky Medical School illustrate how some of these standards are implemented.

The standards fall under the categories of observation, communication, sensory and motor coordination or function, intellectual-conceptual integrative and quantitative abilities, and behavior attributes. Students must be able to observe medical

[aamc.org/applying-medical-school/article/applying-medical-school/](https://www.aamc.org/applying-medical-school/article/applying-medical-school/) (last visited Feb. 26, 2020).

65 To do so would be an impermissible preadmissions inquiry.

66 Aspiring Docs, *Applying to Medical School*, ASS'N OF AM. MED. COLLS, <https://students-residents.aamc.org/applying-medical-school/article/applying-medical-school/> (last visited Feb. 26, 2020).

67 See LCME, Standards for Accreditation of Medical Education Programs Leading to the MD Degree, Standard 10.5, at 16 (2019). https://medicine.vtc.vt.edu/content/dam/medicine_vtc_vt.edu/about/accreditation/2018-19_Functions-and-Structure.pdf (last visited December 29, 2021). See also <https://www.aamc.org/services/first-for-financial-aid-officers/lcme-accreditation>.

68 LCME, Standards for Accreditation of Medical Education Programs Leading to the MD Degree, (published March 2020).

69 For example, the University of Kentucky Medical School and Harvard are quite similar and are the basis for the observations in this section.

demonstrations and have the ability to obtain a medical history and perform physical examinations.⁷⁰

Harvard Medical School specifies that observation includes the ability to observe patients accurately from both a distance and nearby.⁷¹ Harvard also states that “observation necessitates the functional use of the sense of vision and somatic sensation” but is merely “enhanced by the functional use of the sense of smell.”⁷²

Students are generally expected to be able to communicate with both patients and other health care team members effectively through written and oral communication. Students must also be able to observe and effectively communicate changes in mood, activity, and posture, and must also be able to pick up on nonverbal cues.⁷³

Students should also have sufficient motor functions to “elicit information from patients by palpation, auscultation, percussion, and other diagnostic maneuvers.”⁷⁴ They must also be able to “execute motor movements reasonable required to provide general care and emergency treatment to patients.”⁷⁵ Some schools also specify that students should be able to do basic laboratory tests.

Schools generally also require students to possess sufficient cognitive abilities to engage in problem solving. This expectation includes the ability to assimilate, interpret, and apply detailed and complex information.⁷⁶

Harvard Medical School states that students must possess the “emotional health” required to fully utilize their intellectual abilities and develop effective relationships with patients. Harvard also requires students to be able to handle physically taxing workloads and work effectively under stress. Both schools emphasize the ability to be sensitive to patients. The University of Kentucky states that “personal qualities of empathy, integrity, honesty, concern for others, good interpersonal skills, interest, and motivation are required.”⁷⁷

Harvard also includes a statement about medical students with disabilities and the ADA. The AAMC statement on the ADA and medical students with disabilities, which was released in 1993, is quoted in their application materials. Harvard requires all students to possess the requisite physical, mental, and emotional capabilities to undertake the curriculum in a “reasonably independent”

70 *Technical Standards*, UNIV. OF KY. SCH. OF MED., <https://meded.med.uky.edu/medical-education-technical-standards> (last visited Mar. 1, 2020).

71 *Technical Standards*, HARV. MED. SCH., <https://meded.hms.harvard.edu/admissions-technical-standards> (last visited Mar. 1, 2020).

72 *Id.*

73 *Id.*

74 *Id.* University of Kentucky has identical wording.

75 *Id.*

76 *Technical Standards*, Univ. of Ky. Sch. of Med., <https://meded.med.uky.edu/medical-education-technical-standards> (last visited Mar. 1, 2020). University of Kentucky specifies that students must possess good judgment and the ability to communicate the limits of their knowledge to others when appropriate.

77 *Id.*

manner and without the need for reliance on intermediaries.⁷⁸ Harvard further specifies that it can provide accommodations for students who are affected by disabilities, including impaired mobility, chronic illness, dyslexia, and other learning disabilities.⁷⁹

3. *Licensing Exams*

The licensing exams are administered by the United States Medical Licensing Examination (USMLE).⁸⁰ While these steps were mentioned previously, a review is provided here. The exam consists of three parts taken at various points in medical school and after residency.

The first exam is Step 1. Step 1 is typically administered after the second year of medical school. Step 1 is a purely multiple-choice exam that tests knowledge of pathology, physiology, pharmacology, biochemistry and nutrition, microbiology, immunology, anatomy, behavioral sciences, and genetics. The questions also test patient diagnosis, communication skills, and practice-based learning. In May 2020, the exam increased the number of questions that test communication and interpersonal skills from two percent to five percent to six percent to nine percent.⁸¹ USMLE recently announced that it is also changing the score-reporting format from a numbered score to pass/fail.⁸² This policy was enacted to “strengthen the integrity of the USMLE and address concerns about Step 1 scores impacting student well-being and medical education.”⁸³

Step 2, before it was canceled, tested clinical knowledge and clinical skills. This step was cancelled in 2020 and then discontinued permanently in 2021.⁸⁴

Step 3 is the final examination, which leads to licensing.⁸⁵ Step 3 is a two-day multiple-choice exam that tests the ability to apply medical knowledge and understand clinical science in order to practice medicine unsupervised. The test includes substantive questions that also test patient diagnosis and management. Communication and professionalism make up between seven percent and nine percent of the questions.

78 *Technical Standards*, Harv. Med. Sch., <https://meded.hms.harvard.edu/admissions-technical-standards> (last visited Mar. 1, 2020).

79 *Id.*

80 *Step 1*, U.S. Licensing Examination, <https://www.usmle.org/step-1/#overview> (last visited Mar. 1, 2020).

81 *Id.*

82 *Announcements*, U.S. Licensing Examination, <https://www.usmle.org/announcements/> (last visited Mar. 1, 2020).

83 *Id.* There are some concerns that changing this to pass/fail may have some unintended consequences in ensuring greater rigor in the program and evaluation for residency selection.

84 See <https://www.aamc.org/news-insights/what-elimination-major-medical-licensing-exam-step-2-cs-means-students-and-schools> (last visited Sept. 22, 2021).

85 *Step 3*, U.S. Licensing Examination, <https://www.usmle.org/step-3/#outlines> (last visited Mar. 1, 2020). The ability to practice medicine without direct supervision is determined by the residency program director. It is not a function of the USMLE or the NBME.

4. *Physician Licensing and Transferability*

Physicians must be licensed in each state in which they practice. Licenses are not transferable among states. Each state has its own medical licensing board that develops criteria for licensing similar to state bar associations. When physicians are applying for their first state license, they must provide the licensing office with proof that they successfully completed all three step exams. The licensing offices also independently verify that the individual requesting the license completed medical school and the required residency programs. The licensing office also considers exam scores, references, other state licenses, and hospital privileges. A full and unrestricted license is required in order to receive privileges and malpractice insurance.⁸⁶ Physicians must also periodically renew their license and participate in continuing medical education.⁸⁷ Most states require annual renewal of licenses. The practice of licensing focuses on completed education and criminal background checks and disciplinary and grievance actions.⁸⁸

5. *Privileges and Transferability*

Privileges are the authorization of a hospital for an individual to practice medicine within a specific scope of practice based on the person's credentials and performance. Individual hospital boards are responsible for setting guidelines and requirements for privileges within that particular hospital. Privileges are not transferable; an individual must apply for and receive privileges from each hospital or hospital system where they wish to practice. There are different types of privileges. These include active and courtesy. Active privileges generally mean that the person is eligible to be appointed to the medical staff and may admit patients to the hospital. Courtesy privileges allow the individual to admit patients occasionally or act in a consulting role.

Before doctors receive privileges, they must first go through credentialing. Credentialing is the process where the hospital reviews an individual's education, training, experience, *current competence*, certifications, licenses, and malpractice liability certificates. The person must also sometimes provide references; submit letters of recommendation; and/or submit case reports, including number and types of cases handled and treatment outcome. After the hospital board reviews the person's credentials, it may then consider the person's application for privileges.⁸⁹ Physicians who develop disabilities during the course of their career may have difficulties obtaining new privileges or may receive limited privileges as a result of their disability.

86 *Navigating State Medical Licensure*, AMA, <https://www.ama-assn.org/residents-students/career-planning-resource/navigating-state-medical-licensure> (last visited Mar. 1, 2020).

87 Most states require annual renewal of licenses. Kentucky practice is similar to most states. Its licensing agency is made up of physicians, medical school deans, three Citizens at Large (who are all attorneys), and a Department of Public Health. Continuing education is required. 201 KAR 9:021, (2018), <https://apps.legislature.ky.gov/law/kar/201/009/021.pdf>.

88 201 KAR 9:081, (2016), <https://apps.legislature.ky.gov/law/kar/201/009/081.pdf>.

89 *Hospital Credentialing and Privileges FAQs*, Am. Acad. of Fam. Physicians, <https://www.aafp.org/practice-management/administration/privileging/credentialing-privileging-faqs.html#privileging> (last visited Mar. 1, 2020).

6. Accreditation Standards and Position Statements

As noted above, in order to be licensed or granted privileges, the individual must meet the requirements of a range of accrediting and oversight agencies. The following generally describes the role that each of them has with respect to this process.

The LCME⁹⁰ provides accreditation standards for medical schools in the United States and Canada. There are currently twelve standards that address institutional leadership, faculty, curriculum, standards for admission into medical school, and student health services.⁹¹ Standard 10 on student qualifications for admission includes the requirement that medical schools publish their technical standards.

The LCME states that its purpose is to provide an optional, peer-reviewed process that ensures medical programs meet established standards. This includes the ability of the institution to produce competent graduates who are ready for entry into the next step of their medical education.⁹²

The ACGME⁹³ accredits residency and fellowship programs. The ACGME accredits institutions that sponsor training programs, gives recognition of program formats, and allocates resources to initiatives that address important issues in graduate medical education. The ACGME publishes Common Program Requirements for residencies, which establishes standards in oversight, personnel, student appointments, evaluations, and work environment.⁹⁴ Student physical and/or mental ability is not addressed in the Common Program Requirements.

Although not accrediting organizations, there are two groups that should be mentioned because they provide guidance on issues relevant to this discussion. The Association of American Medical Colleges (AAMC)⁹⁵ is a leading nonprofit organization dedicated to “advancing medical education to meet society’s evolving needs; making patient care safer, more affordable, and more equitable; and sustaining the discovery of scientific advances.” The AAMC provides data and reports for policy considerations and professional development.

The AMA⁹⁶ is a group of doctors and health professionals that provides research

90 See LCME, Standards for Accreditation of Medical Education Programs Leading to the MD Degree, (published March 2020).

91 LCME, Standards for Accreditation of Medical Education Programs Leading to the MD Degree 16 (2019). https://medicine.vtc.vt.edu/content/dam/medicine_vtc_vt_edu/about/accreditation/2018-19_Functions-and-Structure.pdf (last visited December 29, 2021).

92 *Scope and Purpose of Accreditation*, LCME, <https://lcme.org/about/> (last visited Mar. 1, 2020).

93 *What We Do*, Accreditation Council for Graduate Med. Educ., <https://www.acgme.org/What-We-Do/Overview> (last visited Mar 1, 2020). Milestones are now used and are a more accurate assessment of a resident’s progress.

94 *Common Program Requirements (Residency)*, Accreditation Council for Graduate Med. Educ., <https://www.acgme.org/Portals/0/PFAssets/ProgramRequirements/CPRResidency2019.pdf> (last visited Mar. 1, 2020).

95 *What We Do*, Ass’n of Am. Med. Colls., <https://www.aamc.org/what-we-do> (last visited Mar. 1, 2020).

96 *About*, AMA, <https://www.ama-assn.org/about> (last visited Mar. 1, 2020).

and data for medical professionals. The AMA states that it is “a powerful ally in patient care, giving strength to physician voices in courts and legislative bodies across the nation.” It is “dedicated to driving medicine toward a more equitable future, removing obstacles that interfere with patient care and confronting the nation’s greatest public health crises.”

7. *Academic and Clinical Education and the Impact of the Evolving Flexner Model on the Application and Enrollment Process in Light of Disability Issues*

As the preceding sections note, students today are aware before they apply and are admitted what the essential requirements are for medical education. While it may not have been the case before disability discrimination laws took effect or became included as part of the process, section 504 of the Rehabilitation Act of 1973 requires virtually all medical schools to incorporate into their programming how to ensure that the school not discriminate on the basis of disability, including providing reasonable accommodations.

While medical schools were initially slow to respond to these changed expectations, by 1990 when the ADA was enacted, medical schools had incorporated into their policies an awareness of the need to ensure that medical students met the essential functions of the program and provided for that by proactively alerting them to these requirements.

What medical schools seem to be less adept at, however, is planning for and thinking through the accommodation issues that are needed for students with various disabilities throughout medical education. That is probably why the litigation described below has occurred and why more attention should be paid to this issue.

Under the Flexner model of traditional classroom learning in the first two years, accommodations, such as additional time for exams, readers, and other support services, can often address the disabilities of some students. For example, giving extra time for exams for students with learning disabilities, providing readers and signers for those with visual and hearing impairments, and ensuring accessible classrooms for wheelchair users is possible for a traditional academic course. It is at the clinical stage, where the student must meet specific physical and technical requirements that have now been set after 1973, where often the challenges begin. This becomes even more complex once students enter the residency portion of education. This is apparent from the case litigation descriptions below.

There have been criticisms of the standards as presenting barriers to individuals with disabilities.⁹⁷ Some of the criticisms have argued that there should be differentiated standards that allow credentialing based on abilities, not disabilities.⁹⁸ In light of

97 Sarah H. Ailey & Beth Marks, *Technical Standards for Nursing Education in the 21st Century*, 42 *Rehab. Nursing* 245 (2017), <https://pubmed.ncbi.nlm.nih.gov/27197703/>; *Accreditation Standards for Nursing Education Programs*, Nat’l League of Nurses, Comm’n for Nursing Educ. Accreditation (Feb. 2016), <http://www.nln.org/docs/default-source/accreditation-services/cnea-standards-final-february-201613f2bf5c78366c709642ff00005f0421.pdf?sfvrsn=12>.

98 Beth Marks & Sarah Ailey, *White Paper on Inclusion of Students with Disabilities in*

the fact that the courts have been quite reluctant to accept those arguments and defer to educational agencies that set standards, addressing those arguments is not part of this article.

V. Legal Framework

A. Statutory and Regulatory Requirements and Agency Guidance

The application of federal disability discrimination law to health care professional programs begins in 1973 with amendments to the Vocational Rehabilitation Act. Those amendments prohibit programs receiving federal financial assistance from discriminating on the basis of handicap/disability. While most medical schools receive federal funding and are therefore subject to these mandates, it was the 1990 ADA that provided additional coverage. The ADA provided expanded coverage of disability discrimination law to programs that do not receive federal funding, most importantly accreditation bodies, licensing agencies, and administrators of various standardized examinations for admission to medical school and throughout the medical school process. The following provides a basic framework for how these major statutes applied to health care professional programs.

1. Section 504 of the Rehabilitation Act

In 1973, Congress considered the reauthorization of the Vocational Rehabilitation Act, and in doing so, added provisions that mandated that programs receiving federal financial assistance must not discriminate on the basis of disability.⁹⁹ While much of the private sector (most employers and places of public accommodation) was not covered by this statute, the two most significant programs that did receive federal financial assistance were educational programs (both private and public) and many health care service providers who received Medicare/Medicaid funding. Because of that, much of the early judicial interpretation of how section 504 of the Rehabilitation Act and its implementing regulations were to be applied arose in the context of higher education and/or health care providers.¹⁰⁰

The basic provision of section 504 of the Rehabilitation Act¹⁰¹ was that individuals with disabilities (originally the term was handicap) were protected from discrimination on the basis of the disability. The individual had to be otherwise

Nursing Education Programs for the California Committee on Employment of People with Disabilities (CCEPD), Am. Ass'n of Colls. of Nursing, <https://www.aacnursing.org/Portals/42/AcademicNursing/Tool%20Kits/Student-Disabilities-White-Paper.pdf> (last visited Aug. 20, 2021). This is a very interesting advocacy article that evaluates these issues.

99 Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 842, 847 (2010), <https://www.stetson.edu/law/conferences/highered/archive/media/Higher%20Education%20and%20Disability%20Discrimination-%20A%2050%20Year%20Retrospective.pdf>.

100 Laura Rothstein & Julia Irzyk, *Disabilities and the Law* (4th ed. 2021)).

101 Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794).

qualified and the program also had to provide reasonable accommodations.¹⁰² Individuals with disabilities were those who had a substantial limitation to one or more major life activities, who had a record of such an impairment, or who were regarded as having such an impairment. The implementing regulations, which were not promulgated until 1978,¹⁰³ provide greater specificity for different programming areas. There was very little litigation interpreting this statute for several years. The provisions applied to a range of activities for those covered entities, including employment, admissions, access to services, and other programming.

2. *Americans with Disabilities Act*

Advocates for disability rights realized the limitations of a nondiscrimination statute only applicable to recipients of federal financial assistance.¹⁰⁴ It was not until 1990, however, that they were able to succeed in convincing Congress to pass the ADA.¹⁰⁵ Section 504 of the Rehabilitation Act was fairly minimalist in detailing its requirements in the statutory language. The ADA was able to build on not only the regulations and federal agency guidance¹⁰⁶ that had been promulgated under section 504, but the extensive case law that had developed. Much of that guidance language was incorporated into its provisions that provided much greater statutory language than section 504. The ADA provided additional clarifying language about the terms and definitions and how the protections of the ADA applied to most employers (Title I),¹⁰⁷ to state and local governmental programs (Title II),¹⁰⁸ and twelve categories of private providers of programs available to the public (Title III).¹⁰⁹ The vast majority of these covered entities had not been subject to section 504. While most medical schools had been subject to section 504, the coverage of the employment sector under Title I of the ADA and state licensing agencies under Title II provided related benefits for individuals with disabilities attending medical schools in terms of protections.

The basic nondiscrimination mandate of the ADA was similar to section 504. Individuals with disabilities (defined virtually identically to the Rehabilitation Act)¹¹⁰ were protected from discrimination. They were also entitled to reasonable

102 *Id.*

103 Rothstein, *supra* note 99, at 849.

104 Two other provisions applied to federal contracts (section 503 of the Rehabilitation Act of 1973) and federal agencies (section 501 of the Rehabilitation Act of 1973), but these additional areas of protection did little to expand coverage to most of the private sector.

105 For the story behind the passage of the ADA, see LENNARD J. DAVID, *ENABLING ACT: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS* (2015).

106 Although agency guidance does not have the force of regulations, it is often followed by the entities subject to the federal mandates, and courts are generally deferential to agency guidance.

107 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §§ 101-108, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101).

108 *Id.* §§ 201-205.

109 *Id.* §§ 301-310.

110 Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794).

accommodations and modifications to the programs. The individuals receiving protection were required to be able to carry out the essential requirements of the program, with or without reasonable accommodations.¹¹¹ The statutes are intended to be interpreted consistently, and this means that case law from either statute is generally applicable to interpretation of both.

Cases brought under the ADA began to give much greater focus to the definition of “disability” than had been the case under section 504. The pre-ADA section 504 cases focused more on whether the individual was qualified and whether requested accommodations or modifications were reasonable.¹¹² Most of the early section 504 restrictive definition cases arose in the context of employment, but some were addressed in higher education settings, particularly related to individuals with learning disabilities.¹¹³

Ultimately Supreme Court decisions in 1999 and 2002¹¹⁴ narrowed the definition of disability (notably in employment cases) so significantly that advocates came together to pass major amendments to the ADA in 2008. The amendments clarified that a broad definition of disability was intended. The amendments also provided statutory clarification about what would constitute major life activities and documentation that could be required to prove that an individual was a person with a disability.¹¹⁵ The cases discussed below from the higher education and/or health care context are only a small number of the judicial decisions interpreting section 504 and the ADA.¹¹⁶

B. Judicial Interpretation

1. Consistent Themes

The judicial analysis from the cases involving admission and readmission into health care professional programs¹¹⁷ generally demonstrate several consistent themes.¹¹⁸ Noteworthy is the fact that very few of the cases focus on whether the

111 42 U.S.C. § 12101(8).

112 For a comparison about how conditions might be treated differently before and after the amendments, see LAURA ROTHSTEIN & ANN C. MCGINLEY, *DISABILITY LAW: CASES, MATERIALS, PROBLEMS* (6th ed. 2017) pages 59-60.

113 See ROTHSTEIN & IRZYK, *supra* note 100, § 3:22.

114 See *Sutton v. United Airlines*, 527 U.S. 471 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Bartlett v. N.Y. State Bd. of Law Examr’s* 527 U.S. 1031 (1999).

115 42 U.S.C. § 12102 et seq.

116 For additional cases, see ROTHSTEIN & IRZYK, *supra* note 100, at chs. 3, 5, and 10.

117 This is also true for cases involving determining that a licensed professional is no longer qualified.

118 See also Leslie Francis & Anita Silvers, *The Health Care Work Force: How to Understand Accommodations*, 9St. Louis U.J. Health Law & Pol’y 57, at 76–87 (2015), <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1073&context=jhlp>, an excellent overview of the issue of health care workers with disabilities (including a discussion of accommodations in the educational setting).

individual meets the definition of having a disability.¹¹⁹ These themes include a focus on what it means for the individual to be “otherwise qualified,” generally expecting an individualized assessment. In addressing the issue of reasonable accommodations in an educational setting, the burden is on the institution to establish that *relevant officials* engaged in an evaluation that showed consideration of “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.*”¹²⁰

There has long been a significant level of judicial deference to educational institutions with respect to the content of the program, and such deference is also given to health care institutions concerning issues of patient safety. The courts, however, do not automatically defer to such programs regarding whether certain accommodations could be made. The burden is on the institution to demonstrate what are essential functions and why a requested reasonable accommodation would be unduly burdensome or would fundamentally alter the program. The courts are consistent in expecting an interactive process in resolving accommodation issues, so deference is not generally given where that did not occur.

Courts are consistent about allowing academic programs to require certain grade point and academic performance standards. Some cases, however, highlight that where the program did not provide reasonable accommodations to a known disability that might have affected the performance, a remedy (such as readmission with accommodations) could be ordered. In all cases, however, the court holds that the individual would be required to meet the academic and performance standards for completing the program.

Courts are uniform in not requiring professional health educational programs themselves to change to a limited competency program. The fact that a doctor or nurse might be able to perform many (or even most) of the functions of a licensed professional does not change the expectation that during the educational preparation leading to the license, the individual still had to learn and perform in

119 It was not until the enactment of the ADA in 1990, and its widespread application to employment settings that defendants began responding to discrimination claims by filing a motion to dismiss because the person was not covered by section 504 or the ADA. When the Supreme Court responded to these cases narrowing the definition of coverage in 1999 and 2002, Congress amended both statutes to clarify not only that a broad interpretation was intended, but also clarifying within the statutory language what documentation would be required and specifying major life activities. Having those clarifications within the statutory language (not just in regulations and judicial holdings is important because it makes these interpretations far more sustainable. It is much more difficult to amend a statute than to revise a regulation or regulatory guidance). *See also* Nicole Porter, *The Difficulty Accommodating Health Care Workers*, 9 ST. LOUIS J. HEALTH L. & POL'Y 1 (2015) (noting physical requirements and attendance standards for health care workers); E. Pierce Blue, *Job Functions, Standards, and Accommodations Under the ADA: Recent EEOC Decisions*, 9 ST. LOUIS U.J. HEALTH L. & POL'Y 19 (2015), https://www.slu.edu/law/academics/journals/health-law-policy/pdfs/issues/v9-i1/blue_article.pdf (discussing framing standards as essential functions in the employment setting, and also noting physical requirements and attendance standards for health care workers); Samuel R. Bagenstos, *Technical Standards and Lawsuits Involving Accommodations for Health Profession Students*, 18 AMA J. ETHICS 1010 (2016).

120 See *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19 (497 (1st Cir. 1991). This case is discussed more fully *infra* in section V(B)(2)(b).

all areas that are evaluated for licensing. There remains a debate about whether these programs *should* change their requirements, but that discussion is a policy question that does not change the legal analysis of what section 504 and the ADA require.

Courts across the board in virtually every disability discrimination case hold that complainants do not get a “second chance,” after performance deficiency, to raise the issue of disability when the disability had not been identified nor any accommodations requested before the unacceptable performance occurred.¹²¹ The courts require that an individual make “known” the disability (and provide appropriate documentation of the disability) when seeking accommodations or claiming that discrimination was based on the disability.

Another theme that is notably consistent is that in the vast majority of cases, the outcome favors the defendant. Although plaintiffs rarely win the cases, many of the decisions provide an important framework for institutions to develop revised policies and practices. Some of the decisions discussed in this article highlight the deficiencies in the procedures or standards implemented by the programs.

Of relevance to any type of discrimination case is whether the claimant must prove that the discrimination was intentional or whether disparate impact/effect is sufficient. This issue has been addressed by the Supreme Court in a number of contexts. Of most relevance to this discussion is how it was analyzed in the context of disability discrimination. In *Alexander v. Choate*,¹²² the Supreme Court considered the state of Tennessee’s Medicaid reimbursement policies. It was argued that limiting the number of days of coverage for Medicaid was discriminatory because it had a disparate impact on people with disabilities. The judicial guidance highlighted the fact that disability discrimination is almost never due to malice or ill will and that individuals are not generally going to be required to show intentional discrimination to prevail. The Court cautioned, however, that not all disparate impact cases are actionable and deferred to the balance struck in 1979 in the *Southeastern Community College v. Davis*¹²³ standard that requires meaningful access.¹²⁴

Finally, while almost all of the cases result in a holding that the educational program did not violate section 504 or the ADA, the disputes often lasted years (sometimes as much as a decade) to resolve. The cost to the health care professional education institutions, even when they win, can be quite high in terms of attorneys’ fees and costs, time and energy spent by administrators in responding to litigation, and in some cases lost reputation or the appearance of lost reputation. Rather than rely on the likelihood of winning, institutions would benefit from giving careful thought at the outset, before disputes turn into litigation, into ensuring that their policies, practices, and procedures are proactive and anticipate the kinds of issues raised in the cases discussed in this article.

121 While as a policy matter an institution may choose to give a second chance, courts have almost never required an institution to do so.

122 469 U.S. 287 (1985).

123 442 U.S. 397 (1979).

124 See *infra* Section V(B)(2)(a).

2. *Basic Framework for Admissions, Conditional Admission, and Readmission Judicial Opinions*

One focus of this article is on the initial admissions process¹²⁵ and its relationship to licensing. The question is whether the consideration of a disability at the admissions stage should be allowed in light of the possibility or probability that the student would not be likely to succeed in the clinical portions of the program or to be licensed because of performance requirements that are not evaluated until after the first two years of the academic program. It also addresses cases where a student who was admitted was later found to not be otherwise qualified and denied readmission because of that. Also relevant are the cases where a student completed one level of medical education but is denied entry into the next level (such as a medical residency program). Although rare, there may be instances where a student who is not impaired at the time of admission, becomes impaired through an illness or accident. This raises questions about whether that impairment might impact the ability to complete the educational program or to be licensed.

In some of the readmission case decisions, there are factors that might have been addressed at the point of the initial admission decision. A few of these cases highlight the fact that the expenditure of substantial resources and lost opportunities for the individual might have been avoided by a careful and appropriate consideration of at least some impairment issues at the admission stage. A better alternative, in some situations, to simply denying admission would be for the medical school to be more proactive in planning for and implementing appropriate reasonable accommodations early in the process, thus avoiding at least some instances where the individual is later dismissed for performance deficiencies related to the impairment.

There are numerous judicial decisions involving admission of individuals with a range of disabilities that are relevant to this discussion. Some of those decisions directly consider the licensing issue, while others deem the student not qualified regardless of licensing. Other cases providing insights are where a student has been dismissed and seeks readmission. Some of these decisions highlight the issue about whether the student might have been identified as not "otherwise qualified" at the outset during the admission process. Related to those decisions are cases where a student has been "conditionally" admitted, but then does not meet the conditions, and a disability is a factor in that deficiency.

The following analysis sets out the current general state of judicial consideration on these issues. The first Supreme Court case to address any issue under section 504 of the Rehabilitation Act involved admission of an individual with a severe hearing impairment to a nursing school program. Although the decision was in 1979, it still provides valuable and relevant framing for how the issue of admission

125 There are not many admission cases, perhaps in part because programs do not accept every student who applies, and it is often not apparent what the reasons were for not accepting an applicant in a competitive process. It is somewhat rare for a rejected initial applicant to know that the reason for the rejection was based on the impairment. One of the few cases to highlight the competitive process is *Manickavasagar v. Va. Commonwealth Univ. Sch. of Med.*, 667 F. Supp. 2d 635 (E.D. Va. 2009) *discussed infra*, Section VII(F)(1).

of an individual with a disability into a health care professional program would be judicially considered.

a. *Southeastern Community College v. Davis* (1979)—Otherwise Qualified.

While there are dozens of judicial decisions involving individuals with disabilities in health care educational programs or in the profession, the two key cases that are the basic starting place are a Supreme Court decision and a federal circuit court opinion that has been given great weight in subsequent judicial decisions. The first focuses primarily on the definition of “otherwise qualified” (while considering the issue of accommodations), and the second focuses primarily on the issue of what constitutes a “reasonable accommodation” in the context of determining whether an individual is otherwise qualified to continue. The two cases together highlight how these two issues are often intertwined.

The story behind the *Southeastern Community College v. Davis*,¹²⁶ decision was detailed in a 2008 book chapter by this author.¹²⁷ Frances Davis had completed a Licensed Practical Nursing program and was licensed by the State of North Carolina. She then sought admission to Southeastern Community College’s registered nursing program and was accepted into the program for a preliminary year with the notation on her acceptance that progress would be evaluated at the end of the first year. If progress was satisfactory, she could complete the next two years of the program (the Associate Degree Nursing Program) to receive the degree, a credential that was required for licensing as an RN in North Carolina. The first year of the program was primarily academic content (similar to most medical school programs today). Ms. Davis was advised at the initial admission that at the end of the year, her admission to the Associate Degree program would be based on her academic status and a physical examination. She performed adequately in the academic work, and it was during the interview that her difficulty in communication due to her hearing deficiencies was identified. The community college engaged in a thoughtful process. It referred her for a hearing evaluation, which resulted in a determination that even with a hearing aid, she would still require lip reading skills to understand speech. Before denying the admission, Southeastern sought an opinion from the North Carolina Board of Nursing about whether Ms. Davis could be licensed to practice or whether safety concerns prevent such licensing. It was based on the Board assessment that the accommodations that might be provided during the program could result in her not receiving the “full learning to meet the objectives of [the] nursing programs.” The opinion noted patient care situations where she might be unable to respond to “patient needs that might be critical in life and death situations.”¹²⁸

After the denial, Ms. Davis sought and received consideration of a review of the decision by the college president’s office. The president consulted a committee

126 442 U.S. 397 (1979) (holding that at least some minimal hearing level is an essential requirement for a registered nurse).

127 Laura Rothstein, *The Story of Southeastern Community College v. Davis: The Prequel to the Television Series “ER”* in EDUCATION LAW STORIES ch. 7, pages 197-220 (2008).

128 *Id.* at 201.

of staff members who reviewed and confirmed the concerns, and the denial was upheld. Ms. Davis sought redress in federal courts, and the case was ultimately decided by the Supreme Court. It took five years between her denial and the Supreme Court decision.

At all judicial levels, the courts focused on the definition of the term “otherwise qualified” under the Rehabilitation Act.¹²⁹ The Supreme Court considered federal agency guidance that had been promulgated during the pendency of the lower court decisions, and found that she was not “otherwise qualified.” This determination was based on the fact that she could not participate in the clinical aspects of the coursework, and not requiring those would be a fundamental alteration to the program. The Court did state (noting the requirement that such assessments be “individualized”) that technological advances should be considered in future cases where they did not result in undue financial or administrative burden, in determining whether someone could complete the clinical aspects of the program. The fact that the educational program was tailored to relate to the expectations of licensure was taken into account. The argument that licensure in another jurisdiction might be possible, so the college should admit her, was specifically dismissed.¹³⁰

The Court specifically stated that “Section 504 ... does not compel educational institutions to disregard the disabilities of ... individuals or to make substantial modifications in their programs to allow disabled persons to participate.”¹³¹ In so holding, the Court specifically quoted the regulations that provide that “a ‘[q]ualified handicapped person’ is, ‘[w]ith respect to postsecondary and vocational educational services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school’s] educational program or activity.’”¹³² The Court further referenced the explanatory note within the regulations that provides the following: “The term ‘technical standards’ refers to *all* nonacademic admissions criteria that are essential to participation in the program in question.”¹³³ Rejected was the plaintiff’s argument that section 504 requires that the program should “dispense with the need for effective communication” (which was required in its degree, in addition to being a registered nurse, as the ability to understand speech without reliance on lip reading, as necessary for patient safety during the clinical aspects of the program).¹³⁴

This case is the guiding framework for subsequent judicial decisions in similar cases. Initially, there were few such cases, probably primarily because until the

129 This would be a virtually identical analysis had the ADA been in effect and also a basis for judicial consideration.

130 This is the reverse of the decision in *Palmer College of Chiropractic v. Davenport Civil Rights Commission*, 850 N.W.2d 326 (Iowa 2014) (holding that potential licensing in one state was relevant to whether a student should be admitted to a program of the same college in a different state. See Section VII(A)(3) *infra*).

131 *Se. Cmty. Coll.*, 42 U.S. at 405.

132 *Id.* at 406.

133 *Id.* (emphasis supplied by the Court).

134 *Id.* at 400.

mandates of the 1975 special education law¹³⁵ had been in place for a few years, and section 504 had been implemented in colleges, there were few individuals in a position to seek admission to health care programs. In addition, litigation can take years to reach judicial closure.

b. *Wynne v. Tufts University School of Medicine* (1991)—Reasonable Accommodation Process.

The other key case that provides an essential framework for decisions involving qualification for health care professional programs is *Wynne v. Tufts University School of Medicine*.¹³⁶ While the decision is not a Supreme Court opinion, the reasoning provides such a sound and well-reasoned framework for evaluating the issue of accommodations in higher education settings that it has been adopted by numerous courts in all jurisdictions. The fact that it involves a medical school setting makes it even more relevant for the discussions in this article.

The case involved a medical school student who became aware that he had difficulty with multiple choice exams after failures on multiple choice exams in his first year (which ended in 1984). After a conditional readmission,¹³⁷ he was evaluated by a neuropsychologist who diagnosed that he had a condition that affected his ability to answer multiple choice exams. Noteworthy is the fact that a diagnosis of a learning disability or other protected disability was never made, although the case proceeds as though it were stipulated that he was covered under section 504. During his conditional readmission process, he was provided a number of accommodations and supports, including counseling, tutors, note takers, and taped lectures, and being allowed to retake exams that he previously failed. Due to failures on two of the required exams, he was dismissed from the medical school. Wynne's complaint with the Department of Education and subsequent lawsuit claimed that section 504 had been violated because he had not been granted the requested accommodation of being tested on material in something other than a multiple-choice format. The denial of the request was based on the determination by the school that the multiple-choice test purpose was to measure the ability not just to memorize complicated material, but also to "understand and assimilate it." Further the decision noted the necessity that "practicing physicians keep abreast of the latest developments in written medical journals."¹³⁸ This might call for reading and assimilating computer-generated data and other complex written materials. Making choices under stressful situations could require "a quick reading, understanding and interpretation of hospital charts, medical reference materials, and other written resources. A degree from Tufts University ... certifies ... that its holder is able to read and interpret such complicated written medical data quickly

135 The Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975).

136 932 F.2d 19 (1st Cir. 1991).

137 It is quite likely that legally Tufts would not have been required to readmit him. The school had no notice of a disability that might make him eligible for accommodations. This raises the issue of what a school "can" do but is not legally required to do, and ultimately whether it "should" do it if not required.

138 *Wynne*, 932 F.2d at 27.

and accurately."¹³⁹ It was further stated that "it was the judgment of the medical educators who set Tufts 'academic standards' that the above described demands 'are best tested...by written, multiple choice examinations.'"¹⁴⁰

The court, while recognizing that judicial deference is generally given to the school, faulted the medical school for not engaging in the appropriate process for giving that deference. The court noted that the decision did not mention whether possible alternatives were considered. It was not clear who the decision makers were. The decision was viewed as "conclusory" and might be viewed as a decision that was based on the convenience of the faculty and administration. The court remanded with the guidance (which is quoted frequently by subsequent court decisions) that follows:

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.¹⁴¹ (emphasis added)

The medical school subsequently engaged in the requisite thoughtful process. The circuit court then reconsidered the case and found that Tufts decision not to allow a different testing format placed it in compliance with section 504 expectations.¹⁴² While this was a framework for decisions about reasonable accommodations, it provides an equally sound framework for demonstrating that initial admission criteria was appropriately grounded.

The 1992 circuit court opinion in *Wynne* provides an "eloquent"¹⁴³ analysis that the medical school did an appropriately careful evaluation of why the multiple-choice test was necessary for at least the particular course in question. It also noted that the appropriate "hierarchy" was involved in that assessment.

The *Wynne* case facts arose in 1984, and the final decision was not reached until 1992 (eight years later). This case is one of several examples of extremely lengthy resolution of decisions in which the university almost always ultimately prevails but only after it had expended substantial resources. This is also an example of a situation where an institution probably did much more than was required at the outset (given that a disability had never been documented) and might well have not allowed a conditional admission. Once it did so, however, the door was open to questions about reasonable accommodation. The 1992 opinion also notes

139 *Id.*

140 *Id.*

141 *Id.* at 26.

142 The medical school showed that the alternative proposed would be a substantial program alteration. *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.3d 791 (1st Cir. 1992).

143 Judge Selya, who wrote the opinion, is known for his writing style. Also joining the opinion in this case was Justice (then Judge) Stephen Breyer.

that the fact that other medical schools have granted a similar request does not determine whether Tufts is required to do.

c. Subsequent Decisions.

The early cases interpreting section 504 in health care professional contexts are interesting because they include a range of impairments—from sensory to mental health—and can provide a window into how courts were addressing denials of admission based on disability as well as how courts address issues of qualification in situations where readmission is sought after performance deficiencies and in cases where a student seeks to advance to a higher level of programming or specialty. All of these cases can shed light on whether an individual is likely to be qualified for licensure or certification and can factor into the decision to admit, readmit, or advance a student with a disability in a health care professional setting.

One of the early decisions on admissions was also a Supreme Court decision, but the decision did not directly address whether the individual was otherwise qualified. In *County of Los Angeles v. Kling*,¹⁴⁴ the Court did not reach the issue of whether an applicant to the Los Angeles County Medical Center School of Nursing was otherwise qualified. Instead, the Court found that the applicant with Crohn's disease was not disabled under **Section 504**. While the Supreme Court dismissed the case based on its determination that she did not have a disability covered by section 504, the lower court opinion provides the specific facts that the plaintiff was rejected because of the school's assumption that her health condition would result in excessive absenteeism.¹⁴⁵

The nursing school had not engaged in an individualized assessment of how her condition might affect performance when it learned, after her admission and during a medical examination of admitted applicants, that she had Crohn's disease. While the program had concerns about the potential hospitalization, the plaintiff indicated that this might not be a concern because she could schedule hospitalizations to minimize interference with required school programs. The nursing school apparently did not want to explore that further. The circuit court granted a preliminary injunction, but ultimately the issue of accommodation was not explored further when the Supreme Court in a very short opinion decided that Crohn's disease is not a disability.¹⁴⁶

There are few other cases in the higher education admission context in which the court finds the individual not to be disabled within the statutory protection.¹⁴⁷ There may be a number of reasons that early higher education litigation did not reach the issue of whether the person was denied, when courts addressing employment settings were dismissing cases frequently based on the person not being disabled

144 474 U.S. 936 (1985).

145 *Kling v. Cnty. of L.A.*, 633 F.2d 876 (9th Cir. 1980, *on appeal* 769 F.2d 532 (9th Cir. 1985)).

146 The 2008 amendments to the ADA would probably mean that courts today would find her to be a protected individual, and if so, the lower courts would be expected to engage in much greater exploration of whether the health condition could be reasonably accommodated. There is, however, less clarity about how that would be determined at the initial admission stage.

147 See ROTHSTEIN & IRZYK, *supra* note 100, at § 3:2.

within the statutory definition. One reason may be that the courts were often able to determine that there was not impermissible discrimination regardless of whether the person was covered under the statute, so they did not need to reach that issue.

VI. Judicial Interpretations (by Type of Impairment)

In 2016, the *Journal of College and University Law* published an excellent article by Ellen Babbitt and Barbara Lee on “Accommodating Students with Disabilities in Clinical and Professional Programs: New Challenges and New Strategies.”¹⁴⁸ In the article, the authors establish a framework for providing disability accommodations in medical schools and other professional programs that have clinical aspects to their programs. The article indicates a number of specific recommendations.

The discussion below, while tracking many of the same statutory and judicial interpretations,¹⁴⁹ and building on the framework for medical schools, provides a detailed examination of the most challenging cases. The review tries to identify key institutional policies, practices, and procedures that, if they had been implemented differently, might have avoided protracted and costly litigation.

The following discussion provides an overview of how courts addressed health care professional program admission and subsequent qualification. The case discussions are organized by type of impairment. Providers of health care professional services are generally required to have competencies that include knowledge, cognitive abilities, and technical skills, as noted previously in this article.¹⁵⁰ In addition, the ability to interact with patients and other staff members is often critical to competent practice. The type of impairment may be significant for health care professionals in meeting the technical and academic standards. The possibility of reasonable accommodations or modifications to compensate for deficiencies is essential to examine to determine competency, keeping in mind that changes in technology may affect the ability to compensate. For example, is it critical that a particular health care professional be able to “hear” a heartbeat through a stethoscope, or might adapted instruments give the heartbeat visually on the instrument? These types of questions suggest that those setting technical standards and criteria in terms of assessing what is required do more than they are currently doing at some institutions. These questions also require institutional administrators who set and implement policies, practices, and procedures for evaluating performance to examine these issues carefully. Without such an examination, health care professional programs can find themselves in lengthy legal disputes. Although the institutions generally succeed in litigation that ultimately results in a finding of nondiscrimination, significant resources are often expended in resolving those cases.

148 Ellen Babbitt & Barbara A. Lee, *Accommodating Students with Disabilities in Clinical and Professional Programs: New Challenges and New Strategies*, 42 J.C. & U.L. 119 (2016).

149 The Babbitt/Lee article includes a number of Office for Civil Rights (OCR) opinions from the Department of Education in addition to case discussion. These are not included in this author’s discussion.

150 See Section VI(F) *infra*.

A. *Visual Impairments*

Decisions involving visual impairments and health care professional program admission¹⁵¹ highlight the need for greater clarification about what is permissible in the admissions process. These cases seem to reach inconsistent outcomes, leaving programs in jurisdictions not subject to these holdings unsure about what is mandated or required. In some of the cases, the court denies a motion for summary judgment, indicating that there were issues in dispute that required greater consideration. Such holdings highlight the value of having thoughtful procedures within the institution in handling these cases.

1. *Doherty v. Southern College of Optometry (Clinical Stage)*

In *Doherty v. Southern College of Optometry*,¹⁵² an optometry student with retinitis pigmentosa was found not to be qualified to continue in the program because he was unable to operate certain equipment necessary for the practice of optometry. This case is instructive because, although Doherty was admitted (with considerable concerns and only after three applications),¹⁵³ it was at the clinical stage when he was required to perform on certain instruments that it was determined that he was not otherwise qualified to continue. Although his academic performance was competent, it was determined that he would never be able to “practice optometry as a ‘normal’ clinical practitioner.”¹⁵⁴ Because he was unable to demonstrate mechanical proficiency on some of the instruments in the pathology lab (and there were concerns about patient safety in how some might be used), he was denied completion of the program with a degree. The program determined that the ability to use the instruments was both essential to the educational program and also to the practice. Noteworthy is the fact that the instrument usage had only been required for a few years, so previously certified optometrists would not have been trained on them. There was testimony in the case that many of those who had received their degrees before these instruments were included in the educational program never used the instruments in their practice. The court noted that while there is evidence that some educational programs waive the training on certain instruments, that was not relevant to the decision in this case. The lower court’s analysis of deference to be paid in these cases applied the reasoning in *Davis*.¹⁵⁵ It provides the interesting example that the refusal to waive a physical education requirement for a history degree is very different from modifying a requirement that relates to patient safety.

151 Employment cases can also be relevant for determining a number of issues relevant to the educational aspects of the program. *See, e.g.*, *Babb v. Maryville Anesthesiologists, P.C.*, 361 F. Supp. 3d 762 (E.D. Tenn. 2019). (termination of nurse with retinal degeneration legitimately based on safety concerns because of errors that gave clinic reason to believe that nurse lacked clinical judgment).

152 862 F.2d 570 (6th Cir. 1988).

153 *Doherty v. S. Coll. of Optometry*, 659 F. Supp. 662 (W.D. Tenn. 1987).

154 *Id.* at 666.

155 *Id.* at 672.

2. *Ohio Civil Rights Commission v. Case Western Reserve University (Admission)*

In *Ohio Civil Rights Commission v. Case Western Reserve University*,¹⁵⁶ the Supreme Court of Ohio, addressed whether Ohio state law (which was virtually identical to section 504 and the ADA)¹⁵⁷ was violated when the Case Western Medical School denied admission to a totally blind applicant on the basis that she was not otherwise qualified to complete the program. The court struck down the Ohio Civil Rights Commission's decision that found that Ohio law had been violated by the denial. In doing so, the court provided analysis that incorporates both the *Davis* and the *Doherty* reasoning.¹⁵⁸

The case opinion comments on the fact that a blind applicant had been admitted to medical school at Temple University.¹⁵⁹ The plaintiff had offered that fact as proof that it was not a fundamental alteration of a medical school program to admit someone who was blind. The court rejected that argument and provided relevant guidance for future cases. The court noted that Dr. Hartman's admission had been twenty years previous to the facts of this case, and that the medical school had not admitted the student because it believed it was required to, but because it decided to go beyond what might be legally required. It added one more student to the class and voluntarily absorbed the costs of the accommodations.

In its opinion, the court offered this guiding language.

The goal of medical schools is not to produce specialized degrees, but rather general degrees in medicine which signify that the holder is a physician prepared for further training in any area of medicine. As such graduates must have the knowledge and skills to function in a broad variety of clinical situations and to render a wide spectrum of patient care. All students, regardless of whether they intend to practice in psychiatry or radiology, are expected to complete a variety of course requirements including rotations in pediatrics, gynecology and surgery.¹⁶⁰

In reaching its decision, the court relied on the expertise of the AAMC¹⁶¹ and medical educators who testified that the use of intermediaries to develop skills of medical diagnostic judgment would interfere with the student's exercise of independent judgment, which is crucial to developing diagnostic skills.¹⁶²

Noteworthy in this case is the holding that in cases such as this, an individualized inquiry is not expected. The court finds that it is permissible to have a standard

156 76 Ohio St. 3d 168, 666 N.E.2d 1376 (1996).

157 *Id.* at 181. The court specifically relied on section 504 interpretations in its analysis. *Id.*

158 *Id.* at 191 ("An educational institution is not required to [eliminate] a course requirement which is reasonably necessary to the proper use of the degree conferred at the end of study.").

159 *Id.* at 188.

160 *Id.* at 191.

161 ASS'N OF AM. MED. COLLS., <https://www.aamc.org/> (last visited June 26, 2021).

162 *Case W. Reserve Univ.*, 76 Ohio St. 3d at 192.

that denies admission where a standard excludes all individuals in a particular group such as all blind applicants.

3. *Palmer College of Chiropractic v. Davenport Civil Rights Commission (Conditional Admission)*

The outcome in *Ohio Civil Rights Commission v. Case Western Reserve University* can be contrasted with the Iowa State Supreme Court's decision in *Palmer College of Chiropractic v. Davenport Civil Rights Commission*,¹⁶³ In the *Palmer* case the court found that the denial of a blind student to a chiropractic program violated a state law (which was similar to federal disability discrimination law). The court in its opinion stressed the importance of an individualized assessment (in contrast to the Ohio case), in reaching its conclusion. Although the court noted that deference should be paid to an institution, it nonetheless found that the institution was in violation of disability discrimination law when it denied admission to Mr. Palmer.

Aaron Cannon initially applied to the chiropractic college at its Iowa location (the college had other locations in Florida and California) in 2004 for its bachelor of science program (the program also had a doctor of chiropractic programs) and informed the school early in the admission process of his blindness. His intent was to complete both the undergraduate and graduate programs. The school had adopted technical standards in 2002 and referred Mr. Cannon to its disability student coordinator to assess the impact of Mr. Cannon's blindness in meeting the technical standards.

Although concerns were raised at the point of undergraduate admission about whether he would be able to perform the requisite skills to complete the graduate degree, he was conditionally admitted to the graduate program contingent on success in the undergraduate program. Mr. Cannon notified the school early in the undergraduate process about how various accommodations had enabled him to engage in academic programming, and after two trimesters, he had a 3.44 grade point (on a 4.00 scale) and sought confirmation about his admission to the graduate program. At that point the disability steering committee began to discuss further education with him and expressed doubts about his ability to complete the graduate program, and the interactive discussion about his proposed modifications still left the school in doubt about whether the point at which courses such as radiology would be required would be a "stoppage" point. Although Mr. Cannon was willing to face that obstacle later, the school was concerned that he would not be able to complete the work, and discussions of whether the technical standards and the related accreditation standards resulted in their decision that such waiver was not negotiable.

Factors relevant to the decision of the Iowa Civil Rights Commission and the Iowa Supreme Court were that there had been previous graduates who were blind, and accommodations granted through that process had not resulted in loss of accreditation (at least in California). Both of these entities found the

163 850 N.W.2d 326 (Iowa 2014). The initial admission was in 2004, and ten years passed before the final judicial resolution.

denial of admission and proposed accommodations to violate state and federal discrimination law. In contrast, the district court gave deference to the college claim that the accommodations would be a fundamental alteration of the program.

The Supreme Court's analysis focuses on the issue of fundamental alteration (notably not addressing the undue burden issue because it was not raised below). The court took into account the decisions in *Davis*¹⁶⁴ and *Case Western*¹⁶⁵ and *Wynne*¹⁶⁶ in noting that a rigorous analysis was required before granting deference to the educational institution. In the court's view, *Palmer* (in contrast to the other settings) had not engaged in this requisite assessment.¹⁶⁷ The school had not engaged in the detailed, individualized inquiry expected before deferring to the institution. A lengthy dissent disagrees and provides specifics about how the school had engaged in such an individualized careful assessment of Mr. Cannon. The dissent also rejected the majority reliance on the fact that Mr. Cannon would have to be admitted in California by noting a specific California statute that provides for waiver of certain coursework.

Both the majority and dissent in *Palmer* provide lengthy and detailed analysis of the opinions and conclusions. If the *Palmer* majority opinion were to be adopted in other cases, there would be no instance in which a school could decide not to admit a blind student on the basis of a determination that such a student could not complete essential requirements, even taking into account accommodations.

The *Palmer* majority notes, in passing, the fact that during the interactive¹⁶⁸ process about whether Cannon should be allowed to continue, the school raised its concern about the "time, effort, and money Cannon had already expended and would continue to expend despite the indications that he would not be able to complete the program." The majority also notes, but does not discuss, the fact that the issue of undue burden was not raised in the proceedings,¹⁶⁹ so the issue was not addressed. The issue of cost, however, should be more intentionally addressed in these cases. That would be cost to both the individual and the institution, and the concern should be not only financial cost, but also administrative cost to the institution and costs of lost opportunities to an individual who might be allowed to continue in an educational program, when the institution providing that program believes the student will never be able to use that program to engage in a professional practice. The ten years between initial admission and final judicial resolution imposed substantial costs to both parties.

164 Se. Comty. Coll. v. Davis, 442 U.S. 397 (1979).

165 Ohio Civ. Rights Comm. v. Case W. Reserve Univ., 76 Ohio St. 3d 168.

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

167 Palmer Coll. of Chiropractic, 850 N.W.2d at 337.

168 *Id.* at 331.

169 *Id.* at 336.

4. *Stopka v. Medical University of South Carolina (During Academic Portion of Medical School; Admission to Residency)*

The case of *Stopka v. Medical University of South Carolina*,¹⁷⁰ is instructive because it involves a medical resident who became disabled after he had already begun medical school. The student began medical school in 1997 and, at the end of his first year, suffered a fall that resulted in a closed head injury that resulted in visual perception impairments and substantially slower reading rate. He returned to medical school, but with a reduced class load and clinical load, and additional time for exams and coursework. He graduated in 2003, taking six years not the usual four years.

At the point he sought a residency appointment, the concerns about his competency reached a critical point. He began a pediatric residency, informing the host school of his limitations. Residency is a hybrid employment/educational experience, and thus he signed an “employment” contract as part of it. He received no accommodations initially. His rotations through various programs (neonatal intensive care, emergency, hematology, and oncology) resulted in marginal and unsatisfactory performance assessments. At this point he received a reduced clinical load, but he still took much more time than others to read information. Patient visits took much longer than those conducted by his peers. Assistive devices for reading were not totally adequate and were problematic for reading handwritten notes. He was unable to quickly synthesize complex or large amounts of information. After further performance deficiencies, he was dismissed in January 2004. He had been enrolled for seven years before it was determined that he was not otherwise qualified, even with accommodations.

He challenged the dismissal on the basis that the school had failed to provide accommodations to his disability as required by the ADA. The court found that he was not qualified because he did not possess the essential skills for patient care. The court rejected the argument that not every resident already possesses the skills because the purpose of the residency is to gain the skills. The court noted the extensive accommodations that had been given during the six years of medical school after the injury occurred, but these had not been able to offset the deficiencies of memory, decision making, and speed. His proposal that a handheld scanning device could read aloud texts and notes was deemed not reasonable because many notes are handwritten by many different people, and such an accommodation would not address the concern about speed. The dismissal was permissible and did not violate the university’s procedures for such a dismissal.

This case highlights the issue about whether the medical school *should* have provided the accommodations it did during medical school, if it were likely that he would not be able to succeed in a residency. The court never addresses whether the school *must* have provided the accommodations it did when they reinstated him or whether the school might have been able to justify that he was no longer otherwise qualified at that point. While a medical school *can* provide accommodations, even

170 2007 WL 2022188 (D.S.C. 2007 July 11, 2007) (medical resident with cognitive and visual deficiencies from closed head injury not qualified; could not carry out essential function of caring for patients; accommodations could not compensate).

if not legally required to do so, the unresolved question is whether it wise to do so in all cases. The cost to the student and the institution of six years of medical school that would not in all likelihood lead to licensure as a physician raises this question. The question then becomes what might have been a better course of action in 1998 to avoid this outcome.

5. *Cunningham v. University of New Mexico Board of Regents (During Medical School)*

The decision in *Cunningham v. University of New Mexico Board of Regents*,¹⁷¹ provides marginal precedential guidance for decision makers because the court did not really reach the issue of accommodations or otherwise qualified. It determined instead that because the medical student bringing the claim had not provided sufficient documentation to prove that his Scotopic Sensitivity Syndrome was substantially limiting, the case should be dismissed. The facts involved a medical student admitted in 2005, whose condition caused headaches and high blood pressure due to prolonged reading, which resulted in his request for a medical leave. Although he had been diagnosed with a reading disability in grade school, he had learned to compensate for it and was a superior student who throughout his entire grade school, high school, and college experience was able to complete extensive reading assignments without accommodation.

Upon his return in 2007, he was advised that he had to retake the first-year courses. His requested accommodations for his now diagnosed condition were denied. He passed his coursework without accommodation. When he was to take the First Step of the United States Medical Licensing Exam, he again requested accommodations and was denied. After failing the test, he requested accommodations to take it a second time. He asked the University of New Mexico Disability Committee for assistance in obtaining accommodations, but they did not provide the requested assistance. When he failed the exam (without accommodations) the second time, he was placed on academic leave, and at that point he brought suit against the University and the NBME. The court found that because he was able to mitigate his disability in the past by using colored glasses and taking medication, he was not disabled within the statutory definition. It thus dismissed his ADA/Rehabilitation Act claims, and the dismissal was affirmed by the Tenth Circuit in 2013. From his initial enrollment to the circuit court decision, eight years passed.

The outcome in this case might be different if the same facts were involved today. The primary reason is that during the time of this litigation, a number of cases involving the "mitigating measures" standard were being considered.¹⁷² Congress ultimately amended the ADA in 2008 to clarify that such measures should not be taken into account in determining whether someone has a disability. It is much more likely that the plaintiff would have been considered to be a person with a disability. What is unknown is whether the accommodations he requested

171 779 F. Supp. 2d 1273 (D.N.M. 2011), *aff'd*, 531 F. App'x 909 (10th Cir. 2013).

172 Before the ADA amendments, courts had ruled that the analysis of whether or not an individual was disabled should include whether accommodations were able to mitigate the effect of the disability such that the individual no longer met the definition of "disabled."

would be viewed as “reasonable” under today’s judicial interpretation standards. The facts of the case also highlight the interrelationship of the university and the licensing agency. Mr. Cunningham had requested assistance of the medical school on obtaining accommodations with the licensing agency, and that request was not granted. What is unclear given the facts in the case is what assistance from the medical school would be in his case, since it had denied his requested accommodations itself. It also highlights the extensive time and resource issues of resolving these issues.

B. Hearing Impairments

There have been several judicial decisions where the issue of hearing impairments and accommodations and related issues have been addressed in the context of both nursing programs and medical school.¹⁷³ Significant to these cases is the fact that the first federal court judicial guidance on disability issues in health care professional programs arose out of a nursing program and a student with a severe hearing deficit.¹⁷⁴ As noted by the Supreme Court in 1979, changes in technology should be considered in making determinations about accommodations, and hearing is an area where there have been substantial changes in technology. Such changes include CART¹⁷⁵ technology and adapted stethoscopes. The issue often becomes not whether the individual can “hear” but whether the individual can receive the necessary information in a timely manner depending on the setting.¹⁷⁶ Courts consistently consider issues of patient safety in these settings.

1. *Argenyi v. Creighton University (During Medical School)*

One of the major cases on this issue is *Argenyi v. Creighton University*,¹⁷⁷ which addressed the accommodation requests by a medical student with a significant hearing loss. Mr. Argenyi did not use sign language, but rather relied on cued

173 See ROTHSTEIN & IRZYK, *supra* note 100, at § 10:7. (Sensory Impairments—Hearing and Vision); Christopher J. Moreland et al., *Deafness among Physicians and Trainees*, ACAD. MED. (Feb. 2013), https://journals.lww.com/academicmedicine/Fulltext/2013/02000/Deafness_Among_Physicians_and_Trainees_A.27.aspx. The following are judicial decisions in the employment setting that might be relevant as well. *Searls v. Johns Hopkins Hosp.*, 158 F. Supp. 3d 427, 32 A.D. Cas. (BNA) 885 (D. Md. 2016) (undue financial hardship should consider overall budget, not amount budgeted for accommodations; case involved cost of interpreter service for a deaf nurse (\$120,000)); *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 31 A.D. Cas. (BNA) 1770 (10th Cir. 2015) (deaf applicant for position of plasma center technician did not have to show under direct threat standard that requested accommodation would eliminate every de minimis health or safety risk hypothesized by employer).

174 See the discussion of Southeast Community College, *infra*, Section V(B)(2)(a).

175 CART stands for Communication Access Realtime Translation. See <https://www.nad.org/resources/technology/captioning-for-access/communication-access-realtime-translation/>.

176 Adapted stethoscopes and other technology that provide the heart rate visually are examples.

177 2011 WL 4431177 (D. Neb. Sept. 22, 2011), *rev'd on other grounds*, 703 F.3d 441 (8th Cir. 2013) (medical student with significant hearing loss requested communications access real time transcription, and interpreters as accommodation; preliminary order remanding, recognizing fact issues about whether request was reasonable).

speech.¹⁷⁸ He began medical school in 2009 and sought to use CART technology, cued speech, and an FM system, an accommodation he had received in undergraduate school. The school provided the FM system for lectures, small groups, and labs. The CART accommodation request, however, was denied. Shortly after beginning, Mr. Argenyi recognized the inadequacy of the accommodation and again requested captioning technology. The school instead provided enhanced notetaking. Mr. Argenyi paid for captioning and additional services himself at a cost of over \$53,000 in addition to his tuition. He renewed his request for his second year of medical school and was again denied. Again, he paid for the service himself at a cost of \$61,000. The second year of medical school included clinical courses, which involved interaction and communication with patients. The university negotiated an initial agreement to provide the captioning services in clinical courses, but when these settlement talks broke down, he passed his clinical work and courses without the services. At that point, he took a leave of absence and brought suit under section 504 and the ADA.

The district court in 2011 granted summary judgment to the university, finding that the university had provided effective communication and apparently some findings that the documentation to support the requested accommodations was inadequate because it relied on “unsupported self-serving allegations.”¹⁷⁹ The appellate court addressed the issue of whether the university had provided necessary accommodations and whether the accommodations it had provided ensured “meaningful access.”¹⁸⁰ That requirement expects that an individual will be given equal opportunity to gain the same benefits as peers who are not disabled. The court found that applying that standard to this case, the university would be expected to consider how its programs are available to medical students who do not have disabilities and to take reasonable steps to provide him with a like experience.¹⁸¹ The court found that there was evidence to demonstrate that he had been denied this and remanded for further findings in the case.

On remand,¹⁸² the court found that it was discriminatory to not provide the services and required the service prospectively for his last two years of medical school. Because intentional discrimination could not be found, Michael Argenyi was not awarded reimbursement of the \$133,595 he had expended for the CART services for his first two years. The court did find that the university had not met its burden of showing undue financial burden, making this one of the few decisions where this issue is addressed. Because Argenyi was considered to be the prevailing party, however, he was awarded almost \$500,000 in attorneys’ fees and costs.¹⁸³

178 2011 WL 4431177. at *1.

179 2011 WL 4431177. at *10.

180 *Argenyi v. Creighton Univ.*, 703 F.3d 441, 445-46 (8th Cir. 2013).

181 *Id.* at 449.

182 *Argenyi v. Creighton Univ.*, 2013 WL 4434424 (D. Neb. August 14, 2013); 2014 WL 1838980 (D. Neb. May 8, 2014).

183 *Deaf Nebraska Student Awarded Legal Fees*, KETV NEWSWATCH (May 9, 2014), <https://www.ketv.com/article/deaf-nebraska-med-student-awarded-legal-fees/7646174#>. The initial enrollment was 2009 and the final judicial resolution was in 2014, a period of five years.

While this is a relatively “speedy” judicial resolution, at least as to the issue of the standard to be applied, it again demonstrates the time and cost of litigation. What is not decided in this case is whether Argenyi’s hearing deficit would ultimately prevent him from being licensed or admitted to a residency, and if so, whether the medical school could have considered that in its initial admission decision.

2. *Featherstone v. Pacific Northwest University of Health Sciences (During Medical School)*

The case of *Featherstone v. Pacific Northwest University of Health Sciences*¹⁸⁴ involved issues that arose during medical school although they were raised at the admission stage. In 2012, Zachary Featherstone applied for admission to the osteopathic medicine program at Pacific Northwest University of Health Sciences, and during the admissions interviews he used an interpreter for his hearing impairment. Upon acceptance for admission, he requested captioning for lectures and an interpreter for more interactive sessions such as labs and clinics. The university worked with the state vocational rehabilitation programs in considering his requests, and indicated that it would take more time to make the arrangements and asked if he would defer admission for a year, which he agreed to. The University withdrew its admission decision, claiming concerns about patient safety and the ability to complete his performance evaluation within the time requirements. Cost was apparently not an issue because the state office of vocational rehabilitation had indicated its willingness to pay if the University could not. The court found that the university’s concerns were speculative and unfounded. Featherstone had requested a preliminary injunction after the university’s claims that his requests for accommodations would be a fundamental alteration. No request for additional timing for exams had been made. The claims about fundamental alteration were speculative. Interesting in this case was the concern about the limited availability of interpreter services in Yakima, Washington. The court addressed that concern by finding that those concerns were unfounded, and evidence indicated that such services could be made available. Similarly, the court found the concerns about patient safety to be unfounded.

What is not addressed by this court is what would happen if a clinical rotation (such as surgery) raised an issue of patient safety that could not be accommodated.¹⁸⁵ That issue remains unresolved. The same concern might be raised at the point of entry into a residency.

3. *Guidance from Other Professional Program Settings*

Whether hearing is an essential function (or the ability to communicate in an alternate format) might depend on which health care professional program is involved and also on the level of the program. For example, quick response by a nurse

184 2014 WL 3640803 (E.D. Wash. July 22, 2014). He completed the program.

185 Jake New, *Fighting Their Way into Medical School*, INSIDE HIGHER EDUC. (July 28, 2014), <https://www.insidehighered.com/news/2014/07/28/judge-orders-medical-college-accommodate-deaf-student> (reporting on an order to admit Zachary Featherstone to the osteopathy program at Pacific University after acceptance was withdrawn during the process of working out accommodations for his hearing impairment).

to auditory information in an emergency room setting is more essential than for a physician who diagnoses cancer using visual information. As noted throughout, however, many professional programs have training that requires demonstration of essential functions regardless of specialization or later employment.¹⁸⁶

The case of *Alexander v. State University of New York at Buffalo*,¹⁸⁷ involved a student in a nursing program who relied on lip reading rather than signing and who had worn hearing aids since she was four years old. The case is interesting from the perspective of its detailed description of the communications (and possible miscommunications) before the student started the program about what the accommodations would be. The services at issue included CART technology, preferential seating, note takers, extended time and separate rooms for exams, and an FM system for hearing aids. The student was accepted in December 2008, and in June 2009, the first request to the school about accommodations was communicated to the school. The ensuing discussions during the summer raised questions about what had been promised, and when several of the requested accommodations were not in place when Sara Alexander began the program, she withdrew before the end of the first semester and enrolled in other programs where the requested accommodations were provided and where she was succeeding. The only reported decision came four years after her initial enrollment, and was a denial of the school's motion for summary judgment.

The case is instructive to educational programs in a number of ways. It highlights the importance of an early interactive process for addressing accommodation issues. However, although the process was initiated by the student (there was substantial involvement of the mother)¹⁸⁸ it was not initiated until June, and some of the accommodations seemed to have taken longer to implement than expected, so they were not in place at the beginning, often a crucial part of a course. There was also some disagreement about what had been promised (which would require further resolution), and this highlights the value of clear and specific written follow-up to discussions. This was critical in this case because of the note-taking concern. The case also involves a practice that is somewhat questionable in terms of implementation, which is to give a student a note to give to a faculty member regarding accommodations (such as preferential seating).

In this case, there are questions about faculty member compliance, obligation of the institution to ensure compliance, and the impact on her learning as a result. The court generally addresses that issue in its discussion of whether intentional

186 See, e.g., *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260 (10th Cir. 2015) (deaf applicant for position of plasma center technician did not have to show under direct threat standard that requested accommodation would eliminate every de minimis health or safety risk hypothesized by employer); *Alexander v. State Univ. of N.Y. at Buffalo*, 932 F. Supp. 2d 437 (W.D.N.Y. 2013) (nursing student with severe hearing impairment sought various accommodations and claimed university was deliberately indifferent to her; denial of summary judgment); *Wells v. Lester E. Cox Med. Ctrs.*, 379 S.W.3d 919 (Mo. Ct. App. S.D. 2012) (no evidence that providing sign language interpreter to student in nursing program would fundamentally alter the program or pose a threat to safety).

187 932 F. Supp. 2d 437 (W.D.N.Y. 2013).

188 The fact that the plaintiff was a high school senior when the process began explains the substantial involvement of the parent.

discrimination had occurred (necessary for some monetary remedies) in noting that “deliberate indifference” facts might meet that requirement.¹⁸⁹ The court noted that more than mere bureaucratic negligence is required; if the institution knows of a need and fails to adequately respond, the standard might be met.

While no clear judicial standard or regulation as to what an institution must do to ensure faculty compliance exists on such an issue, it is one that merits closer examination by policy makers and administrators, especially in light of the potential liability of the institution. The case notes, but does not resolve, whether the institution knew of concerns about professors who did not ensure preferential seating and whether the institution should have taken actions to ensure compliance. This type of faculty obligation and related supervisory responsibility is likely to become an increasing concern in all higher education settings where faculty involvement in accommodations is involved. Some medical schools are not organized or financed in a way that emphasizes pedagogy, with faculty members at such institutions expected to give greater priority to revenue-generating clinical services or research. As a result, the conceptualization, coordination, and presentation of classroom instruction can suffer.

So, while the decision does not specify whether the requested accommodations were reasonable, it does give a signal to institutions about taking care in ensuring that their policies, processes, and procedures are adequate to avoiding liability ultimately, and even if there is no liability, avoiding unnecessary litigation.

C. *Mobility Impairments*

Medical school and other health care professional programs require a range of physical capabilities,¹⁹⁰ many of which are incorporated into the clinical work and some of which are inquired about when students are asked to sign an acknowledgment of specific technical abilities when they enter the program. These can and often do include a range of physical functions that can require physical dexterity, strength, and stamina (depending on the particular program).

189 *Alexander*, 932 F. Supp. 2d at 445.

190 In *Widomski v. State University of New York (SUNY) at Orange*, 933 F. Supp. 2d 534 (S.D.N.Y. 2013), *aff'd*, 748 F.3d 471 (2d Cir. 2014) the court did not determine whether impermissible discrimination had occurred. The reason was that it found that the condition was not a disability. The court granted the university’s motion for summary judgment in a claim by student that he was perceived as disabled because of hand shaking that occurred during the phlebotomy clinical program. Because his hand shaking only affected one particular job, he was not disabled. It is possible that even if the applicant would have been found to be protected under the statute, that the court might have found him not to be otherwise qualified because the course affected by his hand shaking was required for graduation. In *Russell v. Salve Regina College*, 890 F.2d 484, 57 Ed. Law Rep. 382 (1st Cir. 1989), *rev'd on other grounds*, 499 U.S. 225 (1991) the court provided only nominal guidance on disability discrimination issues. The case was decided before the courts had clarified that federal financial assistance need not be directly for the program in which the individual was involved for section 504 of the Rehabilitation Act to apply. But the fact pattern is interesting for consideration if the situation arose today. The impact of a nursing student’s weight was a stated reason for her dismissal from a private program. The school initially tried to get her to agree to lose weight (she weighed over three hundred pounds), and when she did not, she was dismissed based on a breach of contract basis. There have been numerous more recent decisions involving physical qualifications of nurses (with varying outcomes). The question to be considered is whether a health care professional program can consider obesity (or its impact) at the initial admissions stage. Could Salve Regina College deny admission to Ms. Russell at the outset?

1. *Pushkin v. Regent of the University of Colorado (Denial of Residency)*

One of the few cases in which the result was in favor of the residency applicant with a disability is the 1981 decision in *Pushkin v. Regents of the University of Colorado*,¹⁹¹ a case involving an individual with multiple sclerosis who was denied admission to the psychiatric residency program directly related to his impairment. Dr. Pushkin was a wheelchair user, and his rejection was a result of the interview process in which the committee members expressed concern about “their concern for psychologic reactions of the patient and in turn the doctor, as a result of his being in a wheelchair.”¹⁹² These observations were found not to be “predicated on any known deficiency of Dr. Pushkin himself.”¹⁹³ The basis for rejection was solely because of the disability, although after the decision, there was an attempt to justify the decision after the fact based on other nonqualifying factors.¹⁹⁴ Both the trial court and the appellate court determined that Dr. Pushkin was qualified (he met the academic standards) and he had provided a letter from his residency program in psychiatry. The articulated reasons for rejection were determined to have been based on incorrect assumptions or inadequate factual grounds.¹⁹⁵ Noteworthy is the fact that this is one of the earliest judicial decisions addressing the issue of disability in the context of medical school admission, and as noted above, it is one of the few cases in which a plaintiff has been successful in such a case.

2. *McCully v. University of Kansas School of Medicine (Conditional Admission)*

The facts in *McCully v. University of Kansas School of Medicine*¹⁹⁶ involved the admission of Emily McCully had a spinal cord injury before she was admitted to medical school, and upon responding to the postadmission information about the ability to meet specified technical standards and her responses to the inquiry about needed accommodations, the admission was withdrawn. Her responses were based on consultation with her physician. Specifically, her physician recommended that a staff person be provided to “assist with lifting and positioning patients, stabilizing elderly patients, and performing basic life support.” The decision was based on consultation with the clinical faculty members who considered the specific recommendations in light of requirements for the program. She then brought suit under the ADA and section 504, and the district court granted the university’s motion for summary judgment.

191 658 F.2d 1372 (10th Cir. 1981).

192 *Id.* at 1386. The interview notes showed that the opinion and judgment of all of the interviewers was “inextricably involved with [his] handicap.” *Id.*

193 *Id.*

194 *Id.*

195 *Id.* at 1383. Pushkin’s rejection was discussed “only in terms of the handicap,” and he was given no “no other reason[s]” for his rejection. *Id.* at 1382. Additionally, “[t]he interview sheets which refer to assumed disabilities occasioned by his multiple sclerosis ... and additional testimony which shows after the fact articulation of concern about his alleged emotional instability which was not manifested in the interview sheets or in Dr. Carter’s conversations with Dr. and Mrs. Pushkin.” *Id.*

196 591 F. App’x 648 (10th Cir. 2014). Medical School withdrew admission to individual who had a spinal cord injury. *Id.*

The circuit court upheld the lower court and noted that while the applicant did not plan to practice in an area that would require these specific skills, the school's decision that the accommodations for the education program would be a fundamental alteration of the program (the required Motor Technical Standards), because she would be an observer, rather than a participant in the training. It recognized the legality of a medical school only providing an undifferentiated medical curriculum, and references that the United States Medical Licensure Examination require these skills.

Noteworthy, related to the possible remedy had she been successful, the court found that the medical school had engaged in an "interactive" process and was not indifferent. Thus, even had it been determined that the accommodations should be granted, compensatory damages would not be awarded because such an award requires a finding of intentional discrimination (deliberate indifference). The final decision was reached in a relatively short period of time (two years from denial of admission), and it provides an example of a more proactive approach to assessing the ability to meet requirements at the admission stage.

3. *Nathanson v. Medical College of Pennsylvania (Withdrawal After Enrollment)*

One of the early cases involving medical school and students with mobility impairments is *Nathanson v. Medical College of Pennsylvania*.¹⁹⁷ The medical school was aware of concerns about Nathanson's back and neck injuries during the admissions interview process. Her major concern was being able to sit in the seats provided for exams. In undergraduate school, she had been allowed to take exams at a table. She indicated, however, that she did not think she would need any special seating during the admissions process. After one year (1985–86), she withdrew from medical school because of her difficulties in sitting. It was not clear whether she had made specific requests for accommodations for seating or whether the school should have been on notice of her needs based on the initial interview. She did not have a "visible" impairment. She had requested closer parking and a straight back chair, but it is unclear whether these requests were specifically as accommodations to a disability.

The reported decision does not reach final resolution but does note issues to be resolved regarding whether the medical school could have/should have engaged in any inquiries and what inquiries would be permissible. It is noteworthy that the facts in this case occurred in 1985, at a very early stage of the development of policies, practices, and procedures for higher education pursuant to section 504 compliance. The case facts to be resolved highlight the value of engaging in an interactive process, which had not received much judicial attention at that point.

Of particular interest for future consideration, however, is that this is one of the few cases in health care professional programming that gives any attention to the cost of an accommodation, which incorporates the undue burden defense. The court incorporates regulatory guidance from employment, which sets out the factors to be considered in determining whether closer parking and a straight back

197 926 F.2d 1368 (3d Cir. 1991).

chair would be unduly burdensome to provide. These factors are overall size of program (referencing number of *employees*), number and type of facilities, size of the budget, type of operation (including structure of *workforce*), and nature and cost of accommodations.

Not addressed in this opinion would be whether a medical school would be required to provide specialized equipment. The regulatory guidance in higher education does not require the provision of personal devices.¹⁹⁸ For example, a university would not be required to provide a specialized wheelchair or other equipment for her personal use that would extend beyond her educational program, but it may well be expected to provide equipment at the education site as an accommodation.

4. Cases Resolved Without Litigation

The other major admissions decisions involving mobility impairments and health care professional programs receiving high-profile attention were not litigated. Nevertheless, they provide interesting and useful insights.

The case receiving the greatest media attention highlights a success story. James Post had been injured in a diving accident at age fourteen, and was quadriplegic when he applied to several medical schools. He was denied admission by ten medical schools although he had exemplary academic credentials. Albert Einstein Medical School in Philadelphia granted admission on the condition that he pay for his own physician's assistant, which he did at considerable cost. A tort settlement from his injury provided the funding for these costs. In addition, his wife provided substantial assistance.¹⁹⁹ After graduation, he practiced in the field of nephrology (kidney specialty), which requires diagnostic skills, at which he excels.

There are several success stories about physicians and medical students with mobility impairments.²⁰⁰ The media accounts are persuasive in demonstrating that a greater openness to intermediaries and assistants and technological developments

198 45 C.F.R. § 84.12 (1990).

199 *Quadriplegic Aims to Become a Doctor*, N.Y. TIMES (Nov. 27, 1992); *Quadriplegic Student Is Set to Graduate from Medical School*, L.A. TIMES (June 5, 1997), <https://www.latimes.com/archives/la-xpm-1997-06-05-mn-347-story.html>; Jon O'Connell, *Quadriplegic Doctor Lives a Fulfilled Life*, TIMES LEADER (Apr. 19, 2014), <https://spinalcordinjuryzone.com/news/12592/quadriplegic-doctor-lives-fulfilled-life>; Joe Ungaro, *Quadriplegic Student Finishes Long Journey by Getting M.D.*, ASSOCIATED PRESS (June 5, 1997), <https://apnews.com/e38b2270df62fdf1606e06b45ef6ffb6>.

200 Joe Ungaro, *Quadriplegic Student Completes Long Journey by Getting M.D.*, ASSOCIATED PRESS (June 5, 1997), <https://apnews.com/e38b2270df62fdf1606e06b45ef6ffb6>; Cindy Dampier, *Chris Connolly is a Brilliant Medical Student. He's Also a Quadriplegic—And the Person Who May Change the Way We Think about Doctors*, CHI. TRIB. (Sept. 18, 2018, 5:00 AM), <https://www.chicagotribune.com/lifestyles/ct-life-quadriplegic-med-student-connolly-0917-story.html>; Kevin Joy, 'A Seat at the Table': Why U-M's Medical School Wants More Students with Disabilities, UNIV. OF MICH. HEALTH LAB (Oct. 10, 2017, 7:00 AM), <https://lablog.uofmhealth.org/med-u/a-seat-at-table-why-u-ms-medical-school-wants-more-students-disabilities>. See also Tim Gilmer, *Disabled Doctors: Healing the Medical Model?*, NEW MOBILITY (Mar. 1, 2019), <https://newmobility.com/disabled-doctors/> (includes stories about a number of physicians who became mobility impaired during medical school or afterward; discusses the technical standards and how they have evolved).

can provide the accommodations that lead to these success stories. Not discussed in these stories, however, is the cost of such accommodations. Because courts rarely address cost as a defense, it is difficult to assess how a court would respond to a medical school that found that undue financial burden prevented providing certain accommodations (a legitimate defense if well founded).

These success stories all seem to be about individuals who demonstrated exceptional academic and other aptitudes by individuals who were highly motivated and who had additional personal support or a mentor or advocate at the medical school. It is less clear whether litigation would have required the medical schools to enroll and accommodate these students. While the medical school *can* provide accommodations that it might not legally be obligated to, the issue to be considered is whether that is something the medical school *should* do. Given the cost of attending medical school for both the individual and the institution, there are questions about the obligations of the school to advise entering students (or continuing students) that certain program completion requirements might not be able to be achieved, even with accommodations.

D. Health Impairments

The technical requirements for admission to medical school often include reference to abilities that would be relevant for an individual with a health condition. Such reference is often much less specific than indicating criteria for other physical characteristics such as sensory concerns or mobility concerns. These requirements are more indirect by making reference to long hours and presence being required during the educational process. Expectations of stamina and attendance are raised in these decisions. There are other health impairments, however, that do not necessarily affect performance but that may create a risk to patients. The decisions relating to these conditions is discussed in this section.

1. Crohn's Disease

a. *County of Los Angeles v. Kling (Admission).*

One of the early decisions on admissions was also a Supreme Court decision but did not directly address whether the individual was otherwise qualified. In *County of Los Angeles v. Kling*,²⁰¹ the Court did not reach the issue of whether an applicant to the Los Angeles County Medical Center School of Nursing was otherwise qualified. Instead, the Court found that the applicant with Crohn's disease was not disabled under **Section 504**. While the Supreme Court dismissed the case based on its determination that she did not have a disability covered by section 504, the lower court opinion provides the specific facts that the plaintiff was rejected because of the school's assumption that her health condition would result in excessive absenteeism.²⁰² The nursing school had not

201 474 U.S. 936 (1985). This case is discussed as a foundational decision in an earlier section. See *infra* VI(D)(1)(a).

202 *Kling v. Cnty. of L.A.*, 633 F.2d 876 (9th Cir. 1980, *on appeal* 769 F.2d 532 (9th Cir. 1985)).

engaged in an individualized assessment, when it learned after her admission and during a medical examination of admitted applicants, that she had Crohn's disease. While the program had concerns about the potential hospitalization, the plaintiff indicated that this might not be a concern because she could schedule hospitalizations to minimize interference with required school programs. The nursing school apparently did not want to explore that further. The circuit court granted a preliminary injunction, but ultimately the issue²⁰³ of accommodation was not explored further when the Supreme Court in a very short opinion decided that Crohn's disease is not a disability.²⁰⁴ The 2008 amendments to the ADA would probably mean that courts today would find her to be a protected individual, and if so, the lower courts would engage in much greater exploration of whether the health condition could be reasonably accommodated. There is, however, less clarity about how that would be determined at the initial admission stage.

b. *Redding v. Nova Southeastern University, Inc. (Enrollment During Clinical Rotations).*

Three decades after the "nondecision" in *Kling*, the issue of Crohn's disease in the context of medical school was again addressed, this time not avoiding the issue of qualification because the individual was found to be disabled within the statute. The case of *Redding v. Nova Southeastern University, Inc.*,²⁰⁵ begins with the student's initial enrollment in 2009 in the osteopathic medical school program. The court seemingly assumed in its decision that Meredith Redding's Crohn's disease was a disability.²⁰⁶ The lengthy trial court decision resulted in several findings and holdings. These included that her absences and unprofessional conduct were the basis for failing clinical rotations that ultimately resulted in her dismissal, and no ADA or Rehabilitation Act violations occurred regarding the dismissal.

Her accommodation issues before the clinical rotations, however, raised issues left open because she could obtain damages under the Rehabilitation Act if the failure to accommodate at that point was intentional (defined as including deliberate indifference to statutory rights).²⁰⁷ Further resolution were issues about whether she had appropriately requested accommodations and whether the accommodations sought would have been reasonable.²⁰⁸ A confusing record of

203 See *Kling*, 464 U.S. 936 .

204 *Id.* (overruling 769 F.2d 532 (9th Cir. 1985)).

205 165 F. Supp. 3d 1274 (S.D. Fla. 2016).

206 The fact that the facts arose after the 2008 ADA amendments that broadened the definition of disability may account for that issue not being addressed, particularly in light of the fact that her disease resulted in hospitalizations that would probably have demonstrated that the impairment was substantially limiting. The court notes in a footnote (footnote 3) that the institution raised a question about the hospitalization that seemed to question whether she was entitled to protection, but the court resolves this in her favor.

207 *Redding*, 165 F. Supp. 3d at 1296.

208 The Student Handbook requires that students address accommodation requests to the outside entity where the rotation was to occur. *Id.* at 1285. The court does not address whether this is a valid practice or procedure or whether the educational institution should/must bear any responsibility in facilitating such accommodation arrangements. This is an issue largely left unaddressed in judicial

communications between the student and the school raises not only legal issues, but highlights the value of having clear policies and practices regarding requests for accommodations, who has the authority to grant them, and what process is to be followed in various situations.

While ordinarily, it would have taken two years to complete the academic portion of the program, Meredith Redding took four years because of missed exams and disputes over makeup exams and her health situation. It is not clear how tuition was charged during this dispute. Her dismissal occurred after the academic program and was based on noncompliance with the attendance policy, a situation for which she had apparently not requested accommodations. Thus, it may be that she would ultimately have been dismissed, even if the academic years had included the provision of accommodations related to her makeup exam requests.²⁰⁹

There is no further official record of disposition of the case on the issue of damages. Nonetheless the decision highlights several issues of relevance to this article in light of the seven years it took for judicial resolution that ultimately found her not to be qualified to continue, when the absences were almost certainly related to her disability. The first issue is the muddled communications between the student and the institution at the outset regarding her requests for accommodations. Ms. Redding did not raise any accommodation issues during her first year, but in the first semester of her second year, she had several hospitalizations that resulted in her missing several exams. The published make-up exam policy, while allowing instructor discretion regarding format, is confusing about timing, but of greatest significance is the apparent practice of making make-up exams more difficult and being given exams in a short answer or essay format instead of multiple-choice format as was the case for the original exam. The timing of course blocks within a semester would require her to take make-up exams at the same time she was beginning a new block of coursework. The process for her to seek a disability-based accommodation to this schedule required her to contact the university's ADA coordinator, who was to tell her who to contact within the medical school.

The opinion includes a lengthy summary of the various contacts between Redding and various administrators, but it seems to indicate confusion about whether there was a clear communication to her about specifically how to request a disability accommodation. It was not until 2012 that there seems to have been a clear invitation to her to request accommodations under the university policies and procedures. There is a dispute about whether her contacts with the Dean of Students allowed her to know how to request an accommodation. While programs are not required to give second chances to students whose disabilities were not made known, the facts raise questions about whether the university had a process that made it clear how students were to do that and what type of documentation

decisions involving higher education programs where outside placements are incorporated into the educational experience.

209 The court opinion provides information that the practice of giving makeup exams was to make them intentionally more difficult. The court did not address whether this itself was a violation, and it would perhaps have been an issue to be resolved in further litigation.

would be required to obtain certain accommodations. In its discussion of denying summary judgment on the failure to accommodate issue under section 504, the court recounts the confusing policies regarding who to contact within the university and the factual dispute about whether she had made contacts and was rebuffed, and how the documentation provided by the physician was considered in the decision to grant her accommodations (extra time for exams and bathroom breaks) that were not really responsive to her requests for make-up classes. The unresolved issues raise factual disputes about whether, if she had received the requested accommodations, she would have taken four years to complete a two-year program, which resulted in her payment of additional tuition costs. Regardless of what damages are or were ultimately ordered or agreed to in settlement, it would seem that having a clear policy, practice, and procedure for obtaining accommodations in higher education is likely to resolve an issue without years of costly litigation.

Finally, and related to the issue of clear procedures is whether an “invitation” by Nova to all incoming students who might want to seek accommodations might have resulted in a better outcome. A student who has a condition, such as Crohn’s disease, who knows it might impact attendance, might be able to ascertain and clarify policies such as make-up exams earlier than the point at which it became an issue.

2. *Sleep Disorders and Seizure Related Conditions*

In addition to the decisions discussed below, there are a few decisions involving employment that might also provide guidance.²¹⁰ They reinforce the concerns about patient safety.

a. **Rodrigo v. Carle Foundation Hospital (*Residency and Clinical Rotation*).**

There are numerous health related conditions that can affect the ability to pass examinations required for completion of medical school work, including during the residency aspects of the program. Seizure disorders and sleep disorders are

210 Stern v. St. Anthony’s Health Ctr., 788 F.3d 276, 31 A.D. Cas. (BNA) 1149 (7th Cir. 2015) (not reasonable to require shift changes essential to supervisory job for chief psychologist with memory and cognitive functions deficiencies because these were not marginal functions, although health center did not engage in interactive process that would not have changed the outcome); Olsen v. Capital Region Med. Ctr., 2012 WL 1232271 (W.D. Mo. April 12, 2012), *aff’d*, 713 F.3d 1149 (8th Cir. 2013) (mammography technologist with epilepsy not otherwise qualified; safety issue); Roberts v. Bayhealth Med. Ctr., Inc., 2015 WL 5031961 (D. Del. August 25, 2015) (denying summary judgment to hospital; part-time nurse with disability resulting from brain tumor sought to maintain previously provided eight-hour daytime shifts that had been changed to twelve-hour shifts; dispute about whether those shifts were essential functions); Badri v. Huron Hosp., 691 F. Supp. 2d 744 (N.D. Ohio 2010) (surgeon with sleep problems not disabled; case challenged revocation of medical privileges); Moran v. Chassin, 638 N.Y.S.2d 835 (3d Dep’t 1996) (physician with epilepsy).

examples.²¹¹ In *Rodrigo v. Carle Foundation Hospital*,²¹² it was apparently not until the student entered the clinical/preresidency program after successfully completing the first two years of medical school that his sleep disorder raised a consideration for accommodation of being allowed to retake the Step 3 exam a third time. He had not requested accommodation nor provided documentation on the disorder prior to the time he took the exam a second time and failed. He was given leave time before the third attempt, but failed again, and was advised that he would be terminated from the program. At this point the issue of whether his “disability” should be the basis for allowing another chance was raised. The district court granted the university’s motion for summary judgment.

On appeal, the circuit court upheld the lower court, finding that it was reasonable to require him to pass the Step 3 exam before continuing, and therefore he was not “otherwise qualified.” The court does not directly address whether his claim that he did not seek accommodations earlier was based on concerns about confidentiality. The general standard was applied that accommodations are only required for “known” disabilities.

The circuit court’s decision was reached eight years after he began his residency, and by then, there had been an investment by both the student and the school of two years in medical school, and two years of residency training. Would there have been a way to address the potential impact of this disorder at the point of admission? Would that have been permissible? If an institution defines the requisite standards at the outset, there would seemingly be a burden on the applicant to determine whether a disability might affect the ability to meet those standards. The technical standards adopted at most medical schools often reference within Cognitive Skills the expectation of engaging problem solving within a timely fashion. Under the category of Behavioral Attributes, Social Skills, and Professional Expectations, the expectation of being able to “effectively handle and manage heavy workloads and to function effectively under stress” is often stated. These are attributes that have been addressed in the context of physician employment. An individual with a previously identified sleep disorder might want to inquire as to accommodations that might be available at the outset of medical school to avoid the investment of time and money if accommodations could not ensure success.

211 See, e.g., *Morgan v. Nova Se. Univ., Inc.*, 2007 WL 2320589 (S.D. Fla. August 10, 2007) (finding that a medical student with epilepsy controlled by medication was not disabled). The student had requested an accommodation of a flexible schedule to allow for doctor appointments, and the court did not reach the issue of whether that was reasonable, and instead determined that he was not disabled. That decision was before the 2008 expanded definition, and today the court would be more likely to focus on whether the accommodation was reasonable and would be likely to find that he was disabled within the ADA).

212 56 Nat’l Disability L. Rep. (LRP) ¶ 104 (7th Cir. 2018) (medical student with sleep disorder was unable to pass exams required to advance; passing exam was legitimate requirement to advance and complete residency program).

b. *Abdullah v. State (Residency).*

Another case raising concerns about sleep issues is *Abdullah v. State*,²¹³ which was also raised in the context of the residency portion of the program. This highlights that conditions such as this may not require accommodations during the first two years of medical school when the focus is primarily on academic classes rather than clinical training. This is somewhat different in that the student did his preliminary medical education in Syria, graduating in 1999. The ADA and section 504 would not have been relevant for his medical school training.

The dismissal from residency programs was based on concerns about his professionalism, and he presented a number of theories challenging that dismissal, none of which were successful. One of the defenses was that his behavior related to sleep deprivation, and he was perceived as disabled because of that. The court rejected that argument and did not allow the disability discrimination claims to go forward.²¹⁴ Based on the other issues discussed in the opinion, it is probable that even if he was covered as disabled, his behavior²¹⁵ would have been found to render him not otherwise qualified.²¹⁶

The district court's grant of summary judgment for the university was affirmed.

3. *Contagious and Infectious Diseases*

Cases involving health care providers with contagious and infectious disease rarely arise in the context of the educational health care program. There are, however, several that have been addressed in the context of posteducation settings.²¹⁷ The cases focus primarily on concerns relating to direct threat to patients, and include

213 771 N.W.2d 246 (N. D. 2009) (upholding dismissal of physician from residency program; dismissal based on professional concerns not because his bouts with sleep deprivation were regarded as a disability).

214 *Id.* at 258.

215 The behavior of concern included a home visit to a patient, and misrepresentations about his employment and academic history.

216 *Abdulla*, 771 N.W.2d at 251.

217 *Bradley v. University of Texas M.D. Anderson Cancer Center*, 3 F.3d 922 (5th Cir. 1993) (HIV positive surgical technician found to pose direct threat to patients, which could not be accommodated in that position); *Estate of Mauro By and Through Mauro v. Borgess Med. Ctr.*, 137 F.3d 398 (6th Cir. 1998) (surgical technician with HIV posed direct threat); *Waddell v. Valley Forge Dental Assocs., Inc.*, 276 F.3d 1275 (11th Cir. 2001) (dental hygienist's HIV status posed significant health risk to patients, which could not be eliminated by reasonable accommodation); *Sternberg v. N.Y. City Health and Hospitals Corp.*, 191 F. Supp. 3d 303 (S.D.N.Y. 2016) (dentist with hepatitis C viral load above guideline levels was qualified to perform essential functions of his work); *Robles v. Texas Tech Univ. Health Scis. Ctr.*, 131 F. Supp. 3d 616 (W.D. Tex. 2015) (legitimate reason to discipline and terminate employee with HIV; employee was a patient specialist and coder; employer's treatment had nothing to do with condition). *See also Tarver v. Okla.*, 2011 WL 3626690 (N.D. Okla. 2011) (nurse requesting light duty as accommodation to stroke; hepatitis C; ability to return to work not clear, could depend on receiving reasonable accommodations); *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 13 A.D. Cas. (BNA) 1711 (5th Cir. 2003) (emergency room physician who had undergone successful treatment for hepatitis C infection failed to establish that she was "regarded as disabled").

HIV positive status as well as Hepatitis C and other conditions.²¹⁸ The technical standards for medical schools do not seem to directly address this kind of issue.

a. Doe v. University of Maryland Medical System Corp. (Residency).

One of the few cases to address this issue involved a student whose HIV positive status resulted from a needle stick when he was a neurosurgery resident during his third year of his residency training (which meant that he had also completed four years of medical school). In *Doe v. University of Maryland Medical System Corp.*,²¹⁹ the infection occurred in 1992, which was early in the understanding and awareness of HIV transmission issues, and was also at a point in time when treatment for HIV was in the early stages. This meant that both the risk of transmission from provider to patient in various settings was clearly known. The outcomes of infection created high concerns about direct threat and the consequences.

When it was known that the resident was HIV positive, an assessment was made by a panel of experts on blood borne pathogens. The panel recommended that he be allowed to continue in the neurosurgery residency but not allowed to carry out procedures that require use of exposed wire. The panel also recommended other practices but did not recommend that he should be removed from the surgical residency. The senior administrators gave these recommendations careful consideration and engaged in further study,²²⁰ and rejected the recommendation. Instead, they suspended him from any surgical residencies but offered him residencies that did not involve surgery. He declined that offered accommodation and brought suit under the ADA and section 504 seeking equitable relief and damages.²²¹

The court's decision recognized the Centers for Disease Control (CDC) position regarding the small risk but noted that the CDC provided that certain surgical procedures were exposure prone, and his continuation in the surgical residency would involve those procedures. This was the basis of the termination of his surgical residency. The court noted that the decision was based on thorough deliberation of reasonable medical judgment of public health officials.

218 The issue of COVID is beyond the scope of this article, but it is an issue for consideration in determining whether an individual seeking an exemption from COVID vaccination, based on various reasons, is nonetheless not otherwise qualified because of the risk to patients and others in a health care setting.

219 50 F.3d 1261 (4th Cir. 1995).

220 This would seem to pass the *Wynne* test, which calls for appropriate personnel to make such a careful assessment. See discussion of *Wynne*, *supra* (V)(B)(2)(b).

221 Notably the court does not dispute that his HIV status is a disability, which was not always the case before the 2008 amendments. The broadened definition makes it extremely unlikely that the coverage would be an issue of dispute today, but there is at least one decision where that was the case. See, e.g., *Alexiadis v. N.Y. Coll. of Health Pros.*, 891 F. Supp. 2d 418 (E.D.N.Y. 2012) (allowing claim to go forward regarding whether HIV positive status was a disability when a college student who was HIV positive was arrested for stealing a bag of hand sanitizer and dismissed from college).

b. *Roggenbach v. Touro College of Osteopathic Medicine (During Enrollment)*.

In the case of *Roggenbach v. Touro College of Osteopathic Medicine*,²²² the court found that a student in the osteopathy program was dismissed because of his conduct violations, not because of his HIV status. Significant to the decision is that the program did not know of his HIV status when it began disciplinary measures for tardiness, missing exams, absences, fabricating emails, and other conduct violations. The student had begun the program in 2008, and the misconduct occurred throughout his enrollment. In the fall of his third year, disciplinary proceedings based on his misconduct leading to his dismissal began. The court deferred to the college regarding academic requirements and upheld the dismissal. The school did not know of his HIV status before the disciplinary action began, and court found that it was the basis of the dismissal. From the first enrollment to court decision was six years.

4. Pregnancy-Related Conditions

While pregnancy itself is not a disability, the 2008 amendments clarify that pregnancy-related conditions might be a disability in some circumstances. While pregnancy-related conditions occur in the context of employment generally, there is little guidance for cases in the health care professional education courses. One of the few decisions is *Khan v. Midwestern University*.²²³ The case involved a student in an osteopathy program who had struggled academically from the outset but who had been given a second chance to complete required coursework. She succeeded on the repeated failed courses but failed new courses during the second year, at which point she was pregnant. After her dismissal based on the second chance failures, she brought suit claiming that her pregnancy-related impairments should have been accommodated.

The appellate court affirmed the lower court's grant of summary judgment for the school, holding that ADA/504 violations had not occurred. The analysis referenced the fact that by the time one of the professors was aware of her condition, she had already failed the courses. She was not otherwise qualified to continue. She was required to make her case to continue after her first set of failures. Her husband's illness was a factor in giving her a second chance. She did not succeed in the semester that followed, failing three courses. At the beginning of the spring 2013 semester, she had become pregnant and requested accommodations for depression and anxiety related to her pregnancy.²²⁴ She received some,²²⁵ but not all

222 7 F. Supp. 3d 338 (S.D.N.Y. 2014).

223 879 F.3d 838 (7th Cir. 2018), *amended on denial of reh'g*, Feb. 26, 2018.

224 It was not addressed, but it is not certain that she would be found to be disabled within the statutory definition, unless these conditions were substantial limitations. *Id.* at 844–45. The court did not need to decide that issue because the case was decided on the basis that she was not otherwise qualified. Also noted in the opinion is the fact that she had a two-hour round-trip journey to school each day, which exacerbated her pregnancy-related conditions, and which caused her to be late for one of the exams. She was not allowed to reschedule that exam and failed it.

225 The school provided some tutoring and some rescheduling.

of the requested accommodations.²²⁶ In its decision, the court noted the deference to academic decision making that is given to educational programs, and accepted the assessment of the school (through its policy related to accumulated course failures) that she was not otherwise qualified. It noted that in its discretion she had been given a second chance, although the school was not required to do so, and that she did not succeed and was therefore no longer otherwise qualified.

She began her coursework in 2010, was finally dismissed in spring 2013 (three years after beginning the program), and the final court decision was 2018, eight years after she began.

5. *Chemical Sensitivities*

A common sensitivity in the health care profession is a latex allergy, which can be significant because of the use of latex gloves. Health care programs can also expose those providing health care services to many other chemicals. There is very little litigation involving educational programs. There are, however, a few decisions in the context of the nursing profession.²²⁷

6. *Other*

In *Wagel v. George Washington University*,²²⁸ the court addressed a claim by a resident in a psychiatric medical school program for failure to provide reasonable accommodations for her kidney cancer. The claim was that when Family and Medical Leave Act leave was requested, it should have put the program on notice that she was requesting ADA accommodations. The appellate court upheld the district court's grant of summary judgment for the university. The decision also addressed the legitimate nondiscriminatory reasons for the adverse actions taken toward this individual based on significant performance concerns.

E. *Learning and Cognitive Disabilities*

The technical standards for most medical schools include requirements that relate to **Communication Skills**. This standard expects effective oral and written communication with all members of a health care team and with patients in order to gather information. The technical standards also include **Intellectual–Conceptual Skills**. These require effective interpretation, assimilation and understanding of complex material in individual, small group, and lecture formats. These requirements expect the ability to synthesize information effectively in person and remotely, and interpretation of casual communications to reach accurate and

226 The school did not provide a quiet room, extended time during exams, or extended time between exams.

227 See, e.g., *Dickerson v. Peake*, 2011 WL 1258138 (M.D. Ga. 2011), *aff'd*, 489 F. App'x 358 (11th Cir. 2012) (holding that the claimant has the burden to identify accommodation and demonstrating that it allows performance of essential functions). The case involved a nurse with multiple chemical sensitivities who could not be accommodated by providing work environment that had rigid limited exposure to certain compounds, odors, and molds.

228 957 F.3d 1364 (D.C. Cir. 2020). The Family and Medical Leave Act, 29 USC 2601-2654.

fact-based conclusions. **Cognitive Skills** require the ability to measure, calculate, analyze, integrate, and synthesize information, and the ability to comprehend three-dimensional relationships and spatial relationships of structures. These are necessary for the problem-solving skill that is expected of physicians. Notably, these skills must be able to be performed in a timely fashion, which introduces the issue of speed, which can be a challenge for individuals with some types of learning disabilities.

The judicial decisions involving learning and cognitive disabilities are similar in certain ways to some of those involving mental health impairments because of the types of skills and qualifications involved. Another similarity is that in many of the cases, the concerns or deficiencies are not apparent at the time of initial enrollment but become apparent once the program has begun. The concerns and deficiencies often become apparent as a consequence of the heavy and challenging academic and clinical programs (which are often time pressured) and/or the stress inherent with a professional program that prepares students to treat and serve patients and to work with other staff members.

First, it is necessary to provide a brief overview of what is included within the learning disability context and how such conditions are covered by the ADA and section 504, both before and after the 2008 amendments. The basic definition of disability has not changed since 1973. It requires a substantial limitation to one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.²²⁹ The student must still be otherwise qualified and able to carry out the essential requirements of the program with or without reasonable accommodation.²³⁰ Before the 2008 amendments, many judicial opinions in numerous higher education settings addressed the issues of major life activities, how to determine if one is substantially limited (by inconsistently deciding about whether this was compared to the general population or another group), and whether mitigating measures (self-compensation) should be considered. The pre-2008 cases often found that a student's learning disability did not meet the definition of a protected disability under the ADA and section 504 due to a narrow interpretation.

The 2008 amendments and related regulatory guidance changed that to some degree.²³¹ The clarification that major life activities included "learning, concentrating, thinking, communicating, and working"²³² may mean that an individual is more likely to meet the definition but does not necessarily mean that the individual is otherwise qualified. Appropriate documentation of the condition is still required, and although the requirements of documentation of the disability have also been revised over time, some individuals with learning disabilities

229 Rehabilitation Act of 1973, Pub. L. No. 93-112, § 702(9), 87 Stat. 355 (codified as amended at 29 U.S.C. § 705(9); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3(2), 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101).

230 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(2), 104 Stat. 327 (codified as amended at 42 U.S.C. § 2(2)).

231 See ROTHSTEIN & IRZYK, *supra* note 100, at § 3:22.

232 42 U.S.C. § 12012(1).

continue to find limited redress under the ADA/504 when there are deficiencies in their performance.

There are approximately fifty reported decisions that involve students with learning disabilities in health care professional programs. Many of these cases involve a combination of learning and other disabilities (sometimes mental health impairments related to anxiety and similar conditions). In some cases, a student might raise both mental health and a learning disability as justification for the conduct. In some situations, the student has been found *not* to have a protected disability.²³³ In other cases, the courts found that the student had not made *known* the disability before the academic failure.²³⁴ In still others, the condition was not allowed to excuse other types of misconduct or lack of professionalism.²³⁵ In still other decisions, the courts have found that the student had not met the academic requirements.²³⁶

233 See, e.g., *Doherty v. Nat'l Bd. of Med. Exam'rs*, 60 Nat'l Disability L. Rep. (LRP) ¶ 62 (5th Cir. 2019) (unpublished) (holding that that claimant's learning disability was not a protected disability under the ADA and that the additional time to take the Step 2 licensing exam need not be provided).

234 See, e.g., *Jin Choi v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 633 F. App'x. 214 (5th Cir. 2015) (holding that dental student with ADD who was dismissed after failures in clinical courses did not provide timely notice and request for accommodation, and the university was not in a position where it should have known of the condition); *Shaikh v. Lincoln Mem'l Univ.*, 46 F. Supp. 3d 775 (E.D. Tenn. 2014), *aff'd*, 608 F. App'x 349 (6th Cir. 2015) (holding that osteopathic medical school student with ADD and dyslexia had been provided with numerous accommodations and had been dismissed for academic deficiencies; request for deceleration of program occurred after dismissal); *Buescher v. Baldwin Wallace Univ.*, 86 F. Supp. 3d 789 (N.D. Ohio 2015) (holding that a nursing program student had not requested accommodations for a learning disability); *Shamonsky v. Saint Luke's Sch. of Nursing*, 2008 WL 724615 (E.D. Pa. March 17, 2008) (holding that the school was not aware of nursing student's learning disability which was diagnosed after dismissal for poor academic performance); *Leacock v. Temple University Sch. of Medicine*, 1998 WL 1119866 (E.D. Pa. Nov. 25, 1998) (holding that a medical student did not make known need for accommodations during the first year or before dismissal).

235 *J. Endres v. Ne. Ohio Med. Univ.*, 2019 WL 4125263 (6th Cir. May 2, 2019) (providing preliminary rulings in case involving medical student with ADHD and his dismissal and whether it was based on discipline or disability); *Pahlavan v. Drexel Univ. Coll. of Med.*, 2020 WL 674475 (E.D. Pa. Feb. 10, 2020) (student with ADHD dismissed because of lack of success in clinical rotations; had been given accommodations during first two academic years and more during clinical rotations); *Chenari v. George Washington Univ.*, 847 F.3d 740 (D.C. Cir. 2017) (affirming summary judgment to medical school that dismissed student with ADHD for honor code violation, taking additional time for exam which had not been requested); *Driscoll v. Bryant Univ.*, 393 F. Supp. 3d 153 (D.R.I. 2019) (finding no violation of ADA/504 where student with ADHD in physician's assistant program that required intensively rigorous exam schedule was "held back" after failing to meet grade point average and required to retake courses; recognizing judicial deference to educational institutions on matters of academic judgment; finding that student had been provided with reasonable accommodations and that some requests were communicated after academic deficiencies); *Shah v. Univ. of Tex. Sw. Med. Sch.*, 54 F. Supp. 3d 681 (N.D. Tex. 2014) (granting university's motion to dismiss claim by medical student with ADHD, finding that dismissal was based on lack of professionalism, not on the basis of a disability); *Schwarz v. Loyola Univ. Med. Ctr.*, 2012 WL 2115478 (N.D. Ill. June 11, 2012) (granting summary judgment against physician with ADD who was not otherwise qualified to perform essential functions of surgical resident; inappropriate and unprofessional behavior was a concern).

236 *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998) (finding that a medical student with test anxiety in math and chemistry did not meet requirements and that a passing grade not a reasonable accommodation). It should be noted that test anxiety is generally not found to be a disability. See also *Johnson v. Washington Cnty. Career Ctr.*, 982 F. Supp. 2d 779 (S.D.

Judicial disputes involving learning disabilities generally do not arise in the context of initial admission, but rather in performance after admission. Notably, while accommodations for learning disabilities often involve additional time for tests taken in academic courses and in the step exams during medical school, the clinical rotations after the first two years may be the first time the accommodation and qualification issues become significant.²³⁷

Ohio 2013) (allowing case to proceed when a student in surgical technology training with dyslexic learning disability who requested numerous accommodations at the outset, disputed that reasonable accommodations were provided, and that resulted in not meeting the performance requirement and recognizing that the program's requirements were related to accreditation requirements; student began in 2008); *Ellis v. Morehouse Sch. of Med.*, 925 F. Supp. 1529, 1535 (N.D. Ga. 1996) (upholding dismissal of medical school student who had been granted decelerated program and extra time on exams after he struggled from outset and provided documentation of his reading disabilities; began in 1988; unprofessional behavior also an issue; during Medicine clerkship in third year he had behavior deficiencies resulting in low grades; during surgery rotation his performance which included poor judgment and inability to process and integrate knowledge raised concerns about patient safety; concerns about ability to achieve "diagnostic formulations in a timely way" and that there was no accommodation that would enable him to carry out the essential functions; lengthy opinion analyzing fundamental requirements and that no accommodation would be available to offset inability to process complex material). The decision in *Singh v. George Washington University School of Medicine and Health Sciences*, 597 F. Supp. 2d 89 (D.D.C. 2009), *aff'd*, 667 F.3d 1 (D.C. Cir. 2011) is particularly useful because it addresses several issues. It holds that test taking is not a major life activity, cautions that the institution should consider the documentation of a disability before making a final decision to dismiss, but also notes that the academic difficulties resulted from factors other than the impairment such as undue pressure, inability to concentrate, and excessive involvement in extracurricular activities. She began medical school in 2003. The decisions recount her academic strengths, but difficulties with multiple choice tests, and failures to follow up with counseling center and to reduce activities. She was in the decelerated program. The relevant major life activity was learning, and she had a strong record of academic success, including in timed settings and reading. The court noted that the dismissal occurred after receiving documentation of a disability before the dismissal but before considering it. The court stated the following: "A well-regarded institution of higher education, such as George Washington University, should be committed to the success of all of its students, and surely that entails a sincere evaluation of their abilities and needs before issuing a decision to dismiss them." 597 F. Supp. 2d at 98.

237 The decision in *Pahlavan v. Drexel University College of Medicine*, 2020 WL 674475 (E.D. Pa. Feb. 10, 2020) is instructive. It also provides a window into the amount of time it can take to resolve these cases. The student began medical school in 2008, and the federal district court grant of summary judgment for the university occurred twelve years later. In the interim, the student was given accommodations during both his academic first two years and during his clinical rotations, given a leave of absence, and opportunity for readmission. The decision highlights a situation where concerns about performance were apparent from the beginning. After his first semester, he requested and received additional exam time based on a psychiatric assessment and recommendation regarding his ADHD. The psychiatrist who evaluated him for these accommodations also provided treatment and diagnosed him as having general anxiety disorder. Academic performance deficiencies were apparent as early as the end of his first year, although he had received exam accommodations. Although offered, the student declined academic support services, personal support services, and the option of having two years to complete the second year of the academic program. He did, however, successfully pass the required exams that he had previously failed. He did pass (with extended time for preparation) the Step 1 exam required before entering clinical rotations. He demonstrated deficiencies in some of the clinical rotations, including failures on Shelf exams and on clinical competence. He was given support at the end of the first year of clinical rotation. During his second year of clinical rotations, he was referred for neuropsychological evaluation (and reviewed during the course of the year), and by February of 2012 his performance was reviewed by the Clinical Promotions Committee, which dismissed him. His appeal of the dismissal resulted in a conditional grant to continue. The conditions included a leave of absence, which was to include intensive counseling and requiring him to repeat clinical rotations. In preparation for his return after the year's leave, he was given a fitness for duty

The key case, of course, related to learning disabilities and health care professional programs is the decision of *Wynne v. Tufts University School of Medicine*.²³⁸ This is discussed in more detail earlier in this article.²³⁹ It provides the framework of the process by which a medical school (or other health care program) should assess whether an accommodation is an undue burden or fundamental alteration. A concern that the *Wynne* decision (and many of the others) highlights is that while some learning disabilities can be accommodated during the first two years, the disability may not be able to be accommodated thereafter. This raises the question about what notice should be provided to the student with a learning disability at the point of initial enrollment that the disability may ultimately result in the student not being able to be accommodated.

One way to address this may be conditional admission programs. This was an issue in *Betts v. Rector and Visitors of University of Virginia*.²⁴⁰ The 2000 lower court decision describes a program of conditional admissions for students who are economically disadvantaged or from minority backgrounds. Admitted in 1994, the student did not meet the conditions to continue but was given another year and additional support to meet the requirements. In the interim, he was diagnosed as having a learning disability and given additional time on some exams, which resulted in strong grades, but his grades in other courses where he was not given additional time apparently pulled his semester GPA to a level where his cumulative performance still did not meet the required standards. His dismissal after two years of effort resulted in his lawsuit seeking damages and injunctive relief. Six years transpired between initial admission and the court's granting of summary judgment to the institution. It is noteworthy that the time frame of the court's decision that he did not have a learning disability was before the 2008 ADA amendments providing clarification, and other federal guidance on documentation had been issued. While the court found that the student's learning disability was not a covered disability under the ADA, the school had provided accommodations of additional time once documentation had been provided regarding his condition.

evaluation, which was the basis for the faculty member who reviewed this to express concerns about his fitness, but she cleared him to return. She raised concerns but thought he should be given one final chance. The readmission was conditioned on several very specific accommodations, some additional to his previous ones. These included mentoring, clinical placements in the Philadelphia area to allow for ongoing psychological treatment, and academic accommodations such as additional time and accessible materials when he repeated his rotations. Upon repeating the rotations, thought organization and integrating information continued to be problematic. Although there was some improvement, he did not pass some of the mandatory coursework, which was a requirement to continue. In his appeal of grades, although faculty evaluators declined to change their evaluations and noted that they had not considered disabilities or accommodations, they were not required or expected to do so because he had not raised the issue in his letters to them. The dean's appeal review upheld the recommendations of the faculty evaluators and also did not address directly disability issues, although noting that the student had been given many opportunities for improvement.

238 932 F.2d 19497 (1st Cir. 1991).

239 See *supra* V(B)(2)(b).

240 191 F.3d 447 (4th Cir. 1999) (unpublished) (holding that a denial of admission to a student with a learning disability who did not achieve the required GPA in special admission program did not violate ADA or section 504). The court on remand considered the issue of whether the student was even disabled under the statute. *Betts v. Rector and Visitors of Univ. of Va.* 113 F. Supp. 2d 970 (W.D. Va. 2000).

Lessons can be drawn from this conditional admissions program, incorporating the changed analysis of definitional coverage after the 2008 amendments. While conditional admissions programs should be encouraged, a more proactive approach today would be to both invite students upon admission to identify learning disabilities for accommodation consideration and to assess whether such accommodations are likely to be allowed on an ongoing basis by the step exams throughout the medical school process.

Lessons might also be drawn from the cases involving decelerated programs that are available in some medical schools. Several of the decisions include provision of such opportunities where a medical school allows a student to take more than the usual two years for the academic program. Often these cases involve learning disabilities or mental impairments. While the accommodations of additional time for exams or reduced course loads may work in an academic setting, in many of these cases, the institutions find difficulties (and the courts recognize the legitimacy of these challenges) in allowing additional time in medical settings.²⁴¹

A case that highlights the high stakes regarding accommodations in these settings is *Soignier v. American Board of Plastic Surgery*.²⁴² This case involves an individual claiming that the board examining entity had not provided reasonable accommodations. The timing of this case highlights the challenges. This individual had apparently completed medical school, his clinical rotations, and the step exams without accommodations for his attention deficit disorder (ADD), dyslexia, and learning disabilities. When he failed his oral certification exam for plastic surgery (having passed the written exam),²⁴³ however, he could not take it another time, and he appealed for failure to accommodate. He had been provided some, but not all, of the accommodations he requested. The board licensing was not essential to practice, but the court noted the following:

[His] diligence in seeking professional certification is understandable; besides the professional prestige associated with board certification, many health maintenance and preferred provider associations refuse to contract with non-board certified plastic surgeons. Over half of [his] potential patients are associated with either an HMO or a PPO.²⁴⁴

So, while this individual can practice medicine generally and even plastic surgery, he is limited by what he can do as a result of the licensing exam. What is not apparent from the opinion is whether he had sought accommodations at any

241 See, e.g., *Soignier v. Am. Bd. of Plastic Surgery*, 92 F.3d 547 (7th Cir. 1996) (dismissing on a statute of limitations basis a case by a plastic surgeon claiming failure to accommodate his learning disabilities on his licensing board exam); *Singh v. George Washington Univ. Sch. of Med. and Health Scis.*, 667 F.3d 1 (D.C. Cir. 2011).

242 92 F.3d 547 (7th Cir. 1996). See also *Ramsay v. Nat'l Bd. of Med. Exam'rs*, 968 F.3d 251 (3d Cir. 2020) (granting preliminary injunction when extra time for national board exam was requested for dyslexia and ADHD).

243 He first took the exam in 1982, and his fifth attempt was in 1992. After five failures, he would be required to take an additional year of training before reapplying to take the oral exam.

244 *Id.* at 549.

earlier point in his medical education. It is notable that this was an oral exam, and it might be difficult to assess at an earlier point in his medical training whether this is something that might present challenges to him.

There have been several decisions involving the limited number of times one can take various step exams or licensing exams.²⁴⁵ Some cases involve requests for changes in the clinical rotations or additional time between clinical rotations in order to pass the step exams.²⁴⁶

Two major cases arose in the same jurisdiction, both requiring several years to resolve and both involving numerous “second chances” after deficient performance. These cases both involved the same medical school system, and both involved students with learning disabilities.

In *Zukle v. Regents of University of California*,²⁴⁷ the student began medical school at UC Davis in fall 1991, her difficulties began very early. In spring 1992, she was placed on academic probation, but she could have been dismissed. In fall 1992, she was referred for a learning disability evaluation by university, resulting in the recommendation of various accommodations for her reading difficulties (comprehension and speed concerns). These were provided beginning fall 1993. She had gone two years without accommodations. Noteworthy is the difference in performance when testing was timed (2% reading comprehension) and untimed (83%). This disparity should result in an examination of the importance of speed in reading in such a program. In 1994, the student took the Step 1 in 1994 and failed. She was in the midst of her OB/Gyn clerkship when she learned of the failure. As a result, she took a review course and requested that she be able to retake her OB/Gyn clerkship later. This request was initially granted, but then denied. She passed Step 1 on the second try, but received unsatisfactory grades on the OB/Gyn clerkship and later the Medicine rotation. This became a cycle of having to study for exams and retake past failed exams at the same time as she was taking new rotations. The process for obtaining accommodations during medical school was not clear. She was dismissed in spring 1995. She appealed through an internal process, but lost at every level. In January 1996 (after having been in medical school for four years), she brought suit seeking damages and reinstatement.

245 In *Lipton v. New York University College of Dentistry*, 865 F. Supp. 2d 403 (S.D.N.Y. 2012), *aff'd*, 507 F. App'x 10 (2d Cir. 2013) (unpublished) the court upheld the the dental school in its denial of permission to take national exam an unlimited number of times without paying rematriculation fee or being allowed to take exam more than four times. The student with a reading disorder had been granted additional time on exams. The court thought the school's refusal to create an exception to graduation requirements was entitled to great deference. See also *Awodiya v. Ross Univ. Sch. of Med.*, 391 F. Supp. 3d 1098 (S.D. Fla. 2019) (granting motion to dismiss claim that medical school in Dominica had not provided testing accommodations; Title III and Rehabilitation Act did not apply to extraterritorial programs). This case involved a student who had failed the NCBE Basic Science Comp test five times. The school required that it be passed by the end of the fifth semester. He was not granted his request for additional time on the exam. Because the case is dismissed based on the nonapplication of the ADA and section 504 to this school, the court did not discuss the accommodation request issue in detail.

246 Compare *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999) with *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999), *as amended*, Nov. 19, 1999.

247 166 F.3d 1041.

The judicial review of the decision noted that “speed” of reaction time is “essential.”²⁴⁸ The court adopted an approach of deference to academic decision making.²⁴⁹ The court discussed her request to rearrange her clerkships (noting that she had been given extra time on exams, and included commentary that the clerkship experience is intended to simulate practice including long hours. The court noted that she had failed clinical portion of exam, although she had passed the exam in Medicine. She had been allowed decelerated schedule, but not been allowed to take eight weeks off between clerkships. Ultimately, however, the court found that even if she had been granted the requested clerkship rescheduling, she still had significant academic deficiencies. She was denied the remedies she sought.

This decision can be compared with *Wong v. Regents of University of California*,²⁵⁰ in which the court reversed and remanded the lower court grant of summary judgment to the medical school. The lower court had upheld the dismissal from medical school of an individual with a learning disability. In this case the student began medical school in fall 1989 with an excellent undergraduate record. He performed acceptably in his first two years, and passed the Step 1 exam. During his third year, he learned he had failed his surgery clerkship. He was placed on academic probation while continuing his medicine clerkship. He was granted support, but took time off for his father’s illness. There were issues of competent performance in some areas, with mixed evaluations about his knowledge, but concerns about his difficulty with putting things together and effective communication of thoughts, organizational skills, and setting priorities. He was subsequently given several years of accommodation for personal issues and academics, but a learning disability was not identified until his third or fourth year when he sought evaluation from the Disability Resource Center (DRC). This occurred in 1994 with the DRC finding that he had receptive deficiencies and recommended that he receive various accommodations. The medical school administrator recommended that he would need extra time and suggested extra time to read between clerkships and recommended that a school resource team be set up, but that was never done. By December 1997, he still requested additional reading time, but he was dismissed based on academic performance deficiencies²⁵¹ This occurred eight years after he had started medical school.

The court’s decision in the case in which the student challenged the 1997 dismissal discussed deference to academic decision making. The court noted that the detailed *Wynne* test had not been met in this case. The decision to dismiss was based primarily on recommendations by the Associate Dean of Student Affairs, with the court noting a “conspicuous failure to carry out the obligation to ‘conscientiously’ ... explore possible accommodations.” The Associate Dean had indicated that additional time

248 *Id.* at 1044.

249 *Id.* at 1048.

250 192 F.3d 807 (9th Cir. 1999) and later decision 379 F.3d 1097 (9th Cir. 2004). For commentary on this decision, see W. Thomas Smith & William L. Allen, *Implications of the 2008 Amendments to the Americans with Disabilities Act for Medical Education*, 10 ACAD. MED. 1097 (2011); DYLAN GALLAGHER, *Wong v. University of California: The ADA, Learning Disabled Students and the Spirit of Icarus*, 16 GEO. MASON U. C.R. L.J. 153 (2005–06).

251 The decision includes a long detailed discussion of the various rotations.

for reading between rotations might be reasonable. The university position was that this altered the curriculum.

The court distinguishes *Zukle* (where the court deferred to the university's decision about accommodations) because the circumstances were different. The court noted the need for individualized assessment in these cases. The issue in *Wong* seems to be about processing under stress, rather than a speed issue, as was the situation in *Zukle*. The court noted a pattern of strong performance when accommodations had been granted but not when they had not. Thus, the university's actions did not pass the *Wynne* test. While the court noted that a jury *might* have found that extra time was fundamental alteration, the university had failed to demonstrate the individualized assessment.

After remand, the case again reached the Ninth Circuit,²⁵² which found that because he could function with accommodations, he was not disabled within the ADA, so he was not entitled to accommodations. The court focused on the finding that he was not substantially limited in the major life activity of learning, applying the Supreme Court reasoning from the 1999 cases,²⁵³ which was addressed in the 2008 ADA amendments. If this fact setting arose today, although the student would probably be protected as "disabled" within the statute, the court might well have still determined that even with accommodations, he was not otherwise qualified because of the essential nature of reading at a rapid rate in a medical professional setting.²⁵⁴

The process by which the accommodation requests were handled, however, highlights the importance of having transparent, manageable, and procedurally defensible policies and procedures in place from the outset of a medical student's admission and throughout the education of that student.

Other decisions involve whether accommodations on the medical board exams themselves should have been granted.²⁵⁵ These decisions highlight the

252 379 F.3d 1099 (9th Cir. 2004).

253 See *supra* cases cited in note 114. In particular, one case is relevant. *Bartlett v. N.Y. State Bd. of L. Exam'rs*, 527 U.S. 1031 (1999). The Supreme Court remanded a case involving whether an individual with a learning disability seeking accommodations on the New York bar examination was covered under the ADA because of her reading disability. The analysis that the lower court made of that issue is similar in many respects to the *Wong* court's analysis, but the 2008 amendments made that analysis no longer the test to be applied.

254 For commentary on this decision, see Smith & Allen, *supra* note 249.; GALLAGHER, *supra* note 249.

255 One of the earliest decisions in the context of medical education was decided before the 2008 ADA amendments, which broadened the definition of disability. It is probable, however, that in this case, the decision would have been the same. In *Price v. National Board of Medical Examiners*, 966 F. Supp. 419 (S.D. W. Va. 1997) the court found that the student was not disabled within the ADA and the denial of accommodations for Step One exams was not a violation of the ADA. It is noteworthy that the student had received accommodations for ADHD on the MCAT exam. The court looked at the comparison to the average person in the population, not the average medical student. The application of the amended ADA definition to an individual seeking accommodations on board exams is found several years later in the decision in *Shaywitz v. American Board of Psychiatry and Neurology*, 848 F. Supp. 2d 460 (S.D.N.Y. 2012). The issue of whether he was disabled was not the primary focus of the opinion. It focused more on the expectation of providing notice and documentation in order to receive accommodations. The decision is one of the few that addresses accommodations

interrelationship between medical school and the various step exams and licensing exams themselves.²⁵⁶

F. Mental Health Conditions

The cases related to mental health are the most challenging in terms of complexity and procedures for medical school professional education. It is not surprising, therefore, that these are often the cases that take the longest to resolve. The previous section on Learning and Cognitive Disabilities, Section VI(E), also involves challenging issues, and it is not uncommon that these issues arise in combination with mental health concerns.

on a specialized board exam. The facts are somewhat different from many of the other decisions in that the student was highly successful in both academic and clinical settings, and had receiving accommodations for his dyslexia throughout most of elementary school, college, standardized admission testing, and apparently in medical school (which he began in 1994 and completed in 1998). It was not until he tried to obtain the psychiatry certification from the American Board of Psychiatry and Neurology that he faced a barrier in receiving requested accommodations for the assessments. These Board assessments include three different settings—a written exam and two oral exams (one an essay or audiovisual exam and the second a live-patient exam to assess clinical skills. There were stated time limitations and sequencing requirements for these assessments, and these had changed in 2007/2008, applicable depending on when individuals had completed their residency. The Board's motion for summary judgment was granted because the individual had not provided the required documentation in a timely manner. The individual seemed to argue that he should be granted the certification in spite of not having a passing score but because of his past record of performance overall. The claims seem to be that the factors required by the documentation were "unreliable" and "subjective." *Id.* at 465. The claim does not address why; although documentation had been provided for earlier accommodation requests (which had been granted), it was not provided for this last stage. The holding basically finds that because the individual had not made known the need for reasonable accommodations during the clearly described process, there was no ADA discrimination. In this case, the fact that he had made known the disability and provided the documentation at earlier stages, made it difficult to justify why he had ignored the expectation and requirements for such notice and documentation at the later stage. The decision indirectly highlights that different types of exams might require different types of accommodations. The change in the requirement eliminated the Part II exam for students completing their residency after a certain point in time but retained it for those who completed it before (which was this applicant). The result is somewhat odd because it seems to hold this individual to a standard that is no longer in effect and applies the requirements to demonstrate success in meeting that standard to the procedures in place at that time.

256 The decision in *Kotz v. Florida*, 33 F. Supp. 2d 1019 (M.D. Fla. 1998) is interesting in many respects. The court declined to decide the merits of the case, applying procedural analysis for federal courts deciding such matters. It is one of the few decisions to not address the merits where similar facts were involved. The case involved an individual who had received accommodations for ADD and dyslexia at various points during her medical education based on the documentation she had provided. It was only at the Step Three exam point (given at the end of a year of residency), when she was denied requested accommodations unless she paid for and submitted additional documentation. Although she had not requested accommodations for the Step One exam and during her four years of medical education exams, she did not request accommodations for Step Two. She was allowed the accommodations without the requested documentation, but the license was withheld pending her submission of the documentation. The decision is useful in its description of the stages of medical education and in its comparison of medical education and licensure to legal education and bar admission. She began medical school in 1992, and the only concerns about her fitness to be licensed occurred at the Step Three phase when the NCBE also asked her to provide information about how with her condition she was fit to practice the entire scope of medical practice and would not be a risk to patients. *Id.* at 1021. It highlights the importance of determining at the outset of medical education whether and how issues of fitness and accommodation will be addressed at various stages of education and licensure.

The technical standards that most medical schools apply refer to qualifications that relate to mental health. In the section on **Communications Skills**, there is often reference to capacity to speak, to hear, and to observe patients in order to elicit information, to describe changes in mood activity and posture, and observe nonverbal communications. A candidate must be able to communicate effectively and sensitively with patients. Communication includes not only speech but reading and writing. The candidate must be able to communicate effectively and efficiently in oral and written form with all members of the health care team.²⁵⁷ Within **Behavioral and Social Attributes** are additional somewhat subjective qualities. These include “good judgment, the prompt completion of all responsibilities attendant to the diagnosis and care of patients, ... the ability to handle and manage heavy workloads and to function effectively under stress.”²⁵⁸

Mental health conditions include a range of conditions from depression (mild to severe), bipolar disorder, anxiety, compulsive behavior impairments, posttraumatic stress disorder, and other stress-related syndromes. In some cases, there are coexisting impairments such as learning disabilities, autism/Aspergers spectrum conditions, ADHD, and ADD.²⁵⁹ Unlike some of the other impairments discussed in this article, it is not unusual for individuals not to realize that they have a mental impairment, and as a result, they do not request accommodations before there has been a performance or conduct deficiency.²⁶⁰ The impact of mental health conditions can have a number of negative effects on medical education, particularly the clinical aspects of the program. It can affect attendance, attentiveness, interaction with patients, concentration, honesty, and judgment.

There are a number of judicial decisions that address cases involving mental health impairments in this context, and many of these cases take several years to resolve and involve complex and challenging fact situations. Decisions from employment situations can provide valuable reference regarding what it means

257 <https://meded.hms.harvard.edu/admissions-technical-standards> (last visited December 29, 2021).

258 *Id.*

259 The impact of learning disabilities and related syndromes is discussed more fully in the previous section VI(E). *See also* Herzog v. Loyola Colle. in Md., Inc., 2009 WL 3271246 (D. Md. Oct. 9, 2009) (clinical psychology student with ADHD had good grades, but was dismissed due to behavior issues during a mandatory internship).

260 Research indicates that the onset of bipolar disorder may often occur in young adulthood (around age twenty-five), which is often the age during which medical students and residents are in the educational program. Philipp S. Ritter et al., *Disturbed Sleep as Risk Factor for the Subsequent Onset of Bipolar Disorder—Data from a 10-Year Prospective-Longitudinal Study among Adolescents and Young Adults*, 68 J. PSYCH. RSCH. 76 (2015), <https://www.sciencedirect.com/science/article/abs/pii/S0022395615001764> (re: disturbed sleep as a triggering factor). In addition, there is evidence that sleep deprivation may be a triggering factor, and the stress of clinical rotations in medical educational programs may well be related to this. *Id.*

to be otherwise qualified for medical professions.²⁶¹ Important to student, employment, and licensing settings is that qualification is not based on diagnosis and treatment, but rather on behavior and conduct, although a diagnostic evaluation might be appropriate for predicting future misconduct or threat.

261 See, e.g., *Stevens v. Rite Aid Corp.*, 851 F.3d 224 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 359 (2017) (employer may change job description to add new essential function; pharmacist with needle phobia no longer qualified when new job description required pharmacists to provide immunizations); *Guice-Mills v. Derwinski*, 967 F.2d 794 (2d Cir. 1992) (nurse with depression that interfered with ability to arrive at work on time); *Rivera v. Smith*, 2009 WL 124968 (S.D.N.Y. Jan. 20 2009), *aff'd*, 375 F. App'x 117 (2d Cir. 2010), *petition for cert. filed* Jan. 18, 2011 (no violation of Title I for employer to require medical testing regarding fitness for duty where physician had continued to contact nurse after a romantic relationship and she complained to hospital about harassment and stalking; safety of employees and patients basis for testing; physician not discriminated against on basis of perceived mental illness or disability); *Harris v. Reston Hosp. Ctr., LLC*, 2012 WL 1080990 (E.D. Va. March 26, 2012), *aff'd*, 523 F. App'x 938 (4th Cir. 2013) (registered nurse who attempted suicide not otherwise qualified); *Lewin v. Med. Coll. of Hampton Rds.*, 910 F. Supp. 1161 (E.D. Va. 1996), *aff'd*, 131 F.3d 135 (4th Cir. 1997) (physician with epilepsy and emotional disorder had license revoked because of professional misconduct); *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402 (5th Cir. 1983) (psychiatric worker with suicidal tendencies presented risk to other patients if she committed suicide); *Kroll v. White Lake Ambulance Auth.*, 27 A.D. Cas. (BNA) 1720, 2013 WL 2253757 (W.D. Mich. May 22, 2013), *rev'd and remanded*, 763 F.3d 619 (6th Cir. 2014); *Jakubowski v. Christ Hosp.*, 2009 WL 2407766 (S.D. Ohio Aug. 3, 2009), *aff'd*, 627 F.3d 195 (6th Cir. 2010) (medical resident with Aspergers was direct threat to patient care); *Alexander v. Margolis*, 98 F.3d 1341 (6th Cir. 1996) (physician whose license was revoked claimed ADA violation for reinstatement of license, claiming psychological disability was reason for misconduct of distribution controlled substances); *Bodenstab v. Cnty. of Cook*, 539 F. Supp. 2d 1009 (N.D. Ill. 2008), *aff'd*, 569 F.3d 651 (7th Cir. 2009) (hospital's discharge of anesthesiologist based on supported concerns about direct threat not a violation of ADA; individual did not have a disability within the definition); *Goomar By and Through Goomar v. Centennial Life Ins. Co.*, 76 F.3d 1059 (9th Cir. 1996) (claim that psychological disability caused behavior of making sexual advances and molesting a woman during an exam); *Guttman v. Khalsa*, 669 F.3d 1101 (10th Cir. 2012) (state medical licensing board immune from Title II claims in case involving license revocation; physician had history of depression and posttraumatic stress disorder); *Melville v. Third Way Ctr., Inc.* 59 Nat'l Disability L. Rep. (LRP) ¶ 139 (D. Colo. 2019) (therapist with history of mental illness and suicidal ideation working at center for at-risk young people, terminated not because she requested Family and Medical Leave Act (FMLA) leave, but because work was terminated for other reasons); *Needham v. McDonald*, 33 A.D. Cas. (BNA) 1318, 2017 WL 5171197 (N.D. Ill. Nov. 8, 2017) (nurse with depression expressed suicidal intentions; triable issues on whether she was otherwise qualified); *Rifai v. CMS Med. Care Corp.*, 2017 WL 4179748 (E.D. Pa. Sept. 21, 2017) (doctor's Title I ADA claim that termination was based on perception of disability; court granted employer summary judgment; condition was transitory and minor; termination based on code of conduct regarding threatened workplace violence; no evidence that perceived mental impairment lasted more than six months); *Antoon v. Woman's Hosp. Found.*, 2012 WL 1094715 (M.D. La. March 30, 2012) (employee a direct threat; ultrasound technologist); *Holland v. Shinseki*, 2012 WL 162333 (N.D. Tex. 2012) (nurse with depression and acute stress disorder not entitled to job reassignment to position of her choice); *Kailikole v. Palomar Cmty. Coll. Dist.*, 384 F. Supp. 3d 1185 (S.D. Cal. 2019) (denying dismissal of claim by employee with anxiety condition who claimed adverse employment actions were based on her disability); *Kenney v. Peake*, 812 F. Supp. 2d 34 (D. Mass. 2011) (inability to work not related to nurse's severe anxiety and depression; lost nursing license due to incarceration); *Hetz v. Aurora Med. Ctr of Manitowoc Cnty.*, 2007 WL 1753428 (E.D. Wis. June 18, 2007) (Title III applies to hospital privileges; claim by physician with bipolar disorder and sleep apnea); *Kirbens v. Wyo. State Bd. of Med.*, 992 P.2d 1056 (Wyo. 1999) (revocation of license of physician with bipolar disorder not ADA violation; individual posed safety risk; had performed unnecessary or inappropriate surgeries).

See also *Rivero v. Bd. of Regents* (10th Cir. 2020) (affirming grant of summary judgment to hospital in case involving psychiatric evaluations of surgeon, which was soon withdrawn without any change in the present terms of employment, did not create a job environment that a reasonable person would consider intolerable and could not be the basis of a constructive discharge).

1. Admissions to Medical School Cases

It is rare that a situation would occur where a student is specifically rejected for admission based on mental health status.²⁶² After the Virginia Tech shootings and the aftermath, it is understandable that higher education institutions are concerned about mental health of individuals within the community. Such a concern is particularly understandable in the context of a health care professional program, where good mental health may be critical to competency. During 2019 some institutions adopted admissions procedures that gave a red flag to give closer scrutiny whenever an applicant self-identified, through a personal statement or other means, that there might be a reason for concern. Because that practice was so controversial, it seems to have been discontinued.²⁶³

The admission process is a key point in time for identifying the need for accommodations for a mental health impairment that might relate to whether that the individual is otherwise qualified or may require reasonable accommodations or modification to the program. It is clear that it is impermissible to ask in an admissions application about disabilities, including mental health disabilities. Programs may, however, make appropriate disability-related inquiries *after* the student has been accepted for admission.

While the practice of advising applicants of the technical standards might result in an applicant volunteering information related to a mental health concern, it is more likely that an admitted student might raise concerns after admission and before beginning the coursework. Admitted students are generally required to sign a statement that they can meet the technical standards. For a range of reasons, however, an individual may be in denial or may not be self-aware (or may even not yet have the trigger that brings on a mental illness), and the individual would sign the statement that they are able to meet the stated technical standards.

One of the few cases involving the disqualification of an admitted student based on mental health arose in the context of the practice of requiring admitted medical students to undergo physical examinations. That was the general practice before section 504 and the ADA, but today medical schools have changed that practice to the current practice of requiring signing off on the technical standards after admission. In *Doe v. N.Y. University*,²⁶⁴ a student admitted to medical school was identified as having concerning behavior as a result of the postadmission physical exam. The decision recounts the fact that Jane Doe had represented

262 The initial criticism of one institution for its process of special review of applicants who self-identified with mental health concerns may have signaled that this is not a wise practice, however well intentioned. See, e.g., Scott Jaschik, *Red Flags for Applicants with Mental Health Issues*, INSIDE HIGHER EDUC (Apr. 29, 2019), <https://www.insidehighered.com/admissions/article/2019/04/29/new-college-florida-criticized-over-its-approach-applicants-mental>. While not tested in courts, there may be concerns about the legality of such practices. *College Found Guilty of Admissions Discrimination in Mental Health*, NET ASSETS (Aug. 28, 2019, 11:15 AM), <https://www.netassets.org/blogs/net-assets/2019/08/28/mental-health-discrimination-ruling>.

263 While that is an extreme example of an inappropriate process that might run afoul of ADA section 504 if tested in court, there are a few cases in which the existence of a mental health concern occurred at a very early stage of a medical school admission process.

264 666 F.3d 761 (2d Cir. 1981).

on her application that she had no “emotional problems.”²⁶⁵ It is questionable whether such a question would be permissible today, but she originally enrolled in medical school in fall 1975, at which time the regulations pursuant to the 1973 Rehabilitation Act (section 504) had not been promulgated. During the fall semester, her mandatory physical exam²⁶⁶ and subsequent acquisition of psychiatric history resulted in her agreement to withdraw,²⁶⁷ with no guarantee of reinstatement, but with the understanding that she might request it. While there may have been improvement in her psychiatric condition, when she applied for reinstatement, the request was not granted. The decision was based on the consideration of her offered evidence of improvement and the judgment of other faculty members.

During the attempt to resolve the dispute, the parties agreed to an examination of the facts by a clinical psychiatry faculty member, who determined that while there were some positive signs, medical school requires “successful interaction with people”²⁶⁸ and she recommended that Jane Doe not be readmitted. This predictor of success was challenged through litigation (seeking injunctive relief that was not granted) and through the Office for Civil Rights complaint proceedings that were not resolved quickly. During the pendency of these pursuits, she was employed at the Department of Health Education and Welfare (now Department of Education and Department of Health and Human Services) and received strong, positive evaluations, and used these to again seek reinstatement, which was again declined.²⁶⁹ When she agreed to an examination by the district court, the findings indicated that “she remained at high risk of personality disorganization if exposed to situations of stress such as would occur on return to medical school.”²⁷⁰ Based on that opinion and other information, the school denied her reinstatement. The district court granted her a preliminary injunction for reinstatement, finding that the evidence was that Jane Doe was likely to prevail on the merits and that she did not present a sufficient danger. The judge indicated that any destructive acts would likely be toward other students or authority figures but not to other patients, although conceding that she might be a danger to patients.²⁷¹

On appeal, the court reversed the order and noted the deference to be given to the program in this case. The court validated the interest of the educational program to take into account “ability to function as a student and *doctor*, to get along with other persons, and to withstand the stress of the kind likely to be encountered in medical school and *practice*.”²⁷² Noteworthy is the inclusion of

265 *Id.* at 765. Jane Doe was a gifted student academically but had a substantial record of serious psychiatric and mental disorders, which manifested as both self-destructive acts and attacks on others.

266 The physical exam indicated scars from cutting that had occurred as a result of the self-destructive acts she had committed over several years.

267 The opinion recounts a long and detailed series of self-destructive acts and serious behaviors that raised the concerns that lead to the withdrawal.

268 *Doe*, 666 F.3d at 770.

269 *Id.*

270 *Id.* at 772.

271 *Id.* at 773.

272 *Id.* at 777 (emphasis added).

language recognizing that medical school is not just about knowledge, but also about the application of that knowledge in practice. The appellate court applied a standard regarding risk, requiring that she not pose a significant risk of recurrence of her self-destructive and antisocial behavior. In applying that standard, the court found that the evidence supported such a finding.²⁷³ The decision was based on substantial evidence provided by experts with excellent reputations. While finding that there may be some evidence that could be provided that would make a summary judgment premature, the motion for preliminary injunction was denied, but the case was left open. The language in that portion of the opinion does not seem promising for ultimate success by Jane Doe.

The *Doe v. N.Y. University* case is a very early decision, one of the very first, but it provides a number of signals for these types of cases. First, these evaluations are very difficult. Mental illness can be difficult to diagnose, and future risks are hard to determine. However, where there is substantial evidence of such risks, and the assessment is thoughtful and individualized, deference to the institution is likely to be granted.²⁷⁴ Patient safety is a critical factor. And the relationship of medical education and practice is relevant to consider. This early decision signaled the types of assessments subsequent courts would make in other cases involving individuals with mental health impairments.²⁷⁵

Issues at the admissions stage were again addressed several years later in *Manickavasagar v. Virginia Commonwealth University School of Medicine*.²⁷⁶ In that case the medical school applicant had applied three times (beginning in 2001) and been rejected. It was not until his fourth application that he indicated that he had a diagnosis of bipolar disorder, apparently as a means of justifying why he had requested accommodations for past academic deficiencies and performance that had apparently been a primary basis for his previous rejections. At that point, he was granted an interview. This was the first time he had reached the interview level. The interviews raised concerns about his weak academic performance, and his interviewers gave him low rankings. They did not reference his bipolar disorder but noted other weaknesses. After the rejection based on those interviews, he requested accommodations of reconsideration and other considerations, some of which might take into account his mental illness. The claims referenced the belief that the decision was based on “antiquated attitudes and unfounded societal and institutional barriers.”²⁷⁷

The court noted that he had received an accommodation by being granted an interview based on his “identified” disability.²⁷⁸ The court granted the school’s motion to dismiss.

273 *Id.* at 777–78.

274 Babbitt and Lee, *supra*, note 147.

275 Note also that from her original enrollment (1975) it took six years for the appellate court to rule.

276 667 F. Supp. 2d 635 (E.D. Va. 2009).

277 *Id.* at 641.

278 *Id.* at 647.

2. *Postadmission Conduct or Events Resulting in Dismissal*

A number of judicial decisions have addressed fact situations involving medical or other health care professional school students²⁷⁹ where the student has requested an accommodation after admission or where deficiencies or performance concerns have resulted in a mental health disability becoming an issue.

The fact patterns for each case are important to consider because of the individualized nature of these situations, but some general guidance can be found in these decisions. First, is that while the institutions generally succeed in the cases, the judicial resolution can take years, at great cost to all concerned. The fact that these students press on for so long probably reflects the high stakes, and highlights the value of identifying policies, practices, and procedures that might have (at least in some cases) prevented such prolonged dispute resolution.

a. **Academic Performance Deficiencies.**

There are several cases involving dismissal from the program based on academic performance deficiencies. Many of the cases intertwine “academic” performance and “clinical performance success” because both are evaluated for grades that allow a student to continue in the program. In some of these cases, the student seeks the accommodation of readmission, based on the argument that accommodations that were not in place could have improved the outcome. As noted previously, however, courts are fairly consistent in holding that an institution does not violate disability discrimination law where the disability is not made “known” to the institution. Some of the cases highlight the importance of a process that clarifies to the student how to make known a disability and need for accommodations, rather than the student assuming imputed knowledge.

- (i) *El Kouni v. Trustees of Boston University (Dismissal)*. One of the earliest judicial opinions to address this issue was the 2001 decision in *el Kouni v. Trustees of Boston University*.²⁸⁰ Initially, this student (who had bipolar disorder and clinical anxiety and depression diagnosed in 1993) was admitted and enrolled in a joint MD/PhD program in 1993.²⁸¹ Because

279 *Mbawe v. Ferris State Univ.*, 366 F. Supp. 3d 942 (W.D. Mich. 2018), *aff'd*, 751 F. App'x 832 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 2022 (2019) (unpublished) (affirming state university's decision regarding pharmacy student with mental health issues because he did not possess mental health to fully utilize his abilities, and licensing was lost because of involuntary commitment); *Horton v. Methodist Univ., Inc.*, 2019 WL 320572 (E.D.N.C. Jan. 23, 2019) (student with anxiety in graduate physician assistant program; student did not request accommodations before failing courses; student had numerous struggles but did not seek specific accommodations for them); *Yennard v. Boces*, 241 F. Supp. 3d 346 (N.D.N.Y. 2017) (former nursing student with bipolar disorder raised plausible claim of 504 discrimination against county vocational school); *Yennard v. Boces*, 353 F. Supp. 3d 194 (N.D.N.Y. 2019) (nursing student with bipolar disorder not able to meet essential requirements for program even with reasonable accommodation; clinical deficiencies were repeated; discharge from program not discriminatory); *Mbawe*, 366 F. Supp. 3d 942 (pharmacy student with mental health problems was dismissed after involuntary commitment for mental health treatment; student was not otherwise qualified based on technical standards established for pharmacy internships).

280 169 F. Supp. 2d 1 (D. Mass. 2001).

281 MD-PhDDualDegree Training, <https://students-residents.aamc.org/md-phd-dual-degree->

of his persistent offensive and disruptive behavior during lectures, he was dismissed from the MD program in 1994 and ultimately dismissed from the PhD program in 2000 (six years later). He also had academic deficiencies during this time period. He had not initially requested any accommodations in spite of his problems with scientific aptitude affecting his ability to do laboratory experiments. In 1997, he notified the school of his mental health concerns, and he was given extra time on exams as an accommodation. Such a condition can affect thought processes and result in cognitive blunting. His performance deficiencies resulted in his dismissal. From his initial admission in 1993 until the judicial resolution in which he sought damages and injunctive relief, both of which were denied, took eight years. The court found that his dismissal was based not only on his academic performance, but also his persistent offensive and disruptive behavior during lectures.

As noted previously, an institution is only obligated to provide reasonable accommodations to a known disability. It is important for the individual with a disability to make that known if accommodations are needed before a deficiency in performance or behavior occurs. Courts are very consistent about not requiring an institution to give a second chance. This can be problematic in situations where an individual may not be self-aware of a mental health impairment. It can also be problematic where the individual mistakenly believes that the institution is or should be aware of the condition and should have acted accordingly in providing accommodations.

- (ii) *Slaughter v. Des Moines University College of Osteopathic Medicine (Depression)*. In *Slaughter v. Des Moines University College of Osteopathic Medicine*,²⁸² the court affirmed the lower court decision that the medical school did not violate the ADA in responding to a medical student's performance and depression. The record in the case indicates that those in a position to consider a reasonable accommodation, had it been requested, did not have the requisite knowledge. While she had been counseled by the school psychologist, the student specifically did not waive allowing the psychologist to disclose her condition to anyone at the institution. The court held that knowledge of the condition by the school psychologist should not be imputed to the institution. In addition, it found that no accommodations would have allowed the student to meet academic standards. Notable is that administrators were aware of her academic struggles and did suggest an extended program, which she declined. Other academic support was provided, but no specific disability accommodations were requested or explored. When she was dismissed, she raised the issue of her depression during the appeals process, but the dismissal was upheld. In the opinion, the court noted that in response to discussion of expectations for interactive communication regarding accommodations, the school had "consistently communicated and sought methods to improve her academic

[training/md-phd-dual-degree-training](#) (last visited Sept. 8, 2021).

282 925 N.W.2d 793 (Iowa 2019).

performance.”²⁸³ The court also discussed the assistance provided both before and after the disclosure, and that it was relevant to consider assistance provided before the disclosure in determining whether the school had provided reasonable accommodations.²⁸⁴ The court found that even if the school should have been more interactive, she had not provided sufficient evidence that any possible accommodation would have allowed her to perform at the required level.

The case decision highlights the value of having a clear process for specifically requesting accommodations because of a disability that is protected under the ADA/504. Discussions with the school psychologist are protected by privilege. The court discussed the reasons for such a privilege, primarily that confidentiality was expected, but did not address the post-Virginia Tech exceptions when a student’s status may present legitimate concerns about a direct threat of danger to self or others. This was not such a situation. She should not have expected that her treating psychologist would disclose her status and possible accommodations to anyone else within the institution.

Discussions with administrators and faculty members may well not be specific enough for this to trigger a request for a reasonable accommodation. Although faculty members and student service administrators generally want to be helpful to student success, nonspecific conversations by a student may not raise whether a reasonable accommodation should be requested through a specific procedure within the institution. In this case, the possibility of medical leave was never requested or considered.

The court recounts the numerous areas of assistance that were provided before the end of the semester when she provided the diagnosis. It notes that she did not inform academic “decision makers” of her depression (in this instance she was aware, but in other situations an individual may not have been diagnosed) until after she had failed academically. While the school psychologist’s knowledge would limit institutional knowledge, she had communications with others within the institution that at least made them aware of her concerns. These communications included the Academic Progress Committee (APC) (its chair and its faculty members), who encouraged her to seek assistance from several parties (her course instructor, her faculty advisor, the Center for Academic Success and Enrichment (CASE), and the counseling center). At this point she was never specifically informed that she might be eligible for reasonable accommodations for a disability. Her communications with CASE provided generalized information about wanting study strategies. She did not tell them of her depression; she believed she had told some staff members and her tutor about her depression. She did not disclose her depression directly to her faculty advisor (with whom she had communications throughout the semester). After her academic failures and meeting with the APC in December, she did not inform them of her depression, but rather generally described trouble sleeping. It was this committee that suggested

283 *Id.* at 800.

284 The court referenced a similar situation in *Dean v. University of Buffalo School of Medicine & Biomedical Sciences*, 804 F.3d 178, 190–91 (2d Cir. 2015).

the Extended Pathways Program, which would allow her five years to complete the program. When she discussed this with her faculty advisor, she disclosed her depression for the first time as an explanation about why that program would not be advisable for her. At no point did any of her contacts indicate the possibility of a medical leave or any specific process for requesting reasonable accommodations for a disability.

When she was placed on academic probation and met with the Associate Dean for Academic Curriculum to discuss study strategies, the depression was not made known. Noteworthy (as discussed in the dissent) is the fact that had that administrator known of that diagnosis, it “would have changed the nature of the conversation.” He indicated that had he known, he would have advised seeking accommodations or a leave of absence.

This raises the value of ensuring that faculty and staff members who have direct contact with students regarding their performance know how a student can request a reasonable accommodation and have that process known. While more attention has been given to this issue regarding awareness of students whose behavior may be threatening, the benefits of having a faculty member or staff member refer a student who shows signs of stress or depression to the appropriate administrator are perhaps less likely to be put into practice.

The dissent in this decision provided some valuable perspectives about medical students with depression. It also highlights the possible distinction between what an institution *must* do and what it *should* do. The dissent argues that the institution did not do what it was legally required to do. At the beginning of the dissent, the opinion provided extensive reference information about the prevalence of depression in medical school and the need for medical schools to respond appropriately. The opinion acknowledged the challenge of dealing with this issue to achieve legal compliance. The three-judge dissent found that the court should not have granted summary judgment and that more should have been required before a determination that the school had adequately engaged in the required interactive process.²⁸⁵

The dissent disputed the majority opinion regarding whether the interactive process should have been triggered at an earlier point to provide reasonable accommodations. The dissent pointed to specific email language sent on December 17 to Slaughter’s faculty advisor, and the chair of the Academic Progress Committee, which should have put the school on notice. The dissent further opined that offering “standard” assistance available to any student (in this case a five-year course program, tutoring, etc.) is not sufficient where the institution should be aware that something more or different is needed. The dissent notes that “magic words” should not be required. The opinion also provides an excellent discussion of what an institution should do.²⁸⁶

285 Noteworthy is the fact that the dissent specifically references that the Iowa statute, although virtually identical to the federal disability discrimination statute might require more, given its stated purposes, and should not be bound by precedents under federal law.

286 *Slaughter*, 925 N.W.2d at 800.

The details of the student contacts with various parties at the institution highlight the challenge of not what *must* be done, but what *should* be done. While a student handbook should specify how to seek accommodations for a disability, it is arguable that key administrators should be proactive (and trained when to be proactive) about advising students of accommodation issues. While more information is available on campuses today to inform all educational personnel (faculty and staff members) about signals and signs of distress, and to whom to refer students, this is a difficult area. The student who is not dangerous or disruptive, but “only” depressed, may not receive the needed attention without such training and sensitivity. While it may not be reasonable to expect that all faculty members have such training and awareness, key student contact administrators should. Less clear is who those key personnel are. In this case, there was a faculty advisor, a progress committee, an academic support program, a counseling program, and ultimately the Associate Dean (who perhaps had oversight over all of these areas). Particularly challenging for a stigmatizing condition is the expectation that a student should know what and to whom to disclose in order to ensure success in a program.

- (iii) *Toma v. University of Hawaii (Depression)*. While having some similar issues to the *Slaughter* decision, the case of *Toma v. University of Hawaii*,²⁸⁷ also involved a student with depression whose academic performance declined, and there were questions about what the medical school should have done to address the student’s depression. He did not request any assistance, although he developed symptoms early in his first semester in 2005. By 2007, his condition required psychiatric care. But it was not until 2009, when he was to take the step licensing exams, that he made a request for some modification, specifically postponing the exam. Like the *Slaughter* case, several individuals within the medical school were involved in working through this issue. These included the Student Standing and Promotion Committee (SSPC), which denied his request to delay the July 2009 exam, which he failed. The failure triggered a major depressive episode. The Director of Student Affairs became involved and required his appearance before the SSPC again. At that point he communicated to the Director about his depression and disability. She did not, however, refer him to the disability services office but did allow two postponements of meetings with the committee. What followed was a series of interactions regarding delayed exams.²⁸⁸ Like the *Slaughter* fact situation, this case raises the challenges of to whom a request for accommodation *must* be made and how specific it must be. With multiple administrators and committee responsibilities, that information can be challenging for any student with a disability, particularly one with a mental health impairment where stress is a triggering factor and that is often a stigmatizing condition. Unlike *Slaughter*, this court focused to some degree on whether his condition actually was a disability protected under the ADA. This is important because depression can be episodic (in which case it may not be an ADA

287 304 F. Supp. 3d 956 (D. Haw. 2018).

288 *Id.* at 958–59.

disability), or it may not be severe. Without a clear process for requesting ADA accommodations, an individual would not even know what documentation might be required to receive various accommodations.

What the *Toma* decision has in common with many of the decisions involving mental health disabilities is the length of time it took to resolve. He started medical school in 2005; his condition resulted in a final dismissal in 2011. He did not bring an action until four years later (raising a potential statute of limitations issue), and this opinion was rendered in 2018 (thirteen years after his initial enrollment), and it remains not finally resolved.²⁸⁹ The case seems to have some of the same contextual concerns about how clearly it was made known to a student how to obtain accommodations for disabilities and what would be required to receive those, as compared to modifications and arrangements that might be available to any student with special circumstances.

- (iv) *Duncan v. University of Texas Health Science Center at Houston (Depression)*. The *Toma* decision tangentially referred to the issue of whether his condition was a disability, and most cases do not focus on that issue. One of those that has focused on the definition of disability is *Duncan v. University of Texas Health Science Center at Houston*,²⁹⁰ which involved a student with depression whose final dismissal occurred before 2008, before Congress had amended the ADA definition to a broader definition. His condition was major depression that was addressed by mitigating measures.²⁹¹ The decision highlights that some mental health conditions might not be substantial enough to provide coverage to the student. The application of coverage is likely to be quite broad today because, even if the impairment is not substantially limiting, there may well be situations where the individual is “regarded as” having an impairment if there is information that provides the basis for adverse action (including failure to accommodate).

Regardless of his status as protected as having a disability, the court found that performance deficiencies that resulted in dismissal occurred before he gave any notice of having a disability. He entered in August 2004 and immediately began having conduct issues (that he later claimed were related to his dismissal). The court noted the written admissions criteria and technical standards in place at the time of his admission, which included reference to taxing workloads and functioning under stress. Interpersonal skills are also referenced. His performance and behavior concerns occurred very soon after admission and continued until his dismissal in 2006, but he was allowed to be reenter in 2007. His behavior resulted in three appearances before the Student Evaluation and Promotion Committee, and on his third appearance he was permanently dismissed in 2008. In his discrimination case, he claimed that mitigating measures for his mental health would have made him qualified, the court turns that around to find that these mitigating measures (which he knew about) would result in his not having

289 Statute of limitations issues affected much of the case.

290 469 F. App'x 364 (5th Cir. 2012).

291 *Id.* at 369.

a disability. This was the Catch-22 that gave rise to the ADA amendment, but this student would not benefit from the amendment because the misconduct preceded 2008, when the definition removing consideration of mitigating measures was changed. The case, nonetheless, provides an additional framework to consider how a better or more clear policy or practice might have resulted in a better outcome. It is not known from the opinion whether the medical school had policies, practices, and procedures in place that would have encouraged students with disabilities to seek accommodations. From the additional admission to the court dispensation, it was a period of eight years.

- (v) *Peters v. University of Cincinnati (Depression)*. As noted above, mental health impairments may not be known to the individual or perhaps not the need for a reasonable accommodation. In *Peters v. University of Cincinnati College of Medicine*,²⁹² the medical student struggled from the outset, but received help, including a tutor. She sought help from a psychologist who determined that she had clinical depression and battered woman syndrome. The medication she was given, however, did not seem to assist with her academic difficulties, and during a consideration regarding dismissal from medical school, further assessment resulted in a determination that she had ADD and seasonal affective disorder. Upon appeal, she was allowed to conditionally reenroll, but she continued to struggle. Although the second year was completed successfully, she again had problems during her third year. Subsequent events indicated a challenging diagnosis of conditions and appropriate medication to stabilize her to allow her to perform. She may have been misdiagnosed initially, which could have had an impact on her performance. Upon assessment of her being allowed to continue, the dean followed the finding of the committee. The committee found that her ups and downs of following the medical regimen, made it unlikely that she could be a successful physician. There was lack of clarity regarding whether if the correct diagnosis had occurred initially, the correct diagnosis and appropriate treatment at an earlier stage would have allowed her performance to be acceptable.

She sought relief in court, and the court denied the university's motion for summary judgment. In allowing the case to proceed, the court noted concerns that the dean had not fully considered all relevant information regarding her disability and possible accommodations. Furthermore, the dean had allowed other students to continue in similar situations. There was evidence that she was perceived as having a mental impairment, when her condition may have been ADD. She did not win the case at this point, but the university would have to demonstrate that the dismissal was not based on a pattern of psychiatric difficulties. A question that is relevant going forward is to what degree it was permissible for the dean to focus on whether she could be a physician rather than whether she could complete the academic program. A number of events during her enrollment raise issues about whether the policies, practices, and procedures were appropriate and would ensure an interactive process regarding accommodations.

- (vi) *Sherman v. Black (Depression)*. The decision in *Sherman v. Black*²⁹³ provides another fact pattern where a student's academic failure seemed to have been affected by his depression. He began medical school in 1999, but it was not until the end of his third year that he was advised by the Dean of Students (pursuant to the recommendation of the Faculty Grades Committee) of the recommendation that he take a leave of absence and that his third year be repeated upon his return, during which time he would be placed on probation. The letter noted that his anxiety was affecting his ability to master the material. The student declined the leave, and his repeated third year resulted in his dismissal. He sought to have the appeal hearing regarding his dismissal postponed because of his depression, but when the Committee met, it upheld the dismissal, which was further approved by the Dean. That fall (2003), he brought legal action through the Office for Civil Rights (OCR) process claiming that the school had failed to provide accommodations related to his psychiatric disability for coursework between 2000 and 2003. The OCR investigation was closed based on a finding that the student had not provided documentation to justify the accommodations he was requesting. In 2006, he brought suit in court to compel OCR to engage in further review. This was unsuccessful, and in 2009, ten years after he began medical school, the district court's adverse ruling was upheld. The case, like others, highlights the issue of the obligation of the individual to give notice to a medical school regarding accommodations.
- (vii) *Doe v. Board of Regents of the University of Nebraska (Depression)*. A more recent case in which the court affirmed the lower court's grant of summary judgment for the medical school is *Doe v. Board of Regents of University of Nebraska*.²⁹⁴ The medical student brought a failure to accommodate case based on his recurrent depressive disorder. The student began in 2003 and immediately had academic deficiencies based on his performance. Although the student had notice of the process to request accommodations in orientation materials and the student handbook, he never specifically requested an accommodation or provided documentation of his depression. The facts in the case recount a long series of both academic and unprofessional performance concerns that the student was warned about. He never raised the issue of depression in order to receive accommodations. The court noted²⁹⁵ that the institution would not be on notice of a disability just because the individual had raised depression during various communications. The student had many opportunities and should have known how to request accommodations. Had he done so, he might have been required to provide appropriate documentation, but because he did not make the request, the issue of whether he was disabled under ADA / 504 was never addressed. The student was dismissed in 2006, three years after initial admission, and after a long and varied series of

293 510 F. Supp. 2d 193 (E.D.N.Y. 2007), *aff'd*, 315 F. App'x 347 (2d Cir. 2009).

294 287 Neb. 990, 846 N.W.2d 126 (2014).

295 *Id* at 1017.

concerns. In 2014, eleven years after he started, the case was decided. This case is a good example of how the medical school did have the procedures in place and known to students. There is no obligation of administrators to be proactive and inquire further when a student notes depression as a basis for deficiencies.

Most of the cases described in this section involved requests for a second chance, the opportunity to retake courses, or to have an additional probationary period. On rare occasions, a complaining party seeks to have grades changed. Reasonable accommodations have never been found to include giving passing grades. Retaking a course or exam might be reasonable, but simply giving a passing grade has never been required.²⁹⁶

b. Behavior and Conduct Performance Deficiencies.

Virtually all medical schools include in their technical standards that there is an expectation of critical behavioral attributes, social skills, and professional expectations. These tend to be evaluated more during the clinical rotations, but sometimes concerns are raised even during the first two years of medical school. Such standards expect respect, adaptability, and the ability to manage heavy workloads and function effectively under stress.

Some of the judicial decisions relating to behavior and conduct issues are related to the clinical performance. Other decisions are separate but related.²⁹⁷ Courts consistently do not require excuse of such conduct,²⁹⁸ even if related to a mental health issue.

- (i) *Zimmeck v. Marshall University Board of Governors (Depression)*. One of the cases resulted in an unpublished opinion in 2015. It is a case that began in 2009, when the student initially enrolled. The court in *Zimmeck v. Marshall University Board of Governors*,²⁹⁹ issued a summary judgment to the university. The student had been removed from the program because of her lack of professionalism, which included being consistently late and

296 *McGuinness v. Regents of Univ. of N.M.*, 183 F.3d 1172 (10th Cir. 1999) (not reasonable accommodation to give passing grade to medical student with test anxiety). See blog for Lessons Learned, by William Goren (Sept. 19, 2012), <http://www.williamgoren.com/blog/2012/09/19/removing-student-disabled-disability-terminating-from-program-higher-education/>. See also Paul D. Grossman & Edward J. Smith, *NASPA Research and Policy Institute Issue Brief: Five Things Student Affairs Professionals Should Know About Disability*, NASPA FOUND. (June 2015), https://www.naspa.org/images/uploads/main/5Things_ADA_Download.pdf; Ryan Ballard & Chris Henry, *Mediation and Mental Health Claims Under the ADA*, 44 CAPITAL UNIV. L. REV. 31, 52–54 (2015) (referencing Job Accommodation Network and accommodations for mental health impairments).

297 See also *Doe*, 287 Neb. 990, 846 N.W.2d 126, discussed *supra* in Section VI(F)(2)(a)(vii)—regarding both academic and professionalism issues. In *Doe*, the student played internet poker during a labor and delivery and took care of personal matters during academic times.

298 See, e.g., *Bharadwaj v. Mid Dak. Clinic*, 954 F.3d 1130 (8th Cir. 2019) (affirming dismissal of doctor because he could not get along with others, not because he was regarded as having a mental impairment).

299 106 F. Supp. 3d 776 (S.D. W. Va. 2015), *aff'd*, 632 F. App'x 117, 328 Ed. Law Rep. 76 (4th Cir. 2015) (unpublished).

disruptive and failing to take an exam. Her conduct issues were observed during her first semester of medical school. She was informed that she did not meet standards for professionalism. In the meeting to discuss this, she noted that she felt isolated, and when asked by the associate dean if she was receiving treatment for depression, she said she did not think she was depressed. This case suggests that, when developing policies, practices and procedures, the policies should include a requirement that agents of the medical school, such as admissions staff, when conducting the interactive process, ensure that students understand the consequences of not requesting accommodation for a disability when there are deficiencies in the student's performance.

In this case, after this notification, the student received evaluations indicating she did meet the standards of professionalism and had improved her communication with faculty members for the subsequent semester, but in June 2011, she did not meet standards and failed to sit for a required exam. By her third year she had received treatment and medication during the preceding summer. At this point she received an evaluation noting that she would be evaluated at the end of the third year. The notice specified the conduct of concern, which included that she was "tardy, dressed inappropriately, made unsettling comments to patients, failed to follow directions, interrupted her teachers, and ran through the hallways."³⁰⁰ When she was emailed about the need to discuss this behavior, she responded, "I quit." This was taken to be a suicide note, but she continued with permission, and received an additional warning during that semester and was dismissed.³⁰¹ At this point, she tapered off medication and at a readmission proceeding, she indicated this was because the side effects of the medication caused the behavior. She had never raised that before the readmission proceeding.

The court's decision notes that professionalism is an essential aspect of the program,³⁰² as noted in the handbook and student standards and goals. She had seen the standards and had signed acknowledgments of seeing them. The court stated that there is no duty to provide accommodation until the student asks.³⁰³ The court found that the argument that the school "should have known" was not persuasive. The court further found that misconduct, even if related to disability, is not a disability. This is another lengthy process (six years) from entry to final judicial determination.

- (ii) *Shurb v. University of Texas Health Science Center at Houston-School of Medicine (Anxiety and Depression)*. In *Shurb v. University of Texas Health Science Center at Houston-School of Medicine*,³⁰⁴ the court granted a summary judgment for the university in a case involving a medical student who was suspended after a series of events that involved both academic and

300 *Id.* at 778.

301 *Id.* at 779.

302 *Id.* at 781.

303 *Id.* at 782, citing the *Halpern* decision, which involved similar facts.

304 63 F. Supp. 3d 700 (S.D. Tex. 2014).

behavior-related issues and concerns about direct threat to self or others. The case involves a complex set of facts related to his condition and numerous university representatives (with varying obligations and responsibilities) involved in the decision making. In essence, the student was academically withdrawn from medical school after concerns were raised regarding his anxiety and depression during his first year. This began in fall 2009. When university officials were notified,³⁰⁵ they advised the student to take the Alternate Pathway Program, which extended the first year into a two-year program. He agreed to that, but his problems continued. He sought and obtained accommodations, including Power Point slides from some, but not all, professors. These apparently were granted on an individual basis, not as part of an ADA accommodation process.³⁰⁶ The student's contacts with the dean about accommodations were eventually directed to the Office of Student Affairs. That office did not facilitate granting the requested Power Points from professors.³⁰⁷ The student subsequently suffered from migraines and as a result took a medical leave, at the recommendation of the Assistant Dean of Student Affairs and Assistance.³⁰⁸ His return to class in fall 2011 was initially conditioned on a letter of fitness to return from his treating psychiatrists. Apparently, the letter was provided, and he returned, but shortly thereafter, he had some significant episodes that resulted in a hospitalization during which a psychiatrist (not his treating physician) raised concerns about attempted suicide.

When he asked to return to class after this incident, there was a dispute about whether he provided the requested documentation to return to class, and he was escorted from classes by a Student Affairs staff member, and met by the Associate Dean for Students, the Director of Admissions and Student Affairs, and the Assistant Dean for Admissions and Student Affairs.³⁰⁹ A few days later, the student and his mother met with the three administrators about the situation, and when the student attempted to record the meeting, it was terminated because legal counsel was not present. The next day, the student and his mother met with the university counsel. The court opinion notes that the student claimed that university counsel was surprised by what had been requested. University counsel, however, requested some, but not all, of the information requested by the three student service administrators (apparently the release of medical records). The student, however, did not provide any of the requested information, believing it was

305 It is not clear from the opinion which officials were notified.

306 This highlights the challenge of having individual professors giving assistance. This is not surprising where it is not requested as an ADA accommodation, but could be problematic if this were part of a university process of providing accommodations.

307 It is not clear whether this office was nonresponsive or denied the request.

308 This does not indicate whether ADA accommodations were discussed or the process to obtain them.

309 These administrators told him that he could not return without the following documents and actions: (1) full medical records from hospitalization and urgent care center; (2) attend scheduled appointments with treating physicians, and provide certification from his psychiatrist that he was not a danger to himself or others and was fit to return to class; and (3) authorizations to obtain medical information.

impermissible. Subsequently, when the administrators believed that the needed information had not been provided, they notified the university counsel that the student would be withdrawn. During the following year, he was also asked to return a \$5,000 grant that had been given to him.

A little more than one year after these events (fall 2011), the student brought suit claiming ADA/504 violations. In 2014, the motion was granted, five years after his initial enrollment. The court found that the actions were based on a determination that he was not a protected individual with a disability,³¹⁰ that he was not otherwise qualified because he had not provided documents required for return,³¹¹ and that his removal was based on his performance deficiencies, not his disability and only after “numerous attempts to reasonably accommodate plaintiff’s disability.”³¹² It is unclear whether the university was treating this situation as a disability accommodation process or simply as an attempt to work with a student regarding health problems.

The court also addressed the failure to accommodate claim, first noting that once an individual requests a reasonable accommodation (and the burden is on that individual to make the request), there is an obligation to engage in an interactive process.³¹³ With respect to the request for Power Points, the court notes that an individual does not have a right to a preferred accommodation. The court notes many instances when accommodations were provided, but these did not improve his academic performance and did not alleviate the university’s concerns about his continued self-harming activities and potential for harm to others. The court determined that the activities of the university did not indicate a failure to accommodate.

(iii) *Halpern v. Wake Forest University Health Sciences (Anxiety Disorder)*. The decision in *Halpern v. Wake Forest University Health Sciences*,³¹⁴ involved a pattern similar to the *Shurb* case. The student’s enrollment in medical school lasted from 2004 to 2009. Although he had ADHD and an anxiety disorder, which had been diagnosed and treated in college and for which he had received accommodations,³¹⁵ he did not disclose that, nor request accommodations upon enrolling in medical school. He was diagnosed as having an anxiety disorder in the spring of his second year of medical school. The behaviors that began immediately included inappropriate interactions with the Academic Computing staff to which he was very abusive, missing classes, lying about the reasons for his conduct and being late for class.³¹⁶ Only after several years of engaging in unprofessional acts,

310 The record did not demonstrate documentation supporting that his visual learning concerns were a disability.

311 The court does not address whether it was permissible to request these documents.

312 *Shurb v. University of Texas Health Science Center at Houston-School of Medicine*, 63 F. Supp. 3d 700, 708 (S.D. Tex. 2014).

313 *Id.*

314 669 F.3d 454 (4th Cir. 2012).

315 *Id.* at 457.

316 His justification was side effects of the ADHD medication.

including abusive treatment of staff and multiple unexcused absences, did he raise his condition as a justification for an accommodation. He was allowed a delay in the Step 1 exam at the end of the second year. Although he had both behavior and academic deficiencies during his first two years, it was not until the clinical rotations that he made known the disability. He requested test accommodations during the surgery rotation but did not provide the documentation required to evaluate the request in a timely manner. After his continued pattern of performance deficiencies, he was dismissed in 2007.³¹⁷ The record notes that he did not accept constructive criticism.

In his appeal of the dismissal to the dean of the medical school, he proposed the accommodation of allowing psychiatric treatment, participating in a program for distressed physicians, and continuing on strict probation. The denial of the appeal was based on the determination that this pattern of behavior made it appear that he would continue to resort to unprofessional behavior. It seemed that while he might be able to control conduct toward doctors, he had difficulties with staff.³¹⁸ The importance of the team approach in patient treatment was relevant to the decision.

The student challenged the denial in court, which took until 2012 for final decision. The court stipulated that his condition was a disability, but ADHD might not be a disability in all cases. The court held, however, that the proposed accommodation was not reasonable. The court deferred to the dean's assessment that the student's proposed remediation plan was indefinite in time and was unlikely to be successful. Of greatest significance is the fact that he did not request accommodations before the misconduct.³¹⁹ The court also noted that the school had engaged in an interactive process. The case follows a pattern of several similar cases where the removal does not occur until the clinical rotations began, and the resolution of the case took several years.

(iv) *el Kouni v. Trustees of Boston University (Anxiety, Depression, Bipolar Disorder)*. In *el Kouni v. Trustees of Boston University*,³²⁰ the student initially enrolled in an MD/PhD program in 1993. This decision was referenced previously in the context of dismissal due to academic performance.³²¹ It should be noted, however, that he was also dismissed from the MD program in 1994 based on his persistent offensive and disruptive behavior during lectures. He was later dismissed from the PhD program in 2000, six years later. Although he had been diagnosed with clinical anxiety and depression in 1993 and with bipolar disorder in 1997, it was not until 1997 that he requested accommodations. The accommodation requests were related to his academic work. Such accommodations, however, would not address the disruptive behavior concerns that were also a basis for his dismissal.

317 Halpern, 669 F.3d at 459.

318 *Id.* at 460.

319 *Id.* at 466.

320 169 F. Supp. 2d 1 (D. Mass. 2001).

321 See Section VI(F)(2)(a)(i).

- (v) *Amir v. St. Louis University (Obsessive Compulsive Disorder)*. In *Amir v. St. Louis University*³²² the resolution was eight years from entry to judicial decision for the university, but the facts included some issues that are important to consider for the university's development of policies, practices, and procedures that appropriately respond to students whose serious mental health conditions raise concerns about being qualified. The student with obsessive-compulsive disorder (OCD) (who entered medical school in 1991 at age twenty) demonstrated rude and arrogant behaviors toward staff, even before classes began. This conduct resulted in a meeting with the dean who advised him that he might want to consider a profession that did not require compassion, but the admission was not revoked. Given the experience of this setting, this might be a point at which a proactive and interactive approach regarding disability issues could give earlier attention to possible accommodations.

The student's OCD disorder was not diagnosed until his third-year rotations. During the first years, however, he had academic failures in some coursework and also some behavior issues.³²³ After the academic problems, he was offered an extended curriculum, which he declined. After a second semester of failed exams, he was again offered an extended curriculum or a leave of absence. At this point, he accepted the leave. When he returned, his performance was weak but adequate. It was during his third-year clinical rotations that he had significant deficiencies in behavior that affected his evaluations. When he was diagnosed at that point with severe obsessive-compulsive behavior, he told his supervising faculty members and hoped that would be a factor for consideration in his performance. The faculty members did not adjust expectations based on this, and other professors were made aware of the condition.

At this point it was suggested that he receive treatment and hospitalization, which he initially declined, but later he voluntarily admitted himself for treatment. The university had notice of this. When he sought to return to the psychiatry rotation after this treatment, the reentry was denied because of the length of time he was absent.³²⁴ When he was later allowed to retake the psychiatry rotation (after receiving passing grades in three other rotations and passing after remediation in the fourth), he did not pass the psychiatry rotation. In the interim, the evaluation policy had changed but only in the psychiatry rotation. The court noted this but found he was nonetheless not qualified, although allowing a retaliation claim to proceed based on the medical school's response to his requests.

While there were sufficient deficiencies in the record for the court to uphold the dismissal on the basis that he was not otherwise qualified,³²⁵ there were concerns

322 184 F.3d 1017 (8th Cir. 1999).

323 *Id.* at 1022. The court noted some misrepresentations in selling tickets to a Cardinals game that did not result in adverse action, although they were in the record.

324 *Id.* It is not clear whether he was given notice at any point how long he would be permitted to be absent from the program.

325 The court found that either the academic or the performance deficiencies would have justified the dismissal.

that allowed the case to go forward on retaliation claims, which might ultimately result in a finding of damages.³²⁶ This is an example of a case where a university may win the case in terms of the dismissal of the student, but still be found to have retaliated and thus be obligated to pay damages, highlighting the value of developing policies, practices, and procedures to avoid such potential liability.

The court noted that none of the student's proposed accommodations for the psychiatry rotation were reasonable.³²⁷ These included attending a different institution (which was never allowed for students with academic difficulties). Consistent with all other judicial decisions, his proposal that he be given a passing grade was not reasonable because it interferes with academic discretion. Of most significance, however, was his request to continue his psychiatry rotation under a different faculty member. While the facts indicate that this might have been a good idea, perhaps to avoid any appearance of bias, it was not a reasonable accommodation.

It is noteworthy that these facts occurred before the ADA amendments to the definition of disability in 2008. The court found that his OCD was a disability,³²⁸ but it may be that more documentation of the condition might be required, although his hospitalization may weigh in favor of the substantial limitation.

Nonetheless, he was also initially found to be qualified for admission. The case provides a setting to examine whether a more proactive approach to accommodating him at an earlier point would have resulted in his ability to succeed.

c. Cases Involving the Timing of Clinical Rotations.

A few cases deal with the timing of clinical rotations and passing various exams within set time frames. In these cases, the student may be seeking accommodation in timing due to the mental health concerns. Although the individual is a student at a medical school, it is the NBME that administers the step tests, so the lawsuit is sometimes brought against that organization, in addition to the medical school.

- (i) *Powell v. National Board of Medical Examiners* (*Learning Disability, Stress, Anxiety*). In *Powell v. National Board of Medical Examiners*,³²⁹ the timing of tests was at issue, and the case demonstrates the interrelationship of board exams and medical education. The student began medical school at the University of Connecticut in 1992 but struggled from the outset. While the primary impairment is a learning disability issue, there are elements of mental health (stress and anxiety) intertwined.

326 *Amir*, 184 F.3d at 1026.

327 *Id.* at 1029.

328 His condition resulted in his not being able to eat or drink without vomiting, inability to get along with others, and affected his ability to concentrate and learn. *Id.* at 1027. The 2008 amendment guidance specifically notes that the inability to get along with others is not a major life activity. The other areas might be sufficient to establish a substantial limitation to other major life activities. It is possible that documentation of his condition today would require more.

329 364 F.3d 85 (2d Cir. 2004), *corrected*, 511 F.3d 238 (2d Cir. 2004).

The Step 1 exam, required for passage in order to advance after two years, is administered by the NBME, but the medical school has discretion to allow a student to retake the exam. Passing the test can be a condition of continuing into the third year. Not only did this individual have deficiencies in course work, but she also failed the Step 1 exam. She was informed by the medical school that she would have to remediate these deficiencies to continue. The medical school provided substantial assistance during the two years in which she sought to do so.³³⁰ Although the student failed the Step 1 exam again, she was allowed conditional admission into the third year, based on her passing the course. During that year, the school provided substantial assistance, but she still failed two times. She was informed that she would be dismissed, but the final decision was to be deferred until after her litigation against the NBME for failure to accommodate was resolved. She did not prevail in the litigation, and was dismissed.

The litigation against the NBME followed her 1997 referral to the medical school's neuropsychologist (paid for by the school), who recommended additional time due to the diagnosis of ADD and a learning disability, and noting that anxiety and depression might be a factor in her academic problems. The NBME did not accept the documentation provided to them as demonstrating that she had a protected disability. These events occurred before the 2008 ADA Amendments Act that clarified to some extent the definition and guidance that addressed what documentation should be required. If this set of facts occurred today, the judicial outcome might have been different, but the opinion highlights the concerns about documentation to justify the requested accommodation.³³¹ When she was finally dismissed as a result of the failure to pass the exam, she brought suit in 1999 (seven years after her initial admission) against both the NBMC and the medical school.

The district court granted the motion for summary judgment by both defendants, and the appellate court addressed the issue, affirming the motion. In reaching the decision, the court focused on whether she was otherwise qualified. Oddly, the court highlighted facts that raise questions about whether she was qualified to have been admitted to medical school in the first place. She had a weak undergraduate record and MCAT scores. In spite of her weak record, she was admitted, and when she struggled, she was provided substantial assistance, but to no avail.³³² The school was not obligated to provide her requested accommodation of being allowed to continue in medical school without passing the Step 1 exam.³³³ The NBME had not acted discriminatorily when it determined that the documentation she provided did not establish a disability or that the accommodation of additional time was required. The court further indicated that even if she had prevailed, money damages are only available where there has been

330 Assistance included "free tutoring services, overlooking an honor code violation ..., expressing concern over the level of stress, and allowing her the opportunity to remediate certain subjects multiple times." *Powell*, 364 F.3d at 82.

331 *Id.* at 84.

332 *Id.* at 87–88.

333 *Id.* at 88.

intentional discrimination, which includes “deliberate indifference.”³³⁴ In 2004, over a decade after her 1992 admission to medical school, the final judicial decision was rendered, again raising the question about whether something might have been done at an earlier stage to avoid the protracted resolution that was costly to all parties.

- (ii) *Datto v. Harrison (Stress)*. An extremely complex set of facts gave rise to the preliminary order in *Datto v. Harrison*.³³⁵ The student was admitted to a joint MD/PhD program and enrolled in 1998, after resolving his expectation of scholarship support.³³⁶ His first two years were quite successful, and he began his PhD work. It was at this point that problems occurred. A series of events, including closure of the program connected to his research, and several faculty members leaving, and other events resulted in his returning to the medical school aspect of the program. Although he again excelled academically, his thesis defense did not go well.³³⁷ He sought additional scholarship support to complete the thesis,³³⁸ but this request was denied. This lack of funding triggered stress for which he received treatment from the medical school’s psychiatrist who prescribed medications. These medications caused significant side effects, which may have affected his performance in the clinical aspects of the program as well as affecting his cognitive abilities. These performance deficiencies resulted in his being placed on a mandatory leave of absence.

In meeting with the Committee on Student Promotions, he told them that his tremors and shaking were side effects of the medication. He did not tell them that his cognitive problems were related. He had been told by the treating psychiatrist that these problems were caused by his bipolar disorder and ADHD.³³⁹ During his penultimate rotation in rheumatology, events occurred regarding communication with a patient that resulted in an adverse performance outcome.³⁴⁰ This adverse grade resulted in his dismissal from medical school, which he unsuccessfully appealed, the resolution being in July 2005, seven years after initial enrollment. His subsequent litigation claiming ADA/504 violations when he was not provided with accommodations raise questions about when the school was on notice of a request to accommodate. The case reports have not yet addressed those issues. The 2009 judicial decision was remanded for further deliberations, so by then

334 *Id.* at 89.

335 664 F. Supp. 2d 472 (E.D. Pa. 2009).

336 There was disagreement about whether he had been promised the support, but ultimately the medical school committed to providing him full support for the seven years. This support adversely affected funds available to other students, and the student alleged that this caused ill will toward him by school officials.

337 The student raised concerns about not having received the expected support from his advisor or the thesis committee.

338 The student had expressed concerns over the workload to the Dean of Student Affairs.

339 Perhaps the student was concerned about the stigmatizing impact of having such information would have in his record. Noted in the opinion is that the student requested that the Dean’s letter remove reference to his anxiety. This request was refused.

340 The facts involved in this are quite complex.

it had been eleven years from entry to only a preliminary resolution. The court order recognized the possibility of individual liability for retaliation claims. This murky fact pattern raises a number of questions about timing and other issues. Notable is the more than adequate academic performance initially and that stress seemed to be a factor in subsequent deficiencies. Whether the medical school had any accommodation obligations related to that stress (depending on whether there was notice of a disability and request for accommodations) remains unresolved.

(iii) *Doe v. Samuel Merritt University (Anxiety Disorder)*. While it is not certain that all cases of anxiety disorder (including test anxiety) will mean that a student has a disability protected by the ADA/504, in some cases the court will recognize that without detailed discussion. In *Doe v. Samuel Merritt University*,³⁴¹ a student in podiatry school with anxiety disorder raised questions about whether test taking was a major life activity and whether limiting the number of times the student could take the licensing exam should be given deference. The student began medical school in 2009 (notably after the date that the ADA definition of coverage had been amended), and was diagnosed with generalized anxiety disorder and agoraphobia in the spring of her second year of medical school (2011). She received additional time for her exams that semester. While this improved her grades in her courses, she was required to pass the Step 1 exam within three attempts, and when she failed to do so, she was dismissed during the summer of 2011. At that point she requested the accommodation of being allowed to take the test an unlimited number of times. She did take the test a fourth time and failed. Her attempt to take the test again was not allowed because she was no longer enrolled. She brought suit in December 2012 as a result.

The motion for a preliminary injunction in the suit was denied. In the opinion, the court addresses the likelihood of success on the merits. This discussion of whether she had a disability specifically noted the changes from the 2008 amendments that provided for a broader definition.³⁴² This is one of the few opinions in the medical school context to give attention to the definition for anxiety-related disorders. The court specifically provided, while noting the precedent of cases decided before the amendments, that test taking might be a major life activity and that she was substantially limited in that regard. While learning is a major life activity, she did not provide adequate evidence of being substantially limited. Interestingly, because it connects to the practice, she argued that the test is required for her to work as a podiatrist, so she was also limited in working, which is a major life activity. The court did not accept that argument.³⁴³ The fact that she was provided accommodations would indicate that the school “regards her” as having an impairment, but that was not the basis for the denial of the modification of the three-time rule.³⁴⁴

341 921 F. Supp. 2d 958 (N.D. Cal. 2013).

342 *Id.* at 965–66.

343 *Id.* at 967–68.

344 *Id.* at 568. The rule was established in 2008. *Id.*

The court's discussion of deference to the institutional policy of limiting the number of times is particularly interesting. The passage of the policy by the Dean's Council was not based on a finding that additional times to pass would fundamentally or substantially alter the standards.³⁴⁵ In addressing the balance of hardships, the court recognizes legitimate concerns if she is allowed to be enrolled in the clinical courses but that if the institution waived the requirement that she must be enrolled to take the test, pending the resolution of the application of the three-strikes rule itself, that would resolve the preliminary injunction order. Thus, the preliminary injunction allowing her to take the test is granted, which seems to de facto, at least in this case, mean that she would not need to be enrolled.

(iv) *Dean v. University of Buffalo School of Medical & Biomedical Sciences (Depression)*. Another case affecting the timing of the Step 1 exam is *Dean v. University of Buffalo School of Medical & Biomedical Sciences*.³⁴⁶ A medical student sought additional leave to deal with his depression. He had completed his first two years of medical school (2004–06), but had failed the Step 1 exam the first time. Although given a leave of absence from medical school before retaking the exam, he was subsequently granted additional leaves. He was informed, before he took the test a second time, that a failure would automatically result in his suspension from medical school, pursuant to the handbook policy. His request for an extension from the February to the May test administration was denied. Although his request noted his "depression, stress, and anxiety," he did not request a medical leave. This raises an interesting question about whether he was requesting a reasonable accommodation pursuant to an ADA recognized disability. The court noted that "sometime *after* failing the Step One Exam for the second time," the student *became* disabled.³⁴⁷ The university's psychologist diagnosed him with situational depression due to his symptoms and recommended a leave of absence, and the student's request for a three-month leave was granted in order for his new medication to become effective. When he realized that he needed more time for the treatment to be effective, he requested an additional month, but this request was denied. Notably, he was not requesting an exception to the number of times the test could be taken, but instead an extension in the medical school's leave of absence time limitation rules.

This denial was followed by an OCR complaint and a court complaint seeking reinstatement and damages. The district court granted the school's motion for summary judgment. On appeal, the court discussed the interrelationship of the student's request based on the need for the medication to take effect and the need for additional time to prepare for the exam. The court found that there was sufficient evidence that the amount of time allowed was not a reasonable accommodation under the circumstances and consistent with the school's policy of allowing a set period to prepare for each exam. The court further set out burdens of proof

345 *Id.* at 969.

346 804 F.3d 178 (2d Cir. 2015).

347 *Id.* at 183 (emphasis added).

and persuasion, and while finding that the student initially has those burdens, they were met in this case. The school did not counter the request with evidence that the request would impose an undue burden or fundamental alteration. The district court's grant of summary judgment to the school on the ADA/504 claims was overruled and remanded for further proceedings.³⁴⁸ Thus, from the initial enrollment in 2004 to the ruling in 2015 (which is not a final resolution), over a decade had expired.

- (v) *Bhatt v. University of Vermont (Obsessive Behavior/Tourette's Syndrome)*. Dishonest behavior will almost never be excused regardless of whether an underlying mental health condition was a factor in the behavior. In *Bhatt v. University of Vermont*,³⁴⁹ a decision that took thirteen years from initial enrollment to resolve, the court held that a medical student's falsifying the evaluations (on more than one occasion) did not have to be excused because of the student's Tourette's Syndrome obsessive behavior. His dismissal was upheld. The decision noted that the stress of medical school, particularly the clinical rotations, may have triggered his conditions. Also noted and significant was the fact that the student did not make known the condition or request any accommodations for it until after the disciplinary actions had occurred. After his dismissal, and subsequent treatment, he sought reinstatement. He continued his medical degree by transferring to another medical school, whose degree was not recognized in every state and which limited where he could practice medicine. Because of this, he brought suit against the University of Vermont in November 2004, seeking equitable relief of reinstatement and granting the degree, based on Vermont's discrimination statute that is virtually the same as the ADA.

The lower court granted the university's motion for summary judgment. The state supreme court, in upholding the lower court, applied standards consistent with most other decisions. These included deference to academic decision making, significant priority for patient safety in these decisions, and caution in applying employment discrimination case precedent to education settings.³⁵⁰ Significant factors in the court's decision included that the conduct involved was egregious, that the student had not made known the condition until after the adverse action, and that the situation taken as a whole was relevant.³⁵¹ He did not even raise the disability during the dismissal proceedings, only after an adverse result. The court even noted that it is possible that this individual would not even be found to have a disability.

3. Admission into Residency Programs

There are a few cases in which admission into residency programs has raised disability discrimination issues. Residency admission generally occurs during

348 *Id.* at 191.

349 184 Vt. 195, 958 A.2d 637 (2008).

350 *Id.* at 201–02.

351 In this case, the student had already been given a second chance.

the fourth year of medical school. By that point, the medical school has a record of academic and technical performance. That information may be a factor for individuals when they seek the residency “match.” It is at this stage that the medical student enters into an employment/student relationship, so cases from employment law might provide additional guidance.

The most significant case was discussed previously in the context of mobility impairments. It also involved concern about the applicant’s psychological health, perhaps more than his mobility limitations, that was the basis for the initial denial. In *Pushkin v. Regents of the University of Colorado*,³⁵² an individual with multiple sclerosis was denied admission to the psychiatric residency program based on the interviewer’s “concern for psychologic reactions of the patient and in turn the doctor, as a result of his being in a wheelchair.”³⁵³ As noted earlier,³⁵⁴ the articulated reasons for rejection were determined to have been based on incorrect assumptions or inadequate factual grounds.³⁵⁵ It should also be noted that in virtually every discrimination context, it is impermissible to use “coworker or customer preference” as a defense to discriminatory action. The possibility of negative reactions from patients (as compared to something that would be a direct threat to patients) should never be the reason for such a decision.

Several years later, a court again addressed a case involving a residency program. In this instance it involved a decision not to readmit a student for admission to a residency program. In *Kaminsky v. Saint Louis University School of Medicine*,³⁵⁶ a student was denied readmission based on the individual’s conduct. The Eighth Circuit affirmed a lower court decision that found that it was not unreasonable to rely on a state website listing indicating medical license suspension in making its decision not to hire (or readmit) the individual into a residency program. The medical school did not have to readmit the student with psychosis into the residency program, where his conduct was unprofessional and illegal, even if it related to his disability. The conduct in question included self-prescribing medication, which resulted in the loss of his medical license.

The case is somewhat unusual in that it involves a transfer from one institution to another. Kaminsky had completed his medical/osteopathy degree (apparently without incident) at the University of Missouri at Kansas City in 1998. He was initially admitted into the residency program for pathology at Wake Forest, but after two years, he sought to transfer to Saint Louis University, which initially granted the transfer. Shortly thereafter, a series of events occurred including unprofessional behavior and learning that his medical license had been revoked because of self-prescribing medication. As a result, his residency was terminated in fall 2002. When he later sought reinstatement, he was denied that in 2004—

352 658 F.3d 1372 (10th Cir. 1981).

353 The interview notes showed that the opinion and judgment of all of the interviewers was “inextricably involved with [his] handicap.” *Id.* at 1386 (quoting the trial court).

354 See discussion in Section VI(C)(1).

355 *Pushkin* 658 F.3d at 1383.

356 2006 WL 2376232 (E.D. Mo. 2006), *aff’d*, 226 F. App’x 646 (8th Cir. 2007).

05, and his subsequent court challenges based on disability discrimination law were unsuccessful. His denials were based on conduct and behavior, not on his disability status.

G. Alcohol and Substance Use and Abuse

There are few, if any, cases involving issues of alcohol and substance use and abuse in the context of adverse action during medical school. There are, however, numerous decisions in health care professions themselves involving this issue.³⁵⁷ This is an issue particularly within health care professions because of the stress of the work in combination with the access to controlled substances. It is quite

357 See, e.g., *Altman v. N.Y. City Health and Hosps. Corp.*, 100 F.3d 1054 (2d Cir. 1996) (head of internal medicine department could be required to be supervised after several incidents and relapses); *McDaniel v. Miss. Baptist*, 74 F.3d 1238 (5th Cir. 1995) (no longer engaging in drug use means being in recovery long enough to have become stable); *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662 (7th Cir. 2000) (physician unsuccessful in claim of discrimination on basis of perceived disability of alcoholism); *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435 (8th Cir. 2007) (nurse with history of illegal activity related to drug dependency; not reasonable for recovery plan to require supervision when handling narcotics; unduly burdensome; related to monitoring illegal activity); *Hartley v. Boeing Co.*, 59 Nat'l Disability L. Rep. (LRP) ¶ 91 (E.D. Pa. 2019) (emergency medical technician job offer contingent on passing drug screen; later requirement of medical test issue about requirement of a health screening not required of all similarly situated employees; questions about whether this was an impermissible health test remained); *McNulty v. Cnty. of Warren, N.Y.*, 59 Nat'l Disability L. Rep. (LRP) ¶ 8 (N.D.N.Y. 2019) (preliminary rulings in claim by county nurse who took FMLA leave for treatment for alcoholism was supervised in a discriminatory manner based on her alcoholism not on performance); *Sper v. Judson Care Ctr., Inc.*, 29 F. Supp. 3d 1102 (S.D. Ohio 2014) (registered nurse terminated for her failure to comply with narcotics distribution procedures not because of her disability); *Wells v. Cincinnati Children's Hosp. Med. Ctr.*, 860 F. Supp. 2d 469 (S.D. Ohio 2012) (fitness for duty issue for nurse potentially regarded as disabled for concerns about use of controlled substance); *Talmadge v. Stamford Hosp.*, 2013 WL 2405199 (D. Conn. May 31, 2013) (nurse with past opioid dependence did not present evidence of being qualified to return to work in operating room after participating in rehabilitation program); *Skidmore v. Virtua Health Inc.*, 2012 WL 2369357 (D.N.J. June 21, 2012) (registered nurse with alcoholism terminated because of nonattendance allowed to bring state disability law claim although FMLA claim was dismissed); *Love v. Baptist Mem'l Hosp.—N. Miss., Inc.*, 2012 WL 4465569 (N.D. Miss. Sept. 25, 2012) (registered nurse with knee injury who fell asleep at work contended that hospital regarded her as drug addicted; she was entitled to reasonable accommodation, not accommodation of her choice; hospital had provided a transitional employment plan for the knee injury); *Scott v. Presbyterian Hosp.*, 2012 WL 4846753 (W.D.N.C. Oct. 11, 2012) (registered nurse with lupus, ADD, and other medical conditions who also had a history of drug abuse for which she had treatment; denial of summary judgment in ADA claim after she was terminated for charting errors that had been attributed to her drug addiction; "regarded" as issue allowed to go forward); *Horne v. Clinch Valley Med. Ctr., Inc.*, 2012 WL 4863791 (W.D. Va. Oct. 12, 2012) (registered nurse who was insulin-dependent was terminated; issue of whether the reason was a pretext could go forward); *Fedorov v. Bd. of Regents for Univ. of Ga.*, 194 F. Supp. 2d 1378 (S.D. Ga. 2002) (dental student with drug addiction not qualified because he was a current drug user and remained a threat to patients); *Judice v. Hosp. Serv. Dist. No. 1*, 919 F. Supp. 978 (E.D. La. 1996) (neurosurgeon with severe alcoholism symptoms could be required to be evaluated by addictionologist before reinstatement); *Wallace v. Veterans Admin.*, 683 F. Supp. 758 (D. Kan. 1988) (nurse with alcoholism and history of drug addiction qualified except for administration of narcotics because she had substantial ICU experience, had been drug free for nine months, and had completed rehabilitation); *Cavins v. S & B Health Care, Inc.*, 39 N.E.3d 1287 (Ohio Ct. App. 2d Dist. Montgomery Cnty. 2015) (registered nurse who was terminated for use of prescription pain medication was regarded as disabled; lack of sufficient evidence that it would be undue hardship to allow employee to work while taking medication).

possible that alcohol and substance use and abuse might have affected performance during medical school, but these situations do not seem to be raised as a factor in excusing performance in the medical school setting. It is possible, although not directly addressed in the decisions, that side effects of medications (not abuse or misuse) relate to performance of students with mental health impairments.

At this point it should be noted that a person with a disability includes a definitional reference to the use of illegal drugs.³⁵⁸ The term

“individual with a disability” does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use. Further rules of construction provide that one is still protected if the person:

- (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
- (3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including, but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.³⁵⁹

VII. Overarching Themes to Consider in Evaluating Policies, Practices, and Procedures for Treatment of Applicants and Students with Disabilities in the Medical Education Process

The 2016 article by Ellen Babbitt and Barbara Lee³⁶⁰ provides a framework for providing disability accommodations in medical schools and other professional programs that have clinical aspects to their programs. The article includes a number of specific recommendations, which provide a valuable framework for both the admission of medical students and the accommodation of students during medical school (particularly in clinical placements). These recommendations are based on a review of judicial decisions up to that point. The focus is primarily on issues arising at the admissions stage and the clinical placement stage. The following strategies and standards³⁶¹ are noted as a framework, and they are a critical starting point:

358 42 U.S.C. § 12210.

359 42 U.S.C. § 12210(b).

360 Babbitt & Lee, *supra* note 147.

361 42 J. C. & U.L. at 142-149.

1. Adoption of technical standards for all clinical programs;
2. Periodic review and updating of technical standards;
3. Consistent and nondiscriminatory application of standards during admissions process;
4. Additional discussion of technical standards at the point student begins clinical rounds;
5. Individualized and rigorous review of requests for accommodations;
6. Consistent and effective documentation of interactive processes and accommodation plans;
7. Effective and clear appeal process(es);
8. Education of admissions staff, faculty, and administrators of clinical programs;
9. Attention to confidentiality and proper communication within the program and institution;
10. Coordination with clinical sites;
11. Appropriate policies regarding information provided to site personnel; and
12. Consistency of technical standards, procedures, and policies as between different clinical programs.

A second study from 2018 provides even greater specificity about steps for various parties in medical schools to take to ensure greater inclusion of individuals with disabilities. The 2018 document³⁶² provides a number of very specific recommendations for applicants, admissions office staff, student affairs staff and orientation planners, learners, and faculty.³⁶³ Institutional and academic barriers identified in the executive summary are the following:

- Uninformed disability service providers
- Lack of clear policies and procedures
- Lack of access to knowledge about nuanced clinical accommodations and assistive technology
- Lack of access to other meaningful accommodations

362 LISA M. MEEKS & NEERA R. JAIN, ACCESSIBILITY, INCLUSION, AND ACTION IN MEDICAL EDUCATION: LIVED EXPERIENCES OF LEARNERS AND PHYSICIANS WITH DISABILITIES, (2018), <https://sds.ucsf.edu/sites/g/files/tkssra2986/f/aamc-ucsf-disability-special-report-accessible.pdf>. The 2018 report is aspirational in arguing for a more proactive approach to inclusion and advocating some steps that may be beyond the requirements of current disability discrimination law.

363 *Id.* at 60–64.

- Failure to publicize technical standards and to provide information on accessing accommodations
- Technical standards that do not reflect current technology and other developments in medical practice
- Lack of access to health care and wellness supports

Structural arrangements specified by the report in order to make arrangements more conducive to students with disabilities are

- Access to appropriate accommodations
- Ease in accessing accommodations
- Knowledge of clinical accommodations and medical education among disability service providers
- Personal networks and student organizations

Additional guidance is provided about culture and climate, including a “top-down commitment to diversity.”³⁶⁴ Although providing some specific steps to accomplishing some of the goals, the report does not designate *who* should initiate and monitor such steps. These steps include

- Designating and providing resources for disability service providers who are knowledgeable about medical education
- Publicizing clear, accessible policies and processes
- Providing access to appropriate accommodations
- Reviewing and revising technical standards in light of current promising practices
- Normalizing help-seeking behaviors and facilitating access to wellness services

And this is followed by specific considerations for fostering an inclusive and welcoming culture. These are

- Regularly assessing institutional policies, processes, services and physical space
- Providing ongoing professional development for faculty and staff
- Integrating best practices in disability inclusion, as well as accessible and respectful language, into curricula and pedagogy
- Integrating disability into diversity and inclusion initiatives

364 *Id.* at 59.

- Making information about disability services and accommodations easily accessible
- Reviewing recruitment and hiring practices
- Taking a universal design approach to both physical space and learner activities and experiences

For many of these steps, there should be a designation of who is to do the task. In many cases the designated person should be the dean of the medical school.³⁶⁵ This does not mean that the dean is the individual who must actually develop the policies and practices, but it is the dean who should ensure that *somebody* does it. And it is the dean who sets a tone that faculty and staff should work across various often siloed offices and units of the medical school and university on these issues. Job descriptions, staff and faculty evaluations, rewards and incentives are opportunities for where a dean should use power, influence, or decision-making responsibility.

University counsel can play a leveraging role in making certain that decanal prioritization by ensuring that the university president, provost, and board are aware of the high cost of unnecessary dispute resolution, and encouraging that the appointment, retention, and evaluation of medical school deans takes into account the ability to create and implement and monitor policies, practices, and procedures described in both the 2016 article by Babbitt and Lee and in the 2018 report by Meeks and Jain. The 2018 report recognizes the importance of “Top Down” commitment (noting the powerful role of making policy). What can be added to both documents is the designation of responsibility for those in a position of top leadership (university presidents, provosts, vice presidents, and medical school deans) to see that these strategies and goals are established and implemented and updated. For example, when deans are filling key staff positions within the medical school, job descriptions for those who are medical school admissions officers, disability service providers, and student service providers should require the ability to work across departments and knowledge of disability issues.

The Babbitt and Lee article examines medical school and other clinical professional education cases to reach the conclusion that specific steps are necessary to avoid unnecessary dispute. What the five additional years of case decisions highlight, however, is the importance of additional attention to including some specific task assignments and communication flow to the framework. Neither the 2016 nor the 2018 detailed publications provide specificity of the role of the dean in setting policy.

A major goal of my article is to get the attention of university counsel, medical school risk management administrators, and medical school deans (and presidents of universities that have medical school programs) who have the power and

365 I base this belief on my five years of experience as a law school dean (2000–05), my six years as an associate dean (1986–1993; 1999–2000), and my many years of service on law school admissions committees and student readmission and support committees. I have also observed the various ways these roles can be most effective through leadership at the top from my several years of experience in the accreditation and membership process for the American Bar Association Section of Legal Education and Admission to the Bar and the Association of American Law Schools. In that service, I reviewed the leadership structure and effectiveness of dozens of law schools.

position to ensure the implementation of the excellent recommendations of these two reports. The reason those in these roles should want to do that is not just because it is the right thing to do, but also because it is likely to provide much more effective resolution of issues in terms of time, resources, and attention for not only the medical school, but also the individuals with disabilities themselves. Even though medical schools will “win” most of the cases, the years of litigation can often be avoided by better implementation of the practices proposed by the 2016 and 2018 publications. This avoids not only the financial costs to all parties, but also can prevent the reputation of the medical school from being damaged.

A few themes from both publications are worth highlighting because in reviewing the extensive litigation of these issues, it seems that breakdowns in accommodating medical students with disabilities often occur because of these barriers. One barrier is the way that medical school administrators and faculty members often do not work across departments. It is important that the admissions administrator communicates to applicants the technical requirements expected for both the academic and clinical portions of the program and also for expectations for licensure and step exams. After admission, these administrators should reach out to all admitted applicants, inviting them to identify accommodations that might be needed. This avoids requiring applicants to self-identify before acceptance. The admissions officer can then share that information with the administrators and faculty members responsible for the enrollment of the student, and coordinate with the campus disability services office about documentation that will be required for some accommodations. Those in these three roles must communicate and coordinate to ensure clear and transparent processes for the accepted students.

The nature of academic work and clinical work, and how faculty members are responsible for evaluating that work and moving students to the next stage of achieving a medical degree require that administrators and faculty members do not work in isolation from each other. As appropriate, faculty members need to be advised about accommodation issues and where and how to seek technical assistance on how to accommodate various disabilities. Faculty members are often not well informed about disability accommodation issues, including confidentiality and privacy related to those issues. An examination of some of the disputes above illustrates how this can be problematic leading to prolonged litigation.

Finally, the spreading of responsibility and lack of clear lines of responsibility and decision making account for at least some of the unnecessarily prolonged litigation. Some cases have factual settings where it was unclear if the student’s inadequate performance was just one aspect of the program, in all of the program, etc., making it confusing to the student to know where and how to appeal or otherwise address the deficiency.

While a detailed comparison of the disputes involving students with disabilities in legal education and medical education is beyond the scope of this article, a general overview might provide some guidance on why there are far fewer lengthy judicial disputes involving law school when compared to medical school.³⁶⁶

³⁶⁶ While the stakes are higher in medical school in some respects, and the clinical education beginning in the third year of medical school may explain some of the difference, it may also be

There appears to be much less litigation involving legal education. That may be because the stakes are higher in medical education. Patient lives may literally be on the line when medical students are involved in patient care. It may also be because those in legal education are attuned to process and procedure. It may also be that law schools have been more directly aware of litigation because of the inherent nature of law schools. It is also probably in part because medical education directly infuses clinical aspects into its program and almost everyone who goes to medical school will “practice medicine” and want certification. Law graduates are much more diffuse in their career paths. The difference in the amount and length of dispute resolution through the courts may be, however, at least in part, due to the factors noted in the details of the cases described above.

VIII. Summary and Conclusions

This article primarily addresses issues of individuals with disabilities in medical school. While that is the health care professional program with the highest stakes, most of the same guidance would be relevant to other health care professional training and how admissions and enrollment relate to licensure. This includes nursing, dentistry, chiropractic studies, and optometry. Some of the guidance may also be relevant for paraprofessional programs, including physician assistant, nurse practitioner, and physical and occupational therapy programs. University counsel and top administrators in these programs should consider the analysis and recommendations that might be relevant to those programs.

The article provides a detailed description of medical school education today and its relationship to licensure and to the accrediting and other regulating agencies that affect the admission, enrollment, and employment of medical students with disabilities. A detailed review of the litigation that has resulted from settings in which individuals in medical school settings with a range of disabilities highlights the importance of prioritizing an examination at many medical schools about how policies, practices, and procedures are established and implemented. Many of the cases, particularly those in settings involving mental health issues, result in litigation that may take a decade to resolve, usually in favor of the institution, but with high costs for all parties.

The article builds on previous assessments of the issue and focuses attention on the importance of having top leadership ensure that the specific strategies and frameworks are actually implemented.³⁶⁷ Not only will such efforts be likely to

because law schools and leadership within legal education have focused attention on proactively addressing these issues far longer than medical schools. Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues?* 22 AM. U. GENDER, SOC. POL'Y & L. 519 (2014). A rough comparison of litigation involving legal and medical education programs indicates less than a dozen cases against law schools compared to approximately fifty involving medical schools. There are 155 medical schools and 37 schools of osteopathy, with about 45,000 enrolled each year. There are 205 ABA accredited law schools, with about 40–45,000 law students enrolled each year.

367 Laura Rothstein, *Southeastern Community College v. Davis*, in EDUCATION STORIES ch. 7 (pages 197-220) (Michael Olivas & Ronna Schneider eds., 2007); Laura Rothstein, *Impaired Physicians and the ADA*, 313 JAMA 2219 (2009), <http://jama.jamanetwork.com/article.aspx?articleid=2319174> (with Mark Rothstein); Laura Rothstein, *Licensing and Physician Mental Health: Problems & Possibilities*, (with Hendin et.al), 93 J. MED. LICENSURE & DISCIPLINE No. 2 (2007); Laura Rothstein, *Health Care Professionals*

save time, money, and good will, but these efforts are the right thing to do.

This article encourages university counsel and top administrators to do more to implement programming at medical schools to ensure fair and transparent admission, enrollment, and transition to licensing. Other national and state organizations (accreditation agencies through their technical standards and licensing agencies through their approval requirements) should take account of this and communicate with the medical school leadership on implementing and communicating appropriate policies.

with Mental and Physical Impairments: Developments in Disability Discrimination Law, 41 ST. LOUIS U. L. REV. 973 (1997) (Symposium Issue). Publications by others on these issues that were important foundational research for this article include Babbitt and Lee, *supra* note 147; Lisa M. Meeks & Neera R. Jain, *Accessibility, Inclusion, and Action in Medical Education*, ASS'N OF AM. MED. COLLS. (Mar. 2018), <https://sds.ucsf.edu/sites/g/files/tkssra2986/f/aamc-ucsf-disability-special-report-accessible.pdf>; Philip Zazove et al., 91 U.S. Medical Schools' Compliance with the Americans with Disabilities Act: Findings from a National Study, 91 ACAD. MED. (979) (2016), (concluding that the technical standards of most medical schools do not support providing reasonable accommodations for students with disabilities); *The ADA at 25: Disability Rights and the Health Care Workforce*: Symposium Issue, 9 ST. LOUIS U. J. HEALTH L. & POL'Y (2015) (articles in the issue include Nicole Buonocore Porter, *The Difficulty Accommodating Health Care Workers* (1–18); Pierce Blue, *Job Functions, Standards and Accommodations Under the ADA: Recent EEOC Decisions* (19–34); Mark C. Weber, *Numerical Goals for Employment of People with Disabilities by Federal Agencies and Contractors* (35–46); Leslie Francis & Anita Silvers, *The Health Care Workforce: How to Understand Accommodations* (57–88); Mary Crossley, *Disability Cultural Competence in The Medical Profession* (89–110)); Thomas W. Koenig et al., *Core Personal Competencies Important to Entering Students' Success in Medical School: What Are They and How Could They Be Assessed Early in the Admission Process*" 88 ACAD. MED. 603 (2013); Lucian L. Leape & John A. Fromson, *Problems Doctors: Is There a System-Level Solution?* 144 ANNALS INTERNAL MED. 107 (2006) (addresses physician performance failures and need for better performance measures and substantial expansion of external programs for assessment and remediation by hospitals; calls on Federation of State Medical Boards, the American Board of Medical Specialties, and the Joint Commission on Accreditation of Healthcare Organizations to collaborate); ASS'N OF AM. MED. COLLS. MEDICAL STUDENTS WITH DISABILITIES: A GENERATION OF PRACTICE (2005); Claudia Center et al., *Confronting Depression and Suicide in Physicians: A Consensus Statement*, 289 JAMA 3161 (2003) (concluding that the low priority given to physician mental health is a barrier to their seeking help; recommending transforming professional attitudes and changing institutional policies); Annie Steinberg et al., *Reasonable Accommodations for Medical Faculty with Disabilities*, 288 JAMA 3147 (2002); Questions and Answers about Health Care Workers and the Americans with Disabilities Act, http://www.eeoc.gov/facts/health_care_workers.html (Mar. 2015).

VULNERABLE INTEGRITY: TWO WHISTLEBLOWER CASES IN PUBLIC UNIVERSITIES

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Abstract

This note analyzes two state higher education whistleblowers' freedom of speech cases under state and federal laws: the 2018 case Bradley v. West Chester University and the ongoing case of Khatri v. Ohio State University. These cases serve as windows into the post-Garcetti v. Ceballos era, characterized by a lack of constitutional protection for whistleblowers in the public sphere, especially in public universities. My analyses of Bradley and Khatri raises questions about public trust in state institutions and the integrity of public officials, competing organizational and public values, and the problematic federal jurisprudence when it comes to First Amendment protections for higher education employees. The distinction between the roles of administrative staff like Bradley, and contingent research faculty like Khatri also raises important questions about whether staff and contingent faculty ought to have the same or different speech protections. This article argues that both cases have instructive value to not only higher education attorneys, but also educational researchers, and organizational stakeholders. The author also argues that the protections available to employees of public higher education institutions ought to depend on their roles in fulfilling the educational mission (like Khatri as a research scientist) versus the business operations (like Bradley as budget director).

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INTRODUCTION

In the last fifty years, federal regulation of higher education institutions has shifted the allocation of power significantly toward the administration and away from the faculty when it comes to laboratory health and safety, research misconduct, and overall budgeting.¹ While the purpose of this regulation may have been to increase accountability and transparency, recent court cases involving university whistleblowers reveal that the shared governance consequences of such administrative power leave a lot to be desired. Laboratory norms and procedures once governed by laboratory safety committees are now enforced by whole compliance offices. While the administrative authority to ameliorate lab safety concerns may lie with the environmental health and safety office, the authority to discipline routine perpetrators of unsafe conduct or exploitative practices still lies solely with academic administration in most universities. While these cases *may* go before a faculty panel, this is often only the case when a tenured faculty member is disciplined. By examining the recent case of *Khatri v. Ohio State University*,² this Note considers what should happen when the person disciplined is a contingent worker (post-doc, graduate student worker, or non-tenure-track researcher) and the reason for that discipline is whistleblowing activity.

This article also explores how whistleblowers who work as administrative staff (like Colleen Bradley in *Bradley v. West Chester University of Pennsylvania State System*³) are and are not protected from retaliation for their whistleblowing activities and to what degree there ought to be shared governance protections for them as well. This case provides an important window into the post-*Garcetti v. Ceballos*⁴ era constitutional failure to protect whistleblowers in the public sphere. More specifically, an analysis of *Bradley* raises questions about public trust in state institutions and the integrity of public officials, competing organizational and public values, and fundamental misunderstandings of First Amendment protections for public employees. The author argues that since there are such limited protections for whistleblowers in public colleges and universities available under federal law, and state whistleblower statutes vary significantly in this regard, this is an area ripe for collective bargaining protections and inclusion in collective bargaining agreements and even non-union contracts. The author argues for a contractual protection for intra-institutional speech made in support of the educational mission⁵ and according to institutional policy outside of one's chain of command, for faculty and for staff.

1 For a more thorough coverage of the changes in federal regulation of higher education institutions over time, see Barbara A. Lee, *Fifty Years of Higher Education Law: Turning the Kaleidoscope*, 36 J.C. & U.L. 649, 679–81 (2009–2010).

2 *Khatri v. Ohio State Univ.*, 2021 WL 534904 (N.D. Ohio).

3 *Bradley v. W. Chester Univ. of Pa State Sys.*, 880 F.3d 643 (3d Cir. 2018).

4 *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

5 This argument builds on the arguments put forth by David M. Rabban, *Academic Freedom, Professionalism, and Intramural Speech*, 1994 NEW DIRECTIONS FOR HIGHER EDU. 77 (1994); Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and*

I. Background and Framework

My argument for increased protections for whistleblowers relies on the scholarship of legal scholars David Rabban, Judith Areen, and Robert Post, who argue that faculty speech that supports the institution's educational mission to create and disseminate expert knowledge ought to be given special protections from retaliatory discipline.⁶ The additional literature that frames the discussion comes from the fields of public administration, higher education, law, and organizational theory. For example, what "public good" means is central to the framing of these cases, yet the Supreme Court's decision in *Garcetti v. Ceballos* has restricted the legal understandings of the public good in public sector whistleblower cases.⁷

In free speech cases, there is often a tension between the intramural/extramural speech dichotomy (speech made to someone else within the organization vs. to someone outside the organization).⁸ In the federal case law, judges sometimes conflate internal speech (expressions made to other members of the organization) with "chain of command" speech — speech made up the reporting structure of the organization to one's supervisor, or one's supervisor's supervisor, etc.⁹ While the First Amendment retaliation caselaw often does not recognize "chain of command" speech as protected speech, the same is not true for all intramural speech. For instance, it is important to distinguish chain of command speech from internal reporting made outside one's chain of command (e.g., to the Equal Employment Office, Title IX office, campus police, or the like).

II. Context

To set the context for the analysis of *Bradley*, it is instructive to look first at the landscape of the protections available for public employees who have been disciplined for their speech made pursuant to their official duties. The First Amendment caselaw changed drastically in 2006 with the Supreme Court decision in *Garcetti v. Ceballos* which is discussed in Part II.A.1.¹⁰ Issues with the *Garcetti* ruling are described, as well as how *Garcetti* and a case from 2014 (*Lane v. Franks*)¹¹ shape the current protections for public employees. Finally, the protections for whistleblowers in public employment contexts, which vary by state and differ for state and federal employees, are discussed.

Governance, 97 GEO. L.J. 945 (2009); ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2013). Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State (Yale University Press Reprint edition ed. Apr. 2013 This argument comes out of my dissertation research on faculty free speech cases.

6 Rabban, *supra* note 5, at 77; Areen, *supra* note 5, at 994; Post, *supra* note 5, at 77–78.

7 *Garcetti v. Ceballos*, 547 U.S. 410 410. Full description of the case is included in the following section.

8 See especially, Rabban, *supra* note 5.

9 See *Khatry v. Ohio State University*, 2021 WL 534904 at *9 (N.D. Ohio Feb 9, 2021, overruling plaintiff's objections because he "failed to plausibly plead that his speech was uttered as a private citizen, unrelated to his job duties and to entities outside the chain of command of his employer.").

10 For a short primer on First Amendment caselaw prior to 2006, see Julian W. Kleinbrodt, *Pro-Whistleblower Reform in the Post-Garcetti Era*, 112 MICH. L. REV. 111, 114 (Oct. 2013).

11 *Lane v. Franks*, 573 U.S. 228 (2014).

A. *First Amendment Protections for Public Servants*

Prior to 2006, all cases in which public employees sued their employers for violating their First Amendment right to free speech were decided using a balancing test developed by the Supreme Court in a series of cases starting with *Pickering v. Board of Education*.¹² Under the *Pickering* balance test, the Supreme Court did not distinguish between public employees in or outside of academia.¹³ Thus, the First Amendment protections available for a faculty member or a staff member at the same university were the same as those for a municipal sanitation worker—at least in principle.¹⁴ Protections for faculty were especially well established, since the McCarthy era brought several important cases to the Supreme Court.¹⁵ Peter Byrne's foundational treatise on academic freedom and the First Amendment serves as an excellent introduction to the line of caselaw dealing with faculty speech through the 1980's.¹⁶ While this jurisprudence has been revised by the addition of *Garcetti*, the research on these earlier cases shows that what started as fairly robust protections, over time came to protect employee speech—and especially faculty speech—less and less.¹⁷

1. *Garcetti v. Ceballos*

In 2006 the U.S. Supreme Court decided a case—*Garcetti v. Ceballos*—that drastically restricted the free-speech protections of public employees.¹⁸ In this case, Ceballos, a calendar deputy in the Los Angeles County District Attorney's Office (DA), was informed by a defense attorney that there were concerns about an affidavit (written by a deputy sheriff) used to obtain a search warrant.¹⁹ Ceballos investigated these claims and found them credible. He wrote a memo to his supervisor to summarize his findings. After the first memo, there was a second, and subsequently a meeting with members of the sheriff's office, Ceballos, and his supervisors that "allegedly became heated."²⁰ Nevertheless, the DA continued unhindered with the prosecution and Ceballos was called to testify for the defense. Thereafter, Ceballos was reassigned to a different title, a different location, and denied a promotion. In his lawsuit he alleged that the DA's office violated his First Amendment rights by retaliating against him for his first memorandum which he claimed was protected speech. The trial court dismissed the case, which Ceballos

12 *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968).

13 J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 264 (1989).

14 *Id.*

15 *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Board of Regents of Univ. of State of NY*, 385 U.S. 589 (1967).

16 Byrne, *supra* note 13; see also, WILLIAM A. KAPLIN ET AL., *LAW OF HIGHER EDUCATION*, ch. 7 (6th ed. 2019).

17 KAPLIN ET AL., *supra* note 16, at 760.

18 547 U.S. 410 (2006).

19 *Id.* at 414.

20 *Id.*

appealed to the Ninth Circuit. The circuit court reversed, asserting that Ceballos' speech was protected. Garcetti, the district attorney, appealed to the U.S. Supreme Court and in 2006 a 5-4 decision was published in favor of the DA.

The U.S. Supreme Court reasoned, in accordance with the appellants' oral arguments, that it would be a great risk to "constitutionalize the employee grievance" process; thus they ruled that speech made pursuant to official duties of a public employee is not protected by the First Amendment.²¹ In other words, the concern for the majority was how employment ramifications for on-the-job speech of public employees might become a constitutional issue (and flood the courts with employment disputes), rather than remaining an internal employment issue. While this is a reasonable concern, there are multiple problematic aspects of this precedent that are well-argued in the dissents of Justices Stevens and Souter (joined by Ginsburg and Stevens). One concern raised in the dissents was that this precedent would be applied unjustly to public college and university faculty.²² The majority opinion thus included a three-sentence paragraph explaining that the Court would defer deciding the question of constitutional protection for faculty speech related to scholarship and teaching in public colleges and universities for a future case.²³ While *Garcetti's* effect on staff or administrator speech cases is fairly uniform across the federal circuits, the Supreme Court's decision leaves open the question of how *Garcetti* should be applied to faculty speech cases, if at all. The Part II.A.2 discusses additional concerns with *Garcetti's* effects on public employee speech doctrine.

2. *Since Garcetti*

In this subsection two issues with *Garcetti* related to *Bradley* and *Khatri* are analyzed. The first issue is the failure to protect whistleblower speech under *Garcetti*, thus making public-employee whistleblowing even more precarious. The second issue is that under *Garcetti* there are social, organizational, and cultural ramifications that result in a convoluted logic to organizational functioning that is not in anyone's—least of all, the public's—best interest.

First, Justice Stevens sums up the most problematic aspect of the precedent in his dissent, writing, "The proper answer to the question 'whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties,' is 'Sometimes,' not 'Never.'"²⁴ The majority claimed that it should not fall on the Constitution to protect this speech, arguing that instead there are whistleblower statutes that protect the speech that Stevens would say falls in the "sometimes" category.²⁵ Yet, Justice Souter, joined by Justices Stevens and Ginsburg, argues, "the combined variants of statutory

21 *Id.* at 420, internal citations omitted.

22 *Id.* at 438.

23 *Id.* at 425.

24 *Id.* at 426, internal citations omitted.

25 For a complete list of whistleblower statutes by state, updated in 2019, see *Whistleblower Statutes Section 25*, in 8th NATIONAL SURVEY OF STATE LAWS 461 (Richard A. Leiter ed., 2019).

whistle-blower definitions and protections add up to a patchwork," which they describe in detail as failing to comprise any semblance of the necessary protections for local, municipal, state, or federal whistleblowers.²⁶ The dissenters conclude that the assertion that whistleblower statutes will protect those employees in need of protection is fundamentally unfair: "individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them."²⁷ Thus, in denying all government employees the protection of the constitution for their speech made pursuant to their official duties, the court knowingly expects the populace to rely on a "patchwork" of statutes to unequally protect whistleblowers speaking out against what they believe to be governmental corruption, deception, or other wrongdoing.

The organizational, cultural, and legal ramifications of this precedent do not appear to have been considered by the majority. In terms of organizational ramifications, by ruling that citizen speech is protected but employee speech is not, the law thus pushes employees with concerns about wrongdoing to speak publicly as citizens before ever speaking with their superiors or other employees. Justice Stevens points out how "perverse" it is "to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors."²⁸ This creates a culture of not only distrust of one's colleagues, which does plenty of damage on its own, but due to distrust, it can mean people have not felt that they could ask around to investigate or gather more information about the potential wrongdoing without outing themselves as a snitch. Thus, *Garcetti* creates a culture of compulsory ignorance and therefore secrecy. Rather than creating a public record of the investigation into potential wrongdoing, this rule encourages secrecy to prevent anything questionable from being seen by the wrong eyes who might go straight to the press. In giving the employers more control over employee speech, this rule essentially has assumed that it is more desirable for the federal courts not to get involved in employment disputes, than it is to ensure the transparent and ethical conduct of public administrators.

In 2014 the U.S. Supreme Court decided in *Lane v. Franks*²⁹ that public employees who speak out against wrongdoing in the workplace within their trial testimony are protected by the First Amendment. In this case, a program director for an outreach program at a community college was called to testify against a legislator indicted for fraud whose name was on the program's payroll for no reason. While the decision was made after *Garcetti*, it did not limit the scope of the *Garcetti* ruling as much as it clarified that subpoenaed sworn testimony "outside the course of [one's] ordinary job responsibilities" is protected by the First Amendment.³⁰ Two

26 *Garcetti*, 547 U.S. at 440.

27 *Id.* at 441.

28 *Id.* at 427.

29 *Lane v. Franks*, 573 U.S. 228 (2014).

30 *Id.* at 231. Note: to a keen observer this may appear to contradict the *Garcetti* ruling, since Ceballos also testified under oath and was penalized; however, Ceballos's legal team did not argue that the speech in question was his court testimony, only the memoranda written pursuant to his

aspects of this decision are important. As noted by Kleinbrodt,³¹ since *Garcetti*, the first question asked by the court in an employee's First Amendment case is whether the speech was made as an employee or as a citizen. Thus, the content of the speech is of secondary interest to the court, and this is affirmed by *Lane*. Second, *Lane* holds that any public employee's testimony in court must still be balanced with the employer's interest in suppressing that speech.

3. Whistleblower Protections

Whistleblowers are employees who report misconduct or wrongdoing in an organization to which they belong, as in *Garcetti* and *Lane*.³² Protections from retaliation by supervisors or powerful administrators are available to some employees as outlined in whistleblower statutes.³³ These statutes vary greatly in terms of who is protected and from what based on the jurisdiction or locale of the employer.³⁴ Bradley's case took place in Pennsylvania and Khatri's in Ohio, both states where there are statutory whistleblower protections for both public and private employees.³⁵ While there is also a federal whistleblower statute, it applies only to employees of the federal government, not to state or municipal employees.³⁶ As stated by the dissenters in *Garcetti*, the statutory landscape for whistleblower protections is a "patchwork" at best.³⁷ While every state appears to have a whistleblower statute, the statutes vary widely in terms of who is protected, what remedies are available, and whether there are any penalties for wrongdoing.³⁸

Under *Garcetti*, the first question to determine if an employee's speech is protected under the First Amendment is whether it was spoken pursuant to official duties; this has nothing to do with the content of the speech. There are surely times when the content of the speech would merit protection (i.e., if it is a matter of public concern) but is not protected because the speech was made pursuant to official duties.³⁹ *Garcetti*'s limitations on employees' First Amendment rights

official duties. Likewise, the court in *Lane* places the caveat that truthful testimony under oath by a public employee must be "outside of the scope of his [sic] ordinary job duties" for it to be considered "speech as a citizen for First Amendment purposes." *Id.* at 238.

31 Kleinbrodt, *supra* note 10.

32 For a more thorough exploration of the definition of whistleblowers, see Milton Heumann et al., *The World of Whistleblowing*, 16 PUB. INTEGRITY 25 (2013).

33 *Whistleblower Statutes Section 25, supra* note 25.

34 *Id.*

35 *Id.*

36 Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (5 U.S.C.).

37 *Garcetti v. Ceballos*, 547 U.S. 410, 440 (2006).

38 *Whistleblower Statutes Section 25, supra* note 25.

39 See *Nuovo v. The Ohio State University*, 726 F. Supp. 2d 829 (S.D. Ohio 2010) (finding that a professor of obstetrics who spoke out against an extremely high rate of misdiagnoses of HPV in female patients was made pursuant to his official duties as a physician and employee, and not as a citizen); *Alberti v. Univ. of P.R.*, 818 F. Supp. 2d 452 (D.P.R. 2011), (finding that plaintiff's allegation that a student violated HIPPA was made pursuant to official duties as a nursing instructor); *Ezuma v. City Univ. of New York*, 367 F. App'x 178 (2d Cir. 2010) (finding that plaintiff's speech in support

means that in the cases where whistleblowing overlaps with employee on-the-job speech, the causes of action available to public employees are limited to the applicable whistleblower statutes. As we will see, in *Bradley* and in *Khatri* there may have been whistleblower violations, but under *Garcetti*, the courts have found no violation of First Amendment rights.⁴⁰

B. Bradley v. West Chester University

From fall 2011 to summer 2015, Colleen Bradley worked at West Chester University (WCU) as the budget director.⁴¹ Part of her work was creating a budget document to submit to the Pennsylvania State System of Higher Education (PASSHE).⁴² At a meeting in her first year at WCU, PASSHE administrators told Bradley she needed to remake the budget document showing a multi-million dollar deficit rather than the multi-million dollar surplus the budget reflected.⁴³ One administrator explained to Bradley that this was a political document—reporting a surplus would jeopardize the state appropriations for the university (and potentially all PASSHE schools).⁴⁴ Bradley told her supervisor, Mixner, of this demand, who agreed with the characterization of the document as “political” and subsequently required her to cooperate with the PASSHE request.⁴⁵ In September of her first year at WCU, Bradley shared the PASSHE request with the Administrative Budget Committee (ABC). She described the request as “unethical and quite frankly, [possibly] illegal,” seemingly unconvinced that there ought to be a difference between a political and financial document.⁴⁶ Mixner confronted Bradley about this a few days later and said her actions threatened “her credibility as well as [her] future.”⁴⁷ The next week she shared with the ABC a memo that stated that she could neither explain nor defend the budgeting technique requested of her and was therefore uncomfortable with the request.⁴⁸ She was unable to persuade them to change their practice, and her name was left on the documents that were submitted to the state.⁴⁹

In fall 2014, two years later, Bradley presented Mixner’s deficit budget at a meeting with the university enrollment management committee.⁵⁰ An attendee had

of one colleague and calling out two others was made pursuant to his official duties).

40 Nevertheless, *Khatri* is currently on appeal to the Sixth Circuit, and the district court’s findings could be reversed.

41 *Bradley v. W. Chester Univ. of Pa.*, 226 F. Supp. 3d 435, 437 (E.D. Pa. 2017). The district court and circuit court decisions present the facts differently (stylistically, not substantively).

42 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F. 3d 643, 647 (3d Cir. 2018). *Id.*

43 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F. 3d at 647.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.* at 648. At 648.

48 *Id.*

49 Youtube Video by Raging Chicken Press, *Colleen Bradley | Whistleblower | Part 1*. <http://bit.ly/2Eyb0k3>; *Id.*

50 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F. 3d at 648.

believed the university had a surplus and asked Bradley why the presented budget instead showed a deficit. Bradley then presented her own budget, which angered Mixner as he had specifically told her to present his. Afterwards, Bradley asked that she be allowed to present her budget at a meeting the next day, but Mixner refused, stating the president requested he present Mixner's budget instead while she sat silently.⁵¹ After a few weeks, in November 2014, Mixner told Bradley her contract would not be renewed after the 2014-15 academic year.⁵²

Bradley is an interesting case for education scholars and organizational stakeholders, since it exemplifies how legal precedent shapes and fails to shape how the public views public educational institutions, competing values in workplace culture, and the (lack of) protections available for educational whistleblowers. This section of the note analyzes three important themes of the case: public trust, competing values, and First Amendment protections.

C. *Khatri v. Ohio State University*

In *Khatri v. Ohio State University*, decided by the U.S. District Court for the Northern District of Ohio, a research scientist sued his former university employer, his principal investigator, his former supervisors, and other colleagues claiming that his First Amendment rights were violated when he was fired because of his whistleblowing activity.⁵³ A research scientist is a non-tenure-track faculty member who is assigned solely to research duties (they have no teaching or service expectations, therefore they do not normally participate in shared governance). In this case, the plaintiff worked in a lab with dangerous infectious substances (strictly regulated under federal law) and found that lab personnel had not been properly trained on how to work with these pathogens. Fearing the very real possibility of a "major disaster that may have resulted in loss of human lives and livestock," the plaintiff attempted to report the misuse and mishandling of the substances to a federal agency but did not know how.⁵⁴ He contacted local law enforcement who told him to contact the campus police; so he did.⁵⁵ He also reported the issues in the lab to the campus biosafety manager and the director of the agricultural research center in which his program was housed.⁵⁶ He reported additional issues with the hostile work environment, harassment, and abuse he endured to the campus human resources director.⁵⁷ Over the course of years, these reports were dismissed or ignored.

51 *Bradley v. W. Chester Univ. of Pa.*, 226 F. Supp. 3d 435, 438 (E.D. Pa. 2017); *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F.3d at 648.

52 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F.3d at 649.

53 2021 WL 534904 (N.D. Ohio); 2020 WL 5340233 (N.D. Ohio); 2020 WL 533040 (N.D. Ohio).

54 *Khatri v. Ohio State Univ.*, 2021 WL 534904, at *1; 2020 WL 5340233, at *9.

55 *Khatri v. Ohio State Univ.*, 2020 WL 5340233, at *10.

56 *Khatri v. Ohio State Univ.*, 2021 WL 534904, at *1-2.

57 *Khatri v. Ohio State Univ.*, 2020 WL 5340233, at *10.

After filing a complaint against the acting head of the program, Khatri was placed on an employee improvement plan which eventually led to his termination.⁵⁸ The court acknowledged that the plaintiff “was valued for bringing in [over \$1 million in] grant money, which his department heads sought to retain” and which they allegedly continued to use for their own purposes without his approval.⁵⁹ The court did not address whether or not the plaintiff’s whistleblowing activity was a motivating factor in his termination, as the court found that none of the plaintiff’s complaints constituted protected speech under the First Amendment.⁶⁰ The court stated that the plaintiff’s complaints were not protected because they were internal communications—meaning speech made to other units within the same university employer—made pursuant to his job duties, even though HR directors, biosafety officers, and campus police are clearly not within the chain of command of a research scientist.⁶¹

III. Analysis

Bradley and *Khatri* are interesting cases for attorneys, scholars, and other organizational stakeholders for three reasons. First, they help us understand what is at stake when judges fail to recognize the competing values inherent to a public institution operating under a shared governance structure. Second, they exemplify how legal precedent can chip away at protections available for educational whistleblowers, thus further eroding the public trust in public institutions. Finally, they highlight the differences between the roles staff and faculty play in the educational mission of universities, thus raising questions about an academic exception for speech made in support of the educational mission.⁶²

A. Competing Values

This subsection of the article analyzes how competing values inherent to the university governance structure can lead to incentivizing the misuse or misallocation of public funds, despite such arrangements being antithetical to the public good.

In the *Bradley* case, we see the value of accounting professional ethics come into conflict with politics. In the *Khatri* case, we see the value of grant funding in conflict with public safety. Competing values are inherent to what Newfield calls a divided governance model in higher education, wherein the administration is responsible for the business operations, and the faculty is responsible for the

58 *Khatri v. Ohio State Univ.*, 2021 WL 534904, at *2.

59 *Khatri v. Ohio State Univ.*, 2020 WL 5340233, at *15.

60 *Khatri v. Ohio State Univ.*, 2021 WL 534904, at *9.

61 *Id.* at *8.

62 The Fourth and Ninth Circuits have adopted academic exceptions to *Garcetti*. See, e.g., *Adams v. Trustees of the Univ. of NC-Wilmington*, 640 F. 3d 550 (4th Cir. 2011); *Demers v. Austin*, 746 F. 3d 402 (9th Cir. 2014). The Sixth Circuit also recently adopted an academic exception to *Garcetti* in *Meriwether v. Hartop*, 2021 WL 1149377 (6th Cir. Mar. 26, 2021).

educational mission.⁶³ This governance structure is essentially adversarial, and we see this play out in Khatri's case—he was repeatedly used and retained for his grant funds, while his academic supervisors blocked his applications to other labs and universities.⁶⁴ Khatri's speech was made as a whistleblower, raising concerns related to public safety from dangerous viruses. As an immunologist, he was expertly trained to identify pathogenic threats, and he did so in furtherance of the educational mission. Nevertheless, such speech can be easily seen as a threat to public safety in itself, since widespread reporting of such danger might cause a community panic, not to mention a public relations nightmare. The district court in Khatri's case sided with the administration without recognizing the underlying governance structure that, at times, pits the faculty who fulfill educational mission against the administration who prioritize business concerns.

In *Khatri*, the district court found that while the plaintiff's reporting of misuse/mishandling of dangerous infectious agents within a departmental lab to campus police was certainly a matter of public concern, it was not, in the court's view, citizen speech under *Garcetti*. The court ruled that since the plaintiff reported the potential harms to the *campus* police and to "superiors" (though not his direct superior, but rather to campus administration and human resources administrators), his was speech "directly relate[d] to his job duties as a research scientist"⁶⁵ and made to entities within "the chain of command of his employer."⁶⁶ Because the plaintiff had failed to establish a *prima facie* case of First Amendment retaliation, the court found that the individual defendants were entitled to qualified immunity. The university defendant was entitled to Eleventh Amendment immunity.

In Bradley's case, the same issue of competing values comes through, but this time it is not due to the often-opposing roles of faculty and administration. Instead, the values at odds in *Bradley* were the plaintiff's professional ethics and the university's role in a political funding process that not only affected their institution, but other sister schools in the state system as well. Kleinbrodt points to the flawed logic of *Garcetti* specifically when it comes to professional codes of conduct, stating that government employees bound by professional ethics can be placed in an impossible situation when they believe their official duties may violate those ethical standards.⁶⁷ In this instance, Bradley felt her integrity as an accounting professional and finance officer was at stake. Bradley believed she was being asked to endorse a budget document that made false representations of the state of the institution's accounts—a document that was headed straight to a governing body that determined funds allocation for all of the schools in the state system of higher education.⁶⁸ She believed this request to not only be unethical,

63 CHRISTOPHER NEWFIELD, *IVY AND INDUSTRY: BUSINESS AND THE MAKING OF THE AMERICAN UNIVERSITY, 1880–1980* 80–81 (Duke University Press 2003).

64 *Khatri v. Ohio State Univ.*, 2021 WL 534904, 1–2.

65 *Id.* at 10.

66 *Id.* at 9.

67 Kleinbrodt, *supra* note 10, at 125.

68 *Bradley v. W. Chester Univ. of Pa State Sys.*, 880 F. 3d 643, 647 (3d Cir. 2018).

but possibly illegal.⁶⁹ For Bradley, the highest priority was to maintain her integrity and abide by her ethical standards, which would not permit her to entertain any rationale for such a false statement of accounts. In contrast, for her supervisor, Mixner, the role of this document was not budgetary—but political.⁷⁰ But how could PASSHE make informed budgeting decisions based on demonstrated need at its individual schools, if the budget documents they receive do not represent the state of accounts? Likewise, Mixner’s insistence that such documentation was par for the course concerned Bradley, not just because she believed that her integrity was on the line, but because if true, in her view, the entire state system of higher education may be participating in a practice of failing to provide accurate information to the state and thus taxpayers.

1. *Integrity and Professional Ethics*

One issue with *Bradley* is that the court apparently viewed personal / professional integrity as an individual quality or personality trait, rather than an expectation of all professionals. Instead of viewing Mixner’s behavior as a deviation from the ethics of the accounting profession, the court focuses on the institution’s right to discipline its employees for contradicting the employer’s sanctioned message.⁷¹ Post discusses the importance of self-governing professions as central to the tenet of democratic competence—the constitutional value ensuring the ability of the people in a democracy to control their own (disciplinary) knowledge production and (through education) thus cognitively empower the people.⁷² In this instance, according to the court’s discussion, we see Bradley’s supervisor requesting that she violate what she believed to be the ethics and practices of the discipline of accounting for what her supervisor seemed to believe to be the greater good. When she refuses to do so, thus adhering to the rules of the profession, rather than acquiescing to the authority of her supervisor, she is treated as insubordinate and disciplined accordingly. When professional and employer authorities come into conflict, other values such as loyalty to the institution, obedience, etc. are prioritized over the profession’s standards for ethics and integrity and democratic competence is thus put at risk.

Administrative integrity, in Newswander’s view, is at risk also because the many constituents holding the institution accountable hold competing values themselves.⁷³ In other words, there is a debate about what “public good” means. Mark Rutgers avers that the public administrator must always balance the general public’s views with organizational values.⁷⁴ Nevertheless, the public good may have different and competing meanings when defined by various constituents;

69 *Id.*

70 *Id.*

71 *Id.* at 651 citing *Garcetti v. Ceballos*, 547 US 410 (2006).

72 Post, *supra* note 5, at 35–36.

73 Chad B. Newswander, *Guerrilla Statesmanship: Constitutionalizing an Ethic of Dissent*, 75 PUB. ADMIN. REV. 126, 128–29 (Jan.–Feb. 2015).

74 Mark R. Rutgers, *The Oath of Office as Public Value Guardian*, 40 AM. REV. PUB. ADMIN. 428 (2010).

the organizational culture—shaped by the state system, trustees, employees, traditions or customs, and especially senior leaders—may be in conflict with the state and local citizenry’s values, and these may all be in conflict with the state lawmakers’ priorities.

The particulars of *Bradley* illuminate the intersection of the more personal values of professional integrity and that which is valued within the organizational culture—in this case, the politics of the state system. Think of Bradley’s and Mixner’s differing understanding of the process of requesting state appropriations. As an accountant and budgeting expert, she looks at the process as one of accounting and budgeting, throughout which she expects to be held accountable to professional ethics, like, as she offered, being able to “explain or justify” the budget.⁷⁵ Mixner, on the other hand, believed that the PASSHE report was a political document, and recognizing the power it had to sway legislators to appropriate more or less funding to all PASSHE colleges, likely also believed he was acting in the public’s and students’ best interest.

Not only do different people understand public values to mean different things, but what these values are may differ according to their roles; thus as a citizen, or as a member of a profession and as a subordinate employee one may confront a conflict of interest.⁷⁶ Ellis⁷⁷ states that the Court’s ruling in *Garcetti* essentially constitutes “the removal of citizen status from public employees speaking pursuant to official job duties.”⁷⁸ In their dissent to *Garcetti v. Ceballos*⁷⁹ Justices Souter, Stevens, and Ginsburg point to a flaw in the majority’s reasoning that lies at the heart of public administration: the public servant is at once a citizen and employee—“citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.” Empirically, employees with high public-service motivation (PSM) have been found more likely to be whistleblowers than employees with lower PSM.⁸⁰ Moreover, public administrators often see themselves as “professional citizens” who “first honor their relationship and responsibility to citizenry and, secondarily, organizational missives.” Thus, to be required to divorce one’s citizenship status

75 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F.3d at 648.

76 For a more thorough discussion of public values see Gjalte de Graaf & Zeger van der Wal, *Managing Conflicting Public Values: Governing with Integrity and Effectiveness*, 40 AM. REV. PUB. ADMIN. 623 (2010).

77 Elizabeth M. Ellis, Note: *Garcetti v. Ceballos: Public Employees Left to Decide Your Conscience or Your Job*, 41 IND. L. REV. 187, 208 (2008).

78 The author would argue that the Third Circuit’s interpretation of *Garcetti* also effectively removes one’s professional status as well by subsuming it wholly under one’s employee status. For more on professional speech, see Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

79 547 U.S. 410, 432 (2006).

80 James Gerard Caillier, *Public Service Motivation and Decisions to Report Wrongdoing in U.S. Federal Agencies: Is This Relationship Mediated by the Seriousness of the Wrongdoing*, 47 AM. REV. PUB. ADMIN. 810 (Oct. 2017); James Gerard Caillier, *Transformational Leadership and Whistle-Blowing Attitudes: Is This Relationship Mediated by Organizational Commitment and Public Service Motivation?*, 45 AM. REV. PUB. ADMIN. 458 (Jul. 2015).

from one's public servant role is an affront to democracy.⁸¹ What is perhaps more worrisome, however, is how the logic of *Garcetti* could be used to enable wrongful conduct and further erode the public trust in institutions of higher education.⁸²

B. Public Trust

Public trust in higher education has been on a steady decline in the United States since Gallup began collecting this data in 2015.⁸³ Gallup polls attribute the lack of public trust in higher education to a variety of reasons that differ along political party lines,⁸⁴ but both democrats (14%) and republicans (9%) who stated they had "some" or "very little" confidence in higher education said this was due to "[p]oor leadership; not well-run; too much corporate interest; bad policies." This suggests that actions or lack of integrity of specific officials or administrators within higher education institutions may be contributing to the degradation of public trust in these institutions.

In his book *Trust and the Public Good: Examining the Cultural Conditions of Academic Work*, higher education scholar William Tierney explains that within an organization, organizational culture shapes and defines the characteristics of trust, such as "perceived individual integrity."⁸⁵ Likewise, integrity, the perception of what one says and does,⁸⁶ can be attributed to persons acting in administrative capacities as well. When whistleblowers call attention to what they perceive as wrongdoing within the organization, as the plaintiffs did in *Bradley* and *Khatiri*, the legitimization of "such a discretionary act poses a risk to administrative integrity" or what Bradley's supervisor called her "credibility."⁸⁷ Bradley felt her individual integrity was at risk if she did not speak up about her discomfort with submitting figures she could not defend. In maintaining her individual integrity, however, she was calling into question the administrative integrity of WCU—not just Mixner's integrity, but also the integrity of the leadership of the entire PASSHE system as well.⁸⁸ If this kind of "political" budgeting was widespread among PASSHE

81 Jennifer Alexander & Samuel A. Richmond, *Administrative Discretion: Can We Move Beyond Cider House Rules?*, 37 AM. REV. PUB. ADMIN. 51, 53 (2007).

82 The author does not, by any means, mean to imply that this was the motivation of any of the parties involved in the lawsuits discussed herein. Simply put, the extension of the logic of the *Garcetti* ruling could be used to keep misconduct from reaching the public by retaliating against potential whistleblowers.

83 Zac Auter, *What Gallup Learned About Higher Education in 2017*, GALLUP NEWS (Dec. 27, 2017), <https://news.gallup.com/opinion/gallup/224444/gallup-learned-higher-education-2017.aspx>; Jeffrey M. Jones, *Confidence in Higher Education Down Since 2015*, GALLUP NEWS (Oct. 9, 2018), <https://news.gallup.com/opinion/gallup/242441/confidence-higher-education-down-2015.aspx>.

84 Frank Newport & Brandon Busteded, *Why Are Republicans Down on Higher Ed?*, GALLUP NEWS (Aug. 16, 2017), <https://news.gallup.com/poll/216278/why-republicans-down-higher.aspx>.

85 WILLIAM G. TIERNEY, *TRUST AND THE PUBLIC GOOD: EXAMINING THE CULTURAL CONDITIONS OF ACADEMIC WORK* 75, 78 (Peter Lang 2006).

86 *Id.* at 78. This definition encompasses both self-perception and the perception of others.

87 Newswander, *supra* note 73, at 127; *Bradley v. W. Chester Univ. of Pa State Sys.*, 880 F.3d 643, 648 (3d Cir. 2018).

88 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F.3d at 647.

schools, Bradley questioned, what does true public accountability look like?⁸⁹

Likewise, Khatri had also shared his complaints with high-level administrators multiple times to request support, a transfer to another lab/department, or some sort of intervention to prevent potential public health crises due to his fear of the potential misuse/mishandling of highly infectious substances that cause sickness or death in livestock and humans.⁹⁰ By failing to take action, Khatri also called into question the administrators' integrity.

Thus, whistleblowers in Bradley's or Khatri's positions must consider whether it is better to maintain the public's trust in the organization as is or call for accountability and improvement by attempting to call out the organization for what they believe is contrary to the institutional mission. The two choices are essentially to continue to follow orders or to see oneself as a public employee whose duty is to the citizens before the institution. Bradley believed that at least \$26 million was being essentially hidden from the public.⁹¹ She herself lost trust in public institutions when she realized this and did not want any part of "business as usual" when she no longer believed it was in the public's best interest. As Tierney explains, "How the public learns to trust academe turns on the meaning of 'public good,'" and Bradley clearly felt it was obvious that more financial aid and/or more budget transparency constituted the "public good?"⁹²

C. First Amendment Jurisprudence

In the months following the Third Circuit's decision in *Bradley*, Kevin Mahoney, an independent journalist, interviewed Bradley and her legal team about the case which they had appealed to the U.S. Supreme Court.⁹³ In the course of the nearly fifteen-minute-long video with Bradley's legal counsel, it is clear that the attorneys did not fully grasp the impact of *Garcetti* on whistleblower cases like Bradley's.⁹⁴ Khatri, on the other hand represented himself *pro se* throughout his entire federal suit, including his pending appeal. The district court's ruling in *Khatri* that his

89 The court writes, "specifically, Plaintiff alleges that she was told by two individuals at the Pennsylvania State System of Higher Education (PASSHE), the administrative body to whom West Chester's annual budget report is submitted, to change a line item in the report such that 'a multimillion dollar surplus [would be converted] into a multimillion dollar deficit.' She believes that this method was used as a way for West Chester to gain more taxpayer dollars than its true financial status merited." *Bradley v. W. Chester Univ. of Pa.*, 226 F. Supp. 3d 435, 438 (E.D. Pa. 2017).

90 *Khatri v. Ohio State Univ.*, 2020 WL 533040, at *7 (N.D. Ohio February 3, 2020).

91 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F. 3d at 648. If true, the money would importantly have been hidden not just from the legislature, but from the students whose educations and lives would obviously benefit from more spending on faculty, resources, and student financial aid.

92 TIERNEY, *supra* note 85, at 174.

93 *Colleen Bradley | Whistleblower | Part 1*, *supra* note 49; *Youtube Video by Raging Chicken Press, Colleen Bradley | Whistleblower | Part 2 - Legal Team Explains Her Case*, <http://bit.ly/2R5rd7a>; Kevin Mahoney, *Exposing Budget Fraud at PASSHE Universities | Colleen Bradley Tells Her Story*, RAGING CHICKEN PRESS, <https://ragingchickenpress.org/2018/04/11/exposing-budget-fraud-passhe-universities-colleen-bradley-tells-story/>. Note: the SCOTUS denied certiorari in October 2018.

94 *Youtube Video by Raging Chicken Press, Colleen Bradley | Whistleblower | Part 2 Legal Team Explains Her Case*, *supra* note 93.

speech was not outside of the chain command, and the Third Circuit's ruling in *Bradley* that her speech was made pursuant to her official duties, raise important questions for employees of public universities and their counsel. For instance,

- 1) How have the courts understood intramural / chain of command speech in higher education cases?
- 2) What ought public employees and attorneys know about whistleblower protections?

This section addresses these two questions.

1. *How Have the Courts Understood Intramural/Chain of Command Speech in Faculty Cases?*

Scholars disagree about every aspect of intramural speech, down to the definition and up to the application of the term in the First Amendment jurisprudence. Scholars like Rabban, Post, Fish, and Finkin have taken stances on what faculty or employee speech should be protected under the First Amendment, and their opinions vary as wildly as desert temperatures.⁹⁵ The courts tend to define intramural speech as speech made within the spaces governed by the university (whether virtual or physical)—in other words, they tend to take a very literal interpretation, understanding intramural as literally “within the walls.” Scholars tend to see the concept as less literal and more abstract; some scholars argue that intramural speech also encompasses any discussion of the employer/institution even if it is made by a public employee in a public forum (e.g., Twitter).⁹⁶ Rabban, in contrast, argues that intramural speech dealing with the business operations, rather than the educational mission, should not be protected because it falls outside of the professional expertise of the faculty.⁹⁷ Finally, Judith Areen argues for a “government as educator” jurisprudence that would protect faculty speech made in teaching, research, or shared governance capacities.⁹⁸ The one thing that's agreed upon by all scholars is that the courts have found many instances of intramural speech to lack protection under the First Amendment that these scholars would want protected.

The courts have repeatedly returned to the concept of “chain of command” speech as well, which the scholars have not relied on at all in their recommendations for First Amendment academic freedom. What courts identify as chain of command speech depends on the court and probably also on many other factors.

In Khatri's case, the court determined that chain of command speech included any and all instances of speech wherein the speaker spoke with anyone else who

95 Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323 (1987–88); Rabban, *supra* note 5; STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* (2014); MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (2009).

96 FINKIN & POST, *supra* note 95, at 113–26.

97 Rabban, *supra* note 5, at 77, 86.

98 Areen, *supra* note 5.

had the same employer. No other faculty speech cases in the Sixth Circuit since 2006 support this understanding of the term. Indeed, such an understanding contradicts the common sense meaning of “chain of command” which connotes speech made up the ladder to one’s supervisor, or to a supervisor’s supervisor and so on. The author has not heard of any university in which the chain of supervisors starting at a faculty member could reach a police officer or HR officer, two of the people to whom Khatri reported his concerns in his lab.⁹⁹ Indeed, this definition seems to connote more of a broader “intramural” speech category, rather than the narrow category of “chain of command.” The court’s conflation of these terms is dangerous precedent, as it indicates that future courts may not view speech made about public safety to campus police to be made by employees in their role as citizens rather than employees. This disincentivizes employees from reporting unsafe conditions or potential threats to public safety to campus police for fear of retaliation.

Likewise, in *Bradley*, the Third Circuit determined that because Bradley’s role as a budget officer included “scrutinizing and analyzing the numbers appearing in the budget” she was responding in her official capacity to a question from the Enrollment Management Committee (EMC) when she presented her own budget at their request.¹⁰⁰ Despite the fact that none of these committee members were in her chain of command, the Third Circuit Court of Appeals wrote, “The undisputed evidence shows that Ms. Bradley was not speaking ‘outside her chain of command’ when she was reporting to the EMC on October 29, 2014; rather she was responding in her official capacity to a direct question by a member of that committee.”¹⁰¹ This precedent, like that set in *Khatri*, is problematic for whistleblowers who bring their concerns of malfeasance or misconduct to other leaders within the institution but outside of their own chain of command. Unlike *Khatri*, however, a similar precedent had already been set within the Third Circuit, in *Meyers v. California University of Pennsylvania*, even though the court did not cite such a precedent in *Bradley*.¹⁰² Nevertheless, in *Meyers*, the District Court for the Western District of Pennsylvania determined that when the plaintiff reported potential misconduct to the office of social equity and other administrators, he was making reports “up the chain of command.”¹⁰³ Meyers reported what he believed to be misconduct by his department chair related to the search committee on which plaintiff was serving, to the office of social equity, the assistant provost (faculty search coordinator), and the president of the university. While the report to the president is within the plaintiff’s chain of command, the other two reports were not. Once again, the conflation of any and all internal speech made to “members of the administration” with “chain of command” speech makes it nearly impossible for a whistleblower to be protected against retaliation.¹⁰⁴

99 The author invites readers to make the author aware of any institutions with such a reporting structure.

100 *Bradley v. W. Chester Univ. of Pa State Sys.*, 880 F. 3d 643, 653 (3d Cir. 2018).

101 *Id.*

102 2014 WL 3890357, at *1 (W.D. Pa.).

103 *Id.* at *14.

104 *Id.*

Whistleblower protection is of the utmost importance to colleges and universities, and especially to these institutions' attorneys. College and university whistleblowers, when granted protections, can bring great press, recognition, and even esteem to their institutions by shining sanitizing light in dark corners—but their protection must be prioritized by the legal office from the start, or the pressure to maintain confidentiality at the public's expense may become too great. We also know that the kinds of decisions not to disclose allegations of misconduct can create a huge amount of tumult in the upper-level administration of a university; indeed, presidents at Michigan State University and Penn State University have faced criminal charges for their active participation in scandals involving sexual abuse of minors.¹⁰⁵ It would be disingenuous not to acknowledge that these are the recent events that jump to mind for whistleblowers in higher education institutions, which can, rightly or wrongly, up the stakes significantly in the minds of those who believe they must call out wrongdoing.

2. *What Ought Public Employees and Attorneys Know About Whistleblower Protections?*

Garcetti is settled law. Part of the majority's reasoning for denying First Amendment protections for public employees was because there are already whistleblower statutes in place to protect these employees. Thus, the central question of Bradley's case was not whether her First Amendment rights had been violated, but rather whether WCU violated the Pennsylvania whistleblower statute by dismissing her. The answer, given the facts presented in her federal case appears to be yes—Bradley was fired for speaking out against practices she believed to be unethical or even illegal, and the record appears to support this. Given her positive performance reviews¹⁰⁶ and the ample documentation of her conflicts with Mixner over WCU's and PASSHE's allegedly unethical practices,¹⁰⁷ the university would be hard-pressed to defend her dismissal in light of the federal court record. Rather than filing a lawsuit under the state whistleblower law, her attorneys filed in federal court, which cost even more thousands of taxpayer dollars by appealing twice. The district court decided in April 2016 that the original filing under the Pennsylvania whistleblower statute would not fall under federal jurisdiction,¹⁰⁸ and after the 2018 Third Circuit decision, plaintiff's counsel resurrected their statutory claim in Commonwealth Court where the case is still active.¹⁰⁹ It would seem that the state whistleblower case was the one to focus on rather than the federal case, as *Garcetti* settled the First Amendment question in Bradley's case back in 2006. Instead, counsel for the plaintiff appealed the federal court decisions twice before turning back to their state whistleblower claim.

105 Mitch Smith & Monica Davey, *Ex-President of Michigan State Charged with Lying About Nassar Case*, THE NEW YORK TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/20/us/lou-anna-simon-michigan-state-nassar.html>; Michael Levenson, *Former Penn State President Will Serve 2 Months in Jail in Child Abuse Scandal*, THE NEW YORK TIMES (May 26, 2021), <https://www.nytimes.com/2021/05/26/sports/football/Graham-Spanier-Sentenced-Penn-State-Scandal.html>.

106 *Bradley v. W. Chester Univ. of Pa.*, 226 F. Supp. 3d 435, 438 (E.D. Pa. 2017).

107 *Id.* at 446–47.

108 *Bradley v. W. Chester Univ. of Pa.*, 182 F. Supp. 3d 195 (E.D. Pa. 2016).

109 *Bradley v. W. Chester Univ.*, 2020 WL 118614 1 (Pa. Commw. Ct. Jan. 10, 2020) (No. 118614).

Given this reality, public employees must be educated about the law, especially those with the managerial authority to discipline whistleblowers without first speaking with someone in the general counsel's office. They need to know that there is no protection under the First Amendment anymore for almost any on-the-job speech, but they also need to know what kinds of protections their employees have under whistleblower statutes. To that end, public service announcements for public employees about how to report wrongdoing and what protections they have for doing so under state or federal whistleblower statutes would be helpful. One way to go about this might be to create an ombuds office for whistleblower complaints that can work closely with the university counsel to handle alleged misconduct before any whistleblowers can be wrongly disciplined. We need to take government misconduct seriously and create systems that are more successful at punishing deception and negligence that threatens the educational missions of our public colleges and universities. To do that, we will need to incentivize government employees to speak out against unethical or unlawful practices in their workplaces.

Attorneys in whistleblower cases like Bradley's need to be careful not to put their clients through years of added stress and additional expense by appealing decisions based on settled law, especially since the cost of defending such claims is on the taxpayers' dime. A close reading of *Garcetti* clarifies that the state whistleblower statute is all that is left for plaintiffs like Bradley.

If a public employee comes to an attorney to ask for advice before blowing the whistle, the attorney ought to be aware of the protections available under the First Amendment as well as applicable whistleblower laws. In this case, Bradley likely would have been protected under the First Amendment if she had written to the *Philadelphia Inquirer* about the PASSHE practice, rather than speaking about it in closed-door meetings on campus. Likewise, college and university counsel ought to consider how they would respond if a whistleblower came to them directly to ask for advice on how to handle a situation of what they perceive to be unethical or reckless conduct on the job. Developing a specific procedure for the office that will protect the whistleblower as well as the institution, is essential for preventing scandals or corruption. Similarly, institutional leaders should be aware that attorneys in the general counsel's office are not themselves immune from the responsibility to blow the whistle.

D. Why Khatri and Contingent Faculty Should Have More Protections Than Bradley

One important aspect of Areen's conceptualization of the university is that the academy is made up of faculty who participate in the governance of the institution,¹¹⁰ as asserted in the American Association of University Professors' original 1915 Declaration of Principles.¹¹¹ By defining the institution by the faculty it houses, Areen's understanding of the academy bridges the gap between Post's professional right

110 Areen, *supra* note 5, at 957–67.

111 Am. Ass'n of Univ. Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, VII BULL. AM. ASS'N. UNIV. PROFESSORS 487 (1922).

to academic freedom and Byrne and Horwitz's institutional right.¹¹² The shared governance structure common to higher education is such that the faculty carry out the educational mission while the administration and board members handle the business operations.¹¹³ The work of the president is to fund the institution through charisma and delegate to capable administrators.¹¹⁴ The work of the provost is to ensure the academic mission is and can be fulfilled through the work of the faculty by creating a culture that maintains a healthy and satisfying workplace.

For Areen, expressions related to all academic matters deserve academic freedom protections as a special concern of the First Amendment.¹¹⁵ In any case where faculty members sue their public colleges or universities for infringing on their freedom of speech, the case would fall under a category of managerial authority that Areen calls "government as educator" where the government acts in its capacity as an educational institution rather than governing the general public.¹¹⁶ Areen's theory calls for two important changes to the First Amendment employee speech jurisprudence. First, Areen's theory calls on courts to recognize that in addition to research and teaching, faculty "have a professional obligation to oversee core academic matters in their institutions."¹¹⁷ Second, the theory demands that academic speech expressed during teaching, research, or shared governance duties be protected from retaliation by government actors (administrators, trustees, politicians, etc.). Connecting to Post's authorities, the institutional function for which the government is granted managerial authority within colleges and universities is the educational mission—the work of which is carried out primarily by the faculty.¹¹⁸

Within the case law to date, the courts' deference toward universities has generally inhaled with the administration rather than the faculty,¹¹⁹ however, the author argues that based on the bifurcation of responsibilities between administrators and faculty which bestows faculty with the work of carrying out the educational mission of the institution, the deference of the courts ought to be awarded to the faculty rather than the administration. This aligns with Areen's understanding as government as educator, as she states "the doctrine of government-as-educator, in contrast to the public-employee speech doctrine of government-as-employer, would provide First Amendment protection for the speech of individual faculty members as long as the speech concerned research, teaching, or faculty governance

112 Byrne, *supra* note 13; PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013).

113 NEWFIELD, *supra* note 63, at 80–81.

114 JAMES J. DUDERSTADT, *THE VIEW FROM THE HELM: LEADING THE AMERICAN UNIVERSITY DURING AN ERA OF CHANGE* 27–28, 285–86, 306 (2007).

115 Areen, *supra* note 5, at 990–91.

116 Areen, *supra* note 5.

117 *Id.* at 999.

118 NEWFIELD, *supra* note 63, at 80.

119 See, for instance, James D. Jorgensen & Lelia B. Helms, *Academic Freedom, the First Amendment and Competing Stakeholders: The Dynamics of a Changing Balance*, 32 *THE REVIEW OF HIGHER EDUCATION* 1, 8–9 (Johns Hopkins University Press Aug. 2008); Michael H. LeRoy, *How Courts View Academic Freedom*, 42 *J.C. & U.L.* 1 (2016).

matters.”¹²⁰ Furthermore, Areen’s government-as-educator doctrine would grant deference to academic decisions made or authorized by the faculty (or a faculty committee); this contrasts with certain high-profile cases since *Garcetti* in which courts overturned academic decisions made by faculty (e.g., *Adams v. Trustees of UNC-Wilmington*).¹²¹ Likewise, Post’s assertion (that institutions ought to be primarily afforded deference in accordance with their need to carry out their missions) logically extends to my argument that judicial deference ought to be awarded to the party who is most responsible for the institutional mission, which in higher education is the faculty.

Tying the argument for faculty as carriers out of the institutional mission back to the two cases discussed in this article, there is no aspect of Bradley’s work that involves creating or disseminating (disciplinary) knowledge; rather, her work was simply to apply her knowledge of budgets and budgeting systems and share information on behalf of the university office she ran. In other words, she spoke *as the university* when she spoke as an employee. Under the precedent in *Garcetti* it is very clear that Bradley’s speech would not be protected under the First Amendment.¹²² This does not mean Bradley’s speech should not be granted protection under whistleblower statutes or that administrators should not advocate for contractual whistleblower protections for themselves when their work requires them to handle important financial information that is of public importance. Rather, the value of democratic competence inherent to the First Amendment is applicable to the creation and dissemination of knowledge and not the business operations; thus *First Amendment protection* ought to be granted only to speech concerning the educational mission.

Unlike Bradley’s speech, Khatri’s speech was made due to his expertise as an animal pathologist who had years of experience working in labs with dangerous infectious substances. His work directly carried out the educational mission of his institution every day. Yet, Khatri also faced pushback from government actors who allegedly took his research funds without permission, impeded his ability to apply to other jobs, threatened him with termination, and otherwise mistreated him. If Khatri had been given an opportunity to relay his concerns about research misconduct, mistreatment, or misuse of his grant funding—not to mention the mishandling of infectious substances—to a faculty committee from other departments, we may have seen the university take a very different approach to his case. Khatri and other contingent faculty members are responsible for a great deal of the work done each day to carry out a college or university’s educational mission. These workers speak as professionals and experts within their disciplines, and thus play an essential role in preserving democracy. For this reason, it is extremely important when determining the level of protection available for employee speech to consider how that speech relates to the educational mission of the institution. When other influences aside from the educational mission enter into consideration, the focus can become blurred, and other concerns can distract leaders from the purpose and reason for the institution to begin with.

120 Areen, *supra* note 5, at 994.

121 *Adams v. Trustees of the Univ. of NC-Wilmington*, 640 F. 3d 550 (4th Cir. 2011).

122 Although it almost surely would have been protected under the Pennsylvania whistleblower statute, though her state court claim appears to be still pending.

Looking at the Bradley case, we see that public universities and their employees are influenced by state systems (PASSHE), state legislators (appropriations), individual administrators (president of the university), organizational culture (valuing obedience over integrity), and professional ethics and standards (accepted accounting practices). This aligns with the theoretical understanding of public organizations as “open systems” or the idea that “organizations are in constant interaction with their environments, [and] that organization boundaries are permeable.”¹²³ While all of these influences were clear throughout the case, what was not clear to the plaintiff’s attorneys and therefore the plaintiff, was the role of common law in shaping the systems in place. The precedent set by *Garcetti* was upheld in this case because it is settled law. According to that settled law, if Bradley had sought First Amendment protection, she would have been better off posting her concerns on a blog or in a newspaper rather than sharing them with her supervisor or an administrative committee.

We know from O’Leary’s study of public administrators who have dealt with “guerrilla government”—government employees achieving their goals against the policies, practices, or commands of their supervisors—that the best practices for preventing employees from “going rogue” include being “accessible,” having “an open-door policy,” and insisting “that employees come to you first.”¹²⁴ Yet this directly contradicts *Garcetti*, which requires that employees speak as private citizens for the First Amendment to protect them from retaliation: speech made on the job is often speech for which you can be fired. Imagine how widespread knowledge of this precedent among public employees would shape the culture of their workplaces. How might it challenge the integrity of the public servants? How might it further erode the public’s trust in higher education? To prevent the erosion of public trust and protect integrity of public servants, colleges and universities should clarify policies and procedures that will provide whistleblowers with safe and effective ways to report and resolve allegations of misconduct or malfeasance. A contractual protection for all employee whistleblowers would have not only kept *Khatri*’s job secure, but it likely also would have meant that more would have been done to investigate and eradicate the alleged corruption in his department. And had West Chester’s leaders considered how Bradley’s speech related to the public perception of the university and intervened before condoning her supervisor’s decision not to renew her contract, perhaps she never would have lost her job.

This analysis of *Bradley* and *Khatri* demonstrates the need for legal and policy researchers to educate public employees and attorneys on the protections available to whistleblowers in public educational institutions. These cases have provided evidence to support Rainey’s claim that “most public managers and employees need a sound knowledge of the judicial environment.”¹²⁵ Similarly, the questions raised by *Bradley* are essential to the work of collaborating with organizational stakeholders. For example, can WCU really fulfill its mission as a public institution of higher education when the public cannot be sure of its financial stability? We do

123 Rosemary O’Leary, *The 2016 John Gaus Lecture: The New Guerrilla Government: Are Big Data, Hyper Social Media and Contracting Out Changing the Ethics of Dissent?*, 50 POL. SCI. & POLS. 12, 13 (2017).

124 *Id.* at 20.

125 HAL G. RAINEY, *UNDERSTANDING AND MANAGING PUBLIC ORGANIZATIONS* 130 (5th ed. 2014).

not know what the president's plans were for the funds that were allegedly hidden from the legislature, and it is for the trustees to decide if funds should be saved for a rainy day or new buildings or scholarships. What is so problematic about the facts of this case is that when Bradley shared her concern with the administrative budget committee she was reprimanded.¹²⁶ While the administration argued over how to get more appropriations from the state, 77% of WCU students, on average, owed over \$36,000 in student loans¹²⁷—ranking WCU fortieth among U.S. public colleges for highest average student debt.¹²⁸ Perhaps, the administration was motivated by this very fact, and wanted more appropriations for student assistance, a noble pursuit indeed. The problem is, without accountability and transparency, the public just does not know.

These cases also reveal the tension that general counsel's offices must confront when presented with the kinds of issues faced by Khatri and Bradley. On the one hand, clearly it is not in the best interest of the institution to facilitate misconduct, whether inadvertently or knowingly. On the other hand, the threat to the institution may be greater if those individuals were to be removed from their positions. In Khatri's case, the removal of the most senior research faculty on their campus could cost the university millions of dollars in research grants. In Bradley's case, calling out the budgeting practices of (potentially) the entire PASSHE system could mean saying goodbye to state appropriations in the billions of dollars, and not just for WCU, but for the entire state system. Facing these dilemmas is in no way easy. Nevertheless, there is something of more fundamental importance to colleges and universities than money that should trump all other concerns: the educational mission. The educational mission demands that a university practice what it preaches; accounting majors learn not to hide funds from the government, so the university should be held to the same ethical principle it teaches. Likewise, the university teaches proper lab safety, academic integrity, and the value of excellent research, thus the alleged mistreatment faced by Khatri during his time at Ohio State was unacceptable. When considering settlement, the author recommends that attorneys for higher education institutions pause to imagine whether fighting whistleblower cases like *Khatri* and *Bradley* in court is truly serving the educational mission of the university, or if by defending retaliation against whistleblowers, that defense in fact erodes that mission, along with the community's trust in public institutions.¹²⁹

126 *Bradley v. W. Chester Univ. of Pa State Sys.*, 880 F. 3d 643, 648 (3d Cir. 2018).

127 *Here's How Much You'll Pay to Attend West Chester University of Pennsylvania*, <https://www.usnews.com/best-colleges/west-chester-3328/paying> (last visited July 30, 2021).

128 *lendedu, Average Student Loan Debt Statistics by School by State 2019*, LENDEDU (Aug. 8, 2019), https://lendedu.com/wp-content/uploads/2021/04/Student-Loan-Debt-by-School-by-State-Report-2019-_LendEDU.pdf.

129 Undoubtedly, many cases of alleged whistleblowing ought to be fervently defended in court. The author wants to make it abundantly clear that sometimes plaintiffs think they are whistleblowers but the facts objectively demonstrate that they themselves are lawbreakers or otherwise in the wrong. See, for instance, *Shub v. Westchester Cmty. Coll.*, 556 F. Supp. 2d 227 (S.D.N.Y. 2008).

IV. Conclusion and Significance

These two cases demonstrate how First Amendment jurisprudence fails to protect public higher education whistleblowers from retaliatory termination. Yet whistleblowers play an essential role in holding public institutions accountable to their missions, and especially in holding colleges and universities to their specifically educational missions. Without whistleblowers raising the alarm when employees operate without regard for the educational mission or contrary to standards of professional ethics, our higher educational institutions can fall prey to leadership that diverts the institutional trajectory away from its mission, as we saw in the Michigan State¹³⁰ and Penn State¹³¹ scandals.¹³² Thus, adequate protections for whistleblowers must be adopted at the level of the states, institutions, or collective bargaining agreements, in light of the federal courts' treatment of these cases. Despite Bradley's speech addressing matters of public concern, the current *Garcetti* case law leaves little room for First Amendment protection for Bradley's speech up the chain of command. Instead, Bradley may have a state whistleblower case, but it is still pending in courts more than five years later. There is still room for Khatri's speech to qualify for First Amendment protection under an academic exception to *Garcetti*. The academic exception jurisprudence has been adopted in multiple federal circuits so far,¹³³ and just this year was adopted by the Sixth Circuit Court of Appeals where Khatri's case is currently pending.¹³⁴

In addition to advocating for additional contractual protections for whistleblowers like *Bradley*, this article extends Areen, Post, and Rabban's arguments that the educational mission of postsecondary institutions requires further protection than is currently offered by the Supreme Court's reading of the First Amendment.¹³⁵ Building on these legal scholars, speech furthering the educational mission of the institution ought to be protected under the First Amendment. Since the Supreme Court has yet to cite this line of reasoning, one might hope that this research will be used to inform the development and implementation of institutional policies to protect all public university whistleblowers.

130 Smith & Davey, *supra* note 105.

131 Levenson, *supra* note 105.

132 For an apt example at a private institution, consider Liberty University's documented divergence from their educational mission due to the leadership of its former President Jerry Falwell Jr. and subsequent lawsuit, Eric Kelderman & Jack Stripling, *Liberty U. Sues Disgraced Former President Jerry Falwell Jr. for \$10 Million*, CHRON. HIGHER EDUC. (Apr. 16, 2021), <https://www.chronicle.com/article/liberty-u-sues-disgraced-former-president-jerry-falwell-jr-for-10-million>. The whistleblowers at Liberty University were there, but their voices seemed to have been ignored, if not silenced according to recent reporting for the podcast "In God We Lust." Aricia Skidmore-Williams & Brooke Siffrinn, *Survivors of Liberty (Episode 8)* (Wondery Aug. 2021).

133 See, e.g., *Adams v. Trs. of the Univ. of NC-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011), concluding that *Garcetti* does not apply to the "academic context of a public university"; *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019).

134 *Meriwether v. Hartop*, 2021 WL 1149377, at *7 (6th Cir. Mar. 26, 2021).

135 Areen, *supra* note 5; Post, *supra* note 5; Rabban, *supra* note 5.

*Relearning and Rethinking Campus Governance
Through a Student Affairs Lens:*

Review of George McClellan and Neal H. Hutchens's

SHARED GOVERNANCE, LAW, AND
POLICY IN HIGHER EDUCATION:
A GUIDE FOR STUDENT AFFAIRS
PRACTITIONERS

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Much of the classic scholarship on campus governance, such as Robert Birnbaum's *How Colleges Work*,¹ have failed to create substantive connective tissue between student affairs practice and campus governance. To address this gap, McClellan and Hutchens have crafted a thoughtful and practical guidebook for student affairs professionals to help expand their understanding of university governance and how it correlates with their daily practice. Most importantly, the authors present a forward-thinking vision of campus governance founded upon inclusivity, shared power, ethics, trust, and engaging with purpose. As central as this text will become to the campus governance conversation the authors' framing of power and privilege inadequately addresses how the lack of inclusion in many university governance structures has hindered and may continue to hinder the refreshing new vision for inclusive campus governance the authors passionately advocate for. This lack of diversity and inclusivity in campus governance has led to campus unrest and a loss of faith in traditional university governance structures.² McClellan and Hutchens open the door to the critical conversation of rethinking campus governance to address these modern challenges but fall just short of giving student affairs practitioners all the tools needed to politically deconstruct traditional campus power structures and to rebuild a new campus governance edifice they sketch the blueprint for.

Chapter 1, "Overview of Shared Governance," is foundational in scope and leads with a short case study that highlight how issues of budget and the lack

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1 ROBERT BRINBAUM, *HOW COLLEGES WORK* (1988).

2 Anemona Hartocollis, "Long After Protests, Students Shun the University of Missouri," *New York Times* (July 9, 2017), <https://www.nytimes.com/2017/07/09/us/university-of-missouri-enrollment-protests-fallout.html>; (2017) "Summary Profile," AMERICAN COUNCIL OF EDUCATION (ACE), <https://www.aceacps.org/summary-profile/> (demographic profile of America's college and university presidents).

of inclusivity in campus decision-making can impact the academic quality of an institution. The case studies at the opening of each chapter in this work help to frame the authors' succinct and broad overview of campus governance. The authors carefully present cogent definitions of *shared governance* and provide a historical overview of *early governance* and how the concept has evolved in the modern day. They also underscore the *theories of transactional behavior* to assist in better understanding governance through an economic theory of organizational self-interest and competing interest lens. The authors' overview of *contemporary developments and challenges* is also helpful for student affairs practitioners as they carefully frame how student enrollment and demographic shifts are radically shifting expectations for campus leaders and how the expansion of non-tenure track faculty has increased tensions and feelings of marginalization on our campuses. Student affairs professionals should carefully consider the challenges outlined by the authors as many of these feelings of marginalization that have impacted nontenured faculty have mirrored the feelings of marginalization that some student affairs professionals express. The authors also point to the increasing complexity of organizational structures as an emerging challenge as well. McClellan and Hutchens also turn to a timely discussion of increasing globalization and the rise of for-profit and megauniversities that serve as direct threats for traditional brick and mortar universities. Each chapter ends with thought-provoking questions for discussion. The authors do a thorough job of foundation setting and highlight challenges and *calls for change* but fail to adequately discuss emerging issues such as the ethical use of *big data* on campuses and how universities can leverage technology to better serve faculty, staff, and students.³

Chapter 2, "Shared Governance Shareholders and Structures," provides a robust overview of the variety of governance structure nuances and how each is defined. The authors highlight the varying versions of governance, teasing out the nuances of the Board of Trustees and/or Board of Governors, each serving in a variety of leadership and political schemes on university campuses. The authors also discuss the university senates, faculty senates, student and staff senates, advisory councils, alumni associations, and task forces. McClellan and Hutchens thoughtfully frame the descriptions of each of these critical stakeholders through the lens of student affairs work and how student affair professionals can advocate for their work with each campus body. The authors acknowledge that the majority of student affairs professionals do not interact with many of these campus bodies, but astutely challenge student affairs professionals to rethink how this collaboration could amplify their work with students. Student affairs professionals typically understand the meta concepts of these boards function, but the authors encourage student affairs professionals to have a deeper understanding of the political, legal, and financial calculus that animate governance board decision-making.

In chapter 3, "How to Help Foster and Strengthen Shared Governance," McClellan and Hutchens's thesis becomes clearer. How can student affairs professionals strengthen shared governance, is the question that drives this chapter. They lean upon the characteristics of shared governance of Venable and

3 KAREN L. WEBBER & HENRY Y. ZHENG, *BIG DATA ON CAMPUS: DATA-INFORMED DECISION-MAKING IN HIGHER EDUCATION* (2020).

Gardiner⁴ that included *meaningful participation* and creating a climate of trust. The authors also wisely turn to Bejou and Bejou⁵ who promote transparency, planning, evaluation, and flexibility. McClellan and Hutchens detail how developing trust, patience, and political mapping are critical to navigating campus governance successfully. Their discussion of *getting comfortable with power, politics, and persuasion* misses an opportunity to provide student affairs professionals with more practical tools to dismantle traditional power structures on university campuses. McClellan and Hutchens acknowledge issues of inclusion and how they interact with campus power and encourage student affairs professionals to challenge this dynamic but posit that this work is beyond the scope of their project. The authors may have been better served intertwining their definition of power and privilege with critical race theory⁶ and feminist theories⁷ that deconstruct traditional definitions of power in higher education spaces. For example, student affairs professionals often serve as frontline advisors for student organizations engaged in activism to raise awareness for low-wage university staff or faculty of color; these equity issues are often elevated to campus governing boards. Student affairs professionals are often caught between their role as staff and assisting students to find their voice as advocates. Student affairs professionals often serve as an invisible student advising force, helping to prevent student advocacy from becoming antagonistic if possible. How can student affairs professionals be better prepared to navigate these politically multifaceted environments? How can student affairs professionals be better prepared to articulate their value to governing boards during and after these critical moments? Instead of the standard student protest and governing board response dynamic, is there an opportunity for seasoned student affairs professionals to facilitate restorative justice practices to mediate these conflicts? Could practices like restorative justice, a skill set well-honed by multicultural affairs and student conduct professionals, create a space that flattens the traditional campus power structures the authors wisely identify? McClellan and Hutchens could have gone a step farther to give student affairs professionals the tools needed to address these questions. Engaging in this discussion would help shift the power imbalances and political disconnect that exist between frontline student affairs professionals and governing boards.

Chapter 4, “Student Participation in Shared Governance,” paints a vivid portrait of how student affairs professionals are critical to the effort of ensuring that students are an essential component of the shared governance architecture. This chapter’s case study details campus’s challenges with institutional racism and privilege, and how this reality plays out depending on the demographics of students participating in the shared governance experience. The case study also highlights how the students on this campus did not feel engaged by campus

4 Venable & Gardiner, Synergistic governance, leadership teams, and the academic department head. Annual meeting of the association for the Study of Higher Education, St. Louis (1998).

5 David Bejou & Azam Bejou *Shared Governance: The Key to Higher Education Equilibrium*, 15 J. RELATIONSHIP MKTG. 54 (2016).

6 Laurence Parker & Octavio Villalpando. *A Racialized Perspective on Education Leadership: Critical Race Theory in Educational Administration*, 43 EDUC. ADMIN. Q. 519 (2007).

7 H. Anderson, H. (2003), *As if Gender Mattered: Feminism and Change in Higher Education*, 74 J. HIGHER EDUC. 321 (2003). 5

leadership, and thus healthy student participation in campus governance suffered. This case study adds color to the concepts of student engagement the authors introduce later. The authors wisely remind student affairs professionals of the tenets of quality advising, *telling students how to think not what to think*, how to build trust and, creating a culture that is inclusive and reaffirms student's identity as they navigate this experience. This chapter is a well-constructed roadmap for student affairs professionals who are seeking to engage a diverse student body on campuses where there exists a lack of inclusion in student leadership. This chapter serves as a helpful reminder for student affairs professionals that if students are a part of their campus governance architecture, by default as student affair professionals their role as advisors, mentors, and educators is essential and must be amplified by campus governance and legal affairs leadership on campus.

Chapter 5, "Intersections of Law and Shared Governance," is essential reading for student affairs professionals, particularly those whose daily practices intersect with general counsel (student conduct, Title IX, fraternity and sorority life, campus threat assessment). The chapter also highlights the many sources of law that impact university governance, ranging from state/local to federal, and how these rules may impact public and private institutions differently. For new student affairs professionals serving in these spaces, the introductory remarks do not traffic in anxiety-inducing admonitions. The counsel provided is grounded in a spirit of collaboration rather than conflict with these campus legal entities. This section also speaks to seasoned university legal professionals, encouraging them to tap into the expertise of student affairs professionals to remain student-centered as they navigate legal challenges. Often, student affairs professionals are disconnected from the political and policy intricacies of the law that define how their daily professional practices are animated. This chapter encourages student affairs practitioners to keep abreast of how local political influence can impact local and state laws and ultimately influence governance board decision points. These laws impact how student affairs professionals engage with students in crisis, discipline, and advise students seeking their services on campus. The authors make a strong case for rethinking how student affairs professionals are developed professionally. This chapter should compel leaders of student affairs divisions to provide broader context for emerging laws that may impact campus policy. More robust professional development of student affairs professionals will help these professionals better contextualize and communicate these policy shifts for parents and students during the animation and implementation phases of new campus policies. Those in governance and legal affairs roles should also be active in connecting with student affairs leadership to create platforms and open forums to educate new and seasoned student affairs professionals on emerging public policy and potential legal obstacles relating to American with Disabilities Act compliance, sexual misconduct, hazing statutes, and campus threat assessment they may encounter in their daily practice.

Chapter 6, "The Individual Voice in Shared Governance: Institutional Actor Versus Private Citizen," offers a unique and refreshing take on how student affairs professionals can balance their private and at times political identities with their professional obligations. These two identities are often at odds, particularly when an institution advocates for a policy position that may be in direct conflict with one's political or religious beliefs. The authors conduct a comprehensive overview

of campus speech litigation and the emerging challenges of student speech, faculty speech, and staff speech. The staff speech discussion is cutting edge, forward thinking, and encourages the reader to rethink many of the challenges related to staff expression on controversial matters and the differences in how faculty and staff speech are understood by the courts. The case law reviewed in this chapter is current, robust, and expertly frames the authors' counsel to student affairs professionals who elect to speak out and engage in social justice advocacy work to carefully consider the professional risks of speaking out. These sentiments are well timed and immensely valuable in our current political climate on university campuses.⁸

Much of the existing scholarship and on-campus training regarding the first amendment is often primarily centered upon student and faculty speech, leaving discussions of staff speech woefully underconsidered. As referenced earlier, student affairs professionals are often in the middle of helping students understand the scope of their First Amendment rights on campus. Legal professionals on campus would be wise to host educational sessions for student affairs professionals aimed directly at helping staff to navigate the scope of their First Amendment rights within the limits of their professional roles on campus. Student affairs professionals' roles as professionals in the traditional sense can often appear blurry. For example, a staff member may be a part-time doctoral student conducting controversial research frowned upon by superiors or present an unpopular professional perspective at an academic conference that is in conflict with the stated mission and vision of their department head. This is a gap in current knowledge that legal affairs professional and student affairs professionals can work collaboratively to fill, and would greatly benefit student affairs professionals who may be making the transition from staff to faculty or vice versa.

In chapter 7, "Policy, Policy Process, and Shared Governance," the authors explore the nuances of policy formation and the many external and internal entities that can help formulate policy and influence policy. The authors detail how the variety of external factors, such as emerging technologies, federal executive action, and lawsuits, can all influence the direction of policy formation for those in campus governance roles. This discussion is extremely clarifying for student affairs practitioners who are responsible for animating policy on their campus. McClellan and Hutchens lean into this reality and give proper time providing sage counsel to what they call street level bureaucrats who are rarely responsible for formulating policy but who are often solely responsible for educating and enforcing campus stakeholders on new policies. Reaching back to the principles of inclusion and building trust highlighted in chapter 3, the authors posit that the ideal policy formation works to incorporate frontline student affairs staff in the policy formulation stage. This chapter wisely advocates for early outreach to intentional and deeper bonds between those in governance roles and frontline student affairs staff to create stronger policy, highlighting a reality that is not the

8 Wesley Jenkins, *Since U. of Alabama Dean's Resignation, Students and Faculty Have Demanded Answers From a Silent Administration*, CHRON. HIGHER EDUC. (Sept. 18, 2019), <https://www.chronicle.com/article/since-u-of-alabama-deans-resignation-students-and-faculty-have-demanded-answers-from-a-silent-administration/>.

case on many campuses.⁹ Student affairs professionals are very much acclimated to environments where policy shifts are announced without warning or political context by governmental agencies and university leadership. During the summer of 2020, the Department of Education announced new regulations that oversaw the adjudication of campus sexual misconduct.¹⁰ Many campuses' student conduct, Title IX, and legal affairs offices collaborated and combed through the new regulations to ensure compliance and worked to animate the changes in their respective policies. Campuses that engaged additional student affairs units beyond student conduct and Title IX (housing, multicultural affairs, fraternity, and sorority life) to collect feedback about the policy changes and how these changes may impact students is an example of inclusive shared governance. Legal affairs and governance boards that create a platform for student affairs professionals to not just be informed about policy shifts, but to help in the policy animation and actualization process, creates a stronger sense of shared governance and stronger campus policy.

Chapter 8 concludes with "Themes, Thoughts, and Things to Do." This chapter serves as a call to action for student affair professionals. McClellan and Hutchens turn to the fifteen principles of Bejou and Bejou¹¹ once again to frame a pathway forward for student affairs professionals to have stronger understandings and connections with their existing campus governance structures. The authors reiterate the importance of ethics, building trust, patience, and engaging with purpose. It is here where the authors share more on their broader intent and vision with this work. Deftly, McClellan and Hutchens encourage student affairs professionals to recognize privilege and oppression in campus governance spaces and to confront *systemic isms* together in order to better wield campus governance power in ways that are *socially just caring, ethical, and impactful*. This sentiment is the undercurrent ethos of this text but would have better served student affairs professionals if more deeply interwoven within the theoretical underpinnings of the authors' definitions of power, shared governance, acting ethically, patience, and building trust.

A question that is beyond the scope of the authors' mission and left unanswered in this text is how governance boards can take ownership of the gap that exists between student affairs professionals? To collectively elevate student affairs work, those who serve in campus governance roles will need to work to assess their high-ranking and entry-level student affairs professionals. Identifying the gaps in campus governance knowledge and then working to create connective tissue between their campus's student affairs vision and the daily work of campus governance is an essential need. Creating stronger political bonds with student affairs leadership to learn more about the daily operations of the *street level bureaucrats* that animate governing boards' campus policy decisions will only elevate shared governance.

9 Lindsay Ellis et al. *The New Order: How the Nation's Partisan Divisions Consumed Public-College Boards and Warped Higher Education*, CHRON. HIGHER EDUC. (Sept. 25, 2020), https://www.chronicle.com/article/the-new-order?cid=gen_sign_in.

10 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Office for Civil Rights, Department of Education, 85 Fed. Reg. 30026 (May 19, 2020)

11 Bejou & Bejou, *supra* note 5.

A global pandemic and national racial conflict have once again placed higher education at an inflection point. McClellan and Hutchens expertly explore the theoretical groundwork on governance for student affair practitioners in this text. But given the scope and complexity of higher education's current challenges, the classic definitions of shared governance must be completely disrupted by understanding them through a lens of richer professional development opportunities for student affairs professionals, inclusion, and social justice.

Review of George S. McClellan and Neal H. Hutchens's

SHARED GOVERNANCE, LAW AND POLICY IN HIGHER EDUCATION: A GUIDE FOR STUDENT AFFAIRS PROFESSIONALS

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“Shared governance is one of the basic tenets of higher education, and yet there is considerable evidence that it is not generally understood by its primary participants—faculty members, presidents, and members of boards of trustees.”¹ The same can fairly be said about lawyers who practice in the area of higher education law. In *Shared Governance, Law and Policy in Higher Education*, authors George S. McClellan and Neal H. Hutchens seek to teach student affairs professionals about this challenging area, as part of the “American Series in Student Affairs Practice and Professional Identity.” But the book is also a useful exploration of the topic for college and university lawyers who must advise clients in navigating these challenging waters.

Shared governance is generally not something that we are taught in law school. If anything, the concept of running an organization by spreading power and decision-making, in a democratic and quasi-political process, runs counter to the norms we learn in corporation law and certainly differs greatly from how lawyers are used to dealing with clients in for-profit institutions. The topic is particularly challenging because, as the authors note, the concept of shared governance is “difficult to define”;² different institutions have different ways of employing shared governance; and there is considerable debate in the academy and in practice as to what shared governance should and should not be.

The authors of *Shared Governance, Law and Policy in Higher Education* provide a helpful primer into these topics, which will orient not only student affairs professionals, but also lawyers who are new or not so new to higher education.

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1 S.E. Bahls, SHARED GOVERNANCE IN TIME OF CHANGE: A PRACTICAL GUIDE FOR UNIVERSITIES AND COLLEGES (2014) (quoted in GEORGE S. MCCLELLAN & NEAL H. HUTCHENS, SHARED GOVERNANCE, LAW AND POLICY IN HIGHER EDUCATION 3 (2021)).

2 MCCLELLAN & HUTCHENS, *supra* note 1, at 5 (quoting V.M. Lechuga, *Exploring Current Issues in Shared Governance*, in W.G. TIERNEY & V.M. LECHUGA, RESTRUCTURING SHARED GOVERNANCE IN HIGHER EDUCATION 95–98 (2004)).

The first several chapters of the book lay out the concepts of shared governance, how it works; its benefits and drawbacks; and, given the focus on student affairs professionals, the role of students in shared governance. The later chapters of the book take what feels like a bit of a detour into basic legal concepts and government policy making, concluding with a chapter on the author's observations about shared governance and how institutions, and student affairs professionals in particular, can implement shared governance in their work. Overall, the book is a worthwhile read to enhance understanding of this complicated topic.

Chapter 1 begins with an effort to create a working definition of shared governance, at least for purposes of the book. The authors note that shared governance can be defined by considering three basic attributes: "structure (who is involved in the sharing and in what mechanisms), what is its purpose (what is it that is to be governed), the process through which it is to be pursued (how will it transpire), or some combination of the structure, purpose and process of the thing."³ The authors then explore each of these elements, noting that in general shared governance addresses the division of power and decision-making among the board, the president, and the faculty,⁴ and that one of the purposes of shared governance is adding expertise to decision-making from different constituencies and encouraging engagement among the community.⁵ The authors also provide a fascinating history of how shared governance came to be, tracing the origins to before the establishment of colonies in America and at the first American university, Harvard.⁶ They explain the rationales and theories behind shared governance, and some of the developments in the modern world that have pushed back on the notion of shared governance, including the increase in different forms of higher education and the structure of universities (for-profits, increased community college attendance, increases in nontenure track faculty), and changing attitudes about how organizations should be run, with an emphasis on efficiency and management.⁷ If the reader is to read but one chapter in the book, this is the one. It provides an outstanding, balanced discussion of what shared governance is, why we have it, and the reader can draw conclusions as to the values and drawbacks of shared governance.

Chapter 2 works through what shared governance looks like in practice. The chapter explains the roles and responsibilities of governing boards, the administration, and the faculty, including the sometimes unique roles that state governing boards can play.⁸ The most interesting part of the chapter is the discussion of groups of less traditionally considered players in shared governance models, including student senates, staff senates, unions, advisory councils, and alumni.⁹ The discussion helps

3 *Id.* at 6.

4 *Id.* at 7.

5 *Id.* at 8.

6 *Id.* at 11–12.

7 *Id.* at 18–19.

8 *Id.* at 29–31.

9 *Id.* at 38–42.

to frame the utility of engaging large segments of the community in decision-making, while clearly defining their ultimate authority. The broad range of constituencies also helps explain the unique nature of higher education, which makes shared governance an important consideration in effective leadership.

Chapter 3 discusses ways that colleges and universities can enhance and improve shared governance, particularly from the perspective of student affairs professionals. The authors emphasize that the process of shared governance is a collaborative one that takes time, and therefore requires patience—a concept that, unfortunately, is often challenged by the real-time pressures colleges and universities face in decision-making, meaning not every decision can be made over a course of time.¹⁰ The authors suggest understanding deadlines and creating a working plan to achieve collaboration within the deadlines.¹¹ The chapter also discusses the importance of trust in the procedural systems that have been established to implement shared governance, which should reflect the community's and society's values.¹² Unfortunately, trust is often lacking, in part because of gaps in understanding by one group (such as the board vs. faculty), which leads to distrusting the "other."¹³ The authors offer ideas for ensuring trust, including respecting the role of each constituent group and not intruding on issues that are properly in the lane of someone else.¹⁴ Shared governance necessarily involves politics, and the book provides advice on how to approach shared governance problems from a political perspective.¹⁵ Finally, the chapter reminds the reader that shared governance has its limits, and that to function properly, each constituency must understand not only its own role in the process, but the role of others.¹⁶

As the book is aimed at student affairs professionals, chapter 4 is all about the role of students in shared governance. "Students impact higher education decision-making through three mechanisms: self-governing structures; reaction to policies and practices; and stands on public issues taken by student groups"¹⁷ The authors discuss the history of student involvement in university governance and note that students have been effective at influencing policy through taking stands on public issues, while they have been less successful in making impacts through formal governing structures such as student senates.¹⁸ A strong case is made for the importance of student participation in shared governance, because it helps students learn about government and teaches them to be better leaders.¹⁹ These benefits are

10 *Id.* at 55–56.

11 *Id.* at 56.

12 *Id.* at 56–57.

13 *Id.* at 59.

14 *Id.* at 59–60.

15 *Id.* at 60–66.

16 *Id.* at 66–69.

17 *Id.* at 77 (citing W.H. CROWLY, PRESIDENTS, PROFESSORS, AND TRUSTEES (1980)).

18 *Id.* at 77–78.

19 *Id.* at 82–83.

particularly profound for historically marginalized students.²⁰ That said, students will only trust the process if the university is sincere about student participation. If schools are merely engaged in window dressing, they should not bother.²¹ The authors offer practical ideas for ensuring active student involvement.²²

The reader may find the next three chapters a bit of a detour, and the book could have effectively stopped at chapter 4, or more clearly tied the concepts discussed in these next few chapters to the concept of shared governance. Chapter 5 is titled “Intersection of Law and Shared Governance” but is primarily a primer on basic legal concepts, including the basic sources of law (the Constitution, statutes, and common law) and the difference between public and private schools.²³ While the chapter provides good, basic information that student affairs professionals should know, it could be more clearly tied to the issue of shared governance. Chapter 6 discusses the role of the individual in advocating for issues on campus,²⁴ concepts of freedom of speech,²⁵ and the limitations that are put on employees when talking about issues involving their employment, as opposed to broader issues of public concern.²⁶ The information may provide useful guidance to individuals on how to exercise their role in shared governance which the authors discuss.²⁷ Finally, chapter 7 talks about policy formation, including a discussion about how individuals and groups can help influence the content of laws and regulations. The authors talk about general strategies with respect to formulation of policy and how that policy can be implemented by “street level bureaucrats.”²⁸

In the book’s final chapter, themes from earlier chapters are summarized and the authors opine that there is no one set of policies and procedures that can adequately encompass all aspects of shared governance. The authors’ views are well encapsulated in the following passage:

Institutions would be better off recognizing that shared governance is an ideal, or a set of ideals, which mirror back to us and serve as a symbol of our highest aspirations for the ways in which educated persons can and should go about building communities in the service of society. Recognizing and embracing the inherent contradictions and tensions associated with such a task, and mindful of the ways in which systemic isms play themselves out in our lives and our obligations to acknowledge and confront those social ills, the stakeholders of higher education at a given institution can, through shared discussion and deliberation, reach agreements on the ways

20 *Id.* at 83.

21 *Id.* at 85

22 *Id.* at 84–87.

23 *Id.* at 93–103.

24 *Id.* at 117–18.

25 *Id.* at 110–12.

26 *Id.* at 115–17.

27 *Id.* at 117–20.

28 *Id.* at 134–38.

in which the power associated with higher education can be shared for the betterment of all.²⁹

Shared Governance, Law and Policy provides a helpful summary of a unique aspect of higher education, and arms both student affairs professionals and lawyers with an understanding of the reasons for this model and how to make it better. Lawyers in particular will benefit from the perspectives offered in the first several chapters.

29 *Id.* at 145.