

SECTION 504 AT FIFTY  
DISABILITY POLICY AND PRACTICE  
IN HIGHER EDUCATION  
WHY 504 AND THE ADA REMAIN  
RELEVANT AND IMPORTANT

LAURA ROTHSTEIN\*

*Abstract*

*The article provides an overview of the history and current status of federal disability discrimination law as it applies to institutions of higher education. It sets out the major issues of attention historically and provides a perspective on issues that most require current and focused attention because they are complex, changing, and high profile. It urges an approach that is proactive and encourages institutions not to just comply with the legal mandates, but to consider what actions can be done and should be done by balancing a range of concerns.*

*Appreciation is expressed to Barbara Lee and Maxine Idakus for their exceptional editorial work on the article.*

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\* Professor of Law and Distinguished University Scholar Emeritus, University of Louisville, Louis D. Brandeis School of Law. B.A., University of Kansas; J.D., Georgetown University Law Center. Professor Rothstein's experience in higher education spans 46½ years at five law schools and includes several years of administrative leadership experience (including service as Dean of the Brandeis School of Law at the University of Louisville). She served as the first law school faculty editor of the *Journal of College and University Law* from 1980 to 1986 and currently serves on its editorial board. She published many of the earliest works on disability and higher education and K-12 education. She has retired but continues to publish and serve as a consultant on higher education disability rights issues.

She continues biannual updates for *Disabilities and the Law* (Thomson Reuters) coauthored with Julia Irzyk (first published in 1984 and now in its fourth). A fifth edition (also to be cumulatively updated twice a year is being planned for 2024 or 2025 publication. She is in the process of writing the seventh edition of *Disability Law* (with Ann McGinley and D'Andra Millsap Shu) for fall 2024 publication by Carolina Academic Press and the seventh edition of *Special Education Law* (with Scott Johnson) for fall 2025 publication with Sage Publishers.

This article is adapted from presentations given at the Association of American Law Schools annual meeting on January 6, 2023, and the Stetson Conference on Higher Education and Policy on March 4, 2023. It also incorporates the framework of coverage of these issues from *A Primer on Disability Discrimination in Higher Education* (cited later in this article).

This article is dedicated to the late Professor Michael Olivas. The article also acknowledges Gordon Gee Each of them played a significant role in my career focus on higher education and disability issues.

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Michael Olivas died in April 2022. He had retired from the law faculty at the University of Houston. I first knew Michael through our attendance at AALS Education Law Section programs, beginning in about 1981 (when I was the Faculty Editor of the *Journal of College & University Law (JCUL)*). We were both interested in higher education policy issues, and I invited him to write an article for *JCUL*. Since then, he has written several articles for *JCUL* (beginning in 1984) and wrote broadly on higher education topics, which is reflected in his textbook on higher education law. He recruited my husband, Mark, and me to the University of Houston where we became colleagues. Michael and I team-taught higher education law several times. He was always a wise counsel as a colleague and friend on numerous higher education issues. He is an icon in higher education and recognition of that came when he was selected as the first recipient of the William Kaplin Award in 2009 by Stetson University Center for Higher Education and Institution Policy which “recognizes scholars who have published works on education law that embrace the intersection of law and policy.” When I was Faculty Editor of *JCUL*, he often provided advice that was always just right. I miss his wise counsel.

Gordon Gee (now President of West Virginia University (WVU)) opened the door for me to build a lifetime of commitment to issues of higher education and disability law. He was the Dean of WVU College of Law in 1980 when I was appointed to the faculty. WVU Law School had just been invited to serve as the editorial home for *JCUL*, and he asked me to serve as the first Faculty Editor, which I did for six years. This was at the same time I became interested in a newly emerging area of disability law. Gordon also allowed me to create a course at WVU in disability law. Gordon’s opening these two doors allowed me to see the intersection of higher education and disability law at a very early stage. Gordon also has a casebook on higher education law and has served as President at five universities. He was also a recipient of the William Kaplin Award (in 2018).

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## I. PERSPECTIVE

The goal of this article is to reach college and university attorneys who are in a position not just to “defend” the institutions of higher education (IHEs) they represent, but also to persuade leadership at those institutions to take a proactive approach to disability issues on campus in a way that goes beyond “risk management” and “compliance check-offs.”<sup>1</sup> The article intends to highlight the benefit—beyond avoiding the use of scarce resources on litigation and other dispute resolution—of raising key leadership awareness about the advantages of taking a positive and inclusive approach to disability discrimination issues. The article provides a starting place for what institutions *must* do within the legal mandates—the basic legal mandates for the major issues of disability discrimination that have arisen in the past fifty years. It also encourages institutions to develop approaches where they also consider what *can* be done—for example, where IHEs have the discretion to go beyond what the law requires, while taking into account considerations of fairness and resources limitations in deciding what *should* be done.

Individuals at IHEs affected by disability discrimination requirements include students, staff, and faculty. Others affected include visitors (sports and entertainment event attendees); applicants for admission; health care clinic and hospital patients; those served in other clinical programs; employers interviewing on campus; and individuals visiting food services programs, stores, libraries, or museums on campus. University counsel can guide institutional policy makers how to consider a very wide range of issues in planning for proactive approaches.

The “style” of this article—written after forty-three years of thinking about the connection between higher education and disability is more personal than previous articles.<sup>2</sup> It references<sup>3</sup> detailed citations and synthesis on many topics, but unlike most of my previous scholarly work, it is written as a “commentary” narrative with the intent to persuade. It draws not only on my scholarship on these

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1 Presidents seek more training on a range of areas, including diversity, equity and inclusion (DEI), legal issues, technology planning, and crisis management. These all have implications for disability law. Audrey Williams June, *Here Are the Parts of the Job for Which Presidents Want More Training*, CHRON. HIGHER EDUC. (Apr. 14, 2023), [https://www.chronicle.com/article/here-are-the-parts-of-their-job-for-which-presidents-want-more-training?utm\\_source=Iterable&utm\\_medium=email&utm\\_campaign=campaign\\_6613795\\_nl\\_Academe-Today\\_date\\_20230414&cid=at&source=&sourceid=&cid2=gen\\_login\\_refresh](https://www.chronicle.com/article/here-are-the-parts-of-their-job-for-which-presidents-want-more-training?utm_source=Iterable&utm_medium=email&utm_campaign=campaign_6613795_nl_Academe-Today_date_20230414&cid=at&source=&sourceid=&cid2=gen_login_refresh).

2 This is the ninth article I have published in *JCUL*, for which I served as Faculty Editor while at West Virginia University College of Law (1980–1986) and for which I currently serve as an advisory board member. I began writing and teaching about disability law also in 1980 and saw the connections between higher education and disability law at that point. See Appendix A.

3 The footnotes guide the reader to more detailed citations of cases and other material on each topic. They provide some detail on a few key cases. The treatise that is cited throughout was written in its first edition during the five years I served on the faculty at West Virginia University and included even then a chapter devoted solely to higher education issues, before there was much case law or even regulatory guidance on the topic. Published in its first edition in 1984, it is now in its fourth edition, but is updated cumulatively every six months, which attests to the dynamic evolution of disability discrimination law. It is now coauthored. See LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* (2014) [hereinafter *DISABILITIES AND THE LAW*]. A revised edition is planned for 2024.

issues, but also on my experience as a faculty member<sup>4</sup> and administrator,<sup>5</sup> active participant in national legal and higher education programming,<sup>6</sup> and presenter on individual campuses and at national conferences.<sup>7</sup> This knowledge and these experiences reinforce my approach to legal issues, which has been to be proactive (in planning for and anticipating issues), to resolve the issue without unnecessary and costly disputes, and to “do the right thing.” This approach recognizes that resources are not unlimited and that institutions have an obligation to fairness and that there is a duty to protect the public by ensuring that graduates of professional programming are competent. It considers the hidden cost of negative media attention (including through social media) when a campus policy or practice is not thoughtful. It also recognizes that while it is not my belief that higher education institutions intentionally exclude individuals with disabilities, from the perspective of many, the way that IHEs are built and operate can seem “ableist” to individuals with disabilities in many settings.<sup>8</sup>

The article reflects on the fifty years since disability rights became an issue for IHEs. It does not attempt to provide in-depth analysis of all issues. Instead, it provides a basic overview of most of the major issues that arise in the higher education context (including a perspective on areas that benefit from proactive planning) and the status of those issues today. In addition, the article provides a more focused analysis of current and crystal ball or evolving topics. Finally, it suggests and encourages a framework for university counsel to present to leadership to encourage policies, practices, and procedures that not only avoid costly disputes, but also avoid negative high-profile and embarrassing media attention, and a proposed administrative structure to make that approach more effective.

While the basic substantive provisions are the same for all federal disability nondiscrimination statutes (section 504)<sup>9</sup> and Titles I, II, and III of the Americans

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4 My legal education service began in 1986 and included service at five different law schools (one private religiously affiliated and four state public university) in five different states.

5 My law school administrative experience includes Director of Admissions (at Ohio Northern University) for one year; Associate Dean for Students (1986–1993) and Associate Dean for Graduate Programs (1999–2000) at University of Houston, and Dean (2000–2005) at University of Louisville Louis D. Brandeis School of Law.

6 Major service included membership on the Law School Admissions Council (LSAC) Board of Trustees, committee and task force membership in Association of American Law Schools (AALS), American Bar Association (ABA) Council of Legal Education and Admission to the Bar, and service on ABA/AALS accreditation/membership reviews for eight law schools.

7 The national conferences span a wide range of perspectives, including, National Association of College and University Attorneys, Education Law Association, Association of Higher Education and Disabilities, American Council on Education, Southeastern Association of Law Schools, AALS, ABA, and LSAC. Presentations at major higher education policy conferences have been given frequently at the Stetson Conference and the Vermont Conference. Many invited lectures were for community college leadership at institutions in New York, Pennsylvania, Texas, California, Indiana, and Kentucky. Many of my lectures have been invited talks to key leadership, including deans, associate deans, presidents, and provosts.

8 See JAY T. DELMAGE, *ACADEMIC ABLEISM: DISABILITY AND HIGHER EDUCATION* (2017) (now available on open access).

9 29 U.S.C. § 794, enacted as part of the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355.

with Disabilities Act (ADA),<sup>10</sup> the remedies and procedures vary depending on what setting the individual with a disability is in.<sup>11</sup> Section 504 of the Rehabilitation Act applies to all programs receiving federal financial assistance and would thus affect student, faculty, staff, and visitors. Title I of the ADA applies to employment. Title II applies to all aspects (most courts also apply it to employment) of a state or local governmental program (e.g., a state university). Title III applies to *private* providers of twelve categories of accommodations (including education programs) open to the public (e.g., a private university). Title III does not apply to employment. Because of the limited damages, remedies under Title III, section 504, remains a “safety net” in higher education, which could be critical if the Supreme Court erodes the application of the ADA in any way. It also provides the avenue for the Department of Education (ED) Office for Civil Rights (OCR)<sup>12</sup> investigations that “incentivize” compliance with disability discrimination requirements in higher education. Section 504 also provides the vehicle for funding programs such as mental health treatment in higher education institutions.<sup>13</sup>

In the world of federal disability regulatory law, universities and colleges are unique in at least two ways. First, they have had longer experience with disability rights issues<sup>14</sup> because most were covered by section 504 since 1973 and have addressed these issues in a variety of settings for decades. Second, a campus setting usually includes a range of affected individuals (students (and applicants), faculty and staff, alums, and visitors) in a very wide range of settings (housing, transportation, sports and performance venues, classrooms, food services, museums and other display areas, libraries, clinics, labs, programs abroad, alumni activities, hospitals and other health care settings). This makes it challenging to develop policies, practices, and procedures that consider those different settings and that ensure a means of communicating access issues to the wide range of constituents and to train those who are on the front lines of serving students and visitors and others.

## II. OVERVIEW

Section 504 of the Rehabilitation Act (hereinafter section 504)<sup>15</sup> was enacted in 1973 with little fanfare or publicity and little legislative history. The first major federal civil rights statute for individuals with disabilities provides that entities receiving federal financial assistance may not discriminate on the basis of disability

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10 42 U.S.C. &§ 12101- 12212, Pub. L. No. 101-336, 104 Stat. 327.

11 For more detailed discussion, see *DISABILITIES AND THE LAW*, *supra*, note 3, ch. 3.

12 For the website of the federal Department of Education, see <https://www.ed.gov/>.

13 See, e.g., <https://www.ed.gov/news/press-releases/us-department-education-announces-intent-strengthen-and-protect-rights-students-disabilities-amending-regulations-implementing-section-504>.

14 The only other major institutions that have had somewhat similar lengths of experience are health care entities, such as hospitals, which receive substantial federal funding for grants and health care coverage. It is not a surprise that many of the early disability discrimination cases in higher education also involved health care programs directly or indirectly.

15 29 U.S.C. § 794.

(originally “handicap”). Its regulatory scheme was slow to evolve,<sup>16</sup> but once in place, it provided an important basic framework that was interpreted by the courts and later included as statutory language in the framework for the ADA.<sup>17</sup> Between 1973 and 1990, the Education for All Handicapped Children Act of 1975 (now Individuals with Disabilities Education Act) of 1975<sup>18</sup> provided a comprehensive statutory and regulatory framework that resulted in a gradual but eventually fairly significant increase in the number of students with disabilities on campus. This gradual infusion of students with disabilities into higher education, the lack of regulations until 1977, and the limited public attention given to section 504 when it was enacted are all factors in why there is almost no judicial attention to these issues before 1980.

Because higher education was one of the major societal recipients of federal financial assistance, higher education became an early laboratory for developing many of the judicial interpretations of its provisions, including the first Supreme Court case that framed the meaning of “otherwise qualified” in *Southeastern Community College v. Davis*<sup>19</sup> in 1979. Case law on what was required for reasonable accommodations also developed earliest in the higher education context. Except for the issue of learning disabilities, there were few judicial decisions addressing whether the individual complaining of discrimination met the definition of “disabled” until the ADA was enacted in 1990.<sup>20</sup>

The ADA brought most employers into the sphere of entities obligated to comply, and the private-sector defendants began to bring motions to dismiss on the basis that the complainant did not meet the definition for protection. The 1999 *Sutton* Supreme Court trilogy of employment cases<sup>21</sup> was a “backlash” reaction to the 1990

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16 This year also marks the passing of disability rights icon, Judy Heumann, whose advocacy leadership was a key factor in the promulgation of regulations under section 504. Alex Traub, *Judy Heumann, Who Led the Fight for Disability Rights, Dies at 75*, NEW YORK TIMES (Mar. 5, 2023), <https://www.nytimes.com/2023/03/05/obituaries/judy-heumann-dead.html>.

17 42 U.S.C. § 12101.

18 20 U.S.C. § 1400, Pub. L. 91-230, title VI, §601. See DISABILITIES AND THE LAW, *supra* note 3, § 1:25 and ch. 2. Beginning in 1975, the framework existed for a child to be identified as eligible for special education and related services. A kindergarten-age child so identified in 1976 would reach college age about 1990, and because of IDEA, these individuals would be much more likely to be otherwise qualified to do college level work. Students with learning disabilities are probably the most significant population for which that was the case.

19 442 U.S. 397 (1979). For context and background of the case, see Laura Rothstein, *The Story of Southeastern Community College v. Davis: The Prequel to the Television Series “ER,”* in MICHAEL A. OLIVAS & RONNA GREFF SCHNEIDER, EDUCATION LAW STORIES ch. 7 (2008).

20 DISABILITIES AND THE LAW, *supra* note 3, §§ 3:1–3:3.

21 *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (individuals with vision corrected with eyeglasses or contact lenses were not disabled); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) (individual with high blood pressure controlled by medication was not disabled); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (truck driver with correctable monocular vision was not disabled). The same day that these cases were decided, the Court also remanded a case related to higher education regarding whether an individual with a learning disability was disabled under the ADA. The case involved an individual seeking accommodations for the New York bar exam. *Bartlett v. N.Y. State Bd. of L. Exam’rs*, 970 F. Supp. 1094, 1119 (S.D.N.Y. 1997), *aff’d in part, vacated in part on other grounds*, 156 F.3d 321 (2d Cir. 1998) *cert. granted, judgment vacated*, 527 U.S. 1031 (1999) and *aff’d in part*,

enactment of the ADA and its much greater application to most employment settings. Although it took almost a decade after those decisions, Congress responded by enacting the ADA Amendments Act of 2008,<sup>22</sup> which clarified the definitional coverage.

This article provides a brief overview of the history of the legislative, regulatory, and judicial developments related to disability discrimination in higher education since 1973. It briefly reviews some of the key issues under section 504/ADA that higher education has faced in the past fifty years.<sup>23</sup> It highlights major issues that are being faced in the disability context by higher education in 2023, fifty years after section 504 was passed.

Of most importance is that this article will emphasize the value and benefits for higher education leaders and policy makers to take a proactive approach to disability discrimination issues, one that does not seek to “get out of” liability, but rather one that takes a holistic approach, using the current legal framework as a starting point. My approach is one based on my own experience as a higher education administrator and my experience in fielding questions and hypotheticals on not only the campuses where I have served as a faculty member, but also from colleagues across the country.<sup>24</sup> My views on this approach have been consistent in my presentations at conferences and for higher education programs and publications on this topic since 1979. This approach encourages leaders in higher education to consider a framework for what institutions *must* do (what is legally required), what they *can* do (the value of going beyond mere compliance), and what they *should* do (balancing a range of considerations for whether the institution should go beyond legal compliance). This section provides a framework for that approach, including the importance of “training” and “cultural competence” for higher education administrators, faculty, and staff—not just those who provide student services and disability resources on campus. It also encourages those institutions that have not created an administrative position that coordinates all disability issues on campus—such as an ADA coordinator—to consider doing so.

This article recognizes the increased activism of individuals with disabilities (especially students) within IHEs. It urges recognition of the advocacy of these individuals to go beyond compliance and move to full inclusion and equity (seeking not just what *must* be done but what *can* be done),<sup>25</sup> while balancing this activism

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*vacated in part on other grounds*, 226 F.3d 69, 10 A.D. Cas. (BNA) 1687 (2d Cir. 2000) (no presumption one way or the other should be given to the treating physician’s evaluation of a learning disability).

22 ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. For an overview of the history of these developments, see *DISABILITIES AND THE LAW*, *supra* note 3, §§ 1:1, 1:2, and 1:6.

23 For more detailed history, see articles cited in *DISABILITIES AND THE LAW*, *supra* note 3, chs. 1, 3, and 4, and § 10:7 (which includes discussion of many medical school and health care professional education program judicial decisions).

24 Frequently colleagues and others (including university attorneys) will contact me for informal ad hoc input on a range of issues. Additional situations are brought to my attention during Q&A at my presentations at conferences and institutions.

25 Brenda K. Smith et al., *Activism Among College Students with Disabilities and the Move Beyond Compliance to Full Inclusion*, 16 *REV. DISABILITY STUDS.* (2020), <https://rdsjournal.org/index.php/journal/article/view/950/2318>. See also Janell Marie Salanga, *New Generation of Disabled UC Students Revives Activism* (Sept 23, 2021); <https://calmatters.org/education/higher-education/college-beat-higher->

with the realities of resources and structures and the different situations within different IHEs. My approach advocates considering fairness to the individual with a disability, others in the community, and the institution itself—to implement what *should* be done. A small community college may have much more limited staffing to provide accommodations than a large statewide public university or a private university with significant private endowment resources. Building connections and contacts, however, may facilitate better responses.

### III. HISTORY OF SECTION 504 AND THE ADA IN HIGHER EDUCATION

This section provides a brief overview of the key statutes and the regulatory oversight for higher education and disabilities rights beginning in 1973. It does not provide in-depth detail, but it does provide references to sources for more extensive detail.

Both section 504 of the Rehabilitation Act and the ADA prohibit discrimination against otherwise qualified individuals with disabilities. They also both require reasonable accommodations (which can include auxiliary aids and services and modification of policies). To be protected, an individual must be *substantially impaired in one or more major life activities, be regarded as substantially impaired, or have a record of such an impairment*.<sup>26</sup> The person must be *otherwise qualified* to carry out the essential requirements of the program with or without reasonable accommodations (including not posing a direct threat).<sup>27</sup> The 1979 *Southeastern Community College v.*

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education/2021/09/university-of-california-disabled-student-activism/. A starting point for disability justice <https://journals.shareok.org/jcscore/article/view/96> (2020) (focusing on disabled students of color), 6 DISABILITY JUSTICE RACE & EDUCATION (2020); <https://ndlsa.org/> (law students with disabilities national organization).

26 29 U.S.C.A. § 706(8)(D); 42 U.S.C.A. § 12102(1). 34 C.F.R. § 104.3(k)(3) (2017). See DISABILITIES AND THE LAW, *supra* note 3, § 3:2.

27 34 C.F.R. § 104.3(k)(3) (2017). See DISABILITIES AND THE LAW, *supra* note 3, § 3:3. Title II regulations provide the following regarding direct threat:

Direct threat means a significant risk to the health or safety of *others* that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.

28 C.F.R. § 35.104 (2016) (definitions).

The determination of direct threat is to be based on an individualized assessment based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk.

28 C.F.R. § 35.139(b) (2010).

Title I regulations applicable to employment, however, allow direct threat as a defense when the individual poses a direct threat to the health or safety of *the individual* or others in the workplace. See 29 §§ 1630.2(4) (2016) and 1630.15(b)(2) (2016).

The statutory language of the ADA does not define direct threat. The Equal Employment Opportunity Commission (EEOC) regulation has been upheld by the Supreme Court as being valid and within the scope of the statute. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002). The Title II regulation (which is part of the regulations issued in 2010) has not been subjected to clarifying judicial review.

*Davis*<sup>28</sup> Supreme Court decision sets the standard for what it means to be otherwise qualified. The Court held that an individual who is covered by section 504 is “one who is able to meet all of a program’s requirements in spite of his handicap.”<sup>29</sup>

Included in the standard for some situations is whether the individual poses a direct threat to others.<sup>30</sup> Unresolved is whether a student whose threat is to “self” only can be treated differently based on that threat. While earlier ED opinion is that it would be impermissible to do so, this advisory guidance has been considered by many IHEs to be problematic and presents difficulty in how to deal with students who are self-injurious or suicidal. Will such agency “guidance” even be given judicial deference going forward? Many in higher education have raised concerns about how the Title II regulation (not considering threat to “self”) will be applied to actions toward students with suicidal tendencies or who have other self-destructive behaviors. Recent Department of Justice (DOJ) guidance on direct threat does not yet provide definitive answers for how institutions should handle these cases. This lack of clarity highlights the importance of training for faculty and staff regarding responding to behavior of concern.

The person must also “*make known*” the disability to be entitled to accommodations,<sup>31</sup> although in some settings, it might be apparent. Courts are generally consistent in requiring an *individualized* and *interactive process* in resolving accommodation issues. Numerous cases find that institutions are not required to excuse misconduct or deficient academic or other performance requirements.<sup>32</sup>

Historically courts have given substantial deference to educational institutions regarding their academic programming and what constitutes essential aspects of the program and what might be a fundamental alteration. Recent cases, however, demonstrate less judicial deference when such decisions are not thoughtfully justified and not carried out through an interactive process.

While the basic substantive provisions are the same for both section 504 and the ADA, the remedies and procedures vary depending on what setting the individual with a disability is in. Section 504 of the Rehabilitation Act applies to all programs receiving federal financial assistance and would thus affect student, faculty, staff, and visitors. Title I of the ADA applies to most employers. This would include students engaged in work-study employment. Title II applies to all aspects (most courts apply it to employment) of a state or local governmental program (e.g., a state university). Title III applies to *private* providers of twelve categories of accommodations (including education programs) open to the public (e.g., a private university).<sup>33</sup> Title III does not apply to employment. Enforcement in the higher education context includes complaints to the ED OCR under section 504.

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28 442 U.S. 397 (1979).

29 *Id.* at 407.

30 DISABILITIES AND THE LAW, *supra* note 3, §§ 3:3, 3:24.

31 *Id.* § 3:22 n. 15.

32 *Id.* § 3:3.

33 Private clubs and religious entities are exempt to some extent under Title III, and that might affect a particular activity. 42 U.S.C. § 12187.

Universities are somewhat different from most other entities covered by section 504/ADA in at least two ways. First, they have had longer experience with disability rights issues because most were covered by section 504 since 1973 and have addressed these issues in a range of settings for decades. Second, a campus setting usually includes a range of affected individuals (students (and applicants), faculty and staff, and visitors) in a very wide range of settings (housing, transportation, sports and performance venues, classrooms, libraries, clinics, labs, programs abroad, hospitals and other health care settings). This makes it challenging to develop policies, practices, and procedures that take into account those different settings and to ensure a means of communicating access issues to the wide range of constituents and to train faculty and staff members who are on the front lines of serving students and visitors.

There are a few key Supreme Court decisions in the higher education context that are important to framing any disability issue in higher education.<sup>34</sup> There were other key Supreme Court decisions decided in other contexts that affected higher education.<sup>35</sup> On some occasions, these holdings were responded to by Congressional action. One lower court case stands out as having the stature of a Supreme Court decision. That case involved the burden on the parties for demonstrating that a requested accommodations was reasonable or not.<sup>36</sup>

Beyond the judicial interpretations, higher education leaders must be mindful of the great impact of the enforcement of section 504 by the ED OCR. The ED came into existence in 1980, when the Department of Health Education and Welfare (HEW) was divided into ED and the Department of Health and Human Services (HHS). The responsibility for oversight of section 504 activities in education settings currently falls to ED. This includes complaints regarding discrimination and promulgation of regulations applicable to higher education institutions receiving federal financial assistance (which is almost all of them). In addition to the initial section 504 regulations promulgated in 1977,<sup>37</sup> ED has also initiated regulations (pursuant to both section 504 and the ADA) on a wide range of topics of significant impact on campus.<sup>38</sup> Other agencies have also issued regulations or provided guidance applicable to an array of settings that are also relevant to higher education.<sup>39</sup> How the requirements of these agencies interact is complex, and the

34 See *DISABILITIES AND THE LAW*, *supra* note 3, § 1:6. These include *Grove City Community College v. Bell*, 465 U.S. 555 (1984) (program specificity); *University of Texas v. Camenisch*, 451 U.S. 390 (1981) (payment for services by university); *County of Los Angeles v. Kling*, 474 U.S. 936 (1985) (holding that Crohn's disease was not a disability in the context of a nursing student claiming discrimination on that basis); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (not a violation of the First Amendment Establishment Clause to provide vocational rehabilitation aid to a blind student seeking religious training at a Christian college)).

35 See *DISABILITIES AND THE LAW*, *supra* note 3, §§ 1:7–1.9. This section includes a chart listing all Supreme Court decisions, major statutes, and other significant developments as far back as 1935 that had relevance to disability discrimination).

36 *Wynne v. Tufts Univ.*, 932 F.2d 19, 26 (1st Cir. 1991). See *infra* Part IV for more on this decision.

37 34 C.F.R. pt.104, <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html>.

38 *W. Va. v. EPA*, 597 U.S. 2587 (2022).

39 For example, see ADA Department of Justice Regulations about service and emotional support animals (<https://www.ada.gov/resources/service-animals-2010-requirements/>); EEOC Department of

specific discussion is beyond the scope of this article, but it is particularly important to recognize that section 504 creates a regulatory agency enforcement mechanism with outcomes that are not always apparent, which goes beyond litigation by individual complainants. This multiple agency regulatory role highlights the interplay of section 504 and the ADA in higher education.

There are some signals from the Trump-appointed Supreme Court justices that signal a different approach to any area of society that is subject to administrative and regulatory oversight. The 2022 Supreme Court decision in *West Virginia v. EPA*,<sup>40</sup> sent signals that the Court is less deferential to statutory frameworks that depend on regulatory guidance, even regulations that have gone through notice and public comment. The Court has also been noted as being less deferential to long-standing precedent, as has been discussed following the *Dobbs v. Jackson Women's Health Organization*<sup>41</sup> decision that called into question the 1973 Supreme Court precedent in *Roe v. Wade*.<sup>42</sup> These signals raise concerns about how future Supreme Court decisions might change long-standing doctrines and even call into question the constitutionality of statutes such as section 504 and the ADA, despite decades of reliance on these statutes and their impact in a broad array of settings, including in higher education.<sup>43</sup> Of greatest concern may be the potential for the Supreme Court to revisit the issue of disparate impact under disability discrimination laws.<sup>44</sup>

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Labor regulations on employment (<https://www.eeoc.gov/regulations-related-disability-discrimination/>); and housing regulations issues by the Department of Housing and Urban Development ([https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/disability\\_overview/](https://www.hud.gov/program_offices/fair_housing_equal_opp/disability_overview/)); Health and Human Services regulations for a range of health issues (<https://www.hhs.gov/civil-rights/for-individuals/disability/laws-guidance/index.html>). For a comprehensive overview of federal agency regulation on disability issues, see <https://www.ada.gov/resources/disability-rights-guide/>.

40 142 S. Ct. 2587.

41 142 S. Ct. 2228 (2022).

42 410 U.S. 113 (1973). This case was decided the same year that section 504 of the Rehabilitation Act was passed.

43 For example, the application of section 504 (and other civil rights statutes) to all aspects of an entity if one aspect receives federal financial assistance was established in the Civil Rights Restoration Act of 1987, 29 U.S.C.A. § 706(8)(D), Pub. L. 93-112, 87 Stat. 355.

44 This could affect issues such as website access and other conduct that is not intentionally discriminatory (which for disability issues that is often the case). Potential holdings could undermine the entire purpose of both section 504 and the ADA. See e.g., *Payan v. L.A. Cmty. Coll. Dist.*, 114 F.4th 729 (9th Cir. 2021). In that decision, the Ninth Circuit Court of Appeals recognized a private right to bring disparate impact claim under Title II of ADA and Rehabilitation Act; recognizing disparate impact in case involving website access and teaching materials accessible to student with visual disabilities; applies equally to both statutes in spite of Supreme Court holding in *Alexander v. Sandoval*, 553 U.S. 275 (2001). In this case, the community college chose not to appeal. But it is possible that the issue could reach the Supreme Court in the future, with the possibility that the underlying goal of disability discrimination laws (which almost always address unintentional discrimination) would be defeated.

#### IV. OVERVIEW OF JUDICIAL ATTENTION TO ISSUES IN HIGHER EDUCATION

In the first decade after section 504 was enacted, there was very little judicial attention to this statute in any setting. The first Supreme Court decision on disability discrimination under section 504, however, directly involved higher education and became the framework for important issues that continues today.<sup>45</sup>

Many of the earliest court decisions in higher education involved procedural issues, but after regulations were promulgated in 1978 and more disabled students<sup>46</sup> came to campus, courts began to address several substantive issues. Many of these issues remain important and current today, and this section reviews the major categories addressed by the courts.

The following sections do not attempt to provide extensive detailed analysis of all higher education and disability-related topics relevant to IHEs. Rather, they provide a brief overview of what is involved in these ongoing and recurring topics, some examples of cases on these topics, and reference to more detailed listings of cases and other developments. While most of the following sections focus primarily on student issues, there is also relevance to employees (both faculty and staff) and campus visitors.

##### A. *Who Is Protected—Meeting the Definition of “Disabled” and Being “Otherwise Qualified”*<sup>47</sup>

###### 1. *Definition of Coverage*

Regardless of the setting—student, faculty, staff, or visitor to campus— an individual is only protected from discrimination under section 504 and the ADA if that individual is substantially limited to one or more major life activities, has a record of such an impairment, or is regarded as<sup>48</sup> having such an impairment.

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<sup>45</sup> In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the Court established the definition of “otherwise qualified” in the context of a deaf nursing student. It set out the basic requirement that to be otherwise qualified one must meet the essential requirements of the program with or without reasonable accommodation. It is the framework for all subsequent decisions on this issue, not only in higher education contexts, but in areas such as employment.

<sup>46</sup> The term “disabled person” (identity first) is generally used throughout this article rather than what was at one time the preferred “people first” terminology (“person with a disability”). The preference for which type of terminology has changed over the years. Because my work focuses specifically on the issues related to the disability, I think it is appropriate to use the identity-first language, but I understand that others may not.

<sup>47</sup> For a more detailed analysis and extensive case citations on this topic, see *DISABILITIES AND THE LAW*, *supra* note 3, §§ 3:2 and 3:3.

<sup>48</sup> Interesting higher education cases on this issue include *Davis v. University of North Carolina*, 263 F.3d 95 (4th Cir. 2001) (student with multiple personality disorder was not disabled because she was not perceived as unable to perform broad range of jobs); *Widomski v. State University of New York (SUNY) at Orange*, 933 F. Supp. 2d 534 (S.D.N.Y. 2013), *judgment aff'd*, 748 F.3d 471 (2d Cir. 2014) (granting university’s motion for summary judgment in claim by student that he was perceived as disabled because of hand shaking that occurred during the phlebotomy clinical program, which was required for graduation; handshaking only affected one particular job; court found that he was not protected as disabled).

There is additional protection from discrimination in employment settings for those who are associated with an individual who meets the definition of disability.<sup>49</sup> Transitory impairments are not considered to be disabilities, and this issue is likely to become a source of debate going forward for conditions related to COVID.<sup>50</sup>

Early litigation in higher education settings did not focus on the issue of whether someone met the definition of having a protected disability, with some exceptions for learning disabilities.<sup>51</sup> After the Supreme Court narrowed the definition of coverage in 1999 and 2001, Congress amended the ADA (and indirectly the Rehabilitation Act because it is intended to be interpreted consistently with the ADA) in 2008, to more clearly apply to a wide range of learning disabilities, mental impairments, and some health conditions (such as being HIV positive).<sup>52</sup> One of the issues frequently raised is whether test anxiety is a major life activity. There are a few post-2008 amendments that give some sense of how courts are interpreting this, conditions related to neurodiversity, and similar issues.<sup>53</sup>

One of the few issues that has been quite clearly interpreted by the courts is that an institution must “know” of the impairment to be found to have discriminated against an individual.<sup>54</sup> There is also substantial precedent that an entity is not required to give an individual a second chance if the disability is identified and made known after that individual’s failure to meet the requirements of the program.<sup>55</sup> In situations where the individual might not know of the disability (it was not diagnosed for a range of reasons), the institutions might decide that it *can* give a second chance, and many institutions have done exactly that. Whether a

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49 See, e.g., *Ballard v. Jackson State Univ.*, 62 F. Supp. 3d 549 (S.D. Miss. 2014) (no claim for associational discrimination by university compliance officer who claimed his advocacy on behalf of students with disabilities was reason for his termination; not deciding whether Fifth Circuit even recognizes associational discrimination claims, but determining that this was not basis for adverse employment action).

50 42 U.S.C.A. § 12102(4)(D), Pub. L. 101-336, 104 Stat. 327. A transitory impairment is an impairment with an actual or expected duration of six months or less.

51 See, e.g., *DISABILITIES AND THE LAW*, *supra* note 3, § 3:22 n.7.

52 *Id.* § 3:2.

53 See, e.g., *Doe v. Samuel Merritt Univ.*, 921 F. Supp. 2d 958 (N.D. Cal. 2013). In that case, a student with *anxiety disorders* claimed the right for additional opportunities to take medical licensing exam. The case was allowed to go forward on issues of whether *test-taking is a major life activity* and whether limit on taking exams was entitled to deference. See also *Singh v. George Washington Univ. Sch. of Med. and Health Scis.*, 597 F. Supp. 2d 89, *judgment aff’d*, 667 F.3d 1 (D.C. Cir. 2011) (holding that a medical student did not establish that her difficulty in taking timed tests was a disability under the ADA).

54 *DISABILITIES AND THE LAW*, *supra* note 3, § 3:22 n.15.

55 See, e.g., *Maples v. Univ. of Tex. Med. I Branch at Galveston*, 901 F. Supp. 2d 874 (S.D. Tex. 2012), *aff’d*, 524 Fed. App’x 93 (5th Cir. 2013) “second chance;” not a reasonable accommodation; would fundamentally alter the program after medical school student with ADHD and depression was dismissed academically; court discussed causation factors—ADA prohibits exclusion “by reason of disability”; *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 17 A.D. Cas. (BNA) 465, 201 Ed. Law Rep. 889. (D.D.C. 2005) (no misapplication of the second chance doctrine where student requested accommodation after she was dismissed); *DePaul Univ.*, 4 Nat’l Disability L. Rep. ¶ 157 (May 18, 1993); *Ferrell v. Howard Univ.*, 1999 WL 1290834 (D.D.C. 1999) (university not required to reconsider dismissal after student was diagnosed with ADHD after failing a licensing exam).

second chance *should* be given, however, will depend on an individualized assessment of whether that is fair and/or opens the door or floodgates to others.

Less clearly established is the status of the application of disparate impact to some types of discrimination that are likely to arise in the IHE setting.<sup>56</sup> The most obvious example is to have a built environment that only has stairs to enter a building. Such a design is not “intended” to exclude wheelchair users, but its impact/effect is to do so. With respect to the physical built environment, federal agencies early on established detailed regulations and design standards involving physical space design to clarify what is required of entities regarding architectural design. There is, however, the potential that the Supreme Court (or even some lower courts) could determine that other types of policies and conduct do not violate 504/ADA because these statutes do not reach conduct that has a disparate impact. While that may seem unlikely, a recent case involving a college’s policy and practice regarding teaching materials that were not accessible to individuals with visual impairments raises that issue. That case was resolved at the federal circuit court level, but there is some concern should the Supreme Court decide to address that issue. A holding that disparate impact does not apply to disability rights cases would fly in the face of the fact that much disability discrimination is not the result of discriminatory intent but results from unintentional creation of barriers that prevent equitable access.<sup>57</sup>

## 2. *Otherwise Qualified*

One is only entitled to protection from discrimination if the individual is otherwise qualified to carry out the essential requirements of the program with or without reasonable accommodations.<sup>58</sup> This requirement contemplates an analysis of what is an essential function. Cases are consistent that meeting the academic requirements of a program is an essential function.<sup>59</sup> Perhaps the most difficult issue within this requirement is the issue of “direct threat.” An individual is not

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56 The key case that established that not all actions that have disparate impact are violations of section 504, but that neither is intent required to demonstrate a violation. *See Alexander v. Choate*, 469 U.S. 287 (1985). *See also* DISABILITIES AND THE LAW, *supra* note 3, § 10:2.

57 *See Payan v. L.A. Cmty. Coll. Dist.*, 114 F.4th 729 (9th Cir. 2021). (private right to bring disparate impact claim under Title II of ADA and Rehabilitation Act; recognizing disparate impact in case involving website access and teaching materials accessible to student with visual disabilities; applies equally to both statutes in spite of Supreme Court holding in *Alexander v. Sandoval*, 553 U.S. 275 (2001)).

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

59 *See, e.g., Villanueva v. Columbia Univ.*, 916 F.2d 709 (2d Cir. 1990) (student twice failed qualifying exams); *Buck v. Thomas M. Cooley L. Sch.*, 597 F.3d 812 (6th Cir. 2010) (affirming dismissal of ADA claim by law student dismissed for poor academic performance; student with generalized anxiety disorder had received additional time on exams but was denied reduced course load; after academic performance did not improve, she was dismissed); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432 (6th Cir. 1998) (graduate student with ADHD did not meet academic requirements); *Anderson v. Univ. of Wis.*, 841 F.2d 737 (7th Cir. 1988) (expelled law student with alcoholism did not meet academic standards to continue); *Schuler v. Univ. of Minn.*, 788 F.2d 510 (8th Cir. 1986) (graduate student dismissed because she failed oral exams); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999) (learning disabled medical student did not meet academic standards); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998) (student dismissed because of marginal grades).

protected if the individual presents a direct threat to others.<sup>60</sup> What is less clear is whether a direct threat to “self” is also disqualifying in contexts other than employment. Because that issue is one that continues to be subject to judicial interpretation, it is expanded on in Part V.

The burden of documentation to demonstrate a disability is another issue expanded on in Part V. That is because of the difficulty of balancing the high cost of documentation in some settings and the concerns about fairness and resource issues.

As noted previously, the early litigation on meeting the definition in higher education focused on the issue of learning (and related) disabilities<sup>61</sup> and later HIV status and some health conditions<sup>62</sup> and mental health situations.<sup>63</sup> While these are impairments that occasionally still raise the issue of whether they are protected disabilities, the most significant issue in the next decade is likely to be a myriad of COVID-related issues and mental health concerns (some of which are related to COVID). With respect to COVID, the following are likely to be definitional disputes: is long COVID a protected disability; is being immunocompromised a condition that might require some level of protection in the workplace from COVID exposure; and are individuals who are associated with vulnerable individuals entitled to protection? The stress related to COVID and other current stressors also raise a new level of concern about mental health status as a disability. These are addressed in greater detail in Part V.

### ***B. Reasonable Accommodations—Academic Modifications and Auxiliary Aids and Services***<sup>64</sup>

Federal disability discrimination statutes are somewhat different from most other discrimination laws<sup>65</sup> because they mandate not only nondiscrimination, but also reasonable accommodation. Such accommodations are expected not to be unduly burdensome, taking into account both financial and administrative burden. Consideration of reasonable accommodations is intertwined with the determination of whether an individual is “otherwise qualified.” It expects individualized assessment and an interactive process for review.

The framework for determining if something is reasonable is generally found within the judicial discussion in a case that is not a Supreme Court decision, but which has taken on the stature of such a decision, because it has been followed by so many courts. The standard came from the *Wynne v. Tufts University*<sup>66</sup> case involving the initial refusal of a medical school to allow a student to take tests in a format other

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60 See *DISABILITIES AND THE LAW*, *supra* note 3, § 3:24.

61 See *id.* § 3:22.

62 See *id.* § 3:25.

63 See *id.* § 3:24.

64 See *id.* §§ 3:8–3:15.

65 There are aspects of discrimination statutes based on religion and pregnancy that incorporate some accommodation expectations.

66 932 F.2d 19 (1st Cir. 1991). For expanded discussion of this case, see *DISABILITIES AND THE LAW*, *supra* note 3, § 3:9.

than multiple choice. The First Circuit required the medical school to engage in a process that ensured careful consideration of a request. The standard that is currently applied by most courts places the burden of proof regarding reasonable accommodations on the institution and requires that

*relevant officials* within the institution considered *alternative means, their feasibility, cost, and effect* on the program, and came to a *rationaly justifiable conclusion* that the alternatives would either *lower academic standards or require substantial program alteration*.<sup>67</sup>

After the Tufts University Medical School reconsidered the decision applying this standard, the First Circuit on reconsideration upheld the denial of giving the multiple-choice test in a different format.

Too often administrators responding to requests for accommodations by conflating several issues and reaching a conclusion without going through the appropriate steps. These steps include addressing the issue of documentation of the disability. Sometimes the issues of whether the individual has a disability (documented or not) is conflated with whether an accommodation should be provided. How much consideration is required depends on the situation. A colleague who has been a leader in Association of Higher Education and Disabilities described at a conference that he uses the following broad “standard”—the greater the accommodation request, the more documentation that might be required.<sup>68</sup> In my conference presentations on this topic, I use this extreme example: “if you request the accommodation of being allowed to park in the university president’s parking space, I’m going to want a lot of documentation.” I also add that I believe that unlimited time for exams or assignments is never going to be required as a reasonable accommodation. Although this has not been tested in court, my reasoning is that an institution cannot plan for unlimited time, and in life, no one is given unlimited time to complete required work.

The two categories of accommodations are auxiliary aids and services and modification of policies. Each of these categories requires proactive attention.

### 1. *Auxiliary Aids and Services*

Initially section 504 regulations provided definitions for what auxiliary aids and services were expected. These regulatory provisions were substantially incorporated into the ADA language itself in the 2008 Amendments, which also added additional specifics about auxiliary aids and services.

The costliest individually provided auxiliary aid is probably interpreter services and transcription service for individuals with hearing impairments. Early judicial decisions provided some guidance on what is required, but as higher education budgets shrink and state vocational educational agencies have begun providing less service, this is becoming of greater concern. Technology that allows for real time auditory transcription (and other artificial intelligence (AI) developments)

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67 *Wynne*, 932 F. 2d at 26 (emphasis added).

68 34 C.F.R. pt.104 (2017). See *DISABILITIES AND THE LAW*, *supra* note 3, § 3:10 for detailed citations.

may reduce that cost, but this is an issue that has the potential for universities to consider an undue cost burden to be raised. While the expectation that such services are provided for classroom work and major events such as graduation, whether such services must be provided in a range of social and extracurricular settings (including for faculty and committee meetings and for individual meetings with students) is unaddressed by the courts.

Technology changes have made access to written materials much easier to provide. In 1973, a hard copy textbook might have to be turned over for recording on tape or even transfer to Braille. This meant that a university needed substantial notice to have these materials available at the beginning of a semester. Later, the evolution of Kurzweil machines and the ability of computers to “read” content has reduced the time lag for making those materials available. In recent years, most books can be “read” using technology programs. There is not much judicial guidance on this issue, but as technology evolves, it will be an issue for planning attention.

The provision of tutors is not generally required as a reasonable accommodation, although if an IHE provides tutoring programs, those programs must be accessible. There is very little judicial attention to this issue.<sup>69</sup>

It is clear that institutions are not required to provide auxiliary aids and services of a personal nature.<sup>70</sup> This has not been an issue subject to much dispute.

## 2. *Modifications of Policies, Practices, and Procedures*

The regulations for section 504 (and now applicable to the ADA) also require reasonable modification of policies, practices, and procedures to allow access for protected individuals. In the early years of higher education response to disability rights requirements, the primary issue receiving judicial attention involved additional time for exam taking, primarily for individuals with learning disabilities.<sup>71</sup> This same issue was often raised in the setting of professional licensing exams.<sup>72</sup> Later cases<sup>73</sup> also addressed issues such as reduced courseloads and waiver of required courses such as foreign languages or mathematics. Policies receiving more recent attention include those relating to test taking in alternate formats, mandating food plans on campus, and permission to have animals on campus in various settings. Courts have been consistent in not requiring IHEs to give a second chance by waiving performance or conduct requirements where students had not given notice of the disability before the deficiency occurred.

Most IHEs now have in place a process for evaluating the documentation of individuals with disabilities to justify the modification and to determine the appropriate

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69 One of the few cases to specifically address this issue is *Sellers v. University of Rio Grande*, 838 F. Supp. 2d 677 (S.D. Ohio 2012) (holding that although ordinarily tutors are not required, where services are provided to general population, they must be provided).

70 34 C.F.R. § 104.44(d)(2) (2017). An example would be personal assistance in dressing, eating, handling of materials in a classroom setting, or even providing assistance with a service animal.

71 *DISABILITIES AND THE LAW*, *supra* note 3, § 3:22.

72 *Id.* § 5:7.

73 For citations to cases on these modifications, see *id.* § 3:9.

accommodation such as the amount of additional time. Granting additional time to take an exam and administering exams in a distraction-free space have begun to raise cost issues, particularly as more students (often with mental health conditions or neurodiverse issues) are requesting these accommodations. Granting such requests can require additional staff for proctoring and an added cost to the disability service office budget. Location of physical space can also be problematic during end of the semester exams. These additional pressures may be a factor explaining why IHE documentation requirements are sometimes becoming more rigorous. Modifications regarding animals on campus raise the issue of the impact on others in a setting who might have allergies or animal phobias.<sup>74</sup>

Very little judicial attention has been given to date to the issue of cost, probably because IHEs do not want to have the university budget opened to scrutiny in litigation, so any disputes that might have resulted in litigation have been resolved before they reach a formal court decision.

The other modification issue of high impact as a result of COVID is the issue of attendance or presence for both students and employees (faculty and staff). Establishing that attendance or presence is an “essential requirement” is of critical importance, and the caselaw on this issue is in a state of evolution. It is an issue relevant to students (who want to have attendance requirements waived or to be provided classroom work remotely on a continuous basis), staff (many of whom have jobs that do not necessarily require physical presence), faculty (whose employment expectations often include contact with students in the classroom and during office hours), and administrators (whose work might include meeting with individuals for fundraising and other purposes). The issues that must be addressed for proactive planning for this modification consideration include whether the individual is “disabled” under the statute and whether the accommodations being requested is reasonable. Because of the probability that this will have great impact on campus planning for the foreseeable future, it is treated in greater depth later in this article as a “hot topic.”<sup>75</sup>

### 3. *Campus Design and Other Physical and Virtual Barrier Issues*<sup>76</sup>

Navigating physical space requires attention to accessible design, barrier removal,

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74 *See infra* Part V. In recent years, the modification of policies as an accommodation requirement has received the greatest attention in the context of animals on campus and attendance. The animals on campus issue benefited greatly from the DOJ 2010 regulations providing clarity about what animals would be allowed and in what settings. Because campus life can include such a wide range of activities, it is essential for planners to understand that the Title II and Title III regulations about service animals in settings such as classrooms, libraries, laboratories, social settings, and other public spaces are not directly applicable to settings of employment and housing. These settings allow animals other than dogs (and miniature horses) but also allow the program to require more documentation of the justification for the presence of not just service animals but also emotional support animals. During 2020 and early 2021, when most campuses went to remote education, the issue of animals on campus was not significant. During the “stay at home” months, many individuals adopted pets for companionship, and the slippery slope of their wanting to bring them to campus has required renewed attention to policy modifications of what most campuses mandate—no animals on campus.

75 *See infra* Part V.

76 DISABILITIES AND THE LAW, *supra* note 3, §§ 3:17–3:20.

and signage. There is not a great deal of judicial attention to these issues. This is probably because, unlike some other disability discrimination issues, there are specific design standards that provide guidance for college campuses. These have been in place for several years, unlike some other disability access regulations that are more recent.<sup>77</sup> The regulations promulgated under section 504 required programs to engage in a self-evaluation and to implement a plan for barrier removal. A similar requirement was put in place for programs subject to Title II of the ADA. What is particularly challenging for higher education planners is the complex spectrum of programs and activities on a college campus and the array of types of individuals seeking to access those programs and the spectrum of disabilities for individuals in each setting. Many campus facilities have been renovated since 1973, and while new construction is generally likely to include accessibility design, it is less certain that renovations do so. An example of litigation that highlights the importance of anticipating access issues in renovation is the dispute about how the Chicago Cubs stadium was renovated and moved accessible seating to a much less desirable location. The \$500 million renovation highlights the importance of this and ensuring that unique facilities (such as stadiums) have included addressing location of seating and sightlines. These renovations resulted in a lawsuit by the DOJ.<sup>78</sup>

While most planners tend to think about the student using a wheelchair, consideration of not just access issues for students, but also faculty, staff, and visitors to campus is critical. Physical design issues (including signage and messaging) affect individuals with sensory impairments. A range of other conditions can become relevant to physical space access, for example, those needing a distraction-free environment for certain activities, or, at the other extreme, those who need to have a view should be considered in some settings. Allergies and sensitivities to chemicals in the environment or those who are immunocompromised might need assurance of ventilation. It is not possible to anticipate everything, but good faith efforts and inclusion of individuals with disabilities in planning can avoid conflict and retrofitting in many situations.

A typical college student who lives on campus will encounter physical access in housing; classroom settings including labs; libraries; food service; social activities; spectator sports; internship placements; and parking and transportation facilities. Colleges also have numerous employees, including faculty members whose job requirements are unique in many ways requiring them to have a faculty office, to teach in classrooms or labs, to supervise students in clinical settings, to do research in laboratories and other spaces, and to attend meetings. Visitors to campus include alums, attendees at sports and entertainment events, visitors to campus museums, patients and clients accessing clinical service programs facilitated by the university,

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77 A major set of regulations in 2010 from the DOJ provided guidance on a range of issues that affected campuses, most importantly animal accommodations, but also for accessible physical design. For regulations under the ADA regarding accessible design, including housing on campuses (for Title II covered entities), see generally <https://www.ada.gov/law-and-regs/design-standards/2010-stds/>.

78 See <https://www.justice.gov/usao-ndil/pr/us-attorney-s-office-files-suit-against-chicago-cubs-alleging-wrigley-field-renovations>. See also [https://www.bisnow.com/chicago/news/commercial-real-estate/chicago-cubs-fend-off-charges-of-ada-violations-as-trial-opens-118494?utm\\_source=outbound\\_pub\\_20&utm\\_campaign=outbound\\_issue\\_66561&utm\\_content=outbound\\_link\\_13&utm\\_medium=email](https://www.bisnow.com/chicago/news/commercial-real-estate/chicago-cubs-fend-off-charges-of-ada-violations-as-trial-opens-118494?utm_source=outbound_pub_20&utm_campaign=outbound_issue_66561&utm_content=outbound_link_13&utm_medium=email).

applicants for admission, employers interviewing students on campus, health care patients in university hospitals and those visiting these patients. And in each of these situations, the disability could include a mobility impairment or a sensory impairment affecting hearing or vision.

In addition to the buildings themselves, transportation programs operated by or facilitated by an IHE are a key aspect to ensuring access. Physical campus features between buildings, including signage, can also present barriers.

In a campus setting, it is not going to be enough to make sure the door widths meet design standards, that there are accessible restroom stalls, and that the slopes on the ramps into buildings are not too steep. It is essential to consider how various individuals use and access physical space throughout the day. Sometimes safety and privacy concerns must be balanced with accessibility issues. While the required self-evaluations and new construction requirements have gone a long way to ensure such access, they are not a guarantee. As uses of various spaces are changed, it is important to consider how new users of that space might be affected by design barriers.

All of these considerations incorporate the backdrop of an expectation of integration. This means avoiding separate spaces, entrances, and other features that can be stigmatizing and not inclusive as much as possible.

Related to physical space access is virtual space access, which includes websites that provide the invitation to apply for admission, to attend events, and notice of where to park and how to participate. Technology-related access was not an issue in 1973, when section 504 was passed, but it now has increasing importance and requires greater attention.

Finally, activities abroad can present unanticipated issues.<sup>79</sup> Institutions that host or facilitate study abroad programs must anticipate whether the space where students are housed, attend classes, and participate in enrichment tours and other activities will be accommodated in the physical environment in a foreign country. Even alumni offices that facilitate university “sponsored” cruises or other tours abroad must consider whether and how to ensure accommodations, often in countries where barrier removal is not a government policy or practice.

Although there are a number of judicial decisions over the years that have addressed these issues in a wide variety of settings,<sup>80</sup> it is important to bear in mind that some of these disputes are addressed through complaints to the ED OCR.<sup>81</sup> In addition, many disputes are settled, and often the terms of such settlements

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79 See, e.g., *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015 (9th Cir. 2002) (student with mobility impairment sought accommodations in an overseas program; unsuccessful in ADA Title III case; numerous accommodations had been provided including hiring two helpers, paying for student to fly when others took alternate transportation; providing alternative lodgings as needed).

80 DISABILITIES AND THE LAW, *supra* note 3, §§ 3:17–3:20.

81 The OCR opinions in these cases do not generally provide an individual remedy for the complainant but are instead intended to take action against an entity receiving federal funding regarding its access issues. These opinion letters and resolutions are not always easily accessed and publicized documents in the way that judicial decisions are.

are not made public.<sup>82</sup> While the vast majority of judicial decisions addressing disability issues in higher education respond to issues other than physical design access, the high cost of such disputes should signal the importance of paying close attention.<sup>83</sup> Once a complainant seeks resolution to a particular barrier on campus, it is not unusual for that person to seek redress for all barriers faced on campus, which can result in a court issuing a timetable for remedying the situation, rather than allowing the university to set its own schedule.

### C. *Technology*

The existence of e-mail and websites and other major technology issues was not on anyone's radar screen in 1973. The technology simply did not exist or was in its infancy.<sup>84</sup> In 1979, the *Southeastern Community College v. Davis*<sup>85</sup> decision, however, recognized that evolving technology should be considered in determining whether someone was "otherwise qualified."<sup>86</sup> That issue, however, has received little judicial attention. The evolution of technology has had an impact on a range of issues, including teaching materials and communications within and outside a campus, and might affect course materials and communications to those outside the university and within the university. Technology issues were not a major focus on judicial attention in early years.

When 2020 COVID campus shutdowns resulted in most college campuses providing course content virtually, it became more critical to be proactive and responsive to technology issues. While not the earliest judicially addressed issues under section 504 on campus, recent judicial attention has been paid to access to technology relating to websites, teaching materials and educational platforms, signage in public spaces, and communications on jumbotrons and similar platforms on campus. Because this is a "hot topic," it is addressed in more detail later.<sup>87</sup>

### D. *Faculty and Staff Employment Issues*

Most disability discrimination issues within higher education focus on student issues. There has been some judicial attention paid to issues of visitors on campus and alumni events,<sup>88</sup> but it is important that those responsible for policy making give

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82 There are a few exceptions involving highly publicized issues such as animal accommodations, food issues, and adverse treatment of students with mental health concerns.

83 For example, in a case involving an accessible restroom at a student center at a public state university, the litigation extended over several years, and the court admonished the counsel representing the university about this protracted litigation in awarding a high amount of attorney fees. See *Covington v. McNeese State Univ.*, 118 So. 3d 343 (La. 2013) (reversing some of the attorney fee awards and holding that district court decisions on the amounts was not an abuse of discretion); *Covington v. McNeese State Univ.*, 98 So. 3d 414 (La. Ct. App. 3d Cir. 2012), *writ granted*, 104 So. 3d 427 (La. 2012), *rev'd*, 118 So. 3d 343 (La. 2013), *writ denied*, 130 So. 3d 338 (La. 2014) (awarding approximately \$1.8 million in attorneys' fees in case involving student using wheelchair who brought action for lack of accessible restrooms in student union and lack of transition plan; case took ten years to resolve).

84 Email was invented in 1971 and websites became a "thing" in 1991.

85 442 U.S. 397 (1979).

86 *Id.* at 412–13.

87 See *infra* Part V.

88 See, e.g., *DISABILITIES AND THE LAW*, *supra* note 3, § 3:20. *Alumni Cruises, LLC v. Carnival Corp.*,

attention to employment issues, especially those unique to higher education (faculty and coaches).<sup>89</sup> It is beyond the scope of this article to provide an in-depth analysis or synthesis on how the courts and policy makers have addressed these issues.

Two major factors should be considered, however, in anticipating likely concerns going forward. One is related to COVID. The other involves aging professors who are not subject to mandatory retirement. For both issues, whether the individual is “disabled” will be a possible area of dispute. The faculty member who is immunocompromised or is associated with someone who has health concerns or who has long COVID may seek protection under section 504/ADA.<sup>90</sup> The faculty member whose performance is affected by the normal issues of aging may also seek accommodations. For individuals in both groups, the issue of whether they are “otherwise qualified” will often be a factor for evaluation. Issues of attendance and presence will continue to be raised. The faculty member with “brain fog” from COVID might seek adjustments to teaching loads, performance evaluations, and other issues. An in-depth discussion of these issues is beyond the scope of this article, but policy makers and counsel who represent institutions should be alert to these issues.

#### *E. Other Issues*

As noted previously, little attention was paid by the courts, regulatory agencies, or the institutions themselves to disability discrimination issues on campus for the five to ten years after section 504 was passed. Early attention after that time was primarily focused on student life issues, sometimes including physical plant issues that affected others. The early issues (some of which still arise as topics of concern) included admissions and standardized testing,<sup>91</sup> athletics programs on campus (student athletes with disabilities),<sup>92</sup> Greek life on campus,<sup>93</sup> food allergy issues on campus,<sup>94</sup> transportation services on campus,<sup>95</sup> and study abroad programs.<sup>96</sup> While cases involving these areas still arise from time to time, they are not frequently the topic of dispute. Nevertheless, university counsel would benefit from proactive consideration of possible areas for policy attention. The next part highlights the areas where a spotlight is more likely to shine or where the spotlight that shines is likely

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987 F. Supp. 2d 1290 (S.D. Fla. 2013) (allowing issues to be tried on whether cruise line had made reasonable modifications).

89 See, e.g., *DISABILITIES AND THE LAW*, *supra* note 3, § 3:26. For more cases on employment generally, see, e.g., *id.* ch. 4.

90 See *infra* Part V.

91 *DISABILITIES AND THE LAW*, *supra* note 6, § 3:6; see also *id.* § 5:7.

92 *Id.* § 3:11.

93 Although fraternities and sororities might generally seem to be exempt from Title III of the ADA as private clubs, and also not recipients of federal financial assistance, on some campuses the housing is owned or operated by the university, or the student organization membership is regulated by the institution, which is covered by section 504 and/or Title II and/or Title III of the ADA. *Id.* § 3:15.

94 *DISABILITIES AND THE LAW*, *supra* note 6 § 3:8.

95 *Id.* § 3:19.

96 *Id.* § 3:20.

to be brighter or more intense (from media attention of resource litigation costs).

## V. HOT TOPICS AND CRYSTAL BALL TOPICS IN HIGHER EDUCATION TODAY

This part focuses on “hot topics.” They are not necessarily topics currently receiving attention in the courts or by regulators. In some ways they are “crystal ball” topics meriting proactive thinking by university leaders and the legal counsel who represent these IHEs.

These topics are selected for greater attention in this overview for the following reasons.

- **They are costly.**  
These include physical structures that are much more costly to retrofit than to make accessible when first built. Technology has vast cost issues, including the cost of staff to remain current on accessible technology. Auxiliary aids and services and some accommodations, such as interpreters, can be costly. Increasingly, requests for separate distraction-free testing and even single residence hall housing can be costly in terms of physical space and staffing. Failure to respond or be proactive can result in costly litigation.
- **They are receiving current enforcement or litigation attention.**  
Areas of recent significant litigation or regulatory enforcement include discipline of individuals with mental health conditions, technology-related issues, and even some animal accommodation issues.
- **They are extremely challenging.**  
Probably the most challenging issue for higher education involves individuals on campus with a range of mental health conditions—from depression to dangerous (to self and / or others) behavior resulting from mental illness. Individuals who are neurodiverse are often not well understood, and handling situations involving such individuals requires knowledge and sensitivity.
- **They are evolving and changing.**  
Changes in technology continue to evolve, but the most challenging issues are those related to COVID aftermath (and potentially new epidemics). What is known about how COVID is transmitted and how to prevent others from being affected is in a constant state of flux, and there is frequently new information. In some situations, it requires a university to respond quickly.
- **They are confusing.**  
Legal expectations about what it means to be otherwise qualified in various settings can be confusing. So, too, are issues about appropriate reasonable accommodations for learning disabilities and neurodiverse conditions. What is permissible to require for documentation of a disability can also be confusing.

COVID issues are not only changing, they are confusing.

- **They raise concerns about safety and qualifications of professionals receiving degrees and where the educational program is connected to professional licensing.**

Higher education professional programs are the pathway into a number of professions such as law and health care professions. These concerns raise questions about whether it is permissible in the admissions process or later to consider certain attributes that may affect admission to be licensed to practice in the profession.

- **They have become the topic of focus for advocates.**

The issue of neurodiversity has received increasing attention because of the increase in the population of neurodiverse students enrolled in higher education. There have been recent national movements by students and others for IHEs to be more welcoming and sensitive to issues or neurodiversity. Claims of “ableism” come from this population as well as from others with disabilities.

- **They would benefit from greater proactive attention.**

While little litigation has involved issues of community colleges and transition services and dual credit programs, these issues would benefit from a more proactive approach by those responsible for policies, practices, and procedures on campus.

Proactive planning to respond to the “greying” of the faculty, especially in light of COVID and related issues, is recommended.

#### *A. Mental Health Issues on Campus*

A primary focus of this section is the relevance of section 504 and the ADA to mental health in higher education. COVID-related issues exacerbated mental health concerns, and the need for more mental health services and awareness in college settings. Student suicides and other self-harming behavior and campus violence against others on campus bring additional attention to this issue. While this section focuses primarily on students and mental health,<sup>97</sup> employees (faculty and staff) should also be considered.

The following are some examples of student behavior that might raise concerns.<sup>98</sup>

- A faculty member notices a student in class whose behavior has recently become distressed.

<sup>97</sup> *Id.* § 3:24. See also *id.* § 3:23.

<sup>98</sup> These are taken from attendee suggestions at a Webinar Presentation for the Campus Suicide Prevention Program on September 22, 2022. Students Who Are Depressed, Distressed or Disruptive: A Proactive Approach Within Disability Discrimination Law, Webinar for the Campus Suicide Prevention Center of Virginia, <https://www.campussuicidepreventionva.org/> (last visited 6/14/23).

See also How Disability Law Impacts Voluntary and Involuntary Student Leaves Related to Harm-to-Self and Harm-to-Others (June 11, 2021), <https://www.jdsupra.com/legalnews/how-disability-law-impacts-voluntary-9325706/> (last visited June 14, 2023), prepared by Strategic Risk Management Solutions provided as tip to the National Association for Behavioral Intervention and Threat Assessment (NATIBA). The “tip sheet” recognizes the lack of a cohesive due process roadmap by courts and government agencies.

- A student tells her residence hall advisor that she has become extremely depressed and just does not think she can “go on.”
- A student tells his residence hall advisor that his roommate watches violent videos until late hours, and it is disturbing to his ability to concentrate.
- A student is reported as stalking a classmate by following her around campus (it is suspected that the “stalking student” is on the autism spectrum).
- A student expresses serious self-harming conduct or threats.

One can imagine similar scenarios involving faculty and staff where coworkers notice unusual behavior.

Mental health concerns manifest themselves in different ways, and it is important to understand the differences in considering policies related to them. At one extreme are those who are violent (such as the student at Virginia Tech).<sup>99</sup> Others have depression or anxiety that may result in self-harming in a variety of ways, including simply not engaging in academic work by not turning in assignments, not attending classes, or other behaviors. There are those with mental illness, such as bipolar disorder, that may not have been diagnosed or that may result in problematic behavior because of medication or other issues. There are those with mental health issues or neurodiversity conditions (addressed further below), who are disruptive (not dangerous) in a variety of ways.

High-profile incidents of shootings and violence on campus raised questions about how to deal with students with mental health challenges. Suicides on campus also receive media attention. While a long-standing area of concern, the isolation and other stressors resulting from the COVID pandemic on campus make this an even more important priority. Students and others with mental health concerns exhibit a range of behaviors that might raise concerns (e.g., depressed, disruptive, different, dangerous), but some university policies do not differentiate treatment of these concerns.

This topic could and has received more detailed discussion.<sup>100</sup> For purposes of this overview article, however, policy makers should consider whether there are current policies and training in place, and that policies and resources are communicated appropriately for a number of legal issues. This assessment should consider, how and to whom the behavior or status of concern presents itself. It is important to recognize that not all students with mental health concerns will be “registered” for services within the disability services office or known to a faculty or staff member (or even another student or roommate or housing counselor). That

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99 Virginia Tech was the first major recent event on campus, but there have been others that highlight the importance of this issue. Of particular concern are events where a student was the perpetrator. PBS Newshour, *What Data Analysis Shows About Campus Shootings*, February 14, 2023. <https://www.pbs.org/newshour/nation/what-data-analysis-shows-about-campus-shootings>.

100 It is critical to note that not all individuals with mental health problems are violent and to be careful about taking actions based on such assumptions. Gary Pavela’s work on this issue continues to provide important insights. GARY PAVELA, *DISMISSAL OF STUDENTS WITH MENTAL DISORDERS: LEGAL ISSUES, POLICY CONSIDERATIONS AND, ALTERNATIVE RESPONSES* (1985).

may be because the condition does not (at least initially) require accommodations. It may also be because the condition manifests itself after initial enrollment or is one that has not been diagnosed before a student entered college.<sup>101</sup>

1. *Is the Individual “Disabled”?*

First, is the issue of whether the individual is “disabled” within the definition of section 504/ADA. While the courts have been consistent in finding that exam anxiety and similar conditions are not themselves protected disabilities,<sup>102</sup> they may be symptoms of a substantial limitation. And even if a condition does not rise to the level of a disability, an institution should consider whether a response “can” and “should” be made, even if it is not required under disability discrimination law. For example, it is likely that a faculty member would allow a student a leave of absence or an extension of turning in an assignment if the student had a death in the family. Whether someone has a disability can also become questionable when behavior of concern arises with a student who is not already registered with appropriate documentation to receive services as accommodations such as additional time on exams. Understandingly, however, the increase in the number of students requesting separate distraction-free exam rooms, can raise the issue of whether the student is “entitled” to the service, which can result in greater scrutiny of documentation.

2. *Is the Individual “Otherwise Qualified”?*

Many of the judicial decisions involving individuals with mental health conditions result in a finding that whether the person’s condition rose to the level of a statutory disability, the individual was not “otherwise qualified.”<sup>103</sup> This might be because the student or faculty member failed to perform adequately or that the conduct violated campus codes of conduct, and removal from the campus setting was merited and was not “because of” discrimination.

The discussions of this issue are quite fact dependent, and many of the cases address issues of whether there is a “direct threat.” Whether the individual is a direct threat to self has been the subject of much unresolved debate. While the Supreme Court has recognized that direct threat to self is relevant to determining whether an individual is otherwise qualified,<sup>104</sup> it remains unsettled whether threat to self (such as self-harming or suicidal behavior) can be the basis for a university taking action such as removing a student from campus.<sup>105</sup> When the ED released a

101 For example, bipolar disorder is a condition that often manifests itself during college age years. Ross J. Baldesserini et al., *Age at Onset Versus Family History and Clinical Outcomes in 1,665 International Bipolar-I Disorder Patients*, 11 *WORLD PSYCH.* 40 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3266753/>; see also <https://www.mayoclinic.org/diseases-conditions/bipolar-disorder/symptoms-causes/syc-20355955>.

102 G.E. Zuriff, *Accommodations for Test Anxiety Under the ADA?* 25 *J. AM. ACAD. PSYCH. AND THE L.* 197 (1997), <https://pubmed.ncbi.nlm.nih.gov/9213292/>.

103 *DISABILITIES AND THE LAW*, *supra* note 3, § 3:24 n.5.

104 The Campus Suicide Prevention Center of Virginia website is [www.campusuicideprevention.org](http://www.campusuicideprevention.org), and the legal page is found at <http://www.campusuicidepreventionva.org/legal-csp.php>.

105 Dear Colleague Letters issued in 2011 and 2021 (<https://www2.ed.gov/about/offices/list/>

“Dear Colleague” letter of guidance to universities in 2011, it was met with much consternation on campuses. More recent (2022) issuance of an ED position on the issue does not resolve how courts will respond to such cases. An example of the dilemma for campus administrators is a student who exhibits self-harming behavior who will be remaining in university housing during holidays. This leaves an institution to identify specific conduct that is disruptive to others in violation of campus rules in some way, because acting based on concern for the particular student might be viewed as a violation of 504/ADA.

While the university can act based on a direct threat to others (perhaps even disruption to other students and administrators), administrators are challenged about how to handle such situations without running afoul of disability discrimination law. Withdrawing and removing individuals based on mental health concerns requires entities to engage in a thoughtful and careful process in order to balance concerns for the individual, concerns for others in the community, and compliance with legal mandates (particularly when they are not entirely clear). It is strongly suggested that universities be proactive, not reactive, in developing policies, practices, and procedures that respond to a range of situations involving mental health concerns. Given the flux in the mental health status of any individual, such planning will need to include appropriate training for staff and faculty members to be alert to conduct of concern and a means of raising those concerns to administrators or others who can respond appropriately.

A part of the challenge regarding mental health concerns for students is that for some professional education programs (law and medicine), the institution may be asked by the professional licensing agency for admission to practice law or medicine, to report whether a student has been diagnosed or been treated for a range of mental health conditions. Such requirements have been demonstrated to deter students from seeking treatment, and have been criticized extensively,<sup>106</sup> and the judicial response to this is varied.<sup>107</sup> I suggest that such entities (and the institutions themselves) should act based on behavior and conduct, not diagnosis and treatment.

Practices of threat assessment teams and red-flagging students based on statements made in their applications should be carefully considered before being implemented. Knowledge of suicide response practices in advance of such a situation on a campus as well as practices that seek to avoid suicide are important in planning.

It is important that student and employee conduct requirements be established and communicated, if the IHEs seek to rely on behavior and conduct, rather than status, as the basis for taking adverse action. It is also critical that such requirements are known to key administrators and communication lines within universities are established

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[ocr/correspondence/stakeholders/educator-202110-students-suicide-risk.pdf](https://ocr/correspondence/stakeholders/educator-202110-students-suicide-risk.pdf) ) provided confusing guidance. The ADA website currently provides general guidance, which has not been subject to much judicial review. *Supporting and Protecting the Rights of Students at Risk of Self Harm in the Era of Covid-19*, [https://archive.ada.gov/students\\_self-harm\\_fact\\_sheet.pdf](https://archive.ada.gov/students_self-harm_fact_sheet.pdf) (last visited May 11, 2023).

106 David Jaffe et al., “It’s OK Not to Be OK”: *The 2021 Survey of Law Student Well-Being*, 60 UNIV. LOUISVILLE L. REV. 438 (2022), [https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=3142&context=facsch\\_lawrev](https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=3142&context=facsch_lawrev).

107 See DISABILITIES AND THE LAW, *supra* note 3, § 5:8 n.1.

and maintained. As noted, previously, giving second chances is not generally required where there has been misconduct. That does not mean, however, that an IHE could not choose to grant readmission or another second chance in an appropriate situation. For example, a student may engage in disruptive (not dangerous or violent) behavior that justifies removal (or other adverse action such as removal from university housing), and then is diagnosed with a condition such as bipolar disorder, and then seeks readmission. Whether to grant the request is less a legal issue than a question of what can and should the university do in such a situation. This might include return to campus with very specific conditions attached and placed in the student record for future reference.

### *3. Privacy Concerns*

Like the other issues in this section, a detailed synthesis and analysis of the legal requirements relating to privacy and confidentiality of student (or employee) mental health conditions is not provided here. Policy makers should, however, consult with their counsel regarding how their campus interprets and implements FERPA (Family Educational Rights and Privacy Act) and HIPAA (Health Insurance Portability and Accountability Act) mandates.<sup>108</sup>

While certain records are private and confidential, there are often situations where a student can “waive” access to these records (such as in the professional licensing board reporting process). These should be thought through carefully to reach the appropriate balance of protecting the student and the public.

### *4. Mental Health Services—Challenges for the IHE*

In light of the increase in mental health stress on campus, particularly in response to COVID isolation and return to campus, the question of what obligation a campus has to provide mental health services is raised.<sup>109</sup> While it is unlikely that an IHE is obligated to provide mental health services, most have recognized the benefit in offering some level of service. The issues of cost and wait times and crisis level counseling are all part of the challenge. Will a university be found negligent in not providing counseling? It is unlikely that it will. The high-profile publicity surrounding a campus suicide prompts IHEs to seek to have mental health services made available on campus. Challenges of resources, however, remain. Even if there is an unlimited budget, finding enough counselors to provide such services may be a barrier. Issues of privacy should also be planned for in providing only in-person counseling by appointment.

## ***B. Neurodiversity as a Disability in Higher Education, and Impact on Faculty and Students***

Neurodiversity refers to a range of conditions including autism spectrum disorder, developmental language disorder, Tic disorders (including Tourette’s Syndrome),

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108 See DISABILITIES AND THE LAW, *supra* note 3, § 3:21.

109 See generally Zara Abrams, *Student Mental Health Is in Crisis: Campuses Are Rethinking Their Approach*, 53 AM. PSYCH. ASSN. 60 (Oct. 21, 2022), <https://www.apa.org/monitor/2022/10/mental-health-campus-care>.

intellectual disability, attention deficit/hyperactivity disorder (ADHD), attention deficit disorder (ADD), developmental coordination disorder, dyslexia, and dyscalculia.<sup>110</sup> Before 1975, many individuals with such conditions were often not provided public education for much of their school age years. The passage of the Individuals with Disabilities Education Act (IDEA)<sup>111</sup> and the implementation of inclusion over the years, resulted in a substantial increase in the presence of students with such disabilities in higher education.<sup>112</sup> Faculty members also present with neurodiversity.<sup>113</sup> It is difficult to quantify how many students on campus present with neurodiverse conditions, but it has been estimated that it is probably between fifteen and twenty percent.<sup>114</sup> It is even more difficult to obtain data on faculty and staff.<sup>115</sup>

The impact on a campus requires faculty members who serve students with disabilities and those providing students services, in addition to university attorneys and the leaders on campus to have a basic understanding of the range of disability discrimination issues that might arise from this increased presence.

Before this increased presence, disability service officers had long provided additional time for exams, but the increased presence of those with neurodiverse conditions is almost surely the reason that more disability service offices are faced with an increase in the number of requests for distraction-free exam-taking environments, usually requiring separate rooms. Related to that are the increased requests for single rooms in campus housing. Such an increase requires a careful

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110 Lynn Crowder et. AL., *Neurodiversity in Higher Education: A Narrative Synthesis*, 80 HIGHER EDUC. 757 (2020).

111 Students with specific learning disabilities are defined as those who have a disorder in one or more basic psychological processes in language or math, such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and development aphasia. The Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 et seq., Pub. L. 91-230, 122 Stat. 3553, title VI, § 601 specifies that a learning disability is a disability making the student eligible for special education. A *learning disability* is defined as follows:

The term “children with specific learning disabilities” means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

20 U.S.C.A. § 1401(30).

112 Emily V. Rasch, *The Lights Are Too Loud: Neurodivergence in the Student Affairs Profession*, 43 VT. CONNECTION (2022), <https://scholarworks.uvm.edu/tvc/vol43/iss1/19>.

Sabina Conditt, *Neurodiversity in the College Setting: A Basic Overview for Fostering Success*, April 22, 2020. See <https://storymaps.arcgis.com/stories/dd1f45e1f2da4ec38f60852226e68928>.

113 Bradley J. Irish, *How to Make Room for Neurodiverse Faculty Members*, CHRON. HIGHER EDUC. (Mar. 2, 2023), <https://www.chronicle.com/article/how-to-make-room-for-neurodivergent-professors>; Rebekka McClellan, *How Disabled and Neurodivergent Faculty Live* (June 17, 2022), <https://www.insidehighered.com/views/2022/06/17/how-disabled-and-neurodivergent-faculty-live-opinion>.

114 Irish, *supra* note 114; McClennan, *supra*, note 114.

115 Irish, *supra* note 114; McClennan, *supra*, note 114.

consideration of documentation requirements for such accommodations. Documentation can be costly to these students, but the administrative and financial cost of this increased demand may justify such requests. It creates a situation where initially with a few such requests, the disability service office may have been willing to provide the separate rooms, but as these requests increase, it becomes necessary to consider whether this is something that should be done. It is important that the legal approach for what must be done uses the same steps of assessing whether the individual meets the statutory definition of disability; then whether the individual is otherwise qualified; and, finally, whether a requested accommodation is reasonable. Considering whether to provide an accommodation that is not legally required requires each institution to make an assessment about the implications of doing so considering existing resources and setting precedent for others in the same situation.

### *C. Attendance/Presence as an Essential Requirement*

Traditionally, courts have been deferential to IHEs regarding essential requirements for participation as students or in work settings. Some disciplines (such as law) mandated a certain level of student attendance for accreditation purposes. Professors were generally given deference in all disciplines about their attendance and participation expectations for students. While students and employees within the discipline were to be engaged in an interactive process where they requested a waiver of attendance requirements, when a disability affected that, there were few reported disputes addressing the issue in the context of higher education.<sup>116</sup> Perhaps that was because the issue did not arise often or perhaps disputes were resolved informally.

COVID brought new challenges to the issue of both attendance and presence. In spring 2020, when most IHEs went into hybrid/remote coursework almost overnight, students and faculty learned quickly how to use remote platforms (both synchronous and asynchronous) for learning and teaching. A great deal of flexibility was granted by accreditors and administrators during that first semester because of the abrupt way in which remote learning became essential. Remote work for other employees was also flexible for those first months. By fall 2020, when guidelines about masking and social distancing had been implemented, there was a gradual return to in-person work, but there was still much flexibility regarding

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116 Neal v. East Carolina Univ., 53 F.4th 130 (4th Cir. 2022) (dismissal upheld when based in part on attendance record of graduate student; court noting deference to professional program in determining qualifications including conduct); Ladwig v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. Coll., 481 Fed. App'x 239 (5th Cir. 2012) (doctoral student with depression and anxiety did not make Title I or Title II case; student did not make case that she was qualified to perform essential functions of graduate assistantship; student did not adequately request accommodations for head injury excusing her from attendance; university had provided accommodations by providing letters supporting absences); Toledo v. Sanchez, 454 F.3d 24 (1st Cir. 2006) (student with mental health issues not barred by Eleventh Amendment immunity; student requested accommodations to his class attendance deficiencies; attendance expectations had been applied to all students similarly situated). This can also apply to faculty members. See, e.g., Silk v. Bd. of Trs., Moraine Valley Cmty. Coll., Dist. No. 524, 795 F.3d 698 (7th Cir. 2015) (adjunct professor with heart condition requiring triple bypass surgery terminated because of his work, including problems with poor attendance in courses).

this. Remote classes were a benefit to some individuals with disabilities—those with mobility impairments, for example. But for some, technology could be a barrier to the communication in the classroom. Remote work became a stressor for some, exacerbating or creating mental health issues for some.

By spring 2021 (with the implementation of vaccines regimens), there began to be more tension about whether returning to in-person classes should be mandatory. On many campuses, administrators believed that it was essential to give students an in-person experience and a return to the classroom became mandatory. This was even more so by fall 2021. For students, faculty, and staff, this shift from prohibiting in-person work and classes to prohibiting remote work created tension. This issue raised particular concerns for those with disabilities in different ways. As with all issues addressed in this article, planners and responders to questions about attendance should apply the framework of what *must*, *can*, and *should* be done regarding making exceptions to in-person presence.

There is an emerging body of case law on the issue of attendance and presence, due to COVID response.<sup>117</sup> It is beyond the scope of this article to provide a detailed and in-depth analysis and synthesis of that guidance to date. However, some basic concepts are available. Legally, the individual seeking an exception must meet the definition of having a disability. Many of those seeking not to do their coursework or employment work in person are requesting this due to good faith concerns about close family members whose health conditions make that individual vulnerable to COVID. Legally, neither the ADA nor section 504 require accommodation for an individual who is associated with someone with a disability. But for cases where the individual has a health condition or where the individual claims stress from returning to the classroom or work, that individual must meet the definition of having a disability.

The next step is the *Wynne* test,<sup>118</sup> requiring that

*relevant officials within the institution considered alternative means, their feasibility, cost, and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower academic standards or require substantial program alteration.*

The burden is on the institution, and ideally, policy decisions should be made in a way that is thoughtful, not reactive, especially when making decisions that apply across the board. Global policies should provide a transparent process through which individual exceptions can be requested, and such a process should be interactive. The challenge for universities in making these calculations is that in some instances, it is not a problem to make one or two exceptions, but this can result in a slippery slope that can cause substantial program alteration or administrative or financial burdens. This is more likely to apply in faculty and other employment settings. If a small academic department has only fifteen faculty members, many of whom teach core courses, and that university is seeking to ensure a substantial

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117 See, e.g., Ellen M. Babbitt & Claire E. Hawley, *Remote Work as a Reasonable Accommodation, Implications for Colleges and Universities*, 48 J. COLL. & U.L. 1 (2023), [babbitt-and-hawley-vol-48-issue-1.pdf](#).

118 *Wynne v. Tufts Univ.*, 932 F.2d 19, 26 (1st Cir. 1991) (emphasis added).

in-person experience for students, it may be feasible to allow one faculty member to teach remotely. But that could open the door for others seeking to do so, and it may be difficult to anticipate how many others would seek the same accommodation. And this can be different from semester to semester. On the other hand, while in-person office hours might be preferable from a student service perspective, allowing Zoom meetings instead might be a feasible alternative without harming the experience. Universities are difficult settings in which to plan and implement attendance issues, given the many different types of programs, but it is nevertheless incumbent on them to really think this through. For example, large lecture classes operate differently than a small seminar class where a group project is part of the course requirement.<sup>119</sup> Learning from other students through classroom discussion is a different experience when some or all students are attending remotely.

In considering what IHEs *can* do, consideration should be given to whether strict attendance rules for students are a good idea. If a student is feeling ill, must that student provide documentation of a *disability* before being allowed to miss one more class than the attendance policy for that professor allows? What if it is more than one more class? Administrators should be thoughtful in thinking through these policies and communicating them.

When planning for what IHEs *should* do in this regard, it is again useful to think through the various scenarios of what would happen if the burden for documentation of a disability were lowered for individual cases. Could this result in a “slippery slope” of requests not to attend?

#### **D. Documentation**

As noted previously, an individual seeking an accommodation or claiming discriminatory treatment, must make the disability “known.”<sup>120</sup> This can require that the individual provide documentation of the disability. There have been judicial decisions and some high-profile settlements involving documentation to provide guidance.<sup>121</sup> There are a few cases that address which professionals are qualified to

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119 I know this from my own personal experience of teaching hybrid, in-person, and totally remote between fall 2020 and fall 2022, in which I taught large first-year property law classes of about sixty students and small seminar classes of about fifteen students, including one class in which groups of five students were required to present a group solution (in written form and in a classroom presentation) to a systemic poverty and health situation. I was on sabbatical in spring 2020, when COVID began, so I was able to benefit from the experience of others and did not have to quickly learn how to teach remotely. During those five semesters of evolving return to full-time presence for everyone all the time, the additional issue of “mandatory masking” was raised. If IHEs require in person attendance, and a student is immunocompromised, is it a reasonable accommodation to require all class members to wear masks in that class? Or is it a better practice to allow that student to attend and participate remotely? *See also* Maggie Levantovskaya, *What College Masking Policies Tell People with Disabilities* (Nov. 14, 2022), <https://www.pestemag.com/lost-to-follow-up/collegemaskingpolicies>.

120 *See supra* Part IV.

121 *See* DOJ settlement with the law school admission council, addressing both flagging and documentation issues (May 20, 2014), <https://www.justice.gov/opa/pr/law-school-admission-council-agrees-systemic-reforms-and-773-million-payment-settle-justice>. For some best practices guidance on this, see Association for Higher Education and Disabilities: Supporting Accommodation

provide such documentation, how recently the evaluation for the documentation must have been made, and what deference should be paid to the individual's treating professional or the IHE's professional.<sup>122</sup>

The financial burden on students (and employees) to document health conditions and learning disabilities and other neurodiversity issues has been an issue for some time, but it has become a more significant issue in recent years due to the increase in students with neurodiverse disabilities requesting accommodations. The challenge is to balance the issues of cost to the student with fairness to others who might believe unfair advantages are being given to those without a justification for the accommodation. In addition, there is the concern about the "cumulative" effect of granting exceptions to documentation that can lead to slippery slope requests. And there is a recognition of the disparate impact on low-income students who may not be able to afford the tests necessary for documentation to justify accommodations.

Burdensome documentation of a disability seems unnecessary for granting a minor exception to an attendance requirement. But students requesting separate exam rooms (not necessarily additional time) might raise other concerns. One can imagine a student who is in a situational stress situation (due to a family death) requesting a distraction-free room to take an exam. An academic unit might allow that whether the student has a disability or not. But would/could that open the door to others seeking such an "accommodation"? Is this a policy or practice that could be adapted as circumstances evolve?

Whatever policies, practices, and procedures are put into place should be transparent and communicated. Reasonable time to provide documentation and for the institution to evaluate and respond to it should be provided for, and that will depend on the situation.<sup>123</sup>

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Requests: Guidance on Documentation Practices, <https://www.ahead.org/professional-resources/accommodations/documentation> (last visited May 12, 2023).

122 See generally DISABILITIES AND THE LAW, *supra* note 3, § 3:22. Many of the documentation cases arise in the context of learning disabilities. One of the earliest judicial decisions on this issue was *Guckenberger v. Boston University*, 974 F. Supp. 106, 134–40 (D. Mass. 1997) in which the court found that the requirement that documentation be created within the past three years imposes significant additional burdens on disabled students. The court held that a waiver of the three-year standard must be allowed where qualified professional deems retesting not necessary. The court further held that evaluations for retesting for learning disability can be made by trained, experienced professionals who need not have doctorate degrees but that reevaluations of ADD and ADHD were subject to a more stringent currency standards and must be made by evaluator with a Ph.D. or an M.D. See also *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1119 (S.D.N.Y. 1997), *aff'd in part, vacated in part on other grounds*, 156 F.3d 321 (2d Cir. 1998) (*abrogated by*, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, (1999)) and *cert. granted, judgment vacated*, 527 U.S. 1031 (1999) and *aff'd in part, vacated in part on other grounds*, 226 F.3d 69 (2d Cir. 2000) (No presumption one way or the other should be given to the treating physician's evaluation of a learning disability.).

123 In my six years as Associate Dean for Students at the University of Houston Law Center (1986–1993), I developed a "handbook" for Applicants and Students with Disabilities. The framework for the handbook includes information on deadlines for requesting accommodations for exams, the documentation requirements, and other specifics. I brought that Handbook to the University of Louisville Brandeis School of Law where I was dean from 2000 to 2005. It has been adapted at many other law schools, and I assume it is also updated and reviewed each year at those institutions that use it. See <https://louisville.edu/law/experiences/student-life/disabilities/disabilities-handbook> (dated 2019).

Also important for administrators handling documentation are issues of confidentiality and privacy. Consideration for who is allowed to see this documentation is critical. Where it is to be filed is also important. For employment, the disability information must be kept in a separate file. There is no such requirement for student records. Again, it is beyond the scope of this article to provide a detailed synthesis and analysis of the legal requirements and interpretations on this issue. But recognizing it as an important issue for planning is essential.

### E. *Technology*<sup>124</sup>

There are several technology-related issues that affect individuals with disabilities in higher education.<sup>125</sup> Because of the speed of technology development, it is difficult to keep up with changes. It is beneficial, however, to be alert to issues that affect IHEs with respect to the use of technology and individuals with disabilities.

Of greatest importance is the delivery of coursework to students. While remote coursework existed in higher education before spring 2020,<sup>126</sup> the almost immediate turn to only remote work in March 2020 at almost all IHEs highlighted the importance of understanding the benefits and barriers of remote teaching and learning for both students and faculty with disabilities. For those with visual impairments, the use of a computer mouse as the only means of accessing computer-generated material creates an almost insurmountable barrier. For those with hearing impairments requiring some type of interpreter service in a remote setting can create new challenges.<sup>127</sup> The stress of isolation due to remote classes had an impact on mental health. Students who were immunocompromised, however, benefited from not being required to attend classes in person. While most IHEs already had some experience with remote teaching and learning, the sudden mandate that everything must be remote put a huge demand for technology staff support on IHEs. While many students had some experience prior to March 2020 with an occasional remote class (but those were usually elected, not mandated), in March 2020, all faculty members were suddenly required to learn and understand how to teach remotely, how to use the “chat” feature, how to record classes on platforms such as Blackboard. Disability service providers, tech support offices, and faculty members all needed to be aware of how students with a range of disabilities might require new types of accommodations to a wide range of disabilities when learning

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Institutions providing such guidance should tailor them to the particular department and issue involved.

124 The landmark decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979), recognized that technology might have an impact on whether an individual met the definition of being otherwise qualified. The Court noted that technology over time might result in a situation where an individual could be accommodated to ensure that the individual was otherwise qualified.

125 See generally DISABILITIES AND THE LAW, *supra* note 3, §§ 3:8 and 3:16.

126 Massive open online courses (MOOCs) began being offered broadly around 2008. For a history of MOOCs, see John Daniel, *MOOCs and Online Education: Evolution or Revolution*, OXFORD UNIVERSITY PRESS (Apr. 26, 2016), <https://blog.oup.com/2016/04/moocs-higher-education/>.

127 While many platforms provide for real-time closed captioning, not all do, and it is the obligation of the instructor to know if that is a concern. It may require some lead time to ensure that this has been checked out. If a remote student is trying to hear students speaking in a classroom with masks on, the ability to comprehend what is being said can be adversely affected.

was occurring only in a remote setting. While most campuses returned primarily to in-person learning by fall 2020 (initially and for about a year with guidance about social distancing and masking in the classroom), there were still those who could not return, and the expectation of technology support to enable faculty members and students with some disabilities to continue their coursework remotely meant that attention to technology and accommodation issues continued. For example, a faculty member who taught a class by Zoom might need to ensure that the auto captioning feature was available for students with hearing impairments.

It was the return to in-person learning that has made attention to technology an emerging “crystal ball” issue. The accommodation of one or two students or one faculty member places different burdens on technology support staffs, and this has the potential for universities to raise the undue burden defense to the request for technology accommodations. Do they have the funds to pay for staff? Even if they do, are there enough people with the needed skills available to fill funded positions?

Related to the instructor delivery of the course substance is the issue of the materials themselves. While technology has made it possible for published books to be placed into an accessible format much more quickly than in the past,<sup>128</sup> instructors often provide their own materials and handouts and links to articles or YouTube videos without thought as to access issues. That may not be a problem when there are no students with accommodation needs, but it can be for those with such needs. The delay in obtaining access to materials in settings where instructors assign initially inaccessible materials can be harmful to the student learning experience, which can give rise to frustration and sometimes ultimately complaints to the ED or litigation.<sup>129</sup> Related to all of this are power points frequently used by faculty members during a class, which are then placed on the course platform for access. Must there be descriptors for images in the documents stored on Blackboard or other platforms? Some universities have made recorded classes and other materials to be open access without thought about what that might mean. A faculty member who does not have any students with disabilities for which accommodations are necessary may not take the extra steps of ensuring that those modifications are made, but once those materials are available to the public, this raises the necessity of anticipating that there may be users who need such modifications.

An example of a technology challenge is a course taught in real time as a hybrid course—students in the room and students attending remotely. What if the

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128 The Chafee amendment to the copyright law provides that reproducing textbooks in an accessible format for individuals who are blind is fair use and not a violation of copyright. 17 U.S.C. § 121.

129 See *Payan v. L.A. Cmty. Coll. Dist.*, 114 F.4th 729 (9th Cir. 2021) (private right to bring disparate impact claim under Title II of ADA and Rehabilitation Act; recognizing disparate impact in case involving website access and teaching materials accessible to student with visual disabilities and applies to both section 504 and the ADA in spite of Supreme Court holding in *Alexander v. Sandoval*, 553 U.S. 275 (2001). If the Supreme Court reached that issue now, there is a real concern that it would overrule the *Alexander v. Choate* 1985 precedent recognizing disparate impact can be used to challenge some (but not all) actions. This Supreme Court could strike down all disparate impact situations where they have not been specifically codified into the statute. Even “codification” through federal regulations that have gone through notice and public comments are at risk. See *West Virginia v. EPA*, 597 U.S. 2587 (2022), requiring that Congress demonstrate clear authority, especially when large financial implications are affected—the “major questions doctrine.”

classroom is not set up so that remote attendees can hear both the instructor and others in the room engage in classroom discussion? What needs to be anticipated in ensuring that someone is monitoring the “chat” feature so that remote attendees are fully included?<sup>130</sup>

Higher education institutions that provide programs (such as conferences and symposia)<sup>131</sup> to the public or audiences beyond students will need to anticipate those issues as well. Other issues of concern related to course delivery can include mandating or making available accessible technology and allowing use of certain computer platforms (such as JAWS) for exam purposes.<sup>132</sup>

Website issues can have a significant impact on IHEs.<sup>133</sup> There are several unsettled issues related to websites. These include whether websites themselves are subject to ADA Title II or Title III or section 504 and under what circumstances. Beyond that is what content on a website must be accessible or provide information about access.<sup>134</sup> The issue of standing to bring a complaint involving websites is being addressed by the Supreme Court.<sup>135</sup> One of the major challenges for all website settings is not having specific design standards for different types of institutions. While design standards for federal agencies have been in place for some time,<sup>136</sup> the DOJ standards now being considered<sup>137</sup> might not be upheld by the federal courts given the recent trend of federal judges not to give deference to federal agencies in some regulatory settings.

130 This perspective comes from first-hand experience when I taught law school classes (both large classes of sixty to seventy-five and smaller classes of ten to twenty) recorded on Blackboard for those who could not attend. It was challenging for me to monitor the “chat” while engaging in the discussion in the room. This was due primarily to my own vision limitations. It was much easier to monitor and include when everyone was remote. There are certainly ways to plan for that, but these issues should be anticipated and planned for to the extent feasible. It is important to be inclusive even if only one student is affected.

131 This may require having speakers provide PowerPoints and other materials in accessible formats, if they are to be shared beyond the room in which they are presented. Such materials ideally should be accessible in any case.

132 See *DISABILITIES AND THE LAW*, *supra* note 3, § 5:7 n.13.

133 See *DISABILITIES AND THE LAW*, *supra* note 3, § 9:5.

The November 22, 2022, DOJ Consent Decree with Berkeley has the potential to answer many of these questions, at least with respect to publicly available website information. Its impact will depend on the precedential value placed on such a settlement. The consent decree addresses a very broad range of issues that remind universities of what they should consider. These issues include faculty hosted webpages and podcasts, student and student group hosted web information, information over ten years old on websites, training issues, tips for creating new websites, and references to other digital access information. This settlement provides information about training and other matters relevant to online information provided by universities and by individuals and organizations within institutions. See <https://technology.berkeley.edu/DAP/FAQ>.

134 *DISABILITIES AND THE LAW*, *supra* note 3, § 9:5 n.7.

135 *Acheson Hotels v. Laufer*, *cert granted*, S. Ct. Mar. 26, 2023.

136 29 U.S.C.A. § 794d. Access Board’s current rules for web accessibility are found at 36 C.F.R. pt. 1194 (2017), for section § 508 of the Rehabilitation Act.

137 Guidance issued in March 2022, <https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act>; <https://www.ada.gov/resources/web-guidance/> (March 18, 2022).

A few additional unanswered questions arise in the context of websites, with potential unintended consequences if answered in certain ways. For example, many universities have archived documents available through websites. The PDFs of photocopied original handwritten documents of historical figures are examples. Must those documents be put into accessible format? If so, how quickly? If the answer is too burdensome, a university may simply decide to remove those documents from archives, with the unintended consequence that no one can access them. Another example is inclusion of the curriculum vita (CV) for faculty members, which most universities have on their webpages for academic departments. While it might seem obvious that the CV itself should be in an accessible format, what about the links to articles written by that faculty member that are listed in the CV?

While not yet tested in the courts, in May 2023, the DOJ and ED issued a joint Dear Colleague Letter that provides guidance on web issues.<sup>138</sup> The guidance reminded

colleges, universities, and other postsecondary institutions to ensure that their online services, programs, and activities are accessible to people with disabilities. Many colleges, universities, and other postsecondary institutions increasingly rely on their websites and third-party online platforms to provide services, programs, and activities to members of the public. This includes courses on learning platforms as well as podcasts and videos on social media and third-party platforms like YouTube, Spotify, and Apple Podcasts. This joint letter reiterates that Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act require colleges, universities, and other postsecondary institutions to provide equal opportunities to people with disabilities in all their operations. The letter also highlights recent web accessibility enforcement activities and technical assistance from the Justice Department's Civil Rights Division and the Department of Education's Office for Civil Rights.

The guidance does not directly apply to private universities, although most receive federal financial assistance and would be subject to section 504.

Technology issues are also raised in the context of public information provided in large venues, particularly sports arenas.<sup>139</sup> Policy makers and purchasing departments should consider these issues with respect to access to spoken announcements and play description at sports events, and providing that same information on jumbotrons in the arena and whether television monitors in areas serving the arena (e.g., food vendors) should be required to turn on the closed captioning devices on screens where the fan buys pizza and beer.

Finally, the rise of AI, a fast emerging and evolving technology, requires attention by IHEs.<sup>140</sup> There are concerns that have already arisen in the broader employment

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138 See <https://www.justice.gov/crt/case/dear-colleague-letter-online-accessibility-postsecondary-institutions> (May 19, 2023).

139 See e.g., *Innes v. Bd. of Regents of Univ. Sys. of Md.*, 29 F. Supp. 3d 566 (D. Md. 2014) (preliminary rulings in ADA/504 claims by deaf spectators that university did not provide effective communication at athletic events and on sports websites).

140 Derek Newton, *From Teaching to Grading: AI Is Infiltrating Higher Education*, HECHINGER REP. (Apr. 26, 2021), <https://hechingerreport.org/from-admissions-to-teaching-to-grading-ai-is-infiltrating-higher-education/>; Mark Stanberry et al., *In an AI World, Let Disability Access Lead the Way*, INSIDE HIGHER EDUC.

context about screening out applicants based on factors that might be discriminatory.<sup>141</sup> It is not hard to imagine university admissions offices creating templates that consider a range of data and even personal statements to identify students at risk in a variety of ways that could be discriminatory. The temptation to identify the applicant who might have mental health problems (including self-harm) or who is at risk of not completing college for other reasons could lead to a decision not to admit at the outset. A more positive use could be to anticipate the need for certain services, such as how much mental health counseling might be needed for an incoming freshman class. The danger is that the same information could be used in ways that discriminate inappropriately. These issues should be considered before the adoption of such systems.

#### *F. Professional Education and Relationship to Licensing*

There is increased awareness that for professional education programs that connect to licensing (primarily law and medicine, but also other health care professional programs), there are potential issues relating to whether admission of a student should be tied to whether the student is likely to be licensed in the program. For the individual student, the stakes are high. These students invest substantial time and money to achieve a goal of becoming a doctor or lawyer or other professional. For the programs themselves, the cost and investment are high—particularly for medical school education.<sup>142</sup>

While programs can make accommodations for a range of disabilities for some academic aspects of the program, in some instances, such accommodations are not feasible or reasonable for the clinical part of the program. Coursework that requires the ability to perform certain physical tasks (such as surgery), that requires quick reading and processing of information (such as emergency room medical care or a trial attorney), or that requires interaction with patients or clients or coworkers (such as a physician interacting with a nurse or a medical student), can create challenges. Awareness of these issues and proactive consideration (that might include an accessible and transparent process for obtaining accommodations at all levels) can help to avoid some complex and protracted dispute resolution. Thoughtful communications between licensing boards and educational programs can facilitate good practices that are beneficial to all parties. Related to this issue is the practice of reporting mental health treatment and diagnosis by educational programs to licensing boards. Such reporting has been demonstrated to deter individuals from seeking treatment.<sup>143</sup>

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(Feb. 28, 2023), <https://www.insidehighered.com/views/2023/03/01/prioritize-universal-access-ai-policy-response-opinion>.

141 US Warns of Discrimination in using AI in Employment Screening, NPR (May 12, 2022), <https://www.npr.org/2022/05/12/1098601458/artificial-intelligence-job-discrimination-disabilities>.

142 Laura Rothstein, *Medical Education and Individuals with Disabilities: Revisiting Policies, Practices, and Procedures in Light of Lessons Learned from Litigation*, 46 J. COLL. & U.L. 258 (2021), <https://www.nacua.org/resource-library/resources-by-type/journal-of-college-university-law/index-by-volume/jcul-by-volume-landing-page/volume-46-number-2>. See also Ellen Babbitt & Barbara A. Lee, *Accommodating Students with Disabilities in Clinical and Professional Programs: New Challenges and New Strategies*, 42 J. COLL. & U.L. 119 (2016).

143 David Jaffe et al., *"It's OK Not to Be OK": The 2021 Survey of Law Student Well-Being*, 60 U.

There is some judicial guidance on handling these issues,<sup>144</sup> but this is an area that would benefit greatly from more proactive creation of policies, practices, and procedures that anticipate and avoid unnecessary disputes.

### *G. Transition from K-12 to Higher Education*

Because of IDEA, there are many more students with disabilities who are college ready today than in 1973, when section 504 of the Rehabilitation Act was passed. The transition from K-12 to the college level can present challenges in expectations and changes in rights and support. Although IDEA requires that schools develop a “transition plan” for students with disabilities (at least those who were receiving special education), in reality, many students who need accommodations in postsecondary settings did not receive such a related service and enter higher education unprepared for college expectations. For K-12 students with 504 plans (e.g., receiving accommodations but not special education),<sup>145</sup> the transition may be less stark, but K-12 students with 504 plans have them because of the existence of IDEA and special education in the K-12 setting. In some cases, the students and their parents do not recognize those changes, which can result in tension between the student and the IHE.

There are several major differences from K-12 to IHE. Being aware of those can be an opportunity for IHEs to be proactive in their policies, practices, and procedures. In K-12, the burden is on the school to identify (and usually to pay for documentation) a disability for students. Also, in K-12, the student’s disability may result in the entitlement to special education and related services, which can go beyond what is required under section 504’s reasonable accommodation requirement. For example, in K-12, a student with a learning disability may receive tutoring as a related service. The student may receive additional time on exams or on assignments that goes beyond what a reasonable accommodation might require. Some students with neurodivergent conditions, such as students with autism who are academically high performing and were not receiving special education may have difficulty navigating the social expectations and independence of a college environment.<sup>146</sup> Some behaviors may be seen as “stalking” and result in campus discipline if the student is not aware of the expectations for college student conduct.

Anticipating some of these issues at the IHE level can allow avoidance of some conflict. For example, communications with newly admitted students can provide links to resources on campus for support. As in previous sections, a full discussion of these issues is beyond the scope of this article, but IHEs are

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LOUISVILLE L. REV. 438 (2022), [https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=3142&context=facsch\\_lawrev](https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=3142&context=facsch_lawrev).

144     DISABILITIES AND THE LAW, *supra* note 3, §§ 5:9 and 10:7.

145     DISABILITIES AND THE LAW, *supra* note 3, §§ 2:53–2:55.

146     Patrick Dwyer et al., *Building Neurodiversity-Inclusive Postsecondary Campuses: Recommendations for Leaders in Higher Education*, 10 AUTISM ADULTHOOD 1 (2023) (written by students with neurodiverse conditions), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10024274/>. See also Lee Burdette Williams, Director of Higher Education Training and Development, College Autism Network, PowerPoint on *Students on the Autism Spectrum: Responding to a Growing Population* (Feb. 2018), <https://collegeautismnetwork.org/wp-content/uploads/2018/02/ASCA2018-PreCon-ASD-and-Student-Conduct.pdf>.

urged to anticipate these concerns and plan for them in the policies, practices, and procedures, including training of front-line faculty members and other administrators. Community colleges may be most likely to have students in this category present in “open admissions” settings and have parents who expect an individual education plan (IEP) or 504 plan at the college level. Sometimes these parents expect to “speak for their child” who is now an adult. While training and preparation at the community college setting is important, these institutions often have the fewest resources available to respond.

One issue for IHEs to be aware of related to transition services is the issue of dual credit courses. These are often offered in urban areas where a college or university enters into an agreement where a high school student can take a course on campus and receive advanced placement credit. The instructor in the course may have no idea that a student in the class has an IEP or 504 plan, and even if the instructor does, they may not be amenable to allowing extra time on exams or other individualized supports that go beyond reasonable accommodations. Universities would be wise to plan for this in their memoranda of understanding (MOUs) to avoid conflict, especially when there is little judicial or other guidance on what is required in these settings.<sup>147</sup>

#### *H. COVID-Related Issues in Higher Education*

The pandemic hit college campuses abruptly in March 2020. The NCAA (National Collegiate Athletic Association) basketball tournament’s sudden halt was probably the first realization that COVID was going to change everything for everyone immediately. Everyone was sent home. Colleges scrambled quickly to figure out how to continue teaching and learning through technology platforms. Housing on campus was immediately affected. Over the next twelve to eighteen months, life on campus gradually returned to some semblance of what it was before. But it is unlikely that campus life will ever be totally unaffected by the pandemic. There are several public health and disability related issues explaining why that is the case.

By fall 2022, the pandemic was considered in many ways at least temporarily “under control,” which meant that the need for everyone to be masked and socially distanced all the time no longer existed. There are treatments and more efficient access to COVID testing (compared to the long lines and systems created on campus in fall 2020). Vaccinations are available, but although these are an enormous benefit to avoiding serious illness and death, they do not prevent becoming infected and spreading COVID. Those who are immunocompromised and those in close contact with them have a greater need than most people to avoid contracting COVID. Much has been learned about how much learning, teaching, and other campus work can take place outside of in-person settings.

The return to campus for most necessitates an appreciation for how disability discrimination issues affect the in-person learning and work in higher education

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<sup>147</sup> See e.g., *Bradley v. Jefferson Cnty. Pub. Schs.*, 598 F. Supp. 3d 552 (W.D. Ky. 2022). This case highlights the challenges of implementing a free appropriate public education in dual credit and dual enrollment courses and how it is often difficult to define the obligation of a university to provide accommodations for students enrolled in such courses. It is one of the few judicial decisions to even begin to address this issue.

settings that now exists nationwide.<sup>148</sup> Because about three percent of the population are immunocompromised<sup>149</sup> there is still a concern about how to protect those individuals who seek to avoid in-person contact as much as possible. Because COVID can be transmitted even by those vaccinated, there are many others who live with or who have close contact with individuals who are immunocompromised who may also wish to avoid in-person contact. For that reason, there are several disability discrimination issues to consider in planning what *must* be done, what *can* be done, and what *should* be done.

Although not discussed in depth in this article, IHEs should consider in their planning and policies the following legal questions.

1. Is long COVID a disability? Is being immunocompromised a disability? What kind of documentation should an institution require from individuals with these conditions in order to consider whether reasonable accommodations (such as remote work or learning) are legally required.
2. Are those who are associated with someone who has long COVID or who is immunocompromised protected under section 504 or the ADA? Although they are probably protected from discrimination (e.g., being fired or removed or demoted) by the institution, they are not entitled to receive reasonable accommodations related to attendance. This is a prime example of where an IHE might consider not just whether they *must* act in a certain way, but whether they *can* and *should* grant accommodations that are not legally required.
3. Is attendance or presence an essential requirement? For example, if a professor allows only a certain number of absences, and no exceptions are made for illness, there is a risk that students with COVID symptoms or illness will attend, exposing others to COVID. But if the professor is too lax in granting excused absences, there may be a floodgate concern?
4. What reasonable accommodations are required for remote work? Must all classes be made available through distance learning platforms? How does an institution argue that it is not reasonable to allow remote work, when it mandated only remote work for several months? What about reasonable accommodations related to the stress of in-person learning for some with mental health concerns (some of which may be a result of COVID concerns)?
5. What does it mean to be otherwise qualified? Mandatory vaccinations on campus will be an ongoing issue, particularly for those in health care situations (e.g., campus health offices, medical schools, and university hospitals).

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148 For an interesting discussion of the challenge of balancing flexibility with manageability in post-COVID settings on campus, see Becky Supiano, *Course Correction: Students Expect Total Flexibility in the Pandemic-Era Classroom, But Is That Really What They Need*, CHRON HIGHER EDUC. (Feb. 13, 2023), [https://www.chronicle.com/article/course-correction?utm\\_source=Iterable&utm\\_medium=email&utm\\_campaign=campaign\\_6883363\\_nl\\_Academe-Today\\_date\\_20230523&cid=at&source=&sourceid=&sra=true](https://www.chronicle.com/article/course-correction?utm_source=Iterable&utm_medium=email&utm_campaign=campaign_6883363_nl_Academe-Today_date_20230523&cid=at&source=&sourceid=&sra=true).

149 “Seen through a COVID-19 lens, about three percent of the population in the United States is considered moderately-to-severely immunocompromised, making them more at risk for serious illness if they contract COVID-19, even after vaccination. This is because their immune systems do not mount a strong response to the vaccines”; see <https://www.yalemedicine.org/news/what-does-immunocompromised-mean>.

6. What about masking issues going forward? If the instructor or a member of a class requests that everyone be masked because that person is immunocompromised, can that be required? On some campuses, in fall 2022, the mandates went out that faculty members could not require class members to be masked. The courts are addressing a similar issue in the context of K-12 education regarding mandates about no masking.

The failure to consider these issues is an example of “ableism” and campus policy makers and administrators and front-line providers of education and services must think these through before being dismissive and assuming that only a few people are affected, and these people are “on their own.”

### *I. Faculty Issues*

While this issue was highlighted in the section on ongoing disability issues,<sup>150</sup> it is receiving “crystal ball” attention in this section as well. The reason reflects two major developments since the 1970s. First, the greying of the academy in times of economic instability makes it less predictable when and how faculty members will choose to retire. Second, the issue of COVID raises some unique disability considerations to faculty members—who is protected? How can they teach, or how must they teach?

The combination of the economy, the aging professorate, and the pandemic highlights the importance of not just focusing on student issues, but also ensuring that that leaders (deans, provosts, academic departmental chairs, human resources departments) are aware of potential disability issues relevant to faculty employment.<sup>151</sup> As noted in 1993,<sup>152</sup> the elimination of mandatory retirement for faculty members means that institutions should have been paying greater attention to ongoing assessments about whether all faculty members are “otherwise qualified” to perform the requirements that may only be vaguely defined or described in the initial letter of appointment. While many institutions implemented systems of posttenure review and other detailed performance evaluations, these and annual evaluation practices may be subject to challenge by a faculty member whose health or impaired condition raises concerns. Employment remains the anchor for access to health care, so faculty members may be more concerned about that than the salary income itself.

Higher education faculty members benefit from a range of employment supports found in few other professional positions—access to travel and research support, access to technology support, an office in which to work, clerical and other administrative support, companionship from interacting with colleagues, and the admiration and respect of new students year after year. It is no wonder that many university faculty do not want to retire.<sup>153</sup> Those assumptions, however,

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150 See *supra* Part IV.D.

151 DISABILITIES AND THE LAW, *supra* note 3, § 3:26.

152 Laura Rothstein, *The End of Forced Retirement: A Dream or a Nightmare for Legal Education?* ABA SYLLABUS (Jan. 1993).

153 Michael Nietzel, *Pandemic Toll More Than Half of College Faculty Have Considered a Career Change or Early Retirement*, FORBES (Feb. 26, 2021), <https://www.forbes.com/sites/michaelnietzel/2021/02/26/pandemic-toll-more-than-half-of-college-faculty-have-considered-a-career-change-or-early-retirement/>

changed with the pandemic, which resulted in faculty burnout, demoralization, and disengagement.<sup>154</sup> To ensure that faculty who do not want to retire remain qualified, attention to accommodation and other issues is key. The issue of presence and attendance as an essential function for teaching, student office hours, and faculty meetings is important to think about proactively. Having sufficient information technology (IT) support to assist faculty members who are older and less adept at online platforms, monitoring “chats,” and other technology that may be second nature to younger faculty members incorporates the issue of “reasonable accommodation.”

While there is not a large body of recent judicial guidance on these issues, it is likely that many disputes are being resolved without litigation. Such disputes even at preliminary stages, however, might be avoided by proactive attention to anticipating issues, particularly those recently raised due to the pandemic and postpandemic return to a requirement of attendance and presence for faculty members. This is an area where it will be particularly important to implement interactive discussions about accommodations.

#### *J. Facilitated, “Layered,” and Licensed/Leased Premises Activities—Who Is Responsible?*

While not the only institutions with complex operations, universities are somewhat unique in how they carry out the multidimensional provision of programming and services. The primary role of a university is to provide educational programming to students, traditionally in classrooms with supporting services of libraries and laboratories. There are, however, a great many activities beyond traditional educational programming that involve collaborations or contracts with other entities to carry out the services and programs. No other entities subject to disability discrimination law have housing (and sometimes transportation) intertwined with the program itself. Each of these entities are probably themselves subject to disability discrimination laws, making it important to consider in advance the relative obligations of responsibility for disability access (including making reasonable accommodations and ensuring accessible physical facilities), and how this shared responsibility may be treated when there are disputes. This suggests the importance of clear MOUs or other contractual arrangements that while perhaps not immunizing the university entity from liability, might ensure indemnification if damages are awarded for an activity found to be discriminatory.

These activities fall into several categories. In almost none of them is clear guidance available about ultimate liability for compliance with section 504/ADA. Planning through MOUs, contract terms (including indemnification), and including people with disabilities in the planning can be valuable in avoiding costly and frustrating conflict and mistakes.

The first type of activity is a contractual arrangement where the university is the licensor/landlord for activities on campus. Liability or response by the IHE may turn

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early-retirement./ In 2021, the fatigue and stress from the pandemic caused burnout and a significant increase in interest in retirement or a career change.

154 Doug Lederman, *Turnout, Burnout, and Demoralization in Higher Education*, INSIDE HIGHER ED (May 3, 2022), <https://www.insidehighered.com/news/2022/05/04/turnover-burnout-and-demoralization-higher-ed>.

on whether the arrangement is a lease or a license. Examples include bookstores within student centers; food vendors at campus-operated sports arenas; and hosting public events, such as speakers or concerts, on campus that are run by other entities (such as a musical performance concert at a university-owned stadium). Who is liable if the private company operating the beer and pizza sales does not ensure closed captioning on the television set above the bar? If the private bookstore operating on campus does not have an accessible website, is the university responsible for that? Hosting continuing education and other speaker events sponsored by others (sometimes in collaboration with the university) on campus has the potential for access issues to arise.

Second is where the IHE is the licensee/tenant in providing programming or services. Examples include a university contracting to host its basketball games or graduation ceremony in a sports arena or large performance or conference space operated off campus. One can imagine a stage that all students walk across at graduation that has no ramp or the ramp is not ADA compliant or is otherwise not accessible. If a voting site for elections is on campus and does not meet accessibility requirements, who is responsible or liable?

A third type of activity involves contractually provided arrangements through which a university “facilitates” the program of a private provider. The most common example is probably off-campus private housing. If the university promotes or advertises such housing to newly admitted students, is it responsible to ensure that the housing meets disability discrimination standards—ranging from architectural design to how service and emotional support animals are permitted in such housing? While fraternities and sororities may seem to be private clubs, with universities having no responsibility for them and these Greek organizations being exempt,<sup>155</sup> because such organizations may have housing on campus owned or leased property or because the university may play a role in facilitating sorority/fraternity rush or in recognizing them as official campus organizations, there may be some obligation for their ADA/section 504 compliance. The fraternity may not be liable, but the university that recognizes or facilitates it may be liable, if there is notice of discrimination and the university fails to respond appropriately. Similarly, many campuses facilitate private campus bus shuttle services or contract with others to do so.

A fourth type of activity involves IHEs that host or collaborate on the provision of various broadcast activities.<sup>156</sup> Similar issues might arise where a faculty member’s website links to a blog or a video lecture that may not meet design standards for audio or video descriptors.

Fifth are activities related to providing coursework remotely beyond students at the entity from where they originate. As noted previously, universities that provide MOOCs or open access coursework should think through whose obligation it is to ensure access for these programs. For example, if a professor teaches a remote or

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155     DISABILITIES AND THE LAW, *supra* note 3, § 3:15. *See, e.g.*, Entine v. Lissner, 2017 WL 5507619 (S.D. Ohio 2017) (granting preliminary injunction against university seeking to remove service dog from sorority).

156     Yelapi v. DeSantis, 525 F. Supp. 3d 1371 (N.D. Fla. 2021) (preliminary rulings in claim by deaf Florida residents and advocacy group regarding Florida State University television channels that broadcast governor’s press briefings; claiming failure to provide in-frame American Sign Language interpreters violated ADA and 504).

hybrid course to students at their own institution, but students at other institutions are allowed to enroll simultaneously, who is responsible for ensuring that interpreters or exam accommodations are provided—the faculty member’s employer or the university allowing the student to receive credit for the remote course?

Sixth are programs in foreign countries. There is not clear guidance on responsibility when a university hosts a summer program in Spain for its students. While some have argued that because there is no jurisdiction over programs operated outside of the United States,<sup>157</sup> surely the university bears some responsibility for at least ensuring that such a program has accessible housing and classes are conducted in accessible locations or at the very least publicizing the degree of access should the university grant credit or operate such programs abroad. Related to programs operating outside of the United States are alumni travel (such as river cruises) facilitated through university-operated alumni offices.<sup>158</sup>

Seventh are dual enrollment courses where high school students take college courses on campus that provide completion of high school graduation requirements and also can count toward college credit at some institutions.<sup>159</sup> While the IHE faculty member may not be responsible for implementing the special education expectations for a student’s IEP, it may be obligated to ensure that reasonable accommodations are provided to such students appropriate to a college level course.

An eighth area for attention involves university-sponsored or supported or facilitated student placements. These range from colleges of education requiring student teacher placements, law school students working for credit at programs such as Legal Aid or government agencies, and medical or pharmacy students working in clinical placements as part of their education. The issue that can arise in these settings is whose responsibility it is to ensure (and possibly pay for) reasonable accommodations. For example, if a law student with a hearing impairment that requires signing or other interpreting service is working at a law school–approved internship placement, is it the law school or the employer who is responsible for providing that service? What if the employment setting is not accessible for a student who uses a wheelchair? Must the university remove that placement from its list of possible placements? Does it matter if the internship opportunities when viewed in their entirety are in accessible locations? An unintended consequence of requiring the intern-sponsoring employer to pay for the accommodations might be that the employer simply declines to participate in the future, making that internship unavailable to any student. How should a law school handle a situation where a law student with mental health concerns that are accommodated in the academic settings raises concerns if that student is to represent clients under supervision of a supporting internship or clinic program sponsored by another entity such as the public defender’s office? Is there a privilege to disclose these concerns? How should that work?

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157 A.S. Kanter, *The Presumption Against Extraterritoriality as Applied to Disability Discrimination Laws: Where Does It Leave Students with Disabilities Studying Abroad?*, 14 *STANFORD L. & POL’Y REV.* 291 (2003).

158 *Alumni Cruises, LLC v. Carnival Corp.*, 987 F. Supp. 2d 1290 (S.D. Fla. 2013) (allowing issues to be tried on whether cruise line had made reasonable modifications; organization allowed to have standing to bring these claims).

159 *See supra* Part V.G.

It is not the purpose of this section to analyze or synthesize legal guidance on these issues. There are not many judicial decisions to review, so clear guidance on many of the issues does not exist. The purpose, instead, is to encourage university policy makers to be aware of the importance of proactively anticipating potential liability or responsibility for compliance (which is a challenge where it is not certain in many of these settings what substantively is required). Higher education institutions should nevertheless anticipate these issues, work outside of silos, and engage in individualized and interactive resolution.

### ***K. Documentation of Disabilities***

Before the 2008 ADA amendments, many disputes in higher education and testing contexts raised a range of issues involving what documentation would be required for an individual to demonstrate that they had a disability and or that the requested accommodation related to that disability. Cases in this context sometimes address the issue of requiring the institution to “know” (actually or constructively) of the disability before it can be found to have violated. While this is not a new issue, the crystal ball consideration of this arises from the increasing pressure for advocacy groups to reduce the burden of documentation due to its high cost.<sup>160</sup>

The high cost of documentation for some disabilities (neurodiversity and mental health impairments) is a barrier for many students seeking accommodations. Responding to the cost issue, however, should consider that some individuals can “game” the system by submitting questionable documentation or that loosening documentation requirements could open the floodgates of accommodation requests. Issues of documentation are particularly complex with respect to having emotional support animals in campus housing and employment, where greater documentation can be required as compared to service animals where public accommodation and public service providers are much more limited in the documentation requirements.<sup>161</sup>

### ***L. Cumulative Accommodation Concerns—Slippery Slopes and Floodgate Concerns: Where to Draw Lines?***

In applying the must / can / should analysis to granting accommodation requests, IHEs should anticipate the possibility of opening the floodgates or slippery slopes when granting accommodation requests that are not required, but that are discretionary and manageable, at least initially. Faculty members and administrators grant exceptions to deadlines and other requirements regularly. For example, a student who calls a professor to say that she was just in a car accident and requests an extension on a research paper draft assignment would likely be granted that request, usually without documentation. The student who requests to take an exam on a different day than scheduled because of a death in the family might be asked to show some documentation. It is not feasible or wise to have strict rules on every possibility and every setting. Reasonable discretion and common sense still apply.

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<sup>160</sup> For a discussion of this issue, see Robert L. Mapou, *Have We Loosened the Definition of Disability? The Effects of Changes in the Law and Its Interpretation on Clinical Practice*, 15 PSYCH. INJ. & L. 307 (2022).

<sup>161</sup> Laura Rothstein, *Puppies, Ponies, Pigs, and Parrots—Policies, Practices and Procedures in Pads, Pubs, Planes, and Professions—Where We Live, Work, and Play, and How We Get There—Animals in Public Places, Housing, Employment, and Transportation*, 24 ANIMAL L. REV. 13 (2018).

For students who request accommodations that impact resources—staff supervision or physical space—such as separate exam rooms to avoid distraction for a student with ADD or additional time for a student with a learning disability, the documentation expectations become more important to examine. One student requesting a separate exam room (regardless of whether it is for a disability reason or because the student has experienced a recent trauma such as a death in the family) does not usually implicate resources. One student asking for additional time to take breaks during an exam due to a recent illness (not rising to the level of a disability) does not burden an institution. But slippery slopes can occur, particularly when students learn that administrators or faculty members are more flexible than law requires. These situations can also raise issues of fairness, particularly where additional time or assignment extensions are requested.

The same issue arises for faculty members requesting to teach remotely in the “postpandemic” era (e.g., as universities returned to full-time, in-person classes throughout fall 2020 and spring 2021). Academic programs (such as law schools) that require a certain amount of coursework to be taught in person may be able to grant one or two faculty members in a small department the request to teach remotely but might not be able to do so for everyone who wants or prefers remote teaching. This “cumulative” effect of accommodation granting can result in an undue administrative or financial burden, one not always easy to plan for or anticipate. It will be increasingly necessary for higher education programs, however, to consider how they will go about granting such requests, and only doing so as a disability accommodation for which documentation is required.<sup>162</sup>

The point of this section is to remind those who participate in making policies and implementing practices and procedures on campus that care should be taken in how to implement requests for accommodations in situations where it may be difficult to demonstrate at the front end that an accommodation request is burdensome without knowing how many similar accommodations might be sought.

## VI. APPROACH FOR UNIVERSITY LEADERS AND UNIVERSITY COUNSEL —ESTABLISHING OR ENHANCING AN ADA COORDINATOR ROLE

### A. *Planning—Proactive and Reactive*

The discussion of the wide-ranging disability issues on campus—both those that

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162 See, e.g., *Gati v. W. Ky. Univ.*, 762 Fed. App'x 246 (6th Cir. 2019) (requiring judicial deference to determination by university that it cannot accommodate student by offering specific course remotely without jeopardizing academic integrity of program; student in mental health counseling program could not sit for more than one hour at a time affecting ability to commute to take required programming; denial was based on faculty conclusion that interactive television not possible for mental health counseling program that is experiential and required classroom interaction between students and instructor; instructor shortage prevented offering course at satellite campus; accreditation standards affected how many courses an instructor could teach); *Dobyns v. Univ. of La. Sys.*, 275 So. 3d 911 (La. Ct. App. 1st Cir. 2019), *writ denied*, 278 So. 3d 977 (La. 2019) (judgment for professor in claim for disability discrimination through disability-based harassment and denial of accommodations; professor who had been employed since 1992 requested and received accommodations in 2008 for her compromised immune system of alternative scheduling and distance education during December through February; when administration changed in 2011, those accommodations were no longer granted).

are ongoing since 1973 and those that are more recent or emerging—may be eye-opening to the new administrator or university counsel. Some issues may surprise even seasoned higher education professionals. From my viewpoint both as a scholar whose work focuses on these issues and as an administrator and faculty member who has put these expectations into practice for over four decades, I strongly encourage a proactive approach to these issues as well as planning to respond to or react to situations that arise suddenly. The proactive approach includes training and a plan for ongoing assessment and reassessment of a wide range of activities. While such a plan is no guarantee that a university will not be sued or subject to an OCR investigation or negative media attention or major liability after dispute resolution, I believe that such an approach will greatly reduce the potential for such negative outcomes.

One means of doing comprehensive preparation is to create an ADA coordinator position on campus, one that reports directly to the president or provost or a key vice president. Increasingly IHEs are recognizing the value of doing this. The following section sets out a possible framework for such a position. It is important to clarify that this role is distinct from the human resources (HR) 504 officer who handles employment issues or the disability student services officer who primarily administers the provision of accommodations on campus. The position would not involve direct provision of services or direct formal dispute resolution. Instead, it would allow for coordination and facilitation of such programs and more.

Over the past two decades of speaking at higher education law and policy conferences, I have seen an increase in the number of campuses that have created such a position. While each campus is different in how such a position works, having someone with a broad portfolio for planning and reacting (not dispute resolution or implementation of services) can be of great value on campus. At the University of Louisville, I was part of advocating for such a position. It was created, and the first person began in that role in 2016–2017. While that role has evolved, I believe that it has been a means of addressing issues ranging from parking for special events to animals on campus policies to facilitating discussions of postpandemic accommodations. The following section describes a framework for what someone in this role might do (depending on the campus) and other aspects of the position that can be useful.

## ***B. ADA Coordinator***

### *1. The “Why”*

The twenty-fifth anniversary of the ADA was 2015, and, at my suggestion, the annual Stetson Conference on Higher Education Law and Policy, allowed me to present a full-day program reflecting on the twenty-fifth anniversary. Because I had worked with the Association of Higher Education and Disability (AHEAD)<sup>163</sup>

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163 See <https://www.ahead.org/home>. Founded in 1977,

AHEAD is the leading professional membership association for individuals committed to equity for persons with disabilities in higher education. Since 1977, AHEAD has offered an unparalleled member experience to disability resource professionals, student affairs personnel, ADA coordinators, diversity officers, AT/IT staff, faculty and other instructional personnel,

on many occasions, including making presentations at their national and regional conferences, and knew many people from the principal higher education disability services organization, I thought it would be beneficial to include a co-presenter from the AHEAD leadership. Jim Kessler was my co-presenter, and the full-day program was so well received that the Stetson conference continued with full-day programs on disability issues every year after that until 2020 (when a half-day program was presented instead), with co-presentations each year. One of the concepts that was discussed and evolved throughout those years was the idea of an ADA coordinator, with a broad portfolio of responsibilities and connections.

The following framework for such a position was reflected in the 2018 *A Primer on Disability Discrimination in Higher Education*,<sup>164</sup> which has been adapted and updated for various audiences primarily for conference presentations. This also incorporates and reflects the 2021 research about disability services and oversight personnel on campus and the evolution of those responsibilities.<sup>165</sup>

The *Primer* reflects what has only become more apparent, which is that

Having effective policies, practices, and procedures (and personnel) for addressing proactively, reactively, and interactively the implementation of disability law on campus may benefit from ... personnel who are in a position to facilitate such policies. A thoughtful approach to this may be of value before federal agencies (Office for Civil Rights) contact a campus about a complaint. The value is not only to avoid liability, but also to gain positive public relations and to avoid unnecessary negative media attention. It is critical to note initially that this role is not intended to be a "check off" compliance officer (although there may be connection with those who engage in that role). The person filling this role is not expected to have all the answers, but they would be someone who knows where to find the answers, someone who works outside of silos, and someone who has good judgment.<sup>166</sup>

While most higher education institutions have a student services coordinator for disability issues and a "504" /HR person to address faculty and staff issues, many (most?) do not have a single person responsible for coordinating and addressing *all* the ADA /504 issues that might arise. Models exist for this on many campuses.

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and colleagues who are invested in creating welcoming higher education experiences for disabled individuals.

164 Laura Rothstein, *A Primer on Disability Discrimination in Higher Education*, 7 LAW & HIGHER EDUC. (2018), <https://www.mdpi.com/2075-471X/7/3/25/htm>. Conference Report published by *Laws* (ISSN 2075-471X), adapted for numerous conference presentations in 2018 and 2019, and revised and incorporated into subsequent conference outlines. This is an open-source document.

165 See <https://www.ahead.org/about-ahead/about-overview/knowledge-and-practice-communities/ada-coordinators> For a discussion of the shift in the evolution of administrative attention to disability issues on campus, see Sally Scott & Carol Marchetti, *A Review of the Biannual AHEAD Surveys: Trends and Changes in the Demographics and Work of Disability Resource Professionals*, 34 J. POSTSECONDARY EDUC. & DISABILITY 107 (2021), <https://files.eric.ed.gov/fulltext/EJ1319174.pdf>. This article describes a survey of practices since 2008 and notes that "the day to day work of disability resource offices on college campuses has undergone significant changes in this time period, potentially requiring new technical skills, expanded content knowledge, and increasingly complex professional judgement."

166 Rothstein, *Primer*, *supra* note 164, at 26.

They vary depending on the size and type of institution, the resources available for staffing, and several other factors. Some of them are part of a joint position as ADA/Title IX coordinator. Others are responsible only for ADA/504 issues. There are many benefits of having such a coordinator.

## 2. *The “What”*

The following is taken and adapted from the *Primer* (which is published as an open access document).<sup>167</sup> Issues that should be considered for attention in creating or adapting such a position include what is the job title and responsibility of the ADA coordinator, what oversight will that individual have over proactive development and review of policies, practices, and procedures, and how that individual will interact with other key administrators and others on campus. The issues will be resolved differently on different campuses. The following is a framework for thinking through what this administrator would do.

### a. Personnel

The first question is to whom should disability questions be referred? Should the title of the person be “ADA coordinator”? How is this distinguished on campus from other similar positions? How will stakeholders know to contact this person? What should the weblink say to describe the role of the “ADA coordinator”? What administrative offices on campus should be “connected” to this position? For example, should there be a reporting or other communication line to personnel in student services, housing, transportation, campus discipline, human resources, and so forth?

### b. Policies and Procedures

Is there already in place a position such as this with a different name? Most campuses already have administrative offices to handle disability student services and HR/employment issues (often referred to as the 504 officer, often combined with the Title IX officer).<sup>168</sup> Until recently, however, administrators in these positions were not engaged in proactive comprehensive disability policy with oversight for *all* campus activities affecting those with disabilities. The proposal for an “ADA coordinator” in this article is something broader than what is in place on many campuses, which is a noncentralized means of addressing disability issues. Is there a specific office that coordinates policies and procedures for everything from student admissions to housing, to food services, to classroom activities, to the health services, to sports and athletics, to new construction, to parking?<sup>169</sup> Or are all these issues being handled in silos? A centralized ADA coordinator office can do global and appropriately periodic evaluations and reviews of everything from architectural

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<sup>167</sup> *Id.* at 26–29.

<sup>168</sup> College campuses are already required to have a section 504 officer designated. For Department of Education regulations, see 34 C.F.R. subpt. E; for EEOC regulations applicable to employment on campus, see <https://www.ada.gov/resources/disability-rights-guide/#rehabilitation-act>.

<sup>169</sup> Offices (such as grievance offices) that resolve individual disputes would not be included in this position. It should not be designed to resolve disputes (rather to address concerns or situations), although if there are issues that are frequently disputed, the ADA coordinator could be involved to consider whether a change in policy, practice, or procedure could avoid future disputes.

barriers to procurement of technology equipment. That office can see the interconnection of issues, such as animals on campus, that may be treated differently in housing, employment, the campus library or classroom, or in a university-operated hospital. This is a “big picture” office that would look at all policies, practices, and procedures, identify where coordination is needed, prioritize issues that require renewed attention, and do so across programs as appropriate.

### c. Preparation

In addition to ensuring that thoughtful disability policies and procedures exist and that they are transparent and communicated to key people (both those providing service and those with disabilities who are seeking the service), an ADA coordinator office can be involved in developing, recommending, or facilitating a wide range of training activities. Coordination of disability issues on campus can provide a vehicle for ensuring that appropriate training includes who to train,<sup>170</sup> how often to provide training,<sup>171</sup> and what content the training should include for a wide range of activities,<sup>172</sup> and in what format.<sup>173</sup>

### 3. *The “How”* . . . . .

In thinking through not only “whether” such a position would be of value, but also “how” the office would work, the following are issues to be addressed in creating or changing such a position.

#### a. To Whom Does Person Report?

- President
- Provost
- Vice president
- HR
- Other, for example, student services, faculty senate, student senate, etc.

There is a significant benefit to having the reporting line be to the president or provost or other senior vice president. The reason is that when a memo about a

170 It is not just leadership (deans, chairs, department heads) who should be trained, but those with front-line contact (faculty and staff and even contract vendors).

171 Changes in faculty and staff occur frequently. Adjunct faculty, who may only be on campus for a year or semester can be particularly challenging.

172 It is important to keep in mind that there are an increasing number of “trainings” that universities are providing. These include Title IX (sexual harassment), campus violence/active shooter, natural occurrence (fire, tornado, earthquake), emergency health care (such as cardio-pulmonary resuscitation (CPR)), student records privacy (FERPA) and related confidentiality training, human subjects, and conflict of interest training for research faculty. Whether these are optional or required varies widely. Whether they are in person or through remote programs also varies.

173 On-line trainings through asynchronous means can be used given the number of issues for which a campus employee may need to be trained. These include responding to mental health conduct, active shooter situations, CPR training, evacuation procedures for tornadoes, etc.. There is no perfect system of training, so the ADA coordinator should be the person to assess how best to conduct trainings with the awareness that personnel change periodically (including adjunct faculty), policies and practices change, and that everyone has limited time.

particularly important issue (such as attendance for students with disabilities during a pandemic) goes out to campus leadership (deans, department chairs, program officials) and faculty and staff, it is likely to carry more weight if it comes from the president, vice president, or provost “on behalf of the ADA coordinator” than if it comes from the ADA coordinator.

**b. Who Are Key Parties for Regular Connection and Communication?**

- Senior leadership (deans, department chairs, programmatic heads)
- Dean of students and other student service offices
- Disability services office
- Faculty and staff governance bodies
- Athletics directors
- Housing
- Food service programs
- Libraries
- Parking
- Transportation
- Physical plant—new construction, renovations, repairs
- Technology
- Purchasing
- Campus security
- Student discipline office
- Health care programs—including university hospitals and clinics and campus health service providers for students (including for mental health)
- Museum or display venues
- Alumni offices
- Events offices—for concerts and events to which the public is invited (including graduation)
- Campus bookstore
- Student organizations (including fraternities and sororities that have differing relationships to university administrations)
- HR offices
- IT offices (including those with oversight over web design, teaching platforms, other technology systems)
- International activities offices (including study abroad and alumni tours programs)

While some of those listed above are obvious, others are less so. There are varying levels of knowledge and involvement with disability issues, but individuals in each office should at least have a general awareness about disability issues and know how to contact the ADA coordinator as a starting place with an issue. The failure to at

least have some sense of how certain activities might affect those with disabilities is sometimes referred to as “ableism.” For example, it is not unusual for snow removal or temporary work repairs to adversely affect accessible parking or pathways. While those responsible for the snow pile in the designated parking space might respond that it was only once or it was only temporary, from the perspective of the individual who needed that parking (perhaps just before taking an exam), that is an inadequate response. Hosting a special major event on campus (such as televised “College Game Day” may mean that the regular parking spots will be closed off—perhaps only for a few hours, perhaps only on a weekend, but the failure to communicate that to a staff member who works on Saturday and to arrange for alternate parking and to do so without reasonable notice is a problem.

### c. What Is the Authority?

Ideally, the ADA coordinator is there to break down silos, to be a resource about new and emerging issues (such as animals on campus or food allergy issues), rather than to be the place where disputes are addressed. It should be where problems can be headed off. Information can be shared. While it is essential that this individual have open lines of communication with university counsel, ideally, they should not “report to” university counsel. Care should be taken to communicate to those who might contact the ADA coordinator about the limitations of confidentiality. This can allow the ADA coordinator to give university counsel a “heads up” when a recurring issue comes to the coordinator’s attention, in order for university counsel to take proactive steps to address the situation. For example, if the ADA coordinator learned that an officially recognized student organization was hosting a social event in an inaccessible facility or that a continuing education program was being held in an inaccessible conference facility, the coordinator could advise the university counsel about that concern. The role of the ADA coordinator should not be to give legal advice, but to facilitate resolution when potential legal liability comes to light.

For these reasons, the following potential roles should be considered and included (or not) in planning for the position description:

- **Dispute resolution**

Ideally the ADA coordinator should not have the responsibility for addressing grievances or official complaints, but rather identify chronic issues or potential situations that could become grievances or official complaints. For example, a student could raise a question about the lack of choice of accessible seating at the football arena or whether peanuts should be sold in a closed basketball arena. Informal resolution or response to the issue could head off an OCR complaint, a lawsuit, or a media story that places the university in a bad light.

- **Ombudsperson**

Again, ideally, the ADA coordinator should not be an official “ombudsperson” to formally resolve disputes. The AD coordinator, however, could be able to initially steer someone to the ombudsperson or a dispute resolution office.

- **Policy development**

The ADA coordinator office is an ideal place to facilitate development of policies that may be needed to address new situations. For example,

e-scooters on campus can raise safety concerns and disability access concerns.<sup>174</sup> Having an office on campus to have a thoughtful response to the issue, taking into account many factors, can result in a policy that makes sense for that campus and may be something short of banning scooters.<sup>175</sup> Another issue every campus has had to deal with is animals on campus, which now has renewed attention because of the number of individuals who adopted pets during the pandemic and who would now like to bring them to campus (or at least to their housing). While other offices have probably attended to most employment accommodation issues, there will be those that arise that cut across a range of programs—students, faculty, staff, and the public. Animals on campus is a good example of where policy development (or at least facilitation of the discussion) can be of value to a range of offices—food services, housing, library, university health care settings, etc.

Another example would be universities that host dual enrollment courses, through which high school students come to campus and are enrolled in college courses. High school students with disabilities may not have an IEP or even a 504 plan, but participation in a college class may raise the need for accommodations that the student did know to seek out from the college instructor. Extension of time for tests or assignments or tutoring might be something the student receives in other high school classes, but the college instructor with no awareness of that would not grant or have a system to consider such a request.

- **Coordinator**

Given that the proposed title of the position is ADA “coordinator,” the role of “coordination” would certainly be an aspect of this administrator’s zone of responsibility. Coordination might mean opening lines of communication (breaking down silos) so that various administrators coordinate their actions. For example, a student with autism exhibiting stalking behaviors might “present” at a campus conduct disciplinary office or even with law enforcement. If lines of communication are coordinated for such situations between student services and others, a plan of action, such as communicating with the student about the behavior, setting boundaries, ensuring appropriate records of the behavior, are in appropriate offices. Many IHEs with 504 coordinators (or even ADA coordinators) have a position that is more “compliance” driven. Sometimes such positions are combined with Title IX coordination. While that is not ideal, resources are scarce at some universities, so it is better to have a combined position than not having the position at all.

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174 Safiha Abdulahi, *Scooters Spark Safety Concerns Across Campus*, <https://www.insidehighered.com/news/2022/12/16/e-scooters-spark-safety-concerns-across-campus>.

175 There are benefits to allowing scooters for those with disabilities. Gus Elexio, *Scooters Often Hired by Disabled Riders to Combat Pain and Fatigue*, <https://www.forbes.com/sites/gusalexio/2023/04/16/e-scooters-often-hired-by-disabled-riders-to-combat-pain-and-fatigue-survey-shows/?sh=35860f364a42>.

#### 4. *Some Details on the "How and What"*

For universities that want to create or adapt such a position, the following are suggested as areas where new or renewed coordination could be of value. What is often envisioned initially is focus on student services and employment issues and perhaps some physical facility issues. What the list below suggests is that a broader area of programmatic oversight is beneficial. Possible areas of oversight could include

- Students (including student organization activities)
- Faculty
- Staff
- Physical plant operations (including parking and sidewalks)
- Facilities planning (including new construction, alterations, renovations, and repairs)
- Food services
- Health services (including mental health services)
- Housing (both owned and facilitated)
- Access areas (libraries, sports and performance arenas, student centers)
- Alumni events
- Visitors to campus (for sporting and performance events, hosted conferences or speakers or workshops, patients or clients in clinics or hospitals, admissions applicants, employers for on-campus interviews)
- Transportation systems on campus
- Programs abroad
- Placement of students in externships, internships, clinics, and other academically related student learning settings
- Athletics (both intercollegiate and intramural)
- Health care programs (university-operated hospitals and clinics)
- Technology (including websites and open-source documents provided by faculty and others)
- Fraternities and sororities (special issues of "private clubs" require attention)
- Purchasing

When thinking through the array of disability issues that fall into these categories and what role the ADA coordinator would have on those issues, there are a number of activities that could be carried out (or coordinated) by this office. These include training and engaging in a self-evaluation (or developing a program of periodic self-evaluation) that is feasible. Most IHEs engage in a self-evaluation of physical plant issues pursuant to section 504 compliance and later for ADA Title II compliance. As new programs are added, programs are relocated to different space, buildings are renovated, and other major changes occur; having someone assess the impact of such changes on disability access is of great benefit to the institution. An ADA coordinator can act as a sounding board for some changes. For

example, if a large parking lot is being removed due to construction of a building, what impact might that have on accessibility?

There are several skills and qualities that are key for an ADA coordinator. These include the following:

- **Knowledge of law**—The individual need not have a law degree, but does need to have a basic understanding of the provisions of section 504 and the ADA and how they apply to a range of campus situations including students, employment, and architectural access. The individual should have a good working relationship and communications system with university counsel.
- **Knowledge of disability issues**—The individual should be someone who has awareness that disability issues on campus are much broader than ensuring that students with disabilities receive services and that the buildings need to have ramps or signage to where the accessible entrances are. There is no specific professional degree or training for that.
- **Communications skills**—The individual should have a record of sound judgment in communicating in a range of ways. For example, the individual would need to appreciate the impact of a campus-wide message on a sensitive issue (such as vaccinations or masking). This individual will need to communicate internally (with other administrators) and externally (with students, faculty, staff). When and how to communicate with the media is also key.
- **Ability to multitask**—Individuals in all leadership positions on campus must multitask, but the ADA coordinator will need to have the ability to prioritize what tasks are time sensitive and important and how to ensure that those with less urgency or importance do not get lost in the cracks.

Some IHEs that have an ADA coordinator have recognized the value of having an advisory committee for the position. While the advisory committee could have regularly scheduled or as-needed meetings, the role of members should be advisory only, not decision making.<sup>176</sup> The benefits of having such a committee are that it can provide an opportunity to discuss issues at a preliminary stage. Who is on the committee can impact the value of such consultation, and it should include representation from students and the most critical areas (such as disability services, HR, IT, and physical plant). Representatives from various areas could be invited on an ad hoc basis to discuss policy issues under consideration. For example, if an animals-on-campus policy is being discussed, having representation from student housing would be key for that discussion. Having the committee as a consultant or advisory only is recommended rather than decision making. While not every type of disability can be included without making the size of the committee too cumbersome, it is important not to just include issues of mobility and sensory impairments. Neurodiversity and mental disabilities (e.g., depression),

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<sup>176</sup> Initially after the University of Louisville adopted an ADA coordinator (combined with Title IX) position, an advisory committee that addressed ADA issues was created.

environmental sensitivities (food, scent, etc.) should also be considered. Thought should be given to the pros and cons of having reports or minutes of meetings for all discussions or whether that might chill open brainstorming. If such reports or minutes are prepared, thought should be given to whether those are “open records” or confidential records shared with university counsel or others.

Following are suggestions for some areas where new (or renewed) proactive policy would benefit from an ADA coordinator–facilitated discussion:

- Animals on campus (including all settings—housing, classrooms, employment settings, eating areas, etc.)
- Documentation to receive accommodations
- Dispute resolution—students, staff, faculty
- Technology (particularly website issues)
- Housing
- Faculty evaluation and appointment
- Mental health issues

Facilitation of appropriate training for various parties on campus is challenging because everyone has limited time, there are frequent changes of personnel in some offices, and other factors. The following should be prioritized in developing the range of training programs valuable to a proactive approach:

- Student services professionals
- Faculty (deans, associate deans, department chairs)
- Heads of key areas—housing, libraries, athletics, alumni, etc.

In facilitating the range of training activities, consideration should be given to the following:

- How often (recognizing limited time and change of personnel)
- In what format? On line? In person?
- Content?

When new policies are developed, it is important to consider how the ADA coordinator (or another administrator) will distribute them. Unfortunately, it is not unusual for university administrators who have never been teaching faculty not to realize that getting the attention of a faculty member during exam period or the beginning of a semester is not the best time. During those times, faculty members have planning, assessing, or preparing overload.

For those involved in faculty appointments and promotion and tenure and discipline (including provosts, deans, and department chairs), the following might be considered in light of disability issues:<sup>177</sup>

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<sup>177</sup> See *Accommodating Faculty Members Who Have Disabilities*, AAUP (Jan. 2012) <https://www.aaup.org/NR/rdonlyres/49CCE979-73DF-4AF4-96A2-10B2F111EFBA/0/Disabilities.pdf>. I was invited to provide input to the development of this document. It is a document that provides a much more detailed framework for faculty issues than can be set out in my article.

- Letter of appointment—essential functions (at the outset)
- Annual and other review processes
- HR policies on accommodation requests
- Ensuring compliance with privacy and confidentiality of information—challenge in committee review process
- Interactive process in considering reasonable accommodations
- Internal disciplinary and dismissal procedures
- Ensuring consistency for all similarly situated faculty in providing accommodations for situations other than disabilities
- Notice and due process
- Providing retirement and other human resources counseling and planning
- Ensuring that the interview process considers disability issues (inviting the applicant to identify any accommodation requests when being invited to campus for an interview; sharing the culture of expectations for the process)<sup>178</sup>

In implementing section 504/ADA policies, practices, and procedures for all areas, the following are guiding principles:

- Be interactive
- Be proactive
- Be consistent
- Individualized approach as appropriate
- Ensure access to procedures (websites, etc.)
- Avoid “overaccommodation” (to ensure that policies can be implemented fairly and consistently)
- Be holistic (avoid silos)
- Ensure transparency and good communication to all stakeholders

## VII. SUMMARY AND CONCLUSION

This article incorporates elements of the *Primer* on the status of legal interpretation of section 504 and the ADA for IHEs with a big picture review on the occasion of the fiftieth anniversary of major federal application of disability discrimination law to higher education. It provides a basic overview of the history, the major judicial developments (and regulatory application) on the issues that have received attention, and a focus on areas where it is likely that there will be increased attention. Finally, it sets out and encourages university counsel to encourage a proactive approach to the legal issues affecting disability issues on campus. Knowing the evolving areas provides several ways to avoid liability, protracted dispute resolution, wasted resources of

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<sup>178</sup> For example, if faculty candidates ordinarily stand when doing a “job talk,” this can be a barrier for not only those who use wheelchairs, but also for individuals with health impairments that make standing for long periods of time difficult.

time and money, and even damaging media or other public attention. I strongly encourage IHEs to consider developing or adapting a position of an “ADA coordinator.”

The article is intended to be a starting place with reference to more detailed information that analyzes the legal issues and provides a strategy for providing thoughtful and comprehensive proactive means for responding to a dynamic, complex, and challenging (but important) area of law. I have been privileged to have made higher education disability issues a focus in my scholarship and administrative and other service work since 1980. My knowledge of the broad scope of responsibilities for university counsel is the reason I target these messages to that audience. There are also many university leaders (presidents, provosts, and deans) who have law degrees, who may also appreciate the encouragement to develop a set of policies, practices, and procedures (and a “position” of ADA coordinator) to do what is often difficult in higher education—to work outside of silos proactively, rather than reactively.

Having an approach of not just doing what is legally required, but rather considering how disability issues can be addressed by what can and should be done will be likely to reduce costs to higher education institutions and will place them in a positive public perception position.

## APPENDIX A: SCHOLARSHIP ON HIGHER EDUCATION AND DISABILITY DISCRIMINATION BY LAURA ROTHSTEIN

### *Books and Encyclopedia Entries*

DISABILITIES AND THE LAW (in particular chapter 3 (Higher Education) and chapter 10 (Health Care) (4th ed. 2014 published in cumulative editions twice a year (with Julia Irzyk) (a fifth edition also to be updated twice a year is planned for 2024)

*Addressing Barriers to Educational Opportunities Arising from Disabilities*, in OXFORD HANDBOOK OF EDUCATION LAW ( (forthcoming)

*Students with Disabilities: A Half Century of Progress: Education of Students with Disabilities—Past, Present, Future*, in OXFORD HANDBOOK OF U.S. EDUCATION LAW 400 (Kristi L. Bowman ed., 2021)

### *Articles*

*Medical Education and Individuals with Disabilities: Revisiting Policies, Practices, and Procedures in Light of Lessons Learned from Litigation*, 46 J. COLL. & U.L. 258 (2021), <https://www.nacua.org/resource-library/resources-by-type/journal-of-college-university-law/index-by-volume/jcul-by-volume-landing-page/volume-46-number-2>  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4294222](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294222).

*Would the ADA Pass Today? Disability Rights in an Age of Partisan Politics*,” 12 ST. LOUIS UNIV. HEALTH L.J. 271 (2019). This article appears in a symposium issue on the ADA.

*A Primer on Disability Discrimination in Higher Education*, 7 LAW & HIGHER EDUC. (2018), <https://www.mdpi.com/2075-471X/7/3/25/htm>. Conference Report published by *Laws* (ISSN 2075-471X), adapted for numerous conference presentations in 2018 and 2019, and revised and incorporated into subsequent conference outlines. This is an open-source document.

*Puppies, Ponies, Pigs, and Parrots; Policies, Practices and Procedures in Pads: Pubs, Pads, Planes and Professions: Where We Live, Work, and Play, and How We Get There: Animals Accommodations in Public Places, Housing, Employment, and Transportation*, 24 LEWIS & CLARK ANIMAL L. REV. 13- (2018).

*Preserving Access for People with Disabilities*, 378 NEW ENG. J. MED. 2056 (2018).

*The Americans with Disabilities Act and Higher Education 25 Years Later: An Update on the History and Current Disability Discrimination Issues for Higher Education*, 41 J. COLL. & U.L. 531 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2629306](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629306).

*Impaired Physicians and the ADA*, 313 JAMA 2219 (2015), .

*Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment*, 75 OHIO ST. L.J. 1263 (2014).

*Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed, and What Are the New Issues*, 22 AM. UNIV. J. GENDER, SOCIAL POLICY & THE L. 519 (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2441240](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441240). (IHELG Monograph, 14-04, 2014, <http://www.law.uh.edu/ihelg/monograph/14-04.pdf>).

*Litigation over Dismissal of Faculty with Disabilities*, Appendix C of AAUP Report on Accommodating Faculty Members Who Have Disabilities (Jan. 2012)

*Telescopes, Microscopes, and Crystal Balls: Disability Discrimination Law and Policy in Higher Education: How Those in Higher Education Can and Should Influence Policy*, paper presented at the National Conference on Law and Higher Education, the Center, Stetson University College of Law upon receiving the William A. Kaplin Award for Excellence in Higher Education Law and Policy Scholarship, Feb. 7, 2011.

*Disability Rights*, in ENCYCLOPEDIA OF DIVERSITY IN EDUCATION (James A. Banks ed., 2012).

*Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J. COLL. & U.L. 843 (2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1653466](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653466).

*Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J. COLL. & U.L. 101 (2009).

*Strategic Advocacy in Fulfilling the Goals of Disability Policy: Is the Only Question How Full the Glass Is?* 13 TEX. J. CIV. LIBERTIES & CIV. RTS. 403 (2008).

*Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531 (2008).

*Southeastern Community College v. Davis*, in EDUCATION STORIES (Michael Olivas & Ronna Schneider eds., 2007).

*Millennials and Disability Law: Revisiting Southeastern Community College v. Davis: Emerging Issues for Students with Disabilities*, 34 J. COLL. & U.L. 167 (2007).

*Disability Law and Higher Education: A Roadmap for Where We Have Been and Where We May Be Heading*, 63 MD. L. REV. 101 (2004).

*Don't Roll in My Parade: Sports and Entertainment Cases and the ADA*, 19 U. TEX. L. REV. LITIG. 400 (2000).

*Higher Education and the Future of Disability Policy*, 52 U. ALA. L. REV. 241 (2000).

*Reflections on Disability Discrimination Policy: 25 Years*, 22 U. ARK. L. REV. 147 (2000).

*Higher Education and Disabilities: Trends and Developments*, 27 STETSON L. REV. 1 (1997)

*Higher Education and Disabilities: An Overview of 1995 Cases*, 23 J. COLL. & U.L. 475 (1997).

*The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Law*, 47 SYRACUSE L. REV. (1997), <http://ssrn.com/author=37905>.

*Health Care Professionals with Mental and Physical Impairments: Developments in Disability Discrimination Law*, 41 ST. LOUIS U.L. REV. 973 (1997).

*College Students with Disabilities: Litigation Trends*, 13 REV. LITIG. 425 (1994).

*The End of Forced Retirement: A Dream or a Nightmare for Legal Education?* ABA SYLLABUS (Jan. 1993).

*Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities*, 17 J. COLL. & U.L. 471 (1991).

*Section 504 of the Rehabilitation Act: Emerging Issues for Colleges and Universities*, 13 J. COLL. & U.L. 229 (1986).