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## Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues

Laura Rothstein

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# FORTY YEARS OF DISABILITY POLICY IN LEGAL EDUCATION AND THE LEGAL PROFESSION: WHAT HAS CHANGED AND WHAT ARE THE NEW ISSUES?

LAURA ROTHSTEIN\*

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While many portions of this Article are informed by work on a range of task forces, committees, workgroups, boards, and speeches given to organizations (including the Association of American Law Schools, the American Bar Association Section of Legal Education and Admission to the Bar, the Law School Admission Council, the National Conference of Bar Examiners, the National Association of Law Placement, the National Association of College and University Attorneys, and the Association of Higher Education and Disabilities), the views expressed in this Article are my own. I am also informed by my own experiences as a faculty member in legal education since 1976 and as an administrator (Director of Admissions, Associate Dean for Student Affairs, Associate Dean for Graduate Studies, and Dean) at various times since 1976.

I am grateful to a number of individuals and organizations that have provided opportunities for me to develop my perspectives on higher education and disability law. These individuals include Leigh Taylor, E. Gordon Gee, Betsy Levin, Frank (Tom) Read, the late Marilyn Yarbrough, and Michael Olivas. My work seeks to carry out my goal of being an “advocate through education”—that by informing individuals and institutions about the law, they might better put in place policies, practices, and procedures, and make informed decisions about how to address situations involving individuals with disabilities through proactive means rather than through litigation.

The preparation of this Article was assisted greatly by my research assistants Robin David Rice and Jonathan Rayman. Becky Wenning and Rita Siegwald were very helpful in preparing the manuscript drafts. I appreciate the support of my scholarship by Dean Susan Duncan.

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During law school at Harvard, Brandeis's eyes began to fail. He read constantly and suffered the eyestrain common to law students who read by gaslight. His eyes gave out completely, however, during the summer after his first year at Harvard, while he was 'reading law' in Louisville with his brother-in-law. [An oculist] counseled him to think more and read less. Brandeis decided that he could do so if his friends read to him, and it was in this fashion that he completed law school.<sup>1</sup>

#### I. INTRODUCTION AND OVERVIEW

A number of significant events occurred in 1973. In sports, the Miami Dolphins won the Superbowl,<sup>2</sup> Secretariat won the Triple Crown,<sup>3</sup> and Billie Jean King beat Bobby Riggs in the famous battle of the sexes on the tennis court.<sup>4</sup> *The Godfather* won the Oscar for Best Picture.<sup>5</sup> Eileen Heckart won the Oscar for Best Supporting Actress in *Butterflies Are Free* for her portrayal of the mother of a blind man who begins to explore independence.<sup>6</sup> Internationally, the Vietnam War was winding down and the Yom Kippur War occurred in Israel.<sup>7</sup> In the United States, Richard

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1. This is an example of an early "reasonable accommodation." See generally PHILIPPA STRUM, *LOUIS D. BRANDEIS, JUSTICE FOR THE PEOPLE* (1984).

2. See Tyler Holden, *President Obama Welcomes 1973 Super Bowl Champion Miami Dolphins to the White House*, WHITE HOUSE BLOG (Aug. 20, 2013, 5:15 PM), <http://www.whitehouse.gov/blog/2013/08/20/president-obama-welcomes-1973-super-bowl-champion-miami-dolphins-white-house>.

3. See Steve Marantz, *Sports in the '70s Secretariat's Belmont Simply Unforgettable*, BOS. GLOBE, Dec. 28, 1979, 1979 WLNR 1497.

4. See Gail Collins, *Rebattling the Battle of the Sexes*, N.Y. TIMES, Aug. 29, 2013, at A27, 2013 WLNR 21672248.

5. See *The Godfather (1972) Awards*, IMDB, [http://www.imdb.com/title/tt0068646/awards?ref\\_=tt\\_awd](http://www.imdb.com/title/tt0068646/awards?ref_=tt_awd) (last visited Apr. 20, 2014).

6. See *Butterflies Are Free*, IMDB, [http://www.imdb.com/title/tt0068326/awards?ref\\_=tt\\_awd](http://www.imdb.com/title/tt0068326/awards?ref_=tt_awd) (last visited Apr. 20, 2014).

7. See *Almanac*, DAILY PRESS, Mar. 29, 1997, at A2, 1997 WLNR 5963068; *Israel Pauses as Yom Kippur Is Observed*, BOS. GLOBE, Sept. 25, 1993, at 2, 1993

Nixon was sworn in for his second term as President, which would later end due to another 1973 event, the Watergate Hearings.<sup>8</sup> In the legal world, the Supreme Court decided *Roe v. Wade*<sup>9</sup> and *San Antonio v. Rodriguez*.<sup>10</sup>

Not widely recognized as a significant 1973 event, however, was the September 26 passage of the reauthorization of the Vocational Rehabilitation Act that included Section 504. Section 504 provides that:

No otherwise qualified individual with a disability . . . shall, solely, by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>11</sup>

The Vocational Rehabilitation Act marked a critical beginning to providing equal treatment and reasonable accommodations for individuals with disabilities in the United States, though its significance was not realized until much later.<sup>12</sup> There was certainly little, if any, consideration of what it might do to change legal education and the legal profession.

In 1973, no one anticipated the enormous impact this law—and later the Americans with Disabilities Act<sup>13</sup>—would have on legal education and the legal profession. In fact, for the first few years after its passage, very little happened—the Section 504 regulations were not in place until 1978.<sup>14</sup> Only a handful of lower court cases were decided in the early years, and the first Supreme Court case addressing any issue under Section 504 was not decided until 1979.<sup>15</sup> Many of the early cases arose in the context of higher education, particularly legal education and medical education, in part because higher education was one of the few categories of major institutions receiving federal financial assistance.

Under the Vocational Rehabilitation Act (now generally referred to as the Rehabilitation Act or the Rehab Act), courts, government agencies, and Congress have developed the application of disability discrimination law,

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WLNR 1934166.

8. *See id.*

9. 410 U.S. 113, 153 (1973) (extending the right to privacy to include a woman's decision on whether to have an abortion).

10. 411 U.S. 1, 29 (1973) (addressing the issue of school finance).

11. 29 U.S.C. § 794 (2012). The original statute used the term “handicap” instead of “disability.”

12. *See* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 20 (2001).

13. 42 U.S.C. § 12101 (2012).

14. *See* 47 Fed. Reg. 2132 (Jan. 13, 1978).

15. *See* LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW (Fall 2013 & cumulative eds.) [hereinafter DISABILITIES AND THE LAW].

thus producing an enormous body of judicial opinion and regulatory guidance.

When the Americans with Disabilities Act (ADA) was enacted in 1990 with virtually the same legal requirements as the Rehabilitation Act, it made disability discrimination directly applicable to the legal profession. The ADA affected both the employment of attorneys and the provision of services to clients with disabilities.<sup>16</sup> Additionally, bar admission authorities were now subject to the ADA, although they had not been subject to the Rehabilitation Act.<sup>17</sup> The 2008 ADA Amendments<sup>18</sup> broadened the definition of coverage by making the focus more on whether the individual is otherwise qualified, and what reasonable accommodations are required, and less on whether the individual has a disability.<sup>19</sup>

This Article examines the history of disability discrimination law, its impact on higher education and legal education, and its eventual impact on the legal profession. It discusses how the ADA, as enacted in 1990, substantially broadened protection for people with disabilities and suggests that having the earlier Rehabilitation Act apply only to a narrow sector of society may have been good for disability rights generally, and for legal education and the legal profession in particular.

The Article reviews how these two major statutes have affected the policies, practices, and procedures of the American Bar Association, the Association of American Law Schools, the Law School Admission Council, the National Board of Bar Examiners, and other related organizations with respect to individuals with disabilities. It examines the current status of legal education and the legal profession with respect to individuals with disabilities. Part II lays the historical foundation for each of these influential statutes. Part III presents a range of issues facing current law students and lawyers, including the clients they may represent and where and how they represent them. Part III also addresses architectural barriers and concerns for faculty members with disabilities.

The Article focuses on current issues receiving substantial attention, how those issues have been addressed in the past, and why they are important today. Part IV identifies areas where additional attention is needed, including research, reconsideration, and education. Part V recommends approaches to address those issues proactively. While much of the Article provides a general overview of how courts and others have applied the

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16. 42 U.S.C. § 12101.

17. *See id.* (mandating that state bar admission authorities are state governmental agencies under Title II of the ADA despite not receiving federal financial assistance).

18. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

19. *See* DISABILITIES AND THE LAW, *supra* note 15.



requirements of the Rehabilitation Act and the ADA, several issues will receive greater analysis because of continuing tension and questions about the application of certain statutory and regulatory requirements.

## II. HISTORICAL OVERVIEW

Disability discrimination law arises from a combination of statutes relating to government benefits and constitutionally-based equal protection and due process arguments. Activism in the late 1960s and 1970s around civil rights, equal rights, and social justice issues set the context for the rise of major disability “discrimination” laws. For individuals with disabilities—referred to during that time as “the handicapped”<sup>20</sup>—the attitude was one of paternalism and protection. This often meant the segregation of individuals with disabilities and funding for their care. Inclusion, or ensuring that the structures and supports were in place to provide for inclusion, was certainly not the motivating philosophy.

The 1954 decision of *Brown v. Board of Education*, in which the Supreme Court determined that separate but equal education was not constitutional, marked a change in the philosophy towards individuals with disabilities.<sup>21</sup> This change would later prove to have an indirect impact on individuals with disabilities in higher education. The more determinative and specific change for these individuals came with the 1973 reauthorization of the Vocational Rehabilitation Act.

A 1918 predecessor to the Rehabilitation Act provided funding to ensure the rehabilitation of returning war veterans.<sup>22</sup> Later versions provided for vocational training for those with disabilities.<sup>23</sup> Before 1973, the Vocational Rehabilitation Act had been reauthorized on a periodic basis to provide funding to ensure entry into the workplace, primarily for veterans and others with disabilities.<sup>24</sup> In 1973, when the Act was up for renewal, some congressional staff members moved to prohibit programs receiving federal financial assistance, as well as federal agencies and federal contractors, from discriminating on the basis of “handicap.”<sup>25</sup> This was

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20. The preferred terminology today is to use “people first” language, e.g., person with a disability, not “disabled person” or “the disabled.”

21. *Brown v. Board of Education*, 347 U.S. 483 (1954).

22. See Veterans Rehabilitation (Smith-Sears) Act of 1918, ch. 107, 40 Stat. 617 (1918) (amended 1919) (providing rehabilitation funds for World War I veterans).

23. See Civilian Vocational Rehabilitation (Smith-Fess) Act, Pub. L. No. 66-236, 41 Stat. 735 (1920) (repealed 1973, and reenacted in the Vocational Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973)) (establishing a broader program for all individuals).

24. See SCOTCH, *supra* note 12, at 20.

25. See generally *id.*

seen as continuing the philosophy of Title IX and Title VI of the Civil Rights Act, which prohibited federal support of programs that discriminated on the basis of gender and race, respectively.<sup>26</sup> Congress, however, engaged in little debate, and there was likely a lack of a clear understanding of what “handicap” nondiscrimination meant.

The amendments were passed with little fanfare, no signing ceremony, and little, if any, press coverage or public attention.<sup>27</sup> The new Rehabilitation Act included coverage for federal contractors and federal agencies, but it was the provision relating to federal financial assistance that would prove significant for legal education and the legal profession. Initially, the legal profession was affected in only a few areas but as the application of Section 504 evolved and came to be applied to higher education, Section 504 began to have a larger impact on the legal profession.

Before providing a general overview of how the two key statutes—the Rehabilitation Act and the ADA—apply to legal education and the legal profession, the significance of a third statute should be noted. The Education for All Handicapped Children Act of 1975 (later the Individuals with Disabilities Education Act (IDEA)) provided for comprehensive programs of special education for all students with disabilities in public schools.<sup>28</sup> The IDEA included principles of individualization and least restrictive environment—concepts that are part of the nondiscrimination philosophies governed by the Rehabilitation Act and the ADA. Beginning in 1975, the passage of IDEA meant that students in public schools, and even many private schools, started receiving an education that would prepare them to enter college, and eventually, graduate and professional education.<sup>29</sup> While it would take a few years for these students to reach college age, their presence significantly increased the pressure to apply principles of nondiscrimination and reasonable accommodation in a mainstream setting to higher education. Not only were the students prepared, but their parents had learned to use procedural safeguards to press for inclusion, nondiscrimination, and accommodations.<sup>30</sup>

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26. NANCY LEE JONES, CRS REPORT 34041, SECTION 504 OF THE REHABILITATION ACT OF 1973: PROHIBITING DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL ASSISTANCE (2009).

27. *See generally id.*

28. 20 U.S.C. § 1400 (2012); *see also* DISABILITIES AND THE LAW, *supra* note 15, at 91.

29. *See* DISABILITIES AND THE LAW, *supra* note 15, at 92.

30. *See* Adeen Postar, *Selective Bibliography Relating to Law Students and Lawyers with Disabilities*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1237 (2011). *See generally* Laura F. Rothstein, *Disability Rights*, in ENCYCLOPEDIA OF DIVERSITY IN

*A. The Statutes and Regulations*

*1. Key Principles*

Before examining how these statutes apply in specific contexts of particular relevance to legal education and the legal profession, it is helpful to know the key principles common to both the ADA and Section 504 of the Rehabilitation Act. First, to be protected, an individual must have a disability. Those who are associated with individuals with disabilities are also protected, but that is not a major issue for purposes of this Article. The ADA Amendments of 2008 clarified that the definition of disability is to be read broadly.<sup>31</sup>

Documentation sometimes can be required to demonstrate both the existence of a disability and the relationship of the disability to a requested accommodation. Although the documentation required should not be burdensome, the required showing will depend on the circumstances.<sup>32</sup> Individuals are only protected if they are otherwise qualified to perform or carry out the essential requirements of the program. In having these requirements, the ADA incorporates a principle that an individual who poses a direct threat might not be otherwise qualified. There is an ongoing debate about situations where the threat is to self, but not others, and if those situations are included in the principle.<sup>33</sup>

Generally, the burden is on an individual claiming discrimination to demonstrate that the defendant entity was aware that she had a disability because an individual is only protected against discrimination based on “known” disabilities.<sup>34</sup> Unlike special education laws—where the burden is on the educational agency to reach out, identify, and screen for disabilities—Section 504 and the ADA place that obligation on the individual with a disability, including the obligation to pay for documentation.

Substantively, the two statutes provide for both nondiscrimination and reasonable accommodations and require that “reasonable” efforts must be in place to ensure access. Accommodations that are unduly burdensome, either financially or administratively, or that fundamentally alter the nature of the program, are not required. The reasonable accommodation mandate

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EDUCATION (2011). The readings cited in this bibliography are referenced in the appropriate footnotes throughout this Article, but this bibliography is especially useful because it collects the citations in one place.

31. See 42 U.S.C. § 12101(b)(1) (2012).

32. See *infra* Part III.B.6. This is a contentious area and will be discussed later.

33. See *infra* Part III.A.3.

34. See *infra* Part III.B.8.c.

has been the focus of much litigation.<sup>35</sup> Architectural design standards, removal, and barrier removal requirements are forms of accommodation. Other accommodations include providing auxiliary aids and services and modifying policies, practices, and procedures. All disability discrimination laws include the principles of non-segregation or least restrictive setting. It is still possible, however, that some situations could override the general principle of non-separate programming, such as testing in a separate room to avoid distraction.

Disability discrimination disputes are more likely to be resolved before they reach the litigation stage, through an interactive process, as required by law. While there is guidance on what discrimination means in various settings; each situation must be addressed individually. The concept of individual determination is consistent with the general principle that the qualifications and expectations of academic or work performance or other program participation performance should be determined on an individual basis. For example, automatically excluding individuals who are blind from jury pools fails to make an individualized assessment of their qualifications.

Finally, the requirements for Section 504 and the ADA are to be read consistently.<sup>36</sup> The 2008 amendments to the definition of disability were incorporated within the statutory revisions to apply specifically to Section 504. Even without such specific reference, a general principle is that judicial interpretations apply to both Section 504 and the ADA, and the statutes are to be interpreted consistently.

## 2. *Section 504 of the Rehabilitation Act*

Section 504 of the Rehabilitation Act, as originally enacted, provided:

No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>37</sup>

When the ADA was passed in 1990, it amended the Rehabilitation Act to change the term “handicap” to “disability,” making it consistent with the ADA language.<sup>38</sup> The term “disability” covers individuals who have an impairment that substantially limits one or more major life activities.<sup>39</sup>

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35. *See infra* Part II.B.

36. *See* 42 U.S.C. § 12101(a)(3).

37. 29 U.S.C. § 794 (2012).

38. Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12113, 47 U.S.C. § 225 (2000)).

39. 29 U.S.C. § 706(8)(B). A later section of this Article provides a detailed

Also important to note are *which* programs are subject to Section 504 and what is prohibited or required of those programs.

The 1973 Rehabilitation Act applies to three types of programs. Section 501 applies to programs of the federal government,<sup>40</sup> Section 503 applies to federal contractors,<sup>41</sup> and Section 504 applies to recipients of federal financial assistance. Section 501 and Section 503 had a minor impact on legal education and the legal profession, with the exception of employment of attorneys in federal agencies. The impact of Section 504, however, was much more substantial. Virtually all law schools are subject to Section 504 because most receive federal financial assistance for scholarship support. Other federal support is occasionally received through federal grants. For those law schools that are a part of a larger university, if that university receives federal funding, then all aspects of the program are subject to Section 504.<sup>42</sup>

In 1973, law schools and some state and local government programs relating to the legal profession received federal funding, but most employers were not subject to any federal mandate for nondiscrimination based on disability. The Law School Admission Council, which administers the Law School Admission Test (LSAT), did not have a direct obligation under Section 504 because it did not receive federal funding. Bar examining agencies, which are creatures of state governments, state supreme courts, and other state agencies, were similarly not directly affected.

Programs that were subject to the Rehabilitation Act were prohibited from discriminating based on disability. The model regulations made clear that programs and employers subject to Section 504 were required to provide a variety of reasonable accommodations, including physical environment, auxiliary aids and services, and modification of practices. The mandate also incorporated the philosophy of an integrated environment through the regulations.

For several years after the enactment of the 1973 Rehabilitation Act, little happened in law schools or employment settings for a few reasons. First, the 1975 special education statute was not in place, meaning that a significant number of students with disabilities were not seeking entry into law school or the legal profession. Second, the Rehabilitation Act, unlike

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discussion of the definition of *who* is protected as a person with a disability, including who is classified as being otherwise qualified. *See infra* Part III.A.

40. 29 U.S.C. § 791.

41. *Id.* § 793.

42. *See id.* § 794(b). In 1987, Congress amended Section 504 to provide that all operations of a program are subject to Section 504 if any part of the program receives federal funding.

the ADA, received virtually no publicity. In an era without the Internet, advocacy groups and media outlets struggled to increase awareness. Third, regulations were not in place for five more years.<sup>43</sup> It took a major advocacy group protest for the regulations to be promulgated.<sup>44</sup> Finally, unlike the very detailed provisions of the ADA, Section 504 was initially, and still remains, a fairly sparse statute. Very little language spells out who is covered and what is required by covered organizations.

After the protests, the U.S. Department of Health, Education, and Welfare (HEW)<sup>45</sup> promulgated model regulations.<sup>46</sup> These were to be used as a framework by all federal agencies receiving federal funding.<sup>47</sup> The model regulations included several parts: the general provisions; employment practices; program accessibility, referencing both existing and new construction; preschool, elementary, and secondary education; and health, welfare, and social services.<sup>48</sup> Many institutions of higher education received federal funding for their university hospitals and for research, which resulted in the entire university being covered.<sup>49</sup>

Of most significance for legal education were the regulatory provisions related to postsecondary education. These provisions included references to admissions and recruitment; general treatment of students; academic adjustments (the reasonable accommodations provision); housing, financial, and employment assistance to students; and nonacademic services (another reasonable accommodations provision).<sup>50</sup> These regulations became the starting place for early litigation under Section 504.

The Supreme Court did not address any issue under Section 504 until 1979, six years after the passage of the Rehabilitation Act. Prior to the 1979 decision, only two or three other lower courts had considered cases brought under Section 504. The first Supreme Court case was

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43. Coordination of Federal Agency Enforcement of Section 504 of the Rehabilitation Act of 1973, 43 Fed. Reg. 2132, 2132 (Jan. 13, 1978). These regulations had a major impact on law schools. Virtually all law schools are subject to the Rehabilitation Act because either they receive federal student loans or the universities of which they are a part receive federal assistance.

44. *Cf. Cherry v. Matthews*, 419 F. Supp. 922 (D.D.C. 1976).

45. HEW was later abolished and its role taken on by the U.S. Department of Education (DOE) and the U.S. Department of Health and Human Services (HHS).

46. 43 Fed. Reg. at 2132.

47. *See id.*

48. *See id.* at 2136.

49. For a discussion of how the law evolved to cover all aspects of an institution receiving federal financial assistance, see DISABILITIES AND THE LAW, *supra* note 15, § 1:6.

50. 34 C.F.R. § 104.41-.47 (2014).

*Southeastern Community College v. Davis*,<sup>51</sup> which did not involve legal education but had a significant impact on law schools.<sup>52</sup>

### 3. *The Americans with Disabilities Act of 1990*

As opposed to Section 504, the passage of the ADA was the result of a major advocacy movement.<sup>53</sup> Although the initial response to Section 504 was somewhat limited, activists played a major role in getting the model regulations promulgated in 1978.<sup>54</sup> Many of the earliest cases under Section 504 provided valuable clarification by addressing procedural and remedial issues. A number of cases also addressed substantive issues, including who is disabled, what accommodations are reasonable, and what it means to be otherwise qualified. Much of the early litigation involved college students because higher education was one of the few areas that were comprehensively covered by Section 504.<sup>55</sup> Not surprisingly, many of these early cases involved students in graduate and professional programs, for whom the stakes are high. This early case law would prove to be a valuable framework for incorporating specific statutory language responding to those developments.

It soon became apparent that the statute's protections were not complete because coverage was limited and many terms needed clarification. The application of Section 504 to only programs receiving federal financial assistance left out the majority of the private employment sector, programs offered by private entities that are used by the public, and programs operated by state and local governmental entities that do not receive federal financial assistance.<sup>56</sup> By the time advocates began to press for a more comprehensive statute, Section 504 had created a greater awareness of disability rights. Additionally, engaging with broader communities became easier by virtue of the growing use of email and the Internet, which made

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51. *Washington v. Davis*, 442 U.S. 397 (1979).

52. The issue in *Davis* was what it means to be "otherwise qualified" for admission to a nursing program. *See id.* at 400. *Davis* is discussed in more detail later. *See infra* Part II.A.2. It is noted here to highlight the slow development of legal guidance under Section 504.

53. 20 U.S.C. § 12101 (2012).

54. In 2011, PBS produced the documentary, *Lives Worth Living*, which interviews key leaders about the activism that led to the passage of the ADA and provides some of the background to the passage of the Rehabilitation Act.

55. *See generally* Laura Rothstein, *The Story of Southeastern Community College v. Davis: The Prequel to the Television Series "ER,"* in EDUCATION LAW STORIES (2008).

56. For example, law students, law professors, and lawyers may attend conferences in hotels not covered by the Rehabilitation Act.

communication and advocacy more efficient. While the story of the movement to enact the ADA is a fascinating one, it is beyond the scope of this Article.<sup>57</sup> On July 26, 1990, President George H.W. Bush signed the legislation, calling it “independence day” for people with disabilities.<sup>58</sup>

The ADA has three titles that are of major significance to legal education and the legal profession. Title I applies to employers with fifteen or more employees;<sup>59</sup> Title II applies to state and local governmental programs, whether they received federal financial support or not;<sup>60</sup> and Title III applies to twelve categories of privately provided programs that are open to the public.<sup>61</sup> Title III categories include educational programs<sup>62</sup> and service establishments, including law offices.<sup>63</sup>

While it would be unlikely that federal law would protect a law student or attorney in most employment settings before the ADA, Title I extends coverage to most employers. Before the enactment of the ADA, an individual seeking legal services from a private law firm did not have a federal avenue of redress for discrimination on the basis of disability or a means of seeking reasonable accommodations. The ADA now provides protection to those individuals. State bar admission programs are now covered under Title II. The Law School Admission Council is a Title III program. State and local courthouses, jails, and other government justice programs are subject to Title II. Events and conferences hosted by private entities are subject to ADA requirements, and the hotels, restaurants, and other venues that host these events face a range of requirements about access and nondiscrimination. The transportation systems to reach all of these programs are also subject to either Title II or Title III protections.

Specific requirements regarding physical access to facilities were incorporated into the language of the ADA. These requirements provided clarity and specific design standards for existing facilities, alterations, renovations, and new construction. While some of these requirements had been in place through Section 504 regulations, the incorporation into the

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57. An earlier version of the ADA was almost passed in 1989, but it was pulled back to address concerns of small businesses about the cost of accommodations and concerns of the food industry about public health issues when employees with HIV were involved in food service or preparation. By 1990, those concerns were addressed.

58. See George H.W. Bush, President of the U.S., Remarks at the Signing of the Americans with Disabilities Act on the South Lawn (July 26, 1990), available at <http://whitehouse.c-span.org/Video/ByPresident/George-H-W-Bush-Signs-ADA.aspx>.

59. 42 U.S.C. §§ 12111-12117 (2012).

60. *Id.* §§ 12131-12165.

61. *Id.* §§ 12181-12213.

62. *Id.* § 12181(7)(J).

63. See *id.* § 12181(7)(F).



ADA statutory language itself was important. The ADA benefitted from having seventeen years of litigation and judicial guidance from the Rehabilitation Act to draw on. Many significant requirements from both regulations and judicial decisions under Section 504 became part of the statutory language in the ADA. Unlike Section 504, under which regulations were not promulgated or litigated for several years, the ADA resulted in both a substantial body of case law and an array of regulations and agency guidance that were put into place fairly quickly.

#### *4. The Americans with Disabilities Amendments Act of 2008*

Although the 1990 ADA was intended to be read broadly, the definition of who was covered and entitled to protection became a major issue throughout litigation.<sup>64</sup> Determining who was covered may not have been given as much attention early on because higher education and healthcare entities were the primary programs affected by Section 504, and the cases arising in those settings tended to be about whether the individual was “qualified,” whether there had been discrimination, and whether the accommodations being sought were reasonable. There were also some architectural barrier cases in higher education. Only a few cases directly addressed the definition of “disability.”<sup>65</sup>

Before the ADA, ineffective procedures and remedies shielded employers from pressure from state and local discrimination laws. After its enactment, employers faced a new set of expectations, including reasonable accommodations, and began to push back.<sup>66</sup> One tactic involved filing a motion to dismiss a case on the grounds that the individual was not “disabled” under the ADA. The culmination of this litigation occurred in what is known as the “*Sutton* trilogy.”<sup>67</sup> The Supreme Court addressed three consolidated cases involving employment, all in the transportation industry. The plaintiffs included sisters with 20/200 correctable vision who sought positions as airline pilots, an individual with uncorrectable monocular vision who sought a position as a truck driver, and an individual with high blood pressure controlled by medication who sought employment

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64. This had not been a major issue under the Rehabilitation Act, although it did receive some attention. See *DISABILITIES AND THE LAW*, *supra* note 15, at 33.

65. See *id.* at 35-36. The major exception was cases relating to learning disabilities.

66. Employers often found it burdensome to respond to a request for accommodations, and they perceived the administrative process and potential costs to be onerous.

67. See generally *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 562 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999).

with UPS as a mechanic.<sup>68</sup> The Supreme Court adopted what is known as the “mitigating measures” defense in a controversial decision. The Court held that a determination of whether a disability exists should take into account mitigating measures that might correct or ameliorate the condition.<sup>69</sup> The Court remanded a case of substantial relevance to legal education and the legal profession the same day it decided the *Sutton* trilogy cases. *Bartlett v. New York Board of Law Examiners* involved a bar applicant seeking accommodations for her learning disabilities.<sup>70</sup> The Court remanded the case for further assessment of whether Ms. Bartlett would be considered “disabled,” in light of the holdings in the *Sutton* trilogy.<sup>71</sup> The Court further narrowed the definition of “disabled” in *Toyota Motor Manufacturing v. Williams*, when it addressed “major life activities” as part of the disability definition.<sup>72</sup> The Court determined that a major life activity is one related to performing tasks central to the daily lives of most people and remanded the case in light of that standard.<sup>73</sup>

The combined output of these decisions gave rise to a strong advocacy effort to amend the ADA definition to comport with what Congress had originally intended when it enacted the ADA in 1990. In 2008, Congress passed the ADA Amendments Act, which broadened and clarified the definition of “disabled” and included substantial guidance on the meaning of “major life activity.”<sup>74</sup> The amendments also incorporated clarifying language from regulations, regulatory guidance, and judicial decisions.<sup>75</sup>

### *B. Judicial Attention and Federal Agency Attention Generally*

The role of the courts is central to the evolution of disability discrimination law. A dynamic process has taken place over the past forty

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68. See *Albertson's Inc.*, 527 U.S. at 475, 518, 558-59.

69. See *id.* at 475, 520, 556.

70. *N.Y. State Bd. of Law Exam'rs v. Bartlett*, 527 U.S. 1031, 1031 (1999), *vacating*, 156 F.3d 321 (2d Cir. 1998), *remanded to* 226 F.3d 69 (2d Cir. 2000). Subsequent litigation on remand determined that the plaintiff, Marilyn Bartlett, was disabled within the ADA definition. See 226 F.3d at 74-75.

71. That issue is discussed in more detail later in this Article. See *infra* Part III.A.1.a.

72. See 534 U.S. 184, 200-01 (2002).

73. See *id.* at 196-98.

74. See ADA Amendments Act of 2008, 42 U.S.C. § 1202(a) (2012). The revised statute incorporates the language from the amendment provisions. The findings and purpose of the revised ADA make clear that the courts had incorrectly applied and interpreted the requirements of the ADA. See *id.* § 12101(6)-(8).

75. See *id.* The impact of these amendments is addressed generally, and in the context of legal education and the legal profession, later in this Article.

years, where the judicial response to statutory and regulatory provisions has been met with congressional or legislative response or with federal agency regulations, interpretive guidance, and opinion letters.<sup>76</sup>

Following the passage of Section 504 of the Rehabilitation Act, the statute received very little judicial attention. It is possible that a number of cases were filed but were settled and never reached the attention of scholars or advocates, but it is more likely that Section 504 was hampered by a combination of factors within the first decade of its existence. Awareness of the law and its impact were not well known. Plaintiffs were few, especially in the higher education context. Representation was not generally available because few attorneys were knowledgeable about or experienced with these issues.<sup>77</sup> Moreover, few attorneys were interested in taking on cases where there was little, if any, guidance from treatises or regulations.<sup>78</sup> Virtually no agency guidance existed outside of the model regulations.

The early cases tended to focus on procedural issues, especially standing. The judiciary gave little guidance on whether discrimination or a denial of reasonable accommodation had in fact occurred. The first Supreme Court decision on the statute, *Southeastern Community College v. Davis*, addressed the important substantive issue of what it means to be “otherwise qualified” in order to determine whether discrimination had occurred.<sup>79</sup>

It was apparent by 1981 that institutions of higher education were concerned with the finances associated with providing accommodations. Initially, the costs involved were related to providing interpreters to students with hearing impairments, or providing materials in Braille or large print for students with visual impairments.<sup>80</sup> Requests for additional time and other accommodations for students with learning disabilities did not come until later. At issue in *University of Texas v. Camenisch* was a

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76. See Laura Rothstein, *Higher Education and Students with Disabilities: A Fifty Year Retrospective*, 36 J.C. & U.L. 846, 853, 862 (2010).

77. Laura Rothstein, *Teaching Disability Law*, 48 J. LEGAL EDUC. 297, 299 (1998).

78. One of the major reasons that I wrote my first book on disability rights, *RIGHTS OF PHYSICALLY HANDICAPPED PERSONS* (1984), was the recognition that few attorneys would take disability rights cases because no reference material was available to provide guidance. The title of the book was changed to *Disabilities and the Law* for its next edition, and the book is now published by ThomsonWest. It is cumulatively updated twice a year because of the enormous number of cases.

79. 442 U.S. 397, 400 (1979).

80. Technology has changed this to some degree, as other accommodations are now available. Captioning Access and Realtime Translation (CART) provides verbatim transcription of spoken text at live events for individuals with hearing impairments. Job Access with Speech (JAWS) readers are computer screen readers for individuals with visual or learning impairments.

request by a graduate student for an accommodation in the form of a sign language interpreter.<sup>81</sup> Most students could not receive such services at the graduate level through state agencies because of state vocational rehabilitation funding priorities. The student had turned to the University of Texas (a large university with substantial resources) to pay for those services.<sup>82</sup> Although the Supreme Court granted certiorari and heard oral arguments, it declined to actually decide the case based on procedural grounds.<sup>83</sup> Among circuit court decisions in 1983 were *Jones v. Illinois Department of Rehabilitation Services*<sup>84</sup> and *Schornstein v. New Jersey Division of Vocational Rehabilitation Services*,<sup>85</sup> both of which provided clarification that seems to have become the generally accepted standard. The courts in those cases held that state vocational rehabilitation agencies are in most circumstances primarily responsible for providing the services, but where students are not eligible for state vocational rehabilitation funding, the higher education institution is secondarily responsible.<sup>86</sup>

In 1981, the Supreme Court was poised to address important issues in a case relevant to legal education and the legal profession, *University of Texas v. Camenisch*.<sup>87</sup> A decision would have had a significant impact, but the Court decided the case was moot.<sup>88</sup> It came before the Court in a preliminary injunction posture, making a further substantive decision no longer relevant.<sup>89</sup> The case involved a deaf graduate student who requested that the university pay for his sign language interpreter because he was not eligible for funding from the state vocational rehabilitation agency.<sup>90</sup> The lack of decisions left programs of higher education with no guidance about

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81. See 451 U.S. 390, 393 (1981).

82. See *id.* at 392.

83. See *id.*

84. 689 F.2d 724, 729 (7th Cir. 1982) (involving a deaf student majoring in mechanical engineering who was seeking interpreter services).

85. 519 F. Supp. 773, 778, 780 (D.N.J. 1981), *aff'd*, 688 F.2d 824 (3d Cir. 1982) (involving a deaf student seeking a college degree in social work and psychology who intended to become a teacher of students with disabilities).

86. See *id.*

87. 451 U.S. 390, 394 (1981).

88. The series of cases relating to deinstitutionalization might have clarified least restrictive or mainstreaming issues in some settings. Two other Supreme Court dispositions were not decisive because of their remand to lower courts, and they also related less to the kinds of issues affecting legal education and the legal profession. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124 (1984) (addressing deinstitutionalization cases on procedural grounds and not reaching the substantive claims); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 5 (1981).

89. See *Camenisch*, 451 U.S. at 398.

90. See *id.* at 391.

payment responsibility for accommodations.

It was not until 1990 that a circuit court decision addressed the funding issue again. In *United States v. Board of Trustees for University of Alabama*, the issue of financial responsibility for services was considered again.<sup>91</sup> In that case, the University of Alabama had implemented a policy requiring students to pay for services based upon a financial needs test.<sup>92</sup> The court struck this down as impermissible, although it allowed a policy requiring the student to seek services from other sources first.<sup>93</sup> It is interesting to note that while the Court in *Southeastern Community College v. Davis* and *United States v. Board of Trustees for University of Alabama* left open the defense of “undue financial or administrative burden,” it has not been applied in subsequent judicial decisions,<sup>94</sup> perhaps because defendant higher education institutions choose not to open their budgets to judicial scrutiny. One can imagine that a large institution, with a large athletic budget, might not want to have the university’s financial records examined in public through the publication of the case.

Two other significant and early lower court cases applied the “otherwise qualified” standard. In one of the few cases where a plaintiff won against an institution of higher education, *Pushkin v. Regents of University of Colorado*,<sup>95</sup> the court held that the psychiatric medical program had wrongfully denied the admission of a medical student with multiple sclerosis to the residency program.<sup>96</sup> The court noted that the decision had been based on attitudes that the applicant lacked the necessary emotional stability and had been based on short interviews by four faculty members,<sup>97</sup> which it interpreted as “incorrect assumptions or inadequate factual grounds.”<sup>98</sup> Another circuit court decision decided the same year involved the readmission denial of a student to medical school. In *Doe v. New York University*, the court found valid a denial based on demonstrated behaviors that exhibited mental instability.<sup>99</sup> These two opinions demonstrate an early clarification that determinations about behavior characteristics and other qualifications for participation in programs should be individually decided based on concerns about mental stability, and should not routinely

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91. 908 F.2d 740, 752 (11th Cir. 1990).

92. *See id.* at 742.

93. *See id.* at 749.

94. *See id.* at 751; *see also* Se. Cmty. Coll. v. Davis, 442 U.S. 397, 397 (1979).

95. 658 F.2d 1372, 1376, 1391 (10th Cir. 1981).

96. *See id.*

97. *See id.* at 1387.

98. *Id.* at 1383.

99. 666 F.2d 761, 780 (2d Cir. 1981).

be used to disqualify individuals from programs. The *Pushkin* and *Doe* holdings established that the burden is on the institution to demonstrate that mental stability is a necessary qualification and that the facts support the disqualification of the individual on that basis.<sup>100</sup> Also of significance was the preview of the high number of cases that would be brought in the context of professional schools, especially medical and legal education programs. The evolution of the law on this issue is addressed in more detail later in the Article.<sup>101</sup>

A number of cases involving procedural and remedial issues were decided in the decade before the ADA went into effect.<sup>102</sup> These cases addressed the issue of “program specificity,” ultimately establishing that if one part of a program receives federal financial assistance, the entire program is subject to coverage under federal financial assistance related civil rights laws.<sup>103</sup> The Court also addressed whether the primary objective of federal funding requires it to be applied to prevent employment discrimination in order to be subject to Section 504.<sup>104</sup> The Court held that this was not required,<sup>105</sup> which means that federal financial assistance need not be provided for student programs, like financial aid, for a student to be protected under Section 504. The Court also addressed the issue of state agency immunity against actions for damages.<sup>106</sup> Congress revoked state

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100. See *id.* at 776; see also *Bd. of Trs. for the Univ. of Ala.*, 658 F.3d at 1387, 1390.

101. See *infra* Part II.C (discussing the evolution of the law on this issue).

102. The decision in *Witters v. Washington Department of Services for the Blind* is somewhat unique because it addresses the Establishment Clause of the First Amendment. See 474 U.S. 481, 491 (1986). The Court held that it does not violate the Establishment Clause to have state rehabilitation funds used for religious education at the college level. See *id.*

103. In the 1984 decision, *Grove City College v. Bell*, the Court held that receipt of federal financial assistance by one program does not subject the entire institution to Title IX coverage. See 465 U.S. 555, 570-71 (1984). The same analysis would have applied to all federal financial assistance statutes. In response, Congress amended § 504 with the Civil Rights Restoration Act of 1987 to overturn that holding. See *U.S. Dep’t. of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 610 (1986) (preventing the application of nondiscrimination application to all aspects of a program from being stretched too far). The Court held that the benefit to the airlines from the federal financial assistance provided to airports and the air traffic control system is not considered federal financial assistance to airlines. See *id.*; see also *Niehaus v. Kan. Bar Ass’n*, 793 F.2d 1159, 1163 (10th Cir. 1986) (holding that a bar association is not a program that directly receives or benefits from federal financial assistance in an employment case).

104. See *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 632 (1984).

105. See *id.*

106. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985).

agency immunity when it amended the Rehabilitation Act in 1986.<sup>107</sup> The issues of immunity and remedies would later receive more attention by the courts, but in the early years they were not debated to a significant degree.

No case that was decided in the early years addressed issues relating to architectural barriers.<sup>108</sup> Although there were some early cases discussing the issue of whether an individual had a disability, they arose primarily in the context of employment and did not generally involve higher education. In fact, there was limited case law in the employment area because Section 504 covered so little of the private sector. A few early cases examined whether Section 504 provides for a private right of action, ultimately concluding that it does; and a few courts considered whether the employee would be otherwise qualified.<sup>109</sup>

Noticeably absent, however, is a body of litigation concerned with whether the individual met the definition of disability. One of the few cases to address this issue was *County of Los Angeles v. Kling*, in which the Court held that Crohn's Disease is not a disability.<sup>110</sup> The Court decided this case in 1985, with only cursory discussion of the issue.<sup>111</sup> By the late 1980s, issues surrounding HIV were receiving national attention. In *School Board v. Arline*,<sup>112</sup> the Supreme Court first addressed applying disability discrimination law to individuals with contagious and infectious diseases, ultimately establishing that tuberculosis was a disability under the Rehabilitation Act.<sup>113</sup> Additional guidance from the Supreme Court would not come until the 1998 decision of *Bragdon v. Abbott*, in which the Court held that an HIV positive woman seeking dental treatment was disabled under the ADA.<sup>114</sup> The *Bragdon* decision, however, was based on the woman's particular situation, and not the illness generally.<sup>115</sup> Although model regulations had been promulgated in 1978, before the enactment of the ADA, there was little federal agency oversight. The model regulations provided guidance on admission and recruitment, general treatment of students, academic adjustments, housing, financial and employment assistance, and nonacademic services.<sup>116</sup> The 1978 regulations required

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107. See Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807, § 1003(a)(1) (1986).

108. The early years refers to the period from 1973 to 1990.

109. See generally DISABILITIES AND THE LAW, *supra* note 15.

110. 474 U.S. 936, 937 (1985). The Court did not issue an opinion in the case.

111. See *id.*

112. 480 U.S. 273, 283-86 (1987).

113. See *id.* at 275.

114. 524 U.S. 624 (1998).

115. See *id.* at 641.

116. 34 C.F.R. § 104(E) (2013).

institutions to engage in self-evaluation and transition plans.<sup>117</sup>

The enactment of the ADA increased judicial attention to disability discrimination issues. The cases did not always involve Section 504, but the results were almost always applicable to cases arising under either statute. Initially, there was substantial guidance from lower courts and a number of Supreme Court cases involving an array of issues in the special education area, but the Supreme Court did not decide an ADA case until 1998.<sup>118</sup>

Between 1990 and the present, the Supreme Court has considered ADA or Rehabilitation Act issues in about two-dozen cases. Many of these are not directly significant to legal education and the legal profession, though several relate to employment issues, which may affect legal employers.<sup>119</sup> Others addressed issues regarding remedies and applicability of the ADA to a variety of settings.<sup>120</sup>

In *Clackamus Gastroenterology Associates v. Wells*, the Supreme Court considered how to determine the size of an employer for applicability of Title I of the ADA, which only applies to employers with fifteen or more employees.<sup>121</sup> The Court's decision in this case has the potential to affect small law firms. The case involved a medical practice and a determination

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117. *Id.* § 104.6(c).

118. *See Bragdon*, 524 U.S. at 624 (applying IDEA and sometimes Section 504 to K-12 settings).

119. *See DISABILITIES AND THE LAW*, *supra* note 15, at 10-13 (listing relevant cases sequentially to provide an overview of these developments). Several Supreme Court decisions are the most relevant to employment in the legal profession during this time period. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 803 (1999) (ruling that an individual who applies for and receives disability benefits is not precluded from claiming to be otherwise qualified in employment cases); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 76 (1998) (holding that the waiver of employment discrimination claims must be clear and unmistakable).

120. *See, e.g., Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998) (establishing that state correctional institutions are subject to the requirements of Title II of the ADA); *see also United States v. Georgia*, 546 U.S. 151, 159 (2006) (holding that Title II of the ADA abrogates state immunity from suits by prisoners with disabilities in a case involving architectural barriers in the prison setting); *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (holding that Eleventh Amendment immunity does not shield states from lawsuits involving fundamental rights of access to the courts).

121. 538 U.S. 440, 441-42 (2003); *see also, e.g., Doe v. Shapiro*, 852 F. Supp. 1246, 1251-52 (E.D. Pa. 1994) (determining that a law firm with only ten employees that served as legal department of a larger equipment leasing company meets the twenty-five-employee floor under ADA); *Thompson v. City of Austin*, 979 S.W.2d 676, 685 (Tex. App. 1998) (barring two lawyers who advocated for improved accessibility in courtrooms when appointed as municipal court judges from bringing ADA claims because they were public officials and not employees).



about whether some physicians are employees or not.<sup>122</sup> The case could have implications for law firms in determining whether an attorney who is a shareholder or partner is considered to be an employee for ADA purposes. The relevant guiding factors for determining whether an individual is an employee include the individual's role in the organization regarding supervision, reporting, influence, and profit/loss/liability sharing, as well as the intent of the agreements made with the individual.

Several other Supreme Court decisions, while not directly relating to legal education and the legal profession, do clarify some key principles for interpreting the ADA generally. In *Olmstead v. L.C. ex rel. Zimring*,<sup>123</sup> the Court provided significant guidance on the issue it had left unresolved in *Pennhurst*, namely issues of least restrictive environment or segregation of individuals with disabilities.<sup>124</sup> In holding that the ADA generally requires that placement of persons with mental disabilities should be in the community rather than institutional settings, the Court clearly established the least restrictive/mainstreaming principle under disability discrimination law.<sup>125</sup>

The related issues of who is disabled, when individuals are otherwise qualified, and what qualifies as an essential function appeared when the ADA Amendments were passed. These cases include the *Sutton* trilogy and the *Toyota* decision, as well as the decision in *PGA Tour, Inc. v. Martin*, addressing the issue of fundamental requirements for playing professional golf.<sup>126</sup> The *Martin* decision highlights the principle of making individualized assessments about what is an essential requirement.<sup>127</sup> The application of this reasoning is potentially relevant in cases involving websites used by educational agencies, in cases identifying fundamental requirements, and what it means to be otherwise qualified.

The issue of "direct threat" had a significant impact on legal education. In *Chevron U.S.A. Inc. v. Echazabal*, the Court held that direct threat to *self* can be a factor in considering whether an individual is otherwise qualified in the employment context under Title III.<sup>128</sup> While the ADA statutory

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122. *Clackamus*, 538 U.S. at 442.

123. 527 U.S. 581, 587 (1999).

124. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 7 (1981); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 92 (1984).

125. *Olmstead*, 527 U.S. at 599-600.

126. 532 U.S. 661, 682-91 (2001). Casey Martin requested the accommodation of using a golf cart. He had a serious mobility impairment that affected his ability to walk, and he was ultimately granted the accommodation.

127. *Id.* at 690. The Court also decided that a professional golf association is a Title III entity. *Id.* at 679-80.

128. 536 U.S. 73, 79-84 (2002).

language does not include threat to self, the Equal Employment Opportunity Commission's regulations do, and the Court recognized those regulations as valid.<sup>129</sup> There is an ongoing controversy about applying threat to self in the context of Title II and Title III, which would be applicable to law students.<sup>130</sup>

While the Supreme Court has not ruled on the issue, several lower court decisions have significant influence on how to identify a reasonable accommodation. The case of *Wynne v. Tufts University Medical School* established the standard for determining the burden related to reasonable accommodation in the context of requested exam modifications.<sup>131</sup> Outlining the standard for determining this burden, the First Circuit reasoned:

[U]ndisputed facts demonstrat[e] that the *relevant officials* within the institution considered alternative means, their feasibility, cost[,] and effect on the academic program, and came to a *rationaly justifiable* conclusion that the available alternatives would result either in *lowering academic standards* or requiring *substantial program alteration*.<sup>132</sup>

Subsequent decisions addressing the standard for deciding what are reasonable accommodations have frequently applied this reasoning. In *Guckenberger v. Boston University*,<sup>133</sup> the court set out frequently cited standards regarding documenting disabilities and the deference to be given on fundamental course requirements.<sup>134</sup> In *Bartlett v. New York State Board of Law Examiners*,<sup>135</sup> the court considered accommodations on a bar exam for a student with a learning disability.<sup>136</sup> At issue was whether Ms. Bartlett had a disability and whether the requested accommodations, including additional time, tape recording essays, and circling multiple choice answers, were reasonable.<sup>137</sup> The Supreme Court remanded *Bartlett* on the definition of disability issue because the lower court's determination

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129. *Id.* at 86.

130. *See infra* Part III.A.3.

131. 932 F.2d 19, 27 (1st Cir. 1991).

132. *Id.* at 26 (emphasis added).

133. 957 F. Supp. 306 (D. Mass. 1997).

134. *Id.* at 313-16. The court held that requiring documentation to be created within the past three years imposed a significant additional burden on students with disabilities and that waiver of the standard must be allowed where qualified professionals found retesting unnecessary. *Id.* The court further established the professional credentials required for testing for learning disabilities, attention deficit disorder, and attention hyperactivity deficit disorder. *Id.*

135. 156 F.3d 321, 324 (2d Cir. 1998), *vacated*, 527 U.S. 1031 (1999); 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001).

136. *See* 156 F.3d at 324.

137. *Id.*

about the existence of a disability had included the issue of mitigating measures.<sup>138</sup>

At present, the post-ADA Amendments Act cases are working their way through the lower courts. Greater agency support in the form of regulatory and interpretive guidance has been a factor in reduced litigation, although that is difficult to measure.<sup>139</sup> As of 2013, there had been no Supreme Court decisions interpreting the most recent amendments, although there are already a number of lower court decisions.

Notably, there have been no Supreme Court cases, and very few lower court decisions, addressing architectural barriers and related issues.<sup>140</sup> There has, however, been substantial regulatory evolution and guidance on issues of accessible design of physical space.

The Department of Education (DOE) Office for Civil Rights (OCR) is the statute's enforcement agency and has provided numerous Opinion Letters that offer guidance.<sup>141</sup> The DOE Office of Special Education and Rehabilitative Services (OSERS) provides support services primarily to K-12, including preparation for higher education.<sup>142</sup> The Office for Postsecondary Education (OPE) affords grant assistance to higher education institutions in serving students with disabilities.<sup>143</sup> As was noted in a 2009 government report on the agencies responsible for higher education, there is a lack of coordination in providing technical assistance by the three major offices responsible for disability issues within the DOE.<sup>144</sup> Unfortunately, there is also a lack of coordination not only within the DOE, but also between it and the other two major agencies responsible for ADA and Rehabilitation Act issues—the Equal Employment Opportunity Commission and the Department of Justice.

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138. *Id.* The impact of these decisions and the subsequent litigation and activity relating to them is discussed in more detail in later sections of this Article.

139. For extensive references to guidance, see ADA.GOV, <http://www.ada.gov> (last visited Feb. 6, 2014).

140. The decisions in *Tennessee v. Lane* and *United States v. Georgia* addressed the procedural issues, although architectural barriers at courthouses and prisons were at issue. The Court remanded for decisions on what specifically would be required in terms of physical access.

141. For DOE opinion letters, see ADA.GOV, *supra* note 139.

142. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-33, HIGHER EDUCATION AND DISABILITY: EDUCATION NEEDS A COORDINATED APPROACH TO IMPROVE ITS ASSISTANCE TO SCHOOLS IN SUPPORTING STUDENTS 6 (2009).

143. *Id.* at 28-29.

144. *Id.* at 29-30.

### III. IMPACT ON LEGAL EDUCATION AND THE LEGAL PROFESSION

This section considers how regulations, agency guidance, and the judicial interpretations of Section 504 and the ADA have affected legal education and the legal profession. It touches on how professional organizations and service providers have been involved with these issues, although Part IV provides a separate discussion of the role that each of these organizations has played in the evolution of these issues.

#### *A. Definition of Coverage*

##### *1. What Impairments Are Protected Disabilities?*

Under the Rehabilitation Act and ADA definitions, approximately one in five Americans has a condition that would be considered a protected disability. Not all impairments, however, meet the definitional coverage in all circumstances.

Wheelchair users and individuals with sensory impairments (visual and hearing) often come to mind when people think about what it means to have a disability and who nondiscrimination laws are designed to protect. In actuality, a much broader range of conditions can fall within the scope of coverage for purposes of federal disability discrimination law. These conditions may include mobility impairments like quadriplegia, paraplegia, missing limbs, fibromyalgia, lupus, arthritis, mental illness (including depression, post-traumatic stress disorder, bipolar disorder, and other conditions), addiction to controlled substances (drugs and alcohol), learning and related disabilities (attention deficit disorder, attention deficit hyperactivity disorder), traumatic brain injury, cerebral palsy, intellectual disabilities (formerly mental retardation), contagious and infectious diseases (HIV, tuberculosis), epilepsy and narcolepsy, and other health impairments (stroke, multiple sclerosis, asthma, chemical sensitivities, cancer, Crohn's disease).<sup>145</sup> While an intellectual disability<sup>146</sup> is unlikely to be at issue for a law student or lawyer, individuals with intellectual impairments may be clients. Many of these conditions are "invisible" impairments which explains why many claim they do not know anyone with a disability and are surprised to learn that one in five Americans has a disability.<sup>147</sup>

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145. See DISABILITIES AND THE LAW, *supra* note 15, §§ 3:2, 4:8-4:9.

146. Until recently, the term "mentally retarded" was used. This term has been replaced by "intellectually disabled" in most discourse.

147. The 2013 determination by the American Medical Association that obesity is a disease may increase these numbers. See *AMA Adopts New Policies on Second Day of Voting at Annual Meeting*, AM. MED. ASS'N (June 18, 2013), [http://www.ama-assn.org/ama/pub/news/news/2013/2013-06-18-new-ama-policies-annual-](http://www.ama-assn.org/ama/pub/news/news/2013/2013-06-18-new-ama-policies-annual)

The debate around coverage is historic. The 2008 ADA amendments were intended to resolve the issue. Although these amendments offered some clarification, they have not ended the discussion.<sup>148</sup> Several conditions have been the primary focus in the context of legal education and the legal profession: learning and related disabilities, mental health issues, alcohol and drug related disabilities, and sensory impairments. Learning disabilities have been the subject of debate because these conditions require diagnosing the disability and then determining the connection of the disability to the requested accommodations. Mental health concerns focus on dangerousness, disruption, and the ability to function; issues often involve concerns about safety and protection of self and others. The same concerns exist for individuals with drug and alcohol addiction. Both mental health and substance use raise issues of character and fitness that arise for law students, at the bar admission stage, and later on in legal practice. Sensory impairments, while generally found to be disabilities, raise cost issues associated with providing accommodations, including interpreters for individuals with hearing impairments or accessible materials for those with visual impairments. Conditions arising from contagious and infectious disease like HIV are less likely to be at issue within the legal profession itself.<sup>149</sup>

The basic definition of who has a disability under Section 504 and the ADA has not changed significantly. Defining disability under either statute requires applying a three prong test that is meant to protect individuals with “a physical or mental impairment that substantially limits one or more major life activity of such individual; a record of such an impairment; or

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meeting page. Although not all diseases are disabilities, when diseases substantially affect a major life activity, they can be considered a disability. See *DISABILITIES AND THE LAW*, *supra* note 15, § 4:9. Some of the few cases addressing obesity as a disability differentiate between when obesity is a psychological condition and when it is not. See *id.*

148. See Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 660-61 (2009); Paul A. Race & Seth M. Dornier, *ADA Amendments Act of 2008: The Effect on Employers and Educators*, 46 WILLIAMETTE L. REV. 357, 401-02 (2009).

149. The movie *Philadelphia* highlighted that even an attorney with HIV may face discrimination, at least in the early years of HIV awareness. Tom Hanks’s character realizes that he might have protection against discrimination under Section 504 of the Rehabilitation Act of 1973 after reading a case about a teacher with tuberculosis who was protected under the law. It should be noted, however, that the ADA and Section 504 clarify that individuals with a contagious disease or infection that would constitute a direct threat to the health or safety of others would not be protected. See 29 U.S.C. § 705(20)(D) (2012); 42 U.S.C. § 12113(b) (2012). These statutes were primarily directed to concerns from the food service industries, but they are also relevant to health care settings. See § 12113(e)(2).

being regarded as having such an impairment.”<sup>150</sup> Comparing the individual to the general population is how the statutes determine whether a condition “substantially limits.”<sup>151</sup>

The ADA Amendments of 2008 add further clarification for determining what qualifies as a major life activity. The non-exhaustive list includes “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>152</sup> There was discussion of including “interacting with others,” but it is not in the statutory definition.<sup>153</sup> The 2008 Amendments define operation of major bodily functions as including, but not being limited to, “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>154</sup> Although not a major issue for legal education and the legal profession, the definition specifically exempts certain conditions.<sup>155</sup> Individuals who are associated with an individual with a disability might also be protected. For example, if a small law firm rented office space, and the lease was terminated by the landlord after it became known that the firm provided legal services to individuals with HIV, the firm could be protected under the ADA.<sup>156</sup>

While the cases involving legal education and the legal profession are the most instructive, because health and other professional programs also involve high stakes, the guidance from those can be informative.

#### *a. Learning and Related Disabilities*

Learning and related disabilities, and determining whether an individual has a disability and is entitled to protection, are perhaps the most litigated subjects of disability definition cases.<sup>157</sup> One of the earliest and most widely publicized cases, *Guckenberger v. Boston University*,<sup>158</sup> occurred in a higher education context and involved documentation of learning and related disabilities.<sup>159</sup> The court considered questions about the credentials

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150. 29 U.S.C. § 705(9)(B) (2012); 42 U.S.C. § 12101(1) (2012).

151. 29 C.F.R. § 1630.2(j)(1)(I),(II) (2014).

152. 42 U.S.C. § 12102(2)(A) (2012).

153. *Id.*

154. *Id.* § 12102(2)(B).

155. *Id.*

156. 42 U.S.C. § 12112(b)(4) (2012).

157. DISABILITIES AND THE LAW, *supra* note 15, §§ 3:22, 5:7, 10:7.

158. 957 F. Supp. 306, 311 (D. Mass. 1997).

159. *Id.* at 326.

necessary to diagnose different types of learning disabilities and how recent or current the professional assessment of the individual must be<sup>160</sup> since an individual's abilities do not necessarily remain static.<sup>161</sup> A person seeking accommodations may be concerned with this because it can be quite costly to participate in the battery of tests required to diagnose a learning or related disability.<sup>162</sup> The *Guckenberger* Court held that the professional diagnosing a learning disability did not need to have a Ph.D. or M.D., but should be an individual who is trained and experienced in evaluating learning disabilities.<sup>163</sup> For attention deficit disorder (ADD) and attention hyperactivity deficit disorder (ADHD), the court required the individual have a Ph.D. or an M.D., a heightened requirement.<sup>164</sup> The court also considered what an assessment or testing should include and how recent it must be: concluding that requiring the documentation to have been prepared in the last three years poses a significant additional burden on students with disabilities, and recognized circumstances where such recent testing should not be required.<sup>165</sup>

The *Guckenberger* case was among the first to comprehensively discuss the issue of documentation. Following the decision, issues surrounding diagnoses of learning disabilities and the relationship of the condition to requested accommodations received a great deal of media and judicial attention.<sup>166</sup> One of the frequent and previously unresolved questions was whether the comparison group was the general population or those in the group with whom the individual was being directly compared. For example, is the individual's capacity to learn substantially impaired when compared to the general population or to other law students? Before the 2008 ADA amendments, courts had come to different conclusions. The regulations promulgated pursuant to the 2008 ADA amendments provided much needed clarification.<sup>167</sup>

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160. *Id.* at 311-12.

161. *Id.* at 316-17.

162. *Id.* at 319.

163. *Id.* at 312.

164. *See Guckenberger v. Boston University*, 957 F. Supp. 306, 311 (D. Mass. 1997).

165. *Id.* at 327.

166. *See DISABILITIES AND THE LAW*, *supra* note 15, § 3:22.

167. The 2011 EEOC regulations provide that an impairment is a disability "if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." 29 C.F.R. § 1630.2(j)(1)(ii) (2012). Although these regulations fall under Title I, this standard may also apply to student settings, at least for students in professional education that is closely tied to employment.

Mitigating measures are another issue resolved by the 2008 amendments. In *Bartlett v. New York State Board of Law Examiners*,<sup>168</sup> the Supreme Court addressed the issue at the same time it decided the *Sutton* trilogy.<sup>169</sup> In three combined decisions, the Court held that in determining whether someone is currently substantially limited, it was appropriate to take into account whether there are measures that mitigate the condition so that the individual could be evaluated in the “mitigated” state. The Court remanded the *Bartlett* case for consideration consistent with its holdings in the *Sutton* and related decisions.<sup>170</sup> On remand, the lower court determined Marilyn Bartlett, who was seeking accommodations on the bar exam for her learning disability, had “self accommodated” to get through law school, but she was still substantially limited in the major life activity of reading.<sup>171</sup> She was thus entitled to reasonable accommodations.<sup>172</sup>

Before 2008, a number of cases involving students in professional and graduate programs and licensing examinations addressed the range of issues surrounding whether individuals with learning disabilities were covered.<sup>173</sup> It is not surprising that this issue has received and continues to receive so much attention; the number of students reaching the professional and graduate levels increased after students received special education and accommodations in their undergraduate programs. This increased

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168. 527 U.S. 1031 (1999) (vacating judgment and remanding).

169. See *supra* Part II.A.2.

170. 156 F.3d 321 (2d Cir. 2000), *vacated*, 527 U.S. 1031 (1999).

171. *Id.* at 332.

172. *Id.*

173. See DISABILITIES AND THE LAW, *supra* note 15, §§ 3:22, 5:7. Related disabilities can include attention deficit disorder (ADD) and attention hyperactivity deficit disorder (ADHD). See, e.g., *Salvador v. Bell*, 800 F.2d 97, 100 (7th Cir. 1986) (finding no private right of action to review a DOE administrative decision that denied relief to a student with a learning disability); *Kelly v. W. Va. Bd. of Law Exam'rs*, No. 2:08-00933, 2008 WL 2891036, at \*3 (S.D. W. Va. July 24, 2008) (denying a motion for preliminary injunction due to material issues of fact as to what constituted reasonable time accommodation); *In re Bedi*, 917 A.2d 659, 672 (D.D.C. 2007) (concluding that Bedi knowingly provided false or misleading information about dyslexia in order to obtain a testing accommodation); *Marlon v. W. New Eng. Coll.*, No. Civ.A. 01-12199DPW, 2003 WL 22914304, at \*10 (D. Mass. Dec. 9, 2003), *aff'd*, 124 F. App'x 15 (1st Cir. 2005) (finding that the law school did not discriminate against a student with a learning disability, panic attacks, and depression based on insufficient evidence as to whether the student was regarded as disabled); *Argen v. N.Y. State Bd. of Law Exam'rs*, 860 F. Supp. 84, 91 (W.D.N.Y. 1994) (holding that the applicant did not have a learning disability sufficient to justify provision of accommodations); see also, Craig S. Lerner, “Accommodations” for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?, 57 VAND. L. REV. 1043, 1046 (2004).



awareness has empowered individuals to press for accommodations at the professional and graduate level.

The 2008 ADA Amendments Act provided much needed guidance on accommodations for students with learning disabilities in professional and graduate programs. As noted above, the amendments draw upon prior case law and incorporate “learning, reading, concentrating, thinking, communicating, and working” as major life activities.<sup>174</sup> Second, the amendments clarified that a substantial limitation should be assessed by comparing the individual to the general population. Third, the amendments stated that mitigating measures were not to be considered in assessing whether an individual is currently substantially limited.<sup>175</sup> The amendments also provided some clarification about the amount of deference courts should give to previous documentation and accommodations.<sup>176</sup>

Since 2008, there have been a number of cases applying these new standards. These decisions consistently hold that the amendments do not apply retroactively.<sup>177</sup> One exception allowed an applicant to take a professional medical licensing exam with accommodations.<sup>178</sup> Although denying accommodations had originally been permissible under the pre-ADA standards, because the student had not yet taken the exam, the licensing board was required to reconsider the request.<sup>179</sup>

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174. See 20 U.S.C. § 12102(2)(A) (2012). Pre-2008 decisions include *Davis v. University of North Carolina*, 263 F.3d 95, 99 (4th Cir. 2001), which held that a student with multiple personality disorder was not disabled because she was not perceived as unable to perform a broad range of jobs, and *McGuinness v. University of New Mexico School of Medicine*, 170 F.3d 974, 977 (10th Cir. 1998), which held that test anxiety is not a disability for a medical student. For a case applying both pre-2008 and post-2008 standards, see *Brodsky v. New England School of Law*, 617 F. Supp. 2d 1, 4-5 (D. Mass. 2009), which analyzes a law student’s request for readmission after memory and organizational deficits had been identified. The amendments responded to previous judicial decisions in which there was some dispute about whether “learning, reading, concentrating, thinking, communicating, or working” were major life activities. See *DISABILITIES AND THE LAW*, *supra* note 15, § 4:8.

175. 42 U.S.C. § 12102 (4)(E)(i)(I) (2012).

176. See *infra* Part III.B.5.

177. See, e.g., *Duncan v. Univ. of Tex. Health Sci. Ctr. at Hous.*, 469 F. App’x 364, 368 n.7 (5th Cir. 2012); *Nyrop v. Indep. Sch. Dist. No. 11*, 616 F.3d 728, 734 n.4 (8th Cir. 2010); *Strolberg v. U.S. Marshals Serv.*, No. CV-03-04-S-DOC, 2010 WL 1266274, at \*3 (D. Idaho Mar. 25, 2010).

178. The case involved a request for injunctive relief rather than damages. See *Jenkins v. Nat’l Bd. of Med. Exam’rs*, No. 08-5371, 2009 WL 331638, at \*1 (6th Cir. Feb. 11, 2009) (applying new standards where the plaintiff sought prospective relief and attorney’s fees based on a reading disorder).

179. See *id.*

While there have been some decisions involving learning disabilities in the higher education and the licensing context, there have never been many cases involving practicing attorneys with learning disabilities. The cases involving attorneys have not addressed whether the individual attorney is “disabled.”<sup>180</sup> Instead, the decisions have focused more on whether the individual is otherwise qualified and/or should receive the requested accommodations.

*b. Mental Conditions*

Mental health impairments range from depression to serious mental illness. They can include post-traumatic stress disorder, bipolar disorder, mood disorders, schizophrenia, and other conditions. In some cases, individuals seek accommodations claiming that they have test anxiety, stress conditions, and panic disorder.<sup>181</sup> Most of the case law on these conditions, arising in professional settings, focuses on whether the individual is “otherwise qualified”<sup>182</sup> and what accommodations have been requested, but there have been a few cases that have addressed whether the condition qualifies as a disability.<sup>183</sup>

Mental health impairments are an area where the “regarded as” prong of the definition most often comes into consideration. Under the 2008 ADA, an individual meets the “regarded as” prong if that individual establishes that prohibited action has occurred based on an actual or perceived impairment whether or not it actually limits or is perceived to limit a major life activity.<sup>184</sup> If a law school administrator or an employer would treat a student or employee adversely because that individual “seemed crazy,” the

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180. See, e.g., *Doe v. Attorney Discipline Bd.*, No. 95-1259, 1996 WL 78312, at \*2-3 (6th Cir. Feb. 22, 1996) (dismissing the complaint in part because the attorney was not “qualified” to practice law and the defendants could not implement reasonable accommodation).

181. See DISABILITIES AND THE LAW, *supra* note 15, §§ 3:2, 3:24.

182. *Milanes v. Holder*, 783 F. Supp. 2d 272, 282-83 (D.P.R. 2011) (finding no discrimination in the termination of a U.S. attorney who sought transfer as accommodation for his mental health).

183. See, e.g., *Mucci v. Rutgers*, No. 08-4806, 2011 WL 831967, at \*22 (D.N.J. Mar. 3, 2011) (finding that a law student with diabetes and stress induced anxiety did not provide sufficient documentation to justify requested accommodations for take home exam); *Forbes v. St. Thomas Univ.*, 768 F. Supp. 2d 1222, 1230 (S.D. Fla. 2010) (finding that issues of material fact remained as to whether post-traumatic stress disorder was a disability and if so if law student had received reasonable accommodations); *In re Head*, 867 N.E.2d 824, 827-28 (Ohio 2007) (denying accommodations for an individual claiming anxiety disorder in bar exam setting).

184. 42 U.S.C. § 12012(3) (2012).

individual might meet the definition for protection.<sup>185</sup>

*c. Substance Use and Abuse*

Alcohol and controlled substances conditions receive a great deal of attention within legal education and the legal profession, but there are limitations to the amount of coverage these conditions receive in the definition of disability. Both Section 504 and the ADA specifically provide that

[t]he term “individual with a disability” does not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.<sup>186</sup>

Individuals who have successfully completed or are participating in drug rehabilitation programs and are not currently using drugs are not excluded from the ADA under this provision.<sup>187</sup>

In addition to disability discrimination cases, substantial attention within legal education and the legal profession has also been given to the issue of the impact of alcohol and drugs. Indeed, not all individuals who misuse alcohol or drugs are “disabled,” but often substance use can impair fitness in law school and in practice. The legal profession has taken a proactive approach because of the adverse impacts of substance use.<sup>188</sup>

As with mental health impairment issues, existing case law focuses on the issue of qualification and accommodation.<sup>189</sup> Qualification and accommodation will be discussed later in the Article, but the general standard is that alcohol and substance abuse do not excuse conduct and performance deficiencies.<sup>190</sup>

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185. *Marlon v. W. New England Coll.*, No. Civ. A. 01-12199DPW, 2003 WL 22914304, at \*10 (D. Mass. Dec. 9, 2003), *aff'd*, 124 F. App'x 15 (1st Cir. 2005) (holding that a law school did not discriminate against a student with a learning disability, panic attacks, and depression because the student was not disabled under the ADA).

186. 29 U.S.C. § 705(20)(C)(i) (2012); 42 U.S.C. § 12114(a) (2012); *see also* *Gill v. Franklin Pierce Law Ctr.*, 899 F. Supp. 850 (D.N.H. 1995) (dismissing the plaintiff's complaint because the defendant did not know and had no reason to know that the plaintiff suffered post-traumatic stress syndrome as a result of growing up in an alcoholic home); Thomas M. Cooley Law Sch., OCR Resolution Letter, No. 15.04-2055, 31 NDLR 24, 102-03 (July 26, 2005) (finding that the school had not dismissed student based on a disability because she was never regarded as having a disability by school staff).

187. 29 U.S.C. § 705(20)(C)(ii); 42 U.S.C. § 12114(b).

188. *See infra* Parts III.G & IV.A.

189. *See generally* DISABILITIES AND THE LAW, *supra* note 15, § 3:23, 4:9, 4:12.

190. *See infra* Part III.C.

*d. Sensory Impairments*

Courts rarely address whether a significant visual or hearing impairment meets the definition of disability.<sup>191</sup> Rather, case law focuses generally on the accommodations themselves or on issues of qualification.<sup>192</sup> Protection for such individuals is an important issue because accommodations may be more costly or administratively burdensome than accommodations discussed previously. For example, while there may be a small cost to providing a separate testing room or additional time for a student with a learning disability, paying for interpreters and materials in other formats can be a significant administrative cost. That issue is discussed more below.<sup>193</sup>

*e. Known Disabilities*

Generally an individual is not protected against individualized discrimination or entitled to reasonable accommodations unless the disability is “known.”<sup>194</sup> This becomes an issue when a student fails academically and seeks readmission after a learning disability is identified that may have been a factor in the student’s failure. This will be discussed in the sections on reasonable accommodation.<sup>195</sup>

*f. Transitory and Minor Impairments*

While both Section 504 case law and the ADA statutory and regulatory language make clear that minor and transitory impairments are not covered, such conditions could be protected under the “regarded as” prong.<sup>196</sup>

*2. Otherwise Qualified*

Actually having a disability is only the first step to establishing

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191. See *Cunningham v. Univ. of N.M. Bd. of Regents*, 779 F. Supp. 2d 1273, 1281 (D.N.M. 2011) (holding that a medical school student did not allege his Scoptic Sensitivity Syndrome was a disability in claims against the university).

192. See *DISABILITIES AND THE LAW*, *supra* note 15, §§ 3:3; 4; 4:10-4:16.

193. See *infra* Part III.B.

194. See *DISABILITIES AND THE LAW*, *supra* note 15, § 3:22.

195. See *infra* Part III.B.

196. 42 U.S.C. § 12102(3)(B) (2012); 29 C.F.R. § 1630.15(f) (2012); see also *Fleishman v. Cont'l Cas. Co.*, 698 F.3d 598, 607-09, 609 n.3 (7th Cir. 2012). In *Fleishman*, a trial attorney took medical leave for medical problems related to a brain aneurysm. *Id.* The court held that the condition was not a disability under the 1990 ADA. *Id.* The court found no showing that the aneurysm limited a major life activity, and the trial attorney was not “regarded as” disabled because company had transferred him to handle high-value cases. *Id.* Finally, the court noted that the case might have been decided differently under the 2008 amendments. *Id.*

protection against discrimination and the right to reasonable accommodation; the individual must also be “otherwise qualified” in order to be covered by the ADA or Section 504 of the Rehabilitation Act.<sup>197</sup> The first Supreme Court decision to discuss any question under Section 504 addressed exactly this issue. In *Southeastern Community College v. Davis*,<sup>198</sup> an individual with a severe hearing impairment sought admission to a nursing program.<sup>199</sup> After being denied admission specifically based on her hearing impairment and the concerns about its impact on patient safety, she sued the college under Section 504.<sup>200</sup>

The Supreme Court held that to be considered “otherwise qualified,” an individual must meet the “essential requirements” of the program in spite of the disability, with or without reasonable accommodations.<sup>201</sup> The ADA incorporates that standard into the statutory language by providing for what it means to be “qualified” generally, and under each of its major three sections—employment, public services, and public accommodations.<sup>202</sup>

The ADA has incorporated specific language from judicial decisions under the Rehabilitation Act to clarify the issue of fundamental or essential requirements. For employment, consideration is given “to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”<sup>203</sup> Title II is not as specific in the statute. It provides that a qualified individual with a disability must meet the “essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”<sup>204</sup> Title III statutory language does not specifically refer to the issue of “otherwise qualified.” In the context of legal education, for example, this would require a student bringing a discrimination claim to have paid tuition, maintained the required grade point average, or maintained expected standards of behavior

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197. 34 C.F.R. § 104.3(k)(3); 42 U.S.C. § 12201(h).

198. 442 U.S. 397, 397 (1979).

199. *Id.* at 400.

200. *Id.* at 402-03.

201. *Id.* at 406.

202. 42 U.S.C. § 12111(8) (2012) (employment); 42 U.S.C. § 12131(2) (2012) (public services). There is not a specific statutory clarification for Title III (public accommodations), but it will probably be viewed as having the same criteria Title II (public services).

203. 42 U.S.C. § 12111(8). Another provision allows employers—and probably other ADA covered entities—to have uncorrected vision standards that are job-related. *See id.* § 12113(c).

204. 42 U.S.C. § 12131(2).

and conduct.<sup>205</sup> For a recent law school graduate applying for bar admission, it would require graduation from an accredited law school. For an attorney, it would require that he or she be able to perform the work.<sup>206</sup>

### 3. *Direct Threat*

A controversial element of disability law is the issue of “direct threat.” Both Section 504 and the ADA specifically provide that individuals who pose a direct threat are not protected. Section 504 of the Rehabilitation Act does not refer specifically to “direct threat” in the statutory language. Neither the model regulations nor the EEOC regulations promulgated pursuant to Section 504 provide clarification of the meaning of “direct threat.” Instead, the courts defined “direct threat.”<sup>207</sup> Congress later incorporated this, with further specificity, in the ADA statutory language itself. Depending on whether the issue involves employment or other areas such as student enrollment, there is a distinction about whether the direct threat to be considered is only the threat to one’s self.

The ADA’s definition of direct threat as it applies to employment is “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”<sup>208</sup> The EEOC regulations further provide that the determination is to be based on an individualized assessment of the present ability to safely perform the essential functions of the job.<sup>209</sup> This assessment is to be based on “reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”<sup>210</sup> Factors to be considered are “the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm.”<sup>211</sup> The EEOC regulations on defenses involving employment cases note “[t]he term ‘qualification standard’ may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in

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205. J. Patrick Shannon, *Who Is an “Otherwise Qualified” Law Student? A Need for Law Schools to Develop Technical Standards*, 10 U. FLA. J.L. & PUB. POL’Y 57, 60-61 (1997).

206. *Cf. Fleishman v. Cont’l Cas. Co.*, 698 F.3d 598, 602, 606-08 (7th Cir. 2012). An attorney who was previously able to perform the required work had an aneurysm and subsequently experienced performance problems in handling high-exposure claims. *Id.* The court did not reach the issue of qualification, but did determine that his condition was not a disability under the ADA. *Id.*

207. See DISABILITIES AND THE LAW, *supra* note 15, §§ 3:12, 4:12, at 44-45.

208. 42 U.S.C. § 12111(3) (2012).

209. 28 C.F.R. § 1630.2(r) (2014).

210. *Id.*

211. *Id.*

the workplace.”<sup>212</sup> In *Chevron U.S.A. Inc. v. Echazabal*, the Supreme Court held that although the statute does not refer to threat to one’s self, the EEOC interpretation does, and the Court upheld the EEOC standard as valid.<sup>213</sup>

The definition of a direct threat for cases brought under Title II and Title III is found in the DOJ regulations rather than the statute itself. Title II regulations provide that a direct threat is “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.”<sup>214</sup> A separate section of the regulations explains that a public entity is not required to allow an individual who poses a direct threat, to participate.<sup>215</sup> Such an assessment is to be individualized and based on reasonable judgment and the best currently available evidence.<sup>216</sup> Title III also defines direct threat in the regulations; the definition is identical to the definition in Title II.<sup>217</sup> The regulations further provide that a public accommodation is not required to provide services or benefits to someone who poses a direct threat to the health or safety of others.<sup>218</sup>

In the context of legal education and the legal profession, a direct threat most often arises in the context of students with mental health or substance abuse issues. The application of this by the courts is addressed later in the Article.<sup>219</sup> A direct threat can also be an issue in situations involving incarceration of prisoners, which is also addressed later.<sup>220</sup>

### *B. Reasonable Accommodations*

Federal disability rights laws mandate nondiscrimination and require reasonable accommodation.<sup>221</sup> Two primary types of reasonable accommodations are available for individuals: the provision of auxiliary aids and services; and the modification of policies, practices, and

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212. 29 C.F.R. § 1630.15(b)(2) (2014).

213. *Chevron U.S.A. Inc. v. Echazabel*, 536 U.S. 73, 81-83 (2002).

214. 28 C.F.R § 35.104 (2014).

215. *Id.* § 35.139.

216. *Id.*

217. *Id.* § 36.104.

218. *Id.* § 36.208.

219. *See infra* Part III.C.

220. *See infra* Part III.H.

221. 42 U.S.C. § 12112(b)(5) (2012); *see also* Alex B. Long, *The ADA’s Reasonable Accommodation Requirement and “Innocent Third Parties,”* 68 MO. L. REV. 863, 874 (2003); Alex B. Long, *A Good Walk Spoiled: Casey Martin and the ADA’s Reasonable Accommodation Requirement in Competitive Settings,* 7 OR. L. REV. 1337, 1341-42 (1998).

procedures. The 2008 amendments further clarify that “reasonable modifications . . . shall be required, unless an entity can demonstrate that making such modifications . . . would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.”<sup>222</sup> Reasonable accommodations need not be provided to individuals who only meet the definition of disability under the “regarded as” portion of the statute.<sup>223</sup> As noted previously, accommodations are mandated only where the otherwise qualified individual with a disability has made “known” the physical or mental limitations.<sup>224</sup> The statute further contemplates that entities need not make accommodations that would pose an undue hardship.<sup>225</sup>

### *1. Responsibility and Standards*

When it comes to disabilities, discrimination is rarely based on animosity towards a specific individual. More likely, the discrimination results from attitudinal or architectural barriers that cause policy or structural obstacles, often having the disparate, but unintentional, effect of excluding certain individuals. For example, a specific minimum LSAT score for admission to a law school, with no exceptions permitted, could have a disparate effect on individuals with learning disabilities. An entry to a building, such as a law school, a law firm office building, or a courthouse, without a ramp, is not intended to exclude a wheelchair user, but it has that effect.

In recognizing indirect discrimination, Section 504 and the ADA require reasonable accommodation. While Section 504 does not include specific statutory language, the model regulations and EEOC regulations promulgated pursuant to Section 504 provide for reasonable accommodations.<sup>226</sup> In contrast, the ADA incorporates this requirement into the statutory language itself in several places as well as into the regulations adopted pursuant to the statute.<sup>227</sup>

The ADA separates its discrimination provisions among the three major titles relevant to this Article. For employment, the ADA prohibition on discrimination includes the failure to make reasonable accommodations.<sup>228</sup>

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222. 42 U.S.C. § 12112(b)(5).

223. *Id.* § 12201(h) (2012); 29 C.F.R. § 1630.9(e) (2012).

224. *See supra* Part III.A.1.e.

225. 42 U.S.C. § 12112(b)(5). There is a substantial body of law on undue hardship in both the employment and the higher education context. *See DISABILITIES AND THE LAW*, *supra* note 15, §§ 3:8-3:10, 4:20, at 39-42, 20 (1992 & Supp. 1996).

226. 34 C.F.R. §§ 104.3(l)(1), 104.12 (2014).

227. 42 U.S.C. § 12112(b)(5) (2012); *see also* § 12102(4)(E)(III); § 12111(3), (8), (9), (10)(B)(ii); § 12113.

228. § 12112(b)(5)(A)-(B).



The EEOC regulations and interpretive guidance give additional clarification.<sup>229</sup> Individuals are not required to accept offered accommodations, but if an individual rejects an offered accommodation and the accommodation is necessary to perform an essential function, then the individual would not be considered qualified. This provision demonstrates the interconnected nature of the statutory provisions on “otherwise qualified” and “reasonable accommodation.” The EEOC regulations explain that a defense to providing a reasonable accommodation could be that it poses an undue hardship.<sup>230</sup> In an employment context, reasonable accommodations to the known limitations must be provided unless there is an undue hardship. These accommodations may include making facilities readily accessible, job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, providing readers or interpreters, or other similar actions.<sup>231</sup> The model regulations further provide guidance on the factors to be considered in determining if an accommodation would pose an undue hardship, including the size of the program (number of employees, facilities, budget), the type of operation, and the nature and cost of needed accommodation.<sup>232</sup>

The concept of reasonable accommodations was clearly intended at the earliest stages of disability policy development. The Department of Health, Education, and Welfare promulgated the Section 504 model regulations in 1977, which became effective in 1978 and included references to reasonable accommodation.<sup>233</sup> The model regulations relating to postsecondary education (e.g., law schools) specify that adjustments must be made to academic requirements unless the program can demonstrate that those academic requirements are essential to the program of instruction or directly related to licensing requirements.<sup>234</sup> This section of the model regulations provides examples of modifications that might be considered, such as “changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.”<sup>235</sup> The model regulations note that educational institutions may not impose rules that have the effect of

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229. 29 C.F.R. § 1630.9.

230. § 1630.15(d).

231. 34 C.F.R. § 104.12 (2014).

232. *Id.* § 104.12(c).

233. *Id.* § 104.12 (employment); *id.* § 104.44 (academic adjustments in higher education, including reference to examinations and auxiliary aids).

234. § 104.44(a).

235. *Id.*

limiting participation, referencing rules that prohibit the use of tape recorders in classrooms or the use of guide dogs in campus buildings.<sup>236</sup>

Course examinations for students with impaired sensory, manual, or speaking skills are designed to use methods that “best ensure” that the results will represent achievement rather than reflect impairment, except where the skills are the factors the test purports to measure.<sup>237</sup> Model regulations refer to auxiliary aids and services, requiring programs to take steps necessary to ensure that students with impaired sensory, manual, or speaking skills are able to participate.<sup>238</sup> Examples of aids include taped tests, interpreters, readers, and adaptive classroom equipment for students with manual impairments.<sup>239</sup> The regulations specifically note, “[r]ecipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.”<sup>240</sup>

Judicial guidance before the 1990 enactment of the ADA, along with the identification of areas in which there was a need for greater guidance, resulted in the ADA’s comprehensive statutory attention to the issue of reasonable accommodations. The 2008 amendments provided greater clarification on these issues. The statutory language directly incorporates some of the most important aspects of reasonable accommodations, and the regulatory guidance addresses reasonable accommodations in even greater detail.<sup>241</sup>

The most significant cases that provide guiding principles are *Southeastern Community College v. Davis*<sup>242</sup> and *Wynne v. Tufts University School of Medicine*.<sup>243</sup> The *Davis* case involved a nursing student with a severe hearing impairment and discussed what it means to be otherwise

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236. *Id.* § 104.44(b).

237. *Id.* § 104.44(c).

238. *Id.* § 104.44(d)(1).

239. *Id.* § 104.44(d)(2).

240. *Id.*

241. The program specificity issue is a responsibility issue that is not discussed in depth in this Article. It arose early in the evolution of disability discrimination law, and has been clarified by a statutory amendment. This Article does not engage in an in depth discussion of the requirement that all aspects of a program are subject to Section 504 if one portion of the program receives federal funding. In addition, a question remains concerning the primary and secondary responsibility of paying for auxiliary aids and services between educational institutions and vocational rehabilitation programs. For a more detailed discussion of these issues, see DISABILITIES AND THE LAW, *supra* note 15, at 35-37.

242. 442 U.S. 397 (1979).

243. 932 F.2d 19 (1st Cir. 1991).

qualified. The college was concerned about patient safety, and that was its basis for denying Ms. Davis admission to the nursing program. The Court recognized that entities should be mindful that future developments in technology might mean that reasonable accommodations would allow Ms. Davis to be determined otherwise qualified.<sup>244</sup>

The *Wynne* case established key principles for determining whether an accommodation is unreasonable. While the decision is not a Supreme Court decision, courts' deference to the *Wynne* standard has enhanced its precedential value. In a case involving the denial of a requested accommodation for a medical school exam, the court recognized that while educational programs should be given deference for setting standards and requirements (and that is particularly true for medical programs because of patient safety issues), their decision-making should still be based on some standards.<sup>245</sup> The court held that when a program denies a requested accommodation, it must demonstrate that *relevant officials* considered *alternative means*, including their feasibility, cost, and effect on the academic program, and reached a *rationaly justifiable* determination that proposed accommodations would either *lower academic standards* or require *substantial program alteration*.<sup>246</sup> This standard incorporates the interactive process that is generally expected when considering accommodations. The principles from *Davis* and *Wynne* have been incorporated into the current ADA statutory language.<sup>247</sup> The statute specifies that these principles should be applied consistently with the Rehabilitation Act.<sup>248</sup>

Title II and Title III indirectly address reasonable accommodations by prohibiting discrimination against qualified individuals with a disability.<sup>249</sup> Those sections explain that a protected person is one who meets the essential eligibility requirements "with or without reasonable modifications to rules, policies, or practices . . . or the provision of auxiliary aids and services."<sup>250</sup> A miscellaneous provision of the ADA clarifies that the statute does not require the provision of reasonable accommodations that would fundamentally alter the nature of the program.<sup>251</sup> The Department of Justice's Title II regulations, which were finalized in 2010, define auxiliary

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244. *Se. Cmty. Coll.*, 442 U.S. at 412-13.

245. *Wynne*, 932 F.2d at 26.

246. *Id.*

247. *See* 42 U.S.C. § 12102 (2012).

248. *Id.*

249. *Id.* §§ 12132, 12182(b)(2)(A).

250. *Id.* § 12131(2).

251. *Id.* § 12201(b).

aids and services by providing a non-exhaustive list of such services;<sup>252</sup> requires state and local public entities to make reasonable modifications to policies, practices, and procedures unless they would fundamentally alter the nature of the program;<sup>253</sup> and prohibit surcharges for reasonable accommodations.<sup>254</sup> These regulations also clarify that the provision of personal devices and services is not required.<sup>255</sup> Modifications relating to allowing service animals and mobility devices are also addressed in the regulations.<sup>256</sup>

The Department of Justice promulgated a similar set of Title III regulations. These regulations define accommodations and services<sup>257</sup> and refer to modification in policies, practices, and procedures,<sup>258</sup> including service animals.<sup>259</sup> Auxiliary aids and services are defined and include a non-exhaustive list similar to the list included in the Title II regulations.<sup>260</sup> The Title III regulations provide some guidance on the meanings of terms such as “readily achievable” and “undue burden.”<sup>261</sup>

A substantial portion of statutory and regulatory language for Titles II and III refers to architectural barriers and design issues. Accessible design is a proactive reasonable accommodation.<sup>262</sup>

A central issue for reasonable accommodations is who is responsible for the financial cost of the accommodations. This was addressed in some of the earliest cases after Section 504 was enacted.<sup>263</sup> At present, the general standard is that, while the program may seek to obtain payment for, or provision of, such services from another program (such as a vocational rehabilitation agency), the primary responsibility to pay for those services remains with the program in which the student or individual is participating.<sup>264</sup> The program may raise the defense of undue burden,

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252. 28 C.F.R. § 35.104 (2014).

253. *Id.* § 36.302(a).

254. *Id.* § 36.302(f)(3).

255. *Id.* § 36.302(b)(1).

256. *Id.* § 36.302(c).

257. *Id.* § 36.203(c).

258. *Id.* § 36.302(a).

259. *Id.* § 36.302(c).

260. *Id.* § 36.303(b).

261. *Id.* § 36.104.

262. *See infra* Part III.J. Requirements relating to architectural barriers are also “reasonable accommodations,” but that is addressed separately, later.

263. *See* DISABILITIES AND THE LAW, *supra* note 15, at 42.

264. *Id.* (ensuring necessary services).

although that has rarely, if ever, been used in reported cases.<sup>265</sup>

Determining which program bears the financial responsibility for reasonable accommodations is potentially less clear within legal education and the legal profession. In the context of law school, an issue can occur when there are partnerships or relationships with other entities or programs, such as externships, internships, and public service placements.<sup>266</sup> Study abroad programs may also raise questions about responsibility and payment for accommodations.<sup>267</sup> An issue of financial responsibility may also arise when law schools, employers, or bar associations host events such as conferences, CLE programs, and lectures, or allow others to use their facilities for such programs.<sup>268</sup> When an attorney needs disability-related accommodations to represent a client in court, a question arises regarding who has the responsibility for paying for these accommodations.<sup>269</sup> Finally, a lingering issue is whether an accommodation is personal in nature, which would relieve the program from the requirement of providing or paying for it.

The courts' application of the statutory and regulatory requirements in legal education, the legal profession, and justice system settings, with respect to legal education, the legal profession, and the justice system, are addressed in subsequent sections. There is a substantial body of case law on many of these issues, but the discussion that follows primarily focuses on cases involving law schools, employers of lawyers, and legal institutions, such as courts and places of incarceration.

## *2. Fundamental and Essential Requirements*

The 2008 amendments to the ADA clarify that the amendments do not alter the requirement that an entity must make reasonable modifications in policies, practices, or procedures, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.<sup>270</sup>

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265. *Id.* Many universities may wish to avoid publicizing their resources through the litigation process.

266. *See infra* Part III.E.3.

267. *See infra* Part III.E.4.

268. *See infra* Part III.I.

269. *See infra* Part III.G.

270. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, § 6(a)(1)(f) (2008); *see also* 42 U.S.C. § 12201(f) (2012). The earliest case decided under Section 504, *Southeastern Community College v. Davis*, 442 U.S. 397, 407 (1979), had already established that for an individual to be "otherwise qualified," she must be able to carry out the "essential requirements" of the program with or without

These requirements mean that educational programs and other entities will need to be able to identify the essential requirements for a program and justify why a requested accommodation would fundamentally alter the program. This does not mean that every institution or employer must establish, at the outset, its requirements for completion of the program or measurement of success, but they should be prepared to justify the requirements. Considering what is essential at the outset is still useful because some requests for reasonable accommodations may include eliminating certain job functions, scheduling issues, or other changes that raise the question of whether that is essential or fundamental to the program. The employment sector has become much more adept at this since the ADA was enacted in 1990, but not every employer (law firms and law schools) sets out every single requirement that an employee must be able to carry out. The more that is established at the outset however, the more likely courts will give programs deference when there is a dispute.<sup>271</sup>

Reasonable accommodations may include modifying policies, practices, and procedures, as well as providing auxiliary aids and services. A substantial body of case law has considered reasonable accommodations in a wide range of situations, which provides a framework to determine whether accommodations must be provided. Although not a Supreme Court decision, *Wynne v. Tufts University School of Medicine* set the standard for how courts decide the issue of reasonable accommodation.<sup>272</sup> The case involved a medical school student who sought modification of a standardized exam.<sup>273</sup> The student requested to give open-ended answers rather than select from multiple-choice answers.<sup>274</sup> Tufts Medical School refused to grant the accommodation without careful consideration, and the First Circuit found this perfunctory denial inadequate.<sup>275</sup> The court required the institution to demonstrate that relevant officials within the institution considered alternative means and their feasibility, cost, and effect on the program, and then came to a *rationaly justifiable conclusion* that the alternatives would either lower academic standards or require substantial program alteration.<sup>276</sup> The medical school responded by giving the student's request careful consideration using these guidelines, and the First Circuit subsequently upheld the denial of the requested

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reasonable accommodation.

271. See DISABILITIES AND THE LAW, *supra* note 15, at 55 (discussing criteria in the employment setting).

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

273. *Id.* at 22.

274. *Id.*

275. *Id.* at 25-26.

276. *Id.*

accommodation.<sup>277</sup>

### 3. *Undue Burden*

In addition to a defense of fundamental alteration or lowered standards, institutions can raise the defense of undue burden, which includes both administrative and financial burdens.<sup>278</sup> The financial undue burden is rarely raised as a defense in the legal education context, but it was raised in at least one case in the legal employment setting. In *Lyons v. Legal Aid Society*, a Legal Aid attorney who had been injured in a car accident requested that the employer pay for her parking space near the office and courts because she could not take public transportation.<sup>279</sup> The office was in lower Manhattan, and the monthly parking fee cost between \$300 to \$520 per month (about 15-26% of her monthly net salary).<sup>280</sup> The court remanded the case for the development of evidence that the request was unreasonable.<sup>281</sup> Another case where cost could potentially be raised as an “undue burden” defense involved an attorney with a hearing impairment who requested that the court pay for an interpreter for her use in court.<sup>282</sup> The district court denied summary judgment and the case was later settled, so the precedential value of the decision is unclear. These cases represent all the available guidance about when programs are able to establish undue burden in the types of cases likely to occur in law school or legal profession settings.

### 4. *“Best Ensures” Standard*

Title III of the ADA applies to private providers and includes a provision that requires that those providing examinations or courses for applications, licensing, certification, or credentialing are to offer them in a place and manner that is accessible to individuals with disabilities or to provide alternative arrangements.<sup>283</sup> The regulations developed by the Department of Justice to implement Title III further state that private entities providing the examinations must assure that

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277. See *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 792 (1st Cir. 1992).

278. See, e.g., *Forbes v. St. Thomas Univ., Inc.*, 768 F. Supp. 2d 1222 (S.D. Fla. 2010) (requiring some evidence that denial of accommodations was based on a rational belief that no further accommodation would be made without imposing a hardship on the program).

279. *Lyons v. Legal Aid Soc’y*, 68 F.3d 1512, 1513 (2d Cir. 1995).

280. *Id.* at 1514.

281. *Id.* at 1517. No further reported disposition has occurred, so it is not clear what resulted after the remand.

282. See *Mosier v. Kentucky*, 640 F. Supp. 2d 875, 877 (E.D. Ky. 2009).

283. See 42 U.S.C. § 12189 (2012).

the examination is selected and administered so as to *best ensure* that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure) . . . .<sup>284</sup>

This provision of the regulations should not be construed to require that an individual be entitled to the “best” or “preferred” accommodation. None of the federal laws protecting individuals with disabilities—including the Individuals with Disabilities Education Act, the Rehabilitation Act, and the ADA—have a statutory or regulatory requirement that requires the “best.” Instead, these laws (and the courts interpreting them) require the general principle of “appropriate” special education and “reasonable” accommodations.<sup>285</sup> “Best” ensures reasonableness, but does not mean “best” accommodation.

Some of the recent judicial applications of the regulatory requirement might be misapplied by advocacy groups arguing that the ADA and the Rehabilitation Act require the *best* accommodations for individuals with learning and other disabilities specifically listed in the language.<sup>286</sup> The regulations do not require the “best” accommodations nor do they apply to

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284. 28 C.F.R. § 36.309(b)(1)(i) (2014) (emphasis added).

285. LAURA ROTHSTEIN, RESPONSE TO RESOLUTION PROPOSED BY ABA COMMISSION ON DISABILITY RIGHTS (2012). For a discussion of this issue, see generally BARRY C. TAYLOR & ALAN M. GOLDSTEIN, POST SECONDARY EDUCATION AND LICENSING UNDER THE ADA (2011).

286. See, e.g., *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 823 F. Supp. 2d 995 (N.D. Cal. 2011) (holding that accommodations on past exams do not show that they are most appropriate for a given situation), *aff'd*, 630 F.3d 1153 (9th Cir. 2011) (allowing a preliminary injunction for a bar applicant who was denied computer accommodations on the California bar exam for NCBE administered tests, although the applicant had received these accommodations in law school); see also *Brewer v. Wis. Bd. of Bar Exam'rs*, 270 F. App'x 418 (7th Cir. 2008) (finding that a bar applicant who was legally blind was entitled to reasonable, although not ideal, accommodations, and allowing her to receive extended time, a live reader, and a closed-captioned television to enlarge print); *Elder v. Nat'l Conference of Bar Exam'rs*, No. C11-00199 SI, 2011 WL 672662 (N.D. Cal. 2011) (permitting an injunction to allow the use of screen reader software on the Multistate Bar Exam, after finding that exams must be administered to best ensure reflection of aptitude); *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164 (D.D.C. 2011) (applying the “best ensures” standard from ADA regulations that requires a bar examiner to allow use of certain technology); *Jones v. Nat'l Conference of Bar Exam'rs*, 801 F. Supp. 2d 270 (D. Vt. 2011) (allowing a preliminary injunction for a bar applicant with visual impairment to use a screen reader for the MPRE).



individuals with learning disabilities.

The law school student who argues that unlimited time on exams would be the “best” accommodation for a learning disability should not be able to use this regulation to make that claim. That student may not have a disability covered by the regulation, be in a setting subject to the regulation, or be entitled to the “best” accommodation in any case. While programs may not be legally required to provide certain accommodations, they can provide more than what is required by the ADA or the Rehabilitation Act. Law schools, employers, providers of services, and professional certification agencies should be encouraged to do so in appropriate settings. As noted in the next section, however, “over-accommodation” can create unreasonable expectations later on, particularly when these accommodations are provided in law school, but are not likely to be provided by bar admissions testing agencies.

### *5. Deference to Past Accommodations*

The appropriate degree of deference to be given to past accommodation decisions has received a substantial amount of attention, especially after the 2008 ADA Amendments and the regulations implementing those amendments. The revised Title III regulations add a provision in the section on examinations and courses being offered for purposes of admission, credentialing, and licensing.

When considering requests for modifications, accommodations, or auxiliary aids or services, the entity gives *considerable weight* to documentation of past modifications, accommodations, or auxiliary aids or services received in *similar testing situations*, as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act or a plan describing services provided pursuant to [S]ection 504 of the Rehabilitation Act of 1973, as amended (often referred as a Section 504 Plan).<sup>287</sup>

In response to this provision, which went into effect on March 14, 2011, the Association on Higher Education and Disability issued *Supporting Accommodation Requests: Guidance on Documentation Practices* in April 2012.<sup>288</sup> The Guidance recognized the importance of balancing the need

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287. 28 C.F.R. § 36.309(b)(1)(v) (2014) (emphasis added). This regulation is contained in the section on examinations.

288. ASS’N ON HIGHER EDUC. & DISABILITY, SUPPORTING ACCOMMODATION REQUESTS: GUIDANCE ON DOCUMENTATION PRACTICES (2012), *available at* [http://www.ahead.org/uploads/docs/resources/Final\\_AHEAD\\_Supporting%20Accommodation%20Requests%20with%20Q&A%2009\\_12.pdf](http://www.ahead.org/uploads/docs/resources/Final_AHEAD_Supporting%20Accommodation%20Requests%20with%20Q&A%2009_12.pdf). This organization has been in existence since 1977. AHEAD is a professional membership organization that has over 2500 members internationally and provides information and training to higher

for documentation with the burden on the individual with a disability by determining when expensive and unnecessary documentation processes might do little to provide additional information.<sup>289</sup> The Guidance also provided useful information anticipating questions about documentation.<sup>290</sup> According to the document, students should be informed that the process and criteria for one purpose might not be the same as practiced by others.<sup>291</sup> Institutions of higher education will probably use the AHEAD Guidance and courts and OCR will consider it; applying it in a proper context is important.<sup>292</sup>

The regulation on deference only directly applies to examinations and courses for admission, licensing, and credentialing. Courts have yet to adopt the position that the same standards apply to accommodations and documentation in other contexts, including coursework taken as part of a college or law school education. Even if higher education testing outside of admission, credentialing, and licensing were subject to this regulation, the regulations specifically note that deference should be given to past decisions when the accommodation or service occurred in a “similar testing situation.” The examinations referenced in the regulations tend to be lengthy multiple-choice and essay exams, such as the SAT, ACT, LSAT, and state bar exams. College quizzes or law school exams are not generally “similar testing situations.” The fact that an individual received double time for exams in college, however, does not necessarily mean that the student should receive double time on the LSAT or the bar exam.

An “over-reading” or inappropriate application of the regulation has resulted in misunderstanding and potentially unreasonable expectations in the LSAT and bar exam context. The following scenario illustrates the potential fallout from undue expectations regarding deference to past accommodations. A student with a learning disability is admitted to a community college without taking the SAT or ACT exam, but the community college does not have the same level of disability service staffing as a four-year college. The student makes an accommodation request, providing as documentation the Individualized Education Plan

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education personnel about the participation of individuals with disabilities in higher education. *See generally* ASS’N ON HIGHER EDUC. & DISABILITY, <http://www.ahead.org> (last visited Feb. 6, 2014).

289. *See id.*

290. *Id.*

291. *Id.*

292. In September 2012, the AHEAD committee added an appendix, which noted that legal counsel assisted the committee in drafting the guidance document. *See* ASS’N ON HIGHER EDUC. & DISABILITY, *supra* note 288; *see also* TAYLOR & GOLDSTEIN, *supra* note 285.

(IEP) from high school that allowed double time for testing and separate testing space for all. The community college does not have the resources to pay a qualified professional to review the documentation, so the community college finds that it is easier to simply grant the same accommodations that the student received in high school. The student then transfers to a four-year college, which still does not have the resources to engage in an independent review of documentation, and the accommodations continue. The student, understandably expecting the same accommodations in the future, is surprised that the LSAT process requires more because it is not a “similar testing situation.” The LSAT process is more demanding in terms of documentation for a variety of reasons, including the high stakes, the importance of fairness, and the potential costs of accommodations.<sup>293</sup> The student may be surprised that the expected deference is not given to the past accommodations. Unfortunately, some law schools have granted similar accommodation requests without a careful review of the documents, potentially creating a disappointing situation when a bar examiner is unwilling to defer to decisions about past accommodations for a particular student. While it is certainly beneficial to not unduly burden an individual in obtaining unnecessary documentation, “over-accommodation” can result in a misunderstanding of the requirements and may result in protracted disputes regarding accommodation requests on the LSAT or bar exam.

An individual with a disability can also benefit from the lack of a presumption that previous accommodations are appropriate for the future. The fact that an accommodation was not provided in the past does not mean that it will not be reasonable in another setting. This is particularly important due to changing technology and the number of students whose disabilities are identified later in life. A student whose learning disability was not identified until law school should not be denied accommodations simply because the student had not received accommodations in the past.

Several courts have addressed the issue of deference to past accommodations. In its decision in *Enyart v. National Conference of Bar Examiners, Inc.*,<sup>294</sup> the court addressed the State Bar of California’s denial of the use of screen readers on the multistate portion of the bar exam.<sup>295</sup>

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293. Requests for separate rooms and double time will require additional costs for proctors and may require additional costs for space rental. Responding to these requests also requires advanced planning.

294. See *Enyart v. Nat’l Conference of Bar Exam’rs, Inc.*, 630 F.3d 1153, 1156 (9th Cir. 2011); see also *Elder v. Nat’l Conference of Bar Exam’rs*, No. C11-00199 SI, 2011 WL 672662, at \*7 (N.D. Cal. Feb. 16, 2011) (citing *Enyart*, 630 F.3d at 1163).

295. *Enyart*, 630 F.3d at 1156 (specifying the screen readers as Job Access with Speech (JAWS) software). Ms. Enyart had used Job Access with Speech (JAWS)

The use of screen readers was an accommodation Ms. Enyart had been granted for virtually all of her law school exams. In upholding the grant of a preliminary injunction by the lower court, the Ninth Circuit discussed the issue of deference to past accommodations and the standard for determining what is reasonable.<sup>296</sup> The National Conference of Bar Examiners (NCBE) argued that the regulations, which provide the “best ensures” language, were invalid and that a general reasonableness standard should apply instead.<sup>297</sup> The court held that deference should be given to the Department of Justice in promulgating the regulation, finding that the “agency’s interpretation is ‘based on a permissible construction of the statute.’”<sup>298</sup>

The court then applied the “best ensures” standard to the facts of the situation.<sup>299</sup> The NCBE argued that because Ms. Enyart had been successful in other settings without the screen readers, the NCBE should not be required to provide such readers.<sup>300</sup> The court rejected that argument and recognized that Ms. Enyart’s condition had changed over time and that each test setting was different; the court also highlighted the importance of individualized assessments in cases such as these.<sup>301</sup>

The *Enyart* decision did not, however, establish that Ms. Enyart was entitled to her preferred accommodations. Instead, the court determined that providing the readers in this setting would “best ensure” Ms Enyart’s ability to take the test.<sup>302</sup> The documentation she provided demonstrated that the offered accommodations—a live reader or audio CD with closed circuit TV for text magnification—would result in serious physical discomfort and would not permit her to fully understand the test material.<sup>303</sup>

Several other decisions have addressed this issue. All cases involving screen readers for individuals with visual impairments taking the bar exam that have been decided since the promulgation of the revised regulations have reached similar results.<sup>304</sup> In sum, while past documentation should

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computer screen readers.

296. *Id.* at 1160-65.

297. *Id.* at 1161.

298. *Id.*

299. *Id.* at 1162.

300. *Id.* at 1163.

301. *Id.* at 1164.

302. *Id.* at 1165.

303. *Id.*

304. *See, e.g.,* *Elder v. Nat’l Conference of Bar Exam’rs*, No. C11-00199 SI, 2011 WL 672662, at \*1 (N.D. Cal. 2011); *see also* *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164, 184 (D.D.C. 2011); *Jones v. Nat’l Conference of Bar Exam’rs*, 801 F. Supp. 2d 270, 270 (D. Vt. 2011).

certainly be given “considerable weight” in appropriate settings for similar situations, it is important to recognize that the evidence was never intended to be dispositive about whether granted accommodations should be allowed in other settings.

## 6. Documentation Issues

### a. General Overview

The previous section referenced documentation issues regarding the *deference* to be given to past decisions about accommodations. This section addresses two related issues: documentation of the *existence of a disability* and documentation of *how the disability relates to the requested accommodation*. Since the 2008 amendments clarified that the definition of disability is to be given broad interpretation, a renewed focus has been given to documentation regarding whether the disability justifies the requested documentation, particularly for the LSAT and bar exam.

As to the existence of the disability itself, this is primarily an issue with respect to learning disabilities and related conditions, such as attention deficit disorder (ADD) and attention hyperactivity deficit disorder (ADHD). These conditions often involve requests for accommodations, such as additional time for testing or separate testing rooms. The question of whether a certain condition is a disability is also raised in the context of certain mental health conditions, such as anxiety, stress, depression, and other conditions. The issue in those situations is whether the condition is so *substantially limiting* to a major life activity that it qualifies the individual for protection. Another condition at issue in the area of mental health impairments is post-traumatic stress disorder (PTSD), a condition receiving increasing attention due to its prevalence among veterans returning from Iraq and Afghanistan. A third area in the mental health context is traumatic brain injury (TBI), also an issue for returning veterans. Another requested accommodation is allowing emotional support animals in housing, classrooms, and other areas, such as work sites or libraries. In addition, some health conditions, such as fibromyalgia, chemical sensitivities, food allergies, and other health concerns, can require appropriate documentation. These are all invisible impairments that can be more challenging to diagnose, and consequently, have been subjected to greater scrutiny. Generally, no one disputes whether a hearing or visual impairment is a disability. A number of recent cases, however, have concerned whether particular accommodations are justified based on the documentation that is provided.

This section of the Article provides an overview of what the statutes and regulations require regarding documentation and a discussion of the case law that has responded to those requirements. It also discusses AHEAD

Guidance on that topic. Before the 2008 ADA Amendments were passed and the 2010 regulations were promulgated, testing agencies were stringent about requiring that documentation not only establish the disability, but that it also demonstrate the connection between the condition and the particular accommodation being requested. In order to ensure fairness to other test-takers and ensure exam security, testing agencies—like LSAC and state bar examiners—continue to be stringent regarding documentation. The reasons for such stringency also include the costs associated with providing accommodations (e.g., arranging for separate exam rooms, paying for readers, or supplying an amanuensis).

The 2008 ADA Amendments provide for a broad reading of disability, and they establish that documentation requirements relating to requests for accommodations be reasonable and limited to the need for the accommodation requested. The amendments do not change the reasonable accommodation standard related to what courts have required in terms of expecting documentation that is appropriately current, prepared by individuals with the qualifications to make the assessment of the condition, and a demonstration of its relationship to the requested accommodation. While the amendments provide for deference regarding previous accommodations, the courts have generally deferred to the professional judgment of higher education institutions pertaining to fundamental requirements. A similar deference could be expected with respect to fundamental alterations relating to testing.

The frustration from some advocacy groups toward LSAC and state bar examining authorities regarding documentation of disabilities is at least partially a result of a misunderstanding of the documentation expectations and the validity of these expectations. In February 2012, this advocacy took the form of a resolution by several groups that was passed by the ABA's House of Delegates regarding the practices of those who administer law school admission tests (currently only the LSAC).<sup>305</sup> The resolution sought to make the accommodation process readily accessible and the process for gaining accommodations more timely.<sup>306</sup> The resolution also urged that such testing programs provide accommodations that best ensure that the exam reflects what the exam is designed to measure, rather than reflecting the disability.<sup>307</sup> The resolution also indicated opposition to flagging test scores in the law school admission process.

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305. COMM'N ON DISABILITY RIGHTS, AM. BAR. ASS'N, RESOLUTION 111 SUMMARY (2012), *available at* [http://www.americanbar.org/content/dam/aba/administrative/mental\\_physical\\_disability/2011nov11\\_cdr\\_resolution.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/2011nov11_cdr_resolution.authcheckdam.pdf).

306. *Id.*

307. *See infra* Part III.B.8.d.

Although some of the other standardized test providers have eliminated the practice of flagging, the populations (and population subsets) taking tests under different accommodations are much smaller in number for the LSAT than for many of the large undergraduate tests (e.g., SAT), some of which no longer flag tests. LSAC has continued to evaluate its testing predictability, validity, and comparability in a thoughtful and rigorous way. LSAC continues its ongoing evaluation of the flagging process, and its current judgment is that it is not psychometrically sound to report scores of accommodated tests (extra time) as being comparable to those taken under standard conditions.<sup>308</sup> LSAC continues to study issues of comparability and validity for the LSAT, but nothing yet supports that law school admissions testing should be treated the same as undergraduate admissions testing.<sup>309</sup>

*b. Qualifications for Documenting*

The first issue is what qualifications are required of the individual providing the documentation of the disability and the relationship of that disability to the requested accommodation. A related issue is whose opinion should be given the greatest weight in situations where there are multiple evaluators. There is very little statutory or regulatory guidance on who is required to provide documentation of the existence of a disability and to identify the appropriate accommodations for that impairment. One of the few cases to address this issue is *Guckenberger v. Boston University*.<sup>310</sup> In *Guckenberger*, the court required documentation of a learning disability by a trained, experienced professional, who was not required to have a doctorate or medical degree.<sup>311</sup> Documentation of ADD or ADHD, however, was subject to the more stringent requirement that the evaluator have a Ph.D. or an M.D.<sup>312</sup> There is sparse guidance beyond this district court case and a handful of other lower court decisions.

*c. Currency of Documentation*

The second issue is how recent the documentation must or should be. There is virtually no specific guidance within the statutes or regulations

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308. See *infra* Part IV.C.

309. This issue is discussed in more detail later.

310. *Guckenberger v. Bos. Univ.*, 957 F. Supp. 306, 323 (D. Mass. 1997) [hereinafter *Guckenberger I*]. For additional discussion of this issue, see DISABILITIES AND THE LAW, *supra* note 15, at 39-40.

311. See *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 140 (D. Mass. 1997) [hereinafter *Guckenberger II*].

312. *Id.*

about how recent an evaluation must be to be given deference.<sup>313</sup> Perhaps the most attention given by any court to this issue was in the case of *Guckenberger v. Boston University*.<sup>314</sup> *Guckenberger* involved a change in policy about what documentation was required to allow various accommodations for students with learning and related disabilities.<sup>315</sup> In an early holding in the case, the court held that Boston University's requirement that documentation be created within the past three years imposed significant additional burdens on students with disabilities.<sup>316</sup> The court's holding recognized the expense of having a battery of tests to diagnose a learning disability. There is nothing in the ADA or other relevant regulations that gives a specific time frame. Most agree that documentation should be appropriately current. While some conditions remain static over a lifetime (e.g., total blindness), the types of accommodations that are appropriate might change.

There is some controversy over whether the existence of a learning disability, or condition, such as ADD or ADHD, can change over time.<sup>317</sup> There is some indication that certain conditions might change in adulthood and the educational process might alter how an individual learns. Thus, while the individual might still have a substantial impairment in the major life activity of reading, the appropriate accommodation for that impairment might change. Such a change might merit a more current assessment.

Unfortunately, some institutions and programs have adopted strict or closely adhered to mandates that documentation assessments be made no more than three years before the request for accommodations. These "three-year rules" may have come from a special education requirement that evaluations be made every three years.<sup>318</sup> While courts are likely to require appropriately current documentation, there is no indication that they are likely to mandate a specific time frame.

#### *d. Documentation Relating Disability to Requested Accommodation*

The third issue is how the disability relates to the requested accommodation. This issue continues to receive attention in the courts, even after the passage of the 2008 ADA Amendments. Some advocates believed that burdensome documentation should not generally be required and that documentation requirements should be minimalist—the

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313. See generally DISABILITIES AND THE LAW, *supra* note 15, at 26.

314. See *Guckenberger I*, 957 F. Supp. at 316.

315. See *Guckenberger II*, 974 F. Supp. at 135-36.

316. See *id.*

317. See *id.*

318. See 34 C.F.R. § 300.303(b)(2) (2014).



expectation was that there would be little judicial scrutiny. The statutory and regulatory language, however, do not dismiss the expectation that documentation might be required in appropriate circumstances. As noted previously, the documentation is not only intended to identify the disability, but also to identify the relationship between the requested accommodation and the impairment. Accordingly, courts have given attention to this issue even after 2008, and the results have depended on the facts in each case.

*e. Payment for Documentation*

Students in the K-12 educational setting have a set of expectations based on the special education statute, the Individuals with Disabilities Education Act (IDEA).<sup>319</sup> Unlike Section 504 and the ADA, this statute places the burden on the educational agency to organize outreach programs to find and identify those who are eligible for special education and to pay for testing to determine eligibility.<sup>320</sup> Unfortunately, a number of students and their parents continue to have that expectation when they reach postsecondary education. Higher education institutions, including law schools, are not required to reach out and identify such students, nor are they required to pay for evaluators to determine if an individual has a disability, or if that disability justifies any accommodation.

A law school may not be required to be proactive in reaching out to students with disabilities. Disputes and misunderstandings, however, can be avoided when a law school has appropriate outreach in its admissions process, at orientation, and throughout the administration of exams, enrollment, and other student activities. Law schools should be proactive in ensuring that students with disabilities know the process of how to receive accommodations.

*7. Auxiliary Aids and Services*

*a. General Requirements*

Substantial judicial attention has been given to the issue of reasonable accommodations in higher education, specifically in legal education.<sup>321</sup> There is a significant body of law in the employment setting,<sup>322</sup> although very little of it has been in the context of legal education or the legal profession. The following subsections provide additional clarification of

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319. See 42 U.S.C. § 1400 (2012); see also *DISABILITIES AND THE LAW*, *supra* note 15, at 34.

320. See § 1412(a)(3).

321. See *DISABILITIES AND THE LAW*, *supra* note 15, at 35.

322. See *id.* at 21-25.

how the reasonable accommodation standards have been applied in the two major areas of providing auxiliary aids and services, as well as the modification of practices and policies.

The Rehabilitation Act's statutory language does not specifically mention reasonable accommodations. The requirements relating to reasonable accommodation in the employment setting, including auxiliary aids and services, are found in the model regulations. They state that reasonable accommodations must be provided unless they would impose an undue hardship.<sup>323</sup> Reasonable accommodations may include: making facilities readily accessible and usable; job restructuring; allowing part-time or modified work schedules; acquiring or modifying equipment or devices; or providing readers or interpreters.<sup>324</sup> In the context of postsecondary programs, regulations provide that a recipient is to "make such modifications to its academic requirements as are *necessary* to ensure that such requirements do not discriminate or have the effect of discriminating . . . ."<sup>325</sup> Programs are allowed to have academic requirements when they are demonstrated to be essential to the program or licensing requirement.<sup>326</sup> The regulations provide additional examples of program modifications, including "changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted."<sup>327</sup>

The regulations also provide examples of auxiliary aids, which include "taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions."<sup>328</sup> Educational programs are not required to "provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature."<sup>329</sup>

The statutory language of the ADA incorporates much of the Section 504 regulatory language—and also draws on years of judicial interpretation—to

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323. See 34 C.F.R. § 104.12 (2014).

324. See *id.* § 104.12(b). The regulations also specify factors to be considered for an undue hardship, which include size of program, size of budget, type of operation, and nature and cost of the accommodation. See *id.* § 104.12(c).

325. *Id.* § 104.44(a).

326. *Id.*

327. *Id.*

328. *Id.* § 104.44(d)(2).

329. *Id.*

provide language on a range of issues. The ADA includes specific language defining reasonable accommodations, including auxiliary aids and services. The ADA defines auxiliary aids and services as including:

- (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- (C) acquisition or modification of equipment or devices; and
- (D) other similar services and actions.<sup>330</sup>

The statute further defines discrimination as including

a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.<sup>331</sup>

That section further provides that discrimination includes the

failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.<sup>332</sup>

The regulations promulgated by the ADA are even more detailed about reasonable accommodations.<sup>333</sup> The ADA Title II regulations specify that entities may not impose a surcharge to cover the costs of accommodations.<sup>334</sup> Additional provisions address services for applicants, participants, members of the public, and companions with disabilities.<sup>335</sup> Specific provisions clarify that individuals may not be required to rely on others to provide interpreting or similar services.<sup>336</sup> Title III regulations also specify requirements for auxiliary aids and services that are very similar—in fact, identical in many regards—to those required under Title

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330. 42 U.S.C. § 12103(1) (2008).

331. *Id.* § 12182(b)(2)(A)(ii).

332. *Id.* § 12182(b)(2)(A)(iii).

333. 28 C.F.R. § 35.104 (2014) (referencing interpreter services and other services for individuals who are deaf or hard of hearing, and providing specificity regarding services for individuals with visual impairments).

334. *Id.* § 35.130(f).

335. *Id.* § 35.160 (a)-(b).

336. *Id.* § 35.160(c).

II.<sup>337</sup>*b. Accommodations for Individuals with Hearing Impairments*

Accommodations needed for individuals with hearing impairments include interpreters or real-time transcription; these services can be expensive and require planning. The first Supreme Court decision under Section 504 addressed the qualifications of a student for a nursing program.<sup>338</sup> The student's hearing impairment raised issues of patient safety, and it was determined that she was not otherwise qualified.<sup>339</sup> The Court did not address the issue of whether accommodations would be required, but it did recognize that "[t]echnological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens . . . ."<sup>340</sup>

For law students and lawyers, accommodations for hearing impairments are unlikely to raise safety concerns. The costs of interpreter or transcription services, however, may raise the issue of undue administrative or financial burdens. As noted in the 1979 *Southeastern Community College* decision, however, technological advances may reduce costs and should be considered on an ongoing basis.

Unresolved is the question about the extent of interpreter or transcription services that must be provided at a conference or continuing legal education (CLE) program.<sup>341</sup> Must such services be provided for social events, especially those that are optional? Or would that be considered a "personal service" that falls outside the scope of auxiliary aids and

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337. *Id.* § 36.303.

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

339. *Id.* at 407; *see also* *Argenyi v. Creighton Univ.*, 44 Nat'l Disability L. Rep. ¶ 13 (D. Neb. 2011) (holding that a medical student with significant hearing loss who requested communications access real time transcription and interpreters as an accommodation could not show that certain accommodations would be necessary, although they were helpful; judicial deference given to faculty decisions). This case was reversed and remanded by 703 F.3d 441 (8th Cir. 2013), which found that issues of fact remained about whether interpreter services and real time transcription (CART) services were required as reasonable accommodations for a medical student with serious hearing impairment.

340. *Davis*, 442 U.S. at 412.

341. *See generally* COMM'N ON DISABILITY RIGHTS, AM. BAR ASS'N, PLANNING ACCESSIBLE MEETINGS AND EVENTS: A TOOLKIT, *available at* [http://www.americanbar.org/content/dam/aba/administrative/mental\\_physical\\_disability/Accessible\\_Meetings\\_Toolkit.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/Accessible_Meetings_Toolkit.authcheckdam.pdf) (last visited Feb. 6, 2014) [hereinafter COMM'N ON DISABILITY RIGHTS, A TOOLKIT].

services? There is so little case law on this that it is quite difficult to answer these questions.<sup>342</sup>

*c. Accommodations for Individuals With Visual Impairments*

There is a substantial body of case law that applies reasonable accommodation requirements for individuals with visual impairments in the context of higher education.<sup>343</sup> Most of the litigation arises in the context of individuals with visual impairments seeking to use screen reader technology for bar examinations.<sup>344</sup> Some of these decisions highlight the requirement that institutions engage in an interactive process, in determining what reasonable accommodations, including auxiliary aids and services, are to be provided.<sup>345</sup>

Most of the litigation regarding auxiliary aids and services in the context of legal education and the legal profession involve interpreters for individuals with hearing impairments and auxiliary services (such as screen readers or large print) for individuals with visual impairments. The recent decisions are consistent in determining that screen readers are generally an accommodation that should be provided to individuals with visual impairments.<sup>346</sup> In the recent cases, the individuals had been granted the

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342. See *Mosier v. Kentucky*, 640 F. Supp. 2d 875, 877-79 (E.D. Ky. 2009). The case was settled. See also *Kentucky to Provide Court Interpreters for Deaf Attorneys*, NAT'L ASS'N OF THE DEAF (Nov. 23, 2010, 4:31 PM), <http://www.nad.org/news/2010/11/kentucky-provide-court-interpreters-deaf-attorneys>; Douglas M. Pravda, *Understanding the Rights of Deaf and Hard of Hearing Individuals to Meaningful Participation in Court Proceedings*, 45 VAL. U.L. REV. 927 (2011).

343. See *DISABILITIES AND THE LAW*, *supra* note 15, § 3:10.

344. Changes in technology have made it both easier and harder to ensure accommodations. For example, computer screen readers can “read” many materials that previously required a reader to tape them. On the other hand, technology makes it much easier for a faculty member to provide a list of suggested additional reading that may not be available in a readily accessible format. Faculty members often do not realize that there may be students with visual impairments who might require additional lead-time to ensure access. While this is less likely in a law school setting—because law school administrators would be able to alert faculty members that students and observers (e.g., members of the bar, other graduate students, and others interested in enrolling or auditing law classes) in their classes might require accommodations—there may not be as much administrator awareness that these individuals might require accessible formats or other accommodations. The same could be true for CLE programs, in which case it would be important to those inviting attendees to request accommodations.

345. See, e.g., *Cutrer v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108 (5th Cir. 2005) (regarding accommodations for a visual impairment).

346. See, e.g., *Elder v. Nat'l Conference of Bar Exam'rs*, No. C11-00199 SI, 2011 WL 672662 (N.D. Cal. Feb. 16, 2011) (granting a preliminary injunction to allow the

accommodation during law school. Older cases have addressed issues of additional time as a modification of practices and use of large print exams for individuals with visual impairments and other disabilities, such as learning disabilities.<sup>347</sup> Courts have not been inclined to grant the best accommodation or the accommodation preferred by the individual.

*d. Tutors*

Although there is little case law on this issue, as a general rule, tutors are not an auxiliary service required under the ADA or Section 504. At the law school level, students have often had to previously address this issue at the undergraduate level. Typically, these earlier experiences have made them aware that while tutoring might have been a service offered in the context of K-12 special education services, such services are not generally required at the higher education level. Law schools that provide tutoring and other academic support services to students, however, must not deny such services to students with disabilities. Although reasonable accommodations for those services would be required, it is unlikely that a law school would be required to provide academic support specifically designed for students with learning disabilities. The fact that such services may not be required under the law does not mean that a law school might not refer or help to facilitate such services.

*e. Accommodations for Clients and Attorneys With Disabilities*

Most of the case law involving auxiliary aids and services as an accommodation occurred within the context of legal education and bar

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use of screen reader software on Multistate Bar Exam); *see also* *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164 (D.D.C. 2011) (requiring a bar examiner to allow the use of certain technology); *Jones v. Nat'l Conference of Bar Exam'rs*, 801 F. Supp. 2d 270 (D. Vt. 2011) (granting a preliminary injunction to allow the use of screen reader for MPRE). *But see* *Brewer v. Wis. Bd. of Bar Exam'rs*, 270 F. App'x 418 (7th Cir. 2008) (holding, in a case decided before the 2010 regulations, that a bar applicant who was legally blind was not entitled to ideal accommodations, and that the accommodations provided were reasonable, including extended time, a live reader, and a closed-captioned television to enlarge print); *Kelly v. W. Va. Bd. of Law Exam'rs*, No. 2:08-00933, 2008 WL 2891036, at \*1 (S.D. W.Va. July 24, 2008) (granting large print and time and a half to a bar applicant with a learning disability, but denying double time, and rejecting a preliminary injunction because harm to other applicants could occur without fair administration and the applicant had been successful on other exams with only time and a half); *9th Circuit Upholds Injunction Allowing Law School Graduate to Have Accommodations on Her Bar Exam*, ADA COMPLIANCE GUIDE NEWSL., Mar. 2011, at 4 (reporting that a law school graduate with a vision impairment is entitled to accommodations for the bar exam that “best ensure” results that accurately reflect her aptitude).

347. *See infra* Part III.B.4.

admission rather than in legal practice. Lawyers providing legal services may be required to provide such services (e.g., interpreters for individuals with hearing impairments) in their legal practice. Attorneys that provide private legal services are subject to the requirements under Title III of the ADA, and thus would be required to provide reasonable accommodations. For example, a client with a hearing impairment may need an interpreter. While undue burden can be a defense to not providing such a service, the attorney will bear the burden of demonstrating that it would be an undue burden.<sup>348</sup> For that reason, requests for costly accommodations should be handled by obtaining the information on the costs before denying such services. Attorneys should also determine whether alternate accommodations might be possible.

Attorneys may themselves need accommodations such as an interpreter or real-time transcription service. There is little guidance on this issue, but the attorney may have to pay for those costs in some settings. An attorney's employer may be responsible for the cost of accommodation if it is not unduly burdensome. When the attorney is in court, however, it may be the court system that is required to pay for and provide the accommodations.<sup>349</sup> While a court could potentially raise the defense of undue burden, this would require an assessment of budgets, feasibility, and other factors to determine the administrative or financial burden.

#### *8. Modification of Policies, Practices, and Procedures*

As previously noted, reasonable accommodations include not only providing auxiliary aids and services, but also modifying policies, practices, and procedures. The model regulations under Section 504 provide examples of program modifications. These include "changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are

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348. The case of *Wynne v. Tufts University School of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991), provides guidance about judicial deference. Although the case is in the context of an accommodation for a student, its reasoning is relevant to faculty settings as well. The court held that in cases involving modifications and accommodation, the burden is on the institution to demonstrate 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 standards or require substantial program alteration.

349. See *Mosier v. Kentucky*, 640 F. Supp. 2d 875 (E.D. Ky. 2009). The case has been settled. See also *Kentucky to Provide Court Interpreters for Deaf Attorneys*, NAT'L ASS'N OF THE DEAF (Nov. 23, 2010, 4:31 PM), <http://www.nad.org/news/2010/11/kentucky-provide-court-interpreters-deaf-attorneys>; Pravda, *supra* note 342.

conducted.”<sup>350</sup>

The ADA statutory language and regulations further specify the requirements relating to program modifications. These references are found throughout the statute. The Title III regulations provide greater specificity about the requirements. The Title III regulations provide the following:

*General.* A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.<sup>351</sup>

There are additional regulations under both Title II and Title III relating to service animals.<sup>352</sup> Although this can be a significant issue on a college campus or in a law school setting, most of the case law on this issue has not arisen in the context of legal education or the legal profession. For the foregoing reason, that issue is not addressed in detail here.<sup>353</sup>

When considering certain types of modifications, the issue of documentation can become particularly important. The reasons for this include cost and fairness. For an accommodation—such as additional time for an exam, which might require a separate testing room and proctors—there can be a reciprocal cost to rent space or to pay supervisory staff. While this may not seem burdensome for one or two individuals, when a large number of students request that accommodation, it can raise an issue of undue burden.

When speed and timeliness are being evaluated through an exam or assignment deadlines, allowing some individuals more time can raise an issue of unfair advantage if the additional time is not leveling the playing field for an individual with a learning disability. Giving extra time to write an essay answer for someone without documentation of a disability could

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350. See 34 C.F.R. § 104.44 (2014); see also *Conference Panel: Best Practices*, 15 AM. U. J. GENDER SOC. POL’Y & L. 791 (2007); Meredith Georget & Wendy Newby, *Inclusive Instruction: Blurring Diversity and Disability in Law School Classrooms Through Universal Design*, 69 U. PITT. L. REV. 475 (2008) (advocating for a foundation of pedagogical practice that could provide access for students with disabilities without altering the essential nature of the curriculum and program objectives); Susan Johanne Adams, *Leveling the Floor: Classroom Accommodations for Law Students with Disabilities*, 48 J. LEGAL EDUC. 273 (1998).

351. See 28 C.F.R. § 36.302(a) (2014). The regulations under Title II are contained in 28 C.F.R. § 35.130(b)(7). These are virtually identical in most relevant respects.

352. 28 C.F.R. § 36.302(c); see also *infra* Part III.B.8.e.

353. See generally DISABILITIES AND THE LAW, *supra* note 15, § 5:5.



also be unfair.<sup>354</sup>

*a. Testing*

One of the most contentious areas involves testing, including testing for admission to law school, law school course testing, and bar admission testing. Modification requests include, but are not limited to, extra time, additional rest breaks, spreading a test out over more days (e.g., the bar exam), and testing in separate rooms. A limit on the number of times one can take a test has also been raised in some situations involving bar exams.<sup>355</sup>

Test accommodations, like all other accommodations, are to be considered on an individualized basis.<sup>356</sup> It is important to consider the fact

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354. See Ruth Colker, *Extra Time as an Accommodation*, 69 U. PITT. L. REV. 413 (2008); see also Ali A. Aalaei, *The Americans with Disabilities Act and Law School Accommodations: Test Modifications Despite Anonymity*, 40 SUFFOLK U. L. REV. 419 (2007); John D. Ranseen & Gregory S. Parks, *Test Accommodations for Postsecondary Students: The Quandary Resulting from the ADA's Disability Definition*, 11 PSYCHOL. PUB. POL'Y & L. 83 (2005); Suzanne E. Rowe, *Learning Disabilities and the Americans with Disabilities Act: The Conundrum of Dyslexia and Time*, 15 J. LEGAL WRITING INSTITUTE 165 (2009) (discussing accommodations in a variety of legal education contexts); Jennifer Jolly-Ryan, *The Fable of the Timed and Flagged LSAT: Do Law School Admissions Committees Want the Tortoise or the Hare?*, 38 CUMB. L. REV. 33 (2007).

355. Part III.B.4 of this Article discussed the issue of test accommodations that "best ensure" success for a student with a disability and the misunderstanding about when that regulation applies. The issue of additional time for coursework and for testing was addressed previously as well. See *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005) (finding no Eleventh Amendment immunity and that a law student with intractable migraine syndrome could pursue claim requesting additional time on exam).

356. See *Kelly v. W. Va. Bd. of Law Exam'rs*, No. 2:08-00933, 2008 WL 2891036, at \*1 (S.D.W. Va. July 24, 2008) (granting large print and time and half to a bar applicant with a learning disability, but denying double time); see also *Brewer v. Wis. Bd. of Bar Exam'rs*, 270 F. App'x 418 (7th Cir. 2008) (holding that a bar applicant who was legally blind was not entitled to ideal accommodations); *Love v. Law Sch. Admission Council, Inc.*, 513 F. Supp. 2d 206 (E.D. Pa. 2007) (holding that a diagnosis of ADD and learning disability does not automatically entitle a test taker to accommodations under the ADA, especially as the learning impairment that affected processing speed did not substantially limit ability to read and the plaintiff had not sought accommodations during college and graduate school); *In re Bedi*, 917 A.2d 659 (D.C. 2007) (finding questionable conduct during the bar exam and also questioning the dyslexia documentation); *In re Reasonable Testing Accommodations of LaFleur*, 722 N.W. 2d 559 (S.D. 2006) (discounting the expertise of a psychologist testifying on extra time for individual with ADD when expertise was not on bar exam accommodations); *Cox v. Ala. State Bar*, 330 F. Supp. 2d 1265 (M.D. Ala. 2004) (finding that a bar applicant failed to show the reasonableness of the request for twice

that each test setting raises different concerns. A three-hour or four-hour multiple-choice admission test on a single day has potentially different accommodation needs than a three-hour essay exam at the end of an academic semester. A two-day or three-day bar exam that tests cumulative knowledge may require other accommodations.<sup>357</sup> As noted in an earlier section,<sup>358</sup> the documentation required for accommodations should identify not only the disability, but also how the disability relates to the requested accommodation. A student with a visual impairment that makes it difficult to read for long periods of time may need a bar exam to be spread over several days rather than granting additional time on the same day.<sup>359</sup> That

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the amount of time where the expert opinions conflicted); *Agranoff v. Law Sch. Admission Council, Inc.*, 97 F. Supp. 2d 86 (D. Mass. 1999) (granting injunctive relief for the plaintiff—with a neurological disability that prevented him from being able to write for long periods of time—to have the accommodation of extra time to take the LSAT when he provided evidence that he had been accommodated in such a way throughout his schooling); *Argen v. N.Y. State Bd. of Law Exam'rs*, 860 F. Supp. 84 (W.D.N.Y. 1994) (granting a preliminary order that held that the applicant did not have a learning disability that justified providing accommodations); *In re Application of Head*, 867 N.E.2d 824 (Ohio 2007) (finding that the definition of disability was not met where a bar applicant failed to disclose an anxiety disorder and bar examiners denied time extensions); *In re Stoller*, 622 N.W.2d 878 (Neb. 2001) (granting reimbursement for bar exam expenses because of discrimination in the location of the test and other discriminatory treatment that was allowed even though he had passed the bar).

357. See Fla. Bd. of Bar Exam'rs *ex rel.* S.G., 707 So. 323, 325 (Fla. 1998) (holding that calculating sections of the bar exam taken at separate sittings, as if administered at the same time, is not a reasonable accommodation); see also W. Ray Williams, *Hand-Up or Handout? The Americans with Disabilities Act and "Unreasonable Accommodation" of Learning Disabled Bar Applicants: Toward a New Paradigm*, 34 CREIGHTON L. REV. 611, 618-19 (2001). See generally *Conference Panel: The Bar Examination*, 15 AM. U. J. GENDER SOC. POL'Y & L. 861 (2007); *Conference Panel: Anticipating and Meeting Challenges in a Changing Landscape*, 18 AM. U. J. GENDER SOC. POL'Y & L. 141 (2009) (discussing students with disabilities in the law school context).

358. See *infra* Part III.B.6.d.

359. See *D'Amico v. N.Y. State Bd. of Law Exam'rs*, 813 F. Supp. 217, 223-24 (W.D.N.Y. 1993) (holding that a woman with a visual disability must be given the bar exam over four days instead of two); see also TAYLOR & GOLDSTEIN, *supra* note 285; Robert A. Burgoyne & Caroline M. Mew, *New Regulations Under Titles II and III of the ADA: What Has Changed Relative to the Administration of Licensing Examinations*, B. EXAM'R, Mar. 2011, available at [http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2011/800111\\_Burgoyne\\_Mew.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2011/800111_Burgoyne_Mew.pdf) (assessing 2010 DOJ regulations pursuant to Titles II and III of the ADA relating to testing accommodations); Judith A. Gundersen, *The ADA and the Bar Exam*, B. EXAM'R, May 2009, at 40, available at [http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2009/780209\\_Gundersen.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2009/780209_Gundersen.pdf) (providing overview of the comparison of ADA before and after the 2008 amendments); Marilyn Haight et al., *Ensuring*

same individual might not need additional time for a one-hour midterm exam in law school.<sup>360</sup>

One type of accommodation that might be requested is a take-home exam. Very little case law provides guidance about whether a take-home exam is a reasonable accommodation.<sup>361</sup> Law schools denying such a request might consider whether circumstances where a student with a health vulnerability (such as a student with HIV during a flu epidemic) might be appropriate for an exception. As noted previously, individualized determinations should be the general rule.

A contentious and unresolved testing issue relates to the law school admission testing policy and practice of “flagging.”<sup>362</sup> The practice of flagging involves placing a notation on the Law School Data Assembly Service (LSDAS) report that is sent to the law school that indicates the existence of an accommodation such as additional time. Such notations are included whenever a test was taken under nonstandard conditions. The flag does not identify an individual’s disability, the specific accommodation of how much additional time was granted, or what other, if any, accommodation(s) may have been provided. Applicants, however, may elect to have that information and the supportive documentation forwarded to the law school as part of the Law School Data Assembly report.

LSAC believes that whenever a test is taken under “nonstandard” conditions, including allowing a different amount of time, a notation is psychometrically required. To report scores without some notation is

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*Access to the Multistate Professional Responsibility Examination: High Stakes Professional Testing and Accommodations under the Americans with Disabilities Act*, B. EXAM’R, Feb. 2007, available at [http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2007/760107\\_HaightHoltNewton.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2007/760107_HaightHoltNewton.pdf).

360. See *Oser v. Capital Univ. Law Sch.*, No. 2:09-cv-709, 2009 WL 2913919, at \*5 (S.D. Ohio Sept. 8, 2009) (giving deference to school regarding amount of additional time to grant on exams to first year law student with ADHD); see also *Rothberg v. Law Sch. Admission Council, Inc.*, 300 F. Supp. 2d 1093, 1107 (D. Colo. 2004) (holding that law school testing organizations violated Title III by not allowing additional time for test takers with learning disabilities), *order rev’d*, 190 Ed. Law Rep. 145 (10th Cir. 2004).

361. See *Mucci v. Rutgers*, No. 08-4806, 2011 WL 831967, at\*1 (D.N.J. Mar. 3, 2011) (holding that a law student with diabetes and stress induced anxiety did not provide sufficient documentation to justify accommodations for a take-home exam because the documentation was not from a physician and did not include a formal diagnosis).

362. See, e.g., Karen Sloan, *California, Law School Test Council Spar Over Accommodations for Disabled*, NAT’L L.J. 1 (Jan. 8, 2013), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202583770614> [hereinafter Sloan I].

inappropriate from a psychometric professional standard.<sup>363</sup> There are insufficient numbers of students with specific disabilities to do the necessary validation and predictability assessments to compare scores over time, and this forms the basis for LSAC's position on flagging.<sup>364</sup> Opponents of flagging believe that this practice constitutes disability discrimination.<sup>365</sup>

A testing issue that is increasingly occurring in law schools and on bar exams is the expectation that accommodations to testing that were granted in previous settings should automatically be granted in other settings. Without a consistent application of documentation standards, and an understanding that each setting is distinct, there may continue to be situations where students have been "over-accommodated" in an earlier setting.<sup>366</sup>

It is important that all those administering exams provide adequate and reasonable notice of the expectations for documentation and the process of receiving exam accommodations. It can take time for students to obtain the necessary documentation, especially if new and different documentation from previous settings is required. It also takes time for those administering the test to review the documentation and possibly refer the documentation to experts for additional consideration in certain situations. LSAC cannot require that those requesting accommodations register any earlier for the exam. Those applicants who do not anticipate the time it may take for LSAC to review documentation, however, run the risk of

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363. *See id.*

364. *See id.*

365. In 2012, the State of California enacted legislation prohibiting LSAC from flagging reported scores in that state, but the enforcement of that law has been enjoined. *See, e.g., Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council, Inc.*, 896 F. Supp. 2d 849, 869 (N.D. Cal. 2012) (recognizing that issues remain about the practice of flagging); Ed Finkel, *Disabled Law Students See Largest Hurdles at Entrance, Exit*, 40 STUDENT LAW. 8, 3 (Apr. 2012), available at [http://www.americanbar.org/publications/student\\_lawyer/2011-12/april/disabled\\_law\\_students.html](http://www.americanbar.org/publications/student_lawyer/2011-12/april/disabled_law_students.html) (criticizing standardized testing and enumerating several difficulties presented by law school for people with disabilities, including visual impairment and legal research); Karen Sloan, *Ruling Allows Council to 'Flag' Disabled Law School Admission Test Takers*, NAT'L L.J. 1 (Feb. 4, 2013), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202586925213>; Sloan I, *supra* note 362, at 1; Aleks Tzatzev, *DOJ: Law School Admission Council Is Outing Disabled Students to Schools*, BUS. INSIDER (Sept. 6, 2012, 4:15 PM), <http://www.businessinsider.com/lawsuit-alleges-red-flagging-of-disabled-students-on-lsat-2012-9> (discussing DOJ's intervention in a class action suit brought by the State of California accusing LSAC of illegally "flagging" scores of disabled students taking the LSAT).

366. *See supra* Part III.B.5.

being able to take the test, but not being granted the requested accommodation. The LSAC website encourages individuals to begin that process early.<sup>367</sup> Law school policies should also encourage early submission of the request. Law schools and bar examining authorities should provide notice of these expectations as well, so that individuals can plan for it and not be surprised.

*b. Reduced Course Loads and Impact on Financial Aid*

A frequently requested accommodation, particularly for students with learning disabilities or significant health issues, is a reduced course load.<sup>368</sup> One of the issues that arise when granting such an accommodation is the impact on financial aid eligibility. Certain federal financial aid programs require full time enrollment and that cannot be waived. For scholarship awards that do not fall under a government program, law schools may need to consider whether waiving full time enrollment is a fundamental alteration of the program. Very little case law addresses this issue.<sup>369</sup>

In one of the few cases to address whether a reduced course load was even a reasonable accommodation, the Fifth Circuit Court of Appeals in *MacGregor v. Louisiana State University Board of Supervisors*,<sup>370</sup> held that a law school did not have to grant a reduced course load as an accommodation to a student with physical impairments because it did not have a part-time program.<sup>371</sup> The facts in the case may have driven the decision because the student had significant academic problems even with some of the accommodations that had been granted.<sup>372</sup> It is questionable whether this holding would be the same today or in other jurisdictions. For example, consider the situation of an academically outstanding student at the top of the class who is injured during the summer after the first year of law school. If that student sought a reduced load from a law school without a part-time program, and the law school denied the request, it is unlikely that a court would uphold that decision.

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367. See generally LAW SCH. ADMISSION COUNCIL, <http://www.lsac.org> (last visited Apr. 7, 2013).

368. See, e.g., *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 859 (5th Cir. 1993).

369. See Phyllis G. Coleman & Robert M. Jarvis, *Tuition Adjustments for Law School Students: A Necessary Accommodation Under the ADA?*, 24 J.C. & U.L. 45, 45 (1997).

370. See *McGregor*, 3 F.3d at 859 (holding that a part-time program would be a substantial modification and not required under Section 504).

371. *Id.* at 860.

372. See *id.* at 856-57.

*c. Second Chances*

Programs are only required to make accommodations for “known” disabilities. For this reason, courts have generally not required law schools to give second chances to law students whose academic performance was deficient where the student did not request accommodations until after the failure.<sup>373</sup> There are some cases, however, where the condition (a learning disability or a mental health issue) was not identified until after the failure. In such cases, where there was a justifiable reason for not requesting an accommodation, perhaps schools should consider allowing the individual a second chance.<sup>374</sup>

One testing issue unique to bar examination situations is the practice by some states of limiting the number of times an individual can take a particular exam. There is little judicial guidance on this, although there are cases from both bar admissions and other professional licensing. At

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373. See, e.g., *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 465 (4th Cir. 2012) (explaining that a medical student with ADHD and an anxiety disorder did not request accommodations until several years after engaging in unprofessional acts); *Strujan v. Lehman Coll.*, 363 Fed. App'x. 84, 85 (2d Cir. 2010) (finding no discrimination when a request to withdraw from a course was not based on a “sufficiently severe or pervasive” condition); *Lipton v. N.Y. Univ. Coll. of Dentistry*, 865 F. Supp. 2d 403, 410 (S.D.N.Y. 2012) (upholding the denial of a request by a dental student to retake a national exam an unlimited number of times); *Maples v. Univ. of Tex. Med. Branch at Galveston*, 901 F. Supp. 2d 874, 883 (S.D. Tex. 2012) (upholding a ruling that a second chance was not a reasonable accommodation when student with ADHD and depression was dismissed academically for not submitting paper on time); *Rivera-Concepcion v. Puerto Rico*, 786 F. Supp. 2d 489, 499 (D.P.R. 2011) (allowing the expulsion of a student with bipolar disorder from internship program by officials who were unaware of bipolar disorder at time of expulsion); *Garcia v. State Univ. of N.Y. Health Scis. Ctr. at Brooklyn*, No. CV 97-4189(RR), 2000 WL 1469551 (E.D.N.Y. Aug. 21, 2000) (allowing the dismissal of a student from medical school because of unsatisfactory academic performance before diagnosis was known); *Gill v. Franklin Pierce Law Ctr.*, 899 F. Supp. 850, 856 (D.N.H. 1995) (finding that a law student was not qualified under Section 504 to receive accommodations when he had not requested accommodations under the assumption that the law school should have known that he needed accommodations because of his post-traumatic stress syndrome resulting from being the child of alcoholic parents).

374. See, e.g., *Haight v. Haw. Pac. Univ.*, 116 F.3d 484 (9th Cir. 1997) (determining that where an institution was aware of behavior or performance deficiencies or where reasonable questions are raised after dismissal, the institution may have the discretion to allow readmission that is subject to conditions not applied to students in the initial admission process); *Peters v. Univ. of Cincinnati Coll. of Med.* No. 1:10-CV-905, 2012 WL 3878601, at \*2, 7 (S.D. Ohio Sept. 6, 2012) (determining that the failure to allow a student with a learning disability and ADD to retake exams was discriminatory after it was determined that her medication regimen had been stabilized).

present, no clear judicial precedent applies in every jurisdiction.<sup>375</sup>

*d. Attendance*

There has been significant judicial attention to the issue of attendance as an essential requirement for law students and attorneys in a wide range of settings.<sup>376</sup> The ABA law school accreditation standards require regular attendance,<sup>377</sup> and it would be unlikely that law schools would be required to waive attendance requirements as a reasonable accommodation.<sup>378</sup> Attendance has often been held to be an essential requirement for a number of employment positions, but there has been little case law relating to attorney employment. The importance of meeting dates, such as court dates, would almost certainly be something that would be viewed as essential.

*e. Excusing Performance or Behavior Deficiencies*

A fair amount of case law in the higher education context concerns meeting academic requirements, deadlines, and other performance expectations. Most courts have held that entities need not waive academic or other performance requirements and that deficiencies in these areas need not be excused, even if there is a relationship to a disability.<sup>379</sup> This issue

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375. See, e.g., *Lipton*, 865 F. Supp. 2d at 410 (holding that dental student with a reading disorder who had been granted additional time on exams was not allowed to retake a national exam an unlimited number of times without paying the re-matriculation fee); *Tips v. Regents of Tex. Tech Univ.*, 921 F. Supp. 1515, 1517-18 (N.D. Tex. 1996) (finding no violation of either the ADA or the Rehabilitation Act when a graduate psychology student who did not make her learning disability known was dismissed); DePaul Univ., OCR Resolution Letter, No. 05-89-2029, 4 NDLR 157, 27-28 (Dep't of Educ. May 18, 1993) (establishing that an institution must at least consider the effects of disability in evaluating student for readmission); see also Lynn M. Daggett, *Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students*, 32 J.C. & U.L. 505, 509 (2006).

376. See DISABILITIES AND THE LAW, *supra* note 15, § 4:20; see also *Toledo v. Sanchez*, 454 F.3d 24, 33-34 (1st Cir. 2006) (upholding attendance requirements for student with schizoaffective disorder); *Harville v. Texas A&M Univ.*, 833 F. Supp. 2d 645, 658 (S.D. Tex. 2011) (finding no violation of the ADA for a research assistant who was terminated because of excess absences).

377. ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR ACCREDITATION STANDARD 304(d).

378. See *Ladwig v. Bd. of Supervisors of La. State Univ. & Mech. Coll.*, 842 F. Supp. 2d 1003, 1005 (M.D. La. 2012) (noting that the attendance exception accommodation has been contingent on providing a letter to professors).

379. See *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1051 (9th Cir. 1999) (holding that a medical student with a learning disability did not meet academic standards).

is interrelated with the “second chance” accommodation in some cases. Similarly, behavior and misconduct requirements need not be excused, even where there is a relationship to the disability.<sup>380</sup> This most often arises in the context of individuals with mental health or substance abuse issues.<sup>381</sup>

*f. Billable Hours and Related Issues*

The issue of evaluation of work performance can include questions about how attorneys in practice are to be accommodated where speed may be an issue. A frequently asked question is whether an attorney with a learning disability or other disability (such as a visual impairment), who may require more time to accomplish a work assignment, can be assigned billable hours. The ADA and Section 504 are intended to spread costs among those able to bear them. The concept of “reasonable” accommodation incorporates the consideration that employers, law schools, and court systems can spread the costs of accommodations to the entire budget of the program. Where an individual client, however, is paying for billable hours, a question can arise as to whether this is an appropriate burden spreading policy. There is not a good answer for this, but it should be noted that speed and quality are not the same thing. As a law student, Louis Brandeis had visual problems and so, classmates read the course assignments to him. While it might have taken him longer to read some material, the quality of his work certainly made up for that.<sup>382</sup> His extraordinary memory made him incredibly efficient in applying the knowledge he gained. No case law really provides guidance on this issue, but there are publications about how individual attorneys have used

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380. See generally John V. Jacobi, *Professionalism and Protection: Disabled Lawyers and Ethical Practice*, 69 U. PITT. L. REV. 567, 580 (2008); Kelly Cahill Timmons, *Disability-Related Misconduct and the Legal Profession: The Role of the Americans with Disabilities Act*, 69 U. PITT. L. REV. 609, 628-29 (2008).

381. See *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 437 (6th Cir. 1998) (finding that a graduate student with ADHD did not meet academic standards); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974, 979 (10th Cir. 1998) (holding that a medical school was not required to advance a student with marginal grades as this would be a substantial alteration); *Childress v. Clement*, 5 F. Supp. 2d 384, 392 (E.D. Va. 1998) (holding that a student who had plagiarized was not otherwise qualified for position as graduate student in criminal justice program, as the learning disability had been taken into account in evaluating violations of the honor code and the inquiry was individualized); *Doe v. Vanderbilt Univ.*, 983 F. Supp. 205 (D.D.C. 1997) (finding that a student with manic depression need not be readmitted to medical school as the dismissal was based on academic deficiencies and behavior problems).

382. See MELVIN I. UROFKSY, LOUIS D. BRANDEIS: A LIFE 34-35 (2009).



accommodations in practice.<sup>383</sup>

*g. Employee Transfer, Job Reassignment, or Job Restructuring*

In the employment context generally, there are a large number of cases about whether job reassignment and employee transfer must be granted as reasonable accommodations.<sup>384</sup> Related issues of light duty, part time scheduling, leaves of absence, and time off are also accommodations that have been the topic of numerous court cases.<sup>385</sup> There have been few cases, however, where this has arisen in the context of attorneys. The basic guiding principles incorporate the factors previously stated regarding undue burden. As a general rule, the majority of courts have neither required “light duty” as a continuing accommodation nor have they required that an individual may receive a change in supervisory status, although the issue of a hostile work environment could alter that result.<sup>386</sup>

*C. Mental Health and Substance Use and Abuse Issues*

Impairments resulting from mental health conditions and substance abuse are a significant issue for attorneys as well as law students. A comprehensive discussion of all of these issues is found in a 2008 article, *Law Students and Lawyers With Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*.<sup>387</sup> The following is a

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383. See, e.g., Donald Stone, *The Disabled Lawyers Have Arrived: Have They Been Welcomed with Open Arms into the Profession? An Empirical Study of the Disabled Lawyer*, 27 L. & INEQUALITY 93, 105-07 (2009).

384. See *Milanes v. Holder*, 783 F. Supp. 2d 272, 382-83 (D.P.R. 2011) (finding no showing of discrimination in the termination of a U.S. Attorney who sought transfer as accommodation for his mental health).

385. See DISABILITIES AND THE LAW, *supra* note 15, § 4.20.

386. See *Rothman v. Emory Univ.*, 828 F. Supp. 537, 541 (N.D. Ill. 1993) (explaining that a law school’s letter of recommendation to a state board of bar examiners is a service under the ADA); see also *Rothman v. Emory Univ.*, 123 F.3d 446, 453 (7th Cir. 1997) (holding that a student with epilepsy did not show that the law school administrator’s conduct created a hostile environment).

387. See generally Jacobi, *supra* note 380, at 567; Michael L. Perlin, “They Keep It All Hid”: *The Ghettoization of Mental Disability Law and Its Implications for Legal Education*, 54 ST. LOUIS U. L.J. 857, 860 (2010); Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities Out of the Stigma Straitjacket*, 79 UMKC L. REV. 123, 125-26 (2010); Jennifer Jolly-Ryan, *Promoting Mental Health in Law School: What Law Schools Can Do for Law Students to Help Them Become Happy, Mentally Healthy Lawyers*, 48 U. LOUISVILLE L. REV. 95, 95 (2009) [hereinafter Jolly-Ryan, *Promoting Mental Health*]; Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 691, 715-16 (2009); Michael L. Perlin, “Baby, Look Inside Your Mirror”: *The Legal Profession’s Willful and Sanist Blindness to Lawyers with Mental Disabilities*,

brief summary of the same article by this author and an update of developments since that date.

The article provides an overview of the policies, practices, and procedures relevant to mental impairment and substance abuse, including statutory and regulatory guidance, how the courts have addressed these issues, how regulatory associations (the ABA and the Association of American Law Schools) have responded, the law school admission and enrollment process (including obligations to report mental health and substance abuse issues in the admission and bar certification process), the issue of treatment, issues of discipline, and issues of professional licensing (initial licensing and retention), and employment issues.

The article concludes with a number of recommendations. These include collecting data on the prevalence of mental illness and substance abuse, as well as the impact of stress. The recommendations also include determining what research demonstrates about the benefits of education programs focused on mental health and substance abuse. Collecting data about the effectiveness of treatment programs for lawyers and law students, and on the benefits of education programs about mental health and substance abuse are also recommended. The article further suggests a review and evaluation about initial licensure, issues of license revocation, and other disciplinary measures relating to attorneys with mental health and substance abuse problems. It provides a much more detailed discussion than is possible in this Article, but the following provides more recent cases and developments, and details what has occurred with mental health and substance abuse issues since 2008.

### *1. Definition of Disability for Mental Health and Substance Abuse*

As noted previously,<sup>388</sup> Section 504 and the ADA have essentially the same definition of a disability. For individuals with mental health impairments, the condition must substantially limit a major life activity. An important consideration is whether the cases determining if mental impairment is a disability were decided before or after the effective date of the ADA Amendments Act of 2008. The 2008 amendments intend that certain conditions, particularly mental health conditions, be more likely to

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60 U. PITT. L. REV. 589, 589 (2008) [hereinafter Perlin, *Lawyers with Mental Disabilities*]; Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 531-32 (2008) [hereinafter Rothstein, *Substance Abuse Problems*]; Adam J. Shapiro, *Defining the Rights of Law Students with Mental Disabilities*, 48 U. MIAMI L. REV. 923, 924-25 (2004).

388. See *supra* Part II.A.

be classified as disabilities.<sup>389</sup>

## 2. *Otherwise Qualified*

As noted previously, meeting the definition of disability is only the first step to finding that impermissible discrimination has occurred. The individual must also be otherwise qualified to carry out the essential requirements of the position or program, taking reasonable accommodations into account.<sup>390</sup> An important change since 2008 is more likely to affect law schools than employers. In the context of determining whether an individual is otherwise qualified, entities can take into account whether the individual presents a direct threat.<sup>391</sup> Since 2008, the issue of

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389. *Compare* Marlon v. W. New Eng. Coll., No. Civ.A. 01-12199DPW, 2003 WL 22914304, at \*8 (D. Mass. Dec. 9, 2003), *aff'd*, 124 F. App'x 15 (1st Cir. 2005) (holding, in a pre-amendment decision, that a law school did not discriminate against a student with a learning disability, panic attacks, and depression, because there was insufficient evidence as to whether the student was regarded as disabled), *with* Ladwig v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll., 842 F. Supp. 2d 1003, 1007 (M.D. La. 2012) (holding that a doctoral student with a head injury and recurrent depression was not substantially limited in a major life activity), *and* Forbes v. St. Thomas Univ., 768 F. Supp. 2d 1222, 1230-34 (S.D. Fla. 2010) (finding issues of material fact regarding whether a law student's post-traumatic stress disorder was a disability and, if so, whether the student had received reasonable accommodations, including requiring evidence that the denial of the requests was based on a rational belief that no further accommodation could be made without imposing a hardship on the program).

390. *See supra* Part II.A.2; *see also* Halpern v. Wake Forest Univ. Health Scis., 669 F.3d 454, 465 (4th Cir. 2012) (finding that a medical student with ADHD and an anxiety disorder did not request accommodations until several years after engaging in unprofessional acts, including abusive treatment of staff and multiple unexcused absences, and so the proposed accommodation—allowing psychiatric treatment, participating in program for distressed physicians, and continuing on strict probation—was not reasonable); *Ladwig*, 842 F. Supp. 2d at 1008 (holding that a doctoral student with depression and anxiety did not adequately request accommodations for a head injury to excuse her from attendance and allow additional time to turn in assignments, and that the university had provided accommodations by providing letters supporting absences and extra time).

391. *See* Mershon v. St. Louis Univ., 442 F.3d 1069, 1073 (8th Cir. 2006) (regarding a student with a disability who was banned from campus because of a threat of violence against a professor). Several opinion letters from the Office for Civil Rights have also addressed this issue. *See* St. Thomas Univ. Sch. of Law, OCR Resolution Letter, No. 04-01-2098, 23 NDLR 160, 6-9 (Dep't of Educ. 2001) (upholding dismissal after noting that a law student with bipolar disorder was dismissed because of threats to “blow up the legal writing department”); Dixie Coll., OCR Resolution Letter, No. 08-95-2111, 8 NDLR 31, 4-5 (Dep't of Educ. 1995) (finding no ADA or Section 504 violation in expelling a student because of stalking and harassing a professor, as the expulsion was because the student posed a threat and not because of a perceived mental disability).

whether a threat to “self” can be considered has become the subject of debate.<sup>392</sup>

Consideration of threat to “self” is permissible in the employment context. But for law schools addressing mental health concerns such as depression, eating disorders, and other conditions related to their students, this is not as simple. While being otherwise qualified allows the law school to discipline or take other action where a student is disruptive or dangerous to others, when the potential harm is only to the individual students themselves, it is not clear what is allowed.

The Title II regulations issued in 2010 provide that a “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.”<sup>393</sup> The determination of direct threat is through 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.”<sup>394</sup> The Title II regulatory interpretation probably applies to Title III entities as well. 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.<sup>395</sup>

The statutory language of the ADA does not define direct threat. The EEOC regulation has been upheld by the Supreme Court as being valid in the employment context and within the scope of the statute.<sup>396</sup> The Title II regulation, however, has not been subjected to judicial review. DOE unofficial guidance has indicated that the agency enforcement will interpret the requirement to mean that threat to self may not be considered and entities that act on that basis may be in violation of the ADA. Many in higher education have raised concerns about how the Title II regulation (not considering threat to “self”) will be applied to actions towards students who are suicidal or who have other self-destructive behaviors such as

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392. See *supra* Part II.A.3.

393. 28 C.F.R. § 35.104 (2012) (emphasis added).

394. *Id.* § 35.139(b); see also Marietta Coll., OCR Resolution Letter, No. 15-04-2060, 31 NDLR 23, 12-13 (Dep’t of Educ. 2005) (asserting dismissal of student threatening suicide violated Section 504 because decision was not sufficiently based on a high probability to substantial harm).

395. 29 C.F.R. § 1630.15(b)(2) (2012).

396. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85-87 (2002).

severe depression or eating disorders.<sup>397</sup>

### 3. Law School Admission and Enrollment

Since 2008, there has been little change in law school admission policies and practices regarding mental health and substance abuse issues. Most law schools inquire only about discipline and behavior issues, not diagnosis and treatment. Law schools continue to use their student codes of conduct to address situations where student misconduct is at issue, even where it may be related to a mental health or substance abuse issue. The bar certification reporting processes have not changed substantially since 2008. While the lawyer assistance programs for law students have evolved,<sup>398</sup> there has not been a comprehensive study on the effectiveness of these programs.

Since the 2008 amendments to the ADA, the concerns about stress and its impact on law students have increased.<sup>399</sup> More attention is being paid to what to do about the impact of stress during law school.<sup>400</sup> One of the major concerns beyond recognition of the need to do more is the availability and affordability of mental health services and whether such treatment will remain confidential.

### 4. Professional Licensing

Concerns about mental health, substance use, and abuse within the practicing bar have received substantial attention since 2008.<sup>401</sup> The

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397. See Paul Lannon & Elizabeth Sanghavi, *New Title II Regulations Regarding Direct Threat: Do They Change How College and Universities Should Treat Students Who Are Threats to Themselves?*, NACUA NOTES, Nov. 1, 2011, at 5-6 (discussing that there is a lack of clear guidance to universities on how to analyze self-harm).

398. See Rothstein, *Substance Abuse Problems*, *supra* note 387, at 548 (discussing that students with substance use disorders may have to disclose counseling despite counseling being “confidential,” which might reduce the number of students accessing the service).

399. See, e.g., Hollee Schwartz Temple, *Speaking Up: Helping Law Students Break Through the Silence of Depression*, 98 ABA J. 23, 23 (2012) (detailing the high prevalence of depression and suicide among recent graduates and professional lawyers).

400. See Jolly-Ryan, *Promoting Mental Health*, *supra* note 387, at 96 (exploring the possible causes of law student stress, questioning the teaching method itself, and offering ideas for coping). See generally LAWRENCE S. KRIEGER, *THE HIDDEN SOURCES OF LAW SCHOOL STRESS* (2005) (discussing reasons that law school is stressful and providing advice to students on how to manage stress, in a booklet that is used at over one hundred law schools).

401. See Michael J. Herkov, *Mental Illness and the Practice of Law*, B. EXAM’R, Mar. 2013, at 47-51 (providing the perspective of a psychiatrist about what should be appropriate for a bar application review process, and raising concerns about the impact

practice of asking questions about diagnosis and treatment for mental health and substance abuse during the licensing process continues to be challenged.<sup>402</sup> As of 2008, the vast majority of courts were upholding these questions as permissible under the ADA.<sup>403</sup> More recent cases have hinted

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of mental illness on an attorney's ability to meet essential requirements to practice law); Perlin, *Lawyers with Mental Disabilities*, *supra* note 387, at 606 (discussing the value of looking at the role of therapeutic justice in addressing harms done by lawyers with mental illness); *see also* Symposium, *Assisting Law Students with Disabilities in the 21st Century: A New Horizon?*, *Suffering in Silence: The Tension Between Self-Disclosure and a Law School's Obligation to Report*, 18 AM. U. J. GENDER SOC. POL'Y & L. 121, 122 (2007) (debating amongst panelists on the difficulty on encouraging mental health treatment that carries possible bar application implications); Erica Moeser, *Standards, Change, Politics and the Millennium*, 28 LOY. U. CHI. L.J. 229, 235 (1996) (discussing ABA accreditation issues); Erica Moeser, *Yes: The Public Has the Right to Know About Instability*, 80 ABA J. 36, 36 (1994) (asserting that public interest should be balanced against the applicant's interest and that the ADA does not bar all inquiries into mental health status). *See generally* JAMES T.R. JONES, *A HIDDEN MADNESS* (2011) (providing the story of a law professor living with severe bipolar disorder); ELYN SAKS, *THE CENTER CANNOT HOLD: MY JOURNEY THROUGH MADNESS* (2007) (detailing the experiences of a law professor with severe mental illness).

402. *See, e.g.*, TAYLOR & GOLDSTEIN, *supra* note 285, at 16, 18-22 (discussing various cases challenging the bar admission process and calling for disclosure to be based on misconduct rather than status); *see also* Peter Ash, *Predicting the Future Behavior of Bar Applicants*, B. EXAM'R Dec. 2013, at 6-16 ("Given the complexities inherent in making accurate long-term predictions regarding an individual's behavior, it seems unlikely that in the coming decade we will have a database that will significantly improve our ability to quantify the future risk of impairment."). The article discusses the ability to predict future behavior based on past history of substance abuse or mental health problems.

403. *See, e.g.*, *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 431, 438-40, 444 (E.D. Va. 1995) (striking down a question asking whether an applicant has been treated or counseled for any mental, emotional, or nervous disorders within the past five years as being impermissible under Title II). The *Clark* opinion provides a detailed discussion of the other decisions on this issue and the practices of bar admission authorities in various states. The court left open the possibility that the Texas inquiries might withstand challenge. *Id.*; *see also* *Campbell v. Greisberger*, 80 F.3d 703, 705 (2d Cir. 1996) (indicating that New York had changed its mental health status question); *Stoddard v. Fla. Bd. of Bar Exam'rs*, 509 F. Supp. 2d 1117, 1124-25 (N.D. Fla. 2006), *aff'd*, 229 F. App'x. 911 (11th Cir. 2007) (finding no violation of the ADA when reviewing mental health and financial history or unprofessional conduct, especially since the applicant had many issues that raised concerns); *Doe v. Judicial Nominating Comm'n for the Fifteenth Judicial Circuit of Fla.*, 906 F. Supp. 1534, 1537, 1544-45 (S.D. Fla. 1995) (concluding that questions asked of judicial appointment applicants were overly broad when they concerned any physical impairment, hospitalization, treatment of mental illness, or addiction to drugs or alcohol regardless of whether they would affect applicant's job performance capabilities); *Applicants v. Tex. State Bd. of Law Exam'rs*, No. A 93 CA 740 SS, 1994 WL 923404, at \*2, 5 (W.D. Tex. Oct. 11, 1994) (permitting narrowly drawn questions asking about treatment for bipolar

that this may change.<sup>404</sup>

There have been a few judicial decisions since 2008 addressing attorney discipline and license retention relating to mental health<sup>405</sup> and substance

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disorder, schizophrenia, paranoia, or any other psychotic disorders within the past ten years or since age eighteen, whichever time period was shorter); *Med. Soc. of N.J. v. Jacobs*, No. 93-3607, 1993 WL 413016, at \*1 (D.N.J. Oct. 5, 1993) (denying a preliminary injunction to prohibit a state medical board from asking about alcohol or drug abuse and mental or psychiatric illness); *In re Frickey*, 515 N.W.2d 741, 741 (Minn. 1994) (ordering the board of bar admissions to remove certain mental health treatment questions from Minnesota's Bar Application because these types of questions would deter law students from seeking appropriate counseling); Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 94 (2001) (asserting that the bar admissions process is ill-suited to handle disability issues); Stanley Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635, 637 (1997) (discussing the wide variety of state questionnaires despite increasing number of bar applicants with disabilities); Letter to Karen Richards, Executive Director of Vermont Human Rights Commission, from U.S. Department of Justice Civil Rights Division, Jan. 21, 2014 (responding to inquiries about the use of mental health questions in Vermont, and stating the position that the ADA prohibits discriminatory inquiries, investigations and additional burdens imposed on health disabilities). *But see In Re Henry*, 841 N.W. 2d 471 (S.D. 2013 ) (holding that Board of Bar Examiner's inquiry into mental health including prior diagnosis of bipolar disorder was not an ADA violation; facts of case included past conduct that had included arrests for reckless driving).

404. *See, e.g., Roe v. Ogden*, 253 F.3d 1225, 1225 (10th Cir. 2010) (allowing an individual and a student chapter of the ACLU to challenge bar questions on drug use and mental health); *ACLU of Ind. v. Individual Members of the Ind. State Bd. of Bar Exam'rs*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at \*9 (S.D. Ind. Sept. 20, 2011) (holding that open-ended questions about mental health diagnosis or treatment for any mental, emotional, or nervous disorder were impermissible, and that permissible questions are those asking whether an applicant had been diagnosed with psychotic disorders and whether the applicant had an impairment involving current substance abuse or current mental health conditions); *see also Stoddard*, 509 F. Supp. 2d at 1123-24 (declaring that immunity does not shield a board from an ADA claim); Caroline M. Mew & Robert A. Burgoyne, *ADA Update: The Status of Eleventh Amendment Immunity and Rooker-Feldman Doctrine as Defenses to Claims Asserted Against Bar Examiners Under the ADA*, B. EXAM'R, Aug. 2007, at 17 (concluding that the doctrine would be a defense for bar examiners in fewer cases).

405. *See, e.g., Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Erbes*, 604 N.W.2d 656, 657 (Iowa 2000) (deciding that public reprimand was the appropriate sanction for the misconduct of an attorney who took "refreshingly proactive" steps to deal with his depression); *In re Burch*, 975 N.E.2d 1001, 1003 (Ohio 2012) (requiring an applicant to appear before a review panel for a character and fitness process to answer questions about diagnoses of depression and ADD, and how those conditions related to her law school failures and behavior issues, including failure to take responsibility for actions); *In re Zimmerman*, 981 N.E.2d 854, 856-57 (Ohio 2012) (upholding the board of bar examiners' findings and recommendations regarding the denial of character and fitness,

abuse issues.<sup>406</sup> There have even been a few involving attorneys with ADD and ADHD and other types of conditions.<sup>407</sup> The concept of conditional licensing or admission in light of these kinds of issues has been addressed and would benefit from additional review as to its efficacy.<sup>408</sup>

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but allowing the applicant to resubmit, subject to providing a mental health evaluation by a licensed professional to show compliance with treatment); *Cincinnati Bar Ass'n. v. Stidham*, 721 N.E.2d 977, 983 (Ohio 2000) (finding depression to be a mitigating factor when determining sanction for mishandling client funds); *see also* Fla. Bar v. Clement, 662 So. 2d 690, 692, 700 (Fla. 1995) (concluding that disbarment was not precluded under the ADA despite an attorney's bipolar disorder, and that no reasonable accommodations could be made to prevent the attorney's egregious conduct from recurring); *In re Blackwell*, 880 N.E.2d 886, 886-88 (Ohio 2007) (upholding a determination of psychological unfitness, but allowing a right to apply to take the next bar exam, subject to proof of treatment and reevaluation at his own expense); Leigh Jones, *Reciprocity Denied to Lawyer Treated for Depression*, NAT'L L.J. (Jan. 7, 2013), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202583364054> (reporting on case involving an Idaho attorney, designated by the Social Security Administration as disabled by depression, whose practice was interrupted by bouts of depression and who lost a bid for admission by reciprocity to the Utah State Bar).

406. *See, e.g., In re Marshall*, 762 A.2d 530, 535 (D.C. 2000) (finding that an attorney with a cocaine addiction was not a "qualified" individual protected from disbarment); Fla. Bd. of Bar Exam'rs *ex rel. v. Barnett*, 959 So. 2d 234, 234-36 (Fla. 2007) (granting conditional admission for three years due to evidence of several years of rehabilitation, after a resignation from the bar in lieu of disciplinary proceedings and a petition for readmission caused by five character and fitness incidents, including charges of misappropriation of client funds, heroin use, possession of cocaine, and resisting arrest); *In re Edwards*, 958 So. 2d 1173, 1173 (La. 2007) (denying conditional admission to individual with alcohol-related arrests and citations); *In re Lynch*, 877 N.E.2d 656, 656 (Ohio 2007) (granting qualified admission that required the bar applicant to undergo a Twelve-Step program to address professional responsibility issues and the applicant's use of alcohol, with the panel's decision focused on behavior and conduct issues).

407. *See Doe v. Attorney Discipline Bd.*, No. 95-1259, 1996 WL 78312, at \*1, 3 (6th Cir. Feb. 22, 1996) (finding that an attorney with ADD who was suspended for misconduct was not qualified under the ADA); *In re Sheridan's Case*, 781 A.2d 7, 10-11 (N.H. 2001) (giving public censure to attorney who violated filing deadline requirements when failures occurred while attorney was recovering from serious eye and hip injuries); *In re Acton*, 902 N.E.2d 966, 967-68 (Ohio 2009) (regarding a character and fitness denial based on eight speeding violations and other misdemeanor charges, where the applicant claimed to have ADD and that it make him forgetful, but the court found that ADD did not affect ability to abide by law but instead caused him to be slow to learn his lessons); *State ex rel. Okla. Bar Ass'n v. Busch*, 919 P.2d 1114, 1117 (Okla. 1996) (holding that disability should be a mitigating factor in an attorney discipline case).

408. *In re Beckley*, 926 N.E.2d 485, 485 (Ind. 2010) (addressing requirements for conditional admission related to use of alcohol, after the revocation of conditional admission due to noncompliance, including DWI arrest and marijuana use); Stephanie Lyerly, Note, *Conditional Admission: A Step in the Right Direction*, 22 GEO. J. LEGAL



#### *D. Technology Issues*

Issues of technology have affected legal education and the legal profession in a number of ways.<sup>409</sup> An in depth discussion of these issues is beyond the scope of this Article, but the following is a brief description of how technology has made significant changes since the 1973 enactment of the Rehabilitation Act.

##### *1. Law School Instruction*

Technology in classrooms is the norm in most law schools today. Most law schools have classrooms with document cameras, smart podiums, Internet access, and other technology. Many law school faculty members have their classes recorded for later viewing or access. Laptop computer technology can allow for audio and video recording of what occurs in the classroom. These technologies and others can be both positive and negative for students with disabilities.

A student with a visual impairment will be unable to see images and videos used in the classroom setting. Students with hearing impairments will be unable to hear a video, but if someone is providing translation or transcription for spoken words, access would be available. If the video has closed captioning, the information would be even more accessible. Faculty members who have students with visual or hearing impairments need to be mindful of issues of access in using material from the Internet or other technologies while teaching in the classroom.

There has been a significant increase in the use of textbooks on e-

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ETHICS 299, 300 (2009).

409. See Nina Golden, *Access This: Why Institutions of Higher Education Must Provide Access to the Internet to Students with Disabilities*, 10 VAND. J. ENT. & TECH. L. 363, 383-84, 408, 411 (2008). Today's students are primarily from the millennial generation and have had computers and other technology their entire lives. This affects how they receive and expect information in ways that have important impacts on students with disabilities. See, e.g., Laura Rothstein, *Millennials and Disability Law: Revisiting Southeastern Community College v. Davis*, 34 J.C. & U.L. 169, 192-93 (2007). Several recent settlements and agency actions highlight the importance of universities taking a proactive approach to the use of technology on campus websites and in teaching materials. OCR Resolution Letter and Agreement with South Carolina Technical College System, available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-b.pdf>. Settlement between Department of Justice and Louisiana Tech University and University of Louisiana System (involving online learning program that excluded a blind student from the course) at <http://www.justice.gov/opa/pr/2013/July/13-crt-831.html> and <http://www.ada.gov/louisiana-tech.htm> (prohibiting University from purchasing materials that are not accessible and providing guidance on faculty involvement in ensuring access; Settlement at Berkeley on assistive technology and accessibility of library materials.

readers, such as Kindle™ and other similar devices. Many of these readers are not accessible for an individual with a visual impairment, so requiring that all students use these technologies can be problematic unless accommodations are provided or an alternative, equivalent method of delivery is made.<sup>410</sup>

Moreover, the textbooks themselves can constitute a barrier for students with visual impairments. With sufficient lead time, textbooks can be made available in Braille, large print, audiotape, and other formats. There are technologies, such as Kurzweil machines and JAWS readers that can “read” written materials to students. Law schools may need to ensure the availability of some of this technology, although they may not be required to purchase it for individual at home use by the student. For example, the law school may need to allow the use of JAWS technology for exams, but it would not be required to purchase the laptop for the student.<sup>411</sup>

Faculty members who reference numerous optional or required additional readings using Internet links should be aware that unless the additional material is available in accessible formats or that they have allowed for sufficient lead time for the material to be made accessible, this may present a barrier for some students. While many university campuses have offices for services for students with disabilities, the offices are unlikely to be staffed in such a way to be able to respond quickly, or even at all, to the massive amounts of materials that faculty members want to recommend or assign.

The use of Blackboard and TWEN platforms where materials are posted requires faculty awareness about ensuring that students with visual impairments have access to those materials. The same is true for faculty members who use threaded discussions in classes where there are students with visual impairments who require accessible computer technology. Students with learning disabilities who require additional time to read material may have difficulty with large amounts of material on discussion boards and recommended readings; therefore, they may seek additional time to review this material.

## 2. *Distance Learning*

Much attention is being given to a variety of distance learning programs—including shared courses, using massive online open courses (MOOCs), and other coursework that is taught in one physical location and

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410. The National Federation of the Blind has brought and settled a number of lawsuits against universities relating to the university benefits given to Kindle™ and similar technology users.

411. The relationship of using these readers for law school exams and bar exams should be reviewed at this point. *See supra* Part III.B.8.

received in another. An issue that has not yet received the attention of the courts is the responsibility for accommodations for these courses. This would include both ensuring and facilitating access for students with different disabilities and paying for accommodations, such as transcription. Before jumping on the bandwagon about these courses as being moneymakers, providers and users should consider access issues and develop procedures and policies at the outset.

Faculty members themselves are often not aware of these issues when they are invited or offer to teach using distance-learning platforms. When a law school or another program provides a program of continuing education or a program to the public using technology such as a webinar, these issues should also be taken into account.

### 3. Websites

Although more judicial attention has been given to the issue of websites, there is much that has not yet been settled about what is required in this area. Generally, institutions of higher education, including law schools, have websites that are used for a range of communication purposes; other programs that serve legal education do as well.<sup>412</sup> Websites can provide external communication to potential applicants, individuals seeking to attend events, alumni and friends, and others on and off campus. They can provide internal communication within the law school or legal employer community itself.

Whether websites are themselves subject to the ADA is not yet clearly resolved, although it is probable that they are.<sup>413</sup> Much less clear is what is required in terms of accessibility on websites. There are guidelines about web access design for federal agencies, but that does not mean that these design standards are mandated for anyone else.<sup>414</sup>

While much is uncertain, law schools should consider ensuring that when videos or links to videos are part of their web information, the transcription of audio content is provided at least for critical information. Law firms as well as state and local government agencies that provide legal services should also evaluate their websites for accessibility.

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412. See *Law School Admission Council Settles with Department of Justice*, ADA COMPLIANCE GUIDE NEWSL., June 2011, available at <http://hr.complianceexpert.com/news-briefs-1.1418> (discussing how LSAC agreed to ensure that its website is accessible to individuals who are blind or have low vision).

413. See *DISABILITIES AND THE LAW*, *supra* note 15, at 19-20.

414. 36 C.F.R. § 1194 (2014). In addition, grants are available to states to provide technology related assistance. 29 U.S.C. § 794 (2012).

#### 4. *Archived Materials*

Research is an important aspect of the role of a law school. Research of historical documents can be valuable for faculty members, students, and others. It is not yet settled whether archived materials must be available in accessible formats. Many older documents are currently only available on microfiche and other older technologies. As the policies in this area are developed, it will be important for policymakers to recognize that if all archived reference material is to be put into accessible formats, the unintended consequence might be that some materials will be removed from archival storage and no one will have access. While these libraries might be able to argue undue burden, the easier route might be just to remove them.

#### 5. *Access in the Courtroom*

Like law school classrooms, many courtrooms are now outfitted with a wide range of technological bells and whistles that allow jurors and others to have visual and audio access to evidence being presented. There has been no judicial guidance on this issue, but access to evidence for individuals with disabilities may become an issue in the future.<sup>415</sup> Litigation has already established fairly consistently that individuals with impairments cannot automatically be removed from jury pools.

### *E. The Law School Experience*

#### 1. *Treatment of Law Students With Disabilities*

There are many more students with disabilities in law school today,<sup>416</sup> and their experiences vary. Their successes and attitudes about their treatment reflect factors such as faculty attitudes and approaches;<sup>417</sup> law

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415. See, e.g., DISABILITIES AND THE LAW, *supra* note 15, at 363-64; Douglas M. Pravda, *Understanding the Rights of Deaf and Hard of Hearing Individuals to Meaningful Participation in Court Proceedings*, 45 VAL. U. L. REV. 927, 941-42 (2011); see also *Tennessee v. Lane*, 541 U.S. 509, 532 (2004) (holding that state agencies are not immune from damage actions in cases involving access to state and local courthouses).

416. Although some have advocated encouraging more students to self-report disabilities, stigma and other concerns make this reporting difficult. Currently, the ABA Annual Questionnaire asks law schools to report the number of students for whom accommodations are provided. This is the only reliable number a law school would have. Many students, such as those with conditions like HIV, may not report the condition to the law school administration and may not require or request accommodations.

417. See Robin Boyle, *Law Students with Attention Deficit Disorder: How to Reach Them, How to Teach Them*, 39 JOHN MARSHALL L. REV. 349, 349-50, 371 (2006);

school policies, practices, and procedures;<sup>418</sup> and other factors.<sup>419</sup>

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Andrea A. Curcio, *Assessing Differently and Using Empirical Studies to See If It Makes a Difference: Can Law Schools Do It Better?*, 27 QUINNIPIAC L. REV. 899, 899-900 (2009); Andrea A. Curcio, *Moving in the Direction of Best Practices and the Carnegie Report: Reflections on Using Multiple Assessments in a Large-Section Doctrinal Course*, 19 WIDENER L. REV. 159, 160 (2009); Robert Dinerstein, Symposium, *Assisting Law Students with Disabilities in the 21st Century: A New Horizon?*, Keynote Address: "Disability: When, Why, and How It Matters and When, Why, and How It Doesn't," 18 AM. U. J. GENDER SOC. POL'Y & L. 79, 93-94 (2009); Leslie Pickering Francis & Anita Silvers, *No Disability Standpoint Here!: Law School Faculties and the Invisibility Problem*, 69 U. PITT. L. REV. 499, 499, 508 (2008); Jennifer Jolly-Ryan, *Disabilities to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners and the Law Teacher as Learner*, 6 NEV. L.J. 116, 117, 146-47 (2005); Douglas K. Rush & Suzanne J. Schmitz, *Universal Instructional Design: Engaging the Whole Class*, 19 WIDENER L. REV. 183, 183, 188-89, 194, 212 (2009); Louis N. Schulze, Jr., *Balancing Law Student Privacy Interests and Progressive Pedagogy: Dispelling the Myth that FERPA Prohibits Cutting-Edge Academic Support Methodologies*, 19 WIDENER L. REV. 215, 219, 270, 276 (2009); Kevin H. Smith, *Disabilities Law Schools and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1, 87-89 (1999); Stephanie Lyerly, Note, *supra* note 408, at 300, 326; Simon Ball & Helen James, *Making Law Teaching Accessible and Inclusive*, 3 J. INFO. L. & TECH., Dec. 2009, at 2, 14, available at [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2009\\_3/ball](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2009_3/ball).

418. See Symposium, *Assisting Law Students with Disabilities in the 21st Century: Brass Tacks, Welcome Address*, 15 AM. U. J. GENDER SOC. POL'Y & L. 785, 788-90 (2007); Symposium, *Assisting Law Students with Disabilities in the 21st Century: A New Horizon?*, "And Now a Word from Our Students . . .," 18 AM. U. J. GENDER SOC. POL'Y & L. 103, 104-05, 108-09, 116 (2009); Naomi C. Jones, "Nothing About Us Without Us": *Law Students Discuss Disability Issues*, 56 LA. B.J. 434, 435 (2009); Craig S. Lerner, "Accommodations" for the Learning Disabled: *A Level Playing Field or Affirmative Action for Elites?*, 57 VAND. L. REV. 1043, 1123-24 (2004); Suzanne E. Rowe, *Learning Disabilities and the Americans with Disabilities Act: The Conundrum of Dyslexia and Time*, 15 J. LEGAL WRITING INST. 165, 166, 168 (2009); Suzanne E. Rowe, *Reasonable Accommodation for Unreasonable Requests: The Americans with Disabilities Act in Legal Writing Courses*, 12 J. LEGAL WRITING INST. 3, 5, 33-34 (2006); Donald H. Stone, *What Law Schools Are Doing to Accommodate Students with Learning Disabilities*, 42 S. TEX. L. REV. 19, 20, 23, 57 (2000); David Tatel, Symposium, *Assisting Law Students with Disabilities in the 21st Century: Brass Tacks*, 15 AM. U. J. GENDER SOC. POL'Y & L. 847, 857 (2007); *Accommodation Form Did Not Make Disability Determination*, ADA COMPLIANCE GUIDE NEWSL., Mar. 2004, at 6 (describing a law school student who did not maintain the minimum grade-point average during her first year because of her carpal tunnel syndrome, and how the college's Director of Student Disability Services requested accommodations on her behalf, while the law school allowed her to repeat her first year); *Disabled, Not Disqualified*, STUDENT LAW., Apr. 2002, available at <http://www.abanet.org/lspd/stulawyer/apr02/disabled.html> (suggesting that, with proper accommodations, law students with disabilities can succeed in law school and their careers); *Law School Not Required to Change Enrollment Standards as Accommodation*, ADA COMPLIANCE GUIDE NEWSL., Dec. 2010, at 2 (describing the

The National Association of Law Students with Disabilities began as an organization in 2007 and is a coalition of law students “dedicated to mentorship, disability advocacy, and nondiscrimination in legal education and the legal profession.”<sup>420</sup> This organization has been helpful for networking and information sharing for students with disabilities. A number of law schools have organizations for students with disabilities. One of the challenges for students considering joining such organizations is that some disabilities (such as mental illness and HIV) are stigmatizing, and so students with these conditions do not want to make their disabilities known outside the context of requesting reasonable accommodations.

## 2. Curriculum Including Disabilities Issues

In 1973, not many courses on disability law were available in the curriculum of law schools. Perhaps the only courses that might indirectly relate would be those addressing issues of institutionalization and government benefits for individuals with disabilities. Additionally, while

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experience of a student with migraine headaches, depression, and an eating disorder who had academic failure and was subsequently involved in litigation).

419. See Katie Bacon, *A Self-Advocate Is Now Also a Legal Advocate*, HARV. L. BULL., Summer 2013, at 16 (highlighting the experiences of a deaf and blind student, and how she uses those in advocacy roles); Leah M. Christensen, *Legal Reading and Success in Law School: The Reading Strategies of Law Students with Attention Deficit Disorder (ADD)*, 12 SCHOLAR 173, 177-78, 203-05 (2010); Leah M. Christensen, *Law Students Who Learn Differently: A Narrative Case Study of Three Law Students with Attention Deficit Disorder (ADD)*, 21 J.L. & HEALTH 45, 51, 71-73 (2007); Leah M. Christensen, *Enhancing Law School Success: A Study of Goal Orientations, Academic Achievement and the Declining Self-Efficacy of Our Law Students*, 33 L. & PSYCHO. REV. 57, 91 (2009); Lisa A. Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J.L. & EDUC. 31, 35, 59-62 (1997); Meredith George & Wendy Newby, *Inclusive Instruction: Blurring Diversity and Disability in Law School Classrooms Through Universal Design*, 69 U. PITT. L. REV. 475, 475, 479, 498 (2008); Jones, *supra* note 418, at 435 (describing the experiences of two 2L students and the issues they faced in law school, including what to tell a prospective employer in an interview); Jean Kempe-Ware, *Profiles in Law: Breaking the Sound Barrier*, 59 OR. ST. B. BULL. 23, 23 (1999) (profiling a deaf law student’s experience in law school); Ann Puckett, *How Potential Employers Approach Disability: A Survey of Law Students in Georgia*, 69 U. PITT. L. REV. 509, 510, 519 (2008); Jennifer R. Lloyd, *Blind Law School Graduate Turns ‘the World on Its Head.’* SAN ANTONIO EXPRESS NEWS (Dec. 17, 2012), [http://www.mysanantonio.com/news/local\\_news/article/Blind-law-school-graduate-turns-the-world-on-its-4122641.php](http://www.mysanantonio.com/news/local_news/article/Blind-law-school-graduate-turns-the-world-on-its-4122641.php).

420. The ABA Section on Individual Rights and Responsibility assisted with the establishment of the organization. See NAT’L ASS’N OF L. STUDENTS WITH DISABILITIES, <http://www.nalswd.org> (last visited Feb. 6, 2014). NALSWD hosts an annual conference.

some law schools may have had clinical programs relating to advocacy based on constitutional principles for deinstitutionalization and other issues, there was little, if anything, in the core curriculum about disability discrimination. Until federal discrimination laws existed, there was not much to teach other than state and local law on issues of disability discrimination. There was also a lack of textbooks from which to teach. That is no longer the case.<sup>421</sup> Today there are many courses on disability law taught in law schools, and several law schools have a center or clinic focusing on such issues.<sup>422</sup>

Today, disability law issues may be infused into the law school curriculum through a broad range of courses.<sup>423</sup> This includes traditional first-year courses, such as property law, which deals with issues of housing discrimination, zoning for group homes, barrier-free design issues, and nondiscrimination in public accommodations. Torts classes could address architectural barrier design standards as a standard of a duty of care in negligence cases. Criminal law classes could address access to the judicial system, courthouses, and places of incarceration by criminal defendants with mobility impairments; whether execution of individuals with mental disabilities is cruel and unusual punishment; and issues relating to HIV in prisons. Constitutional law classes could cover classification of individuals with intellectual disabilities and the rational basis test, Eleventh Amendment immunity under the ADA, and the application of the Establishment Clause in cases involving providing special education in parochial schools. Civil procedure classes could address the challenge of demonstrating common interests in class actions for individuals with disabilities. Contracts classes could address the issue of mental capacity to enter contracts by individuals with mental impairments. Disability rights cases could make interesting problems to use in legal research and writing courses.

In the upper division curriculum there are ample opportunities to include disability issues in courses such as administrative law, where the courts'

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421. See Laura Rothstein, *Teaching Disability Law*, 48 J. LEGAL EDUC. 297, 309 (1998).

422. Law schools that have an emphasis on disability rights issues in a center, a clinic, or other special program include American University, Harvard University, Indiana University Bloomington, Loyola (LA) University, Maryland University, Pace University, Pepperdine University, Pittsburgh University, Syracuse University, and Wayne State University. Many law schools have student organizations for students with disabilities.

423. See Laura Rothstein, Presentation at the AALS Annual Meeting: Teaching Disability Law Throughout the Curriculum (Jan. 6, 2006); Laura Rothstein, Disability Issues in Legal Education: A Symposium, 41 J. LEGAL EDUC. 301, 304 (1991).

deference to agency regulations and interpretations in the context of disability cases, such as EEOC guidelines, can be addressed. Family law courses can include discussions of child custody by parents with disabilities, procedural safeguards in special education cases where the parents are divorced or separated, and domestic abuse of individuals with disabilities. Wills and trusts courses can include estate planning issues and discussions about how to ensure that inherited property does not displace government benefits. They can also cover issues of preparing for guardianship of adults with disabilities. Tax courses can include coverage of tax credits and benefits under federal disability law.

Specialized courses also offer even greater opportunities for infusing disability issues. Courses in health law can address access to health care for individuals with disabilities, discrimination in access to health services (for individuals with HIV for example), and issues experienced by health care professionals with disabilities. Employment law and employment discrimination classes provide substantial opportunity for including disability issues. Courses in real estate and housing law provide some of the same issues as noted previously in the property law courses. Similarly, courses in prisoners' rights can incorporate some of the issues mentioned in the criminal law area. Courses in elder law provide an opportunity to compare rights and benefits with disability law. Insurance law courses can discuss the issue of access to health and life insurance for individuals with disabilities.

Even highly specialized courses, such as sports and entertainment law, can include a discussion of the *Casey Martin* case involving accommodations in a professional golf setting<sup>424</sup> and whether cruise ships are subject to ADA requirements.<sup>425</sup> Courses in technology or communications law can address whether websites are a public accommodation and what that means for providing access, what is required for telephone access, and what is required for closed captioning on television. Consumer protection courses can address whether there are special duties owed to consumers with disabilities. Election law and voting rights classes should include information about laws relating to voting accessibility. Animal law provides wonderful opportunities to address the complex issues about when animals can or must be allowed as reasonable accommodations in public places, employment, and housing. Trial

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424. See *PGA Tour, Inc. v. Martin*, 532 U.S. 581, 663 (2001) (finding that allowing the use of a golf cart is not a fundamental alteration and holding that the PGA Tour is a Title III organization).

425. See *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 (2005) (holding that cruise ships departing from and returning to U.S. ports were covered under the ADA). This is also an issue for coverage in an admiralty law class.



advocacy courses can address issues of clients and attorneys with disabilities and how potential issues might be addressed in court. Of course, substantial coverage of disability issues is not only infused, but is generally a major aspect of courses (and textbooks) on mental health law, education law, special education law, and higher education law.

Robert Burgdorf, Jr., published the first casebook on disability law in 1980, but additional disability discrimination law casebooks were not available from major publishers until 1995.<sup>426</sup> The first comprehensive treatise on disability discrimination law was not published until 1984<sup>427</sup> and the first textbook on special education law was published in 1990.<sup>428</sup> Not only have the earliest books been updated with new editions (often several new editions), there are a large number of textbooks available on both broad and narrow subtopics of disability law.<sup>429</sup> The passage of the ADA in 1990 was almost certainly was a major catalyst for the increased interest in disability issues by law schools.

Although there had been a Section on Law and Mental Disability in the AALS for some time, it was not until 2007 that the AALS added a section on disability law generally. This section often co-sponsors programs at the January annual meeting on disability issues, which covers a wide range of issues.

### *3. Clinical Programs and Internships/Externships*

Law schools that place law students in clinical programs and externships where the students might have limited practice privileges can face complex issues if there are concerns about the mental health of an individual student in such a situation. Because such placements may not require as a practice that students submit to a character and fitness certification, there is the potential that a student with significant mental health or substance abuse problems (or other problems) might affect the client. Some placement settings may be concerned about payment for accommodations, and thus there is little guidance on how best to address this because of confidentiality concerns about the student record. The administrators who have access to student records may not be in a position to disclose concerns to supervising faculty members or supervisors of externship type

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426. Two casebooks were published in 1995. See RUTH COLKER, *THE LAW OF DISABILITY DISCRIMINATION* (7th ed. 2009); LAURA ROTHSTEIN & ANN MCGINLEY, *DISABILITY LAW: CASES, MATERIALS PROBLEMS* (5th ed. 2010).

427. See also *DISABILITIES AND THE LAW*, *supra* note 15. Updates are required twice a year to keep users current on the large amount of cases that are now reported.

428. See LAURA ROTHSTEIN & SCOTT F. JOHNSON, *SPECIAL EDUCATION LAW* (5th ed. 2014).

429. Employment would be the major example.

placement. Perhaps a starting place could be that whenever a law student is placed in a position of trust regarding clients, that placement supervisor should seek approval from the student for access to the student record. This would allow that individual not only to identify personal issues that might be relevant, but also it could identify students with honor code or academic status issues that could be of concern. This is different than law students obtaining employment through interviews with the placement office. Career services offices generally do not certify the character and fitness of students who use the services of their offices. Students receiving credit, however, are directly subject to the oversight of the law school itself.

Another issue involving placements in external offices—judicial internships, public service placements, etc.—is the responsibility of facilitating and paying for accommodations that a student might need. For example, who is responsible for accommodations for a student with a hearing impairment who requires interpreter service? Despite little guidance on this issue, this is an area where the issue of undue burden might be raised.<sup>430</sup> A proactive approach to this is advisable, and a negotiation of cost sharing should be explored. The law school should take the lead on anticipating issues, planning for them, and working with both the student and the placement program in an interactive process. Law schools may be concerned that the law school must pay for accommodations, and thus may simply decide not to serve as a placement setting in the future. This would be unfortunate, and it is suggested that a more positive and proactive approach might be for the law school to work out an arrangement to share costs with the placement provider.

Finally, as noted below, there are potential issues regarding barrier-free access. Because of the ADA, many places are more physically accessible than in the past. However, it is still possible that an externship placement might be a location that is inaccessible. As in the case of other accommodations, the law school that is aware of a mobility-impairment should plan around this with the student and the placement location. This planning might include issues of parking or transportation.<sup>431</sup>

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430. See Symposium, *Assisting Law Students with Disabilities in the 21st Century: Brass Tacks, Clinical and Externship Programs*, 15 AM. U. J. GENDER SOC. POL'Y & L. 87, 834-86 (2007); Alexis Anderson & Norah Wylie, *Beyond the ADA: How Clinics Can Assist Law Students with "Non-Visible" Disabilities to Bridge the Accommodations Gap Between Classroom and Practice*, 15 CLINICAL L. REV. 1, 7 (2008); Sande L. Buhai, *Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements*, 36 SAN DIEGO L. REV. 137, 153 (1999).

431. See, e.g., *Lyons v. Legal Aid Soc'y*, 68 F. 3d 1512, 1517 (2d Cir. 1995) (involving whether the Legal Aid Society must pay for parking for an attorney with a

#### *4. Study Abroad Programs*

Students with disabilities who want to take advantage of the many summer abroad programs can face two major barriers. The first is architectural access, which can be a significant problem in studying in locations with ancient, historical architecture. Placements in countries that do not have the barrier-free design standards that exist in the United States also present concerns. The second is the cost of having accommodations such as interpreters and readers who might have the additional challenge of communication in a different language. It is beyond the scope of this Article to address these issues, and some have taken the position that such programs are not even subject to the ADA.<sup>432</sup> A more proactive and positive approach is suggested by having accreditation of such programs ensure that housing and classroom work is in an accessible location or, at the very least, provides disclosure of the barrier challenges to those seeking to study abroad.

#### *F. Faculty Issues*

Legal issues relating to faculty members with disabilities were largely nonexistent in 1973. Today, however, there is the potential for a wide range of issues involving faculty members with disabilities. These can occur in the initial hiring process, in the tenure and promotion process, or after tenure. This is also significant because a faculty member may not have a disability at the outset, but through an accident, illness, or other event, may become disabled. Faculty members face the same issues as students or others when considering protection from discrimination. These issues are whether the faculty members meet the definition of disability, whether the individual is otherwise qualified, and whether accommodations are required.

There is not a substantial body of case law on these issues, but as baby-boomer faculty members enter retirement years, it is likely that law schools will increasingly face these issues.<sup>433</sup> While age does not necessarily

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mobility impairment).

432. See *DISABILITIES AND THE LAW*, *supra* note 15, § 3:20; see also Arlene Kanter, *The Presumption Against Extraterritoriality as Applied to Disability Discrimination Laws: Where Does It Leave Students with Disabilities Studying Abroad?*, 14 *STAN. L. REV.* 291, 303 (2003).

433. See *DISABILITIES AND THE LAW*, *supra* note 15, § 3:26; see also Suzanne Abram, *The Americans with Disabilities Act in Higher Education: The Plight of Disabled Faculty*, 32 *J.L. & EDUC.* 1, 11-17 (2003) (providing a detailed discussion of cases where faculty members won their cases). Examples of the range of issues can be demonstrated from recent cases. See *Hoppe v. Lewis Univ.*, 692 F.3d 833, 840 (7th Cir. 2012) (finding no ADA violation for a faculty member with a clinically-diagnosed

diminish ability, the impact of issues such as dementia and other age-related health issues may occur and even the most outstanding professor may develop a substantial impairment to performance.

Institutions of higher education have been somewhat slow to respond to this emerging issue because of the challenges of having clear measures of performance and policies, practices, and procedures in place to address performance issues.<sup>434</sup> Recognition of the importance of ensuring fair treatment for faculty members and appropriate procedural safeguards has begun to emerge.<sup>435</sup>

### *G. Impaired Attorney Issues*

Previous sections have noted a number of issues relevant to attorneys with disabilities. The issue of initial bar admission and exam accommodations as well as character and fitness were discussed previously. This section briefly touches on the status of discussion about attorneys with disabilities and the challenges they face.<sup>436</sup> This includes challenges at the initial hiring stage, issues of accommodation during employment, and issues that arise if an attorney becomes disabled as a result of injury, illness, or other cause.

Two of the difficulties in providing broad perspectives on this issue are the fact that attorneys do many different kinds of work and there are many different types of disabilities. This may be part of the reason why more law

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adjustment disorder who had been given an interactive process to provide office locations); *Craig v. Columbia Coll. Chi.*, No. 09-CV-7758, 2012 WL 540095, at \*9 (N.D. Ill. Feb. 16, 2012) (upholding a nonrenewal based on offensive blog entries and email correspondence for a college instructor with a hearing impairment who was not denied tenure track position); *Carter v. Chi. State Univ.*, No. 07 4930, 2011 WL 3796886, at \*10 (N.D. Ill. Aug. 24, 2011) (finding that an accounting professor with sleep apnea did not have a disability under the ADA of 1990, but that reasonable accommodations of scheduling had been provided in any case).

434. See DISABILITIES AND THE LAW, *supra* note 15, § 3:26; see also Laura Rothstein, *The End of Forced Retirement: A Dream or a Nightmare for Legal Education?*, ABA SYLLABUS, Winter 1999, at 3-4 (raising issues regarding the elimination of mandatory retirement and the importance of anticipating the potential challenges).

435. See AM. ASS'N OF UNIV. PROFESSORS, ACCOMMODATING FACULTY MEMBERS WHO HAVE DISABILITIES (Jan. 2012); see also *infra* APPENDIX D.

436. See Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodations and Resistance Under the ADA (American with Disabilities Act of 1990)*, 29 BERKELEY J. EMP. & LAB. L. 59, 59-60 (2008); Anita Bernstein, *Lawyers with Disabilities: L'Hanicate C'est Nous*, 69 U. PITT. L. REV. 389, 389-95 (2008); Robert C. Bird & John D. Knopf, *Do Disability Laws Impair Firm Performance?*, 47 AM. BUS. L.J. 145, 146-48 (2010); Ann Puckett, *How Potential Employers Approach Disability: A Survey of Law Students in Georgia*, 69 U. PITT. L. REV. 699, 519 (2008).

schools do not have a student organization for students with disabilities. An attorney with HIV faces different issues than one with a sensory (vision/hearing) impairment or another with a mobility impairment.<sup>437</sup> Learning disabilities provide different concerns than issues of mental illness, such as depression or bipolar disorder, or substance addiction.<sup>438</sup> Dementia resulting from a stroke or from Alzheimer's Disease also has different dimensions.<sup>439</sup> What all of these individuals often have in common are the challenges of attitudinal prejudice, barriers of architectural design, and the need for accommodations in certain situations.<sup>440</sup>

What is useful to know at this point is that there is much more of an information base to turn to for attorneys with disabilities and for those wanting to know more about providing accommodations for these individuals.<sup>441</sup> While some have indicated that they believe that attorneys with disabilities are underrepresented in the profession, if one counts attorneys with mental health or substance abuse conditions, the numbers

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437. Cf., e.g., PHILADELPHIA (TriStar Pictures 1993) (starring Tom Hanks as an attorney with HIV).

438. David Boies, one of the most successful trial attorneys in the country, succeeded in spite of his dyslexia.

439. See Richard Acello, *Ethics May Require Challenges to Alzheimer's-Impaired Lawyers*, 96 ABA J. 22, 57 (2010); GERALD A. BEECHUM, INTERVIEWING TIPS FOR LAW STUDENTS WITH DISABILITIES AND THE EMPLOYERS WHO RECRUIT THEM 22 (2d ed. 2006).

440. See Bernstein, *supra* note 436, at 389; see also Carrie Griffin Basas, *The New Boys: Women with Disabilities and the Legal Profession*, 25 BERKELEY J. GENDER L. & JUST. 32 (2010); Randall M. Howe, *The Limits of Law: Eliminating Discrimination Requires Attitude Adjustment*, 47 AZ. ATT'Y 24 (April, 2011) (providing the story of an attorney born in the 1960s with cerebral palsy, and discussing the attitudinal barriers toward attorneys with disabilities).

441. See AM. BAR ASS'N, BEST PRACTICES IN EMPLOYING LAWYERS WITH DISABILITIES (2009), available at <http://www.abanet.org/disability/conferences/reports.shtml>; see also Symposium, *Assisting Law Students with Disabilities in the 21st Century: A New Horizon?*, *Lost in Transition: The If/When/How of Disclosing to an Employer*, 18 AM. U. J. GENDER SOC. POL'Y & L. 41 (2009); Symposium, *Assisting Law Students with Disabilities in the 21st Century: A New Horizon?*, *What the ADA Amendments and Higher Education Acts Mean for Law Schools*, 18 AM. U. J. GENDER SOC. POL'Y & L. 13 (2009); Symposium, *Assisting Law Students with Disabilities in the 21st Century: A New Horizon?*, *Career and Professional Development*, 15 AM. U. J. GENDER SOC. POL'Y & L. 899 (2007); Symposium, *Assisting Law Students with Disabilities in the 21st Century: Brass Tacks*, *Working the Difficult Issues: A Round Table Discussion*, 15 AM. U. J. GENDER SOC. POL'Y & L. 899 (2007); Matthew W. Dietz, *Reasonable Accommodations for Attorneys with Disabilities*, 81 FLA. B.J. 66 (2007); H. Thomas Wells, Jr., *Allowing Our Differences to Unite Us: ABA Helps to Break Down Racial, Sexual and Disability Barriers in the Legal Profession*, 95 ABA J. 9 (2009).

are probably not disproportionate. If, however, one is considering attorneys with mobility impairments and sensory impairments, it is quite likely that individuals with disabilities are underrepresented. As more stories about attorneys with disabilities become known, some of the negative attitudes will likely change.<sup>442</sup>

In some ways, one of the issues involving whether an attorney is otherwise qualified is that, like faculty members, the precise expectations and requirements for a particular position are context based. Faculty members and attorneys do not work on an assembly line where it is easy to measure how quickly, how accurately, and how much work is done.<sup>443</sup> For that reason, each situation must be individualized; but as with law students, having a positive and proactive approach, and engaging in an interactive process, is most likely to produce the best results for everyone.

In 1988, the ABA established the Commission on Impaired Attorneys, which changed its name to Commission on Lawyer Assistance Programs (CoLAP) in 1996.<sup>444</sup> CoLAP has made a number of recommendations over time. One of the recommendations was a conditional admissions program that would provide for a monitoring process for attorneys in appropriate cases.<sup>445</sup> It would be useful to study how many states have implemented such programs as well as the other CoLAP recommendations and whether the effectiveness of these programs has been demonstrated.<sup>446</sup> While CoLAP programs tend to work primarily with issues of substance abuse and more recently mental health issues, there is an increasing awareness that programs such as conditional admissions might be appropriate for individuals with other disabilities.

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442. See LAWYERS, LEAD ON: LAWYERS WITH DISABILITIES SHARE THEIR INSIGHTS (Carrie G. Basas, Rebecca S. Williford, & Stephanie L. Enyart eds., 2011) (providing shared experiences by lawyers with disabilities for law students and new lawyers); *A Roundtable Discussion: Lawyers with Disabilities: Ready, Willing & Able*, ARIZ. ATT'Y, Dec. 2002 (producing a discussion of attorneys with disabilities who discussed their personal histories about overcoming stereotypes and describing the progress that still needs to be made).

443. See Wendy F. Hensel, *The Disability Dilemma: A Skeptical Bench & Bar*, 69 U. PITT. L. REV. 637 (2008); Jacobi, *supra* note 380.

444. See *Commission on Lawyer Assistance Programs*, AM. B. ASS'N, [http://www.americanbar.org/groups/lawyer\\_assistance.html](http://www.americanbar.org/groups/lawyer_assistance.html) (last visited Feb. 6, 2014) (the name was changed to the Commission on Lawyer Assistance Programs (CoLAP) in 1996).

445. See Rothstein, *Substance Abuse Problems*, *supra* note 387, at 554-55.

446. See Stephanie Lyerly, Note, *supra* note 408.

### *H. Client Issues*

#### *1. Providing Accommodations*

Before 1973, there would have been little reason for a client with a disability to seek legal assistance for cases involving disability discrimination laws because the laws simply did not exist, at least not at the federal level. Until 1990, a client with a disability seeking legal services for some other issue would generally not be entitled to any accommodation by the legal services provider when seeking those services. The client who needed an interpreter or access for a wheelchair had little recourse if the legal services provider was not accommodating.

When Title III of the ADA was enacted in 1990, for the first time, the private legal service provider was required to consider these issues with respect to clients with disabilities. There is little case law on this to provide guidance, but it is important that lawyers recognize that even if they are in a small law firm (with fewer than fifteen employees) and not subject to Title I of the ADA with respect to employment, they still have obligations regarding the provision of legal services. This would apply when a client with a hearing impairment needs an interpreter or a wheelchair user needs barrier-free access. While the issue of undue burden may be a defense, particularly for a small practice, it is important to recognize this change in the legal landscape.

#### *2. Other Issues*

Although beyond the scope of this Article, a few other points about clients and the unique aspects of clients with disabilities should be noted. One is that mental illness or incapacity can sometimes be raised as a defense, occasionally even as a statute of limitations issue.<sup>447</sup> Clients with disabilities seeking class action redress also often face questions of whether their interests are sufficiently common to entitle them to class action status. Other issues include architectural barriers in the courts and in places of incarceration. Access to sign language interpreting is also a concern. Harm to individuals with disabilities in the criminal justice system due to lack of training and awareness is yet another issue.<sup>448</sup>

#### *I. Architectural Barrier Issues*

Everyone in legal education and the legal profession is affected by the

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447. See *DISABILITIES AND THE LAW*, *supra* note 15, § 9:12, n.5.

448. *Id.* §§ 9:9-9:12. Also not addressed in this Article is the issue of whether individuals with disabilities—especially vision and hearing—can be excluded from jury pools. See *id.* § 9:9.

requirements of Section 504 and the ADA that relate to physical space. It is beyond the scope of this Article to provide an in depth discussion of those issues, but there is substantial reference information about what is required for new construction, existing facilities, renovations, alterations, and for making alternative accommodations where barriers cannot be removed.<sup>449</sup> While the requirements for Section 504, Title II, and Title III programs are similar, there are some differences, particularly for removal of barriers for facilities existing before the effective dates of the statutes.

### *1. Law Schools*

Law schools are unique facilities. They serve students, employees, and the public. It is important to consider classrooms, the library, public spaces, clinic offices, auditoriums, courtrooms, faculty and staff offices, and other unique spaces in ensuring access. Signage is particularly important for ensuring access. There is no template for determining exactly what access is required for a particular building because of these unique settings. Because of the importance of ensuring access, an appendix at the end of this Article provides a guide to *Architectural Barrier Issues For AALS/ABA Site Evaluation Teams*.<sup>450</sup>

### *2. Law Offices*

Although Title I of the ADA only applies to employers with fifteen or more employees, private law offices are still subject to Title III of the ADA with respect to access for clients. State and local government legal offices are subject to Title II of the ADA and perhaps Section 504 if they receive federal funding.<sup>451</sup>

The small law firm located in a building with no elevators or lack of an accessible entry is not necessarily out of compliance if it is not feasible to remove barriers. The attorney, however, would need to consider arranging to meet a client in an accessible location if barriers cannot be removed. Parking for clients and other visitors should comply with ADA design standards. As with law schools and all other buildings, appropriate signage is essential.

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449. See generally *id.* at Chapter 6.

450. See APPENDIX B. This has no official status, but was prepared as a result of my service on a number of site visit teams and my service as a member of the AALS Membership Review Committee. For issues relating to access that could be provided to students, see APPENDIX E, HANDBOOK FOR STUDENTS AND APPLICANTS WITH DISABILITIES. See also DISABILITIES AND THE LAW, *supra* note 15, § 3:16-3:20.

451. See *Lyons v. Legal Aid Soc.*, 68 F.3d 1512 (2d Cir. 1995) (involving a determination of whether the Legal Aid Society must pay for parking for attorney with mobility impairment).



### *3. Educational and Social Programming at Other Venues*

Law schools and other organizations, such as the bar association, frequently host CLE programs, conventions, conferences, or social events, such as alumni dinners, at locations other than the law school or host office. It is important that the planners of these events take into account the importance of ensuring access.<sup>452</sup>

### *4. Access in Courthouses*

Access in courthouses was the subject of a 2004 Supreme Court decision. In *Tennessee v. Lane*, the Court did not decide specifically what was required in terms of access, but it did decide that courthouses are programs that are subject to Title II of the ADA.<sup>453</sup> The case was remanded in light of that guidance. While there has been some attention to the need to address this, many courthouse facilities are in jurisdictions with financial challenges. Many may also have historical designations, which raises additional issues. It is important that where the facility is not accessible, alternative arrangements may be required in appropriate cases. For example, a trial might need to be moved to a different location to accommodate a wheelchair user who is a party, an attorney representing a party, a witness, or a jury member.

### *5. Jails and Prisons*

In *Pennsylvania Department of Corrections v. Yeskey*, the Supreme Court held that state prisons are subject to the mandates of Title II of the ADA.<sup>454</sup> There has been a significant amount of judicial attention to issues of access within places of incarceration. Many facilities are old and have issues of safety and security that make access particularly challenging. Having access to facilities such as exercise areas and libraries within a prison has been the subject of some of this litigation. The DOJ issued some clarifying regulations in 2010 specifically applicable to state and local governmental jails and prisons.<sup>455</sup>

## IV. ACCREDITATION AND LEGAL EDUCATION REGULATION, OVERSIGHT, AND POLICY ISSUES

Several organizations have played a major role in the changes for legal education and the legal profession in the context of disability issues. These

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452. See COMM'N ON DISABILITY RIGHTS, A TOOLKIT, *supra* note 341; see also DISABILITIES AND THE LAW, *supra* note 15, § 3:20.

453. See 541 U.S. 509 (2004).

454. 524 U.S. 206 (1998).

455. See DISABILITIES AND THE LAW, *supra* note 15, § 9:11, n.17.

organizations play different and often overlapping roles. They provide for accreditation standards and membership requirements. They present educational programming. They facilitate groups with common interests in organizing and networking. The following is a very brief description of the differing roles the major organizations have played.<sup>456</sup>

#### *A. American Bar Association*

The American Bar Association is an umbrella organization that has existed since 1878. It has a broad mission that includes eliminating bias and enhancing diversity. The ABA provided major leadership in recognizing issues of concern for individuals with disabilities when it created the Commission on the Mentally Disabled in 1973. The name was changed to the Commission on Mental and Physical Disability Law in 1991 and more recently changed to the Commission on Disability Rights.

In 1988, the ABA recognized special concerns for lawyers and established the Commission on Impaired Attorneys. The name of that group was later changed to the Commission on Lawyer Assistance Programs (CoLAP), and responded to recommendations made in the 1996 AALS Report on Substance Abuse by establishing the Law School Outreach Committee in 2002. In 2007, the ABA facilitated the creation of the National Association of Law Students with Disabilities and now provides support for the group. In 2010, the ABA Commission on Mental and Physical Disability Law published a compilation of statistics on lawyers with impairments. All of these groups have been quite active in facilitating publications, conferences, and resolutions on a range of issues.<sup>457</sup> Several past ABA Presidents and others in leadership have demonstrated strong interests in disability issues.<sup>458</sup>

While under the umbrella of the ABA, the ABA Section of Legal Education and Admission to the Bar has its own separate role that includes setting accreditation standards, gathering data on law schools, and conducting site visits of law schools. The ABA Section of Legal Education

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456. There are organizations such as the National Association of Law Placement and the National Association of College and University Attorneys and others that have more indirect connections to these issues. This section only addresses the primary organizations.

457. See COMM'N ON DISABILITY RIGHTS, A TOOLKIT, *supra* note 341.

458. See, e.g., Mark Hansen, *Left Behind: ABA Says People with Disabilities Should be Part of the Diversity Mix of Nominees to the Federal Bench*, 98 ABA J. 56 (2012); William T. Robinson III, *Lawyer + Disability = Lawyer: Time to Reject the Perception that Disabilities Are Barriers to Productive Legal Careers*, 98 ABA J. 10 (2012).

standard on diversity is also relevant to disability issues.<sup>459</sup> In 2006, Thompson Publishing Group prepared a guide for ABA Accreditation of Law Schools and ADA Issues for the Section 504 Compliance Handbook.<sup>460</sup> The Section of Legal Education in its annual questionnaire collects information about the number of students with disabilities for whom the law school provides accommodations. The Section of Legal Education has partnered with other organizations to co-host conferences on disability issues in 1995 and 1997.

### *B. Association of American Law Schools*

The AALS has existed since 1900. It is not an accrediting body, but rather a membership organization that requires members to demonstrate adherence to core principles, including nondiscrimination. The AALS has addressed disability issues through its educational activities including the establishment of the Section on Mental Disability and later the Section on Disability Law in 2007. Both sections have provided a number of programs at the AALS annual conference and a network for scholars working on disability issues.

The AALS focused attention on disability issues when it created the 1989-1991 Special Committee on Disability Issues that in turn prepared a report issued just after the passage of the ADA. The AALS Report followed this report on disability issues, when it issued another report by another special committee in 1993 on the issue of Substance Abuse in Law Schools. That report was a factor in CoLAP programs providing support to law students. The AALS was also the lead organization hosting the 1995 and 1997 joint conferences on disability issues in legal education.<sup>461</sup>

### *C. Law School Admission Council*

Although LSAC was not subject to Section 504 of the Rehabilitation Act because it did not receive federal financial assistance, the law schools that use the LSAT were subject to Section 504. In 1983, the LSAC formed a Committee on Test Development and Research, which prepared

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459. See AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2013-2014 (2013), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_standards\\_chapter2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_standards_chapter2.authcheckdam.pdf).

460. See *infra* APPENDIX C.

461. In 1995, the cosponsors were AALS, the ABA Section of Legal Education and Admission to the Bar, LSAC, the National Conference of Bar Examiners (NCBE), and the National Association of College & University Attorneys (NACUA). In 1997, they were AALS, ABA, LSAC, and NCBE.

recommendations in 1986 for accommodations for the LSAT.<sup>462</sup> The accommodation policies have been studied and updated over time.<sup>463</sup>

LSAC has provided a substantial amount of educational programming on these issues including serving as a co-host for the 1995 and 1997 joint conferences mentioned above. Additionally, in 2003 the LSAC cosponsored a conference with the Educational Testing Service (ETS) and National Board of Medical Examiners on “High Stakes Testing in a Litigious Society.”

The LSAC has been challenged in litigation regarding its documentation and accommodation policies as well as its policy of flagging test scores. This litigation has in part been a result of the increasing number of applicants with disabilities, and the 2008 amendments to the ADA and the 2010 regulations, which included information on testing.<sup>464</sup>

#### *D. National Conference of Bar Examiners*

The NCBE is similar to the LSAC in terms of being an organization that provides testing services. Unlike LSAC, the NCBE tests are model tests and states may elect to adopt them. The NCBE administers some of the testing for states that have elected this method. The NCBE also provides guidance and suggested policies regarding character and fitness issues. Some of these recommendations or ideas have been criticized, as discussed previously in the section on mental health issues.

Like the LSAC, some of the NCBE positions on test accommodations, particularly the use of readers for individuals with visual impairments, have been challenged in court.<sup>465</sup> These were discussed previously in the section on testing. The NCBE also joined LSAC and other organizations in co-hosting the 1995 and 1997 joint conferences on disability issues.

### V. MEETING THE CHALLENGE BY TAKING A PROACTIVE APPROACH: RECOMMENDATIONS AND CONCLUSIONS

The legal landscape for individuals with disabilities has changed

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462. This author was the co-chair of that committee.

463. See LINDA F. WIGHTMAN, *TEST TAKERS WITH DISABILITIES: A SUMMARY OF DATA FROM SPECIAL ADMINISTRATIONS OF THE LSAT (1993)* (compiling information about accommodated testing in various formats and under different conditions). From 2006 to 2008, an LSAC Taskforce and Workgroup on Disability Accommodations reassessed its policies and practices. This author served as a member of both the Taskforce and the Workgroup.

464. For some of the cases involving LSAC, see *DISABILITIES AND THE LAW*, *supra* note 15, § 5:7.

465. For cases involving bar exam accommodation issues, see *DISABILITIES AND THE LAW*, *supra* note 15, § 5:9.

dramatically in the last forty years. These changes have affected eligibility for protections in an array of contexts and what must be done in those settings. Section 504 and the ADA have changed how law schools operate and what is taught in those law schools. They have changed the practice of law (both employment and client services), courthouses, places of incarceration, and even jury service. Section 504 and the ADA have changed how law enforcement programs deal with individuals with disabilities. They have changed how the regulatory and other oversight legal education organizations have been involved with ensuring access. They have changed whom lawyers might be representing by giving new rights to individuals with disabilities in a wide array of settings.

So what does the crystal ball show about what is coming next? What should those in legal education and the legal profession do to plan for that? What information would be helpful to have in taking a proactive approach?

There will probably continue to be attention to issues of mental health, substance use, and abuse as described in the Article. It is unlikely that legal education or the legal profession will become less stressful anytime soon, so those issues are likely to be a focus of attention. There will continue to be issues about whether individuals are covered, whether they are otherwise qualified, and whether they can be reasonably accommodated. It will be important that educators and policymakers continue to provide education and information about these issues and continue to examine whether current policies, practices, and procedures are appropriate and working. Much more research needs to be done about recent changes to determine whether these are working. For example, what is known about the effectiveness of conditional admissions policies within the state bars? What do we know about which law school programs are successfully dealing with student stress? What are the best practices? The practice of state bar certification authorities inquiring into mental health treatment and diagnosis should continue to be examined. There are strong views on this issue on both sides and more research is needed about whether the practices of the states in which such questions are eliminated (or significantly changed) have had an adverse impact on client protection. It is critical that this debate continues and that it is based on accurate information.<sup>466</sup> It is known that these questions deter students from getting

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466. See Rothstein, *Substance Abuse Problems*, *supra* note 387, at 561-565. These recommendations include collecting data on the prevalence of mental illness and substance abuse and on the impact of stress, determining what the research demonstrates about the benefits of education programs about mental health and substance abuse, and determining what is known about the effectiveness of treatment programs for lawyers and law students. It also recommends a review and evaluation of initial licensure, license revocation, and other disciplinary measures relating to

treatment, but do we know that such questions protect the public?

The issue of mental health and substance abuse within the practice is likely to continue to need attention, especially as the baby boomer population of lawyers, facing some of these issues, reach retirement age and as financial security becomes more challenging in light of the uncertain economy. More attention to mental health and substance abuse within the practicing bar is needed. This concern only highlights the need for greater advocacy to make mental health treatment available in a way that is affordable, non-stigmatizing, and confidential.

Issues related to learning and other similar disabilities will continue to be raised and require attention. Individuals with these conditions, such as ADD and ADHD, will probably continue to challenge the denial of accommodations. It is important that law schools and those providing examinations carefully consider their documentation policies and be proactive in communicating about them. Related is the need for all parties in the pipeline to try to achieve clarity regarding transition from one phase to another and to improve their communications about those issues to individuals affected by disabilities. Litigation resulting from misunderstandings about issues of “best ensures” and deference to prior accommodations might be avoided with better communication to students and by appropriate practices along the way. While it is unrealistic to hope that the LSAC, law schools, and bar examiners can change the behavior of undergraduate institutions that might be “overaccommodating” or not requiring documentation that would be required later, these parties have at least made improvements to proactively inform individuals about the timing and reasons for the documentation. These programs should themselves continue to re-examine whether their requirements for documentation strike the balance of ensuring fairness and reasonableness without unduly burdening the individuals with costly additional testing.

The cost of accommodations for sensory impairments may become an increasing issue. Given the recent challenges to the economics of legal education, a student requesting accommodations—such as interpreters and translators for individuals with hearing impairments or providing materials in alternative and accessible formats for individuals with visual impairments (for example, the cost of providing all assigned materials in Braille)—might begin to see law schools claim undue burden. There is little judicial guidance on whether that defense would be valid in such a setting. A proactive approach to anticipating these issues might help to alleviate some of these concerns. A lawyer with a small practice whose client with a hearing impairment requests an interpreter might raise the

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attorneys with mental health and substance abuse problems.

undue burden issue.

Technology will continue to provide challenges and benefits. Some of these will arise in the settings noted above. Technology will mean that it is easy to access a great deal of information. Unless that information is available in an accessible format, information on websites, in E-readers, and assigned by instructors may be problematic for individuals with visual impairments.

Technology has also made it very efficient to find guidance on a wide range of issues affecting law students and lawyers. This guidance includes information from the federal government and from others about how to provide accommodations in a wide range of settings for both employers and law schools. There is guidance about best practices on many issues. There are many publications written about these issues, and as the footnotes of this Article demonstrate, this is an issue of substantial interest.

It is probable that the curriculum within law schools will continue to incorporate these issues in a wide range of substantive classes and clinical programs. This reflects the fact that disability discrimination has become an issue in areas ranging from access in prisons to custody of children by parents with disabilities.

What is unlikely to change is an overhaul of the basic underlying protections of disability law. The advocacy movement is too strong, and these protections are entrenched in the broad body of legal protections. While there will probably be fine tuning of specific provisions of the statute or regulation, for example, whether threat to self is a nondiscriminatory basis for taking action, no major overhaul is likely.<sup>467</sup>

In closing, it should be noted that there has been a proactive approach to issues affecting law students, lawyers, and disability issues in many respects. The ABA, in particular, should be applauded for its leadership in making these issues a priority in a number of ways and for providing information and publications about these issues as early as 1973, the same year that Section 504 of the Rehabilitation Act was enacted.<sup>468</sup> The ABA has done a great deal to highlight and celebrate the accomplishments of law students, lawyers, and judges with disabilities. The interest and involvement of other organizations—the ABA Section of Legal Education

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467. The “vexatious litigation” involving a handful of advocates representing individuals in what are sometimes referred to as “cookie cutter” lawsuits challenging architectural design have resulted in some backlash. This is unlikely to cause any basic change in substantive protections under Title III of the ADA. The article may, however, give some Congressional consideration to changing remedies. A few courts, have already expressed negative responses to these suits. *See* DISABILITIES AND THE LAW, *supra* note 1, § 6:17.

468. *See infra* APPENDIX A.

and Admission to the Bar, the Association of American Law Schools, the Law School Admission Council, and the National Conference of Bar Examiners—as well as a number of law schools with specialized programs has enhanced and added to the understanding and knowledge of these issues. While these organizations have not always agreed and individuals within their leadership have different approaches, all efforts have been made with the strongest commitment towards equal opportunity and balancing those interests with issues of fairness, protection of the public, and administrative and financial burden. Going forward, the collaboration among these organizations will provide the best chance of continuing the progress towards equal opportunity for individuals with disabilities within the legal system, legal education, and the legal profession.



APPENDIX A

TIMELINE OF SIGNIFICANT DEVELOPMENTS

**1973** Section 504 of the Rehabilitation Act is passed. It prohibited discrimination on the basis of handicap (later disability) by programs receiving federal financial assistance. Most law schools received such assistance and were thus covered. The statute requires reasonable accommodation as well as prohibiting discrimination.

**1973** The American Bar Association created the Commission on the Mentally Disabled (later changed to Commission on Mental and Physical Disability Law (1991)); more recently the name changed to Commission on Disability Rights (2011).

**1975** Education for All Handicapped Children Act (EAHCA) is passed and later amended in 1990 when the name is changed to Individuals with Disabilities Education Act. Special education for all students with disabilities eventually resulted in more individuals being prepared for and able to succeed in higher education and later legal education.

**1977-1978** The Department of Health, Education, and Welfare (HEW) issued the first set of model regulations pursuant to Section 504 of the Rehabilitation Act. These were to serve as the framework for all federal agencies in issuing their regulations. HEW was later abolished and its functions given to the new federal agencies—Department of Education and Department of Health and Human Services.

**1979** *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), was the first Supreme Court decision addressing any issue of disability discrimination. It addressed the issue of what it means to be “otherwise qualified” in the context of a student seeking admission into a professional college nursing program.

**1980** Enforcement of Section 504 is transferred to the Department of Justice.

**1981** *University of Texas v. Camenisch*, 451 U.S. 390 (1981), was a Supreme Court “nondecision” in case involving payment for auxiliary services in a graduate level program.

**1983-1986** The Law School Admission Council (LSAC) Committee on Test Development and Research prepared recommendations for accommodations on the LSAT.

**1987** The Civil Rights Restoration Act was a response to the 1984 Supreme Court decision in *Grove City College v. Bell*, 465 U.S. 555 (1984). The CRRA provided that when one program receives federal financial assistance, all aspects of the institution are subject to nondiscrimination mandates of Section 504.

**1988** The American Bar Association (ABA) established the Commission on Impaired Attorneys.

**1988** The Fair Housing Act was amended to add “handicap” as a protected class. This is relevant for purposes of law schools that provide housing.

**1989-1991** The Association of American Law Schools Special Committee on Disability Issues prepared a report and recommendations.

**1990** The AALS Special Committee on Disability Issues Report issued.

**1990** The Americans with Disabilities Act (ADA) was enacted. The ADA substantially broadened what entities are prohibited from discriminating. Title I covers employers with fifteen or more employees; Title II covers state and local governmental programs; Title III covers twelve categories of private providers of public accommodations, including educational programs. The ADA is intended to be interpreted consistent with the Rehabilitation Act. This increased awareness for law schools and individuals with disabilities about accommodations on standardized testing. The LSAC had not been subject to the Rehabilitation Act, but responded to issues of accommodations because all member schools are. The LSAC is subject to the ADA.

**1991** *Wynne v. Tufts University*, 932 F.2d 19 (1st Cir. 1991) was remanded with guidance about the standard for determining reasonable accommodation—that appropriate university officials must demonstrate feasibility, cost, and effect of accommodation based on a rationally justifiable decision.

**1991** The American Bar Association Commission on the Mentally Disabled changed its name to the Commission on Mental and Physical Disability Law (1991); more recently the name changed to Commission on Disability Rights (2011).

**1993** The AALS Report on Substance Abuse in Law Schools issued. This report prompted the creation of the ABA Commission on Lawyer Assistance; in 1996 the name changed to the ABA Commission on Impaired Attorneys.

**1993** “Test Takers with Disabilities: A Summary of Data from Special Administrations of the LSAT,” prepared by Linda F. Wightman (Research Report 93-03, December 1993) was published. The report compiled information about accommodated testing in various formats and under different conditions. The report’s conclusions and recommendations included the continued flagging of nonstandard conditions, and refining the amount of extra time provided so that it is based on specific needs rather than a routine practice of double time. The importance of learning more about the law school environment was also indicated. Small sample sizes were noted as presenting difficulties in drawing conclusions.

**1993** The Family and Medical Leave Act was enacted.

**1995** The AALS, ABA Section of Legal Education and Admission to the

Bar, LSAC, National Conference of Bar Examiners (NCBE), and National Association of College & University Attorneys (NACUA) hosted a Joint Conference on Disability Issues.

**1996** The ABA changed the Commission on Impaired Attorneys' name to Commission on Lawyer Assistance Programs (CoLAP) in response to the AALS Report on Substance Abuse.

**1997** The Second Joint Conference on Disabilities Issues was hosted by the AALS, ABA, LSAC, NCBE.

**1997** *Guckenberger v. Boston University*, 957 F. Supp. 306 (D. Mass. 1997) was a highly publicized case involving policies for determining accommodations for students with learning and related disabilities and for determining standards for waiver of courses.

**1998** *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998) was a Supreme Court decision clarifying that state correctional institutions are subject to Title II of the ADA. This is significant for lawyers representing individuals with disabilities in those institutions.

**1999** The *Sutton* trilogy cases were decided by the Supreme Court. The Supreme Court substantially narrowed the definition of who is protected in three cases. The Court determined that a disability determination should be made with reference to mitigating measures. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999).

**1999** *Bartlett v. New York State Board of Law Examiners*, 119 S. Ct. 2388 (1999), vacated and remanded a case involving bar exam accommodations for an individual with a learning disability. Subsequent litigation on remand determined that she was disabled within the ADA definition. 226 F.3d 321 (2d Cir. 2000).

**2002** *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002) was a Supreme Court decision that narrowed the definition of a "major life activity" for the purposes of determining whether one is substantially limited to qualify as "disabled" under the ADA.

**2002** The ABA CoLAP program established the Law School Outreach Committee.

**2003** The LSAC cosponsored a conference with the Educational Testing Service (ETS) and the National Board of Medical Examiners on "High Stakes Testing in a Litigious Society" in December in Philadelphia.

**2004** *Tennessee v. Lane*, 541 U.S. 509 (2004) was a Supreme Court that determined that Eleventh Amendment immunity does not shield states from lawsuits involving fundamental rights of access to courts. Lawyers who serve clients with disabilities and lawyers and judges with disabilities are affected by this decision, which expanded on the 1998 *Yeskey* decision.

**2006-2008** The LSAC Taskforce and Workgroup on Disability

Accommodations reassessed policies and practices.

**2007** The Association of American Law Schools Section on Disability Law was approved.

**2007** The National Association of Law Students with Disabilities was formed. The ABA Section of Individual Rights and Responsibilities provided support.

**2008** The ADA Amendments Act (ADAAA) are passed. This amendment responded to the 1999 and 2002 Supreme Court rulings that narrowed the definition of disability. It also incorporated substantial language from the regulations into the statute itself. The statute specifically amended related provisions of the Rehabilitation Act to be consistent.

**2010** The Department of Justice issued revised regulations for the ADA that incorporate the amendments (addresses testing, criminal justice facilities, assistance animals, and other issues affecting law schools and legal education).

**2011** The American Bar Association Commission on Mental and Physical Disability Law changed its name to the Commission on Disability Rights.

APPENDIX B  
ARCHITECTURAL BARRIER ISSUES FOR  
AALS/ABA SITE EVALUATION TEAMS<sup>469</sup>

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Both the Association of American Law Schools (in its membership review) and the American Bar Association Section on Legal Education and Admission to the Bar (in its accreditation review) consider physical plant and discrimination issues during the sabbatical site visits. Often the team members responsible for these issues are generally aware of architectural design issues, but they are not sure how best to address them.

The following is a very general overview of issues to consider during this process. This information should not be viewed as legal advice, but only general guidance. Each law school should consult its own legal counsel if there are issues of compliance.

INTRODUCTION

AALS Membership Bylaw 6-3(a) provides for equality of opportunity and nondiscrimination for individuals with disabilities. Bylaw 6-9 requires a member school to have an adequate physical plant to support the curriculum and development of an intellectual community outside the classroom, and to support the research needs of its faculty and students.

The ABA Standards for Membership have similar expectations. ABA Standard 211 (Non-Discrimination and Equality of Opportunity) provides the following:

“A law school shall foster and maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on the basis of . . . disability.”

ABA Standard 213 (Reasonable Accommodation for Qualified Individuals with Disabilities) provides that:

“Assuring equality of opportunity for qualified individuals with disabilities, as required by Standard 211, may require a law school to provide such students, faculty and staff with reasonable accommodations.”

Both Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. §

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469. Prepared by Laura Rothstein.

794, and the Americans with Disabilities Act (ADA), 20 U.S.C. §§ 12101 *et seq.*, prohibit discrimination against otherwise qualified individuals with disabilities by programs subject to these federal statutes. Section 504 applies to recipients of federal financial assistance, which virtually all law schools are, either through student loans and/or university grants from federal agencies. Title II of the ADA applies to public law schools, and Title III applies to private law schools. Law schools have been subject to the mandates of Section 504 since 1973 and the Americans with Disabilities Act since 1990. Together these statutes, through their regulations, provide guidance about a variety of issues relating to physical access. Each has provisions for access issues for facilities existing at the time of the effective date of the statute, renovations and alterations, and new construction. Although construction before the effective date does not have to be retrofitted to provide the same level of access as would be required for new construction, law schools are still required to ensure some level of access as noted herein.

Newer buildings and facilities must meet a specific set of design standards found in the regulations, but older buildings may ensure access in different ways. For example, a large classroom or auditorium of a certain size (if built today) probably should have a choice of seating, sight lines, etc., but the same classroom in an older building may not need to be completely retrofitted, so long as some seating is available, or if classroom assignments are rearranged to ensure that the student or faculty member with a mobility impairment has reasonable access.

The following are areas to consider in assessing potential access issues when visiting a law school. They are also areas that those planning new construction and renovations might keep in mind. One of the advantages of law schools as a facility is that for the most part on a day to day basis, administrators have a sense of who in the community might have access concerns because the students, faculty, and staff are known. Administrators, however, should keep in mind that others—such as guest speakers, applicants for admissions, clinic clients, career service employer interviewers, library patrons, attendees at public events, and alums may also use the facility.

#### ARCHITECTURAL AND PHYSICAL BARRIERS—KEY ISSUES

##### *Classrooms*

Access for both students and faculty should be considered. Teaching areas requiring use of steps should be avoided. The possibility of a guest teacher with a mobility impairment should be considered.

Large classrooms (depending on size) might be required to provide a

choice of wheelchair accessible seating. Federal design standards specify requirements for new construction. Arrangements for accessibility should be considered if the building is older. What arrangements are made? How does the student or visitor know about access?

#### *Library*

Consider access to shelved book areas, computer areas (compatibility of software to Assistive Technology), photocopy machines, card catalogues, and support service areas.

Small rooms or other private spaces for Kurzweil reading machines, video-enlarging machines, tape recording equipment, and private study space for special exams should be considered in evaluating and planning library space.

Other helpful library equipment includes Braille printers and microfiche machines accessible to wheelchair users and adaptive software for computers (voice output and screen enlargement); if the law library is a public repository, there may be additional requirements.

Furniture for libraries should take access into account. Typical table heights are twenty-nine inches, which is also the minimum knee clearance needed below a table for someone who uses a wheelchair.

#### *Administrative Offices*

The location and ready access to administrative offices (particularly admissions, financial aid, student services, registrar, and placement) should be carefully considered. These areas should be readily accessible to individuals who use wheelchairs or who have mobility impairments.

#### *Assembly Areas*

Auditoriums should provide access not only for those in the audience but for speakers, etc. Assembly areas that accommodate numerous public forums may be required to provide FM systems to accommodate hearing impairments. ADA design standards provide guidance on this.

#### *Eating and Social Areas*

Eating areas and social areas should be located so that they are physically accessible. Not every part of every such room must be able to be used by a wheelchair user, but the general area as a whole should be reasonably accessible. Students in wheelchairs should have reasonable access to cafeteria service if such is provided. Nonstructural items such as vending machines, microwave ovens, check-out aisles, condiment tables and furniture must be accessible.

*Study Areas*

A reasonable number of accessible carrel areas (if these are provided) and other comparable access should be available. Are small study rooms for special uses such as exams available if needed?

*Traffic Flow*

How do students, faculty, staff, and members of the public move about space in facilities? What happens when there are restricted hours on weekends and other times? If certain entrances and exits are affected for security or other reasons, how can someone access important areas of the facility, such as the library. Card access control systems or telephone access to secured areas after hours should be accessible to people with vision and learning impairments. These should also address the limits of people with mobility impairments.

*Support Areas*

Not only students, but faculty, staff, and members of the public should be taken into account. Access in faculty offices, staff support areas, and areas used by the public should provide appropriate access. Are areas such as career service offices and clinic space accessible to others outside the law school community who regularly visit?

*Other Issues*

The entrances to buildings for students, faculty, staff, and visitors should be considered. Is the main entrance accessible? If not, is there clear signage about how to enter the building through an accessible entrance?

Attention to parking, restrooms, and elevators is essential. Having elevators in good working order is essential for some facilities for reasonable access. Thought should be given to emergency evacuation plans for individuals who cannot use stairs. Is there good signage to the elevators? Is there good signage to accessible restrooms?

Although physical plant access usually involves individuals with mobility impairments, having telephone facilities for individuals with hearing impairments and barriers affecting individuals with visual impairments should be taken into account in planning. The ADA regulations specify TDD requirements.

Individuals with chemical sensitivities can be affected by new and renovated facilities because of chemicals from carpet, paint, and other materials. Classes and other programs may need to be moved during some renovation. Some individuals are sensitive to chalk dust, and this should be a consideration in deciding whether to have chalk boards or whiteboards. Others have problems with the chemicals from whiteboard markers.



There are specific design standards for parking lots depending on size and other factors. Is accessible parking close to the accessible entrance? If not, does signage make the path of travel clear?

### *Housing*

Multiunit dwellings constructed after March 1991 must be designed to meet access requirements under the Fair Housing Act. The FHA also requires landlords to allow tenants to make barrier removal alterations under specific conditions. The ADA covers residence halls as places of public accommodation.

### *New Versus Existing Facilities*

ADA and Rehabilitation Act both have requirements relating to new versus existing facilities. The requirements are different, but some retrofitting is contemplated for existing facilities.

All new buildings and alterations must meet applicable accessibility standards.

Construction after June 3, 1977 is considered new construction under Section 504 of the Rehabilitation Act.

Construction after January 26, 1992 is considered new under the ADA.

#### New Construction

Specific design standards found in regulations.

#### Existing Facilities

Title II (public institutions) program, when viewed in its entirety, must be accessible. 28 CFR Section 35.150; 56 Fed. Reg. 33708-710 (July 26, 1991).

Title III (private institutions) – barriers must be removed to ensure access to the extent that it is readily achievable to do so. Readily achievable means easily accomplishable without much difficult or expense. When not readily achievable, alternate methods of providing services must be implemented. 28 CFR Section 35.304; 56 Fed. Reg. 35568-571 (July 26, 1991).

#### Alterations and Renovations

These are major changes, such as remodeling, renovation, rehabilitation, rearrangement of structural parts or walls or full-height partitions.

Where alterations affect primary function areas, access is required for primary area, and to the maximum extent feasible.

#### The Facilities Requirement Most Overlooked by Architects

Renovations that change the function or occupancy of a space built prior to those dates must meet the currently applicable standards within the scope of the project (renovated space) along with the supporting amenities and

path of travel that serves the renovated space.

#### *Signage and Information Communication*

The ADA and Section 504 design standards reference signage. These requirements refer to door numbering location and appearance and tactile requirements. Student handbooks and information provided to the public should include information on access, parking, etc.

Handbooks should include the following regarding physical plant issues:

- 1) Name of individual to whom to direct accommodations requests
- 2) Information about accessible parking and how to obtain permits
- 3) Location of ramped entrances
- 4) Location of accessible restrooms
- 5) Location of elevators
- 6) Classroom access information
- 7) Advance registration information where access may be an issue

(If the student needs to have classes located on an accessible floor, the student may need to obtain early registration permission).

8) Other access information—food service; housing; common areas—may be unique to the facility.

#### *Off Campus Programming*

Consideration should be given to access issues for summer abroad programs, social events, CLE programs, and other law school sponsored or supported programs that occur off campus.

Externship Placements—Location of externships for students with mobility impairments should be planned for.

#### *Consultation*

Architects and designers are much more knowledgeable about access requirements than in the past, but they are not always completely aware. Law schools are unique facilities and the special uses need to be discussed with these designers.

Case law is not clear about whether architects and designers are directly liable for ADA violations. In planning and contracting for services, indemnification clauses should be a consideration. Individuals with disabilities should be included in planning stages.

#### *Technology Issues*

The following should be considered: (1) assistive technology for individuals with hearing and visual impairments; (2) assistive technology

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for LD/Dyslexics with disabilities impacting ability to use print; (3) voice input technology for those with disabilities impacting ability to keyboard or write long hand; and (4) substantial technical assistance regarding website access should be made available.

#### **TECHNICAL ASSISTANCE**

Office of the Americans with Disabilities Act

Civil Rights Division

Department of Justice

P.O. Box 66118

Washington, D.C. 20036-6118

(202) 514-0301; (202) 514-0381 (TT); (202) 514-0383 (TT)

Architectural and Transportation Barriers Compliance Board

1331 F Street, NW, Suite 1000

Washington, DC 20004-1111

(800) USA-ABLE (Voice/TT)

<http://www.access-board.gov>

Association on Higher Education and Disability (AHEAD)

P.O. Box 21192

Columbus, Ohio 43221-0192

(614) 488-4972 (Voice/TDD)

<http://ahead.org>

Job Accommodation Network (JAN)

912 Chestnut Ridge Road, Suite 1

West Virginia University

Morgantown, WV 26506

1 (800) 527-7234

<http://janweb.icdi.wvu.edu>

Institute for Higher Education Policy

Higher Education for Students with Disabilities:

A Primer for Policymakers (June 2004)

<http://www.ihep.com/organizastion.php3?action+printContentItem&orgid=104&typeID=906&itemID=9292>

Technical Assistance on Technology Access

[www.itpolicy.gsa.gov/coca/nii.htm](http://www.itpolicy.gsa.gov/coca/nii.htm)

2014]

FORTY YEARS OF DISABILITY POLICY

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United Kingdom Tests for Website Accessibility  
(UK standards differ from U.S. Section 508 guidelines)  
[www.publictechnology.net](http://www.publictechnology.net)

“When the ADA Goes Online: Application of the ADA to the Internet and  
the Worldwide Web”  
National Council on Disability  
<http://www.ncd.gov/newsroom/publications/adainternet.html>

Laura Rothstein, Professor of Law and Distinguished University Scholar  
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Louisville, KY 40292  
[laura.rothstein@louisville.edu](mailto:laura.rothstein@louisville.edu)  
(502) 852-6288

L. Scott Lissner, ADA Coordinator  
Office of the Provost, The Ohio State University  
1849 Cannon Drive  
Columbus, OH 43210-1266  
[lissner.2@osu.edu](mailto:lissner.2@osu.edu)  
(614) 292-6207 (voice); (614) 688-8605 (TT)

November 3, 2008

The above document prepared on June 23, 2013 makes only minor stylistic changes from the November 3, 2008 version. The creation of the document was initiated by Laura Rothstein as a result of her service on a number of ABA/AALS site visit teams and her three years of service on the AALS Membership Review Committee. This document is not an official document but was sent to both AALS and the ABA for their use as the organizations deem appropriate.

APPENDIX C  
ACCOMMODATING FACULTY MEMBERS  
WITH DISABILITIES<sup>470</sup>

The opening paragraphs below are adapted and updated from Laura Rothstein, *Disability Law and Higher Education: A Road Map For Where We've Been and Where We May Be Heading*, 63 MD. L. REV. 101, 107, 122 (2004) (footnote references omitted). They are reprinted with Professor Rothstein's permission and followed by her further analysis prepared for this subcommittee report.

The elimination of mandatory retirement, the difficulty of measuring performance for higher education faculty, and a shaky economy have combined to create an increasing number of challenges by faculty members claiming discrimination on the basis of disability. Faculty members have brought challenges in the context of employment and tenure, as well as promotion decisions. Although this development is part of a larger societal issue, the uniqueness of employment in an academic setting has required institutions and the courts to address these issues in an unusual context.

[Factors requiring attention] include the elimination of mandatory retirement and the challenges in measuring and documenting performance deficiencies. Uncertainties about the economy and whether retirement benefits will be sufficient have caused more people to delay retirement. The higher education setting gives aging faculty members the opportunity to remain connected to a community of colleagues. This opportunity is particularly compelling considering the benefits of having an office and access to support services, such as long distance telecommunications, clerical support, technology support, computer upgrades, and even travel funding.

An increasing number of cases involve faculty claiming disability discrimination. In these cases, the institution of higher education generally has prevailed because of its ability to prove that the adverse employment decision was a result of factors other than the disability.<sup>471</sup> These cases illustrate, however, the importance of establishing essential functions and fundamental requirements for a program at the outset, and documenting deficiencies on a careful and ongoing basis. Although many institutions of higher education have improved [their faculty evaluation procedures and practices], those that have not may find themselves in messy and lengthy disputes.

It is not only faculty members reaching retirement who raise disability

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470. LAURA ROTHSTEIN, COMMITTEE A ON ACADEMIC FREEDOM AND TENURE, REPORT LITIGATION OVER DISMISSAL OF FACULTY WITH DISABILITIES app. C (2012).

471. AMY GAJDA, THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION (2009) (discussing the trends that courts are no longer as deferential to institutional decision making as has been the case previously).

issues. The faculty member who becomes depressed, develops substance abuse problems, has cancer, or has some other condition that either affects (or is perceived to potentially affect) performance may raise concerns regardless of the seniority of the individual.

*Who Is “Disabled”*

To be protected under disability discrimination law the individual must be substantially limited in one or more major life activities, have a record of such a limitation, or be regarded as such. The ADA Amendments Act of 2008 and the 2011 EEOC Regulations make it clear that the definition of who is covered is to be broadly interpreted. The result is that in most cases, a dispute about discriminatory treatment should not focus on whether the faculty member meets the definition of “disability.” Instead, the focus should be on whether the institution has established the essential requirements of the program and whether the faculty member is otherwise qualified to carry those out. This assessment should take into account reasonable accommodations and should involve an interactive process.

The case of *Wynne v. Tufts University School of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991) provides guidance about judicial deference. Although the case is in the context of an accommodation for a student, its reasoning is relevant to faculty settings as well. The court held that in cases involving modifications and accommodation, the burden is on the institution to demonstrate 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 standards or require substantial program alteration.

*When Will Misconduct or Deficiencies Be In Question?*

For both tenure track and contract faculty members, an annual evaluation process can raise issues of misconduct and deficiencies. These issues can also be raised in granting raises, sabbaticals, or research support. Post-tenure review, more common on campuses today, may also highlight concerns. And, of course, promotion and tenure decisions are occasions for evaluation of performance. A termination for cause at any point may result from claimed misconduct or deficiencies.

Deficiencies that may raise concern could include the inability to teach a full load. Student evaluations (even with their limitations) might raise concerns about the faculty member’s performance in class. For example, several students might comment that the faculty member seemed frequently impaired in the classroom—perhaps by a controlled substance or perhaps because of a psychological or health condition. The faculty member may not turn in grades in a timely manner or meet with students according to

expected norms. The faculty member may not meet the publication or other scholarship/productivity expectations. [T]here may be off-the-job conduct, such as drunk driving or inappropriate behavior, that reflects on the institution. A faculty member may simply not be able to interact with other colleagues in required committee and other service responsibilities.

Whenever there is a deficiency (or perceived deficiency), one of the questions that must be answered is whether the expectations were clearly stated in terms of employment or whether they are implied. Does the faculty member's appointment letter state what is required in terms of teaching, research, and service? If not, what documents are incorporated by reference? What notice did the faculty member have? These questions are important for establishing the "essential functions" of the position. Did the faculty member have reasonable notice of deficiencies?

#### *Reasonable Accommodations*

The reported judicial decisions involving faculty members generally present fact patterns where the faculty member's performance was deficient, and the courts rarely discuss whether reasonable accommodations might have been provided. The types of accommodations that should be considered in appropriate cases, however, might include adjustments in teaching times, leaves of absence (paid or unpaid, depending on institutional policy), extension of the "tenure clock," reduction in committee responsibilities for a semester, and other adjustments.

The challenge in finding good guidance on this is that faculty members do not produce widgets, and establishing the exact requirements[,] . . . expectations[,] and . . . norms is quite challenging. While institutions have improved in developing consistent policies and expectations, faculty members may have been appointed, tenured, renewed, and promoted under old rules that have been changed later.

#### *What Other Legal Issues Must Be Considered?*

In addition to disability discrimination requirements under the ADA, the Rehabilitation Act, and state law, several other laws must be considered when looking at faculty performance deficiencies that might be related to health or disabling conditions. The Family and Medical Leave Act provides for leave if certain conditions are met. Privacy policies under HIPAA allow faculty members to protect certain information, although the faculty member may need to waive that privacy (at least for limited purposes) in a dispute where the faculty member is claiming discrimination or claiming that the deficiency was related to the disability. And, of course, university internal personnel policies, including all faculty review procedures, must be followed.

The faculty member who can show that policies were followed inconsistently may have a claim of discrimination. For example, if extended leaves or special teaching accommodations are granted routinely for faculty members who do not have disabilities, but not for those who do, this could be a violation of discrimination laws.

#### *Faculty Dismissal*

In the context of a faculty dismissal process where there may be an issue of disability, while it is humane to take into account the potential stigma and privacy issues of a faculty member, it would probably violate the ADA and the Rehabilitation Act to have a mandatory process for termination based on a health or disability issue. While it might be appropriate to provide a faculty member an option of addressing the issue outside of the ordinary termination process, it is problematic to require it.

The increasing number of faculty with disability issues should highlight to institutions the importance of developing consistent and appropriate procedures for termination and for addressing disability issues in other employment decision making.

BARBARA A. LEE AND PETER H. RUGER, *ACCOMMODATING FACULTY AND STAFF WITH PSYCHIATRIC DISABILITIES* (1997).

Suzanne Abram, *The Americans with Disabilities Act in Higher Education: The Plight of Disabled Faculty*, 32 J. L. & EDUC. 1 (2003) (detailed discussion of cases involving faculty members who won their cases).

Lawrence C. DiNardo, John A. Sherrill, & Anna R. Palmer, *Specialized ADR to Settle Faculty Employment Disputes*, 28 J. C. & U. L. 129 (2001).

Barbara A. Lee and Judith A. Malone, *As the Professoriate Ages, Will Colleges Face More Legal Landmines?*, CHRON. HIGHER EDUC., Nov. 30, 2007, at B6-B8.



APPENDIX D  
UNIVERSITY OF LOUISVILLE  
LOUIS D. BRANDEIS SCHOOL OF LAW  
HANDBOOK FOR APPLICANTS AND STUDENTS WITH DISABILITIES

[During law school at Harvard] Brandeis's eyes began to fail. He read constantly and suffered the eyestrain common to law students who read by gaslight. His eyes gave out completely, however, during the summer after his first year at Harvard, while he was "reading law" in Louisville with his brother-in-law. [An oculist] counseled him to think more and read less. Brandeis decided that he could do so if his friends read to him, and it was in this fashion that he completed law school.

Louis D. Brandeis, *Justice for the People*, by Philippa Strum  
Harvard University Press, 1984

It is the policy and practice of the Louis D. Brandeis School of Law to comply with the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and state and local requirements regarding students and applicants with disabilities. Under these laws, no qualified individual with a disability shall be denied access to or participation in services, programs[,] and activities of the Louis D. Brandeis School of Law and the University of Louisville campus programming.

The University of Louisville provides equal treatment and opportunity to all persons without regard to race, color, religion, national origin, sex, age, disability, veteran status[,] or sexual orientation except where such distinction is required by law. This statement reflects compliance with Titles VI and VII of the Civil Rights Act of 1964, Title IX of the Educational Amendment of 1972[,] and all other federal and state regulations. The university reserves the right to make changes without notice in any publication as necessitated by university or legislative action.

**Updated October 2012**

*This policy was adapted from LSAC policies and procedures and from those at the University of Houston Law Center and Hastings Law School. Assistance in adapting this policy was provided by Cathy Patus, Director of the University Disability Resource Center.*

*General Statement*

In carrying out the law school's policy regarding students and applicants with disabilities, we recognize that disabilities include mobility, sensory, health, psychological, and learning disabilities, and we will provide reasonable accommodations to these disabilities to the extent it is readily

achievable to do so. We are unable to make accommodations that are unduly burdensome or that fundamentally alter the nature of the program. While our legal obligation relates to disabilities of a substantial and long-term nature, it is our practice to also provide accommodations when possible to temporary disabilities such as a broken leg and for pregnancy.

### *Admissions*

#### *The LSAT*

In the admissions process, because extensive accommodations are provided for taking the LSAT, waiver of the LSAT is unlikely to be granted except in extremely unusual circumstances. Applications are never automatically rejected based on the LSAT or GPA. An indication on the LSDAS report that an applicant took an accommodated test will not be the basis for discrimination.

#### *Documentation of the Disability*

Applicants who wish to have their disabilities considered as factors in the admissions process must identify the nature of disability and provide an explanation of why a disability is a factor at the time of application. If the applicant wishes the disability to be considered as a factor, it may be necessary for the applicant to provide appropriate documentation of the disability.

#### *Reconsideration*

It is not Brandeis practice to reconsider applications that have already been rejected unless there is new information that was not available at the time of the application through no fault of the applicant. For that reason, applicants are advised to make the disability known at the time of application if they wish to have the disability taken into account in the application process. It will be necessary for the applicant to provide documentation supporting the disability and its impact on academic performance for the reconsideration process.

#### *Information on the Disability Retained in Applicant's File*

Applicants wishing to have documentation relating to the disability remain in their student records should request this in writing as soon as they are accepted. There is no guarantee that such letters will be retained, but every effort will be made to do so. These letters may be useful in evaluating whether to provide future accommodations to the student who has been admitted. The documentation may also be useful in certification to the bar examiners when the student applies for accommodations on the bar exam. Because each setting has unique characteristics, there is no

guarantee that accommodations on the LSAT will be provided in law school. Nor is there any guarantee that accommodations provided on the LSAT or in law school will be granted on the bar exam. Documentation for each setting, including documentation of the impairment and documentation of the relationship of the disability to the requested accommodation varies from setting to setting.

#### *Self-Identification After Acceptance*

Applicants who are accepted for admission should contact the Assistant Dean for Student Life of the law school and the University Disability Resource Center as soon as possible regarding any disabilities that might require accommodations. Accepted applicants are strongly encouraged to identify those disabilities requiring accommodations early to allow adequate time for evaluating documentation and for working out the specific accommodation (e.g. arranging scheduling in barrier-free classrooms, funding for auxiliary services, and arranging accommodations for orientation).

Requests for accommodations concerning classes, the classroom, the library, and/or the building must generally be made [thirty] days before the beginning of each semester. Students should request accommodations for exams (e.g. extra time, specific testing needs) at the same time. In any event, exam accommodations must ordinarily be requested no later than thirty (30) days prior to the law school's first exam or the student's first exam, whichever occurs earlier.

#### *Enrolled Students*

##### *Identifying the Need for Accommodations*

Students with disabilities who require accommodations must make those needs known to the Assistant Dean for Student Life of the law school and the University Disability Resource Center as soon as possible. It is the responsibility of the student to make these needs known in a timely fashion and to provide the necessary documentation and evaluations in appropriate cases. Do not assume that because your application to law school indicates the presence of a disability that this information has been forwarded to or has been shared with the assistant dean's office or the University Disability Resource Center.

Documentation submitted to the Assistant Dean for Student Life may be shared with the staff of the University Disability Resource Center, and vice versa, for review to determine eligibility for requested accommodations. Disability Resource Center staff will collaborate with the Assistant Dean for Student Life and may request a meeting with the student to determine effective accommodations (such as mode of communication for students

with deafness, format for alternate texts for students with visual impairments, etc.).

Students who do not require accommodations need not make their disabilities known. The information on the student's disability and accommodations is treated as confidential information under applicable federal, state, and university laws and policies and is only provided to individuals who are privileged to receive such information. Faculty members who are apprised of a disability are advised that this information is confidential.

#### *Accommodations*

The Brandeis School of Law will make reasonable accommodations to students with documented disabilities. Accommodations may include, but are not limited to: modifying course loads; providing alternative exam accommodations; providing interpreters or note takers; and providing materials in an accessible format. Such accommodations will not be provided if they fundamentally alter the nature of the program or if they would be unduly burdensome either financially or administratively. The Assistant Dean for Student Life at the Brandeis School of Law and the University Disability Resource Center will develop with the student an appropriate accommodation plan. The Assistant Dean and the University Disability Resource Center may consult with appropriate experts and professionals on a confidential basis.

#### *Academic Modifications*

Academic modifications may include reduced course loads, extending the amount of time for graduation, allowing enrollment on a reduced course basis, course substitution, and similar modifications. Applicable statutes and regulations require only modifications that do not fundamentally alter the nature of the program and that are not unduly burdensome financially or administratively. In litigation while the law school must justify denial of a requested reasonable accommodation, higher education institutions are given substantial deference in establishing their own academic requirements.

Requests for academic modifications should be made to the Assistant Dean for Student Life at the law school and the University Disability Resource Center. In appropriate cases, the adjustment will be made in consultation with faculty. For example, the Assistant Dean may permit a reduced course load administratively, but the Assistant Dean in consultation with the appropriate faculty member will make modifications such as extensions of time for completing course requirements.

### *Auxiliary Aids and Services*

Auxiliary services may include interpreters, note takers, materials formatted for accessibility, assistance with photocopying and library retrieval, and other support services in connection with the academic programming. Services for personal use are not provided. Purchase of special equipment (such as a Kurzweil reading machine, an image enlarger, portable computers, etc.) to be used at the law school may also constitute an auxiliary service.

Brandeis School of Law does not provide individual tutorial assistance tailored to the special needs of students with learning or other related disabilities. The Academic Success Program does not discriminate on the basis of disability. The director of that program or the Assistant Dean for Student Life may refer students with learning or related disabilities either to the University's counseling center or the Disability Resource Center in order to obtain additional assistance in appropriate cases.

Students requiring auxiliary services should direct requests to the Assistant Dean for Student Life and the University Disability Resource Center. For certain auxiliary services such as interpreters, the Assistant Dean may request that the student seek eligibility for such services from the Kentucky Vocational Rehabilitation Agency or other no-cost service providers. The Assistant Dean and the Disability Resource Center will work with the student in facilitating such services. Because obtaining these services can be a time-consuming and complicated process, students are urged to seek assistance as early as possible after being accepted for admission.

Assistance in the library may be obtained by making a request of the library desk staff. The student who will require more extensive assistance and/or assistance on a regular basis should make this need known to the Assistant Dean for Student Life and the Director of the Disability Resource Center. The Disability Resource Center will work with the Law Library staff to facilitate an appropriate schedule of assistance. Students who are unable to receive satisfactory responses to their requests for library assistance should direct this concern to the Assistant Dean for Student Life.

### *Exam Modifications*

Exam modifications may include additional time to take the exam, time allowed for rest breaks, use of a reader or amanuensis, being allowed to eat during exams, separate exam room, or taking the exam at a time other than the regularly scheduled time. Students requesting certain exam modifications may be asked to ascertain the format of the exam (e.g. multiple choice, essay, short answer, etc.) in order to determine the appropriate modification. For example, if the student has difficulty writing,

but does not have difficulty reading, the need for additional time would be affected by whether the exam is in a multiple choice or essay format.

All exam modification requests are to be directed to the Assistant Dean for Student Life. Because of the time needed to arrange these requests, students should ordinarily make such requests no later than thirty (30) days after the beginning of the semester in which exams are to be taken. In any event, exam accommodations must ordinarily be requested no later than thirty (30) days prior to the law school's first exam or the student's first exam, whichever occurs earlier. Requests for any assistance to be provided by the Disability Resource Center are also needed in this time frame to ensure that they are adequately staffed. Exam accommodation requests must be renewed each semester. Depending on the nature of the disability, new or updated documentation may be required.

#### *Computer Exams*

The Law School permits students to use laptop computers to take examinations, subject to faculty approval. Students must provide their own computer which meets or exceeds hardware and software requirements for the exam software, and a portable storage device (generally a USB drive) for storage and submission of completed exams. The Law School cannot and does not guarantee compatibility between the exam software and any particular student's computer. Students taking exams on computer acknowledge and accept that in cases of pertinent software or hardware problems, they may be required to take or complete an exam by hand in approved bluebooks if problems cannot be corrected within a reasonable time.

Detailed information about the use of computers on law school exams will be issued by the Law School's IT Staff and the Assistant Dean for Student Life. The instructions provided may vary from semester to semester depending on the technical requirements of the particular software application being used by the Law School for administration of exams. Students are responsible for complying with all published procedures for the use of computers on exams.

Prior to the start of final exams each semester, the Administration will provide students with notice of room assignments and other administrative information for computer exam takers and those hand writing their exams.

#### *Architectural Barriers*

A substantial portion of the law school was built before federal law required accessible design. While there are many aspects of the facility that are readily accessible, there are some barriers that require advance planning to ensure access. Suggestions for removing barriers are welcome

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and should be directed to the Assistant Dean for Student Life.

### *Parking*

There are several accessible parking spaces near the law school for individuals with the appropriate parking permit. A UofL handicap permit is required to park in designated handicap spaces. For information regarding obtaining a handicap parking permit, contact the University Parking office at (502) 852-PARK (7275).

### *Ramped Entrances*

There are several ramped entrances into the School of Law and the Law Library. These ramps are in obvious locations.

### *Accessible Restrooms*

There are accessible restrooms on every floor of the School of Law.

### *Elevators*

Passenger elevators with emergency communication features are found at both ends of the law school. Key access is required and must be requested for the elevator in the law library.

### *Classrooms*

All classrooms are accessible and all have accessible seating areas.

### *Housing*

There are several choices of accessible housing on campus, including both dormitory and apartment living. For information on campus housing, call 502-852-6636 or email [housing@gwise.louisville.edu](mailto:housing@gwise.louisville.edu). Information on accessible housing in the Louisville area is available from the Center for Accessible Living at 502-589-6620 or [www.calky.org](http://www.calky.org).

### *Modification of Policies and Practices*

Students with disabilities that justify advance registration should direct their requests to the Assistant Dean for Student Life approximately one month before registration. Arrangements can be made to facilitate accessible class location, etc.

Class attendance is generally deemed to be a fundamental aspect of legal education. For that reason, ordinarily, faculty members will not be expected to waive attendance policies for students with disabilities. Students believing that their situations are extraordinary should direct requests to the Assistant Dean for Student Life, who will consult with the faculty member regarding such requests. Because reduced course loads

and other accommodations are available, it would be extremely unusual that an alteration to an attendance policy would be a necessary reasonable accommodation.

Students who believe that registration or other policies and practices should be modified should direct these requests to the Assistant Dean for Student Life.

#### *Academic Dismissal and Readmission*

Students who are academically dismissed sometimes raise a disability as the basis for the academic difficulty. While this may sometimes justify allowing the student a second opportunity to prove academic ability, the burden will be on the student to explain why the disability was not brought to the attention of the administration if it had not been previously, to explain why accommodations were not requested, or to explain why accommodations that had been provided were not adequate. Readmission petitions should be discussed with the Assistant Dean for Student Life. The Reinstatement and Probation Committee decides on such petitions. Committee members may have access to disability documentation if it is to be considered and the student will be asked to sign a permission form allowing the committee access to the student's record, including disability documentation.

#### *Bar Examinations*

Law students with disabilities who believe they will require accommodations in taking the bar examination should inquire early in their legal education as to what will be necessary to obtain accommodations. Bar Examiners may require recent documentation of an individual's disability. Information on how to contact bar examiners in all states is available from the Assistant Dean for Student Life. Many state boards of bar examiners will request that the law school provide information on accommodations received during law school. Such information will be provided upon a written release from the student. **Please note that accommodations provided for the bar examinations may not be the same as those provided by the law school.** Inquiries concerning accommodations for the Kentucky Bar Examination may be directed to:

Kentucky Office of Bar Admissions  
1510 Newtown Pike, Suite 156  
Lexington, KY 40511-1255  
(859) 246-2381  
ATTN: Mary Riddell, Deputy Director of Bar Admissions



### *Grievances*

Students who request accommodations from faculty or staff members and who believe that such accommodations have been impermissibly denied, or who believe that they have been discriminated against on the basis of their disability, should bring this matter to the attention of the Assistant Dean for Student Life. If the Assistant Dean for Student Life is unable to resolve the matter informally, or if the student is unsatisfied with the resolution, the student may file a grievance with the Affirmative Action/Employee Relations Office on campus. That office is located in the Personnel Services Building, 852-6538.

### *Psychological and Substance Abuse Impairments*

Students with psychological impairments, including alcohol or drug addiction, may wish to seek help from the university's Counseling Center, located at the Student Health Center, 852-6585. Such counseling is confidential and is not part of the student's official record. In addition, students may contact the Lawyers Helping Lawyers (502-564-3795), a Kentucky Bar Association Committee dealing with substance abuse. All communications with that organization are kept strictly confidential, but students may be required to disclose such counseling by some state bar licensing agencies.

Law school is stressful, and students whose disabilities justify accommodations such as a reduced course load have the obligation to request accommodation before academic failure. Problems such as exam anxiety and chronic lateness will not ordinarily be considered to be disabilities justifying accommodation under the ADA or the Rehabilitation Act, although they may be symptoms of disabilities requiring appropriate diagnosis and those disabilities may justify accommodations.

Students should be aware that while reasonable accommodations are available to such disabilities, all students would be held to the same academic performance and behavior standards.

### *Career Counseling*

The Office of Professional Development provides assistance to all students including those with disabilities. Students who believe that an employer using the services of the Office of Professional Development has discriminated on the basis of disability should bring that to the attention of the Assistant Dean for Professional Development.

*Resources and References*

Offices at the Law School area code  
Assistant Dean for Student Life  
Assistant Dean for Professional Development  
Director of Academic Success  
Office of Student Records  
Law Library  
Offices on Campus area code  
Affirmative Action/Employee Relations Office  
(Location: )  
Student Counseling Center  
Disability Resource Center  
University Parking Office  
Housing and Residence Life Office

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National Association of Blind Lawyers  
<http://www.blindlawyer.org>  
National Federation of the Blind  
<http://www.nfb.org>  
ABA Sites and Commissions:  
Lawyers with Disabilities  
[http://www.americanbar.org/portals/lawyers\\_with\\_disabilities.html](http://www.americanbar.org/portals/lawyers_with_disabilities.html)

Law School Disability Programs  
[http://www.americanbar.org/groups/disabilityrights/resources/law\\_school\\_programs.html](http://www.americanbar.org/groups/disabilityrights/resources/law_school_programs.html)

Bar Information for Applicants with Disabilities  
<http://www.americanbar.org/groups/disabilityrights/resources/biad.html>  
ABA Commission on Disability Rights  
740 15th Street, N.W.  
Washington, DC 20005  
(202) 662-1570  
[cdr@americanbar.org](mailto:cdr@americanbar.org)  
<http://www.americanbar.org/groups/disabilityrights.html>

Taped law casebooks and treatises are available from:

Learning Ally

20 Roszel Road

Princeton, NJ 08540

(609) 452-0606

<http://www.learningally.org>

<http://custhub.rfbd.org/SearchCatalog.asp?from=audiobookcatalog>

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For information on substance addiction issues:

ABA Commission on Lawyer Assistance Programs

321 N. Clark Street

Chicago, IL 60654-7598

(312) 988-5717

[http://www.americanbar.org/groups/lawyer\\_assistance.html](http://www.americanbar.org/groups/lawyer_assistance.html)

Law Student ListServ

“CoLAP maintains a confidential listserv for recovering law students. If you are interested in joining this group, contact Matthew Reel at [matthew@arjlap.org](mailto:matthew@arjlap.org).”

Kentucky Lawyer Assistance Program

P. O. Box 1437

Frankfort, KY 40602

(502) 564-3795

<http://www.kylap.org>

Current information on AIDS issues can be obtained from:

Center for Disease Control National AIDS Hotline

c/o American Social Health Association

PO Box 13827

Research Triangle Park, NC 27709

[HIVnet@ashastd.org](mailto:HIVnet@ashastd.org)

[www.ashastd.org](http://www.ashastd.org)

<http://www.ashastd.org/std-sti/hiv-aids.html>

<http://www.cdc.gov/hiv/default.htm>

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FORTY YEARS OF DISABILITY POLICY

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Organization committed to full participation of individuals with disabilities in college life:

Association on Higher Education and Disability (AHEAD)

107 Commerce Center Dr., Ste. 204

Huntersville, NC 28078

(704) 942-7779

[www.ahead.org](http://www.ahead.org)

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Disability & Diversity Contact Information:

Diversity in the Profession Committee,

Kentucky Bar Association

514 W. Main Street

Frankfort KY 40601-1812

Phone: (502) 564-3795

[jmeyers@kybar.org](mailto:jmeyers@kybar.org)

<http://www.kybar.org/72>

National Association of Law Students with Disabilities

[www.nalswd.org](http://www.nalswd.org)

<http://www.nalswd.org/resources.html>

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**Service Request Form:** Semester \_\_\_\_\_

Name: \_\_\_\_\_

Last, First, MI

Address: \_\_\_\_\_

Street/Box # Apt.#

\_\_\_\_\_

City State Zip

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

ID#: \_\_\_\_\_ Major: \_\_\_\_\_

Vocational Rehabilitation Counselor: \_\_\_\_\_

Please list below only those classes for which you request accommodations. The course information should include all information as it appears on your schedule (the name of the class is not necessary). Indicate with a check mark the services you wish to request.

Class Number	Subject	Catalog. Number	Section	Letter to Faculty	Exam Accom.	Note Taker

**For Office Use Only:**

Code: \_\_\_\_\_ Approved by: \_\_\_\_\_

Date Received: \_\_\_\_\_ Received by: \_\_\_\_\_