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The Impact of Race and Socioeconomic Status on Access to Accommodations in Postsecondary Education

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THE IMPACT OF RACE AND SOCIOECONOMIC STATUS ON ACCESS TO ACCOMMODATIONS IN POST-SECONDARY EDUCATION

ASHLEY YULL*

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I. INTRODUCTION

Consider the following hypothetical: Two students are accepted into college and request accommodations based on behavioral characteristics associated with autism that impact their ability to function in an educational setting. Both students previously received accommodations in kindergarten through twelfth grade, in accordance with the Individuals with Disabilities in Education Act (IDEA), which allowed the students to obtain the skills that they needed for future educational advancement, yet only one student continued to receive accommodations in college.

The student whose request for accommodations was granted is Michael, a Caucasian¹ male² who grew up in a two-parent household³ in an affluent suburb.⁴ At two years old, Michael was referred to a psychiatrist by his primary care physician, after presenting with gross developmental delays during a routine examination, and diagnosed with autism.⁵ After Michael was accepted to college, his parents reviewed the college's policy on accommodations and submitted the required paperwork.⁶ Michael already

1. See David S. Mandell et al., *Race Differences in the Age at Diagnosis Among Medicaid-Eligible Children with Autism*, 41 J. OF THE AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY 12, 1447-1453 (2002) (discussing factors that impact the age of initial diagnosis among children with autism).

2. JON BAIO, PREVALENCE OF AUTISM SPECTRUM DISORDER AMONG CHILDREN AGED 8 YEARS — AUTISM AND DEVELOPMENTAL DISABILITIES MONITORING NETWORK, 11 SITES, UNITED STATES, 2010, (Ctr. for Disease Control & Prevention, 2014), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6302a1.htm> (finding that the “prevalence [of autism] was 4–5 times higher among boys than girls, with a prevalence of one in 42 boys compared with one in 189 girls”).

3. See Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, VOX (Feb. 4, 2014) <http://www.voxeu.org/article/where-land-opportunity-intergenerational-mobility-us> (finding that “the strongest predictors of upward mobility are measures of family structure such as the fraction of single parents in the area” and that “[c]hildren of married parents also have higher rates of upward mobility if they live in communities with fewer single parents.”).

4. See David S. Mandell et al., *Factors Associated with Age of Diagnosis Among Children with Autism Spectrum Disorders*, 116 PEDIATRICS 1480, 1483 (2005) [hereinafter *Factors*] (finding that, on average, children living in rural areas received an autism diagnosis 0.4 years later than children living in urban areas).

5. See Tony Charman & Gillian Baird, *Practitioner Review: Diagnosis of Autism Spectrum Disorder in 2- and 3-Year-Old Children*, 43 J. CHILD. PSYCHOL. & PSYCHIATRY 289, 290 (2002) (explaining the process used when diagnosing a child with autism and indicating that symptoms of autism can be apparent by eighteen months of age).

6. See *Transition of Students with Disabilities to Post-Secondary Education: A Guide for High School Educators*, U.S. DEP'T OF EDUC. OFFICE OF CIVIL RIGHTS (Mar. 2007), <http://www2.ed.gov/about/offices/list/ocr/transitionguide.html> [hereinafter

had an updated psychiatric diagnosis, which had been obtained to allow him to receive accommodations on his college entrance examination.⁷ Michael's parents had supplied the psychiatrist that evaluated him with evidence regarding his disability, including report cards from elementary school illustrating that Michael exhibited symptoms of autism beginning in early childhood.⁸ Based on the submitted information, Michael received accommodations throughout his four years of college,⁹ which allowed him to graduate with a bachelor's degree.¹⁰ After graduation, Michael worked as an actuary¹¹ and he received workplace accommodations that helped him succeed in this position.¹² Michael had insurance coverage through his

Transition of Students with Disabilities] (detailing the process for receiving testing accommodations for post-secondary education).

7. See *Disability Documentation Guidelines*, COLLEGE BOARD, <https://www.collegeboard.org/students-with-disabilities/documentation-guidelines/disability-documentation> (last visited Sept. 24, 2014) (detailing seven requirements for documentation of a disability needed to access accommodations for the SAT, including a diagnosis made by a person with appropriate professional credentials using applicable professional standards and the provision requiring "relevant educational, developmental, and medical history.").

8. See AM. PSYCHIATRIC ASS'N, *THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 50* (5th ed. 2013) (mandating the presence of symptoms during the "early developmental period" as a prerequisite for an autism diagnosis) [hereinafter DSM-5].

9. See Marci Wheeler, *Academic Supports for College Students with an Autism Spectrum Disorder: An Overview*, IND. RESOURCE CENTER FOR AUTISM, <http://www.iidc.indiana.edu/?pageId=3417> (last visited Sept. 24, 2014) (detailing accommodations that may be helpful to a student with an autism spectrum disorder, including having a note taker or receiving copies of the instructors notes, receiving step-by-step written instructions, receiving extra time to work on assignments, or provision of hands-on and visual aids).

10. See *Employment Projections*, BUREAU OF LABOR STATISTICS (Mar. 24, 2014), http://www.bls.gov/emp/ep_chart_001.htm (demonstrating a positive correlation between education level and employment status); see also *Statistical Abstract of the United States: 2012*, U.S. CENSUS BUREAU (2012), <http://www.census.gov/compendia/statab/2012edition.html> (correlating educational attainment with earnings).

11. See Temple Grandin, *Choosing the Right Job for People with Autism or Asperger's Syndrome*, IND. RESOURCE CENTER FOR AUTISM (Nov. 1999), <http://www.iidc.indiana.edu/?pageId=596#sthash.U6zQVs3L.dpuf> (discussing the types of positions that are best suited for individuals with autism and indicating that jobs that require high demands on short-term working memory (i.e., a cashier) are generally bad for individuals with autism while jobs in fields such as accounting, engineering, and library science are well suited for these individuals).

12. See MELANIE WHETZEL, OFFICE OF DISABILITY EMP'T POL'Y, *JOB ACCOMMODATION NETWORK: ACCOMMODATIONS AND COMPLIANCE SERIES – EMPLOYEES WITH AUTISM SPECTRUM DISORDER* (2013), available at <http://askjan.org/media/ASD.html> (providing recommendations to employers regarding appropriate

employer and he remained self-sufficient throughout his adult life.

The student whose request for accommodations was denied is Samuel, an African American¹³ male who grew up in a single-parent household in a rural community. Samuel experienced gross developmental delays throughout his childhood (failing to meet most social, emotional, and cognitive milestones beginning at approximately eighteen months of age), but he was never formally diagnosed with a psychiatric disorder.¹⁴ Samuel's request for accommodations was denied because he lacked a psychiatric diagnosis, required by the college to gain access to accommodations for a mental impairment. Even when Samuel finally received a formal evaluation by a psychiatrist (despite it not having been covered by his school health insurance),¹⁵ he did not receive a psychiatric diagnosis because he lacked records from childhood documenting behavioral characteristics of autism that he exhibited during that period of time (as his mother had not maintained any such documentation).¹⁶ Therefore, Samuel remained ineligible for accommodations even though he experienced significant impairment in an educational setting as a result of his behavioral characteristics of autism. Without accommodations, Samuel was unable to compete with his non-disabled peers and was ultimately forced to dropout of college.¹⁷ Samuel experienced difficulties finding

accommodations for employees with autism spectrum disorders based on areas of functional impairment).

13. BAIQ, *supra* note 2, at 1 (“Non-Hispanic white children were approximately 30% more likely to be identified with [autism] than non-Hispanic black children and were almost 50% more likely to be identified with [autism] than Hispanic children.”).

14. See Gregory S. Liptak et al., *Disparities in Diagnosis and Access to Health Services for Children with Autism: Data from the National Survey of Children's Health*, 29 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 152, 157 (data from a National Survey of Children's Health identifying disparities in access to care and early intervention); see also David S. Mandell, et al., *Disparities in Diagnoses Received Prior to a Diagnosis of Autism Spectrum Disorder*, 37 J. OF AUTISM & DEVELOPMENTAL DISORDERS 1795, 1799 (2007) (identifying racial and ethnic disparities in the diagnosis of autism) [hereinafter *Diagnoses Received Prior to a Diagnosis of Autism*].

15. See *Psychoeducational Evaluations*, PSYCHOLOGICAL HEALTH AFFILIATES, <http://www.phcentralpa.com/psychoeducational-evaluatio.html> (indicating that “[h]ealth insurance companies do not consider psychoeducational testing a medical service.”) (last visited Oct. 26, 2014).

16. See DSM-5, *supra* note 8, at 299.00 (F84.0) (“Symptoms *must* be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).”) (emphasis added).

17. See Lex Frieden, *People with Disabilities and Postsecondary Education – Position Paper*, NAT'L COUNSEL ON DISABILITY (Sept. 15, 2003), <http://www.ncd.gov/>

work¹⁸ and was routinely fired from positions that he did manage to secure because of his behavioral characteristics of autism.¹⁹ After experiencing months of homelessness,²⁰ Samuel secured housing with the help of payments from Social Security Disability Insurance and he remained dependent on governmental support throughout his adult life.²¹

This hypothetical demonstrates how premising access to accommodations in post-secondary education on receipt of a psychiatric diagnosis magnifies the negative impact of childhood poverty (and thus minority status) on adult earning and productivity. Even though individuals who grew up in poverty may experience more severe impairment associated with the behavioral characteristics of autism, they are less likely to receive a psychiatric diagnosis.²² Therefore, when colleges and

publications/2003/Sept152003 (indicating that “the lack of, or limited access to and availability of support is a major factor that eventually discourages or excludes many students with disabilities from continuing their schooling” and emphasizing that “postsecondary schools have no legal obligation to help students with disabilities transition into their institution.”).

18. See Julia L. Taylor & Marsha M. Seltzer, *Employment and Post-Secondary Educational Activities for Young Adults with Autism Spectrum Disorders During the Transition to Adulthood*, 41 JOURNAL OF AUTISM AND DEVELOPMENTAL DISORDERS 5, 566-67 (2011) (looking at post-high school activities of adults with autism spectrum disorder and finding that only 27% were working—approximately half of those individuals were employed in a traditional work environment and the other half were working in some type of sheltered work environment—indicating that “the slowing in improvement in behaviors for young adults with [autism] without [intellectual disability] may be related to less stimulating occupational activities after high school exit, especially for those youths from lower income families who may have greater barriers to accessing services.”).

19. See Rachel Ewing, *Young Adults on the Autism Spectrum Face Tough Prospects for Jobs and Independent Living*, DREXEL NOW (Sept. 14, 2013), <http://drexel.edu/now/archive/2013/September/Autism-Spectrum-Young-Adult-Transition-Studies/> (indicating that young adults with autism are less likely to secure employment than other individuals with disabilities and, if they do secure employment, are on average paid less than individuals with other disabilities).

20. See Laurel Joss, *Are People with Autism at Higher Risk of Homelessness?*, AUTISM DAILY NEWSCAST (Feb. 4, 2014), <http://www.autismdailynewscast.com/are-people-with-autism-at-a-higher-risk-for-homelessness/6784/laurel-joss/> (indicating that individuals with autism are more likely to be unemployed and thus more likely to be homeless).

21. See *Disability Evaluation under Social Security, 12.00 Mental Disorders – Adult*, SOCIAL SECURITY ADMINISTRATION (Sept. 2008) <http://www.ssa.gov/disability/professionals/bluebook/12.00-MentalDisorders-Adult.htm> (listing the criteria used to classify an autistic person for purposes of qualifying for Social Security Insurance) [hereinafter *Disability Evaluation*].

²² See *infra* Part IV (explaining the diagnosis of autism and its impact on minority students).

universities require students with mental impairments to present evidence of a psychiatric diagnosis as a pre-requisite for access to accommodations, students who grew up in poverty are disproportionately prevented from accessing accommodations, which are required for them to compete on equal footing with their non-disabled peers. This in turn perpetuates a lack of educational attainment among individuals who grew up in poverty (disproportionately individuals from minority groups), leading to lower adult productivity and earning among these individuals.²³ Part II and III of this article examine federal policies and legislation underlying the provision of educational opportunities to all students (including students with disabilities).²⁴ Part IV examines the diagnostic criteria for autism, the barriers to obtaining a diagnosis of and treatment for autism, and the impact of behavioral characteristic associated with autism on minority students.²⁵ Using autism as illustrative, Part V argues that having a psychiatric diagnosis plays an inappropriate role in decisions regarding access to accommodations in post-secondary education and that this has a particularly negative impact on a subset of students with mental impairments—minorities and other socioeconomically disadvantaged groups.²⁶ Part V recommends moving towards a system where eligibility determinations for receipt of accommodations in post-secondary education are premised on the level of impairment that a student experiences in an educational setting, rather than a psychiatric diagnosis.²⁷ Finally, Part VI highlights the costs associated with failing to provide disabled students with access to educational accommodations.²⁸

II. PROVISION OF EDUCATIONAL OPPORTUNITIES TO ALL STUDENTS

Throughout the history of the United States, there has been consistent recognition of the importance of education to both the individual and society. Education has long been viewed as “fundamental to democratic

²³ See *infra* Part II (discussing the correlation between educational attainment, poverty, and minority status).

²⁴ See *infra* Part II-III (examining the provisions of the IDEA, the ADA, and § 504 of the FRA).

²⁵ See *infra* Part IV (providing an overview regarding autism).

²⁶ See *infra* Part V (discussing the problems associated with using a psychiatric diagnosis as a basis for making decisions regarding access to accommodations).

²⁷ See *infra* Part V (arguing that determinations regarding access to accommodations for psychiatric disabilities should mirror the process used when making decisions regarding access to accommodations for physical disabilities).

²⁸ See *infra* Part VI (addressing the negative implications of failing to provide individuals with disabilities with equal access to educational opportunities).

society and the life chances of American young people.”²⁹ Thomas Jefferson argued that “democracy required educated citizens who could employ reason and deliberate publicly about the competing ideas for guiding the nation.”³⁰ More recently, the United States Supreme Court emphasized the importance of education, indicating that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”³¹

Growing up in poverty makes a child more likely to experience low productivity and earnings as an adult,³² and this association has been linked to differences in educational attainment.³³ Research has clearly and consistently demonstrated that individuals with more education have higher rates of employment and lower rates of poverty.³⁴ Moreover, the link between socioeconomic status and educational attainment necessarily implicates race and ethnicity because minority students are more likely to have grown up in families with low socioeconomic status.³⁵

Breaking the cycle of poverty seen among minority groups requires ensuring that all students have equal access to educational opportunities regardless of socioeconomic status. Title I of the Elementary and Secondary Education Act, passed in 1965, specifically allocated funding for the education of socioeconomically disadvantaged students, reflecting the importance placed on education and the desire to ensure that all students have equal access to educational opportunities.³⁶ The 2001 passage of the No Child Left Behind Act demonstrated continued support for

29. Jeannie Oakes et al., *Grassroots Organizing, Social Movements, and the Right to High-Quality Education*, 4 STAN J. C.R. & C.L. 339, 344 (2008).

30. *Id.* at 342.

31. *Id.* at 344 (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

32. Kristen Anderson Moore et al., *Children in Poverty: Trends, Consequences, and Policy Opinions*, CHILD TRENDS, 5 (April 2009), <http://www.childtrends.org/?publications=children-in-poverty-trends-consequences-and-policy-options-april-2009> (reporting it is estimated that “reduced productivity lowers the gross domestic product by 1.3 percent annually.”).

33. *Id.* at 4.

34. *Id.* For example, according to data from 2009, on average, individuals who had received at least a bachelor’s degree had a median income of \$33,000 compared to individuals who had not completed high school, for which their median income was \$19,000.

35. For instance, in the United States, “blacks and Latinos have much higher poverty rates than other racial and ethnic groups.”

36. Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L.L. L. REV. 47, 59 (2012) (“distribut[ing] nearly \$1 billion to school districts throughout the country to provide extra services to students from low income families”).

meaningful access to educational opportunities for all students.³⁷ The Act specifically recognized the increasing importance of education to future attainment in our knowledge-based economy and aimed to “clos[e] the achievement gap between racial, ethnic, and income groups.”³⁸

The existence of federal statutes intended to protect individuals with disabilities also reflect the importance of ensuring that all students have equal access to educational opportunities. There are three federal statutes that play a pivotal role in the provision of services and accommodations to individuals with disabilities in the educational context: Title II and III of the Americans with Disabilities Act (ADA), § 504 of the Federal Rehabilitation Act (FRA), and the Individuals with Disabilities in Education Act (IDEA). Section 504 prohibits programs and activities, including schools that receive federal funding, from discriminating against an individual on the basis of a disability.³⁹ The ADA extends protection to domains that are not covered by § 504, including public and private post-secondary educational institutions.⁴⁰ The IDEA provides funding for the education of students with disabilities in kindergarten through twelfth grade, and makes state receipt of funding contingent on compliance with statutory requirements aimed at protecting students with disabilities.⁴¹

III. EDUCATING STUDENTS WITH DISABILITIES

The federal statutes that protect individuals with disabilities are intended to work together to ensure that individuals with disabilities are able to obtain an education that will allow them to fully participate in mainstream society.⁴² Theoretically, this objective is achieved by providing students with disabilities equal access to educational opportunities throughout their

37. *Sch. Dist. Of Pontiac v. Sec’y of Edu.*, 584 F.3d 253, 257 (6th Cir. 2009), cert. denied, 130 S. Ct. 3385 (2010).

38. Richard D. Kahlenberg, *Fixing No Child Left Behind*, THE CENTURY FOUNDATION, <http://www.policyarchive.org/collections/presidential/index?section=5&id=10864>.

39. *See* The Rehabilitation Act of 1973, 29 U.S.C. § 794 (2013); 34 C.F.R. pt. 104 (2013) (regulations implementing § 504); *see also* *Protecting Students with Disabilities*, U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS (Dec. 12, 2013), <http://www2.ed.gov/about/offices/list/ocr/504faq.html> (indicating that almost all post-secondary schools receive some type of federal funding and, therefore, are subject to the requirements of § 504).

40. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b) (2012).

41. *See* Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1400(c)(6)-(7) (2013).

42. *See* 20 U.S.C. §§ 1400(c)(5)(A)(i), 1400(d)(1)(A) (2013) (indicating that the purpose of the IDEA is to provide students with educational opportunities to “prepare them for further education, employment, and independent living”).

lives. Initially, in kindergarten through twelfth grade, students with disabilities are provided with access to educational opportunities through the educational benefit standard set forth in the IDEA. Next, in post-secondary education, students with disabilities are protected by the non-discrimination mandate of the ADA and § 504. The provision of accommodations to students with disabilities in post-secondary education ensures that students are able to utilize the educational benefits they received under the IDEA to further their education. Finally, when students with disabilities enter the workforce, they are provided with accommodations in accordance with the ADA and § 504, allowing them to utilize their education to participate in the workforce.

A. Provision of Accommodations and Services in K-12th Grade: The IDEA

The IDEA requires schools to provide disabled students in kindergarten through twelfth grade with a free and appropriate public education as a means of preparing them for future educational and employment opportunities.⁴³ To qualify for services and accommodations under the IDEA, a student must have a disability within the meaning of the statute and require special education as a result of that disability.⁴⁴ Individuals who do not qualify for educational services (special education) under the IDEA may still qualify for accommodations in accordance with § 504. However, the educational benefit standard employed by the IDEA typically entitles students to a greater level of services and accommodations as well as procedural safeguards; therefore, provision of services and accommodations under the IDEA is generally the preferred means to access accommodations for qualifying students and is assumed to satisfy the requirements of § 504.⁴⁵

The provision of accommodations and services under the IDEA is determined in accordance with the statute. When making IDEA eligibility determinations, the threshold question is whether a student is disabled within the meaning of the statute. The IDEA includes a statutory definition of disability, which specifically includes students with autism.⁴⁶ Under the IDEA, autism is defined broadly and not dependent on outside diagnostic classification systems or receipt of a psychiatric diagnosis from a

43. § 1400(d)(1)(A).

44. See § 1401(3)(A) (2013) (defining “child with a disability”).

45. National Center for Learning Disabilities, Section 504 and IDEA Comparison Chart, available at <http://www.nclld.org/disability-advocacy/learn-ld-laws/adaaa-section-504/section-504-idea-comparison-chart> (noting that schools may not use IDEA funding on students found eligible only under § 504) (last visited Dec. 2, 2014).

46. See 34 C.F.R. § 300.8(a)(1) (2012) (stating the general statutory definition for “child with a disability”).

healthcare provider.⁴⁷ Students who meet the IDEA's statutory definition of autism are automatically classified as disabled within the meaning of the statute.⁴⁸ If a student is found to have a disability then a determination is needed regarding whether the student requires special education and related services as a result of that disability.⁴⁹ Regardless of the definition of special education⁵⁰ adopted by the state, most students who meet the statutory definition of autism will also require special education services and thus be provided with services and accommodations under the IDEA.⁵¹

B. Provision of Accommodations in Post-Secondary Education: Section 504 of the FRA and the ADA

The FRA and the ADA are non-discrimination statutes that apply to the provision of accommodations in post-secondary education.⁵² When passing the FRA in 1973, Congress was attempting to prevent individuals with disabilities from being "excluded from participation in" or "denied the benefits of" federally funded programs, including post-secondary education.⁵³ The regulations accompanying § 504 of the FRA formed the basis for the 1990 passage of the ADA, which extended protection of individuals with disabilities beyond programs that receive federal funding.⁵⁴ Through passage of the ADA, Congress was attempting to create

47. § 300.8(c)(1)(i) ("Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance.").

48. § 300.8(c)(1)(iii) (indicating that a child could be classified as autistic even if the behaviors manifest after three years of age).

49. See H. Rutherford Turnbull, III et al., *A Brief Overview of Special Education Law with Focus on Autism*, 32 JOURNAL OF AUTISM AND DEVELOPMENTAL DISORDERS 479 (2002) (indicating that the state's definition of services that qualify as special education will determine whether a student receives services under the IDEA or § 504).

50. See 34 C.F.R. § 300.39(a)(i)-(ii) (2013) (defining special education).

51. See Education of the Handicapped Act Amendments of 1990, 20 U.S.C. § 1401(a)(1)(A)-(B) (1994) (repealed 2004) (indicating that students with autism have a recognized disability that entitles them to accommodations and special education services).

52. See 42 U.S.C. § 12182(B)(2)(a)(iii) (2013); see also 34 C.F.R. pt. 104 (2013) (implementing regulations for § 504 which recognize the applicability of the statute to post-secondary institutions that receive federal funding).

53. See The Rehabilitation Act of 1973, 29 U.S.C. § 794 (2013); see also 29 U.S.C. § 701(a)(3)(f) (2013).

54. See Arlene Mayerson, *The History of the ADA: A Movement Perspective*, DISABILITY RIGHTS EDUCATION & DEFENSE FUND (1992), http://dredf.org/publications/ada_history.shtml (indicating that § 504 was modeled after other statutes designed to protect minority groups).

a national mandate for the elimination of discrimination against individuals with disabilities.⁵⁵ Titles II and III of the ADA specifically cover the provision of accommodations to students with disabilities in post-secondary education.⁵⁶

The ADA and § 504 require post-secondary schools to make reasonable modifications that are necessary to ensure access to students with disabilities.⁵⁷ A student is disabled, and thus entitled to protection, if he or she has a mental or physical impairment that substantially limits at least one major life activity.⁵⁸ An individual is “substantially limited” if he or she cannot perform a major life activity or is “significantly restricted as to the manner or duration under which [he or she] can perform a major life activity.”⁵⁹ Importantly, for students seeking accommodations in post-secondary education, major life activity is defined to include learning.⁶⁰ Therefore, a student with a mental impairment that substantially impacts his or her ability to learn is entitled to protection under the federal statutes. If a determination is made that an individual is disabled with the meaning of the statutes, the next step is to determine whether the individual is entitled to accommodations and, if so, what accommodations are reasonable and necessary.⁶¹ In post-secondary education, accommodations that would require modification of an essential component of the educational program are not considered reasonable and thus not required to be provided.⁶²

Under the ADA and § 504, post-secondary institutions can create their own standards that students must satisfy to access accommodations,

55. 42 U.S.C. § 12101(b)(1) (2012).

56. 42 U.S.C. §§ 12131-65 (2013); Equal Opportunity for Individuals with Disabilities, 42 U.S.C. §§ 12181-89 (2013).

57. 42 U.S.C. § 12102(2); 28 C.F.R. § 36.104 (2012).

58. 29 C.F.R. § 1630.2 (g)(1)(i)-(iii) (2013) (defining disability to include a mental or physical impairment).

59. 29 C.F.R. § 1630.2(j)(1) (2013) (defining “substantially limited”).

60. 42 U.S.C. § 12102(2)(A) (2013) (defining “major life activities” to include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”).

61. 42 U.S.C. § 12102(2) (2012); 28 C.F.R. § 36.104.

62. *See* 34 C.F.R. pt. 104.44; 34 C.F.R. pt. 104, app. A ¶ 31 (entitled “Academic Adjustments”); *see also* *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 115 (1997) (“In general, federal law does not require a university to modify degree requirements that it determines are a fundamental part of its academic program by providing learning disabled students with course substitutions.”); *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791 (1st Cir. 1992) (outlining the steps a school must make when determining that provision of an accommodation is not required because it would either lower the programs academic standards or substantially modify the program).

provided that those standards are consistent with the federal statutes. At minimum, the required documentation must establish that a student has a disability and allow the school to identify the appropriate accommodations for that student.⁶³ Many colleges and universities require students with mental impairments to submit up-to-date documentation regarding the diagnosis of a psychiatric disorder based on formalized diagnostic criteria, such as the *Diagnostic and Statistical Manual of Mental Disorders (DSM)* classification system, as a pre-requisite for making a determination regarding whether the student is disabled and thus entitled to accommodations.⁶⁴

Determinations regarding access to accommodations in post-secondary education are typically resolved on an informal basis, but in litigated cases involving mental impairments, courts, consistent with standards utilized by many post-secondary institutions, have shown an affinity for reliance on the DSM diagnostic classification system when determining whether a student is disabled.⁶⁵ In *Guckenberger v. Boston University*,⁶⁶ for example, the United States District Court for the District of Massachusetts relied on the DSM diagnostic categories and criteria when reaching a decision in a class action lawsuit brought by a group of students claiming that the University had violated the ADA and § 504 by employing eligibility criteria that denied them access to accommodations.⁶⁷ The court indicated that the provision of “unreasonable, overly-burdensome eligibility criteria for qualifying as a disabled student” would violate the ADA and § 504.⁶⁸ The court, however, appeared reluctant to second-guess decisions regarding eligibility criteria made by the University.⁶⁹ For instance, the court upheld

63. *Students with Disabilities Preparing for Postsecondary Educ.: Know Your Rights and Responsibilities*, U.S. DEP'T OF EDUC. OFFICE OF CIVIL RIGHTS (Sept. 2011), <http://www2.ed.gov/about/offices/list/ocr/transition.html> [hereinafter *Students with Disabilities*] (outlining documentation requirements).

64. *See id.* (indicating that many post-secondary institutions require students to provide “one or more of the following: a diagnosis of your current disability, as well as supporting information, such as the date of the diagnosis, how that diagnosis was reached, and the credentials of the diagnosing professional; information on how your disability affects a major life activity; and information on how the disability affects your academic performance.”).

65. There are two key factors that can be attributed to the lack of litigation in this context: (1) the potential negative implications associated with bringing a suit (i.e., the stigma associated with everyone knowing that you have a mental impairment); and (2) the lack of available recourse even if the lawsuit is successful.

66. *Guckenberger*, 974 F. Supp. at 110 (D. Mass. 1997).

67. *Id.*

68. *Id.* at 114.

69. *See id.* at 140 (upholding as necessary the requirement that students with

the use of a recently updated diagnosis of a psychiatric disorder based on DSM diagnostic categories and criteria as a prerequisite for access to accommodations without regard to other evidence as to the level of impairment a student experiences in an educational environment.⁷⁰

Requiring a current diagnosis of a psychiatric disorder made in accordance with the DSM diagnostic categories and criteria as a prerequisite for accessing accommodations for mental impairments has also been upheld in other contexts.⁷¹ In *Love v. Law School Admission Council*,⁷² the United States District Court for the Eastern District of Virginia addressed a complaint filed by a student with a psychiatric disability against the Law School Admission Council claiming that the Council's failure to provide him with accommodations violated the ADA.⁷³ Despite having been diagnosed with a psychiatric disorder—Attention Deficit Hyperactivity Disorder (ADHD) Combined Type—by a healthcare provider in accordance with the DSM diagnostic categories and criteria, the court concluded that the student did not establish that he satisfied the threshold requirement of being disabled within the meaning of the statute.⁷⁴ In reaching this conclusion, the court focused on the student's inability to produce documentation demonstrating that he met all of the relevant DSM diagnostic criteria for the psychiatric disorder.⁷⁵ For example, the DSM diagnostic criteria indicated that symptoms of ADHD must be present in early childhood, and the student was unable to produce educational records specifically indicating that he displayed symptoms during that period.⁷⁶ Courts have also relied heavily on DSM diagnostic categories and criteria as a basis for determining whether an individual with a mental impairment is disabled in employment cases.⁷⁷

Attention Deficit Hyperactivity Disorder have a current evaluation by an individual with a medical degree or a doctorate level degree in psychology, where the University cited the unstable nature of the condition, co-morbidity, and frequency of treating the condition with medication as justifications for these requirements).

70. *Id.* at 123 (requiring “a specific diagnosis, test results, and specific recommendations for accommodations”).

71. *See id.* at 133 (indicating that the definition of disability should be interpreted consistently across contexts of the ADA).

72. *Love v. Law Sch. Admission Council, Inc.*, 513 F. Supp. 2d 206 (E.D. Pa. 2007).

73. *Id.*

74. *Id.* at 225.

75. *See id.* (indicating that the student's records from childhood lacked evidence of symptoms that were “‘disruptive and inappropriate for developmental level’ in two or more settings as required by the criteria in DSM-IV.”).

76. *Id.*

77. James McDonald, *Will DSM-5 Lead to Crazy Employment Law?*, FISHER &

By contrast, when determining whether an individual is disabled in cases involving physical disabilities, courts tend to focus on the level of impairment that the individual experiences, rather than the individual's receipt of a formal medical diagnosis. For example, in *PGA Tour, Inc. v. Martin*, the Supreme Court decided a case brought under the ADA by an individual who was requesting accommodations for participation in a professional golf tournament.⁷⁸ In determining that the golfer met the threshold requirement of being an individual with a disability, the Court did not question whether he met the diagnostic criteria for Klippel–Trenaunay–Weber Syndrome, even though the golf association had required submission of his medical records as part of its initial determination regarding whether he qualified for accommodations.⁷⁹ Instead of questioning the medical diagnosis that the golfer had received from a healthcare provider, the Court focused on the level of impairment that the golfer experienced.⁸⁰ The Court concluded that the golfer was entitled to accommodations because of the impairment that he experienced on the golf course, which impacted his ability to compete on equal footing with other golfers, rather than focusing on his formal medical diagnosis (or questioning the appropriateness of that diagnosis).⁸¹

IV. A CLOSER LOOK AT ONE DISABILITY: EDUCATING STUDENTS WITH AUTISM

Minority students (regardless of socioeconomic status) are less likely to receive an autism diagnosis and as such may be unable to satisfy the threshold requirement for access to educational accommodations at many post-secondary institutions, even if they qualified for accommodations in kindergarten through twelfth grade under the IDEA.⁸² And changes to the DSM diagnostic categories and criteria for autism may exasperate this

PHILLIPS, ATTORNEYS AT LAW (July 11, 2013), <http://www.laborlawyers.com/will-the-dsm-5-lead-to-crazy-employment-law> (indicating that heavy reliance on the DSM diagnostic categories and criteria in the employment context has raised concerns that the changes in DSM-5 will require employers to provide accommodations to individuals who now qualify for a DSM psychiatric diagnosis but do not experience significant impairment).

78. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 687 (2001) (noting only that the golfer had Klippel–Trenaunay–Weber Syndrome without explaining the process or criteria used by his physician to make this diagnosis).

79. *Id.*

80. *Id.* at 668 (stating that the Syndrome prevented the golfer from walking the eighteen holes on the golf course, and that if he attempted to walk this distance he risked developing serious health related complications).

81. *Id.*

⁸² See *infra* Part IV A-B.

situation by making it more difficult for students to receive an autism diagnosis (even if they exhibit behavioral characteristics associated with autism that impact their ability to function in an educational setting).⁸³

While minority students may be less likely to receive an autism diagnosis, they may paradoxically be more profoundly impacted by deficits associated with the disorder.⁸⁴ Moreover, when students with behavioral characteristics associated with autism are denied access to educational accommodations in post-secondary education because they lack a formal psychiatric diagnosis, deficits associated with autism may interfere with their ability to compete on equal footing with their non-disabled peers.

A. Diagnosis of Autism

An autism diagnosis is generally made in accordance with the DSM (a classification and diagnostic tool published by the American Psychological Association, which is widely regarded as the gold-standard for the diagnosis of psychiatric disorders).⁸⁵ The DSM was first released in 1952, but autism was not included in the DSM as a separate diagnostic category until 1980.⁸⁶ Since its initial inclusion in the DSM, the diagnostic categories and criteria for autism have been updated from time-to-time in an attempt to keep pace with advances in the understanding of the disorder.⁸⁷

The DSM Fourth Edition (DSM-IV) and its Text Revision (DSM-IV-TR), released in 2000, included the diagnostic category of Pervasive Developmental Disorders. This diagnostic category was divided into five sub-categories, three of which were referred to as the autism spectrum—Autistic Disorder, Asperger’s Disorder, and Pervasive Developmental Disorder Not Otherwise Specified.⁸⁸ Autistic Disorder, often referred to as classic autism, was characterized by the presence of social and

⁸³ See *infra* Part IV B.

⁸⁴ See *infra* Part IV C.

⁸⁵ DSM, AM. PSYCHIATRIC ASS’N, <http://www.psych.org/practice/dsm> (last visited Sept. 19, 2014)

⁸⁶ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) [hereinafter DSM-IV] (including a diagnosis of infantile autism); Leo Kanner, *Autistic Disturbances of Affective Contact*, 2 NERVOUS CHILD 217, 217-30 (1943) (describing a cluster of symptoms that later became known as infantile autism).

⁸⁷ DSM: *History of the Manual*, AM. PSYCHIATRIC ASS’N, <http://www.psychiatry.org/practice/dsm/dsm-history-of-the-manual> (last visited Sept. 19, 2014) (indicating that the initial impetus for development of the DSM was the need to collect statistical information).

⁸⁸ *Id.*

communication disturbances as well as the presence of restricted behaviors and interests.⁸⁹ Asperger's Disorder also fell on the autism spectrum and encompassed individuals with less severe symptoms than Autistic Disorder.⁹⁰ Pervasive Developmental Disorder Not Otherwise Specified, often referred to as atypical autism, was the least restrictive of the classifications that fell on the autism spectrum and was used to classify individuals who did not fit the diagnostic criteria required for the other disorders but still experienced significant deficits associated with autism.⁹¹

There has been an increasing prevalence of autism in the United States in recent years, but minority children are less likely to receive an autism diagnosis.⁹² According to a March 2014 report released by the Center for Disease Control and Prevention, relying on the DSM-IV-TR diagnostic criteria, approximately one in sixty-eight children in the United States qualify for an autism diagnosis.⁹³ This represents an increase over a previous report released in 2011, relying on the same diagnostic criteria, finding that approximately one in 101 children qualified for a diagnosis of autism.⁹⁴ Consistent with previous reports, the March 2014 report showed "apparent differences in prevalence and other characteristics among children with [autism] when stratifying by race/ethnicity and socioeconomic indicators."⁹⁵ African American and Hispanic children were disproportionately underrepresented among children diagnosed with autism.⁹⁶ "Non-Hispanic white children were approximately 30% more

89. DSM-IV, *supra* note 82, at 70 (indicating that the essential feature is "the presence of markedly abnormal or impaired development in social interactions and communication and markedly restricted repertoire of activities and interests.").

90. DSM-IV, *supra* note 82, at 80.

91. DSM-IV, *supra* note 82, at 84 (indicating that this category includes individuals who do not meet the diagnostic threshold for "Autistic Disorder because of late age of onset, atypical symptomology, or subthreshold symptomology, or all of these.").

92. *Ten Things to Know About New Autism Data*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 31, 2014), <http://www.cdc.gov/features/dsautismdata/>.

93. JON BAIO, PREVALENCE OF AUTISM SPECTRUM DISORDER AMONG CHILDREN AGED 8 YEARS — AUTISM AND DEVELOPMENTAL DISABILITIES MONITORING NETWORK, 11 SITES, UNITED STATES, 2010 (Ctr. for Disease Control & Prevention, 2014), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6302a1.htm>.

94. *What We've Learned About Autism Spectrum Disorder*, CENTERS FOR DISEASE CONTROL & PREVENTION (Mar. 29, 2012), available at <http://www.cdc.gov/Features/Counting/Autism>.

95. BAIO, *supra* note 89, at 12.

96. *Id.* at 1 ("White children were 30% more likely to be identified [as having autism] than black or Hispanic children. About 1 in 63 white children, 1 in 81 black children, and 1 in 93 Hispanic children were identified [as having autism].").

likely to be identified [as having autism] than non-Hispanic black children and were almost 50% more likely to be identified [as having autism] than Hispanic children.”⁹⁷ Moreover, of the eleven sites analyzed as part of the report, “[a]ll [] sites reported higher prevalence estimates [of autism] among white children than among black or Hispanic children.”⁹⁸ The African American and Hispanic children who received an autism diagnosis were more likely to be children who also experienced significant intellectual impairments.⁹⁹ “Approximately 48% of non-Hispanic black children with [autism] were classified in the range of intellectual disability compared with 38% of Hispanic children and 25% of non-Hispanic white children.”¹⁰⁰ As the authors of the report noted, these findings raise important questions regarding the “underrecognition of [] symptoms [of autism] in some racial/ethnic groups, cultural differences influencing the decision to seek services, [and] socioeconomic disparities in access to services.”¹⁰¹

Research suggests that regardless of socioeconomic status, children living in poorer neighborhoods (such as those communities more likely to be occupied by predominantly racial and ethnic minorities) are less likely to be diagnosed with autism.¹⁰² For instance, one study found that among children born in California between 1992 and 2000, there was a 250 percent greater chance that the child would receive a diagnosis of autism if that child lived in an affluent neighborhood than a poorer neighborhood, regardless of the family’s socioeconomic status.¹⁰³ The study “also found that the less severe cases [of autism] were disproportionately found among wealthier and more educated areas meaning that kids living in less affluent neighborhoods were under diagnosed.”¹⁰⁴ The researchers attributed this difference in part to the fact that “parents talking to each other about navigating the service system and talking to each other about how to understand developmental dynamics are really strongly associated with increased autism diagnosis,” and “in wealthier neighborhoods, there are

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Rick Nauert, *Poor Kids Still Less Likely to Get Autism Diagnosis*, PSYCH CENT. (Apr. 7, 2011), <http://psychcentral.com/news/2011/04/07/poor-kids-still-less-likely-to-getautism-diagnosis/25096.html>.

103. *Id.*

104. *Id.* (“Since California has a state-wide program dedicated to serving kids with developmental disorders, it is likely that the inequalities in autism diagnoses are greater in other states.”).

more opportunities for parents to be talking to each other at parks, schools, and other focal points.”¹⁰⁵

B. Recent Changes to the Diagnostic Categories and Criteria for Autism

In May 2013, the American Psychiatric Association released the DSM Fifth Edition (DSM-5), which included substantial revisions to the diagnostic categories and criteria for autism.¹⁰⁶ The DSM-5, the most recent version of the DSM, superseding DSM-IV-TR, moved towards a spectrum approach to the classification of autism and made the diagnostic criteria for autism more restrictive.¹⁰⁷ There are only two dimensions of symptoms recognized in DSM-5, rather than the three dimensions of symptoms previously recognized in DSM-IV-TR.¹⁰⁸ DSM-5 also requires an individual to meet six criteria to qualify for a diagnosis of autism, whereas under DSM-IV-TR, an individual could be diagnosed with Pervasive Developmental Disorder Not Otherwise Specified, the least restrictive category that fell on the autism spectrum, by meeting only three diagnostic criteria.¹⁰⁹ Furthermore, DSM-5 requires an individual to meet certain criteria to obtain a diagnosis of autism, whereas DSM-IV-TR included a broad set of criteria and no individual criteria was necessary or sufficient for a diagnosis of autism.¹¹⁰ Therefore, when using the DSM-5 classification system, fewer individuals will qualify for an autism diagnosis than under DSM-IV-TR.¹¹¹ For example, one study found that up to 39.4% of individuals who previously qualified for a diagnosis of autism no longer fall on the DSM-5 autism spectrum.¹¹²

105. *Id.*

106. DSM-5, *supra* note 8.

107. See *Autism Spectrum Disorders*, AM. PSYCHIATRIC ASS’N, <http://www.psychiatry.org/autism> (last visited Sept. 25, 2014).

108. Compare DSM-IV, *supra* note 22, at 70 with DSM-5, *supra* note 8, at § 299.00 (F84.0).

109. Compare DSM-IV, *supra* note 22, at 84 with DSM-5, *supra* note 8, at § 299.00 (F84.0).

110. DSM-5, *supra* note 8, at 50-51 (requiring the presence of all of the outlined criteria).

111. See *Thomas W. Frazier et al., Validation of Proposed DSM-5 Criteria for Autism Spectrum Disorder*, 51 *J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY* 28, 37 (2012) (discussing the likely impact of the changes); Julie A. Worley & Johnny L. Matson, *Comparing Symptoms of Autism Spectrum Disorders Using the Current DSM-IV-TR Diagnostic Criteria and the Proposed DSM-V Diagnostic Criteria*, 6 *RES. AUTISM SPECTRUM DISORDERS*, 965, 969 (2012) (finding that “the prevalence of [autism] decreased by 32.3% when using the DSM-V”).

112. James C. McPartland et al., *Sensitivity and Specificity of Proposed DSM-5 Diagnostic Criteria for Autism Spectrum Disorder*, 51 *J. AM. ACAD. CHILD &*

The more restrictive diagnostic criteria in DSM-5 may have a larger impact on the diagnosis of children from minority groups (already underrepresented among those diagnosed with autism) than other populations. For example, elimination of the diagnosis of Pervasive Developmental Disorder Not Otherwise Specified makes it more difficult, if not impossible, for individuals with limited records from their childhood to be diagnosed with autism.¹¹³ This is because the DSM-5 requires the presence of certain symptoms during early childhood development, without which an individual cannot qualify for a diagnosis of autism, even if the individual currently experiences significant impairment.¹¹⁴ Children who grew up in poverty may be less able to provide such documentation than other individuals, thus precluding them from being diagnosed with autism. Moreover, a healthcare provider's use of his or her professional discretion to determine that a student still qualifies for a diagnosis of autism based on the DSM-5 criteria, may not guarantee access to accommodations because post-secondary institutions and courts appear willing to second-guess healthcare provider's diagnostic determinations.¹¹⁵ A post-secondary institution or court may require a student to provide documentation that he or she meets all of the required DSM-5 diagnostic criteria, regardless of the diagnosis that student received from a healthcare provider.¹¹⁶ For example, even if a clinician decided that it was appropriate to classify a student as autistic that could not produce records of impairment stemming from early childhood, as is now required, a post-secondary institution (or court) may still determine that the student was not disabled and thus entitled to accommodations due to the healthcare provider's failure to strictly adhere to the DSM-5 diagnostic criteria.¹¹⁷ Thus, a student's inability to produce evidence of impairment in early childhood, as required by the DSM-5 diagnostic criteria, could prevent the student from accessing accommodations, even though the student experienced significant impairment and had been diagnosed with a psychiatric disorder by a

ADOLESCENT PSYCHIATRY 368, 380 (2012).

113. DSM-IV, *supra* note 22, at 830 (permitting diagnosis despite a lack of evidence of impairment from early childhood).

114. DSM-5, *supra* note 8, at 55 (mandating the presence of evidence of impairment from three years of age).

115. *See Love v. Law Sch. Admission Council, Inc.*, 513 F. Supp. 2d 206, 221 (E.D. Pa. 2007) (determining that a student did not meet the DSM diagnostic criteria for a disorder even though he had received a diagnosis from a healthcare provider).

116. *Id.* (citing lack of records of early childhood impairment as a basis for disregarding a diagnosis made by a healthcare provider).

117. *See DSM-5, supra* note 8, at 50 (precluding a child for qualifying for a diagnosis of autism without evidence of impairment stemming from early childhood).

healthcare provider.

Additionally, the DSM-5 indicates that individuals previously diagnosed with autism can maintain a psychiatric diagnosis of autism even though they no longer meet the DSM-5 diagnostic criteria,¹¹⁸ which may further disproportionately impact minority students.¹¹⁹ The DSM-5 specifically indicates that “[i]ndividuals with a well-established DSM-IV diagnosis of autistic disorder, Asperger’s disorder, or pervasive developmental disorder not otherwise specified should be given the diagnosis of autism.”¹²⁰ It is not entirely clear how this provision will be interpreted by healthcare providers, post-secondary institutions, or courts, but the DSM-5 language appears to suggest that individuals who received a DSM-IV (or DSM-IV-TR) diagnosis of autism should continue to be characterized as autistic regardless of whether they satisfy the more restrictive DSM-5 diagnostic criteria. On average, African American and Hispanic children tend to be diagnosed with autism later in life than their Caucasian counterparts.¹²¹ African American and Hispanic children also tend to be under diagnosed with autism and those who are diagnosed tend to be children who also have an intellectual disability.¹²² Therefore, grandfathering in individuals who were previously diagnosed with autism in accordance with DSM-IV for a diagnosis of autism under DSM-5 disproportionately impacts minority students who on average diagnosed later in life and, therefore, may not yet have received an autism diagnosis. Moreover, minority students, with normal or high levels of intelligence, who are least likely to continue to qualify for an autism diagnosis under DSM-5 (as discussed below) and also least likely to have been previously diagnosed with autism, would not be grandfathered (due to failure to have been previously diagnosed with autism based on the DSM-IV categories and criteria) and thus would no longer qualify for an autism diagnosis, potentially making them unable to qualify for access to educational accommodations in post-secondary education.

Accommodations in post-secondary education are likely still needed by students who no longer qualify for an autism diagnosis in accordance with the DSM-5 diagnostic criteria. Under DSM-5, individuals who no longer

118. DSM-5, *supra* note 8, at 51.

119. *Ten Things to Know About New Autism Data*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 31, 2014), <http://www.cdc.gov/features/dsautismdata/>.

120. DSM-5, *supra* note 8, at 51.

121. JON BAIJO, PREVALENCE OF AUTISM SPECTRUM DISORDER AMONG CHILDREN AGED 8 YEARS — AUTISM AND DEVELOPMENTAL DISABILITIES MONITORING NETWORK, 11 SITES, UNITED STATES, 2010 (Ctr. for Disease Control & Prevention, 2014), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6302a1.htm>.

122. *Id.*

qualify for a diagnosis of autism are likely to be those with the highest intellectual capacities,¹²³ which means that they are also more likely to advance to post-secondary education. Studies suggest that of individuals with normal intellectual abilities, less than one-half of individuals who qualified for a diagnosis of autism based on the DSM-IV-TR classification system will continue to qualify for a diagnosis of autism in accordance with DSM-5.¹²⁴ Moreover, provision of accommodations to individuals who no longer qualify for a diagnosis of autism as they enter post-secondary education is important because these individuals are likely to still experience significant impairments associated with autism.¹²⁵ For instance, one study found that when compared to children developing normally, children who no longer met the diagnostic criteria for autism still demonstrated significant impairments and these impairments were of similar severity to the impairments experienced by children who still qualified for an autism diagnosis.¹²⁶

Changes in the DSM-5 stand to impact the provision of educational accommodations to students with autism. Under the IDEA, students in kindergarten through twelfth grade with characteristics of autism that impact their ability to function in an educational setting will continue receive accommodations, regardless of whether a healthcare provider determines that they meet the DSM diagnostic criteria for autism. This is because schools are required to rely on the IDEA's statutory definition of autism, which is not dependent on changes to outside diagnostic criteria (such as changes to the DSM).¹²⁷ In post-secondary education, however, students who no longer meet the diagnostic criteria for autism may be unable to satisfy the requirement of having a current psychiatric diagnosis, which is used by many schools as a threshold requirement for access to accommodations for mental impairments.¹²⁸ Accordingly, no longer

123. James C. McPartland et al., *Sensitivity and Specificity of Proposed DSM-5 Diagnostic Criteria for Autism Spectrum Disorder*, 51 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 368, 380 (2012).

124. *Id.* at 380-81.

125. Notably, individuals who no longer qualify for a diagnosis of autism in accordance with DSM-5 may be diagnosed with another psychiatric disorder. However, receipt of another diagnosis is not certain and it is also not clear what types of accommodations will be available to these students (even if they receive another diagnosis). For example, some, but not all, individuals who no longer meet the diagnostic threshold for autism will likely qualify for a diagnosis of Social Communication Disorder, which is characterized by “[p]ersistent difficulties in the social use of verbal and non-verbal communication.” DSM-5, *supra* note 8, at 47.

126. McPartland, *supra* note 107, at 369.

127. 34 C.F.R. § 300.8(c)(1)(i) (2012) (providing statutory definition of autism).

128. *See, e.g., Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 115 (D. Mass. 1997)

qualifying for an autism diagnosis may be outcome determinative and the level of impairment that the student experiences in an educational setting will likely never be evaluated by the post-secondary institution.¹²⁹

C. Impact of Behavioral Characteristics of Autism on Minorities Students

Even though minority students are less likely to receive an autism diagnosis, they may be more severely impacted by the behavioral characteristics associated with autism. This is because minority students with deficits associated with autism are less likely to receive treatment that helps ameliorate those deficits.¹³⁰ Moreover, minority students are more likely to be exposed to environmental factors that may exacerbate the deficits associated with autism that they experience.¹³¹ Additionally, minority status may lead teachers and other individuals with whom these students interact to have more negative and less forgiving reactions to their behavioral characteristics of autism.¹³²

1. Access to Treatment for Autism

Minority students are more likely to have grown up in poverty and, therefore, less likely to have had access to healthcare to gain a diagnosis of or treatment for autism. For instance, a report released in 2011 found that 9.4 percent of children did not have healthcare coverage, and for children living in poverty the number without health insurance was 13.8 percent.¹³³ Even for students who had healthcare coverage as a child, the type of treatment that they received may have been limited due to financial considerations (including lack of insurance coverage for autism treatment). One type of treatment for autism is Applied Behavioral Analysis (ABA), regarded by some as the gold standard for treating children with autism.¹³⁴

(upholding the use of a psychiatric diagnosis as a prerequisite for accessing accommodations).

129. *See id.* (upholding the school's requirement that a student's diagnosis must have been made within a two year time period for the student to be considered for access to accommodations).

¹³⁰ *See infra* Part IV C 1.

¹³¹ *See infra* Part IV C 2.

¹³² *See infra* Part IV C 3.

133. JULIET M. BRODIE ET AL., *POVERTY LAW: POL'Y AND PRACTICE* 145 (Vicki Been et al. eds., 1st ed. 2014) (indicating that 15.7 percent of individuals in the United States did not have health insurance) (citing Carmen De-Navas et al., *Income, Poverty, and Health Insurance Coverage in the United States: 2011*, U.S. CENSUS BUREAU (2012)).

134. *Applied Behavioral Analysis*, AUTISM SPEAKS, <http://www.autismspeaks.org/what-autism/treatment/applied-behavior-analysis-aba> (last visited Sept. 22, 2014)

As a result of insurance companies' refusal to pay for autism treatments, such as ABA, a number of states have passed laws requiring autism treatment to be covered by at least some types of insurance plans.¹³⁵

When it comes to healthcare coverage for children, Medicaid is of utmost significance because it covers approximately one in three children in the United States.¹³⁶ Medicaid is a means-tested program administered by the states (with joint funding from the state and the federal government) that provides healthcare coverage primarily to low-income individuals.¹³⁷ Because the Medicaid program is administered by individual states benefits received by Medicare recipients vary from state-to-state.¹³⁸

Even in states that require autism treatments to be covered by health insurance policies those laws may not apply to insurance policies that cover all individuals in the state.¹³⁹ In California, for example, all private insurance companies are required to cover evidence-based treatments for autism, including ABA, but the State's Medicaid Program (Medi-Cal) is exempt from this requirement.¹⁴⁰ Medicaid's failure to provide coverage for ABA makes such treatment inaccessible for low-income families because "ABA is expensive—costing as much as \$60,000 a year."¹⁴¹ Thus, for families in California (as well as other states), the type of insurance that they have largely dictates whether their child has access to ABA.¹⁴² Some individuals in California that are covered by Medi-Cal may be able to

(describing ABA as a "customize[d] [] intervention [designed to fit] each learner's skills, needs, interests, preferences and family situation.").

135. *Insurance Coverage for Autism*, NAT'L CONFERENCE FOR STATE LEGISLATURES (Aug. 2012), <http://www.ncsl.org/research/health/autism-and-insurance-coverage-state-laws.aspx> ("At least 31 states—Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, West Virginia and Wisconsin—specifically require insurers to provide coverage for the treatment of autism.").

136. KAISER COMMISSION ON KEY FACTS, THE HENRY KAISER FAMILY FOUNDATION, MEDICAID PROGRAM AT A GLANCE (March 2013), *available at* <http://kaiserfamilyfoundation.files.wordpress.com/2013/03/7235-061.pdf>.

137. *Id.*

138. *Id.*

139. *See Insurance Coverage for Autism*, *supra* note 149 (indicating that autism treatment coverage varies from state-to-state).

140. Heather Tirado Gilligan & Callie Shanafelt, *The Cost of Parity: Low Income Kids with Autism Don't Get Costly Care*, CAL. HEALTH REP. (Aug. 6, 2013), <http://www.healthycal.org/archives/12377>.

141. *Id.*

142. *Id.*

access ABA by contacting regional centers that provide services for individuals with disabilities; however, “[p]eople who do not speak English or otherwise lack the skills or time to advocate have the hardest time securing services for their children.”¹⁴³ This disparity is readily apparent from statistics regarding state spending on children with autism from various racial, ethnic, and socioeconomic backgrounds. “For instance, assistance for autistic children between [three] and [six] years old, the window for early intervention, varies widely by race,” in California, “the state Department of Developmental Services spent significantly more on white and Asian children than on Latinos and African Americans, more than \$11,000 per child for whites and Asians, compared to about \$7,600 for Latinos and about \$6,500 for African Americans.”¹⁴⁴ California is not alone in this regard, in Minnesota, for example, reports indicate that in 2010 “the state Medicaid program spent \$13.5 million on ABA treatments for 379 children—most of them above the poverty line.”¹⁴⁵ Notably, “[t]hose families [above the poverty line] have been able to tap into Medicaid through a special disability category that has no limit on family income.”¹⁴⁶ Disparities in access to treatment for children with autism, even those provided with state and federal funding, as highlighted by the examples regarding utilization of services by children in California and Minnesota, are unfortunately not likely to be remedied by the Affordable Care Act because under the Act states are afforded significant discretion regarding determinations as to what types of behavioral services are covered for individuals with mental impairments.

Even for low-income children with insurance that covers autism treatment, there may be other barriers that prevent them from accessing services. This is because access to specialized health services, in situations where such care is warranted, is linked to both family income and insurance coverage.¹⁴⁷ For instance, one study found that African American and Hispanic children are less likely to receive care from a specialist for autism, as well as other medical conditions, than their Caucasian peers.¹⁴⁸

143. *Id.*

144. *Id.*

145. Maura Lerner, *Kids with Autism Face Double Standard*, STAR TRIBUNE (Apr. 21, 2011, 3:07 PM), <http://www.startribune.com/lifestyle/health/119121669.html>.

146. *Id.*

147. Shirley L. Porterfield & Timothy D. McBride, *The Effect of Poverty and Caregiver Education on Perceived Need and Access to Health Services Among Children with Special Health Care Needs*, 97 AM. J. PUB. HEALTH 323 (2007).

148. *Minority Children with Autism Lack Access to Specialists*, CNN HEALTH (June 17, 2013, 9:13 AM), <http://thechart.blogs.cnn.com/2013/06/17/minority-children-with-autism-lack-access-to-specialists/?iref=allsearch>.

Even if minority families receive a referral to a specialist for their child, research suggests that these families have more difficulty maintaining continuity of care and attending regular follow-up visits with the specialist.¹⁴⁹ Research also suggests that African American and Hispanic children are less likely to receive specialized medical tests than their Caucasian peers.¹⁵⁰ Minority children may be less likely to be seen by specialists and receive specialized tests than their Caucasian peers because of barriers that prevent their families from accessing specialty services, including “[l]ower numbers of local specialists, transportation issues, and lack of a regular health care provider.”¹⁵¹ Moreover, families of African American and Hispanic children may be more likely to hold “beliefs that lead to the use of non-traditional services, or attribution of a child’s symptoms to non-medical causes.”¹⁵² For instance, one study found that “[l]ower-income and less-educated parents were less likely than higher-income and more-educated parents to say their special needs children needed specialized health services.”¹⁵³ Research also suggests that on average, parents living in poverty are less aware of interventions for autism and also less aware of the types of educational and therapeutic services that their child receives.¹⁵⁴ Accordingly, minority children may be less likely to receive treatment for their behavioral characteristics of autism, regardless of insurance coverage.

2. Impact of Poverty on the Health of Students with Autism

Research evaluating the impact of poverty on health suggests that the deficits associated with autism may be exacerbated in minority students whose health is more likely to have also been negatively impacted by other factors. Although the specific mechanisms remain largely unknown, research has clearly and consistently shown that low socioeconomic status is linked to poorer health outcomes (even when controlled for access to healthcare).¹⁵⁵ “[T]he conditions in which people are born, grow, live,

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Porterfield & McBride, *supra* note 160, at 323-29 (controlled for activity limitation and severity of need).

154. *Id.* at 328.

155. BRODIE ET AL., *supra* note 147, at 398 (“Though the association between poverty and poor health outcomes in the United States and globally is known, ‘the specific mechanisms by which low socioeconomic status . . . of individuals – or . . . [a] greater degree of income inequality within society – exerts its harmful effects’ is not fully known.”).

work, and age play a greater role in health disparities than access to health insurance and health care, which are important pathways to reducing health disparities but do not address the root causes of illness.”¹⁵⁶ Therefore, even though the Affordable Care Act will increase the availability of healthcare coverage to low-income Americans, this will not eliminate disparities in health that are seen among minority groups in the United States.¹⁵⁷

The deficits associated with autism may be exacerbated in minority students who are more likely to have grown up in poverty leading them to experience factors such as toxic stress and food insecurity, which may have negatively impacted their overall health (both as a child and as an adult). Research has demonstrated the impact of an individual’s social environment on the level of stress that individual experiences, and thus an individual’s social environment can impact the effect that stress will have on that individual’s short- and long-term health outcomes.¹⁵⁸ For instance, “[t]he scientific community is increasingly uncovering evidence of specific changes to brain structure[] as a result of chronic stress and documenting stress effects on child development and subsequent adult health.”¹⁵⁹ In children, prolonged exposure to stress hormones can damage parts of the brain that are responsible for learning and memory, leading to cognitive deficits that persist into adulthood.¹⁶⁰ Certain stress is normal, necessary, and part of healthy development, but other stress can have a toxic impact on a child, leading to negative consequences on that child’s health that persist into adulthood.¹⁶¹ A child living in poverty is more likely to experience toxic stress that leads to negative health effects than other children.¹⁶² Moreover, research has shown that “children of lower [socioeconomic status] have higher levels of this stress indicator on a daily basis than children of higher [socioeconomic status].”¹⁶³ Because minority students with behavioral characteristics of autism are more likely to have grown up in poverty than their Caucasian peers, cognitive deficits associated with prolonged exposure to stress hormone may compound the deficits associated with autism that they experience. In addition to the negative impact of stress on health, there is also research demonstrating an

156. *Id.* at 395 (quoting WENDY E. PARMET ET AL., SOCIAL DETERMINANTS, HEALTH DISPARITIES AND THE ROLE OF LAW in *Poverty, Health, and Law: Readings and Cases for Medical-Legal Partnership* (Elizabeth Tobin Tyler et al. eds., 2011).

157. *Id.*

158. *Id.* at 400.

159. *Id.* at 400-01.

160. *Id.* at 401 (documenting the impact of cortisol on the hippocampus).

161. *Id.*

162. *Id.*

163. *Id.*

association between food insecurity, more likely to be experienced by low socioeconomic status children, with problems with cognitive and behavioral development,¹⁶⁴ which may further exasperate the negative impact that deficits associated with autism have on minority students.

3. Impact of Implicit and Explicit Biases on Students with Autism

Research also suggests that in day-to-day interactions behavioral characteristics associated with autism may have a more negative impact on minority students than their Caucasian peers. This is due to the impact that biases may have on individuals' perception of and reaction to behavioral characteristics of autism exhibited by minority students. Biases are attitudes and stereotypes that either consciously or unconsciously affect an individual's behavior. Explicit biases are those biases that an individual knows that he or she possesses and may even attempt to conceal from others.¹⁶⁵ On the other hand, "implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner."¹⁶⁶ Both implicit and explicit biases have an impact on behavior¹⁶⁷ and thus may influence the way that individuals interact with students who exhibit behavioral characteristics of autism.

The behavioral characteristics associated with autism may make a student (regardless of race) more likely to be perceived as an outsider or even someone who is dangerous. This is because individuals with autism may display nonverbal behaviors related to eye contact, body posture, and gestures used to regulate social interactions that are markedly different than those exhibited by individuals who do not have autism.¹⁶⁸ Individuals with autism may also display impairments in communication such as language delays or deficits, impairments in the ability to initiate or sustain conversation, and stereotyped or repetitive use of language.¹⁶⁹ In a social

164. *Id.* at 402.

165. Kirwan Institute for Study of Race and Ethnicity, Understanding Implicit Bias, available at <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>

166. *Id.* ("The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages.").

167. See Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 969 (2006) (indicating that research suggests that "most people have an implicit and unconscious bias against members of traditionally disadvantaged groups" that can influence behavior even when they are a member of the disadvantaged group).

168. DSM-IV, *supra* note 22, at 70.

169. *Id.*

setting, these behavioral characteristics may be interpreted negatively, particularly when an individual does not know that they are dealing with an individual with autism.¹⁷⁰ For instance, there are a number of examples of situations where individuals with mental disabilities, including autism, have been accidentally killed by law enforcement officers who misinterpreted their behavior as violent.¹⁷¹ In fact, data suggests that at least half of the individuals fatally shot by police officers suffer from mental illness.¹⁷²

When coupled with minority status, individuals with behavioral characteristics of autism may be particularly at risk of being viewed as dangerous or violent. This risk is especially great for African American students with behavioral characteristics associated with autism, as research suggests that behavior by individuals from this racial group is more likely to be interpreted as violent.¹⁷³ This research is consistent with data demonstrating that African Americans are more likely to be shot by police than individuals from other racial and ethnic groups.¹⁷⁴ A finding that could be explained, at least in part, by implicit biases held by police officers.¹⁷⁵

Implicit biases may also have a negative impact interactions that minority with behavioral characteristics of autism have with their teachers. Even when Caucasian and minority students with autism behave similarly,

170. For example, failure to make eye contact, abnormal body posture, lack of normal gestures used to regulate social interactions, and failure to respond (due to language deficits or impairments) may lead to an individual with autism being perceived as an outsider or someone who is dangerous. *See also* Geoffrey Wolff et al., *Community Knowledge of Mental Illness and Reaction to Mentally Ill People*, 168 BRIT. J. PSYCH. 191, 191-98 (1996) (correlating lack of knowledge regarding mental illness with fear of mentally ill individuals).

171. *See, e.g.*, Greg Botelho, *In Police Shooting of Mentally Ill N.C. Teen, Who Do You Believe?*, CNN (Jan. 10, 2014, 5:38 PM), <http://www.cnn.com/2014/01/10/us/north-carolina-teen-killed/> (describing the shooting death of a schizophrenic teen holding screwdriver).

172. Fernanda Santos & Erica Goode, *Police Confront Rising Number of Mentally Ill Suspects*, N.Y. TIMES (Apr. 1, 2014), http://www.nytimes.com/2014/04/02/us/police-shootings-of-mentally-ill-suspects-are-on-the-upswing.html?_r=0.

173. Sagar, H. Andrew; Schofield, Janet W., *Racial and behavioral cues in Black and White children's perceptions of ambiguously aggressive acts*, 39 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 4, 590-98 (1980).

174. *See, e.g.*, *Black Residents 10 Times More Likely Than White To Be Shot By Chicago Police: Analysis*, HUFFINGTON POST (Feb. 6, 2014 1:23 PM), http://www.huffingtonpost.com/2014/02/06/chicago-police-shootings-_n_4726489.html (citing data from the City of Chicago Independent Police Review Authority).

175. *See* Jolls & Cass, *supra* note 140, at 969 (discussing the impact of implicit bias on behaviors).

educators may interpret their behaviors differently.¹⁷⁶ Some of these disparities may be explained by implicit biases that teachers hold with regards to certain groups of students, given that implicit biases have been shown to be predictive of behavior.¹⁷⁷ For instance, teachers may be less likely to attribute the behavior of a minority student with autism to his or her disability than if a Caucasian student with autism exhibited the same behavior, leading to the behavior of the minority student being viewed in a more negative light. Behavioral characteristics based on cultural and ethnic differences may also pose more difficulties for minority students, who are less likely to be taught by an educator that is from their same racial, ethnic, or socioeconomic background than their Caucasian peers.¹⁷⁸

The disparity in the way that educators view minority students has been illustrated in the context of referrals for special education. Under the IDEA, classroom teachers' perceptions are particularly important because the 1997 IDEA moved away from referrals for special education based on standardized test scores, in part, because of the racial bias inherent in such scores,¹⁷⁹ and most students referred by their teachers are subsequently deemed eligible for special education.¹⁸⁰ Ironically, while minority students may be less likely to receive accommodations in post-secondary education, these same students are overrepresented among those receiving services and accommodations under the IDEA.¹⁸¹ In fact, the IDEA has been

176. Douglas B. Downey & Shana Pribesh, *When Race Matters: Teachers' Evaluation of Students Classroom Behavior*, 77 *SOCIOLOGY OF EDUCATION* 267, 267 (2004). See generally Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 *URBAN REV.* 317, 319 (2002) (finding that when subjective determinations were involved, African American students were more likely to be disciplined); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 *J. PERSONALITY & SOC. PSYCHOL.* 590, 597 (1980) (suggesting that this is also true of other children's understanding of their peers' behavior by finding that children were more likely to interpret ambiguous behaviors aggressively when performed by black versus white figures).

177. See Jolls & Cass, *supra* note 140 (discussing the Implicit Association Test).

178. Elizabeth W. Saft & Robert C. Pianta, *Teachers' Perceptions of Their Relationships With Students: Effects of Child Age, Gender, and Ethnicity of Teachers and Children*, 16 *SCH. PSYCHOL. Q.* 125, 128 (2001) (finding that on average teachers rated their experiences with students of their same race or ethnicity more positively).

179. Individuals with Disabilities Education Act Amendments for 1997, 20 U.S.C.A. § 1400 (1997).

180. Garda, Jr., *supra* note 131, at 1090 (indicating that 90% of students referred by their teachers are subsequently deemed eligible for special education services).

181. See Individuals with Disabilities Education Act Amendments for 1997, 20 U.S.C.A. § 1400 (1997) ("Although African-Americans represent 16 percent of elementary and secondary enrollments, they constitute 21 percent of total enrollments

criticized as being used as a means of discriminating against and providing substandard educational opportunities to minority students.¹⁸² This can be attributed, at least in part, to the fact that even when Caucasian and minority students behave similarly, educators may interpret their behaviors differently.¹⁸³ For example, when African American and Caucasian students both display the same type of disruptive behaviors in a classroom setting, the African American student may be perceived as warranting referral to special education services while such a referral may not be deemed warranted for the Caucasian student. Consistent with this assertion, research has demonstrated that Caucasian teachers are more likely to refer minority students to special education than minority teachers.¹⁸⁴ As such, this issue could be addressed by placing greater numbers of minority teachers in the classroom; however, this requires, among other things, that minority students receive an education that will allow them to advance into these types of roles.¹⁸⁵

Even though minority students are more likely to be placed in special education they are less likely to be qualified for IDEA services and accommodations based on the IDEA's statutory definition of autism. The United States Department of Education's Office of Special Education Programs' report on racial and ethnic disparities demonstrates that white (non-Hispanic) children are more likely to receive special education services based on a categorization of autism than black (non-Hispanic) and Hispanic children.¹⁸⁶ On the other hand, African American children are

in special education.”).

182. Redfield & Kraft, *supra* note 127, at 185 (indicating that “the IDEA is viewed as a tool of racial discrimination and a dumping ground for minority students.”).

183. Douglas B. Downey & Shana Pribesh, *When Race Matters: Teachers' Evaluation of Students Classroom Behavior*, 77 *SOCIOLOGY OF EDUCATION* 267, 267 (2004). See generally Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 *URBAN REV.* 317, 319 (2002) (finding that when subjective determinations were involved, African American students were more likely to be disciplined); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 *J. PERSONALITY & SOC. PSYCHOL.* 590, 597 (1980) (suggesting that this is also true of other children's understanding of their peers' behavior by finding that children were more likely to interpret ambiguous behaviors aggressively when performed by black versus white figures).

184. Redfield & Kraft, *supra* note 127, at 156.

185. Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400–82 (2013) (acknowledging this issue, Congress indicated that “[a]s the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.”).

186. Sarah E. Redfield & Theresa Kraft, *What Color Is Special Education?*, 41 *J.L.*

more likely than their Caucasian counterparts to be labeled as intellectually disabled or emotionally disturbed.¹⁸⁷ This can be attributed, at least in part, to the impact of implicit and explicit biases on educators' perceptions of students' behavior. It may also be attributed to the willingness of minority parents and parents of students from other socioeconomically disadvantaged groups to defer to special education recommendations made by teachers and their inability to successfully advocate on their child's behalf.¹⁸⁸

Regardless of the cause, this may make it even more difficult for minority students to qualify for accommodations in post-secondary education because issued guidance indicates that post-secondary institutions should defer to accommodations that students received in kindergarten through twelfth grade when making determinations regarding receipt of accommodations in post-secondary education.¹⁸⁹ Therefore, Caucasian students who are more likely to have received IDEA services and accommodations under the categorization of autism may be able to use this documentation as leverage when attempting to obtain access to accommodations in post-secondary education.

V. RECONSIDERING THE STANDARD FOR MAKING DETERMINATIONS REGARDING ACCESS TO ACCOMMODATIONS IN POST-SECONDARY EDUCATION

By using a psychiatric diagnosis as a requirement when making determinations regarding receipt of accommodations for mental impairments, post-secondary institutions are failing to satisfy the mandate of the ADA and § 504, which require post-secondary schools to provide disabled students with equal access to educational opportunities.¹⁹⁰ The presence or absence of a psychiatric diagnosis becomes a threshold requirement for determining whether a student is disabled.¹⁹¹ If this

& EDUC. 129, 172 (2012) (citing a Fall 2005 report).

187. *Beyond Brown: Pursuing the Promise*, PBS, http://www.pbs.org/beyondbrown/legacy/gifted_facts.html (last visited Sept. 22, 2014) ("Black children are nearly three times more likely than whites to be labeled 'mentally retarded,' and nearly twice as likely to be labeled 'emotionally disturbed.'").

188. Robert A. Garda, Jr., *The New Idea: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1084-85 (2005).

189. *Students with Disabilities*, *supra* note 6.

190. 42 U.S.C. § 12101 (extending the prohibition of discrimination against individuals with disabilities beyond programs that receive federal funding); 29 U.S.C. § 794 (prohibiting discrimination against individuals with disabilities).

191. *See, e.g.*, *Love v. Law Sch. Admission Council*, 513 F. Supp. 2d at 226 (determining that a student was not disabled based on his failure to meet all of the

threshold requirement is not satisfied, the student is deemed not disabled and thus not evaluated further for receipt of accommodations.¹⁹² This standard for determining whether a student is disabled fails to sufficiently account for the level of impairment that a student experiences in an educational setting.

Predicating access to accommodations in post-secondary education on a psychiatric diagnosis excludes some students with disabilities from being evaluated for receipt of accommodations. In accordance with federal statute, a student is disabled, if he or she has a mental impairment¹⁹³ that substantially limits his or her ability to perform a major life activity, which is specifically defined to include the ability to learn.¹⁹⁴ “Substantially limited” is defined as an inability to perform or significant restriction “as to the manner or duration under which [a student] can perform a major life activity.”¹⁹⁵ Accordingly, a student would satisfy the threshold requirement of being disabled if he or she had a mental impairment that significantly restricted the manner or duration under which he or she could learn. Regardless of whether the student had received a formal psychiatric diagnosis as a result of his or her mental impairment, the student would be covered by the statutory definition of disability and the school would be required to evaluate that student to determine what accommodations are reasonable and necessary.¹⁹⁶ Accordingly, requiring a student to produce documentation regarding receipt of a psychiatric diagnosis as a prerequisite for accessing educational accommodations restricts the definition of disability beyond what is permissible in accordance with federal statute. Moreover, it fails to focus on the core factor underlying the definition of disability, which is the level of impairment that a student experiences in an educational setting (as defined by whether or not the student is “substantially limited” in his or her ability to learn). While a student’s psychiatric diagnosis may be one relevant factor that post-secondary institutions should consider when making determinations regarding receipt of educational accommodations for mental impairments, the diagnosis should not be the defining factor in determining whether a student is disabled and thus entitled to accommodations.

diagnostic criteria for a psychiatric disorder).

192. *Id.* at 228.

193. 29 C.F.R. § 1630.2 (g)(1)(i)-(iii) (2013) (defining disability to include a mental or physical impairment).

194. 42 U.S.C. § 12102(2)(A) (2013) (defining “major life activities” to include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”).

195. 29 C.F.R. § 1630.2(j)(1) (2013) (defining “substantially limited”).

196. 42 U.S.C. § 12102(2) (2012); 28 C.F.R. § 36.104.

Requiring a psychiatric diagnosis as a basis of qualifying for educational accommodations not only contravenes the mandates of the ADA and § 504, it also disadvantages minority students. For example, it may disproportionately prevent minority students with deficits associated with autism from accessing accommodations in post-secondary education because minority students are less likely to receive a psychiatric diagnosis regardless of the level of impairment that they experience.¹⁹⁷ Moreover, the presence or absence of a psychiatric diagnosis may not provide a complete picture regarding the level of impairment that a student experiences because other factors, including the stress associated with growing up in poverty or lack of access to appropriate treatment for a mental impairment, such as autism, may magnify the negative impact of that impairment on the student.¹⁹⁸

Additionally, premising receipt of accommodations on a psychiatric diagnosis means that changes to the DSM diagnostic classification system will result in changes to who qualifies as disabled and thus is entitled to accommodations. This is problematic because (as changes to the diagnostic categories and criteria for autism in DSM-5 illustrate) changes in the DSM do not change the level of impairment that an individual experiences, regardless of whether or not he or she continues to qualify for a psychiatric diagnosis.¹⁹⁹ Further, changes to the DSM diagnostic categories and criteria reflect the uncertainty and incomplete understanding of psychiatric disorders.²⁰⁰ Moreover, although the DSM attempts to create a uniform standard for psychiatric diagnosis, there is inherent ambiguity and professional discretion involved in the diagnosis of a psychiatric disorder, which the drafters of the DSM specifically acknowledged when they cautioned against use of the DSM as a legal standard.²⁰¹ The training and professional expertise exercised by healthcare providers when interpreting the diagnostic criteria is not adequately recognized when courts or post-secondary institutions second-guess a diagnosis made by a trained professional by requiring a student to produce evidence that he or she meets all of the required DSM diagnostic criteria as part of an inquiry into

¹⁹⁷ See *supra* Part IV A-B.

¹⁹⁸ See *supra* Part IV C.

¹⁹⁹ See *supra* Part IV B.

200. Johnny L. Matson & Alison M. Kozlowski, *The Increasing Prevalence of Autism Spectrum Disorders*, 5 RES. AUTISM SPECTRUM DISORDERS 418, 420 (2011) (discussing the uncertainty regarding the diagnosis of autism).

201. DSM-5, *supra* note 8, at 25 (indicating that the definition of mental disorders included in the DSM was developed to meet the needs of mental health professionals and not based on the level of technical precision required in other contexts).

whether the student is disabled.²⁰² Courts and post-secondary institutions are ill suited to make determinations regarding whether an individual qualifies for a specific psychiatric diagnosis (much in the same way as they would be ill suited to determine whether or not an individual with a physical disability meet the criteria for a certain medical diagnosis). They are, however, better equipped to examine the level of impairment that a student experiences in an educational setting as a basis for determining whether that student is disabled and thus entitled to further evaluation for receipt of accommodations.

When determining whether a student is disabled within the meaning of the federal statutes, the inquiry should focus on the student's level of impairment in an educational setting.²⁰³ An inquiry that focuses on the level of impairment experienced by an individual in the relevant context (such as an educational setting) has been successfully used to assess whether individuals with physical disabilities are entitled to accommodations,²⁰⁴ and should be mirrored in the context of mental impairments. Importantly, moving towards a system where eligibility determinations are based on the level of impairment that a student experiences in an educational setting does not mean that eligibility determinations would be made solely based on subjective criteria, as the singular reliance on subjective criteria could have a number of negative consequences. For instance, the singular reliance on subjective criteria could potentially continue to disadvantage minority students whose behavior may be viewed differently than the behavior of their Caucasian peers based on implicit and explicit biases held by educators, a problem that has been illustrated in the context of the IDEA eligibility determinations.²⁰⁵

Consistent with issued guidance, post-secondary schools should consider accommodations that a student received in kindergarten through twelfth grade when making determinations regarding receipt of accommodations in post-secondary education.²⁰⁶ Although certainly not perfect, this information may be among the best evidence available to colleges and universities as to the level of impairment that a student experiences in an

202. *See, e.g., Love*, 513 F. Supp. 2d at 225 (requiring a student to produce documentation that he met all of the DSM diagnostic criteria for a psychiatric disorder, even though he received a DSM psychiatric diagnosis from a healthcare provider).

203. 42 U.S.C. § 12102(1)(A) (indicating that the inquiry should focus on the level of impairment that a student experiences and not their diagnosis).

204. *See, e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001) (acknowledging the individual's diagnosis but focusing on the specific impairments that individual experienced as a result of the medical condition).

²⁰⁵ *See supra* Part IV C 3.

206. *Students with Disabilities*, *supra* note 6.

educational setting (as well as the type of accommodations that a student may require). Despite previously acknowledged problems with special education determinations under the IDEA, the potential negative impact that reliance on this information could have on minority students can be mitigated by focusing on the type (and level) of documented impairment that the student experienced in an educational setting, rather than the classification that was utilized as a basis for referral of that student for IDEA services and accommodations. This is consistent with the general premises that accommodations should be based on the level of impairment that a student experiences in an educational setting rather than a specific diagnosis or categorization.

Focusing on the level of impairment that a student experiences will help to ensure that certain groups of students—students who are minorities and from other socioeconomically disadvantaged groups—are equally likely to receive educational accommodations as their otherwise similarly situated peers. It would also create a clear and enforceable standard that is not subject to the inherently ambiguous and changing nature of the DSM classification system.²⁰⁷ This would help alleviate fears that the addition of a new diagnostic classification in the DSM would mean that individuals who now qualify for a diagnosis would automatically be eligible for accommodations regardless of the level of impairment that they experience.²⁰⁸ Moreover, it would work to more closely align the provision of accommodations in post-secondary education with the provision of accommodations to students in kindergarten through twelfth grade, as determinations under the IDEA already focus on the level of impairment that a student experiences in an educational setting.²⁰⁹ And this would help ensure that students who receive accommodations in kindergarten through twelfth grade are able to use the education that they obtained to advance in future educational and employment opportunities.

It is important to note that despite continuous efforts to eliminate the stigma associated with disabilities, labeling an individual as disabled can have a negative impact on that individual—both in terms of how they view themselves and how they are viewed by others. Being labeled as disabled may cause an individual to have lower expectations of themselves and may also cause others to have lower expectations of them. The House Report on the

207. *See also* 42 U.S.C. § 12101(b) (intending use of a clear and consistent standard for enforcing the federal non-discrimination mandate).

208. McDonald, *supra* note 76 (expressing fears that the changes in DSM-5 will require the provision of accommodations to individuals that qualify for a psychiatric diagnosis but do not experience significant impairment necessitating accommodation).

209. 20 U.S.C. § 1400 *et. seq.* (focusing on the level of impairment an individual experiences in an educational setting).

IDEA specifically acknowledged this issue citing a number of problems with over identification of minority students for special education services including “the stigma attached to labeling a child with a disability, the decreased self-perception of the labeled child, and the reduced curriculum that labeled children often receive.”²¹⁰ The National Research Council (NRC) also touched on this issue when indicating that:

[A]s every parent of a child receiving special education services knows, is that in order to be eligible for the additional resources a child must be labeled as having a disability, a label that signals substandard performance. And while that label is intended to bring additional supports, it may also bring lowered expectations on the part of teachers, other children, and the identified student. When a child cannot learn without the additional supports, *and* when the supports improve outcomes for the child, that trade-off may well be worth making. But because there is a trade-off, both the need and the benefit should be established before the label and the cost are imposed.²¹¹

These statements are likely equally applicable to labeling students as disabled for purposes of receipt of accommodations in post-secondary education. Being labeled as disabled may be particularly harmful to minority students because they face potential discrimination on at least two fronts—discrimination associated with the stigma of being labeled as disabled and discrimination as a result of being a member of a minority group. Because of the close relationship between minority status and poverty in the United States, minority students with disabilities may also face stigma and discrimination based on their socioeconomic status.²¹² Moving towards a system where eligibility determinations for mental disabilities are based on the level of impairment that a student experiences in an educational context, rather than receipt of a psychiatric diagnosis will help to address this problem. This is because being labeled as having a psychiatric diagnosis would no longer be a prerequisite for receipt of accommodations. However, students would still be required to experience the stigma associated with being labeled as an individual with a disability to qualify for access to educational accommodations.

Although it is admittedly difficult to draw lines regarding who should and should not qualify for accommodations in post-secondary education,

210. *Id.* at 1082.

211. COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUC., NAT’L RES. COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUC. 3 (Suzanne M. Donovan & Christopher T. Cross eds., National Academy Press 2011).

212. ETHNIC AND RACIAL MINORITIES & SOCIOECONOMIC STATUS, *American Psychological Association*, <http://www.apa.org/pi/ses/resources/publications/factsheet-erm.aspx> (last visited Nov. 6, 2014).

this issue has serious implications for students and society, making it too important to ignore merely because it raises difficult questions. States have grappled with many of these same issues while attempting to determine which students qualify for special education services under the IDEA.²¹³ For example, questions have been raised regarding whether a student should qualify for services and accommodations merely because he or she could benefit from their provision.²¹⁴ Questions have also been raised regarding whether a student must be failing academically to be eligible for services and accommodations.²¹⁵ Critics of the provision of educational accommodations have argued that accommodations are over utilized and provide some students with an unfair advantage.²¹⁶ However, litigation, review of post-secondary institutions practices for determining eligibility for accommodations, and practical considerations suggests that the real concern should be on failure to provide adequate access to accommodations, particularly to minorities and other socioeconomically disadvantaged groups, rather than fear that too many accommodations are being provided.²¹⁷

The stigma associated with being labeled as disabled—a classification that is currently a prerequisite for access to accommodations in an educational setting—as well as difficulties in drawing lines between who is truly disabled and thus in need of accommodations suggests that focusing on the level of impairment that an individual experiences in an educational context is a step in the right direction but may not go far enough. It may be time to move towards more inclusive educational policies and practices. It would be prudent for educators and legislators to focus attention on the structure of the educational system system in the United States, which privileges certain characteristics and abilities over others. There are structural changes that could be made to the educational system that would help make it more inclusive for all students, including students with disabilities. For example, research suggests that certain changes to the

213. Garda, Jr., *supra* note 131, at 1082 (discussing the difficulty in defining special education and through this definition determining who qualifies for services under the IDEA, a decision left largely to the state).

214. *Id.* at 1125.

215. *Id.*

216. *But see* Price v. Nat'l Bd. of Med. Exam'rs, 966 F. Supp. 419, 427 (S.D.W. Va. 1997) (emphasizing that accommodations are not intended to create a back door for students with disabilities, but instead rebuild the front door so that students have access).

217. *See also* Daniel Koretz & Karen Barton, *Assessing Students with Disabilities: Issues and Evidence*, 9 EDUC. ASSESSMENT 29, 35 (2004) (emphasizing the importance of educational accommodations).

educational environment that assist students with disabilities, such as varying the way that information is presented, have a beneficial impact on the learning of all students, not just those students with disabilities.²¹⁸

Students with disabilities are as intelligent and capable as their peers, but denying them access to accommodations or, alternatively, failing to alter the educational environment to make it more inclusive to all students, will prevent students with disabilities from participating in educational opportunities on an equal basis with their non-disabled peers. This will prevent students with disabilities from having equal access to an education, and thus future employment opportunities, as required by federal statute.²¹⁹ It will also be detrimental to society at large, because of future costs and lost productivity, if steps are not taken to ensure that all students with disabilities, including students with impairments associated with autism, are provided with reasonable and necessary educational accommodations.

VI. ECONOMIC IMPACT OF THE FAILURE TO PROVIDE ACCOMMODATIONS TO STUDENTS WITH DISABILITIES

There are profound economic consequences for the individual as well as society when students with disabilities are not provided with reasonable and necessary accommodations. Receipt of accommodations may be outcome determinative regarding whether a student is able to succeed academically. And in some cases failure of a post-secondary institution to provide a student with accommodations may mean that student is unable to complete their education. Ensuring that students with mental impairments have access to educational accommodations necessary to succeed in post-secondary education is particularly important because in the United States educational attainment is correlated with higher rates of employment and lower rates of poverty.²²⁰

Provision of educational accommodations can help to reduce the cost of disabilities, such as autism. For instance, providing accommodations to individuals with deficits associated with autism that impact their ability to function in an educational setting will help to minimize the impact of autism on an individual's life, thereby reducing the direct and indirect costs associated with autism on both the individual and society at large.

218. See *Working Together: K12 Students and Teachers with Disabilities*, U. WASH. (Apr. 11, 2012), available at <https://www.washington.edu/doi/Brochures/Academics/working.k12.html> (providing examples of teaching modifications).

219. 20 U.S.C. §1400(d)(1)(A) (expressing the intent to ensure that students with disabilities have equal access to future opportunities).

220. *Id.* According to data from 2009, on average, individuals who had received at least a bachelor's degree had a median income of \$33,000 compared to individuals who had not completed high school, for which their median income was \$19,000.

Although autism is often thought of as a disorder of childhood,²²¹ many of the costs of autism are associated with adulthood. Estimates suggest that the lifetime societal cost of an individual with autism is over three million dollars.²²² This number takes into account the costs associated with treatment and care of an individual with autism, lost work from the individual with autism, and lost work from individuals who forgo work to care for that individual.²²³ With the growing prevalence of autism in the United States, the costs associated with autism will likely continue to rise. In some cases, mitigating the costs associated with autism may be possible by providing students with educational accommodations in post-secondary education that they need to compete on equal footing with their non-disabled peers thereby providing them with the education and skills necessary to obtain employment that best suits their abilities.

VII. CONCLUSION

Predicating access to accommodations in post-secondary education on receipt of a psychiatric diagnosis prevents some students with mental impairments, such as impairments associated with autism, from accessing accommodations. To ensure that the provision of accommodations is consistent with the spirit and intent of the federal statutes aimed at protecting individuals with disabilities, particularly minorities and other socioeconomically disadvantaged groups, decisions regarding access to accommodations for individuals with mental impairments should focus on the level of impairment that an individual experiences rather than an

221. The impact of autism on individual families is great. Families not living in poverty prior to having a child with autism may experience poverty as a result of the direct and indirect costs associated with having an autistic child. Even for families with insurance, there are still high costs associated with the treatment and care of a child with autism. For example, in the first twenty-two years of the life of a child with autism, estimates suggest that a family, on average, loses as much as \$160,000 in income because of lost work by the parent caring for the child with autism. Lea Winerman, *Autism Diagnosis Bring Slew of Costs for Families*, PBS NEWSHOUR (Apr. 13, 2011, 6:11 PM), http://www.pbs.org/newshour/updates/health-jan-june11-autismcosts_04-13/ (citing a 2006 Harvard Study); see also Zuleyha Cidav et al., *Implications of Childhood Autism for Parental Employment and Earnings*, 129 AM. ACAD. PEDIATRICS 617, 621 (2012) (“[M]others of children with [autism] earn 35% (\$7189) less than the mothers of children with another health limitation and 56% (\$14 755) less than the mothers of children with no health limitation.”).

222. Press Release, Harvard School of Public Health, *Autism Has High Costs to U.S. Society*, (April 25, 2006), available at <http://archive.sph.harvard.edu/press-releases/2006-releases/press04252006.html> (citing Michael Ganz, *Understanding Autism: From Basic Neuroscience to Treatment* (CRC Press, 2006)) (lifetime cost of autism for one person estimated at 3.2 million dollars).

223. *Id.*

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individual's psychiatric diagnosis. The provision of educational accommodations to individuals with mental impairments, is not only morally compelling, it is required by federal law.