HIGHER EDUCATION AND THE FUTURE OF DISABILITY POLICY

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I. INTRODUCTION

The year 2000 marks the tenth anniversary of the Americans with Disabilities Act ("ADA"),[1] and, as a result, there is much attention focused on reflecting on the past decade of disability policy. The most significant year in disability policy for higher education, however, is really 1973, because in that year Congress enacted Section 504 of the Rehabilitation Act ("Section 504"),[2] which marked the beginning of federal protection against discrimination on the basis of disability for programs receiving federal financial assistance. Because the vast majority of institutions of higher education receive support that subjects them to the mandates of Section 504, these programs—even for those that are private institutions—have been subject to these mandates long before most of the rest of the private sector or many other institutions were affected.

Because of the application of disability discrimination laws for over a quarter of a century, a significant body of law has developed in the courts to clarify what is required of these institutions and the ways in which individuals with disabilities are protected. Policy development by Congress and/or administrative agencies is needed in a number of areas, and courts are often not the best avenue for clarification. In still other areas, governmental policy may not be the solution, but rather a recognition of the need for individual institutions or higher education associations to develop their own appropriate policies to address certain issues. In still others, an increase in technical assistance and communication about the best practices may be the best avenue to pursue.

This Article will review the development of higher education dis-

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1. 42 U.S.C. §§ 12101-12213 (1994).
2. Pub. L. No. 93-112, 87 Stat. 394 (1973) (codified at 29 U.S.C. § 794 (1994)).

ability policy since 1973. It will then discuss the areas that have received the major focus of judicial attention in recent years. The Article will suggest the directions the courts are likely to take on these issues. Finally, it will indicate issues that merit re-examination and review by Congress and the Department of Education or even by institutions of higher education themselves, because judicial attention is not as likely to provide a roadmap on how to best address these issues.

II. HISTORICAL OVERVIEW

In 1973 Congress enacted Section 504 of the Rehabilitation Act,[3] which prohibited discrimination on the basis of handicap (now disability) against otherwise qualified individuals by programs receiving federal financial assistance. The application of Section 504 to an entire higher education institution, even if only one program within that institution received the federal funding was clarified by the enactment of the Civil Rights Restoration Act of 1987.[4]

There was minimal impact on higher education institutions for several years after the enactment of Section 504 for a variety of reasons. First, it took five years for the Department of Health, Education, and Welfare (now the Department of Education and the Department of Health and Human Services) to promulgate regulations.[5] Second, there did not seem to be significant efforts to enforce the mandates. For example, the regulations required that institutions engage in a self-evaluation and implement changes to ensure that the program was accessible when viewed in its entirety.[6] While most colleges and universities engaged in these self-evaluations, they did little to implement many of the needed changes. Third, those who might wish to challenge the discriminatory practices and policies of higher education institutions did not seem to be aware of Section 504 as a vehicle for protection. This lack of awareness is probably due in part to the fact that the level of media attention to Section 504 was significantly less than that of the media attention and resulting public awareness when the Americans with Dis-

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3. 29 U.S.C. § 794. This was an amendment to the Vocational Rehabilitation Amendments of 1954 which were an amendment to the LaFollette-Barden Vocational Rehabilitation Act of 1943, 29 U.S.C. §§ 31-42 (1994), which focused on providing for vocational rehabilitation. For a more detailed discussion of the history of the Rehabilitation Act, see RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (1984); *see also* LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW § 1.02 (2d Ed. 1997 & Supp.).

4. Pub. L. No. 100-259, 102 Stat. 28 (1988). This was enacted as a result of the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), in which the Court held that only the program receiving the funding was subject to the nondiscrimination mandates of federal funding nondiscrimination statutes. § 2(1), 102 STAT. at 28.

5. *See* 45 C.F.R. 84 (1999). This only occurred after public demonstrations and a lawsuit. *See* Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976).

6. 45 C.F.R. § 84.6(c) (1999).

abilities Act was enacted seventeen years later.

Fourth, Section 504 only protects individuals with disabilities who are "otherwise qualified."[7] Most college age individuals had not had the benefits of a comprehensive special education policy in the early years after the enactment of Section 504. The federal mandate to ensure that all children with disabilities received free appropriate public education and related services with assurance of procedural safeguards began in 1975.[8] It would take several years before substantial numbers of children identified early in their education would have had sufficient benefits from these programs to be qualified for admission into higher education programs and to succeed once they were admitted. The American Council on Education has been surveying the presence of students with disabilities on campus for several years. The most recent report indicates that, in 1998, one out of every eleven college freshman had a disability.[9] That number is three times the number reported in 1978.

Fifth, the fact that there were initially few attorneys or other advocates with the expertise and willingness to take on disability discrimination cases resulted in Section 504's initial minimal impact. Generally speaking, only advocacy organizations created by the federal Developmentally Disabled Assistance and Bill of Rights Act of 1975[10] and other similar advocacy groups were likely to take on these types of cases. Private attorneys were not as involved. As knowledge and understanding of the laws and the awareness of the availability of attorneys' fees increased, so did the litigation.

In addition to the lack of private enforcement, federal enforcement by administrative agencies was not significant. Initially, this lack of private enforcement may have resulted from a reluctance to spend resources on isolated complaints. In the 1980s, it reflected the Reagan administration philosophy of de-regulation generally, so federal resources were not used for this enforcement.

The early litigation that did occur tended to focus on procedural issues, so it was not until the mid-1980s that the courts began to address a significant number of more substantive issues.[11] Beginning in the mid-1980s, the combination of better prepared college age students with disabilities and the awareness of the disability policies resulted in an in-

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7. 29 U.S.C. §794 (1994).

8. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. § 1400-1491 (1994)).

9. Study by HEATH Resource Center of the American Council on Education *available in* <http://www/acenet.edu/about/programs/access and equity/heath/newslet.../update_freshmen.htm>. Of those reporting a disability in 1998, 41 percent indicated a learning disability. That compares with only 15 percent in 1988. The study also documents shifts in enrollment patterns between community colleges and four year colleges.

10. Pub. L. No. 94-103, 89 Stat. 486 (1975) (codified at 42 U.S.C. § 6042 (1994)).

11. *See* ROTHSTEIN, *supra* note 3, § 7.01.

crease in the number of judicial decisions addressing the application of Section 504 in the context of higher education.[12]

The passage of the Americans with Disabilities Act in 1990,[13] although not significantly adding to the protections available in a higher education context, opened a floodgate of complaints, both to the Department of Education and in the courts. Other reasons for this increase in complaints are probably related to factors such as the existence of a greater understanding and identification of individuals with learning disabilities. For faculty members in higher education, the elimination of mandatory retirement has caused increased litigation. In addition, the presence of students with HIV on campus is also responsible for some of the increased litigation.

The ADA is significant, not so much for its direct impact on higher education, but because of its application to a much broader sector of society. Unlike the Rehabilitation Act, the ADA more comprehensively requires private employers and private providers of public accommodations and other entities, such as state licensing agencies, to comply with the same mandates that institutions receiving federal financial assistance have been subject to since 1973.[14] As a result, the student who graduated from a college or university receiving the Rehabilitation Act protection against discrimination and the mandates for reasonable accommodations now has that same level of protection in the arenas of professional licensing exams or employment, or both.

Whatever the reason or combination of reasons for the burgeoning advocacy efforts, it is clear that there remain many unresolved issues relating to higher education and individuals with disabilities, and that litigation involving these issues is increasing. The following section will provide an overview of the key provisions and principles of both Section 504 and the ADA and a focus on the major areas where the Department of Education and the courts have focused their attention.

In addition to Section 504 and the ADA, there are a number of other federal statutes relating to housing,[15] student records,[16] medical leave,[17]

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12. *Id.*

13. 42 U.S.C §§ 12101-12213.

14. *See id.* § 12111 (5)(A) (definition of employer); *id.* § 12181 (prohibiting discrimination in public accommodations).

15. The Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3631 (1994) (prohibiting discrimination in housing based on handicapping conditions). This may require new university housing to ensure reasonable access to students with disabilities.

16. The Family Educational Rights and Privacy Act ("FERPA") of 1974, 20 U.S.C. §§ 1232g(a)-(i) (1994 & Supp. 1998), requires programs receiving federal financial assistance to ensure that students records have a variety of privacy and confidentiality protections. This is relevant for students with stigmatizing conditions, such as HIV, psychiatric impairments, alcohol and drug addiction, and other conditions. There is substantial authority establishing that there is not a private right of action under FERPA. *See* 1 WILLIAM VALENTE, EDUCATION LAW § 16.41 (1985), citing Daniel B. v. Wisconsin Dept. of Pub. Instruction, 581 F. Supp. 585, 592 (E.D. Wis. 1984), Girardier v. Webster College, 563

and age discrimination[18] that affect individuals with disabilities in a higher education setting. In addition, a variety of state disability discrimination statutes and other laws can affect this area. The focus of this Article, however, will be on Section 504 and the ADA.

III. CURRENT ISSUES

A. Overview of Section 504 and the Americans with Disabilities Act

1. Application to Various Programs

Section 504 of the Rehabilitation Act[19] and the Americans with Disabilities Act of 1990[20] both prohibit discrimination against otherwise qualified individuals with disabilities on the basis of their disability. Section 504 applies to programs that receive federal financial assistance, thereby including most colleges and universities.[21] The prohibition reaches discrimination in all areas, including students, staff, faculty, and events and programs provided to the public.[22]

The ADA has five major sections, three of which have significant impact on higher education institutions.[23] Title I of the ADA[24] applies to employers with fifteen or more employees.[25] This would cover both staff and faculty. Title II of the ADA[26] applies to state and local governmental programs.[27] This would apply to state universities and community colleges. Title II also affects state licensing agencies, a problematic area that had been largely unaffected by Section 504. Title III[28] applies to twelve specific categories of private providers of public accommodations.[29] One of the twelve categories is a place of education.[30] Private

F.2d 1267 (8th Cir. 1977).

17. The Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (1994), requires covered employers to accommodate employees with unpaid leave to deal with serious health conditions. This may be important for employees of universities.

18. The Age Discrimination in Employment Act of 1986, 29 U.S.C. §§ 621-634 (1994), makes it impermissible to apply mandatory retirement to faculty members. This is significant because faculty members who became impaired in the past might not have had their employment terminated because the institution was simply waiting for them to retire. Now, faculty members in that situation will no longer have to leave the institution unless they choose to do so.

19. 29 U.S.C. § 794 (1994).

20. 42 U.S.C. §§ 12101-12213 (1994).

21. 29 U.S.C. § 794.

22. *Id.* § 794; 42 U.S.C. §§ 12101-12213 (1994).

23. 42 U.S.C. §12111(5)(A); *id.* §§ 12131-12165; *id.* §§ 12181-12189.

24. *Id.* § 12111-12117.

25. *Id.* § 12111(5)(A).

26. 42 U.S.C. §§ 12131-12165.

27. *Id.* § 12131(1).

28. *Id.* §§ 12181-12189.

29. *Id.* § 12181(7)(A)-(L).

colleges and universities would be covered by Title III.[31]

It should be noted that there is often overlapping coverage. A private college would be subject to Title III and Section 504 for student issues and programs provided to the public. With respect to employment issues, the private college would be subject to both Title I and Section 504. Although the statutes are very similar in many respects, there may be procedural or strategic reasons why one statute is more useful in a particular case. For example, Title III does not specifically provide for individual damages unless the Attorney General intervenes,[32] while such damages would be available under Section 504.[33] In employment cases, Title I requires a complainant to pursue administrative remedies through the Equal Employment Opportunity Commission,[34] while Title II and Section 504 do not.

It is also significant that Section 504 is very sparse in its statutory language. The details of what is required were spelled out initially in regulations and subsequently in case law development. The ADA statutory language draws on this body of administrative and judicial interpretation and incorporates much of it directly into the statutory language itself.[35] There are, however, additional detailed regulations and substantial administrative agency guidelines on how the ADA should be interpreted. It is clear that the two statutes are intended to be interpreted consistently in most instances.[36]

Section 504 of the Rehabilitation Act resulted in model regulations being promulgated by the Department of Health, Education, and Welfare.[37] These model regulations include several sections of relevance to higher education, most significantly the section specific to postsecondary education.[38] This is most significant because when regulations were developed pursuant to the ADA, while a great deal was added to the Section 504 regulations on employment, professional licensing, and other topics, few new regulations were added relating to postsecondary education. For instance, Title II covers state and local public educational programs and Title III covers private providers of education, which would cover higher education in both cases. Yet nothing was specifically added in the regulations to flesh out requirements relevant to higher education. The only areas that really add anything are regulations on transportation systems and, more significantly, regulations relating to

30. *Id.* § 12181(7)(J).
31. 42 U.S.C. § 12181(7)(J).
32. *Id.* § 12181(7)(A)-(L).
33. 29 U.S.C. § 794 (1994).
34. 42 U.S.C. § 12117(a).
35. *Id.* §§ 12101-12213.
36. *See id.* § 12117(b).
37. Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1978).
38. 34 C.F.R. §§ 104.41-47 (1999).

examinations and courses for admissions and credentialing related to postsecondary education.[39] For that reason, the Section 504 regulations remain the primary regulatory guidance on most issues, at least those related to students and applicants.

2. *Who Is Protected*

Both Section 504 and the ADA define individuals with disabilities as those with "physical or mental impairment[s] which substantially [limit] one or more . . . major life activities, [those with] a record of such an impairment, or [those who are] regarded as having such an impairment."[40] Major life activities are defined to include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[41] The Supreme Court's decision in *Bragdon v. Abbott*[42] indicated a willingness to read the statute broadly in terms of what are considered major life activities by holding that reproduction is a major life activity. More recent Supreme Court decisions, however, may have narrowed the coverage by determining that mitigating measures, such as medication or self accommodation, are to be taken into account in determining whether someone is currently substantially limited.[43]

In order to receive accommodations under these statutes, it is generally the obligation of the individual with the disability to make known the disability and to provide appropriate documentation establishing the condition.[44] In addition, it is important to note that only individuals who are otherwise qualified are protected.[45] This means that the individual must be able to meet either the academic and technical requirements for admission, the programmatic participation, or the essential job functions for employment in order to be protected. The application of this requirement may necessitate establishing what are essential or fundamental requirements.

Another aspect of being otherwise qualified is that the individual must not pose a direct threat to self or others.[46] This requirement can be

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39. 28 C.F.R. § 36.309 (2000).
40. 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(2).
41. 34 C.F.R. § 104.3(j)(2)(ii).
42. 524 U.S. 624 (1998) (holding that a woman who had been denied dental treatment in the dentist's office because of her HIV status was disabled because her HIV status substantially limited her major life activity of reproduction).
43. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (each holding that the conditions of these individuals were corrected by mitigating measures and compensating factors so that the individuals were not substantially limited in major life activities).
44. 42 U.S.C. § 12112(b)(5)(A); 34 C.F.R. § 104.12.
45. *See* Southeastern Community College v. Davis, 442 U.S. 397, 407 (1979).
46. 42 U.S.C. § 12113(b); 29 U.S.C. § 705(20)(D) (Supp. IV 1998).

significant with respect to students with HIV, psychiatric impairments, and certain other conditions.

The ADA added protection for individuals who are associated with someone who has a disability.[47] By construing the statutes consistently, it seems probable that the same requirement should extend to Section 504. In addition, both Section 504 and the ADA have specifically limited protections related to individuals with contagious or infectious diseases[48] and alcohol and drug abusers,[49] and they both specifically exempt individuals in categories[50] that were so addressed for political reasons. The application of these requirements in the context of higher education is discussed more fully in Part 3.B.

3. *Key Principles*

It is useful, before reviewing the major litigation and the issues in need of re-examination, to be mindful of several key principles underlying the policy of both Section 504 and the ADA. The first of these principles includes the requirement that the individual be "otherwise qualified," as discussed in the previous section.

In addition, disability discrimination policy intends for there to be equal opportunity, not just equal treatment. Thus, opening the doors of the institution is not enough if the ramps or the lack of other accommodations prevent the individual from benefiting. The equal opportunity principle relates to the requirement that a program may be required to provide reasonable accommodations, even accommodations that result in financial or administrative cost.[51] The reasonable accommodation requirement marks a significant difference from most other federal nondiscrimination policy.

Another key principle is that of integration. In line with the philosophy of *Brown v. Board of Education*,[52] this policy recognizes that "separate but equal" is not equal and, furthermore, stigmatizes the student.[53] To the extent appropriate, programming is to be provided in the most integrated setting.[54] This principle is responsible for mandates related to the designing of sports arenas and theatres with a distribution of seating for individuals with mobility impairments and provision for companion

47. 42 U.S.C. § 12112(b)(4).
48. *Id.* § 12113(d)(2); 29 U.S.C. § 705(20)(D).
49. 42 U.S.C. § 12114; 29 U.S.C. § 705(20)(c)(i).
50. *See* 42 U.S.C. §§ 12208, 12211; 29 U.S.C. § 705(20)(E) &(F).
51. *See* 42 U.S.C. § 12112(b)(5)(A).
52. 347 U.S. 483 (1954).
53. *Id.*
54. 42 U.S.C. §§ 12182(b)(1)(A)(ii); 12182(b)(1)(B).

seating.

One other principle of significance relates to the issue of disparate impact. The Supreme Court has recognized that many policies and practices that adversely affect individuals with disabilities are not the result of intentional animus, but rather are the result of their discriminatory effect.[55] The Court, in *Alexander v. Choate*,[56] struck a balance on this issue by holding that while not every policy or program with disparate impact on individuals with disabilities constitutes a violation of Section 504, at least some policies or programs with unjustifiable disparate impact do.[57] These policies were not designed to bankrupt or fundamentally alter the programs to which they apply. For that reason, institutions are not required to fundamentally alter programs, to lower standards, nor to provide accommodations or access that are unduly burdensome.[58] Disability discrimination laws, however, are intended to place more of the burden (both financial and administrative) on the institutions that are in a better position to bear those burdens than the individuals themselves. For that reason, the courts have placed the burden of demonstrating undue burden and fundamental alterations on the institutions.[59] The judicial deference to higher education institutions that is routinely given in many contexts is not so "automatic" in the area of disability law.

B. Major Areas of Litigation

While there have been a number of issues that the courts have addressed involving disabilities and higher education, this section focuses only on the major recent areas of litigation.[60]

1. Learning Disabilities

The area of greatest activity with respect to disability issues in higher education involves learning disabilities.[61] Among the reasons for increased activity in this area is the increase in the number of students with learning disabilities that are already enrolled in or seeking to enter higher education programs. This increase results from the identification of disabled students, a result of special education mandates, a greater awareness of rights of individuals, and increased research and understanding about learning disabilities. The complexity of identifying and

55. *See* Alexander v. Choate, 469 U.S. 287 (1985).
56. 468 U.S. 287 (1985).
57. *Alexander*, 469 U.S. at 307.
58. 42 U.S.C. §§ 12112(b)(5)(A); *See also id.* § 12111(8) & (10); *id.* § 12131(2).
59. *See* ROTHSTEIN, *supra* note 3, § 3.27.
60. For more comprehensive coverage of all areas of litigation, see *id.*
61. ROTHSTEIN, *supra* note 3, § 3.22.

diagnosing a learning disability and of determining appropriate reasonable accommodations for this has also led to increased activity in this area.

a. Identification of Learning Disabilities

The first question related to individuals with learning disabilities is whether they are even disabled within the definition of Section 504 and the ADA. The case of *Sutton v. United Air Lines, Inc.*[62] raises some questions about that issue. In *Sutton*, the Supreme Court addressed whether mitigating measures should be considered in determining whether an individual is currently substantially limited in a major life activity.[63] In deciding that such measures should be considered, the Court specifically referenced *Bartlett v. New York State Board of Law Examiners*[64] and remanded that case for further evaluation in light of its decision in *Sutton*.[65] *Bartlett* involved a bar exam applicant claiming a learning disability and seeking a number of accommodations on the New York Bar Exam.[66] The Second Circuit had determined that Ms. Bartlett's condition constituted a substantial limitation to the major life activity of reading and learning.[67] The court further held that inappropriate test instruments had been used by the New York bar experts in evaluating her.[68]

Essentially, the Second Circuit court had to determine whether Ms. Bartlett's self accommodations, which had affected her ability to learn in college and law school, disqualified her from being disabled under the ADA.[69] It seems probable that because Ms. Bartlett was found to be substantially limited in the activity of reading,[70] even with the compensating efforts, that she would still be found to be disabled. It is important to recognize that *Sutton* arose in the context of employment, and that in a higher education context, reading and learning would probably be viewed as major life activities.

The *Bartlett* district court decision occurred shortly after a decision in a similar case, *Price v. National Board of Medical Examiners*.[71] In *Price*, the district court reached the conclusion that three medical stu-

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62. 527 U.S. 471 (1999).
63. *Sutton*, 527 U.S. at 475.
64. 970 F. Supp. 1094 (S.D.N.Y. 1997), 156 F.3d 321 (2d Cir. 1998) *cert. granted, judgment vacated*, 527 U.S. 1031 (1999).
65. New York State Bd. of Law Exam'rs v. Bartlett, 527 U.S. 1031 (1999) (remanding case to Second Circuit for further consideration).
66. *Bartlett*, 156 F.3d. at 321.
67. *Id.* at 329.
68. *Id.*
69. *Id.*
70. *Id.*
71. 966 F. Supp. 419 (S.D.W. Va. 1997).

dents were not disabled under the ADA because they demonstrated superior intellectual ability, such that their impairments did not substantially limit major life activities.[72] The *Bartlett* district court seemed to distinguish its decision from *Price* on the basis that *Price* involved education, rather than professional placement, despite the fact that a professional licensing exam involves elements of both education and employment.[73]

In a decision after the *Sutton* Supreme Court decision, a lower court addressed the issues raised by *Bartlett* and *Price*. The case of *Gonzalez v. National Board of Medical Examiners*[74] is similar to the *Price* decision in that it involves medical board exams. In fact, the court cites the *Price* holding favorably in its determination that the evaluations used to establish a learning disability did not demonstrate a disability because the plaintiff did not demonstrate substantial impairment.[75] Applying the *Bartlett* reasoning, the plaintiff claimed that his performance demonstrated substantial impairment in the major life activities of reading and learning when compared with the performance of others of similar age and education.[76] The court, however, applied the *Price* court's reasoning, comparing instead compared the plaintiff's overall IQ test performance with the average person and found him to be within the average to superior range.[77] In addition, Gonzalez had a history of strong academic achievements without accommodations, combined with an indication of an ability to read within the average to superior range.[78] There seem to be some significant factual distinctions between the performance level in *Gonzalez* and *Bartlett*. At a minimum, the plaintiff in *Bartlett* had limited reading ability[79] while the plaintiff in *Gonzalez* could read within the normal to superior range.[80] Thus, it remains to be seen whether the facts in *Bartlett* will result in a finding of a disability.

The other major question related to identification of learning disabilities involves documentation issues. The issues include: (1) whether documentation can be required, (2) who is qualified to provide appropriate documentation, (3) what types of evaluations are appropriate to document a learning disability, (4) who has the obligation to pay for the documentation, and (5) how current the documentation must be. While there are no complete and definitive answers to any of these questions in

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72. *Price*, 966 F. Supp. at 427-28.
73. Bartlett v. New York State Board of Bar Exam'rs, 2 F. Supp. 2d 388, 393-96 (S.D.N.Y. 1997).
74. 60 F. Supp. 2d 703 (E.D. Mich. 1999) (holding that a medical student suit against a testing service did not make out a case for a preliminary injunction under the ADA).
75. *Gonzalez*, 60 F. Supp. at 708, 710.
76. *Id.* at 708.
77. *Id.*
78. *Id.*
79. *Bartlett*, 156 F.2d at 321.
80. *Gonzalez*, 60 F. Supp. 2d at 708.

either the regulations or Supreme Court decisions, there are several key lower court decisions that have provided some direction.

The requirement that accommodations or special consideration of a disability be given only where the individual makes *known* the existence of the disability and the need for accommodation indicates that a documentation requirement is legitimate.[81] Two or three key recent cases involving documentation issues provide further guidance about the qualifications of evaluators, the types of testing instruments, and the currency of the evaluations.

In *Bartlett v. New York State Board of Law Examiners*, the district court addressed accommodations by a learning disabled applicant to take a bar exam.[82] The New York State Bar had determined that the applicant's learning disability did not reach the level of a disability within the ADA definition.[83] One of the issues the court addressed was the deference to be given to the evaluators of either party. The court held that no presumption one way or another should be given to the treating physician's evaluation of the learning disability.[84] Of significance, however, is the fact that the court was also unwilling to give particular deference to the bar examiner's experts who had never directly evaluated the individual.[85]

The district court in *Bartlett* had found that Ms. Bartlett's learning disability was a disability substantially limiting her major life activity of working, because, without the accommodations on the bar exam, she would be precluded from potential employment in the legal profession.[86] The Second Circuit upheld the district court on all major issues but applied a different test, determining that Ms. Bartlett was substantially limited in the major life activities of reading and learning.[87] The appellate court found that she was substantially limited compared to those with comparable training, skills, and abilities.[88] The court further held that inappropriate test instruments had been used to evaluate her.[89]

Another significant case on this issue is *Guckenberger v. Boston University*.[90] The court addressed a number of issues in a lengthy opinion involving a challenge by several students with learning disabilities to a variety of decisions and practices by the university.[91] The court spe-

81. *See* 42 U.S.C. § 12112(b)(5)(A) (1994).
82. 970 F. Supp. 1094 (S.D.N.Y. 1997); 156 F.3d 321 (2d Cir. 1998), *cert. granted, judgment vacated*, 527 U.S. 1031 (1999) (remanding the case for further consideration).
83. *Bartlett*, 970 F. Supp. at 1102.
84. *Id.*
85. *Id.* at 1136.
86. *Id.* at 1121.
87. *Bartlett*, 156 F.3d at 328-29.
88. *Id.* at 328.
89. *Id.* at 329.
90. 974 F. Supp. 106 (D. Mass. 1997).
91. *Guckenberger*, 974 F. Supp. at 114.

cifically addressed the issue of who is qualified to determine whether an individual has a learning disability or other disabilities affecting learning, including attention deficit hyperactivity disorder.[92] The court held that, when testing for learning disabilities, trained, experienced professionals need not have doctorate degrees.[93] However, the court held that when testing for attention deficit disorder ("ADD") and attention deficit hyperactivity disorder ("ADHD"), the university could require that the evaluators have a Ph.D. or an M.D.[94]

The court also addressed how recent such evaluations must be.[95] The court held that a requirement that learning disability documentation be current within the past three years imposes significant additional burdens on students with disabilities.[96] The court determined that where a qualified professional deemed that retesting is not necessary, it would be impermissible to mandate that testing be no more than three years old.[97] The court allowed the possibility that testing for ADD and ADHD might need to be more current.[98]

With respect to cost, because the burden is on the individual to make known the disability, the individual is obligated to bear the cost. Problems arise, however, when an individual has provided documentation, and the institution disputes the validity of the documentation on one basis or another. Although some institutions have developed their own policies on this issue, the law is far from clear about these obligations. This is one of the issues that would benefit from regulatory guidance.

A final issue related to identification of the disability involves the timeliness of the identification. When an individual wants to have an accommodation or the disability taken into account for some other reasons, it is the obligation of the individual to provide such documentation in a timely manner.[99] The courts and the Office for Civil Rights have been quite supportive of institutions when they have denied accommodations or otherwise adversely treated the student because of lack of

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92. *Id.* at 139.
93. *Id.* at 140.
94. *Id.* at 140-41.
95. *Id.* at 135.
96. *Guckenberger*, 974 F. Supp. at 135-36.
97. *Id.* at 136.
98. *Id.*
99. *See* Leacock v. Temple Univ. Sch. of Med., 14 Nat'l Dis. L. Rep. (LRP) ¶ 30; No. 97-7850, 1998 U.S. Dist. LEXIS 18871 (E.D. Pa. Nov. 25, 1998) (holding that a medical school legally dismissed a student with a learning disability when the student did not make known the disability during the first year or before dismissal); Tips v. Regents of Texas Tech. Univ. 921 F. Supp. 1515 (N.D. Tex. 1996) (holding that student did not make known her learning disability nor request accommodations and therefore there was no violation of the ADA or the Rehabilitation Act in dismissing the student); Temple Univ. (PA), 8 Nat'l Dis. Law Rep. (LRP) ¶ 125; No. 03-95-2090, 1995 NDLR (LRP) LEXIS 2048 (O.C.R. Dec. 1, 1995) (finding that there is no violation of Section 504 of the Rehabilitation Act or the ADA when the student did not seek academic modifications for a class until well into the semester).

timely notice.[100] Institutions are likely to be more adversely treated, however, when their own policies and procedures do not clearly indicate how one is to go about making requests related to disabilities.[101]

b. Admissions Issues

It is clear that it is impermissible for an institution to ask about disabilities in most instances at the admissions stage, unless the student is requesting to have the application given special consideration because of the disability.[102] Some institutions still ask such questions, and they get away with it simply because they have not yet been challenged. There has been very little judicial or regulatory activity on preadmissions inquiries. The majority of the activity in this area relates to standardized tests.

Title III of the ADA applies to private programs that administer standardized tests, such as the Scholastic Aptitude Test, the Law School Admission Test, and other admissions tests.[103] The vast majority of higher education institutions require these tests for admissions decisions. The first question, therefore, is whether it is permissible to require that an applicant take a standardized test. Because accommodations are now provided to individuals with disabilities for all of these tests, it is probably likely that a court would uphold requiring such tests, unless an individual could demonstrate that no accommodation was being provided for a specific disability.

The more difficult questions involve the "flagging" of standardized test scores and the use of these scores in the admissions process. With respect to flagging, the Department of Education has had an interim policy for some time allowing a "flag" to be placed on any test that was taken under nonstandard conditions.[104] Although there have been significant questions raised about that policy, it has remained in place for over twenty years. Recently, however, the practice of flagging has been challenged in the context of medical board exams. Thus far, the practice has been upheld as valid.[105]

With respect to the use of standardized test scores, most of the judicial attention has involved the use of these scores by the National Colle-

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100. *See* Temple Univ. (PA), 1995 NDLR (LRP) LEXIS 2048.

101. Harvard University (MA), 6 Nat'l Dis. L. Rep. (LRP) ¶ 58; No. 01-93-2084, 1994 NDLR (LRP) LEXIS 1712 (O.C.R. Aug. 19, 1994) (finding that Section 504 was violated by denying student's petition for a make-up exam because the policy on make-up exams was unduly vague with respect to students with disabilities).

102. 34 C.F.R. 104.42(c) (2000).

103. 42 U.S.C. §§ 12181-12189 (1994).

104. *See, e.g.*, Doe v. National Bd. of Med. Exam'rs, 199 F.3d 146, 156 (3d Cir. 1999) (holding that neither Title III nor its regulations proscribe the practice of flagging).

105. *Doe*, 199 F.3d at 156.

giate Athletic Association ("NCAA") to aid in determining eligibility for athletic scholarships. There have been a number of challenges to the NCAA's practice of requiring minimum standardized test scores to obtain athletic scholarship approval.[106] Since the first of these cases began, the NCAA has changed its standards by providing for a more individualized assessment of qualifying status for students with disabilities.[107] Because these cases have been settled or have only received preliminary procedural decisions, it is not clear where the courts will ultimately come down on this issue. Most likely, courts will not support any policy that does not allow for individualized assessment in these cases. It is significant that in one of the cases, the court specifically recognized that it is legitimate for the NCAA to have standards that ensure academic ability to succeed in college.[108]

c. Accommodations

The types of accommodations sought by students with learning disabilities generally include additional time for exams, reduced course loads, alternative testing formats, and waiver of courses (such as foreign language or math). Because institutions are not required to provide auxiliary aids or services or accommodations for personal use,[109] it may be that tutoring would be considered a personal service. However, there is no clear regulatory or judicial guidance on this issue. This does not mean that an institution could not provide tutoring for students with learning disabilities, but they may not necessarily be required to do so. If, however, an institution provides tutoring services to all students, students with learning disabilities could not be discriminated against in accessing such services.[110]

While the Section 504 model regulations provide examples of ac-

106. Matthews v. NCAA, 79 F. Supp. 2d 1199 (E.D. Wash. 1999) (denying a preliminary injunction on behalf of a college football player for declaring him ineligible because NCAA is not covered by Title III and that NCAA had made reasonable accommodations in any case); Bowers v. NCAA, 9 F. Supp. 2d 460 (D.N.J. 1998) (denying summary judgment in case involving learning disabled football player who challenged NCAA standardized test requirements); Tatum v. NCAA, 992 F. Supp. 1114 (E.D. Mo. 1998) (denying injunctive relief to student athlete who claimed NCAA's nonrecognition of untimed standardized test violated ADA); Ganden v. NCAA, No. 96-C-6953, 1996 U.S. Dist. LEXIS 17368 (N.D. Ill. 1996) (involving preliminary injunctions for students); Butler v. NCAA, 74 F. Supp. 2d 1021 (W.D. Wash. 1996) (denying attorney fees in case where he had been given an extension of a scholarship period and athletic eligibility after a consent decree) and C.A. No. 96-1656D (W.D. Wash. 1996) (involving a preliminary injunction for a student).

107. A Consent Decree obligating the NCAA to change its eligibility requirements for learning disabled student athletes was entered into on May 26, 1999, and adopted on January 12, 1999. *See* Butler 74 F. Supp. at 1023, note 4.

108. Bowers v. NCAA, 9 F. Supp. 2d 460, 466-67 (D.N.J. 1998).

109. 42 U.S.C. §12182(b)(2)(A)(ii) (1994).

110. *Id.*

commodations that should be considered,[111] institutions have a number of defenses that can be raised with respect to accommodation requests. Institutions are not required to provide accommodations that are unduly burdensome, either administratively or financially,[112] nor are they required to make accommodations that fundamentally alter the program or lower its standards.[113]

Although not a Supreme Court decision, the case of *Wynne v. Tufts University School of Medicine*,[114] establishes a widely adopted standard for deciding whether accommodations should be provided. The case involved a medical school student who requested that a multiple choice exam be given in a different format.[115] In its much quoted opinion, the court required that relevant officials within the institution consider alternative means, their feasibility, cost, and effect on the academic program, and provide rationally justifiable reasons as to why available alternatives would lower academic standards or result in substantial program alterations.[116]

Subsequent decisions have applied these standards to a number of requested accommodations. Generally speaking, the application of this standard has resulted in holdings that do not require waiver of coursework.[117] While the institutions still have the burden required in *Wynne*, there is, nonetheless, a substantial degree of deference given to higher education institutions with respect to their programmatic academic requirements. Similarly, courts and agency findings are highly unlikely to require accommodation to demonstrating academic ability for admission,[118] with the caveat that this deference does not generally extend to

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111. 34 C.F.R. § 104.44(a) (2000).

112. United States v. Board of Trustees for Univ. of Ala., 908 F.2d 740, 747 (11th Cir. 1990). It is noteworthy that, since this decision, little, if any, judicial guidance has clarified what is meant by undue financial burden. Perhaps this is because universities are politically reluctant to try to make out such a claim because they would have to justify funds spent on discretionary programming such as athletics.

113. Unlike the defense of undue financial burden, there is a fair amount of judicial clarification about the fundamental alteration issue. The standard was first established in *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979), which held that educational institutions need not make substantial modifications or fundamental alterations in the nature of the program to allow participation. *See also* ROTHSTEIN, *supra* note 3, § 3.10.

114. 932 F.2d 19 (1st Cir. 1991).

115. *Wynne*, 932 F.2d at 22.

116. *Id.* at 26.

117. *See, e.g.*, Guckenberger v. Boston Univ., 8 F. Supp. 2d 82 (D. Mass. 1998) (waiving foreign language would be a fundamental alteration of the program); Guckenberger v. Boston University, 974 F. Supp. 106 (D. Mass. 1997) (holding that a decision as to whether course substitution for foreign language requirement may be a reasonable accommodation and holding that course substitution for math requirement was not); Darian v. University of Mass., Boston, 980 F. Supp. 77 (D. Mass. 1997) (holding pregnant nursing student not entitled to have core course requirement waived); Bennett College (NC), 7 Nat'l Dis. L. Rep. (LRP) ¶ 26; No. 04-95-2065, 1995 NDLR (LRP) LEXIS 1735 (O.C.R. May 15, 1995) (deciding college required to waive math for student in political science major).

118. *See, e.g.*, Betts v. Rector and Visitors of the Univ. of Va., 191 F.3d 447 (4th Cir. 1999) (unpublished opinion) (remanding for a determination as to whether the student was disabled under the ADA); Gent v. Radford Univ., 976 F. Supp. 391 (W.D. Va. 1997), *aff'd*, 122 F.3d 1061 (4th Cir. 1997) (holding

rigid requirements related to specified minimum standardized test scores for eligibility.[119]

The cases of *Wong v. Regents of University of California*[120] and *Zukle v. Regents of University of California*[121] are an interesting comparison with respect to the degree of deference that courts should give to institutions with regards to accommodations and academic qualifications. In the *Wong* decision, the court held that the burden of demonstrating the necessity of a decelerated schedule for clinical clerkships for a medical student was on the university.[122] By contrast, in *Zukle*, the same judge reached a different conclusion under remarkably similar facts.[123] The accommodations sought in both cases involved an allowance of additional time between clinical clerkships as well as other accommodations relating to scheduling of clerkships. While the ultimate decision regarding the accommodations may be the same, it is interesting that the court in *Zukle*, in contrast to the court in *Wong*, did not require a reassessment of this issue.

The area where the individual with a disability is most likely to be successful in obtaining the requested accommodation involves that of an accommodation for additional time to take exams. Institutions are often unable to meet the burden of establishing that they are testing "speed."[124] Since it cannot be planned for, it is more likely that an institution will be able to demonstrate that unlimited time for exams is not a reasonable accommodation. Institutions in some instances may be able to demonstrate legitimate concerns about exam integrity. However, in many instances, arrangements can be made to ensure that integrity as well. Most of the cases that have addressed the issue of additional exam time have focused on whether the individual had learning or other disabilities justifying the accommodation and have not yet begun to address whether the additional time on an exam constitutes a fundamental alteration to the school's program.[125]

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that student denied admission to graduate school did not have the requisite grade point average); University of Minn., 6 Nat'l Dis. L. Rep. (LRP) ¶ 295; No. 05-94-2139, 1995 NDLR (LRP) LEXIS 1562 (O.C.R. Jan. 13, 1995) (finding that law student with learning disability had grades and test scores substantially lower than other applicants).

119. *See supra* at Section III.(B).(1).(b).

120. 192 F.3d 807 (9th Cir. 1999) (remanding for factual determination).

121. 166 F.3d 1041 (9th Cir. 1999).

122. *Wong*, 192 F.3d at 817.

123. *Zukle*, 166 F.3d at 1050-51.

124. *See generally* Linda Lee, *To Teach, or Merely Accommodate*, N.Y. TIMES, Apr. 9, 2000, at 4A (recognizing the dilemmas raised in providing additional time and other accommodations for learning disabilities). *See also* Doe v. National Bd. of Med. Exam's, 199 F.3d 146, 151 (3d Cir. 1999) (discussing speed and power elements of standardized tests).

125. *See, e.g.*, Bartlett v. New York State Bd. of Law Exam'rs, 156 F.3d 321 (2d Cir. 1998).

d. Readmissions

There have been a number of instances involving students who have not met academic standards once they have been admitted into a program.[126] These situations can be problematic, depending on how and when the presence of a disability became known. Where the disability has been identified and appropriate accommodations have been received, there is virtually no basis upon which a court or the Office for Civil Rights ("OCR") would require readmission.[127]

These situations are more difficult, however, where the student's learning disability has not been identified, where it has been identified but appropriate reasonable accommodations were not provided, or where the student does not request accommodations because of concerns about stigma or because the student did not realize they might be needed.[128] The courts and the OCR generally have been consistent in not requiring readmission even in these settings, although there is some guidance indicating the entity considering readmission should at least take the issue of the learning disability into account in making its decision.[129]

One particularly troubling case is *Betts v. Rectors and Visitors of the University of Virginia.*[130] In that case, the student's medical school grades were below the requisite level until he was identified as having a learning disability.[131] After that point he was given reasonable accommodations, and grades earned subsequent to being accommodated were at an acceptable level.[132] Because her *cumulative* grade point was below the required level, however, the court upheld his academic dismissal. This case seems to signal the need to consider allowing students to repeat coursework in cases such as this.

2. Psychiatric and Substance Abuse Impairments

Incidents such as the shooting at Columbine High School and other highly publicized incidents involving students who may have psychiatric

126. *See, e.g.*, McGuiness v. University of N.M. Sch. of Med., 170 F.3d 974 (10th Cir. 1998) (holding that a medical school was not required to advance a student with marginal grades); Ellis v. Morehouse Sch. of Med., 925 F. Supp. 1529 (N.D. Ga 1996) (holding that a medical student who had been accommodated was not qualified to continue because of ongoing performance deficiencies).

127. Zukle v. Regents of Univ. of Cal., 166 F.3d 1041 (9th Cir. 1999); McGuinness v. University of N.M. Sch. of Med., 170 F.3d 974 (10th Cir. 1998); Leacock v. Temple Univ. Sch. of Med., 14 Nat'l Dis. L. Rep. (LRP) ¶ 30; No. 97-7850, 1998 U.S. Dist. LEXIS 18871 (E.D. Pa. Nov. 25, 1998); Ellis v. Morehouse Sch. of Med., 925 F. Supp. 1529 (N.D. Ga. 1996); Tips v. Regents of Texas Tech Univ., 921 F. Supp. 1515 (N.D. Tex. 1996).

128. *See* ROTHSTEIN, *supra* note 3, §3.22.

129. DePaul University, 4 Nat'l Dis. L. Rep. (LRP) ¶ 157; No. 05-89-2029, 1993 NDLR (LRP) LEXIS 1107 (O.C.R. May 18, 1993).

130. 191 F.3d 447 (4th Cir. 1999)

131. *Betts*, 191 F.3d at 450.

132. *Id.*

or emotional problems have heightened the concern about ensuring a safe environment for others in the educational community.[133] Litigation activity in this area has focused primarily on the issue of whether certain performance or conduct deficiencies must be excused when these deficiencies are related to the disability. Some litigation has addressed whether certain conditions are even disabilities entitling the individual to special treatment in the first place.

With respect to the question of whether certain mental impairments are even disabilities, there have been few cases on this point in the context of higher education. Most cases addressing the definition of disability, however, have involved employment.[134] Still, there is some indication that conditions such as test anxiety will not be considered to be disabilities, but rather as symptoms of other conditions.[135] Even where conditions such as panic disorder are considered to be disabilities, the courts may determine that an individual is not otherwise qualified. For example, in *Maczaczyj v. State of New York*,[136] the court found that it was not reasonable to accommodate a masters degree candidate with a panic disorder by waiving class attendance and allowing him to attend classes by phone.[137]

The majority of cases involving excusing misconduct or deficiencies have resulted in decisions holding that an institution is not required to accommodate psychiatric or substance abuse impairments in this way. Recent decisions include upholding the dismissal of a medical student with obsessive compulsive disorder who was dismissed because of his academic deficiencies[138] and not requiring readmission of a medical student with manic depression whose dismissal was based on academic deficiencies and behavior problems.[139]

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133. *See* ROTHSTEIN, *supra* note 3, § 3.24.

134. Pressman v. University of N.C., 337 S.E.2d 644, 649 (1985) (having occasional episodes of stress, depression, and mental exhaustion is not a disability for a faculty member).

135. McGuinness v. University of N.M. Sch. of Med., 170 F.3d 974 (10th Cir. 1998) (holding that test anxiety is not a disability for a medical student); *see also* Linson v. Trustees of Univ. of Penn., 8 Nat'l Dis. L. Rep. (LRP) ¶ 299; No. 95-3681, 1996 NDLR (LRP) LEXIS 740 (E.D. Pa. Aug. 21, 1996) (finding that the university did not perceive a former graduate student as having a mental disability although counseling was suggested by university officials because of unusual behavior); Gill v. Franklin Pierce Law Ctr., 899 F. Supp. 850 (D.N.H. 1995) (finding that a law student need not be provided accommodations where he did not make known the need for them; he claimed that the law school should have known this because he stated on his application that he was a child of alcoholic parents); Crancer v. Board of Regents, 402 N.W.2d 90 (1986) (holding that post traumatic stress syndrome is not a disability). *See also* ROTHSTEIN, *supra* note 3, § 3.02.

136. 956 F. Supp. 403 (W.D.N.Y. 1997).

137. *Maczaczyj*, 956 F. Supp. at 409.

138. Amir v. St. Louis Univ., 12 Nat'l Dis. L. Rep. (LRP) ¶ 151; No. 4:95CV02132, 1998 NDLR (LRP) LEXIS 197 (E.D. Mo. Feb., 19 1998). On appeal, the court upheld the dismissal but found that there was a basis for a retaliation claim. Amir v. St. Louis Univ., 184 F.3d 1017 (8th Cir. 1999).

139. Doe v. Vanderbilt Univ., 132 F.3d 32 (6th Cir. 1997) (unpublished opinion). *See also* Motzkin v. Trustees of Boston Univ., 938 F. Supp. 982 (D. Mass. 1996) (holding that a psychological disorder causing "disinhibition" did not excuse behavior of sexual harassment and serving alcohol to underage students).

Decisions not to readmit after behavior or performance deficiencies may be sound with respect to students whose behavior presents a danger or a direct threat. As a policy matter, however, where the individual may not have known of the condition or may have been justifiably concerned about the stigma related to the condition, it might be good policy to give the student a second chance.[140]

Another issue involving students with mental health impairments relates to student records and what information about mental health problems may be reported to various institutions. This issue arises in the context of students who either seek to transfer to another institution or seek professional certification, both of which require information from the higher education institution. While there is very little judicial guidance on this issue, what does exist seems to indicate that there is a privilege to report generally in certain contexts.[141] Where it is conduct and behavior, rather than the underlying condition, reporting this information is not generally viewed as discriminatory.[142]

One of the dilemmas that has arisen and not yet received consistent judicial treatment involves the reporting of mental health histories to state licensing boards, such as state boards of medical examiners and state boards of law examiners. When these boards request information of the individual or of the professional school attended by the individual about mental health history, there is a significant risk that this practice acts as a deterrent to mental health treatment.[143] While much has been written about the need to rethink such policies, the reaction to this advocacy has been mixed.[144]

3. *Health Professional Programs*

There has been a significant amount of litigation involving students seeking admission to health professional programs including medical school, nursing programs, dentistry, and other health professional programs.[145] These cases primarily involve three major issues.

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140. Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931 (1997) (discussing cases in which mental impairments are related to deficiencies).

141. *See* Rothman v. Emory Univ., 123 F.3d 446, 451 (7th Cir. 1997).

142. *Rothman*, 123 F.3d at 451.

143. For an excellent discussion of this issue, see Stanley Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635 (1997).

144. For cases addressing this issue, see ROTHSTEIN, *supra* note 3, §§ 3.24, 5.08.

145. For a discussion of this issue, see Laura F. Rothstein, *Health Care Professionals with Mental and Physical Impairments: Developments in Disability Discrimination Law*, 41 ST. LOUIS U. L.J. 973 (1997). *See also* ROTHSTEIN, *supra* note 3, §§ 10.03-10.08.

a. Admission and Physical Attributes:

Health care professional programs have been the focus of a number of cases involving admission of students with certain physical attributes. The reason why medical school, nursing school, and other health professional programs have probably been the focus of so many of these cases is because of the special concerns related to health and safety in patient care.

While several of these cases are early cases under Section 504, there have also been a number of more recent decisions. These cases have addressed issues such as whether vision is an essential requirement for medical school,[146] whether lifting and mobility are essential to certain professional programs,[147] and whether HIV poses a direct threat in certain situations.[148] Common themes and principles arising from these cases include substantial deference to health care institutions in determining whether certain situations pose a direct threat and a requirement that institutions bear the burden of demonstrating what are essential functions or fundamental requirements.

b. Learning Disabilities

There have been a significant number of cases involving medical school students with learning disabilities.[149] These cases demonstrate a pattern that may highlight a need to focus on admissions policy in this area. Several cases have involved medical school students whose learning disabilities have been accommodated initially in the academic por-

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146. Ohio Civil Rights Comm'n v. Case W. Reserve Univ., 666 N.E.2d 1376, 1388 (Ohio 1996) (holding that it would require fundamental alterations to admit a blind medical school applicant).

147. Zevator v. Methodist Hosp. of Houston, 7 Nat'l Dis. L. Rep. (LRP) ¶ 255; No. H-94-859, 1995 NDLR (LRP) LEXIS 1948 (S.D. Tex. Mar. 30 1995) (finding that physical aspects of a nursing position could not be eliminated); Stafford v. Radford Community Hosp., Inc., 908 F. Supp. 1369 (W.D. Va. 1995) (holding that a nurse who suffered a back injury resulting in her being unable to lift could not be accommodated by reassignment); Board of Educ. of the City of N.Y., 12 Nat'l Dis. L. Rep. (LRP) ¶157; No. 02-97-1125, 1997 NDLR (LRP) LEXIS 758 (O.C.R. Oct. 15, 1997) (stating that a nursing student was not entitled to a waiver of lifting requirements because nurses must be able to lift and ambulate patients and to react immediately in emergency situations).

148. Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995) (holding that an HIV-infected neurosurgery resident was not otherwise qualified, although residencies in pathology and psychiatry were offered); Doe v. Washington Univ., 780 F. Supp. 628 (E.D. Mo. 1991) (holding that an HIV positive dental student could not be accommodated).

149. Betts v. Rector & Visitors of the Univ. of Va., 191 F.3d 447 (4th Cir. 1999) (unpublished opinion); Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041 (9th Cir. 1999); Wong v. Regents of the Univ. of Cal., 192 F.3d 807 (9th Cir. 1999); McGuinness v. University of N.M. Sch. of Med., 170 F.3d 974 (10th Cir. 1998); Kaltenberger v. Ohio College of Podiatric Med., 162 F.3d 432 (6th Cir. 1998); Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19 (1st Cir. 1991); Leacock v. Temple Univ. Sch. of Med., 14 Nat'l Dis. L. Rep. (LRP) ¶ 30; No. 97-7850, 1998 U.S. Dist. LEXIS 18871 (E.D. Pa. Nov. 25, 1998); Ellis v. Morehouse Sch. of Med. 925 F. Supp. 1529 (N.D. Ga. 1996).

tion of the program, but who later have problems involving clinical rotations and other performance aspects. The cases often raise concerns about whether the upper level medical school requirements can be accommodated appropriately without lowering standards or altering the programs.

In light of this pattern of cases, it would seem appropriate for health care professional programs, particularly medical schools, to closely examine the requisite requirements and how these requirements are evaluated at various stages. This would enable a more focused evaluation at the initial admission stage. While the goal is certainly not to screen out applicants or to terminate attendance for qualified medical students with learning disabilities or any other impairment, it may be worthwhile to make an assessment at an earlier stage to avoid the heartbreak and lost time and resources on both parts when medical school students have devoted two difficult, demanding, and costly years to study in an area in which they will not be able to continue.

c. Professional Licensing

Another issue related to health care professional programs that has been the focus of substantial judicial attention involves the reporting of mental health and substance abuse problems to licensing boards. As was previously noted, behavior and performance deficiencies are not excused, even if they relate to a disability.[150] Courts are particularly deferential to institutions on the issue of health care programs because of the substantial concerns about the health and safety of patients.[151]

4. Athletics

While not an area where there has been a tremendous amount of litigation, athletics in colleges and universities has nonetheless been the focus of some interesting recent litigation.[152] The major areas of attention concern athletes with learning disabilities and athletes with health impairments.

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150. *See supra* Section III.(B).(2).

151. Rothman v. Emory Univ., 123 F.3d 446 (7th Cir. 1997) (holding that the college did not violate the ADA by disclosing behavior problems to the state board of bar examiners); Lewin v. Medical College of Hampton Rds., 910 F. Supp. 1161 (E.D. Va. 1996) (holding that the dismissal of a medical student did not violate Section 504 because student did not show dismissal was based on a perceived mental disability; rather student had substantial academic and clinical performance weaknesses).

152. For discussions of these issues, see Laura F. Rothstein, *Don't Roll in My Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding the Americans with Disabilities Act*, 19 UNIV. OF TEX. REV. OF LITIG. ISSUE 399 (2000); Adam A. Milani, *Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports*, 49 ALA. L. REV. 817 (1998).

a. *Learning Disabilities*

The issue of athletes with learning disabilities has been discussed previously.[153] Of primary concern is when the learning disability adversely affects a student's eligibility for a scholarship pursuant to NCAA rules. As noted previously, the NCAA has recently altered its previously rigid eligibility requirements.[154] The issue still remains, however, as to what is the appropriate way to evaluate an athlete for scholarship eligibility.

While the courts seem to support requirements related to ensuring that a student athlete is adequately prepared for college work,[155] they have signaled that the NCAA should provide for more individualized evaluation processes in cases involving students whose standardized test scores and high school coursework may have been affected by a learning disability.[156]

b. *Health Impairments*

While there have not been many cases on health impairments, two highly publicized cases from the mid-1990s reflect legitimate concerns about ensuring the safety of college athletes and deferring to higher education institutions in making those decisions. In the cases of *Knapp v. Northwestern University*[157] and *Pahulu v. University of Kansas*,[158] the courts addressed basketball and football players with serious health conditions (a heart condition and a potential neurological condition) and upheld the denial of their participation by the institutions.[159]

An incident that received national media attention involved a high school basketball player who claimed that his suspension from participation, for driving while under the influence of alcohol, violated Section 504 of the Rehabilitation Act.[160] The court to date has been consistent in holding that even if the behavior relates to alcoholism, the student need not be excused from applicable standards.[161]

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153. *See supra* Section III.(B).(1).(b).

154. *See supra* notes 106-08 and accompanying text.

155. Bowers v. NCAA, 9 F. Supp. 2d 460 (D.N.J. 1998).

156. Ganden v. NCAA, 9 Nat'l Dis. L. Rep. (LRP) ¶ 33; No. 96-C-6953, 1996 NDLR (LRP) LEXIS 702 (N.D. Ill. Nov. 21, 1996); *See* Butler v. NCAA, 74 F. Supp. 2d 1021 (W.D. Wash. 1999).

157. 101 F.3d 473 (7th Cir. 1996), *cert denied*, 520 U.S. 1274 (1997).

158. 897 F. Supp. 1387 (D. Kan. 1995).

159. *Knapp*, 101 F.3d at 479; *Pahulu*, 897 F. Supp. at 1393.

160. Stearns v. Board of Educ. for Warren Township High Sch., 16 Nat'l Dis. L. Rep. (LRP) ¶ 266; No. 99-C-5818, 1999 U.S. Dist. LEXIS 17981 (N.D. Ill. Nov. 16, 1999).

161. *See, e.g.*, Maddox v. University of Tenn., 62 F.3d 843 (6th Cir. 1995); *Stearns*, 1999 U.S. Dist. LEXIS 17981. For a detailed discussion of this issue, see Laura Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Law*, 47 SYRACUSE L. REV. 931 (1997). *See also* ROTHSTEIN, *supra* note 3, § 4.09.

5. *Other Areas of Litigation*

a. *Architectural Barriers*

There has not been a great deal of judicial precedent involving architectural barrier issues on campus,[162] perhaps because many of these cases are settled to avoid negative publicity. A few recent complaints have focused attention on issues related to student housing.[163] Higher education institutions may also have learned that it is better to resolve these issues quickly than to have a court ordered plan of barrier removal.[164] It may also be that universities are reluctant to claim undue financial burden in these types of cases because they do not want to have their discretionary budgets subject to scrutiny as a result of highly publicized court cases.

b. *Faculty Issues*

While not receiving the same degree of attention as student issues, the courts have recently begun to address complaints by faculty members claiming disability discrimination.[165] The reason why the litigation on this issue is more recent probably relates to a combination of factors. Such factors include the end of mandatory retirement (which provided an "efficient" means of removing some faculty members who were no longer effective), the trend towards post-tenure review, and an increased awareness of disability law as a means of protection. The litigation generally relates to whether the faculty member's performance and conduct deficiencies that relate to a disability must be excused.[166] The litigation highlights the need for institutions to develop appropriate policies and procedures in this area, not only to address potential concerns about disability discrimination, but also to ensure confidentiality, and to ensure the dignity of individuals who are no longer qualified to carry out their work.

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162. *See* ROTHSTEIN, *supra* note 3, §§ 3.17, 6.13-6.18.

163. Fleming v. New York Univ., 865 F.2d 478 (2d Cir. 1989) (holding that a university had not discriminated against a graduate student with quadriplegia by charging twice the single occupancy rate when he wanted to live in an undergraduate dorm when graduate housing was available); Coleman v. Zatechka, 824 F. Supp. 1360 (D. Neb. 1993) (finding that a university's practice of automatically excluding a student with quadriplegia from the roommate pool for residence halls violated Section 504 and the ADA).

164. In *Brown v. Washington Univ.*, C.A. No. 88-1907-C-5 (E.D. Mo., settlement May 11, 1990), the settlement agreement required the university to make $2.5 million in modifications over a two-year period of time.

165. *See* ROTHSTEIN, *supra* note 3, § 3.26.

166. *See id.*

IV. ISSUES TO BE RE-EXAMINED AND REVIEWED

The litigation resulting from Section 504 and the ADA highlights the need for new guidance on a number of disputed issues, as well as on issues where well-intentioned administrators or policymakers need assistance in interpreting statutory requirements. Although the regulatory guidance has helped in many areas, there are number of issues that remain problematic. In some cases, the issues are probably best addressed by the Department of Education or other federal agencies, through regulations, administrative guidance, or technical assistance. In other instances, it may be that each institution of higher education must develop its own policies in light of those mandates that are clear, but that a greater awareness of these requirements is needed. In other areas, it may be that what is needed is simply a wider dissemination of information or technical assistance. The following are some suggestions.

A. Learning Disabilities

The Department of Education could be extremely helpful if it were to issue new regulations, or at least regulatory guidance similar to what has been issued by the Department of Justice ("DOJ") and the Equal Employment Opportunity Commission ("EEOC") on various issues. The guidance could draw upon the extensive technical assistance that is currently available in the private sector and lower court case law, but which has not received the specific approval of the primary federal agency. The issues that this guidance should address with respect to learning disabilities includes the following:

1) Who is entitled to protection under the ADA and Section 504? This could seek to respond to the issues raised by the *Sutton* decision in the context of higher education.

a) Who is qualified to provide the documentation of a learning or related disability (such as ADD or ADHD)? This analysis could draw upon guidance found in the *Guckenberger* and *Bartlett* cases.

b) How current must the documentation be? Many policymakers had been relying in good faith on a "three year rule" by incorporating guidance from special education rules applicable to K-12. The *Guckenberger* case calls such reliance into question.

2) What accommodations should be provided and how is it to be determined that these accommodations are reasonable? While the *Tufts* decision provides an important framework for making these decisions, many educational institutions are questioning issues related to tutoring, allowing specialists to help students "rewrite" papers, and determining how much additional time should be provided in various settings.

3) What obligations does the student have where the learning dis-

ability is discovered after academic failure? While at least one Office for Civil Rights opinion letter indicates that the later discovered learning disability must be taken into account in a readmissions decision determination, it would be helpful to have such guidance incorporated into more widely available documents, such as regulations or regulatory guidance.

4) How should standardized test scores be used in determination qualification? Should "flagging" be permitted? Are presumptive cut-scores *per se* impermissible? This issue is receiving debate not only with respect to students with disabilities but with respect to minority students, as a result of the challenges to affirmative action. The litigation involving the NCAA seems to raise questions about absolute cutoffs for eligibility based on standardized scores, but such guidance remains unincorporated into official agency policy.

B. Emotional Impairments and Substance Abuse Impairments

Like issues relating to learning disabilities, some of these issues have been resolved in some jurisdictions by the courts. Higher education officials, however, would benefit from knowing which of these varied decisions provide appropriate guidance. The following are some of the issues requiring agency clarification:

1) When are these students protected? Courts have begun to address cases involving students with stress disorders, test anxiety, depression, and other conditions. Some guidance on when such conditions are likely to be considered disabilities would be helpful.

2) What can be asked about these conditions in the admissions process? Although Section 504 has been applicable to higher education for many years, admissions applications still ask blatantly impermissible questions. While the current model regulations already clarify that this is impermissible, some additional guidance is needed on which types of questions about past misconduct are permissible. For example, it is probably permissible for a college to ask whether a student had ever been arrested and to request information about the arrest, even if that question would result in learning that the student is an alcoholic. It would, however, be helpful if the regulations provided more clarification on these types of questions.

3) Should misconduct or behavior be excused when it is related to these impairments? Again, there are a number of cases and OCR opinions that suggest that misconduct and behavior violations need not be excused, even if they relate to a disability. The guidance related to taking the disability into account in a readmissions decision, however, might also be applicable to these situations. For example, a student

might not have been identified as having a bipolar disorder until an event of misconduct occurs. It might be appropriate for a readmission consideration to take that into account. Current federal policy does not provide clarity on whether that is required.

4) What obligations do institutions have with respect to counseling? In recent years, because of events involving violence and suicide, there have been questions raised about the obligation of an institution to provide counseling to individuals. This may not be an area where federal policy should mandate such counseling, but it is an area where knowledgeable professionals might provide guidance on how to identify students who might present a threat, how to respond to such students, and other related issues. While some of this information is beginning to be discussed at national and regional conferences, a greater focus on this issue would be valuable.

5) What is the role and responsibility of the higher education institution as related to certifying entities (such as professional licensing boards) with respect to student file information about such impairments? Student affairs professionals often face a dilemma when a student self-identifies as having emotional problems or substance abuse. Students often present these concerns because they are seeking accommodations, such as a leave of absence or a need for a reduced course-load, an exam rescheduling, or because they are seeking assistance in how to get help for these problems. In some cases, the reason for the accommodation is noted in the student record. In others, the professional administrator simply remembers that the student raised such a concern.

When a licensing agency asks the institution for information about the student's record of emotional stability or substance abuse, this creates a moral conflict for the administrator. Although some impairments might inherently raise concerns about professional competence, others do not. Because court decisions are in conflict about which of these types of questions licensing agencies can ask, it places higher education institutions in a difficult position.

While it may not be possible for federal guidance on this to be issued at this point, a greater awareness of this issue might help institutions in setting their own institutional policy. For example, student handbooks might provide notice that this type of information cannot be kept confidential. While many conferences for professionals address these issues, there appears to be an ongoing need for more technical assistance or guidance in this area.

6) What other protections with respect to student record information are needed? In addition to licensing agencies, college and university officials are often called upon to provide references or other information to prospective employers, transferee institutions, etc. Federal student

records statutes do not necessarily provide adequate protection from disclosures. Even impermissible disclosures may not entitle the injured party to an adequate remedy.

C. Auxiliary Aids and Services

1) What is the relative responsibility between state vocational rehabilitation programs and higher education institutions?

2) How does one determine the "cap" for financial costs of such services, i.e., what is undue burden?

3) In making determinations about obligations, whose budget is relevant? If the service is sought for a continuing education program sponsored by the college, is it only the continuing education budget that is relevant?

4) What are the obligations regarding programs abroad, off campus programs, and noncredit courses? These are areas where there is some technical assistance from disability advocacy organizations, but it is unclear whether this guidance reflects official federal policy.

5) When must reduced courseloads be allowed?

6) When must waivers of required courses be allowed?

7) What obligations are there with respect to credit-enrollment requirements for financial aid eligibility? How are these obligations affected by a reduced course-load as an accommodation?

D. HIV and Contagious and Infectious Diseases

1) How can the goals of nondiscrimination, avoiding threats to the health and safety of others, and protecting privacy be ensured with respect to this population?

2) What services should be provided to these students?

E. Housing

1) What is required in terms of choice of housing options?

2) How can fire and other safety concerns be assured without unduly segregating students with mobility impairments?

3) What may be charged for students using wheelchairs who request a single room?

F. Architectural Barrier Issues

While existing regulatory guidance in the ADA may answer some of these questions, a more clear reference to appropriate guidance in a separate, revised higher education regulation might be helpful.

1) Is there a need for additional guidance on unique facilities such as stadiums, etc., or are the current ADA standards sufficient for higher education?

2) What is the relationship of responsibility when private entities use public institution space (e.g., bookstores, fast food restaurants, etc.)?

3) What is the responsibility between the institution and another party hosting an event at the higher education institution?

G. Health Professional Programs

1) What do these programs need to do in terms of establishing fundamental requirements before students enroll (e.g., requiring certain sensory or mobility abilities as fundamental).

2) Are there requirements with respect to the licensing process (as discussed previously) that are unique to health care professional education programs because of heightened concerns about safety and direct threat?

H. Financial Aid

1) Must scholarship and other financial aid eligibility be adjusted for students with disabilities, i.e., must a student be enrolled as a full time student to receive scholarships and financial aid?

2) Must academic eligibility requirements for scholarships and financial aid be adjusted with respect to students with certain disabilities?

I. Distance Learning and Technology

With the increase in the use of technology in higher education, what obligations are there to make websites accessible; to ensure access to distance learning programming; and to provide information to students who do not use email, etc.?

J. Faculty Issues

In this area, it is more important that institutional policymakers begin to think through how they will handle difficult faculty issues in light of post-tenure review and the fact that there is no longer mandatory retirement.

1) What should administrators be doing to establish fundamental requirements at the appointment stage?

2) How should institutions be preparing for aging and other faculty members whose health impairments may begin affecting performance?

3) How should a disability be considered in tenure and promotion

timing requirements?

4) How should the institution address concerns regarding confidentiality and privacy in these cases?

V. CONCLUSION

Clearly Section 504 and the ADA have created more opportunities for individuals with disabilities of all types in their access to higher education programs. The number of individuals with disabilities in higher education has increased dramatically, in part as a result of special education policy. The increased employment and public accommodation requirements resulting from the ADA have provided greater opportunities for those individuals with disabilities who have had the benefits of nondiscrimination and reasonable accommodation while they were in colleges or universities.

While much law has been developed, there are areas that remain in need of attention. A review of the past quarter-of-a-century, however, should provide the basis for optimism that these issues will be addressed, and that full participation of individuals with disabilities will only continue to increase as a result of these important federal policies.