A BRIEF OVERVIEW OF SELECTED LEGAL ISSUES RELATED TO THE ADMISSION AND INSTRUCTION OF STUDENTS WITH DISABILITIES PURSUANT TO THE AMERICANS WITH DISABILITIES ACT

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A Brief Overview of Selected Legal Issues Related to the Admission and Instruction of Students with Disabilities Pursuant to the Americans With Disabilities Act

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This brief memorandum attempts to answer three questions about § 504 of the Rehabilitation Act of 1973, as amended, and the Americans With Disabilities Act of 1990: (1) Do covered institutions of higher education have an affirmative obligation to provide auxiliary aids or services to an otherwise qualified, disabled student who is admitted to a specified program of study? (2) May the institution transfer that duty to the student by requiring the student to seek out and obtain funding for such aids or services on his own? (3) Does the state have an obligation to assist the institution in funding necessary auxiliary aids or services for disabled students?

(1) It is beyond cavil that both § 504 of the Rehabilitation Act, as amended, and the Americans With Disabilities Act [hereinafter ADA] require covered institutions of higher education to provide "reasonable accommodations" for otherwise qualified students who are admitted to a specific academic program. What is sometimes misunderstood in that the statutes and regulations affect both the admissions decision, and the post-admission requirement of accommodation.

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In *Southeastern Community College v. Davis,* the United States Supreme Court reaffirmed that the issue of accommodation of an applicant is first addressed as an admissions decision. More particularly, the Court held that a covered institution of higher education is not required to fundamentally alter its curriculum in order to accommodate a disabled applicant for admission. The Court explains that § 504 of the Rehabilitation Act "does not require a (college) to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the principal benefits of the training." In other words, the college is not required to admit a student whose disability would require an accommodation that compromises *bona fide* occupational requirements of the profession to which s/he seeks entry.

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3 Thus, the Court held, in *Davis,* that a hearing-impaired nursing applicant may be denied admission, where her impairment poses an "insurmountable barrier" to her safe performance of necessary clinical and patient care functions as a nurse. More specifically, where the student could not understand speech directed to her without the aid of lip-reading, she was not "otherwise qualified" for admission to a nursing program's normal clinical training. "While personal supervision by a nursing instructor, or a waiver of the clinical requirement might have enabled the student to participate in the training program, this accommodation would have resulted in a substantial modification of an essential feature of [that program]." See *Southeastern Community College v. Davis,* 442 U.S. at 411; and see *Nathanson v. Medical College of Pennsylvania,* supra, 926 F.2d at 1383. An applicant for admission is "otherwise qualified" if such person is able to meet program requirements in spite of the handicap, without accommodation, or with reasonable accommodation. *Anderson v. University of Wisconsin,* 665 F. Supp. 1372 (W.D. Wis. 1987); aff'd 841 F.2d 737.

*Cf.* *Halasz v. University of New England,* 816 F. Supp. 37 (D.Me. 1993); [Transfer student with learning disability and Tourette's Syndrome was not "otherwise qualified" for admission to university's undergraduate program, where student scored in first percentile on test and never completed any programs in prior schools, and where university made reasonable accommodation]; *Doe v. Washington University,* 780 F.Supp. 628 (E.D. Mo. 1991) [University had discretion to dismiss HIV infected student from dental program where university had scientific evidence that infection posed direct risk to patients, even though probability of risk of transmission could not be measured. Limited standard of judicial review in academic dismissal cases requires that academic disqualification of student must be affirmed unless arbitrary]; *Doherty v. Southern College of Optometry* 659 F. Supp. 662 (W.D. Tenn. 1987), reversed on other grounds, 862 F.2d 570 (1988), *cert. den.* 493 U.S. 810 [Student with visual and neurological disabilities, who was unable to meet clinical proficiency requirements with instruments, without posing danger to patients, was not "otherwise qualified" for optometry program, where proficiency with instruments was necessary skill in practice].

Definitions which confer or deny standing under the statutes are still emerging. For example, the *Report of the Special Committee on Disability Issues for the AALS* notes, at page 10, that the term disabled has been interpreted by some courts to include clinically diagnosed depression which is permanent, but to exclude occasional episodes of stress/depression/mental exhaustion, or post-traumatic stress disorder (Nov. 1, 1990).
This accommodation issue is not to be confused with the issue of accommodation of the student who has already been determined to be qualified for admission. In *Nathanson v. Medical College of Pennsylvania*, the Third Circuit Court of Appeals upheld the admission, and the requirement of reasonable accommodation of a medical student with a partial disability resulting from back and neck injuries. Distinguishing Davis’ disqualifying disability from Nathanson’s "surmountable" barrier to medical studies, the Court stated:

"Nathanson does not typify those handicapped individuals to which the "reasonable accommodation" standard in Southeastern was directed because that standard was designed to clarify whether an individual was "otherwise qualified" for a program * * * This distinction is important because Nathanson’s case involves alleged discrimination (as) to a handicapped individual who has already been admitted to a program and deemed to be "otherwise qualified" but who requests individual accommodation in order to have (equal) access to, or to continue benefitting from the program. . . ."

Finding post-admission accommodation to be implicit in the decision to admit the applicant, the Court noted that the College need not be required to make "fundamental" or "substantial" modifications to accommodate a disabled student, but it must make reasonable ones.

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4 926 F.2d 1369 (3rd Cir. 1991).
5 926 F.2d at 1384, citing *Doherty v. Southern College of Optometry*, supra, note 3.
6 The *Nathanson* Court noted that Southeastern Community College’s decision to deny admission to Davis was particularly stringent because Davis’ disability posed a direct threat to her safe performance of clinical and patient care responsibilities. 926 F.2d at 1384; cf. *McGregor v. Louisiana State University Bd. of Supervisor*, 3 F.3d 850 (5th Cir. 1993) [Accommodating law student’s request that he be permitted to attend classes part-time, and take his final examinations at home, would involve substantial alteration of law school’s program, and were thus not required accommodations]; *Wynne v. Tufts University School of Medicine*, 976 F.2d 791 (1st Cir. 1992) [Medical school’s refusal to offer a student with cognitive defects an alternative form of multiple choice biochemistry examination was not a failure to reasonably accommodate student; school adequately substantiated academic necessity for exam format and student had successfully taken multiple choice exams in other courses. Student was not diagnosed as dyslexic and never requested an oral examination]; *Barnett by Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991), cert. den. 112 S. Ct. 175 [Centralizing "cued speech" services for handicapped high school students at a particular high school in the district did not constitute discrimination on the basis of handicap since the statute does not require substantial modification of curriculum requirements; requirement that any deaf student at any high school in district have individual interpreter would involve substantial modification of educational programs and is not required]; *But cf. Rothchild v. Grotenthaler*, 716 F. Supp. 796 (S.D.N.Y. 1989) [Deaf parents of non-impaired students are entitled to interpreter services so as to have meaningful access to school-initiated parent-teacher conferences incident to academic or disciplinary aspects of their children’s education].
This duty to accommodate clearly subsumes a duty to provide interpreters, and/or note takers, where necessary to a deaf student’s effective participation in a program of study for which s/he is otherwise qualified for admission. That is, where the deaf applicant is "otherwise qualified" for admission, under the *Davis* rationale, s/he is entitled to note takers, and/or interpreter services, if such services are a necessary auxiliary aid. Assuming, *arguendo*, that the institution cannot justify denial of admission under the "fundamental alteration" rule, or "direct threat to safe performance" rule of *Davis*, the affirmative duty to provide reasonable accommodation arises.

(2) The covered institution cannot unilaterally transfer the duty to provide reasonable accommodation to the enrolled student. In *U.S. v. Board of Trustees for U. of Ala.* the Court of Appeals for the Eleventh Circuit held that § 504 of the Rehabilitation Act, and its implementing Regulations, apply specifically to post-secondary education programs that receive or benefit from federal financial assistance. The statute and regulations provide that the covered institution "shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of . . . or . . . subjected to discrimination under the educational program or activity . . . because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills." The term "auxiliary aids" is specifically reaffirmed to include "interpreters", or other effective methods of making aurally delivered material available to students with hearing impairments.

Rejecting the argument that the providing of interpreters for deaf students is, *a fortiori*, an alteration of the University’s curriculum, the Court holds:

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7 908 F.2d 740 (11th Cir. 1990).

8 *Id.* at 744, citing 29 U.S.C., § 794 (1988), and Regulation at 34 C.F.R. §§ 104.4, 104.41–44 (1989) [A recipient, in providing any aid . . . or service, may not, on the basis of the handicap . . . deny a qualified handicapped person the opportunity to participate in or benefit from the aid . . . or service (or) afford . . . an opportunity to . . . benefit from the aid . . . or service that is not equal to that afforded to others, [or] provide a qualified handicapped person with an aid . . . or service that is not as effective as that provided to others"; *See e.g.*, McGuire v. Switzer, 734 F. Supp. 99 (S.D.N.Y. 1990).

9 *Id.* at 744, citing Regulations at 34 C.F.R. § 104.44 (1989).
"This argument ignores the fact that in some instances the lack of an auxiliary aid effectively denies a handicapped student equal access to his or her opportunity to learn . . . . A university, by offering lecture, laboratory and discussion courses, also offers a benefit to its students. Some students, by virtue of their innate intelligence, or their willingness to study, will benefit from this opportunity more than others. In the case of a deaf student, however, all access to the benefit of some courses is eliminated when no sign-language interpreter is present. In the context of a discussion class held on the third floor of a building without elevators, a deaf student with no interpreter is as effectively denied meaningful access to the class as is a wheelchair bound student . . . . [I]f the provision of interpreters when necessary would not impose an undue burden on [the institution], then it would be a reasonable (and thus required) accommodation which would allow deaf students to get some benefit from attending (the class)."10

Citing Davis, the Eleventh Circuit reaffirmed in the University of Alabama (Birmingham) case, that § 504 does not impose an obligation to engage in the affirmative preference of disabled students.11 However, the Court held, "the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons will not always be clear. Identification of those instances where refusal to accommodate the needs of a disabled person amounts to discrimination . . . continues to be an important responsibility of [HEW]. That agency's decision that the provision of interpreters is necessary to comply with the non-discrimination mandate of § 504, and does not amount to an affirmative action requirement, is a policy choice that [HEW] is empowered to make."12

The Eleventh Circuit specifically held in the University of Alabama (Birmingham) case, that the University violated § 504 when it refused to provide interpreter services to deaf students who are unable to procure such services elsewhere free of charge, and who are not eligible for financial aid for such services. UAB argued that federal regulations required only that it provide

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10 908 F.2d at 748; Cf. 42 U.S.C.A., § 12,102 [Auxiliary aids and services includes: (A) qualified interpreters or other effective means of making aurally delivered materials available to individuals with hearing impairments].

11 Neither § 504, nor the ADA imposes an "affirmative action" requirement as that term is understood to mandate a preference for affected class applicants. See University of California Regents v. Bakke, 438 U.S. 265 (1978); Steelworkers v. Weber, 443 U.S. 193 (1979), and their progeny.

12 Citing School Board of Nassau County, Fla. v. Arline, 480 U.S. 273, 279 (1987); Alexander v. Choate, 469 U.S. 287, 304 (1985), and other cases.
auxiliary aid to disabled students who were "otherwise qualified to receive financial aid". The
government argued that the history of the Regulations indicates that [HEW] intended for the
burden of providing auxiliary aids to be shouldered by the university, whether the university
obtained such services for the student through a state vocational rehabilitation service, private
charities, or the university's own funds. In formulating the Regulations, [HEW] made clear that
if state or charitable sources were unavailable, the university was responsible for providing the
auxiliary aid. The Court rejected UAB's policy of merely disseminating to deaf students
information about possible external sources for payment of auxiliary aids, including interpreters,
and itself becoming only a last resort for students who have been otherwise unable to procure
such services. In effect, the UAB decision requires at least that the university actively assist the
student in securing payment for such services.\(^{13}\)

(3) In deciding that § 504, and its implementing Regulations require the university
to provide interpreter services, where necessary,\(^{14}\) to deaf students, the Eleventh Circuit engaged
an important assumption, i.e., that the implementing regulations anticipated that universities
could and would use state vocational rehabilitation services and private charities as a means of
meeting this obligation.\(^{15}\) The Court held that the 1978 Amendments to the Rehabilitation Act
of 1973" . . . require state vocational rehabilitation centers to provide technical assistance,
including interpreters, to universities, to assist them in complying with (the Act), and
particularly the requirement of Section 504."\(^{16}\) In light of congressional awareness of [HEW's]

\(^{13}\) 908 F.2d at 746.

\(^{14}\) The Court noted that not all hearing impaired students need interpreters for all classes. Some
students can tape lectures and have volunteers transcribe the tapes. In other instances, the provision of a note
taker may be a reasonable accommodation. The university is required to provide an interpreter only where
interpretation is the only method by which the hearing impaired student will have meaningful access to a class.
908 F.2d at 749, fn. 5.

\(^{15}\) 908 F.2d at 745-6.

\(^{16}\) The Court cited Title 29, Chapter 16, § 775 (a)(2): To the maximum extent possible, (state
rehabilitation centers established pursuant to § 775) shall provide, upon request, to . . . public and private
nonprofit entities located in the area such . . . technical assistance (including support personnel such as
interpreters for individuals who are deaf) as may be necessary to assist those entities in complying with (§ 794)
of this title [the nondiscrimination provisions of the Rehabilitation Act] (as amended by Pub.L. 102-569, § 102
decision that universities should be required to provide interpreters and other auxiliary aids for deaf students, the Court held that the 1978 amendment requiring state vocational rehabilitation centers to assist "universities" in meeting this requirement, "signals Congressional approval of the policy choice made by [HEW]."^{17}

Though the Court does seem to require the university to pursue both public and private funding for interpreter services and other auxiliary aids for disabled students, the Court's holding appears clearly to reject an undifferentiated refusal by state vocational rehabilitation centers to fund interpreter, or other auxiliary aids, for disabled university students. Such refusals, as a matter of policy, are generally based upon the notion that the vocational rehabilitation center is required only to assist its client in becoming employable. If such a notion had a dispositive validity, the UAB Court would certainly not have made specific reference to the obligation of universities to provide interpreter and other services to university students, and the obligation of state vocational rehabilitation centers to assist universities in providing these services.

**State Immunity**

Of course, the question arises whether the federal regulations may require the expenditure of state funds in fulfillment of federal nondiscrimination mandates. Particularly as to institutions covered by the Americans With Disabilities act, any general defense of sovereign immunity should be rejected, as to both injunctive and monetary relief arising from a valid claim of discrimination.^{18} Moreover, it may be argued more simply, that state assistance to public and private universities in meeting federal nondiscrimination mandates is a precondition to the receipt of federal funds by state vocational rehabilitation centers.

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^{17} 908 F.2d at 745, 749. In response to comments on its initial regulations, HEW observed that, "If a deaf student is unable to obtain the services of a classroom interpreter from the vocational rehabilitation agency, the (university) is responsible for providing an interpreter, a written version of class materials, or the opportunity to pursue independent study. [It is not believed that the cost of this requirement] will be substantial as long as enforcement is done in a manner which allows flexibility in means of compliance. In publishing its final regulations, HEW acknowledged the concern of colleges and universities about cost and compliance, but emphasized that "recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. HEW repeated its prediction that the bulk of the costs of auxiliary aids would be paid by these state and private agencies, and that the regulation allowed universities significant flexibility in choosing the methods by which they would provide aids when students were unable to obtain them elsewhere."

^{18} See 42 U.S.C.A., § 12,202 (1990), providing that a state shall not be immune under the Eleventh Amendment of the U.S. Constitution from an action in State or Federal court for violation of the Act's nondiscrimination provisions. Congressional authority for such a provision is found in § 5 of the Fourteenth Amendment.