I. INTRODUCTION

Section 504 of the Rehabilitation Act of 1973 (Section 504)\(^1\) mandated that colleges and universities take action under the Americans with Disabilities Act of 1990 (ADA)\(^2\) to stop discrimination against students, staff, and faculty on the basis of their disabilities. It was not until the early 1990s, however, that disability law in the higher education context was the subject of substantial activity in the courts and by enforcement agencies. The reasons for this delayed activity probably include the entry into colleges of students who had received special education in public schools beginning in 1975,\(^3\) and the greater awareness of rights by college-age students because of the media attention surrounding the passage of the ADA. With respect to employment issues, particularly faculty issues, the increased activity probably relates to the elimination of mandatory
retirement and the need for colleges and universities with increasing budgetary constraints to find ways of belt-tightening, including the termination of unproductive and incompetent faculty.

Whatever the reasons for the increased activity in the early 1990s, there has been little indication that the use of disability law to redress grievances is dissipating. And the number of students with disabilities continues to grow. While some of the issues, such as determining the qualifications and accommodations of students with learning disabilities, remain the same, new questions have emerged in more recent years. The questions include disabled students' participation in athletics and programs abroad, and determination of fundamental aspects of programs, particularly in areas such as health care professional training programs. Students and faculty with mental health and substance abuse problems also have presented new and complex challenges for institutions of higher education.

This Article reviews the recent caselaw and enforcement activi-


5. The percentage of freshmen with disabilities has increased from 2.6% in 1978 to 9.2% in 1994. Of those college students with disabilities, the following conditions were cited: 23% with health impairments, 20% with hearing impairments, 18% with learning disabilities, 11% with sight impairments, and 7% with speech impairments. See American Council on Education, Postsecondary Students with Disabilities: Where Are They Enrolled? (Dec. 1996) [hereinafter ACE Report].


7. For a detailed discussion of this issue, see Laura F. Rothstein, Health Care Professionals with Mental and Physical Impairments: Developments in Disability Discrimination Law, 41 St. Louis L.J. (forthcoming 1997) (manuscript available from Author).

8. The focus of the Article is on developments within the last two years, but less recent developments of significance are also discussed.
ty in areas in which there has been substantial activity. It identifies trends and developments in these areas and then attempts to predict the direction that activity will follow.

II. LEARNING DISABILITIES

The number of students with learning disabilities has increased substantially in the last decade.9 While some of this growth is attributable to better preparation of students with learning disabilities for higher education, some almost certainly results from better knowledge about identifying disabilities.10

Substantial controversy surrounds whether someone has a learning disability and who is qualified to make such an assessment. Colleges and universities face a number of difficulties as a result of their admissions practices, as well as in their accommodation of enrolled students.

A. Admissions Issues

Institutions of higher education must not discriminate in admissions, recruiting, applications, testing, interviewing, or decision-making processes.11 With respect to applicants with learning disabilities, schools must proceed carefully when using standardized tests and other eligibility criteria that tend to screen out individuals with disabilities.

Virtually all standardized testing programs provide accommodations for students with learning disabilities. For that reason,
when scores received on tests taken with accommodations are not treated as having less value, institutions generally have no problem in requiring standardized test scores, particularly when such scores are not the sole basis for admission. These institutions may well be vulnerable, however, when standardized test scores are used as the sole basis for admission, scholarships, or any other benefit relating to admission, and when other factors are not considered for students with learning and other disabilities.

It is quite clear from the opinion letters of the Office for Civil Rights of the Department of Education (OCR) that programs are not required to lower standards to make admission decisions. A number of colleges and universities have been investigated as a result of complaints by applicants with learning disabilities who were not admitted. In virtually all of these cases, the institution was able to demonstrate that it did not discriminate by showing that applicants with learning disabilities had been admitted and that the academic qualifications of the rejected applicant were below those of accepted applicants.

Although neither the ADA nor Section 504 requires them, a number of institutions have developed special admission programs that allow students who do not meet the qualification requirements for regular admission an opportunity to prove they are academically
able. While preadmission inquiry about disability is generally not allowed, when admission to a special program depends on the existence of the disability, the institution is allowed to ask about this on the application and to require that the applicant provide appropriate documentation proving the disability.16 In spite of accommodation in these special programs, some students still are not able to succeed, and, in these cases, it is not a violation of nondiscrimination mandates to refuse admission into the regular program.17

Although the Office for Civil Rights has found very few violations in the admission processes for individual applicants, in the course of these investigations it has found violations of Section 504 and the ADA when institutions did not have appropriate procedures in place.18 For this reason, institutions are well-advised to review their procedures to ensure that information on how to receive accommodations is well-publicized, that a specific office or individual is identified as the point of contact for requesting accommodations, and that a grievance procedure is in place.

B. Enrolled Students

As is the case for applicants with learning disabilities who request accommodation in the admission process, enrolled students also must provide appropriate documentation of a learning disability and the specific accommodations19 required if they want special

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17. See Betts v. Rector & Visitors of the Univ. of Va., 939 F. Supp. 461 (W.D. Va. 1996) (indicating that applicant to medical school did not successfully complete special admission program and was accommodated during the program); Fruth v. New York Univ., 2 Am. Disability Cas. (BNA) 1197, 1198 (S.D.N.Y. 1993).
19. Accommodations for a student with a learning disability may include additional time for examination, reduced course loads, readers for course materials and for examinations, and assistance in manually marking exams. See Temple Univ., 8 Nat'l Disability L. Rep. ¶ 125 (Off. Civ. Rts. 1995) (no Section 504 or ADA violation when student did not seek academic modifications for economics class until well into the semester); York Technical College, 8 Nat'l Disability L. Rep. ¶ 60 (Off. Civ. Rts. 1995) (no Section 504 or ADA violation when student with hearing impairment did not formally notify the college that she needed accommodations); University of Alaska, Anchorage, 5 Nat'l Disability L. Rep. ¶ 39 (Off. Civ. Rts. 1993) (exam time extension request not justified until student provided documentation); Oregon State Univ., 5 Nat'l Disability L. Rep. ¶ 19 (Off. Civ. Rts. 1993) (Section 504 and ADA violated by failing to promptly respond to request for taped text for student with learning disability); Community College of Vt., 4 Nat'l Disability L. Rep. ¶ 406 (Off. Civ. Rts. 1993) (student with dyslexia failed to provide...
treatment. Generally speaking, the cost of the evaluation is to be paid by the applicant or student.

The issue of documentation can be controversial for a variety of reasons. These reasons include disputes over the qualifications of the evaluators, whether the evaluation is sufficiently recent, and whether the evaluation justifies the specific accommodations requested. In addition, even if the documentation justifies the need for accommodations, institutions have been fairly successful in demonstrating that certain requested accommodations are fundamental alterations of their programs, and, as such, are not required.

One area of controversy involves special programming, such as tutoring and special study preparation specifically designed for students with learning disabilities. Higher education institutions probably are not required to provide specialized programming of this type. A debate has arisen, however, with respect to at least one institution in which such programming was offered and subsequently withdrawn, thus affecting enrolled students. Legal precedent has not yet provided guidance on this issue. It may well be, however, that such cases will be resolved on the basis of contract principles, such as detrimental reliance, rather than on disability discrimination law.

documentation).


An unusual situation arose when concern existed about a student declining accommodations that had been offered. In an opinion letter following a complaint about Columbia Basin College in Washington State, the OCR found it was not a violation to require the student to confirm in writing the decision to decline accommodations. It was, however, a violation of the ADA and Section 504 to go overboard in ensuring that the student understood classroom instructions by repeatedly and publicly asking the student for reassurance that the instructions were understood.

C. Readmission

An area of increasing concern within the higher education community is the readmission of students who either did not discover the learning disability until after the academic failure or who were not appropriately accommodated while attending the program. The question is what, if any, obligation the institution has to readmit the student.

While there is little clear judicial guidance on these issues, there are some principles that may provide clarity. Programs are required to accommodate only known disabilities. This standard can create problems, however, for the student with a learning disability that may not be known, even to the student. At least one OCR opinion letter indicates that while the institution may not be required to readmit the student who discovers the learning disability after failure, it is at least required to consider this as a factor in a readmission decision.

25. See id.
26. See 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) (1996); see also Nathanson v. Medical College of Pa., 926 F.2d 1368, 1381 (3d Cir. 1991) (remanding case to determine whether medical school should have known that a back condition required reasonable accommodations).
27. See DePaul Univ., 4 Nat'l Disability L. Rep. ¶ 157 (Off. Civ. Rts. 1993). The decision in Betts v. Rector & Visitors of the University of Virginia, 939 F. Supp. 461 (W.D. Va. 1996), raises questions about whether the student was really given an appropriate opportunity under the circumstances. The student was admitted to a special program designed for economically disadvantaged and minority students. See id. at 463. His learning disability was not diagnosed until late in the second semester, after which he was provided accommodations. See id. at 464. His low first-semester grade point average made it difficult for him to reach the necessary cumulative grade point required for continuation. See id. Perhaps a more appropriate accommodation would have been to permit
When the student knows of the learning disability, however, and does not make this known and/or does not request accommodations, even if the institution knows of the disability, it probably is not required to readmit the student.\textsuperscript{28} When the institution has made accommodations, it is unlikely that it will be required to waive fundamental requirements or lower standards when the student has not met the academic achievement levels required for continuation.\textsuperscript{29}

### III. AUXILIARY AIDS AND SERVICES AND OTHER ACCOMMODATIONS

The primary issue regarding auxiliary aids and services, such as interpreters and readers, is the responsibility for payment. The Supreme Court avoided this issue when it declined to hear \textit{University of Texas v. Camenisch}.\textsuperscript{30} It is likely, however, that most colleges and universities follow the rationale applied by the Eleventh Circuit in \textit{United States v. Board of Trustees},\textsuperscript{31} in which the court determined that the institution is primarily responsible for costs of reasonable accommodations, although the door was left open if the school could demonstrate undue burden.\textsuperscript{32} In all probability, most large higher education institutions are not interested in subjecting their discretionary budgets to judicial scrutiny, so they are unlikely to raise undue financial burden as a defense.

There have been some new issues raised in recent actions related to auxiliary aids and services. One involves responsibility for accommodations and auxiliary services for foreign study. Another
area of new questions relates to programming such as externship placements. In neither area has there been substantial judicial or agency guidance. Both areas, however, are likely to be the basis for continuing attention and interest.

With respect to externships and field placements, such as those in programs for teachers and social workers, what guidance is available seems to indicate that the higher education institution is responsible for ensuring that the institution providing the field placement or supervising the externship is reasonably accommodating students with disabilities. The student, however, is responsible for giving adequate notice of the need for accommodation.

Related to this issue is whether accommodations must be provided to students taking noncredit courses or to members of the public who attend lectures and programming. It is probable that the institution must provide reasonable accommodations because these are programs and activities that it offers. What is less clear is whether the budget for that program alone will be the basis for determining undue financial burden, or whether the entire budget for the department, college, or institution providing the program is relevant.

IV. ARCHITECTURAL BARRIERS

While few students in higher education have challenged accessibility and sought to eliminate architectural and other physical barriers at athletic, social, and other special events, quite a bit of

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34. See University of Cal., L.A., 8 Nat'l Disability L. Rep. ¶ 314 (Off. Civ. Rts. 1996) (student with learning disability did not provide adequate notice of need for accommodations for field placement work in social work program; no ADA or Section 504 violation).

attention has been focused on this issue by complainants seeking accessibility in public sports arenas and a stadium at a public high school. Perhaps these challenges are a precursor to greater attention by complainants to this issue in the higher education setting. The lack of activity in this area, however, may be a result of the fact that colleges and universities were required to do a self-evaluation under Section 504 of the Rehabilitation Act and may have removed barriers, at least on some campuses.

V. MENTAL AND SUBSTANCE ABUSE IMPAIRMENTS

Issues related to students, staff, and faculty with mental and substance abuse impairments present unique problems for institutions of higher education. These institutions must balance concerns about confidentiality and privacy with concerns about competency and direct threat to self or others, all within the context of disability discrimination law.

Institutions understandably want to prevent dangerous individuals from harming others at the institution and to prevent individuals whose behavior is disruptive from interfering with the educational process for everyone. Care must be taken, however, when making assumptions about individuals with mental health histories or with substance abuse problems.

In avoiding myths and stereotypes about individuals with mental and substance abuse problems, colleges and universities should be careful about asking questions about mental health or substance abuse status in admission or employment applications. It is per-

36. Lawsuits were filed in April 1996 against new sports arenas in Philadelphia and Buffalo. See 8 Disability Compl. Bull. 8 (May 23, 1996).

37. Although not in the higher education context, an interesting case highlighting this issue is Bechtel v. East Pennsylvania School District, 3 Am. Disability Cas. (BNA) 200, 201 (E.D. Pa. 1994). A student in a wheelchair sought barrier removal because he was unable to attend athletic events at the stadium. See id. The court denied the school's motion to dismiss the ADA Title II claim challenging the lack of access. See id. at 202.

38. See 34 C.F.R. § 104.6(c) (1996). In addition, Title II entities are to conduct self-evaluations. See 28 C.F.R. § 35.105(a) (1996).

39. See 34 C.F.R. § 104.42(c) (1996). In Gardiner v. Mercyhurst College, 942 F. Supp. 1050, 1051–52 (W.D. Pa. 1995), a student in a campus police training program was terminated from the program based on a personality test and a psychological review. The court found that although he had received psychiatric treatment in the past, he had personality traits of immaturity and emotional stress that were incompatible with police
work, but which did not define him as protected under the Rehabilitation Act. See id. at 1053.


43. The court in Clark v. Virginia Board of Bar Examiners, 880 F. Supp. 430, 431 (E.D. Va. 1994), struck down a question asking whether an applicant had “been treated or counselled for any mental, emotional, or nervous disorder[s]” within the past five years. The decision includes an extensive listing of judicial decisions in other jurisdictions that address this issue. See id. passim; see also Gardiner v. Mercyhurst College, 942 F. Supp. 1050 (W.D. Pa. 1995).


45. See Linson v. Trustees of Univ. of Pa., 8 Nat’l Disability L. Rep. ¶ 299 (E.D. Pa. 1996) (University of Pennsylvania did not perceive former graduate student as having mental disability although counseling was suggested by university officials because of unusual behavior); Dixie College, 8 Nat’l Disability L. Rep. ¶ 31 (Off. Civ. Rts. 1995) (no violation of the ADA or Section 504 in expelling a student because of stalking and harassing a professor; student was expelled because of threat, not perceived mental disability); Northern Mich. Univ., 7 Nat’l Disability L. Rep. ¶ 244 (Off. Civ. Rts. 1995) (no violation to place observers in classroom of student with Tourette’s syndrome to evaluate...
Excusing behavior and conduct that relates to mental or substance abuse impairments is an area of much concern. These issues arise when a student, staff, or faculty member is expelled, disciplined, or terminated, and then it is learned that the individual had a mental or substance abuse impairment that caused the behavior that was the basis of the adverse action. Like a learning disability that is unknown to the individual, it is not unlikely that an individual may not know that he or she has a mental illness that causes erratic behavior. Even if the condition is known, individuals are understandably reluctant to ask for accommodations for mental illness or for substance abuse impairments because of the stigma attached to these conditions. Even if the condition is known, the need for accommodations or the types of appropriate accommodations may be unknown to the individual.

There has been some guidance on whether second chances should be given to students, staff, and faculty with mental or substance abuse problems in the higher education context. What this guidance, as well as guidance from cases arising in other contexts, seems to indicate, is that in most instances the institution will not be required to excuse the inappropriate behavior or deficient performance. Perhaps the guidance from the OCR opinion involving a student who discovered a learning disability after dismissal would be appropriate to consider in this context. While the college or university should not be required to excuse the misconduct or academic failure or other deficiency, the disability and its relationship to the deficiency, as well as other factors such as the harm or potential harm and the type of conduct at issue, should all be factors that the

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47. Gill v. Franklin Pierce Law Ctr., 899 F. Supp. 850, 855–56 (D.N.H. 1995) (law student not otherwise qualified; law school is not on notice of need for accommodations for the condition of post-traumatic stress disorder simply because student indicated on his application form that his parents were alcoholics).

VI. ATHLETICS

Until recently, the area of participation in college athletics has not been an issue of substantial debate as a disability discrimination issue. Several recent issues, however, have received significant attention not only in the courts, but also in the national media. These issues are the disparate impact of NCAA eligibility rules and the eligibility of college athletes to participate in sports when they have significant medical or similar impairments. Both issues remain somewhat unresolved because of ongoing litigation.

Two courts have addressed NCAA eligibility requirements and their impact on students with learning disabilities. The court in Ganden v. NCAA, 50 addressed a challenge by a swimmer who argued that the NCAA “core course” requirement 51 violates Title III of the ADA. 52 The court denied the motion for a preliminary injunction. 53 Significant to its ruling is the court's indication that Ganden probably would not be able to prove that the accommodations he requested were reasonable. 54 The modifications requested were substituting remedial typing and computer courses, both as core course substitutions and as a means to raise the student's GPA, and lowering the minimum GPA for eligibility. 55 This opinion seems to support the general deference given to institutions in setting academic requirements. It further supports the notion that institutions are not required to fundamentally alter programs, in this case the privilege of participating in intercollegiate swimming. Of significance, however, is that the court indicated that the NCAA may be required to consider factors other than core course requirements for students

49. For a comprehensive discussion of this issue, see Laura F. 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).
51. See id. at *2. The student must take 13 core courses and earn a minimum grade point average. See id.
52. See id. at *5.
53. See id. at *17.
54. See id. at *15.
with learning disabilities, and that such determination should be individualized.\textsuperscript{56}

\textit{Butler v. NCAA}\textsuperscript{57} involved a student with a learning disability seeking eligibility to play intercollegiate football. The district court issued a preliminary injunction allowing him to play, focusing on the irreparable harm, although indicating that ultimate proof of a violation may be difficult.\textsuperscript{58}

These decisions are not necessarily inconsistent, for both courts may ultimately uphold the eligibility requirements. Perhaps the discrepancy between the cases is explained through the impact on the student. In \textit{Ganden}, the swimmer had been given partial qualifier status.\textsuperscript{59} In \textit{Butler}, it appeared probable that the student would lose the scholarship and quit school.\textsuperscript{60}

The cases raise the important issue of eligibility criteria for participation in higher education programs. The guidance from these cases indicates that institutions should be prepared to justify their eligibility requirements, but also should develop procedures for making individualized determinations in exceptional cases.

Generally speaking, when a high school athlete with a serious medical condition seeks to participate in sports, the courts have determined that the student is not able to fully appreciate the seriousness of the risk and therefore, the court will not allow the student to waive liability for injuries that might occur if participation is allowed.\textsuperscript{61} In the college setting, however, courts have been much more likely to allow the athlete to waive liability and to participate.\textsuperscript{62} Two recent college cases, however, were decided differently.

In \textit{Pahulu v. University of Kansas},\textsuperscript{63} the student wanted to participate in intercollegiate football although he had a condition that

\begin{itemize}
  \item \textsuperscript{56} See id. at *16.
  \item \textsuperscript{57} See Percy Allen, \textit{UW's Butler Allowed to Finish Season}, SEATTLE TIMES, Nov. 9, 1996, at B2 (discussing \textit{Butler v. NCAA}, which is pending before Judge Carolyn Dimmick of the United States District Court for the Western District of Washington).
  \item \textsuperscript{58} See id.
  \item \textsuperscript{59} \textit{Ganden}, 1996 WL 68000, at *5.
  \item \textsuperscript{60} See Allen, supra note 57.
  \item \textsuperscript{62} See Wright v. Columbia Univ., 520 F. Supp. 789, 793 (E.D. Pa. 1981) (prohibiting denial of participation in intercollegiate football because of blindness in one eye); Evans v. Looney, No. 77-6052-(CV-SJ), slip op. (W.D. Mo. 1977) (prohibiting college from precluding students with vision in only one eye from playing football).
  \item \textsuperscript{63} 897 F. Supp. 1387 (D. Kan. 1995).
\end{itemize}
created a high risk for permanent and severe neurological injury if he played.64 The court ruled that this high risk rendered him unqualified to participate.65 The university did not violate discrimination law by refusing to allow him to participate.66

Similarly, in Knapp v. Northwestern University,67 the court held that the university did not violate Section 50468 by refusing to allow a player with a heart ailment to participate in intercollegiate basketball.69 The lower court held that Knapp should be allowed to determine for himself whether to take the risk.70 Knapp had an internal heart defibrillator, which was implanted following heart failure at a pickup game. This incident occurred before he enrolled at Northwestern, but after he was offered a basketball scholarship.71 Although Northwestern made good on its scholarship offer, the university refused to allow him to play because of concerns about his medical condition.72 While the court's decision that Section 504 had not been violated may be correct in light of legitimate potential liability concerns,73 the decision should be criticized for its holding that he was not even disabled within the definition of the statute.74 For an individual to be covered, there must be a substantial impairment to one or more major life activities.75 The court held that playing intercollegiate basketball is not a major life activity, so Knapp was not protected by the statute.76 This decision represents an unfortunate rationale applied by a number of courts that fail to read the statute’s definition liberally.

These cases illustrate the tension frequently faced in higher
education and the difficulty in balancing legitimate concerns and interests. The student athletes certainly should be given opportunities to participate in intercollegiate athletics on a nondiscriminatory basis, particularly when such participation may affect scholarships, access to education, and even later employment. Legitimate concerns about fairness and academic integrity when the individual is not academically qualified and about protecting against injury must be balanced against these other interests in participation.

VII. HEALTH PROFESSIONAL PROGRAMMING

For colleges and universities with medical schools, nursing schools, or other health care professional programming, some unique issues arise. These issues include whether specific physical attributes are essential to qualification for participation in the educational programming, and the role of the educational program in certifying the individual as fit for the profession.77

The most highly publicized recent case on this issue is Ohio Civil Rights Commission v. Case Western Reserve University Medical School.78 The case involved an applicant to medical school who was blind.79 The medical school found that it would be a fundamental alteration to the program to accommodate her upon admission80 and found that she was not otherwise qualified.81 After a lengthy legal challenge, the Ohio Supreme Court ultimately agreed and found no violation of the ADA in the denial of her admission.82

Other cases involving physical attributes have reached similar conclusions.83 Recent federal court decisions have concluded that a nurse with a back injury who was unable to lift need not be reassigned to accommodate her lifting restrictions84 and that a nurse with a leg injury was not qualified because the physical aspects of

77. For a more detailed discussion of this issue, see Rothstein, supra note 7.
78. 666 N.E.2d 1376 (Ohio 1996).
79. See id. at 1379.
80. See id. at 1386.
81. See id.
82. See id. at 1388.
84. See Stafford, 908 F. Supp. at 1376.
Learning disabilities and mental impairments and their effect on performance in medical school have been the subject of debate in recent decisions. In *Betts v. Rector & Visitors of the University of Virginia*, an applicant to medical school did not successfully complete the special admission program. His learning disability was accommodated during the program, and the court thus held that it did not violate the ADA or Section 504 to refuse to admit him because he was not academically qualified.

The case of *Lewin v. Medical College*, is perhaps even more significant because it involved a student who had been admitted into the regular medical school program, but who was ultimately dismissed. His dismissal did not violate Section 504 because the institution was able to show that he had substantial academic and clinical performance weaknesses. This demonstration was based on several evaluations, including observation of clinical sessions. In addition, absences and a weak knowledge base contributed to his unacceptable level of performance.

A number of cases have involved substance abuse problems and the effect these have on health care professionals. These cases are significant to institutions of higher education because such institutions may have to certify fitness to state licensing boards. The recent cases generally are decided in favor of the institution that adversely treats health care professionals who have substance abuse or mental health problems that would affect patient safety.

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85. See Zevator, 7 Nat’l Disability L. Rep. at ¶ 255.
87. See id. at 464.
88. See id. at 468.
90. See id. at 1163.
91. See id. at 1171–72.
92. See id.
93. See id.
94. See Altman v New York City Health & Hosps. Corp., 6 Am. Disability Cas. 73, 77 (2d Cir. 1996) (physician with alcohol problems posed direct threat to patients); Judice v. Hospital Serv. Dist. No. 1, 919 F. Supp. 978, 979–81, 985 (E.D. La. 1996) (physician who had relapses after treatment for alcoholism was not otherwise qualified for staff privilege reinstatement); Alexander v. Margolis, 921 F. Supp. 482, 488–89 (W.D. Mich. 1995) (doctor whose license was suspended for distributing illegal drugs was not qualified because of criminal activities even if they related to his bipolar disorder); Sherman v. State, 905 P.2d 355, 360 (Wash. 1995) (physician terminated from university hospital for chemical dependency); Moran v. Chassin, 638 N.Y.S.2d 835, 836–37 (App.
Common themes in these cases are that individualized determinations usually are required and the burden is on the institution to justify why accommodations cannot be provided. When direct threat is involved, however, substantial deference is given to health care professional programs.

VIII. FACULTY ISSUES

For many jobs, colleges and universities do not provide particularly unique issues with respect to employment. Issues relating to clerical staff, custodial staff, and similar jobs do not generally involve unusual issues simply because the individual is employed by a college or university.

For faculty members, however, there are some particularly interesting issues. There are several reasons for this. These reasons include the fact that job requirements of faculty members and non-performance of these requirements may be much more difficult to define than many other types of employment positions. In addition, higher education was given a longer time than most employers to eliminate mandatory retirement requirements. It is only in very recent years that colleges and universities, faced with ever tightening fiscal constraints, are no longer able to absorb dead wood and incompetent faculty. For that reason, many institutions are less willing to tolerate inadequate performance. When adverse employment treatment results, faculty members are increasingly turning to nondiscrimination prohibitions, including disability discrimination law, to challenge the actions of the institutions.

A number of interesting cases have resulted. The factual settings are too disparate to draw too many conclusions, but there are

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95. See Marc L. Kesselman, Putting the Professor to Bed: Mandatory Retirement of Tenured University Faculty in the United States and Canada, 17 COMP. LAB. L.J. 206, 232 (1995).


97. See, e.g., Fisher v. Vassar College, 70 F.3d 1420 (2d Cir. 1996) (holding that the district court's finding of discrimination against married, female professor was clearly erroneous), aff'd en banc, 114 F.3d 1332 (2d Cir. 1997); Pullins v. New Sch. for Soc. Research, 929 F. Supp. 584 (S.D.N.Y. 1993) (denying injunction in part because of the mandatory retirement exemption under the ADEA).
some identifiable trends in these cases.

One area of cases involves alcohol and substance abuse. Where the adverse employment treatment is because of conduct or behavior, courts will generally uphold the institution, even where the behavior relates to alcohol or drug use.98 The most important case on this issue is *Maddox v. University of Tennessee.*99 The case involved a football coach who was discharged because of his egregious and criminal conduct while driving under the influence of alcohol.100 The court upheld the dismissal, finding that his dismissal was based on conduct, not on his alcoholism.101 The court also noted the significance of role modeling in a coaching position as a factor in whether his conduct made him unqualified.102 The case is particularly significant because the misconduct occurred off the job.103 A similar result was reached in the case of *Curtis v. University of Houston.*104 In that case a sociology professor claimed that he had been denied a promotion because of his former alcoholism.105 The court found that his history of nonperformance was the basis for the university's action, and there was no violation of the ADA or the Rehabilitation Act in this instance.106

A number of cases have involved a variety of health and physical problems in faculty and professional staff on campuses. The cases demonstrate many of the typical issues of employment discrimination cases where disability is involved, including whether the condition is even a disability and whether the performance problems render the individual unqualified or whether accommodations can be provided.107

98. See, e.g., *Maddox v. University of Tenn.*, 62 F.3d 843 (6th Cir. 1995); *Curtis v. University of Houston*, 940 F. Supp. 1070 (S.D. Tex. 1996); see also *McDaniel v. Mississippi Baptist Med. Ctr.*, 877 F. Supp. 321, 326 (finding the employee not qualified when the employee was fired during relapse because he had not been in recovery long enough to become stable).

99. 62 F.3d 843 (6th Cir. 1995).
100. *See Maddox*, 62 F.3d at 844.
101. *See id.* at 848.
102. *See id.* at 849.
103. *See id.* at 845.
105. *See id.* at 1080.
106. *See id.*
107. *See Horton v. Board of Trustees*, 8 Nat'l Disability L. Rep. ¶ 89 (N.D. Ill. 1996) (community college professor who did not return to work after several absences due to chronic muscular headaches and stress was not qualified to perform the essential func-
One recent case involved a faculty member who had been hired only for teaching responsibilities.\textsuperscript{108} When he was terminated for behavior that included sexual harassment, sexual assault, and violation of campus policies on serving alcohol to underage students, he claimed that his behavior was a result of a psychological disorder causing “disinhibition.”\textsuperscript{109} Not only did the court reject this as a justification for his actions, but also found that the accommodations he requested, removing all teaching responsibilities, was not reasonable.\textsuperscript{110} Teaching is an essential function of the position.\textsuperscript{111}

These issues may be particularly problematic, however, for higher education faculty situations because there may be requests for deferment of tenure decisions, promotion discrimination claims, and other disparate treatment claims that are not readily addressed by other employment law cases where the job requirements are more clearly defined.

\textbf{IX. SUMMARY AND CONCLUSIONS}

In 1986, the Author, in an early article on disability discrimination in higher education,\textsuperscript{112} suggested a number of steps to prepare university counsel to meet the challenges of disability rights issues in the context of higher education. Because of the continued activity in the area of disability discrimination in higher education, these suggestions are still valid a decade later and could be applied and adapted by university counsel as well as administrators responsi-
sible for issues including admissions, student services, campus access, housing, personnel, and other areas.

These suggestions include the following:113

1) Keep current on judicial developments in this area. There is a growing body of case law. In addition, opinion letters from the Office for Civil Rights provide valuable guidance on a variety of issues.

2) Remember that it is not only students, staff, and faculty who are protected from discrimination. Events held for the public, such as commencement and continuing education programs, are subject to the nondiscrimination requirements as well. Services provided to the public, such as medical care and legal aid, are also covered by the nondiscrimination mandates.

3) Ensure that a good relationship exists with appropriate experts either on campus or as consultants. Individuals with expertise in barrier removal, providing auxiliary aids and service, and evaluating documentation of disabilities may need to be consulted on regular or sporadic bases. Establishing a system for such consultation is essential.

4) Involve individuals with disabilities and those with sensitivity to and expertise regarding disability issues in planning for access and accommodation, as well as in resolving grievances.

5) Ensure that a system for responding to requests for accommodations and for resolving grievances is in place, is “user friendly,” and is communicated clearly and regularly to students, staff, faculty, and the relevant public audiences.

In addition, institutions would do well to establish fundamental requirements of the program for students, staff, and faculty. They should also document incidents of inadequate performance and misconduct. This information will be essential to demonstrating that an individual is not otherwise qualified.

It is as true today as it was in 1986 that good faith cannot preclude litigation,114 but it is likely to prevent a significant amount and it is likely to result in favorable outcomes when legal challenges

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113. These suggestions are adapted from those included in the 1986 article. See id. at 262–63.
114. See id. at 263.
occur.