

**ACCOMMODATING LEARNING
DISABLED COLLEGE STUDENTS:
STANDARDS OF JUDICIAL REVIEW**

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By Shelley Sanders Kehl

***SESSION TOPIC: CURRENT DISABILITY
LAW ISSUES AFFECTING THE
ADMISSION AND INSTRUCTION OF STUDENTS.***

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INTRODUCTION

The passage of the landmark civil rights law, The Americans with Disabilities Act of 1990, 42 U.S.C. §12101 (the “ADA”), which prohibits discrimination on the basis of an individual’s disability, resulted in widespread changes in many spheres of American business and life. However, for higher education, the ADA was essentially an extension of legal obligations which first arose with the enactment of the Rehabilitation Act of 1973, 29 U.S.C. §794 (commonly known as “Section 504”).

Following the promulgation of federal guidelines implementing Section 504 in the late 1970’s, colleges and universities took steps to fulfill the federal mandate to accommodate qualified disabled students interested in obtaining college educations. The effort during the 1980’s was modest, consisting primarily of specific responses to requests from a few individual students for a variety of accommodations. By the early 1990’s, a substantially increasing number of students were seeking accommodations from colleges and universities, and the nature of the impairments identified and assistance sought was similarly diversifying. Much of the increased activity was attributed to the legislative activity surrounding the passage of the ADA and the maturing of advocacy groups for the disabled, but these were only part of the reason for the steady increase.

Although §504 and the ADA have contributed significantly to the presence of disabled students on college campuses today, the real growth in the disabled student population in higher education is more directly a factor of another piece of federal legislation, the Education of All Handicapped Children Act of 1975, 20 U.S.C. §1400 (the “EHA”), reenacted with some modifications in 1991 under the name the Individuals with Disabilities Education Act (the “IDEA”). This legislation essentially provided that all children were entitled to a free,

appropriate public education regardless of disabling conditions, thereby opening the door to full K-12 public education services for a majority of disabled children. The law required public schools to develop procedures for identifying and assessing handicapped children, and to design for each disabled child an individualized education plan which would permit the student to achieve his or her reasonable educational potential.

As a result of the EHA, many students with a variety of impairments, who might otherwise not have sought full participation in public school programs, were able to progress through the public schools and successfully complete high school, thus placing them at the doors of college admissions offices alongside their non-disabled peers. The arrival in the 1990's of college-ready disabled students does not merely represent an increased readiness for college, but is accompanied by an expectation -- nurtured by years of public school services and accommodations -- that the institutions of higher education also will provide a broad range of gratis accommodating services to enable disabled students to progress through college.

The number of students who could be requesting such services are not modest. Some educators estimate that 7 to 12% of the public school population qualifies as needing special education services. The New York State Regents study on the needs of the disabled reported that more than 20,000 students identified themselves as disabled to institutions of higher education in New York State in Fall 1991.¹ And since that figure represents only the number of students who affirmatively chose to identify themselves, the actual figure for disabled students would include a potentially significant number of others who have not identified themselves and have not sought supportive services.

Increasing numbers alone, however, are not the full story: for among the growing population of disabled students arriving on campus, it is of particular significance that the

category of students who are classified as learning disabled (as opposed to being physically impaired) is estimated to be the largest category of all the handicapping conditions.² Coping effectively with this increasing population of learning disabled is emerging as a complex and often daunting issue both for individual faculty and administrators. To the extent that colleges have been adjusting to the special problems of disabled students, it was not inherently difficult to understand and respond to the needs of a wheelchair-bound student with ramps and curb cuts, or to the needs of visually impaired individuals by providing readers or computers. In contrast, assessing the impairment of a learning disabled student and fashioning an appropriate accommodation has been far more difficult and controversial.

Whatever the reason for the increased focus on accommodating learning disabled students -- whether the difficulty is in identifying an impairment and in devising an accommodation, or the "invisible" nature of the handicapping condition (which sometimes fosters a sense of suspicion, or doubt about fairness to non-disabled students) -- an organized and systematic approach is required for a college to satisfy the mandates of the law while preserving the integrity of its academic program. In addressing the needs of learning disabled students, colleges will not be able to utilize "formula" solutions, but will have to take an individualized approach to each student's request for accommodation.

"DEFINING" THE LEARNING DISABLED COLLEGE STUDENT

Section 504 and the ADA explicitly identify learning disabilities (as well as emotional and mental illness) as falling within the covered definition of "mental impairment" which is protected by law. 34 C.F.R. §§104.3(j)(2)(i)(B); 28 C.F.R. §36.104(1)(ii). However, for a definition of specific learning disabilities, the Appendix to Section 504's regulations

incorporates by reference the definition of learning disabilities contained in the IDEA, which defines a learning disabled student as one with:

“a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. Such disorders include such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. Such terms do not include children who have learning problems which are primarily the result of visual, hearing or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural or economic disadvantage.”
20 U.S.C. §1401(a)(15).³

This “comprehensive” federal definition highlights both the broad reach of the concept of learning disabilities and the difficulty which colleges often face in identifying impairments and appropriate accommodation. As noted by one commentator, different professional disciplines have adopted different terms for categorizing learning disabilities; therefore, while educators discuss learning disabilities, psychologists speak of perceptual disorders, speech/language professionals use aphasia and dyslexia, and medical specialists label the same conditions as brain damage, minimal brain dysfunction or brain injury.⁴ These varied labels are more than merely semantic distinctions by different disciplines involved in the diagnostic evaluations of learning disabled students: they also often result in different assessments as to the root cause for an impairment, and in different courses of treatment to remedy the impairment. This complication in fashioning educational programs for learning disabled students is eloquently described by Dr. Melvin Levine in his excellent volume on developmental variations in children; he wrote that in his experience the assessment and treatment of a student with learning difficulties was far too dependent on the specialized training of the individual who evaluated the student.⁵

What thus emerges from the IDEA statutory definition is that learning disability is, in fact, for many a generic term used to cover a group of disorders which result in significant difficulty in

handling certain basic functions.⁶ Accordingly, when we speak of learning disabled college students, we are speaking about a wide range of cognitive impairments which may require carefully coordinated accommodations. The commonly accepted accommodations frequently mentioned as responses for learning disabled students, such as untimed tests or oral exams, may be the most likely requested, but such accommodations may not be responsive to, appropriate to, or required by the individual's impairment.⁷

With such an elusive definitional underpinning, an obvious first step is that an institution must have an established procedure for assessing the needs of learning disabled students; and must make an individualized judgment about each student's impairment, how it affects the student's ability to handle the requirements of the particular program, and what accommodations are appropriate for balancing the student's impairment. Once an institution has reliable data on the impairment and the requested accommodation, it must determine as a second step whether the requested accommodation would result in a substantial modification of its program which is beyond the requirements of the law.

HOW COURTS ASSESS ACCOMMODATIONS FOR LEARNING DISABLED STUDENTS

In view of the expansive scope of government regulations implementing the laws which protect disabled students, guidance on what will be deemed acceptable accommodations, and which denials of requested accommodations will be sustained, is crucial. Court rulings, and agency determinations, offer some parameters, but the limited number of reported decisions, particularly dealing with learning disabled students, means that most issues remain unanswered. Some basic guidance does emerge from an examination of how the courts have been reviewing higher education's treatment of learning disabled students.

Argen v. New York State Board of Law Examiners, 860 F.Supp. 84 (W.D.N.Y., 1994) is a careful presentation of standards that a court will apply in reviewing a denial of accommodations requested by a learning disabled student. Mr. Argen, who had completed college and graduate degrees, was a 1993 graduate of Buffalo Law School. That year he brought suit against the New York State Board of Law Examiners (the "Board"), the state entity which administers the professional licensing exam required for admission to practice law in New York, for accommodations on administration of the exam for him; including extra time and a separate room. At the time Mr. Argen had first applied to law school, an evaluation by Dr. Ronald Schworm, a Ph.D. in special education, identified Mr. Argen as having language processing problems, a learning disability. Dr. Schworm, who was not a licensed psychologist and was not authorized to conduct psychological testing, recommended that Mr. Argen receive double time for taking tests, and that tests be given in a separate room. Both of these accommodations were granted to Mr. Argen for taking the Law School Admissions Test and, the law school later permitted Mr. Argen double time for law school exams and the use of a computer for essay questions. Mr. Argen also was granted double time for taking a multi-state portion of the State's licensing exam for lawyers.

When Mr. Argen was preparing to take the New York State Bar Examination, he requested that the Board grant him double time and a separate room for taking the July 1993 exam. His request, along with the supporting materials he submitted, were referred to Dr. Vellutino, a psychologist and professor at the State University, who has a number of academic appointments and is director of the Child Research Study Center. Since 1987, Dr. Vellutino had been evaluating requests for accommodations on the New York State Bar Examination due to reading disabilities and had approved approximately 25% of the requests which he received.

After reviewing the data submitted, Dr. Vellutino recommended that the Board deny plaintiff's request for accommodations, and the Board so notified Mr. Argen. Mr. Argen commenced his lawsuit against the Board shortly thereafter, and he subsequently was permitted to take the bar exam with the requested accommodations, but with a stipulated agreement that if he passed the exam he would be certified to the court for admission only if he won his lawsuit. He did pass the exam, and in his lawsuit he sought an order to certify his passing score.

At trial Mr. Argen testified that he felt he had learning problems throughout school and college, that his grades did not match his abilities, and that he did poorly on timed exams. During college he was on academic probation. As a graduate student he worked on learning techniques to compensate for his learning problems. He first contacted Dr. Schworm because of low scores on early attempts at the Law School Admission Test. He believed that his subsequent improved LSAT score and his ability to pass law school exams was due to the special accommodations granted him. He took the position that the bar exam is a difficult timed exam and that it was thus especially important that he receive special accommodations.

Mr. Argen's first witnesses, Dr. Schworm, testified about the tests he had given Mr. Argen in 1989, which indicated language processing problems. The second witness, Dr. Langen, a licensed psychologist and clinician, evaluated the plaintiff in January 1994 using various well known testing instruments. His conclusion was that Mr. Argen had difficulty with spatial relationships which interfered with his reading comprehension, and that he had a right-hemispheric learning disability.

Dr. Vellutino, testifying for the State Board, opined that the materials submitted did not support a finding of language learning disability. He believed that the scores on the tests administered by Dr. Schworm were largely in the average or above average range and that the

reported scores were not consistent with a learning disability related to reading. Dr. Vellutino further testified that standardized tests administered as part of the trial preparation confirmed no language-based learning disability in the plaintiff.

In the court's analysis in *Argen*, the threshold question was whether Mr. Argen had presented sufficient evidence to support the conclusion that he was a "qualified individual" with a special learning disability. The court believed that if the plaintiff met the burden of proving by a preponderance of the evidence that he suffered from a specific learning disability, he was entitled to the special accommodations he requested: double time on the exam in a quiet room.

The court, however, accepted the testimony of Dr. Vellutino, the witness for the Board, as more credible and within the mainstream of scientific analysis in the field. The court rejected the testimony of the plaintiff's expert witnesses, noting that their testimony conflicted in important respects. In rejecting Dr. Schworm's testimony, the court concluded that certain of his tests were not nationally normed, that the test results did not sustain a conclusion of learning disability since many of the results were within the normal range, and that Dr. Schworm could not define with any reasonable precision how he distinguished between low intelligence or low reading achievement and a specific learning disability. Neither could he demonstrate that the results he relied on were generally accepted in the scientific community as a reliable basis for establishing the type of learning disability which he had identified.

Dr. Langen's testimony contradicted Dr. Schworm's finding, the court held, because he found weakness in non-verbal areas such as visualization and spatial relationships, but not in verbal areas. The court also found it significant that Dr. Langen never offered proof that there was a correlation between decreased spatial ability and poor reading.

The court was also unwilling to conclude that, because Mr. Argen did better on the LSAT when granted special accommodations, the mere disparity in test scores compelled the conclusion that Mr. Argen was learning disabled. The court observed that disparate test scores could also be the result of, for example, stress or lack of motivation; and that Mr. Argen's argument, if accepted, would compel the court to conclude, that as a matter of law, any underachiever would by definition be learning disabled.⁸

Dr. Vellutino offered as evidence test scores for Mr. Argen on widely-used, well-established test instruments that correlated closely with reading ability and were normal for an adult population. Mr. Argen's scores on these tests did not support a conclusion that he had a language disability. Dr. Vellutino did concede that experts differed on the underlying causes of learning disabilities, but that they did concur that to demonstrate reading disabilities one would score below average on reading tests.

In finding for the Board of Law Examiners, the court concluded that in evaluating whether plaintiff had met his burden of proving that he was a "qualified individual" with a disability, it preferred the State's generally-accepted objective standard for defining learning disabilities to the undefined and unquantified standards proposed by the plaintiff's expert witnesses.

Some points of significance which can be drawn from *Argen* are as follows:

1. the student has the burden of establishing one's status as a "qualified individual with a disability";
2. when dealing with identification of learning disabilities, the student must present objective standards which are generally accepted in the scientific community, and test measurements related to the claimed impairment;

3. the institution has the authority to evaluate both the underlying data presented by a student to support the claim of impairment and the accommodation sought;

4. the courts are unwilling to entertain a presumption that poor academic achievement, which shows improvement when special accommodations are granted, should ipso facto be categorized as a learning disability, absent objective evidence of the impairment.

An earlier case dealing with similar issues was decided in the same fashion by a federal court in Virginia. *Pandazides v. Virginia Board of Education*, 804 F.Supp. 794 (E.D. Va. 1992), rev'd and remanded, 13 F. 3d 823 (4th Cir. 1994) (on issue of right to a jury trial). In *Pandazides*, a teacher who failed the National Teachers Examination after eight attempts contended that she had a learning disability (a weakness in her auditory process) which caused her problems with the communications skills section of the exam.

Virginia had earlier prescribed the National Teachers Examination, administered by the Educational Testing Service, as the professional teacher's examination pre-requisite to certification for a teacher in the state. Ms. Pandazides, a special education teacher, was unable to pass the NTE. After repeated failures, she requested exemption from the communication skills section of the NTE, citing "a subtle learning disability." She provided as documentation a one-sentence letter from her doctor stating that she suffered from test anxiety and should be exempt from the specific portion of the NTE. A letter from her college dean also referred to test anxiety and a suspected learning disability. Virginia denied the request to waive the NTE requirement and Ms. Pandazides requested accommodation from ETS for the NTE.

Ms. Pandazides submitted a letter to ETS from a doctor, identifying her learning disability as an auditory processing disability, and ETS granted special arrangements, including additional

time, a script of the test tape, a slower version of the tape, and a copy of the exam in regular type. In addition, she was permitted to take the test in a separate room. Plaintiff failed the test despite the accommodations.

After additional evaluation by another doctor, who concluded that Ms. Pandazides had a learning disability associated with auditory attention, the integration of auditory-visual information and expressive language, further accommodations were requested. The plaintiff asked for a completely untimed exam and the ability to “interact” with the test examiner. These requests were denied by ETS.

The Virginia District Court, in deciding the case, concluded that Ms. Pandazides bore the burden of establishing the existence of an impairment before the court would address the issue of reasonable accommodation, and that she had failed to meet that burden. The court’s evaluation was that none of the documentation established a learning disability, and further that the alleged disability was not found in the nationally recognized directory of mental illnesses.

Despite its initial conclusion that no learning disability had been proven, the court went on to conclude that plaintiff had also failed to establish that the accommodations made by ETS were not reasonable and were not directly responsive to the difficulties plaintiff claimed. The court also stated that laws protecting the disabled were not intended: to eliminate academic or professional requirements which measure proficiency, to require that basic academic standards be altered, or to require substantial modifications in professional requirements in order to accommodate disabled students. Thus both *Argen* and *Pandazides* demonstrate the court’s willingness to engage in a careful review of the diagnosis of learning disabilities, and the impact of the impairment on academic performance.

A different aspect of accommodating learning disabled students was raised in a recent case, *Fruth v. New York University*, 2 AD 1197 (BNA) (U.S.D.C., S.D.N.Y. 1993), which involved a challenge by a learning-disabled student to a college's required orientation/support services program. Mr. Fruth, who identified himself as learning disabled, was admitted to NYU on the condition that he participate in a summer orientation/support program prior to the start of school, because he did not meet NYU's regular admissions criteria. When he objected to the requirement that he participate in the summer program, his objection was reviewed and he was advised by NYU that he must attend. His mother also requested that he be relieved of the obligation, and NYU re-reviewed the matter and again informed Fruth that he was required to participate in the program. He failed to do so.

After failing to attend the program, Fruth was denied admission to NYU, and brought an action seeking an injunction compelling his admission to the university. The court sustained NYU's determination that Fruth had to participate in the orientation designed for students with his disability. Judge Preska denied the student's motion for an injunction because she determined that NYU's action were well within its professional judgment and were within accepted academic norms. The judge took particular note of the affidavits of NYU's experienced learning specialist, who documented the reason for the special program, and the department chair's explanation of the academic rigor of the course of study Mr. Fruth intended to pursue. The detailed analysis and re-review by NYU of the student's objections (and his mother's) lent support to NYU's position that required participation in the orientation program was appropriate. In contrast, the student's evidence consisted of a series of conclusory assumptions, supported by scant detail and no empirical evidence. The judge articulated an ADA standard that would be appropriate for a reviewing court to apply:

“I find specifically that both the initial determination and the determination, on or about July 9 upon plaintiff’s mother’s request for reconsideration, were made on an entirely individual basis, based on plaintiff’s entire background and qualifications. It was also based on the university personnel’s intimate knowledge of the requirements of the drama program and the details of the [special program]. Both evaluations were based on a complete review of plaintiff’s record, including personal interviews, review of the high school record available at the time each determination was made, various test results and evaluations and letters of recommendation. In short, the evaluation appears to have been made precisely as required in the ADA, that is, it is on an entirely individualized basis. For the same reason I find that plaintiff has not demonstrated a sufficiently serious question going on the merits such as to make this a fair ground for litigation.” *Id.*, at 119.

A different issue was the focus in *Halasz v. University of New England*, 816 F.Supp. 37 (D.Me. 1993), where a college maintained two special support programs for learning-disabled students. The first was a transition program that included a minimal college course load, supportive services and remediation for students who did not qualify for regular admission. The second option was a separate structured supportive services program for students who did meet regular admissions standards. Halasz, a transfer applicant, did not meet regular admissions standards; he was admitted to the transition program, which, if successfully completed, could qualify him for regular admission.

In this case, Halasz did not successfully complete the transition program, was denied admission and brought an action. In addition to raising a number of technical violations (such as failure to identify the §504 administrator in the college bulletin, and a questionable pre-admission injury), Halasz challenged as discriminatory the initial denial of transfer admission and the denial after the transition program, claiming he met the admissions criteria applied to other students generally.

In denying Halasz’ request for relief, however, the court took note of the college’s careful and professional handling of the student’s application, both initially and after the transition year, and the rationally-justifiable academic reasons for its standards. In the decision, the court also

sustained the college's initial denial of the student's request for a note-taker while it was evaluating the student's skills; and did not accord any meaningful weight to the student's objections to being provided readers instead of taped texts, or his complaints about poor tutors and inadequate counseling. Noting that other learning disabled students provided with similar services by that college had matriculated and completed degree programs, the court was not inclined to find discriminatory treatment on such conclusory allegations.

The subtle problems of program accommodation for learning disabled individuals were considered earlier in *Wynne v. Tufts University School of Medicine*, 976 F.2d 791 (1st Cir. 1992), which ultimately recognized the rights and interests of academic institutions in setting and evaluating academic standards and program requirements. In *Wynne* a learning-disabled medical student sued the medical school over its decision not to change the exam format from multiple choice to essay to accommodate his disability. In deciding for the medical school, what the court in *Wynne* looked to was whether the academic institution had adequately considered the availability of reasonable accommodation and whether the institution had articulated a reasoned judgment for its decision not to change its program. Where it was shown that the relevant medical school officials at Tufts had considered alternative means and the feasibility and effect of those alternatives on the academic program, and had concluded that the requested change would either lower standards or require substantial program alteration, the court sustained the medical school's decision to retain its original examination format and not alter it for the learning-disabled student.

The general guidance we can take from these decisions is that when reviewing courts look at a college's programs for students with disabling conditions, the court will be concerned with whether there was a thorough individualized review of the situation by professionals

knowledgeable about the student, the disabling condition, the program in question and the reasonableness of the accommodation. Moreover, in the absence of detailed regulations or a significant number of agency or court determinations, deference will be given to a college's exercise of its professional academic judgment.

**GUIDELINES FOR EVALUATING REQUESTS FOR
ACCOMMODATIONS FOR LEARNING DISABLED STUDENTS**

Although many of the following points will apply to most generalized requests for accommodations, they are primarily designed to address issues involving learning disabled students.

1. Establish and promulgate a *written procedure* for handling requests for accommodations from learning disabled students. Apply this procedure *consistently*.
2. Require that students who identify themselves as learning disabled provide the following:
 - i) *recent* documentation from a qualified specialist which establishes *the nature of the impairment*, including the *basis for the diagnosis* and the *dates of testing*;⁹
 - ii) a recommendation from the specialist of the *accommodation(s)* directly appropriate for offsetting the effects of the impairment;
3. Have appropriate in-house or outside professionals *review* the specific classification of impairment represented by the student.
4. *Make an individualized judgment* on whether the accommodation requested is appropriate or *whether other suitable accommodations are available*.
5. When requiring that learning disabled students participate in specific programs or activities to assist in their readiness for a general college program, be prepared to

support the judgment on an individualized, objective basis, relying on appropriate professional evaluation.

6. In evaluating whether the requested program modifications would require *substantial program alteration* or would *fundamentally alter academic standards or programs*, be prepared to demonstrate the underlying academic reasons for the program components, the academic standards institutionalized in the program, how the challenged components are consistent with the program standards, and how the requested accommodations *would be inconsistent with the academic goals and standards* of the program.

¹ “Opportunity and Independence: Meeting the Needs of New Yorkers with Disabilities.” The Final Report of the Regents Select Commission on Disability, 1993, at p. 6.

² Sears, J., “Learning Disabilities, Postsecondary Education and Section 504 of the Rehabilitation Act of 1973,” 12 Law and Psychology Review, 61, 69 (1988); quoting Lewis and Doorlag. Mainstream Exceptional Children (2d ed. 1987).

³ The IDEA definition is slightly different from the original definition contained in the EHA, which included “neurological impairment” as one of the conditions. The EHA definition of learning disability is still used by many agencies. For instance, it is contained in the definitions section of a questionnaire distributed during 1993 by the New York State Education Department to all institutions of higher education in the State. The form was intended to obtain up-to-date data on the enrollment and services of college students with disabilities for the Department’s directory of Higher Education Services for College Students with Disabilities. NYSED-2H-2. The New York State form also contains a definition of “emotionally disturbed” which is part of State Regulations 8 NYCRR §200.1(cc)(2).

⁴ Sears, *ibid.*, at pp. 61-67.

⁵ Levine, M.D., Developmental Variation and Learning Disorders, p.x. (1987).

⁶ Sears, *ibid.*, at p. 63, quoting Hammill, *et al.*, “A New Definition of Learning Disabilities,” Learning Disability Q.4(4), 336.

⁷ Sears, *ibid.* at pp. 76-77. Quoting from other researchers, the lists of suggested accommodations include: extending time to complete a program, substituting alternates for required courses, modifying exam procedures, untimed tests, readers for objective exams, varying test formats

(essay vs. multiple choice), allowing the use of multiplication tables, calculator or secretary's desk reference. But the lists do not -- and probably cannot -- tie a remedy to a particular impairment; as illustrations of responses they are informative but they are not full solutions.

⁸The Court in *Argen* was citing to an earlier New York federal court decision in a similar case, *Pazer v. New York State Board of Law Examiners*, 849 F.Supp. 284 (S.D.N.Y. 1994).

⁹It is important to have a recent diagnosis because learning disabilities change over time. See: Phillips, S.E., "Testing Condition Accommodations for Disabled Students," 80 Ed.Law Rep. 9, 22 (March 25, 1993).

