

**ISSUES FOR PRIVATE COLLEGES:  
SINGLE GENDER INSTITUTIONS AND THE  
EQUAL PROTECTION CLAUSE  
THE AMERICANS WITH DISABILITIES ACT**

**Presenter:**

**WENDY S. WHITE**  
Managing Partner  
Shea & Gardner  
Washington, D.C.

**Stetson University College of Law:**

**16TH ANNUAL LAW & HIGHER EDUCATION CONFERENCE**  
Clearwater Beach, Florida  
February 12-14, 1995

# EQUAL PROTECTION AND PRIVATE COLLEGES

## A Case Study

### I. Introduction

In the last year, there has been considerable debate about the continued legal viability of single-gender colleges and universities. The debate has focussed on two all-male public military institutions: Virginia Military Institute ("VMI") and The Citadel.

Contrary to the suggestions of some of the supporters of VMI and The Citadel, the outcome of these cases does not implicate the future of private single-gender colleges. The reason for this is simple: the Equal Protection Clause does not apply to private colleges.

An analysis of these cases is useful in showing the distinction between public and private institutions. It is also useful in analyzing how the facts of particular cases, and the personalities involved, affect the application of legal principles. This lesson is useful for public and private colleges alike.

### II. The Starting Point in the Analysis: Mississippi University for Women v. Hogan 458 U.S. 718 (1982)

#### A. Facts

1. Suit brought by a male student who sought admission to the nursing program at Mississippi University for Women.

2. There was another available nursing program at a coed university that he could attend, but it was not as convenient a program.

3. Hogan was a nurse and wanted to enter the program in order to advance his nursing career.

#### B. Analysis

1. Equal Protection Analysis -- No state may deny to any person within the state's jurisdiction the equal protection of the laws.

a. In analyzing whether a statute violates the Equal Protection Clause, the courts over the years have developed a three tiered approach:

Strict scrutiny: This level of analysis applies where a "protected class" is claiming to have been denied equal protection. Under this standard, the state must show a "compelling justification" for the law or policy.

Rational basis test: This is a minimal level of scrutiny generally applied to state laws that classify based on economic considerations, e.g., laws regulating hours of retail store operation.

Intermediate scrutiny: This level of analysis has been applied to sex-based classifications.

b. The second part of the analysis depends on whether there is an explicit classification based on race, gender etc. or whether the statute is neutral on its face -- but has a disparate impact on a protected class.

For explicit classifications, the challenging person does not have to show bad motive.

For policies that are neutral on their face, the challenging person must show invidious intent to discriminate.

2. Justice O'Connor began her analysis in MUW by recognizing that not all classifications based on sex violate the Equal Protection Clause. In this case there was:

a. An explicit classification -- no men admitted to the nursing program;

b. A classification based on gender so that the intermediate scrutiny test applied;

c. Thus, the Court looked at the policy of excluding men from the nursing program to determine:

Purpose: Whether the classification served an "important governmental objective;"

Relationship: Whether the discriminatory means employed were substantially related to the achievement of those objectives;

Justification: Whether the state could demonstrate an exceedingly persuasive justification for the classification.

3. Mississippi University for Women argued: Justification for the admissions policy exclusion of men was to compensate for past discrimination against women in education, that is, educational affirmative action.

a. Court found this asserted justification unpersuasive.

b. Affirmative action might suffice in certain circumstances, but here state could not show that women lacked opportunities for training in nursing. In fact, admissions policy furthered the stereotype of women in health care fields.

c. Court found that state also failed the second test -- not necessary to exclude men in order to give women this affirmative opportunity. In fact, the record showed otherwise. There were men auditing classes and, in fact, Mr. Hogan had been told he could audit the nursing classes.

#### 4. Word about Title IX

a. State said the university was protected under Title IX of the Education Amendments. Title IX exempts public colleges that were traditionally single gender from admissions requirements. [Private colleges' admissions policies are not covered at all under Title IX. In other words, someone could start a new private single sex college today, but a state could not now create a single gender public institution.]

b. But Title IX is subject to Constitutional constraints. If a state policy violates the Equal Protection Clause, even if it were sanctioned by Title IX, the Constitution and not Title IX controls.

#### C. Summary

1. Public institution -- Equal Protection Analysis applies

2. Explicit classification based on gender -- don't have to show bad motive

3. Classification involves women -- intermediate level of scrutiny applies so state must have an "exceedingly persuasive justification."

III. United States v. Commonwealth of Virginia ("VMI"),  
1992 WL 251441 (4th Cir. 1992)

A. Facts

1. No individual plaintiff in this case. The suit was filed by the Justice Department. The State of Virginia came in and then bowed out. So the lawsuit pending now is between the Justice Department and the VMI alumnae.

2. VMI is an all male military institution with a long history of an "adversative learning style."

3. The Court found that: "VMI's military program is absolutely unique. No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI."

B. Proceedings and Analysis

1. Summary judgment was granted in the trial court in favor of VMI. The case was appealed to the U.S. Court of Appeals for the 4th Circuit. There, the 4th Circuit reversed the case and sent back to the trial court for further proceedings. The Court, in its opinion reversing the district court, analyzed the issue under Mississippi University for Women.

a. Explicit sex-based classification -- didn't look for a bad motive.

b. Intermediate level of scrutiny

2. VMI argued: The state had a legitimate need to create citizen soldiers [the purpose or objective]. This was a unique benefit offered to men in the state. The unique benefit would be lost if women were admitted to the program [the relationship]. The justification for the program was educational diversity.

3. The Court agreed with all but the last proposition

a. Agreed that it was an important governmental purpose to train citizen soldiers.

b. Agreed that the VMI single gender admissions policy was important to serve that purpose.

c. But disagreed that the state had shown an exceedingly persuasive justification for providing a benefit to men and not to women. Court held that it was not the maleness as distinguished from femaleness that provides justification for the program. It is the homogeneity of gender in the educational process.

d. Therefore, the Court held, the justification of diversity fails because the "argument does not answer the larger question of whether the unique benefit offered by VMI's type of education can be denied to women by the state under a policy of diversity."

4. The court concluded that VMI had failed to explain how the policy of diversity was furthered by providing this unique benefit to men only.

"A policy of diversity which aims to provide an array of education opportunities including single gender institutions, must do more than favor one gender."

5. The court did not order that women be admitted to VMI if alternatives are available."

a. Other options: parallel program; or abandon state support of VMI leaving VMI the option to pursue its own policies as a private institution.

b. In other words, Court made clear that this analysis would not apply to a private institution.

### C. Status of VMI Proceedings

1. Case was remanded to the District Court.

2. A remedy was created by VMI -- the "Mary Baldwin Plan". Under this plan, women may attend a leadership program at Mary Baldwin, an all women's college. A hearing was held to determine if this program was sufficient to satisfy the Equal Protection Clause. The testimony was undisputed that this is not an identical program -- not adversative in character. Court found it passed constitutional muster.

3. The District Court's decision was appealed to 4th Circuit. It has been briefed and argued and awaiting decision [at the time this outline is being prepared].

### D. Summary

The Court was unwilling to rule that the objective of training citizen soldiers was unrelated to the single-sex admissions policy. It, therefore, had to focus

solely on the justification, diversity, and conclude that the justification was insufficient, where a benefit was provided to men and not to women.

IV. Shannon Faulkner v. James E. Jones,  
No. 94- 1978 (4th Cir. ) "The Citadel"

A. Facts

1. Essentially the same facts are present here as in the VMI case, except in this case, Shannon Faulkner, has sought admission to the school.

2. After the case was filed, South Carolina adopted a new state policy supporting educational diversity: "South Carolina has historically supported and continues to support single-gender educational institutions as a matter of public policy based on legitimate state interests when sufficient demand has existed for particular single-gender programs thereby justifying the expenditure of public funds to support such programs."

B. Proceedings and Analysis

1. Shannon Faulkner filed her lawsuit and sought a preliminary injunction so that she could immediately attend classes.

2. A preliminary injunction was granted by the District Court permitting her to attend day classes. This decision was appealed to U.S. Court of Appeals for the 4th Circuit.

3. The 4th Circuit held:

a. The majority ruled it was bound by the VMI decision. It recognized that South Carolina had this new policy that could affect the outcome of the case. But on balance, the harm to Faulkner outweighed the harm to The Citadel. The preliminary injunction was affirmed.

b. The concurring opinion (Judge Hall) stated: "Notwithstanding VMI, I question whether, under the Equal Protection Clause, a state can ever have a sufficiently important interest to justify expending public funds to maintain an institution that not only practices inequality, but celebrates it."

c. The dissent (Judge Hamilton) said: "Without pause of demonstrated concern for the devastating consequences of its actions, the majority

emasculates a venerable institution by jettisoning 150 years of impeccable tradition and distinguished service."

4. The District Court assumed that in all other respects the case was the same as VMI, and then held a hearing on the "justification."

a. South Carolina recognized that relying on "diversity" would not suffice as a justification for providing single-gender military education to men only. This analysis was rejected in the VMI case. Further, South Carolina had not created a parallel program for women. The state, therefore, advanced "lack of demand" combined with "diversity" as the justification.

b. South Carolina did not submit a remedial plan at this time. The state put on evidence of the structure of South Carolina higher education system and the lack of demand for an all female military academy.

5. The District Court ruled that the justification did not satisfy the Equal Protection Clause.

a. In its opinion, the Court said: "This justification is very appealing to those who sincerely revere The Citadel and its rich traditions, to those who determine where the scarce resources of this State will be placed, and to the many people, men and women, who live in this state who don't want The Citadel to change."

b. This, however, is not the standard.

c. It is not a question of a majority vote, but a question of constitutional analysis.

d. The Court reviewed the case law on the demand justification in the race area and concluded:

"To suggest that a lack of demand for certain type of equal protection can somehow justify the denial of another person's constitutional right therefor undermines the express intent of the 14th Amendment."

e. The Court held the only remedy for Shannon Faulkner was immediate admission into the Corps of Cadets. The state had to come up with an adequate plan for 1995-96, or the Court would order the admission of women. [The Court explicitly held that going private was not a "realistic" option. ]



6. The order requiring immediate admission was appealed again to the 4th Circuit. The Citadel sought and was granted a stay pending resolution by the Court. The case has been briefed.

7. The Citadel's arguments in the Court of Appeals are:

a. "The Court erred by applying the test for express gender classifications to evaluate the constitutionality of South Carolina's justification."

b. South Carolina's decision not to offer currently a public Citadel type single-gender educational program for women as part of its system of higher education does not amount to or result from a gender classification.

c. The Citadel's admissions policy is not the subject of constitutional analysis. Rather it is the gender neutral policy that the state adopted -- lack of demand -- that is at issue and that policy happens to have a disparate impact on women.

d. The Court, therefore, should have required Faulkner to prove intentional discrimination.

e. In addition, the lack of demand is an adequate justification.

8. This case has not been argued as of the time this outline is being prepared. It should be argued and decided by Spring 1995.

## V. Conclusion

These cases raise interesting and important issues for public institutions. It is important for private colleges to understand the issues so that they can see the extent to which the private college concerns are different.

# THE ADA AND PRIVATE COLLEGES

## A Brief Update

### I. The Statutory Scheme

A. Private colleges are covered by Titles I and III of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., which provides:

#### Title I - Employment

"No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

What constitutes discrimination? The statute articulates seven specific categories included within the meaning of the term "discrimination." 42 U.S.C. § 12112(b). Included among these specific items is:

"[N]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;" or

"[D]enying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant." § 12112(b)(5)."

#### Title III - Public Accommodations and Services Operated by Private Entities.

"No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods,

services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." § 12182.

"The following private entities are considered public accommodations for purposes of this title . . . a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education." § 12181(7)(J).

B. In particular, the statute identifies five explicit prohibitions. 42 U.S.C. § 12182(b)(2).

1. Eligibility criteria - This provision prohibits public accommodations from imposing or applying eligibility criteria that screen out or tend to screen out individuals with disabilities, unless these criteria are "necessary." This test is similar to the "business necessity" test for employment criteria.

2. Reasonable modifications - This provision requires that public accommodations make "reasonable modifications to policies, practices, or procedures" when needed in order to provide the service to persons with disabilities; however, modifications need not be made that would "fundamentally alter" the service being provided.

3. Auxiliary aids and services - This provision requires public accommodations to ensure that no person with a disability is denied services because of the absence of auxiliary aids or services, unless to provide these aids would "fundamentally alter" the program or create an "undue hardship."

(a) Auxiliary aids and services included methods of making aurally or visually delivered materials available to persons with hearing or visual impairments.

4. Readily achievable barrier removal in existing facilities - Public accommodations are required to remove architectural barriers and communication barriers that are structural in nature in existing facilities, where such removal is "readily achievable."

5. Alternative methods - If removal of barrier is not readily achievable, the statute requires that public accommodations consider other methods of providing services, such as "coming to the door to receive or return drycleaning; allowing a disabled patron to be served beverages at a table even though nondisabled

persons having only drinks are required to drink at the inaccessible bar; providing assistance to retrieve items in an inaccessible location; and rotating movies between the first floor accessible theater and a comparable second floor inaccessible theater [with public notification of such rotation].” Robert L. Burgdorf, Jr., The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 Harvard Civil Rights - Civil Liberties Law Review 413 (1991).

C. For new construction, the statute requires that these facilities must be made readily accessible and usable by individuals with disabilities unless it would be "structurally impracticable" to do so. 42 U.S.C. § 12183.

## II. Recent Cases

### A. Admissions

1. There are many cases brought by students with disabilities claiming that they have been denied admission as a result of their disability. Colleges can prevail in these cases by showing that the academic credentials of the claimants were generally lower than the applicant pool. It is particularly helpful in these cases if the institution can show that it was unaware of the disability at the time the decision was made.

Middlesex Community College (MA), 5 NDLR ¶ 189 (OCR 1993) (student denied admission into a dental hygiene program, no discrimination found).

University of Delaware, 5 NDLR ¶ 191 (OCR 1993) (university's decision not to select a woman with a hearing impairment to be a drum major in the marching band was upheld).

East Central Community College (MI), 4 NDLR ¶ 225(OCR 1993) (student denied admission to a nursing program, no discrimination found).

2. Schools should make sure that their admissions bulletins clearly identify the person responsible for coordinating ADA obligations and that the institution does not discriminate on the bases of disability.

Washington and Lee University, 5 NDLR ¶ 78 (OCR 1993).

3. In defending a claim for discrimination in admissions, it is useful if the college can show that other students with disabilities have been enrolled.

Emory University (GA), 5 NDLR ¶ 79 (OCR 1993) (university decision not to admit applicant with attention deficit disorder and dyslexia upheld where test scores were lower than other students admitted, student had demonstrated poor writing skills, and other students with similar disabilities had been admitted).

B. Auxiliary Aids

1. Schools need not precisely comply with the students' requests for auxiliary aid and services in order to satisfy their ADA obligations, as long as the school offers sufficient assistance to ensure effective program participation.

Wentworth Institute of Technology (MA), 5 NDLR ¶ 190 (OCR 1993) (student with hearing impairment asked for interpreters and notetakers; school provided notetakers and extra assistance from the professor, which was found adequate).

2. Students have an obligation to notify school of needed aids or adjustments in sufficient time for the school to accommodate the needs.

Highline Community College (WA), 5 NDLR ¶ 165 (OCR 1993) (student with hearing impairment failed to notify college of need for adjustments in psychology class in sufficient time).

University of Alaska Anchorage, 5 NDLR ¶ 39 (OCR 1993).

C. Discrimination

1. Students have argued that failing grades are the result of discrimination.

Valencia Community College (FL), 4 NDLR ¶ 263 (OCR 1993) (student with hydrocephalus argued that her failing grade was the result of disability; OCR found to the contrary).

2. Claimant must prove that his difficulties stemmed solely from the university's discrimination against him or her due to its stereotypical perception of the disability and not because of the school's good faith perception of the claimant's attributes, whether or not those attributes were influenced by his handicap.

Rothman v. Emory University, 3 AD Cases 761 (N.D. Ill. 1994) (law school graduate sued the university over letter sent by dean to bar officials indicating that student was sometimes hostile to students and faculty and attributing this conduct to epilepsy).

3. Schools must be flexible in reasonably accommodating disabilities.

Thomas v. Davidson Academy, 3 AD Cases 352 (M.D. Tenn. 1994) (private school improperly expelled a student with idiopathic thrombocytopenic purpura condition, which is a serious disorder affecting the blood system that can result in hemorrhaging, because she became hysterical when she accidentally cut herself in art class; court held that school's position that it expected the same behavior from her as other students was "the type of blind adherence to policies and standards resulting in failure to accommodate persons with disability that the ADA is intended to prevent).

D. Employment

1. Claimant must establish that there was a causal connection between the denial of a job opportunity and the claimant's request for accommodation.

Saint Louis University, 5 NDLR ¶ 138 (OCR 1994) (professor with asthma was not given the opportunity to teach a lecture course he wanted to teach, claiming that the decision was made as a result of his request to reschedule the course at a different location to accommodate his asthma; OCR found to the contrary relying in part on other accommodations school had made, including, scheduling all courses to be taught by requester in one building, assistance travelling to and from the parking lot, light duty work assignments, rampted entryway, rearrangement of office furniture, and a permit for parking spaces).

2. Employee must be "otherwise qualified" for the job.

Wood v. Omaha School District, 3 AD Cases 481 (8th Cir. 1994) (van drivers who court found to be poorly controlled insulin-using diabetics were not otherwise qualified to drive a van).

E. Program Accessibility

1. College new construction must be readily accessible to and usable by persons with disabilities.

Burlington College (VT), 5 NDLR ¶ 323 (OCR 1994) (school's new construction needed to improve, parking area, appropriate signage, accessible doors, public telephones with volume controls, coin slot and controls for vending machines must be accessible, ramps must have grab bars).

### III. Conclusion

The number of complaints raised under the ADA are many and varied. Colleges and universities need to continue to address these issues -- admissions, employment, program accessibility, discrimination in treatment, auxiliary aids -- in a responsive and flexible manner.

