

A Preventive Law and Policy Approach to Managing Student Disability Issues

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**“We live in a society that has come to equate ‘legal compliance’ with morally
and ethically right...They aren’t the same. They never were.”**

Jane Jarrow, Ph.D., Disability Advocate
Learning Disabled Students in Higher Education: Who, What, Why and How!
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1. Introduction.

At The Catholic University of America (CUA) this past year, nearly 1 out of 10 students registered with or sought consultation with disability services and the number of requests for services continues to increase at an average of 10% a year. While most of the issues treated in this paper are applicable to any type of student disability, the focus of the paper is on psychological and medical disabilities.

In a Fall 2003 article entitled *The Mental Health Needs of Today’s College Students: Challenges and Recommendations* in the *NASPA Journal* (Vol. 41, No. 1), Martha Anne Kitzrow noted that an increasingly diverse student population (30% minorities, 20% foreign born or first generation, 55% female and 44% of all undergraduates over age 25)¹ is coming to campus with more severe psychological problems than previous generations.

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¹ This data is from Choy, S. (2002), *Access and persistence: Findings from 10 years of longitudinal research on students*. Washington, D.C.: American Council on Education.

Citing numerous studies documenting increased college counseling center interaction with severe concerns including suicidality, substance abuse, history of psychiatric problems, depression and anxiety, Kitzrow reported that counseling center directors are seeing significant increases in self-injury incidents, eating disorders, alcohol problems, sexual assault, problems related to earlier sexual abuse and an increase in students who take psychiatric medication and who have to be hospitalized for psychological reasons.

Nationally we know that an estimated 22.1 percent of Americans ages 18 and older—about 1 in 5 adults—suffer from a diagnosable mental disorder in a given year. Additional interesting statistics from the National Institute of Mental Health regarding mental disorders in America are at <http://www.nimh.nih.gov/publicat/numbers.cfm>.

Multiple or co-morbid conditions are also being increasingly reported on campus, e.g., a student with Attention Deficit Disorder (ADHD) or learning disability may also suffer from depression or an anxiety disorder. The unpredictability and inconsistency of symptoms for students with psychological and medical disabilities compound the issues of determining and providing appropriate accommodations.² In this environment, it is all the more important for schools to have clearly defined policies and practices, implement them consistently and have appropriate funding to make necessary accommodations.

Common sense suggests that as more new disabling conditions are identified at the K-12 level (for example, the boom in the last two or three decades in the number of children diagnosed with learning disorders or the current surge in children diagnosed with Sensory Integration problems somewhere along an "autism continuum"), then campuses will continue to be faced with complex challenges -- challenges that can only be properly addressed by constant attention to fundamental policy issues and an awareness of the appropriate legal parameters.

² The days of the disability office dominated by an IBM typewriter and personal scribes and readers has been replaced by "high tech." Assistive technology (AT) that includes electronic access to materials, e.g., email, PowerPoint, web based classes, distance learning, screen reading and voice activated software has become a standard in post-secondary education. But the same technology that solves old problems presents new challenges. Is the equipment readily accessible to our students? Can screen-reading software like JAWS work on web pages, e-courses and software like Blackboard?

And we should remember that the ADA influences nearly all the functions of a university, from admissions to the classroom to the residence hall. It therefore affects and influences nearly all decision-making and policy development.

In short, campus administrators dealing with issues of disability are more and more likely to be confronted by increasingly complex mental health problems experienced by students who, along with their parents, are ready and willing to litigate over the perceived rights of the student. Many students and parents seem to come to the university campus with the expectation that the student will receive the same level of service they experienced at the K-12 level, where the school and the parents were responsible to "take care of everything." Enhancing the chances of "success" for students with disabilities – "success" being defined as achieving the maximum reasonable accommodation for students with disabilities while still preserving the academic integrity and safety of the community – requires developing interdisciplinary teams that combine legal awareness, thoughtful academic requirements and proactive disability support services in an integrated law and policy management approach.

The disability dynamic has shifted from a single person or office on campus responsible for anything and everything that relates to disability to an integrated, collaborative model in which all persons in the campus community share in the responsibility to assure educational opportunity for all qualified students.

The quote at the top of this paper from Dr. Jane Jarrow makes clear that there are important differences between legal requirements and policy goals. This paper focuses on several of the major recurring policy issues involved with disabilities but especially mental disabilities and a few practical things an interdisciplinary team can do to be prepared in the event of a claim in a mental impairment case. It does so by reflecting on the specific legal structure in which student disability issues arise – legal definitions such as "physical or mental impairment", "substantially limited in a major life activity" and "fundamental program alteration" – and at the same time identifying a related policy issue and some preventive steps to help position a school to best manage a student disability issue when it emerges as a legal crisis.³

³ Note that there are many other excellent resources available to deal with certain of these issues, such as mental illness on campus generally (see paper by Vicki Gotkin, Stetson 2003, Vol. II, especially as

2. Some Policy and Practice Considerations in the Implementation of ADA Requirements.

One metaphor for discussing the implementation of the ADA on campus is to think of it as a tree: the roots represent the legal requirements of the ADA and the Rehab Act and their regulations, along with subsequent court decisions interpreting them; the trunk represents the basic policies through which the school implements the law; the branches might represent the specific programs or settings in which students might participate; and finally, the leaves are each individualized student and his/her disability in that setting. A preventive or pro-active approach might be represented as the extent to which the “tree” is cared for, properly tended and trimmed by the university.

Note that many policy issues touch all branches of the tree. For example, policy decisions about budgeting for ADA services can touch all areas of student life on campus. It is critical to have funding policies that assure timely and seamless service delivery to students. Funding should be transparent to the students and faculty. Who pays for the cost of an interpreter for an admissions interview? The cost of an accessible table needed in a chemistry lab? The necessary transcription costs for a conference sponsored by a small department? If it comes from the unit where the service needs to be provided (e.g., the History Department for a disabled history major) it can create lots of hostility towards the student and the disability services office ("Ha, see whether we'll ever accept another student with that kind of disability!").

So, first the roots of the tree. The relevant legal constraints are the Rehabilitation Act of 1973 (29 U.S.C. Section 794 et seq) (Rehab Act) and the The Americans with Disabilities Act (42 U.S.C. §12101 et seq) (ADA) which prohibit discrimination against “otherwise qualified” individuals on the basis of their disability. There are other laws applicable to disability that may apply to a campus, including state and local laws, but the focus here is the Rehab Act and the ADA.⁴

to developing “technical standards”); student suicide (see paper by Peter Lake and Nancy Tribbensee, Stetson 2003, Vol. II, and the paper by Paul Joffe, Ph.D., University of Illinois, Stetson 2003, Vol. II, describing that school’s approach to preventing student suicide; also Ann H. Franke’s excellent paper on preventing student suicide and mitigating liability, Stetson 2004, Vol. I).

⁴ These two Federal statutes contain many similarities, with a few differences that may be of interest in a given case. For example, Title III of the ADA does not specifically provide for damages unless the

Both statutes prohibit discrimination against otherwise qualified individuals on the basis of their disability. An individual with a disability is any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment⁵; or (iii) is regarded as having such an impairment.⁶ Schools must provide reasonable accommodations in the student setting, that is, a *modification or adjustment* to a class or program or other activity of the university that will enable a qualified person with a disability to participate in the program, class or activity and to enjoy the rights and privileges offered by the university. Such accommodations will not be required where they require a fundamental program alteration, constitute an undue financial burden or are a direct threat to safety. The university is required to make modifications only to *known* and validated disabilities.

2 - A. Legal Issue. What constitutes a physical or mental impairment as a legal matter?

A physical or mental impairment is (a) a physiological disorder or condition, cosmetic disfigurement, or anatomical loss such as epilepsy, paralysis, HIV infection, AIDS, or substantial hearing or vision impairment or (b) a mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities. Examples of conditions that would not be disabilities are short-

Attorney General intervenes, but such damages are available under Section 504. The relevant regulations for 504 are at 34 CFR 104.1 *et seq.* and the regulations for the Americans with Disabilities Act can be found at 28 C.F.R. § 36.101 *et seq.* When the regulations were promulgated under the Americans with Disabilities Act, extensive new regulations were not adopted for that part of the law dealing with postsecondary education. Instead, the courts have relied on the 504 regulations that address postsecondary education. Note, too, that the Code of Federal Regulations implementing the ADA specifically addresses the overlap between the Rehab Act and its regulations and overlap between the ADA and other federal, state and local laws (see 28 C.F.R. Part 35.103)

⁵ "Record of such an impairment" means one has a history of, or has been classified as having, a mental or physical impairment that substantially limits one or more major life activities. Individuals who have been misclassified by a school or hospital as having mental retardation or a substantially limiting learning disability would be covered by this part of the definition of disability.

⁶ 29 U.S.C. § 705(2)(B) and 42 U.S.C. § 12102 (2) "Is regarded as having an impairment" means (a) has a physical or mental impairment that does not substantially limit major life activities but that is treated by the university as constituting such a limitation; (b) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (c) has none of the impairments defined above but is treated by the university as having such an impairment. For example, an applicant rejected for a job on the basis of a back x-ray that reveals some anomaly, even though that person has no back impairment, would fall under this category.

term, non-chronic conditions such as a broken leg, a sprain or the flu. Physical or mental impairments include, for example, specific learning disabilities, emotional or mental illness, blindness and visual impairments, deafness and hearing impairments, mobility impairments and some chronic illnesses.⁷

2 - A. Policy Issue.

Examples of policy issues that arise when looking at what constitutes a mental impairment include, for example, the issue of documentation. Documentation of disability is essential for the determination of eligibility under ADA/504. It is where the student and disability services process begins. It is what determines whether or not a person is protected under ADA and provides guidance for the determination of appropriate and effective accommodations and/or modifications. Disability documentation is the road map for the disability services provider and a critical component in the decision-making process in questions of compliance.

Administratively, schools must decide how documentation will be received, evaluated and retained, and by whom. Is it the disability services provider, the ADA coordinator or an academic dean? What does the law require compared with what a school wants to do on behalf of students (e.g., paying for testing)? Additionally, policy regarding the circumstances under which disability information can be shared must be determined and articulated. What practices are in place to assure the confidentiality of disability information and to determine when information may be shared?

All disabilities require documentation. In the case of mental illness (as with all disabilities) documentation of the disability must be current and include a written evaluation from a physician, psychologist or other qualified specialist that establishes the nature and extent of the disability and includes the basis for the diagnosis and the dates of testing. Further, the documentation must establish the current need for an accommodation and contain suggestions for offsetting the effects of the disability.

⁷ From the AHEAD Brochure, *“College Students Who Have Chronic Diseases or Medical Conditions”* (2002), note that “systemic disability,” “medical condition” and “chronic illness” refer to a variety of conditions. “The symptoms associated with these conditions are often unstable and unpredictable and may be episodic...Such conditions may include diabetes, recurrent cancer, autoimmune disorders (lupus, rheumatoid arthritis), respiratory conditions (e.g., asthma), blood disorders, Lyme’s disease, Krohn’s disease, pain syndromes, cardiac disorders, seizure disorders, multiple sclerosis and muscular dystrophy.”

Whether or not documentation is current will depend on the nature of the disability. Well-publicized documentation policies and procedures help prevent the appearance of capricious or indifferent responses to requests for accommodations.⁸

Documentation requirements will vary according to the policies of an institution. For example, at CUA a full psycho-educational battery completed by a psychologist or psycho-neurologist that represents current functioning and includes a diagnostic statement, test scores and an interpretation of those scores, and recommendations for accommodation or support is required for a student with a learning disability or attention deficit disorder. Another school may only require a statement from a doctor.

Medical documentation completed by a medical specialist that includes a diagnosis, current functioning, medications and possible side effects, and suggested accommodations or modifications is required for psychological disabilities and medical conditions. Yearly or more frequent updates of documentation are a standard practice for psychological and medical disabilities as well.

2 - A. Preventive Idea.

For a websites with information on standards for postsecondary documentation and standardized exams, see the Appendix Part 1 and also <http://www.ETS.org>. There is also guidance on the issue of confidentiality of disability records in CUA's "ADA Guidelines - Self-audit Checklist" on the web at <http://counsel.cua.edu>, in the section on the ADA. This audit tool contains more than 70 questions with detailed answers to help a school assess compliance with the ADA, including documentation issues.

To conclude a discussion of documentation and not mention the psychological stigma associated with disclosing a disability (presenting documentation) and the costs of testing for documentation purposes would be remiss.⁹ For all but a few individuals, sharing information about a disability, whether it relates to learning, emotional, physical

⁸ The type of documentation will vary according to the disability, e.g., a psycho-educational or neuro-psychological assessment for learning and other cognitive disabilities; a psychiatrist's report for psychological disabilities; and a letter from a doctor or other specialist for physical and most other disabilities.

⁹ The costs for psycho-educational testing and appointments with psychiatrists and other medical experts are generally the responsibility of the student and are substantial. Such documentation requirements can be a significant barrier to eligibility and to the ADA's goal of "inclusion" of persons outside the mainstream. Ways to provide low-cost or no-cost assessments or changes in the documentation requirements need to be addressed and included in "best practices" models of disability service.

functions or just getting around, compromises an individual's feelings of confidence and autonomy. It requires students to present themselves in terms of what they are not, rather than for who they are and what they can do. There is a fear that they will not be equally valued and will be seen as less than capable. Policies that are sensitive to how, when, and where information is shared are important in establishing and administering documentation and eligibility procedures.

One additional note on qualifying as "disabled" and the effect of mitigating measures is important. A legal question that can arise regarding whether a person is "disabled" -- that is, has an impairment -- is whether the impairment can be lessened or eliminated by corrective or assistive measures. In 1999, in the case of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) the Supreme Court held that two severely myopic women, whose vision was fully correctable, were not considered disabled for purposes of coverage under the Americans with Disabilities Act. The Court stated that no agency, including the U.S. Equal Employment Opportunity Commission (EEOC"), had been given the authority to interpret the term "disability," which the EEOC had tried to do through the issuance of Interpretive Guidance on this question.

Under the Court's reading of the law, whether an individual is disabled should be made *with* reference to measures that mitigate the impairment. The Court's key holding is as follows: "Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures -- both positive and negative -- must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." Under the Court's approach, a diabetic whose illness does not substantially impair his or her daily activities would not be considered disabled.¹⁰ Similarly, where a student with a mental disability is successfully taking anti-depressant medication or a student with ADHD is successfully taking stimulant medication, those students may well not qualify as being disabled for purposes of determining whether an accommodation is required as a legal matter.

¹⁰In a companion case, *Albertsons, Inc. v. Hallie Kirkingburg*, 527 U.S. 555 (1999), the Court held that the *Sutton* decision extends to mitigating measures undertaken, whether consciously or not, with the body's own systems. In other words, a person who has compensated for their disability may not be "disabled" under the law.

2 - B. Legal Issue. “Substantially limited in a major life activity”

“Substantially limited” means that a significant restriction on the duration, manner or condition under which an individual can perform a major life activity exists when compared to the average person's ability to perform that same major life activity. Temporary impairments that take significantly longer than normal to heal, long-term impairments, or potentially long-term impairments of indefinite duration may be disabilities if they are severe. “Major life activities” are determined by the court in each case but generally include functions such as caring for one's self, performing manual tasks, walking, sitting, standing, lifting, reaching, seeing, hearing, speaking, breathing, learning and working.

Although the elements of this legal requirement sometimes get blurred, it is important to remember that there are two parts to this definition. A court may determine that something is a major life activity, such as learning but decide that a student is not “substantially limited” in that activity, as in the case *Wong v. Regents of University of California*, 379 F.3d 1097 (2004). The *Wong* case was decided after the U.S. Supreme Court decision in *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184 (2002) (discussed in Barbara Lee’s paper in this workshop). The Court in *Williams* had found that when addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job. The “Court held that there must be an individualized assessment of whether a claimant’s impairments substantially interfere with tasks that most people consider central to daily life, not merely an evaluation whether the claimant is unable to perform specific tasks associated with his workplace or with the workplace in general.”¹¹

So what does this mean in a student context? The *Wong* court referred to the *Williams* case in response to Mr. Wong’s argument that his impairment substantially limited him in a major life activity. Referring to the Supreme Court’s admonition in *Williams* that “these terms need to be interpreted strictly to create a more demanding

¹¹ From “Accommodating Students With Learning and Emotional Disabilities, Second Ed., by Ellen M. Babbitt, published by the National Association of College and University Attorneys, (2004), Washington, D.C.

standard for qualifying as disabled,” (*Toyota* at 197) the court in *Wong* concluded that Mr. Wong did not demonstrate that he was substantially limited in major life activities. Can someone who achieves great academic success nonetheless be found to be “substantially limited” in reading and learning? Note that because of its finding on the “substantially limited” prong, the court never had to rule on whether reading and learning were “major life activities,” although it noted many decisions which have found “learning” to be a major life activity and cases which have treated “reading” as a major life activity (e.g., *Bartlett v. New York State Bd. Of Law Examiners*, 226 F.3d 69 (2d Cir. 2000); and *Gonzales v. National Bd. Of Medical Examiners*, 225 F.3d 620 (6th Cir. 2000) (although the *Gonzales* court also found that plaintiff was not substantially limited in a major life activity as compared to the average person within the population).

The *Wong* court concluded that since Mr. Wong had previously achieved great academic success without any special accommodations, then he was not substantially limited in the activity of learning. The court also noted that the proper question is not whether his impairment made it impossible for him to keep up with a rigorous medical school program but is whether Mr. Wong’s impairment substantially limited his ability to learn as a whole, for purposes of daily living, as compared to most people.¹²

2 - B. Policy Issue. An example of a policy issue in this area would be that even though the ADA doesn’t apply to study abroad programs, a school needs to decide as a policy issue the extent, if any, to which it wants to try and accommodate students with disabilities who study abroad. The focus becomes what level of inclusion of disabled students into the mainstream of the institution's programs the school wants to support. A note of caution, however. In the case *Bird v. Lewis and Clark College*, 303 F.3d 1015 (9th Cir. 2002), the Court found that while the school did not violate the ADA in its failure to provide accommodations to a disabled student in its study abroad program, it did make promises to the student that it would accommodate her disability in its program

¹² One implication of this holding is to note a recent article, 58 U. Miami L. Rev. 923 (2004), pointing out at page 930 that studies that show a high percentage of law students as being depressed and suggesting that the particular diagnostic label (“Depressive Disorder Not Otherwise Specified” versus “Major Depressive Disorder”) might be very significant in a court’s determination of whether or not the depression was “substantially limiting.” In short, it would be hard to argue that half of the students in very competitive graduate school programs are “substantially limited” in the major life activity of learning as compared to most people in the population as a whole.

and thus raised separate liability issues as a matter of contract law, based on those promises. The lesson here is, "Don't promise what you can't deliver."

2 - B. Preventive Idea. A preventive idea regarding accommodation for study abroad locations is to use principles of universal design. To the extent programs are set up so that any person could use them, then accommodation issues become moot.

It is also important to assure an informed and educated campus community. Students, faculty, staff and administrators at all levels need to participate in training on disability issues and 504/ADA rights and responsibilities. These could be workshops, or some of the very excellent web training being developed at several major universities. (See Appendix Part 1 for Disability Information and Education websites).

Encouragement for faculty to participate in workshops on teaching methodology, design of accessible web pages, principles of universal design, and working with students with psychological disabilities is most effective if it comes jointly from academic and student life administrators. Periodic training updates need to be scheduled. Compliance should not be not about “forced” or legislated obligations. It is about developing and sustaining a cooperative spirit of inclusion and opportunity. Everyone wins when students succeed.

2 - C. Legal Issue. “Otherwise qualified” and “fundamental program requirements.”

The roots of the law as to whether someone is “otherwise qualified” start with the case of *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). This case was brought under the Civil Rights Act of 1971 and the Rehabilitation Act of 1973, against a college that refused a licensed practical nurse admission to the college’s nursing program. Admission was denied as the university believed that the applicant’s hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients. This belief was based on an extensive evaluation of nursing degree requirements, including consultation with an outside nursing expert. The expert concluded that it would not be possible for the applicant to participate safely in the program.

The Court found (*Davis*, 409-10) that, "...in light of respondent's inability to function in clinical courses without close supervision, Southeastern, with prudence, could allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alternation in the nature of a program is more than the "modification" the regulation requires."¹³

To some extent, the notion of "otherwise qualified" is the flip side of the same coin as "fundamental program requirement." In many cases, one determines that someone is not "otherwise qualified" precisely because they can't successfully complete a program unless the school makes "fundamental program alterations."¹⁴

This issue of whether the modifications necessary to accommodate a particular student would require the school to make "fundamental program alterations" may be the single disability question most inviting to potentially litigious students. In our experience, it comes up more frequently than the other two bases on which a school can legally refuse to make an accommodation, those of "undue burden" and "direct threat" to safety. For example, is class attendance an essential component of every course?

¹³ *Davis* is still good law, and is routinely quoted by the courts for the proposition that admission into a professional program requires that the plaintiff be "otherwise qualified." Failure to meet the legitimate professional standards of a program which cannot be altered to meet that particular disability means the student is not "otherwise qualified."

¹⁴ In *Doherty v. Southern College of Optometry*, 862 F.2d 570, (6th Cir. 1988) the Court addressed the case of a student with limited vision who was attending the Southern College of Optometry. After the student's matriculation into the program, the school imposed a requirement that students pass a pathology clinic proficiency requirement in order to qualify for an externship program for fourth year students. The student, due to his disability, was not able to pass this proficiency requirement, and requested that the requirement be waived. The College gave the student extra time to practice the techniques, but refused to waive the requirements. The student could not pass the requirements, even with the extra time, and ultimately brought suit against the school alleging a violation of 504.

The Court of Appeals addressed the case by noting that the inquiry into "reasonable accommodation" is one aspect of the "otherwise qualified" analysis. In holding that the College did not discriminate against the plaintiff, the Court stated (at page 575) that, "(A)lthough SCO had a limited obligation to make reasonable accommodations for handicapped individuals such as plaintiff, it is clear that nothing in the language or history of 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications to a clinical training program. *Davis*, 442 U.S. at 414. An educational institution is not required to accommodate a handicapped individual by eliminating a course requirement which is reasonably necessary to proper use of the degree conferred at the end of a course of student. ... Waiver of a necessary requirement would have been a substantial rather than a merely reasonable accommodation. *Doherty*, 659 F. Supp. at 673.

Courts in general are far less willing these days than they used to be in deferring to the academic judgments of faculty. Thus, it is predictable that courts may be willing to let the trier of fact decide whether a particular accommodation really constitutes a “fundamental program alteration.”

The law provides that a college or university is not required to provide any aid or service or make any modification that would result in a fundamental alteration in the nature of the program. For example, where a course requirement is essential to the program of instruction taken by the student, the university is not required to waive the requirement. In evaluating whether the requested program modifications would require substantial program alteration or would fundamentally alter academic standards or programs, court decisions suggest that the program administrator should consider 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. See 28 CFR § 36.303 (a) for the language on undue burden and fundamental alteration of the program.¹⁵

The process the school must go through in considering alternatives to dismissal of a student from a program is set forth in *Wynne v. Tufts University School of Medicine*, 932 F. 2d 19, 26 (1st Cir. 1991), and 976 F. 2d 791 (1st Cir. 1992). In these two cases the court held that the school must show undisputed facts indicating that relevant officials considered alternative means, their feasibility, cost and effect on academic program and came to a rationally justifiable conclusion that the alternative would result in lowering academic standards or require substantial program alteration. See also *Guckenburger v.*

¹⁵Specific guidance on academic adjustments can be found at 34 CFR 104.44 which states in relevant part as follows: "Academic requirements. A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted."

Boston University, 974 F. Supp. 106 (D. Mass. 1997)¹⁶ and *McGregor v. Louisiana State University Law Center*, 3 F. 3d 850 (5th Cir. 1993), where the court held that the LSU law school policy of not allowing part-time enrollment as a reasonable accommodation (where the school only operated a full-time law program) was not a violation of Section 504. The court found that this was an academic decision that should be left to the university and that the school was not required to create a part-time law school division as an accommodation.

See 28 CFR § 36.303 (a) for the language in the federal ADA regulations regarding “fundamental alteration of the program.” Once an institution has determined that an accommodation would require a fundamental alteration or an undue burden, there exists an obligation on the part of the institution to consider alternative aids or services to the extent they exist. Maintaining a trail of what consideration was given to such alternatives is a legal necessity.

Note that most schools make many, many accommodations without fundamental alteration of their program requirements. The most frequently provided accommodations for cognitive and physical disabilities include: extended time on tests; access to a

¹⁶ As a follow up to her Aug. 1997 decision in *Guckenberger v. B.U.* 974 F. Supp. 106 (D. Mass. 1997), Judge Saris issued a memorandum and order on the issue of course substitutions for students with learning disabilities. This memo addressed the extent to which the University had complied with the Judge’s order that BU propose and implement a “deliberative procedure” for considering whether course substitutions for the foreign language requirement of BU’s College of Arts and Sciences would fundamentally alter the nature of BU’s undergraduate liberal arts degree. The Court held that Boston University did not have to allow learning disabled students to substitute other courses for a two-year foreign language requirement. The Court’s finding in the memorandum and order is as follows:

"This Court concludes that so long as an academic institution rationally, without pretext, exercises its deliberate professional judgment not to permit course substitutions for an academic requirement in a liberal arts curriculum, the ADA does not authorize the courts to intervene even if a majority of other comparable academic institutions disagree."

The Judge’s memorandum is useful in that it spells out the steps the academic institution must take when reaching a decision with respect to the availability of reasonable accommodations under the ADA. The Judge cited *Wynne v. Tufts University School of Medicine*, 932 F. 2d 19 (1st Cir. 1991) for the test to be followed in evaluating the institution’s decision:

"If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation."

computer or other assistive technology; separate test administration; extensions of due dates during periods of heavy class activity; reduced course loads; sign language interpretation or transcription services; note takers; early registration; and alternative options for demonstrating competencies. Useful accommodations for students with psychological and medical disabilities include reduced course load; flexible attendance policies; separate test administration, special seating; accommodated housing; more frequent testing over smaller amounts of material; extended due dates but with specific limits; and distance learning.¹⁷

2 - C. Policy Issue. What are some policy issues in this area? Does the school want to design its programs differently to accommodate certain disabilities? Or create allied alternate programs? Should it take the initiative with licensing boards to see whether all the “old” requirements that might exclude some disabled students are still necessary? Precisely what are the truly necessary academic and technical requirements in each program?

Our campuses are often defined by concepts of tradition, history and campus culture. The older the institution, the more likely that it has a rich history and established ways of doing things. All students must attend class, take comprehensive exams, live in dorms for the first 2 years, attend convocation, and take PE to graduate. Traditionally, student ability is judged by an ability to think quickly, articulate thoughts verbally and write with correct syntax and no spelling errors. They must be good at multiple choice/essay/fill in the blank exams. They must read 5 books, write 5 papers, and have them in on time. To graduate they must demonstrate competence in a foreign language, or in statistics or perhaps the ability to give an injection.

It is easy to understand why introducing modifications and change to such time-honored practices such as written final exams, for instance, can prove challenging. But evaluating the need for a change in the status quo when considering an accommodation may be exactly what ADA requires. It is at this junction of established values and the need to accommodate and initiate possible change that disability law presents its greatest challenge.

¹⁷ Additional services in the student life area can include psychological counseling, assistance with medications through student health services, study counseling, time management, academic tutoring and stress reduction training. It also helps to have advising done by faculty with knowledge of disability issues.

Students with psychological and medical disabilities are often particularly challenged in several ways:

- Consistent academic performance and/or regular class attendance (due in part to manifestations of medical or psychological condition or to unstable medications)
- Socially acceptable behaviors and/or integration into the campus community
- Emotional and/or physical requirements in some performance-based programs

Determining whether they can be accommodated without "fundamental program alterations" also requires a fresh perspective on what things from the traditional requirements are really academically necessary and which are not.

2 - C. Preventive Idea. What are some things a school can do before a student ever arrives to enhance chances of successfully defending a challenge on the basis of fundamental program requirements?

One is to articulate technical standards in professional programs such as nursing, medicine, law, social work, counseling, psychology and others. Just as with performance management of employees, student performance against these standards must be continually monitored from entrance to graduation – progress reports, written evaluations – this prevents unqualified students from making it to graduation and then being told at last minute they may not graduate. It is helpful to think of the technical standards as linking to the licensing requirements for a particular profession. General categories of technical standards include: observation; communication; sensory and motor function; intellectual, conceptual, integrative and quantitative abilities; and behavioral and social requirements.

Additional information about putting together technical standards is available at <http://counsel.cua.edu/ADA/publications> and the PowerPoint program there on Clinical Competency: Academic and Technical Standards of a Program. This is based on a presentation at CUA to faculty in November 2003. See also Note 3 above.

Another proactive step is to articulate the "fundamental academic requirements" for a program, akin to articulating the "essential requirements" of a job on the employment side of the ADA. Standards of practice, or an individual's fitness and qualification to participate in a major life activity such as learning, are central to the implementation of disability law and present a particularly important issue to educational

institutions. Standards protect the academic integrity of a university and its programs and assist in supporting the matriculation of qualified individuals into professional programs such as social work, nursing, law, and medical school. ADA and 504 guarantee an individual access to educational opportunity; they do not guarantee success. The law also requires that a student be “qualified” to participate in the learning process or particular program in the same way that a worker is required to be fit for a job. Making a “fit for practice” or “otherwise qualified” judgment is not an easy one as it requires consideration and identification of the essential components in a course or program. It requires the participation of faculty, program directors, academic and student deans and guidance from legal counsel. See B. Blacklock, Univ. of Minnesota, *Considerations in Determining Essential Course/Program Components* and other university websites in the Appendix Part 2 for further information and guidance.

Schools should take steps to avoid discrimination in the admissions process. See CUA's checklist in the Appendix Part 3 on what questions to avoid during interviews and admission.

For an excellent discussion of the special issues of "fitness" in educating for health fields, see Laura Rothstein's commentary in *Symposium: The American with Disabilities Act: A Ten Year Retrospective: Higher Education and The Future of Disability Policy*, 52 Ala. L. Rev. 241 (Fall 2000). At page 261 the author notes that common themes and principles arising from cases involving health care professional programs and admissions include substantial deference to health care institutions in determining whether certain situations pose a direct threat and a requirement that institutions bear the burden of demonstrating what are essential functions or fundamental requirements.¹⁸

3. Some other policy and legal challenges in the student ADA setting.

A. Undue Burden. The affirmative defenses to a student ADA claim by a university can include that to accommodate the student would be an "Undue Burden" on the school. A university need not make modifications or provide auxiliary aids or services if it constitutes an undue burden. In determining whether or not an undue burden exists, the

¹⁸ See also *Symposium: Health Care Professionals with Mental and Physical Impairments: Developments in Disability Discrimination Law*, 41 St. Louis L. J. 973 (Summer 1997), also by Ms. Rothstein.

factors to be considered are the nature and cost of the action needed in the context of the overall financial resources of the university, not just the budget of the program, academic or administrative unit involved. See 28 CFR § 36.303 (a) for the language on undue burden.

B. Direct Threat. Similarly, a university is not required to permit an individual to participate in or benefit from a university program or service when that individual poses a "direct threat to health or safety." Direct threat means a significant risk to health or safety that cannot be eliminated by modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. In determining whether an individual poses a direct threat to health or safety, the university must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modification of policies, practices, or procedures will mitigate the risk. See 28 CFR 36.208 for the language quoted above on direct threat. In an ADA employment case on the same topic, *Chevron Inc. v. Echazabel*, 536 U.S. 73 (2002), the Supreme Court held that employer could choose not to employ a person where there was a reasonably documented risk to the employee's own safety, even though the ADA on its face permits such a "direct threat" defense only where an employee's disability threatens the of *other* individuals in the workplace. See 28 CFR 36.208 for the language quoted above on direct threat.

C. Discipline of a Disturbed Student. Disciplining a psychologically disturbed student potentially involves complex ADA and other legal issues. Important policy issues in this regard were identified and discussed recently by Kent Weeks and Jayme McKellop in *Lex Collegii*, Vol. 28, No. 2 (Fall 2004), noting, "(T)here are three primary concerns for institutions when taking disciplinary action against a psychologically disturbed student: (1) concern for the individual student, (2) concern for other students, and (3) concern for the college or university." As to the first item, they note that this "includes examining whether the school can provide the care and guidance an emotionally disturbed student needs, whether an academic environment is the appropriate place to meet the needs and interests of the student, and the likelihood that the student

could injure him or herself.” There are also difficult questions, in some cases involving federal law on student records and confidentiality, about the extent, if any, to which the student's parents should be involved.

As with any other student who gets disciplined, there should be an established process and it can include conditions for return to campus and criteria for determining "readiness" to resume studies. As Professor Weeks points out, there is a policy choice between treating these students as purely conduct problems, looking only at their conduct and not at any disability labels, or choosing the approach discussed by Gary Pavela of a special policy for psychiatric withdrawal, as presently developed by some schools. See Pavela's material from the October 6, 2004 Audio Conference "Responding to Students With Mental Disorders: Law and Policy Issues."

4. Conclusion. It is important to retain the ground on campus that has been won at great cost over the last 30 years. Acceptance of the ADA and 504 has been achieved due to hard-working, highly motivated students with disabilities; to informed faculty and staff; and to good interactive processes for decision making, both with students and as between faculty and administrators.

But threats to the continued inclusion of students with disabilities loom. More and more students with disabilities raise the financial bar for schools. More students mean more pressure on scarce faculty time and department resources. More visibility of disabled students runs the risk of complacency, of stereotyping rather than making individualized assessments and implicitly contains the threat that sufficient numbers of such students may be a threat to the status quo in the classroom.

As faculty are asked to make more and more accommodations, it becomes easier for them to see it as interference with their "academic freedom" to teach as they see fit. It becomes easier for them to see accommodations as providing an "unfair advantage" rather than providing a level playing field. Faculty suspicions are heightened by bad experiences with disabled students who ignore rules, deadlines and attendance requirements, and who make last minute requests or disclose a disability only after initially failing. Good communications and administration by an integrated academic and administrative team will help avoid these problems and ensure a fair chance for all students.

Appendix - Part 1 - Suggested Resources

On-Line Resources

Disability Information - General

- <http://www.access-board.gov> U.S. Access Board
- <http://www.adata.org> National Technical Assistance Program with index of regional centers.
- www.ahead.org Association of Higher Education and Disability. Professional association dedicated to the full participation of individuals with disabilities in higher education. Includes a comprehensive publication catalog of brochures, pamphlets, books and audio tape materials.
- www.cast.org/udl Center for Applied Special Technology. Universal Design for Learning
- <http://counsel.cua.edu> *Campus Legal Information Clearinghouse (CLIC)*. The Catholic University of America and the American Council on Education
See also, ADA. Checklists The Catholic University of America
- http://design.ncsu.edu/cud/univ_design/princ_overview.htm
Center for Universal Design
- www.disability.gov New Freedom Initiative for Americans with Disabilities
- www.ed.gov/about/offices/list/ocr/index.html U.S. Department of Education, Office of Civil Rights (OCR)
- www.ets.org/disability.html Educational Testing Service. Documentation guidelines
- <http://www.grsu.edu/offices/provost/FAZsClassroomDisruptionSpring04.pdf>
Frequently asked questions on classroom disruptions
- www.nacua.org National Association of College and University Attorneys
see publications below
- www.naspa.org National Association for Student Personnel Administrators.
- www.nimh.nih.gov National Institutes of Mental Health
- <http://216.218.205.189/> Access Board, a federal agency committed to accessible design

Disability Information and Education

- <http://cte.udel.edu/disabilities.htm> *Teaching College Students with Disabilities.* Resources compiled and reviewed by Al Cavalier, School of Education, University of Delaware
- <http://www.ds.umn.edu> Disability Services Home Page. University of Minnesota
- <http://www.telr.osu.edu/fame> *FAME* Faculty and Administrator Modules in Higher Education. The Ohio State University. Includes web-based training with well-developed pre-post assessment instruments based on case scenarios.
- <http://www.telr.osu.edu/dpg/fastfact/index.html> Fast Facts for Faculty Series developed by The Ohio State University
- www.ualr.edu/pace Project *PACE* developed by the University of Arkansas
- www.washington.edu/doit/ *Do-It* Training Program developed by the University of Washington

Suggested Reading and Other Resources

U.S. EEOC. *Instructions for Field Officers: Analyzing ADA Charges After Supreme Court Decisions Addressing 'Disability' and 'Qualified'.*

U.S. Department of Education Office for Civil Rights (OCR). *Auxiliary Aids and Services for Postsecondary Students with Disabilities: Higher Education's Obligations Under Section 504 and Title II of the ADA.*

AHEAD. *Program Evaluation of Postsecondary Student Services: From Theory to Practice.* By: G. Sam Goodin, University of Michigan; David R. Parker, University of Connecticut; Stan Shaw, University of Connecticut; Joan M. McGuire, University of Connecticut. Edited by: Stephan Smith, AHEAD

NACUA Publications

Accommodating Faculty and Staff with Psychiatric Disabilities

The Dismissal of Students with Mental Disabilities

*Students with Learning and Psychiatric Disabilities: New Challenges for
Colleges and Universities*

Accommodating Students with Learning and Emotional Disabilities, 2nd edition

Blackbird Fly Away: Disabled in an Able-Bodied World, by Hugh Gregory Gallagher (1998).

*College Students with Learning Disabilities: A Handbook for College LD Students,
Admissions Officers, and Administrators*, by Susan Vogel (latest edition).

*Driven to Distraction: Recognizing and Coping with Attention Deficit Disorder from
Childhood Through Adulthood*, by Edward Hallowell and John Ratey (1995).

*In the Mind's Eye: Visual Thinkers, Gifted People with Learning Difficulties, Computer
Images, and the Ironies of Creativity*, by Thomas G. West (1991).

*Keeping Ahead in School: A Student's Book About Learning Disabilities and Learning
Disorders*, by Dr. Mel Levine (1990).

Memoirs of an Unquiet Mind, by Kay Redfield Jamison (1997).

Videos-Tapes

How Difficult Can This Be (PBS)

The Race Inside My Head (GWU)

Working Together: People with Disabilities and Computer Technology (DO-IT Univ.
Washington.)

Appendix – Part 2 - Barbara Blacklock's Accommodation Process pointers

I. Accommodation Process and Roles

Barbara Blacklock, Disability Services, University of Minnesota

Process

- **Is the individual a “person with a disability”?**
- **Is the individual “otherwise qualified”?**
- **What are the barriers resulting from the interaction between the documented disability and the campus environment?**
- **What are the possible accommodations, modifications, or adjustments that might remove the barriers?**
- **Without these accommodations, would the individual still have meaningful access to the program, service, or activity?**
- **Would these accommodations compromise the essential elements of the curriculum? See, *Considerations in Determining Essential course/Program Components* below.**
- **Would these accommodations require a fundamental alteration in the nature of the program, service, or activity?**

Roles

Student Role

- **Provide medical and/or psychological documentation to Disability Services**
- **Participate in the process of determining and implementing reasonable accommodations**
- **Inform Disability Services when accommodations are not working, need to be modified or symptoms change**

Faculty Role

- **Referral to Disability Services**
- **Participate in process to determine and implement reasonable accommodations**
- **Identify essential course components for accommodations to be determined**
- **Request assistance (from Disability Services) with accommodation, implementation or consultation**

Disability Services Role

- **Maintain medical/psychological documentation in a confidential manner**
- **Determine if condition(s) are a disability in accordance with state and federal laws**
- **Identify and assist with implementation of reasonable accommodations**
- **Request updated documentation when symptoms change to determine if accommodations need to be modified**
- **Provide information and referral to campus and community resources to resolve disability-related issues**

II. Considerations in Determining Essential Course/Program Components

Barbara Blacklock, Disability Services, University of Minnesota

As presented at a medical and law school faculty and staff workshop

The following considerations are intended to assist faculty in identifying essential skills/knowledge/attitudes within university courses or programs. They are not intended to identify specific accommodations.

The first step is for faculty to establish specific learning objectives and/or **outcomes**. When considering outcomes, sometimes it is helpful to divide the outcomes into the following broad areas: **skills, knowledge and attitudes**. After the outcomes are determined, the process of determining whether or not the objectives/outcomes are essential begins. The exact definition of “essential” will be determined by individual faculty/academic departments.

Some materials departments should have on hand when identifying essential program requirements include; licensing board requirements, course objectives and if applicable a job description from a general class of occupations such as “Staff Nurse”. When writing out essential functions of a program, it is helpful to start the statement with a strong **verb**, followed by the **object** and ending with the **purpose**. Keep in mind you need to focus on outcomes, not the means by which a student achieves an outcome.

Specific Questions to Consider

- Are the skills/knowledge/attitudes an integral part of the learning objectives of the course?
- Is there only one way for the skills/knowledge/attitudes to be demonstrated?
- Would elimination of the skills/knowledge/attitudes alter the learning objectives of this course/program?
- Was this course created to teach any of the skills/knowledge/attitudes?
- Would there be any significant consequences if the skills/knowledge/attitudes were not learned?
- Would there be any significant consequences if the skills/knowledge/attitudes were performed at varying levels of competency?
- Is it necessary for the student to be able to transfer the skills/knowledge/attitudes to another setting?
- Does the student need to be physically able to perform the skills/knowledge/attitudes themselves?
- Does the student need to be cognitively able to perform the skills/knowledge/attitudes themselves?

CUA - ADA Guidelines

Pre-Admission Inquiries

- [Definition](#)
- [Permissible Inquiries](#)
- [Prohibited Inquiries](#)

Definition: Pre-admission inquiries are defined as those inquiries made orally by those interviewing applicants, including any alumni who may be involved in the interview process. It also includes any questions on written materials sent out by the university that might be construed as inviting information about a disability.

Prohibited Inquiries:

- Pre-admission inquiries about the applicant's disability or possible disability (e.g., you cannot ask "Are you disabled?" or "I notice that you are in a wheelchair, will you only be able to take classes in buildings that have elevators?").
- Questions about alcohol and substance abuse. Questions should be limited to behavior and conduct, and not to status or treatment or history.
- Questions about whether or not the applicant has sought counseling or treatment for an emotional or mental health problem.
- Asking an applicant why any admissions test was taken under "nonstandard" conditions.

Permissible Inquiries:

- Asking about an admitted student's necessity for modifications after the applicant is admitted. For example, if you are supervising a law student with a learning disability who is on law review, and the student does not have the ability to do cite checks because of the learning disability, then you might ask whether a computer program that can do the cite checks for the student would be helpful.
- Asking for voluntary identification of a disability (this is known as *self-identification*) in the pre-admission stage if actively engaged in affirmative action efforts, provided:
 - that it is made clear that the information requested is intended for use solely in connection with affirmative action efforts;
 - the request is on a voluntary basis;
 - the request will be kept confidential; and
 - refusal to provide it will not subject the applicant to any adverse treatment.

Source: *Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430 (E.D. Va. 1995); 28 C.F.R. § 35.104 and 34 C.F.R. § 104.42.

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From CUA's ADA web page materials at <http://counsel.cua.edu>, under ADA - Quick Clicks.