Current Disability Law Issues – Faculty & Students

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FACULTY ISSUES

Overview of the Issue

This section is adapted and updated from Laura Rothstein, *Disability Law and Higher Education: A Road Map For Where We've Been and Where We May Be Heading,* 63 Maryland Law Review 101, 107, 122 (2004) (footnote references omitted).

"The elimination of mandatory retirement, the difficulty of measuring performance for higher education faculty, and a shaky economy have combined to create an increasing number of challenges by faculty members claiming discrimination on the basis of disability. Faculty members have brought challenges in the context of employment and tenure, as well as promotion decisions. Although this development is part of a larger societal issue, the uniqueness of employment in an academic setting has required institutions and the courts to address these issues in an unusual context.

[Factors requiring attention] include the elimination of mandatory retirement and the challenges in measuring and documenting performance deficiencies. Uncertainties about the economy and whether retirement benefits will be sufficient have caused more people to delay retirement. The higher education setting gives aging faculty members the opportunity to remain connected to a community of colleagues. This opportunity is particularly compelling considering the benefits of having an office and access to support services, such as long distance telecommunications, clerical support, technology support, computer upgrades, and even travel funding.

An increasing number of cases involve faculty claiming disability discrimination. In these cases, the institution of higher education generally has prevailed because of its ability to prove that the adverse employment decision was a result of factors other than the disability.[1] These cases illustrate, however, the importance of establishing essential functions and fundamental requirements for a program at the outset, and documenting deficiencies on a careful and ongoing basis. Although many institutions of higher education have implemented detailed

[1] Amy Gajda, THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION (2009) (discussing the trends that courts are no longer as deferential to institutional decision making than has been the case previously).

systems of post-tenure review and other improved faculty evaluation procedures and practices, those that have not may find themselves in messy and lengthy disputes."

It is not only faculty members reaching retirement who raise disability issues. The faculty member who becomes depressed, develops substance abuse problems, has cancer, or has some other condition that either affects (or is perceived to potentially affect) performance may raise concerns regardless of the seniority of the individual.

Who Is "Disabled"

To be protected under disability discrimination law the individual must be substantially limited in one or more major life activities, have a record of such a limitation or be regarded as such. The ADA Amendments Act of 2008 and the 2011 EEOC Regulations make it clear that the definition of who is covered is to be broadly interpreted. The result is that in most cases, a dispute about discriminatory treatment should not focus on whether the faculty member meets the definition of "disability." Instead, the focus should be on whether the institution has established the essential requirements of the program and whether the faculty member is otherwise qualified to carry those out. This assessment should take into account reasonable accommodations and should involve an interactive process.

The case of *Wynne v. Tufts University School of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991) provides guidance about judicial deference. Although the case is in the context of an accommodation for a student, its reasoning is relevant to faculty settings as well. The court held that in cases involving modifications and accommodation, the burden is on the institution to demonstrate that relevant officials within the institution considered alternative means, their feasibility, cost and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower standards or require substantial program alteration.

When Will Misconduct or Deficiencies Be In Question?

For both tenure track and contract faculty members, an annual evaluation process can raise issues of misconduct and deficiencies. These issues can also be raised in granting raises, sabbaticals, research support. Post-tenure review, more common on campuses today, may also highlight concerns. And, of course, promotion and tenure decisions are occasions for evaluation of performance. A termination for cause at any point may result from claimed misconduct or deficiencies.

Deficiencies that may raise concern could include the inability to teach a full load. Student evaluations (even with their limitations) might raise concerns about the faculty member's performance in class. For example, several students might comment that the faculty member seemed frequently impaired in the classroom – perhaps by a controlled substance or perhaps because of a psychological or health condition. The faculty member may not turn in grades in a timely manner or meet with students according to expected norms. The faculty

member may not meet the publication or other scholarship/productivity expectations. Or there may off-the-job conduct, such as drunk driving or inappropriate behavior that reflects on the institution. A faculty member may simply not be able to interact with other colleagues in required committee and other service responsibilities.

Whenever there is a deficiency (or perceived deficiency), one of the questions that must be answered is whether the expectations were clearly stated in terms of employment or whether they are implied. Does the faculty member's appointment letter state what is required in terms of teaching, research, and service? If not, what documents are incorporated by reference? What notice did the faculty member have? These questions are important for establishing the "essential functions" of the position. Did the faculty member have reasonable notice of deficiencies?

Reasonable Accommodations

The reported judicial decisions involving faculty members generally involve fact patterns where the faculty member's performance was deficient, and the courts rarely discuss whether reasonable accommodations might have been provided. The types of accommodations that should be considered in appropriate cases, however, might include adjustments in teaching times, leaves of absence (paid or unpaid, depending on institutional policy), extending the "tenure clock", reduction in committee responsibilities for a semester, and other accommodations.

The challenge in finding good guidance on this is that faculty members do not produce widgets, and establishing the exact requirements and expectations and the norms is quite challenging. While institutions have improved in developing consistent policies and expectations, faculty members may have been appointed, tenured, renewed, and promoted under old rules that have been changed later.

What Other Legal Issues Must Be Considered?

In addition to disability discrimination requirements under the ADA, the Rehabilitation Act, and state law, several other laws must be considered when looking at faculty performance deficiencies that might be related to health or disabling conditions. The Family and Medical Leave Act provides for leave if certain conditions are met. Privacy policies under HIPAA allow faculty members to protect certain information, although the faculty member may need to waive that privacy (at least for limited purposes) in a dispute where the faculty member is claiming discrimination or claiming that the deficiency was related to the disability. And, of course, university internal personnel policies, including post-tenure review, must be followed.

The faculty member who can show that policies were followed inconsistently may have a claim of discrimination. For example, if extended leaves or special teaching accommodations are granted routinely for faculty members who do not have disabilities, but not for those who do, this could be a violation of discrimination laws.

Faculty Termination

In the context of a faculty termination process where there may be an issue of disability, while it is humane to take into account the potential stigma and privacy issues of a faculty member, it would probably violate the ADA and the Rehabilitation Act to have a mandatory process for termination based on a health or disability issue. While it might be appropriate to provide a faculty member an option of addressing the issue outside of the ordinary termination process, it is problematic to require it.

The increasing number of faculty with disability issues should highlight to institutions the importance of developing consistent and appropriate procedures for termination and for addressing disability issues in other employment decision making.

DISCUSSION SCENARIOS

1) Faculty member who "appears" to have a disability – raises issue of "regarded as" and "otherwise qualified"

Professor A is a popular and long serving faculty member in the political science department. He publishes regularly, receives outstanding student evaluations, and is a good citizen in the department. The Department Chair has recently heard through the grapevine that students say he is acting "odd" in class lately, sometimes discussing topics totally unrelated to the subject. Clerical and support staff members as well as colleagues have noticed that his normally impeccable appearance is not so impeccable. He is frequently unshaven and has not showered. His grades were extremely late in the most recent semester. He had always submitted his grades on time before.

2) Faculty member who requests accommodations in advance – raises issue of meeting definition of disability, "otherwise qualified," and "reasonable accommodation"

Professor B is 60 years old and is a tenured full professor in the biology department at State University. She has a solid research record, has provided strong service as a member of several university and department committees in the 30 years she has been teaching at State University. During the past summer she was diagnosed with breast cancer and had a double radical mastectomy. She is about to begin a regimen of chemotherapy and radiation treatments that will last for about four months. She is aware that these treatments may affect her energy level and strength. She is scheduled to teach a class of basic biology to 100 students and a microbiology class to 50 students. She is also scheduled to supervise lab classes. In August she met with the department chair, bringing documentation from her treating physician, indicating that the treatment would have adverse side effects. The outcome of the treatments is unclear. Her physician indicates that some cases like hers have resulted in complete remission, and others

are not positive and the illness recurs. She requests to be relieved from teaching the basic biology class for the semester and not to serve on any faculty committees during the fall semester. She advises the chair that the condition might require additional accommodations to the teaching load for the spring semester, but she will not know until well into the semester. She is a popular and highly respected faculty member.

3) Faculty member who justifies performance problems because of impairment – raises issue of obligation to make "known" the disability; conduct outside of the workplace and whether condition is a disability

Professor C is a lively and popular classroom professor in the history department. He is 63 years old and has always had a reputation as being very "friendly" with female students and staff members, but there has never been a complaint of sexual harassment. He has also been an active social drinker at both university events and elsewhere, but has not previously had any DUI's or other problems as a result. At a history department graduation party for students this past spring, however, Professor C, had too much to drink, gave a ride home to a student and made unwanted sexual advances during the ride, and after dropping her off, was cited by law enforcement for reckless driving, the story making the evening television news. The student has since filed a sexual harassment claim, which has become public because she talked with the media. Since this became public, other students and staff and colleagues have begun to advise the department chair and dean about other similar incidents that did not result in ticketing or an official grievance process. Professor C told the Department Chair that he has always been a drinker, but as he has gotten older, he tends to drink more. He recently realized that he needs treatment for alcoholism and has a diagnosed condition of sexual disinhibition. He has raised these issues as part of the sexual harassment grievance process. He has provided a statement from a mental health professional about his condition.

I. Faculty and Impairment (overview)
   A. Why is this an issue now?
   B. What are the statutes and policies relevant to senior faculty?
   C. What are the relevant disability discrimination laws?
   D. What should be the policy, practice, and procedure response for higher education planning and response?

II. Faculty and Impairment – why is this an issue now?
   A. Baby boomers reaching retirement age – data
   B. Diminishing capacity for some
   C. Uncertain economy affecting retirement funds
   D. Uncertain economy and policies affecting access to health care when most needed "Face it, girls. I'm older and I've got more insurance." Evelyn Couch, Fried Green Tomatoes

III. What statutes and policies are relevant to senior faculty in addition to disability discrimination laws?
   A. Age Discrimination in Employment Act

B. Family and Medical Leave Act
C. HIPAA
D. State laws on privacy, and other matters
E. Institutional policies on retention, privacy, etc.

IV. Federal Disability Discrimination Law – Institutions Covered by Rehabilitation Act and ADA
A. Section 504 of the Rehabilitation Act of 1973 – recipients of federal financial assistance
B. Americans with Disabilities Act – Title I (employment)
C. Americans with Disabilities Act – Title II (state and local governmental agencies, including in their employment practices)
D. Immunity issue – not applicable for Section 504; may be for state institutions

V. Federal Disability Discrimination Law – Substantive Requirements
A. Who is protected – meeting the definition of "disability"
B. Performance expectations
C. Reasonable accommodation
D. Discrimination and retaliation

VI. Source of Guidance on Interpreting Federal Disability Discrimination Law
A. Statutory language for Rehabilitation Act and Americans with Disabilities Act
B. Regulations and agency guidelines
C. Judicial interpretation
D. OCR opinions

VII. Federal Disability Discrimination Law – Who is protected
A. Three prong test –
Substantially limited in one or more major life activities
Record of such an impairment
Regarded as having such an impairment
B. Must be otherwise qualified – able to carry out essential requirements of program with or without reasonable accommodation; must not be danger to self or others
C. Alcohol and substance use are separately clarified – addiction to them would be a disability, but prohibiting use is still permissible

VIII. Impact of the ADA Amendments Act of 2008 and Regulations
A. Broadened definition
Mitigating measures no longer considered
Major life activities clarified and broadened
Regarded as clarified
B. EEOC regulations issued in 2011 provided clarification and guidance
C. Definitions applicable to both ADA and Rehabilitation Act

IX. Major Life Activities
A. Include but are not limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working
B. Also includes operation of major bodily functions, including but not limited to functions of immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions

C. Amendments mean that the following conditions are more likely to be covered – cancer, diabetes, HIV positive status, depression (depending on severity), mental health problems.
D. Amendments MAY give more likely coverage to conditions such as back problems, obesity, and respiratory conditions

X. Otherwise Qualified
A. What are "essential performance expectations need not be excused
B. Even off the job behavior and conduct may be considered
C. What is the source of the performance expectations? Appointment letter, university policies (by reference?), notice, annual reviews, post tenure review policies
D. Obligation of faculty member to make "known" the disability before, not after nonperformance
E. Challenge of vague performance standards for faculty – teaching, research, service

XI. Reasonable Accommodation
A. Need not lower standards or fundamentally alter program
B. Deference standard under *Wynne* – relevant officials, considered alternatives, feasibility, cost and effect on program, reaching rationally justifiable conclusion about standards and program alteration officials
C. Financial and administrative cost are relevant factors
D. Importance of interactive process

XII. Types of Accommodations to Consider
A. Physical environment – location of classes; parking issues, etc.
B. Teaching/scholarship/service reductions
C. Leaves of absence
D. Class scheduling – time of day, frequency
E. Assistance for technical teaching – e.g., demonstrating a surgical procedure

XIII. What Are the Likely Issues for Senior Faculty and Why?
A. Mental impairments – depression, dementia, alcohol and substance abuse
B. Cancer and other health conditions more prevalent as faculty become older
C. Mobility impairments that occur more often or in more serious condition as faculty members become older
D. Vision and hearing conditions

XIV. What Are the Judicial Responses in Faculty Cases?
A. Few cases – possible reasons
B. Guidance from employment cases generally on definition of disability under 2008 amendments
C. Otherwise qualified
D. Reasonable accommodations

XV. Incorporating Disability Discrimination Law Into Policy, Practice, and Procedure
A. Letter of appointment – essential functions
B. Annual and other review processes
C. HR policies on accommodation requests should be made known
D. Ensuring compliance with privacy and confidentiality of information (Challenge in committee review process)
E. Interactive process in considering reasonable accommodations

F. Internal disciplinary and dismissal procedures
G. Ensuring consistency for all similarly situated faculty in providing accommodations for situations other than disabilities
H. Notice and due process
I. Providing retirement and other human resources counseling and planning

XVI. Benefits of Proactive Approach and Final Thoughts
A. Positive and productive environment
B. Avoid use of resources on litigation and internal grievance procedures
C. Allows for predictable and humane process
D. Improves environment for everyone

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STUDENT ISSUES

Higher Education and Disability Discrimination

A Fifty Year Retrospective

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I. Introduction

From 1960 to 1973 -- virtually no consideration of these issues because there was no federal law prohibiting discrimination on the basis of disability. Section 504 of the Rehabilitation Act of 1973 and the 1975 federal special education statute set the stage for changes, but judicial guidance only began in 1979.

II. The Courts Begin to Illuminate and Congress Amends and Adds – Procedural and Programmatic Attention -- 1979-1990

A. *Southeastern Community College v. Davis* – The First Supreme Court Case

The Court held that "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[2] Qualifications take into account both academic and technical standards. Programs are not required to provide *fundamental alteration*, but should consider technological advances but need not lower standards.

Professional education programs leading to licensing, particularly programs for health care professions are given substantial deference by the courts regarding what are the essential requirements of the program, what constitutes a direct threat, and what would be unduly burdensome.

Since *Southeastern Community College*, courts have addressed other professional education disability discrimination cases. Courts require **individualized assessments** of whether the individuals were able to carry out the **essential functions** of the program **with or without reasonable accommodations in spite of the disability**. Courts have not allowed myths or stereotypes or prejudices

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[2] 442 U.S. at 406 (1979)

to be determinative, but instead have required that appropriate officials made rationally justifiable decisions.[3]

B. The Individuals with Disabilities Education Act – Prepares Students for Higher Education

The Individuals with Disabilities Education Act (IDEA) enacted in 1975 required public K-12 education to provide a free appropriate education in the least restrictive environment to all age-eligible students. Many individuals who in the past would have been institutionalized as children, or who would simply have dropped out of public schools, were graduating from high school and were in a position to enter college and the work force as this statute began taking effect.

C. Regulatory Guidance

It was not until 1978 that regulatory guidance was provided and they were not widely known about even after promulgation. The model regulations on postsecondary education[4] provided guidance on **admission and recruitment**, **general treatment of students, academic adjustments, housing, financial and employment assistance, and nonacademic services** (including physical education and athletics). Also in 1978 as part of the regulatory focus, institutions subject to Section 504 were required to engage in a **self evaluation**.[5] States began to develop more extensive Rehabilitation Act programs and departments that provided both funding for services and technical assistance on rehabilitation and accommodations for education, higher education, and employment.

D. Other Developments of Significance

Between 1979 and 1990 several Supreme Court cases (and sometimes responsive legislation) addressed a variety of issues. These included the issue of program specificity (*Grove City College v. Bell*[6] which was followed by the 1988 Civil Rights Restoration Act),[7] *University of Texas v. Camenisch*[8] (in which the Supreme Court granted certiorari, but then did not decide the issue of higher education institutional responsibility under Section 504 accommodations and auxiliary service costs); *County of Los Angeles v. Kling* [9] (Crohn's disease is not a disability), and *Witters v. Washington Department of Services for the Blind*[10] (in which the Court held that it does not violate the First Amendment Establishment clause for state rehabilitation funds to be used for religious education at the college level).

The Fair Housing Act was amended in 1988[11] to include "handicap" as a protected class in housing discrimination adding to the Rehabilitation Act regulations[12] already addressed some issues of housing discrimination on campus.

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3 *See e.g.*, Wynne v. Tufts University School of Medicine, 932 F.2d 19 (1st Cir. 1991).
4 34 C.F.R. Part 104(E).
5 34 C.F.R. § 104.6(c).
6 465 U.S. 555 (1984).
7 Pub. L. No. 100-259, 102 Stat. 28 (1988).
8 451 U.S. 390 (1981).
9 474 U.S. 936 (1985).
10 474 U.S. 481 (1986).
11 42 U.S.C. §§ 3601 *et seq.*

III. Substantive Rights Expand – 1990-1999

A. The ADA Enhances Protection Against Disability Discrimination

Higher education institutions were already fairly experienced with disability discrimination issues by the time the Americans with Disabilities Act (ADA)[13] was enacted in 1990. Title I of the ADA applies to employment. Title II applies to state and local governmental agencies. Title III applies to twelve categories of private providers of public accommodations, one of the categories being educational programs. The ADA nondiscrimination language and definition of who is protected are virtually identical to the language of the Rehabilitation Act.

B. Standard for "Reasonable Accommodation"

The case of *Wynne v. Tufts University Medical School*,[14] established the standard for determining the burden related to reasonable accommodation in the context of requested exam modifications (taking exams in a format other than multiple choice). The standard applied for making these decisions is that there should be

> 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*." (emphasis added).[15]

C. Standardized Testing for Entrance Into Higher Education

The application of Title III to private testing programs resulted in judicial attention to testing and reasonable accommodations. Regulations pursuant to Title II and Title III have provided additional guidance regarding accommodations, documentation, and other issues relating to testing.[16]

D. Professional Education and Professional Licensing Connection

The application of the ADA to state professional licensing agencies created an important avenue of inclusion for professional education students with disabilities. Two major areas of attention became the focus of courts' attention -- accommodations on the exams and character and fitness licensing questions.

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12 34 C.F.R. § 104.45.

13 42 U.S.C. §§ 12101 *et seq.*

14 932 F.2d 19 (1st Cir. 1991).

15 932 F.2d at 26

16 75 Fed. Reg. 56,164-236 (September 15, 2010 (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). See 28 C.F.R. §36.309.

E. Documentation Issues

The two most highly publicized decisions on this issue were *Guckenberger v. Boston University*[17] and *Bartlett v. New York State Board of Law Examiners*.[18] The *Guckenberger* court held that requiring documentation to be created within the past three years imposed a significant additional burden on students with disabilities and held that waiver of the standard must be allowed where qualified professionals deemed retesting not to be necessary. The court further established the professional credentials required for testing for learning disabilities, attention deficit disorder, and attention hyperactivity deficit disorder. A later decision found that a waiver of the foreign language requirement would be a fundamental alteration of Boston University's academic program.

ADA regulations promulgated in 2008 provide new guidance on the documentation that should be required to receive accommodations on tests given by testing companies.[19]

F. Athletes with Disabilities

During the 1990s the increased awareness of disability discrimination rights lead to an increase in cases involving participation in college athletics. While many of these cases involved issues of athletes with learning disabilities and their eligibility to participate under NCAA rules, others addressed issues of substance abuse, HIV, health conditions, and other impairments. The eligibility requirements for standardized test scores and courses taken in high school were at issue because they affected students with learning disabilities. The application of the ADA to the NCAA was never completely resolved because the NCAA changed its eligibility rules in response to the litigation.

G. Faculty and Discrimination Issues

Beginning in the late 1990s, there was an increase in employment cases involving faculty and staff. Some of the cases addressed challenges of discrimination in the promotion and tenure process. The cases highlight the unique types of employment settings for higher education faculty and the difficulty in defining essential functions and whether the faculty member is otherwise qualified.

H. Campus Services for Students with Disabilities Evolve

The combination of increasing numbers of students with disabilities entering higher education and the additional source of protection resulting from the ADA were certainly factors in postsecondary education's increased attention to adding more services and creating disability service offices with more professional and trained staff. The influx of students expecting these services and the cost of some of the services resulted in programs becoming more stringent in determining eligibility for accommodations, particularly in situations involving students with learning and related disabilities. Today disability service offices handle providing or coordinating and facilitating accommodations, evaluating documentation to determine the eligibility for services, and a range of other services.

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[17] 957 F. Supp. 306, 313-316 (D. Mass. 1997).

[18] 156 F.3d 321 (2d Cir. 1998), cert. granted, judgment vacated, 527 U.S. 1031 (1999); 21 National Disability L. Rep. ¶ 160, 2001 WL 930792 (S.D.N.Y. 2001).

[19] 28 C.F.R. § 36.309(1)(iv)-(vi). This section provides that documentation requests should be reasonable and limited to the need for the accommodation, that considerable weight should be given to documentation of past accommodations, and that responses to requests should be timely.

I. Department of Education Oversight and Technical Assistance

During this decade, the Department of Education (ED) Office for Civil Rights (OCR) began receiving more complaints of discrimination and began issuing Opinion Letters that provide insight and guidance, although not the weight of a judicial decision.

V. Protection for Individuals with Disabilities Contracts and New Issues Receive Attention -- 1999-2008

A. Backlash to the Floodgates of Litigation

Most of the early Section 504 cases, both in higher education and in other settings, did not focus on whether the individual was disabled. The floodgates of cases involving employment resulted in a trend to dismiss the cases because the individual was not disabled. This trend ultimately led to the Supreme Court decisions known as the "*Sutton* trilogy." The Court determined that whether a condition is "substantially limiting" must take into account the effect of mitigating measures such as eyeglasses and medication. The definition was further narrowed in the 2002 *Toyota* case when the Supreme Court addressed what constitutes a major life activity and the Court set the standard[20] and determined that major life activities are those that involve tasks central to the daily lives of most people.

To be an otherwise qualified person with a disability, the individual must not pose a direct threat.[21] In the 2002 *Echazabal* decision, the Court established that the standard for direct threat applies not only to threats to the health and safety of others, but also to *oneself.*

The fallout of these Supreme Court decisions was a substantial narrowing of the definition of who is protected under the statutes. Also, probably related to the increase in litigation resulting from the ADA, defendants began raising other issues, such as Eleventh Amendment immunity from damages (for state agencies). The result was that the courts did not focus as much on the substantive aspects of qualifications and reasonable accommodations and thus there is little guidance on these issues.

Much of the development of substantive application thus comes from the higher education cases where courts had focused on these issues before the ADA was passed and the courts began to narrow coverage. Colleges and universities seem still to be less likely to raise the definitional and immunity defenses, perhaps because they had become much more adept at accommodating and serving students with disabilities in the decade between *Southeastern Community College v. Davis* (1979) and the passage of the Americans with Disabilities Act (1990). Colleges and universities also followed the admonition in *Southeastern Community College v. Davis* that

> Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such

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[20] Toyota Motor Mfg. Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

[21] Initially that requirement appeared in the regulations under Section 504 (34 C.F.R. §1630.2(r) and it later was incorporated into the statutory language of the ADA (42 U.S.C. §12113(b).

advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State.[22]

Beginning in the mid-1980s, large numbers of students with disabilities who had received the benefits of special education because of the 1975 Individuals with Disabilities Act, began reaching college age, many without appreciating the differing burdens and rights that exist in college.

B. Other Developments

Other developments during the 1998-2008 decade included attention to governmental immunity issues, architectural barrier issues (including housing, public spaces, parking, social event spaces, and classrooms), programs abroad and field placements. Also occurring at this time was the increase in claims of hostile environment and/or retaliation for making a complaint or seeking accommodations.

One other major area of attention during this decade was a response to issues of violence and disruption on campus. Students with mental health problems present challenges to the college and university setting with how to balance possible concerns about safety and a positive academic environment with considerations of privacy and nondiscrimination on the basis of disability. The revised FERPA regulations under the Federal Education Rights and Privacy Act,[23] respond to that by allowing disclosure of records without consent where there is an emergency related to the health and/or safety of a student or others.

Millennials come to college.

Most of the developments in this decade must be viewed in light of the generation of students coming into higher education with expectations often based on requirements from the K-12 context and with behaviors that reflect their experience with instant communication and use of technology. These students bring new challenges, and although the laws do not apply differently to them, an awareness of their expectations and behaviors and proactive planning in response to that could prevent a great deal of discord on disability issues.

VI. A Reversal of Course – 2008-2010 – The definition is broadened to pre-1999 interpretations

The definition of disability was limited by Supreme Court decisions in 1999 and 2002. In September 2008, Congress returned the definition of coverage to what disability rights advocates thought had been intended at the outset when it enacted the ADA Amendments Act of 2008, which took effect on January 1, 2009. The definition of coverage clarifies that the intent of the ADA was to provide for broad coverage. The definition of disability basically remains the same.[24]

The amendments clarified that major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending,

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22 442 U.S. at 412.

23 34 C.F.R. § 99.67 (2009).

24 42 U.S.C. § 12102(1).

speaking, breathing, learning, reading, concentrating, thinking, communicating and working.[25] [A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[26] To meets the requirement of "being regarded as having such an impairment" the individual must establish "that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[27] The definition of disability does not apply to impairments that are transitory and minor. A transitory impairment is one with an actual or expected duration of six months or less.[28]

The 2008 amendments further clarify that the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures. There is an exception for eyeglasses or contact lenses, but covered entities are prohibited from using qualification standards or selection criteria that are based on uncorrected vision unless these are job-related and consistent with business necessity.[29]

The Mental Health Parity and Addiction Equity Act of 2008[30] provides that group insurance benefits (including caps and deductibles) provided by employers must be available on an equitable basis for physical and mental health treatment. Recently enacted health care reform may well have an impact on how this plays out in practice.

VII. The Crystal Ball – 2011 and Beyond?

What are the next generation issues coming down the pipeline? And what are the likely trends with respect to legislation, regulation, and litigation? And how will those be affected by the challenges of limited resources?

Some of the current challenges for postsecondary institutions include the transition of students from K-12 (and the lack of preparation for the change), providing the range of services (many that are resource intensive or require specialized knowledge), and providing staffing for these needs (such as for coaching students with autism in social skills). Lack of awareness of some faculty members about the legal requirements relating to students with disabilities presents another problem. The growing number of veterans with disabilities will require attention, as will students with intellectual disabilities.

There are already signals of the future legal issues. These include **distance learning** and **on line coursework** and **web access** and other access to technology.

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[25] 42 U.S.C. § 12102(2).

[26] Id. The regulations pursuant to the amendments were promulgated on March 25, 2011, effective May 24, 2011. They can be found at 29 C.F.R. 1630 and are available through the website at www.eeoc.gov.

[27] 42 U.S.C. § 12102(3).

[28] 42 U.S.C. § 12102(4)(D).

[29] 42 U.S.C. § 12102(4)(E).

[30] 29 U.S.C. § 1185a and 42 U.S.C. § 300gg-5.

Health care reform is likely to affect access to **mental health** and other mental health services that may have particular impact for students with disabilities. These may be of particular importance for **returning veterans** from Iraq and Afghanistan. Another health care related issue is the increasing concern about **contagious and infectious diseases** (such as H1N1) and how students with disabilities might raise unique concerns about how such situations are handled.

The economy and the high stakes of a professional education may drive more individuals to pursue legal remedies when they seek accommodations on **licensing exams** or raise issues about character and fitness questions asking about mental health or substance abuse.

It is likely that increasing attention to the issue of **service and emotional support animals** in various arenas, including higher education, will occur.

It is likely that litigation will clarify the impact of the **ADA Amendments Act and the broader definition of disability** that it now includes.

This is probably an era where there will be little legislative activity (other than on health care), but substantial regulatory guidance, and continued litigation and OCR activity.

VIII. CONCLUSION

Students with disabilities in postsecondary education have come a long way in the past fifty years. From a time when there were virtually none of them, they now make up over eleven percent of the student body. Along the way, higher education institutions have learned to define what is essential about their educational programs, they have developed offices to provide disability services on virtually every campus, and they have faced numerous complaints to OCR and in the courts.

Ideally, most college and university attorneys have guided the administrators and educators on their campuses to become proactive in addressing these issues, thus avoiding costly and time-consuming litigation and dispute resolution. Those institutions that have a positive and proactive attitude and approach are more likely to avoid confrontations in the first place and to fare best in litigation and other disputes that do arise.

The Obama administration has demonstrated a proactive approach to education policy and a positive attitude towards ensuring equal access for individuals with disabilities. This attitude should help colleges and universities to have the tools to provide what is legally expected for participation of students with disabilities.

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