HIGHER EDUCATION AND DISABILITY DISCRIMINATION: A FIFTY YEAR RETROSPECTIVE

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I. INTRODUCTION

In reflecting on fifty years of higher education and the intersection with disability discrimination, it is apparent that there have been dramatic and sweeping changes in many respects for individuals with disabilities and their experience in American higher education. From 1960 to 1973 there was virtually no consideration of these issues because there was no federal law prohibiting discrimination on the basis of disability (at that time referred to as "handicap"). While there might have been a few students on campus receiving state vocational rehabilitation funds to support their education, and a few state laws might have had some effect, attention to these issues for the most part was nonexistent in all aspects of American life, and certainly on college campuses.

Section 504 of the Rehabilitation Act of 1973[1] and the 1975 Individuals with Disabilities Education Act[2] combined to set the stage for changes, but it was not until 1979 that judicial guidance began, followed by a decade of litigation primarily on procedural and jurisdictional issues (with little focus on substantive application).[3] By 1990, and the passage of the Americans with Disabilities Act,[4] the number of students with disabilities prepared for college had increased, and the courts began focusing greater attention on

1. 29 U.S.C. § 794 (2006).

2. 20 U.S.C. §§1400–1482 (2006) (originally enacted as the Education for All Handicapped Children Act and now known as the Individuals with Disabilities Education Act (IDEA)).

3. The Supreme Court first addressed Section 504 of the Rehabilitation Act in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Following that decision, the Court addressed similar issues in four cases throughout the 1980s, discussed *infra* in Part III.E.

4. Pub. L. No. 101-336, 101 Stat. 327 (1990) (codified at 20 U.S.C. §§ 12101–12213 (2006)).

the issues affecting them. Faculty members also began increasing their claims of disability discrimination about this same time.[5] In addition there was attention to the intersection of architectural barriers and the interrelationship of professional education and professional licensing.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination by programs receiving federal financial assistance against otherwise qualified individuals with disabilities. To be considered "disabled," the Act required that an individual have been substantially limited in one or more major life activities, have had a record of such a limitation, or have been regarded as having such a limitation.[6] A backlash to the broad definition of who is protected in the employment sector resulted in a contraction of coverage for individuals with disabilities through Supreme Court decisions in 1999 and 2002.[7] Advocates for individuals with disabilities responded by passing the ADA Amendments Act of 2008.[8] This amendment returned the definition to what many thought was its original intent.

This retrospective will broadly track the various stages of development in disability-discrimination law in higher education over the past fifty years. The primary focus will be on students with disabilities, although occasional reference will be made to employment issues and architectural-barrier access. While the early years of the last half century did not result in much activity with respect to disability issues, today these issues receive significant attention in higher education. Although they may create challenges for higher education personnel, it should be recognized that they have opened the door to, and dramatically improved the lives of, individuals with disabilities. The societal benefit has been that these individuals are much more likely to be contributing members of society instead of receiving governmental benefits for maintenance and support.

II. "HANDICAPPED" STUDENTS NEED NOT APPLY: THE REHABILITATION ACT OPENS DOORS, 1960–1979

From 1960 to 1973 there were very few students with disabilities on college campuses. No government agency even counted them. Individuals with conditions such as learning disabilities were unlikely to be prepared for college. Those with mobility impairments faced campuses that had not

5. *See, e.g.*, Brousard-Norcross v. Augustana Coll. Ass'n, 935 F.2d 974 (8th Cir. 1991).

6. 29 U.S.C. § 706(6) (1976). This definition has been affected by the 2008 Amendments to the ADA, which are discussed *infra* Part VI.

7. Three decisions in 1999, well known as the *Sutton* trilogy, addressed disability discrimination. *See* discussion *infra* Part V.A. In 2002, two more disability-law decisions were handed down, discussed *infra* Part V.A.

8. Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified as portions of 42 U.S.C. §§ 12101–12210 and 29 U.S.C. § 785).

been designed to be barrier free. Those with sensory impairments faced significant financial and logistical challenges in accessing higher education. Students with disabilities on campus might be those who had qualified for state vocational rehabilitation funding to assist them in job preparation, but their numbers were not significant.

The year 1973 brought the opportunity for significant change. Section 504 of the Rehabilitation Act was passed, unlike most civil rights laws, with very little detailed planning and without an advocacy movement behind it. Rather, it primarily was the result of some Senate staffers who were working on the reauthorization of the Vocational Rehabilitation Act Amendments of 1954.[9] The Rehabilitations Act initially aimed to expand funding for rehabilitation services first created in the Vocational Rehabilitation Act, a veterans' benefit statute, and to widen the focus of rehabilitation services beyond job training.

Because other federal funding statutes had required that the recipient of federal support not discriminate on the basis or race or gender, it seemed logical that a similar requirement should be applied with respect to nondiscrimination on the basis of disability.[10] The 1973 amendments to the Rehabilitation Act thus prohibited federal employers (Section 501),[11] federal contractors (Section 503),[12] and recipients of federal financial assistance (Section 504)[13] from discriminating against otherwise qualified individuals with disabilities. Most colleges and universities received federal financial assistance in some form, and thus were subject to Section 504 of the Rehabilitation Act. The statutory provisions were deceptively short, without language to define the key terms.[14] Private higher-education programs, along with private health care providers, were the only major private sectors of society affected to a great extent by Section 504 of the

9. *See generally* RICHARD SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (1984) (summarizing the foundation of the Rehabilitation Act and especially Section 504). For a brief summary overview of all disability discrimination laws, see generally LAURA ROTHSTEIN & JULIA ROTHSTEIN, DISABILITIES AND THE LAW ch. 1 (4th ed. 2009).

10. The 1973 materials used the term "handicap." By 1990, however, "handicapped" had fallen out of favor and had been replaced by "disabled," as seen in the title of the 1990s Americans with Disabilities Act.

11. 29 U.S.C. § 791 (2006).

12. *Id.* § 793.

13. 29 U.S.C. § 794.

14. For example, the entire text of Section 504 of the 1973 Rehabilitation Act read:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by the reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

Pub. L. No. 93-112, 87 Stat. 355 (1973).

Rehabilitation Act.

Then, nothing much happened. Because the Rehabilitation Act had been amended with little fanfare or press coverage, there was little awareness about it. Initially and for some time, few advocacy groups existed and those that did were not connected by the internet. As a result, the 1973 Rehabilitation Act was not initially used in any major comprehensive way to bring about broad social change.

At this time the Rehabilitation Act was certainly not the basis for any major activism by individuals seeking greater access to colleges and universities. Perhaps the reason was that, in 1973, there were few students with disabilities of college age with the skills and preparation to attend college. There were so few because it was not until 1975, when Congress enacted the Education for All Handicapped Children Act (now Individuals with Disabilities Education Act (IDEA))[15] that comprehensive education of students with disabilities began. And it would not be until several years later that a student with a disability would have been identified at an early age and received special education and related services throughout the years in K-12 education and thus be prepared for college.

In the meantime, except for the lawyers and advocates for special education and de-institutionalization, there were few attorneys with the expertise, interest, or willingness to handle a disability discrimination case, even if there were clients seeking their services. Taking a case in a new area of law would certainly be daunting, particularly where the statute had little legislative history and no regulatory guidance. While Congress had contemplated that the Department of Health, Education and Welfare (HEW)[16] would promulgate regulations, it took a lawsuit[17] and a sit-in (or "roll-in") by a large number of wheelchair users at HEW to convince Secretary Joseph Califano in 1976[18] to develop the model regulations. And it was not until 1978 that the regulations became final.[19]

So, between the newness and vagueness of the law, the lack of legal expertise, and the lack of potential clients in a position to seek relief from discrimination, it is not surprising that it was not until 1979, six years after

15. 20 U.S.C. §§ 1400–1482 (2006). While many states had special education statutes in place, these were neither as comprehensive nor as well funded as the 1975 federal law.

16. HEW later became the Department of Health and Human Services upon the Department of Education's creation.

17. *See* Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976).

18. Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (Apr. 28, 1976).

19. 43 Fed. Reg. 2132 (Jan. 13, 1978) (codified at 45 C.F.R. pt. 85 (2009)). The regulations relevant to colleges and universities included a number of provisions related to admissions and recruitment, treatment of students, academic adjustments, housing, financial and employment assistance for students, and nonacademic services (physical education and athletics, counseling and placement services, and social organizations). *See* 34 C.F.R. §§ 104.1–104.110.

the enactment of Section 504 of the Rehabilitation Act, that the Supreme Court issued its first opinion on any law involving disability discrimination.

III. 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

In 1979, in *Southeastern Community College v. Davis*,[20] the Supreme Court addressed the denial of admission to nursing school of a deaf individual, Frances Davis. The program was specific in denying her admission because of concerns about safety of patients. The Court held that, "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[21] The Supreme Court thought it appropriate to determine qualification based on both academic and technical standards, a category including *all* nonacademic admissions criteria essential to participation.[22]

The Court applied this standard to the specific facts before it, noting that the record indicated that close, individual attention would be required to ensure patient safety.[23] This would mean that Frances Davis could not participate in the clinical aspects of the class, and exempting her from that prerequisite would constitute a "fundamental alteration" of the curriculum, a step not required under the statute.[24] In the view of the Court, this would be "affirmative action" requiring substantial expenditure.[25] The Court emphasized that

> Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens.[26]

The Court dismissed the argument that because she might be able to

20. 442 U.S. 397 (1979).

21. *Id.* at 406.

22. *Id.* (discussing 45 C.F.R. § 84.3(k)(3) (1978) and 45 C.F.R. pt. 84 app. A (1978).

23. *Davis*, 442 U.S. at 409.

24. *Id.* at 410.

25. *Id.* at 411. This use of the term "affirmative action" is not the traditional use of the term and was not used by other courts in disability-discrimination cases after this decision.

26. *Id.* at 412.

receive a nursing license in another state, the college must admit her.[27] The Court determined that, even if that were the case, it did not require the college to lower its standards.[28] The Court reversed and remanded for further proceedings.[29]

The decision has proven to be a landmark decision and a reference point for all disability-discrimination claims that focus on whether the individual bringing the claim is "qualified." It also served as a precursor to the many current cases involving the connection between professional education and professional licensing.

Following the precedent in the *Southeastern Community College* decision, 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.[30]

Since *Southeastern Community College*, courts have addressed other professional-education disability-discrimination cases. In all cases where the substantive issues were addressed, the courts have required 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.[31] Courts have not allowed myths, stereotypes, or prejudices to be determinative, but instead have required that appropriate officials made rationally justifiable decisions.[32] In most cases, the courts determined that the individual was not "otherwise qualified."[33]

This standard of decision making has carried over from health-care professional programs to other higher-education and licensing situations and to the employment setting. Courts have now grappled with the qualifications of individuals with a wide array of disabling conditions in a

27. *Id.* at 413 n.12.

28. *Id.* at 413.

29. *Id.* at 414.

30. *See* Laura Rothstein, *Millennials and Disability Law: Revisiting* Southeastern Community College v. Davis*: Emerging Issues for Students with Disabilities*, 34 J.C. & U.L. 167, 185, n.96 (2007) (discussing this line of cases).

31. *See, e.g.*, Bates v. United Parcel Serv., Inc., 511 F.3d 974 (9th Cir. 2007); Kalskett v. Larson Mfg. Co. of Iowa, Inc., 146 F. Supp. 2d 961(N.D. Iowa 2001).

32. *See e.g.*, Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19 (1st Cir. 1991). This case set the standard by requiring that these decisions be made by "relevant officials within the institution" who came to "rationally justifiable conclusions" about whether an action would lower academic standards or require substantial program alteration. *See id.* at 26. While not a Supreme Court decision, the case has been widely and consistently cited for this standard of decision making within higher education. *See infra* Section IV.B.

33. ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3:3.

wide variety of settings.[34]

Contrary to what some advocates for individuals with disabilities feared, the decision in *Southeastern Community College* was not the end of opportunities for individuals with disabilities in higher education and professional education. While it defined the key terms of qualification, other parallel legal developments in the 1970s were critical to the inclusion of individuals with disabilities in higher education and ultimately in professions, as well as in society generally.

B. The Individuals with Disabilities Education Act: Preparing Students for Higher Education

The Individuals with Disabilities Education Act (IDEA),[35] enacted in 1975 under the title Education for All Handicapped Children Act, required public K-12 schools to provide free appropriate education in the least-restrictive environment to all age-eligible students.[36] The education was to be individualized to each student.[37] The Act also incorporated a detailed set of requirements related to finding and identifying students with disabilities and to developing individualized educational programs.[38] The elaborate set of procedural safeguards that ensured parents had access to an impartial hearing and that provided judicial review for students with disabilities was essential to the effectiveness of IDEA.[39]

Although it took some time for special education mandates to be phased in, and while there are still substantial challenges with full implementation, the IDEA has made an enormous difference in the participation of individuals with disabilities in society. IDEA made it possible for students with a wide array of impairments (ranging from mental retardation to sensory impairments to learning disabilities to psychological conditions) to participate in public education.

IDEA differs from the Rehabilitation Act and the Americans with Disabilities Act (ADA) by requiring more than nondiscrimination and reasonable accommodation. It requires schools to provide appropriate education,[40] which in many cases may be much more costly and complex than what is required at the college level. The result, however, has been that many individuals who in the past would have been institutionalized as children, or who would simply have dropped out of public schools, have

34. *Id.* §§ 3:2, 3:3.
35. 20 U.S.C. §§ 1401–1461 (2006).
36. 20 U.S.C. § 1412(a)(5) (2006).
37. *Id.* § 1412(a)(4) (2006).
38. *Id.* § 1413. This section specifies requirements state plans must meet for assistance eligibility.
39. *Id.*
40. *See* 20 U.S.C. § 1412(a)(1).

graduated from high school and have been in a position to enter college and the work force.

C. Regulatory Guidance

It took policymakers some time to provide guidance to colleges and universities about how to handle the influx of students with disabilities. Although the Rehabilitation Act was enacted in 1973, it was not until 1977 that regulatory guidance was provided.[41] And even after the regulations were promulgated, the requirements were not widely known and perhaps not taken seriously.

The model regulations on postsecondary education[42] provided guidance on admission and recruitment,[43] general treatment of students,[44] academic adjustments,[45] housing,[46] financial and employment assistance,[47] and nonacademic services (including physical education and athletics).[48] Also in 1980, as part of the regulatory focus, institutions subject to Section 504 were required to engage in a self evaluation a year after the effective date of the model regulations.[49] This self-examination process began to improve the awareness and understanding of college policymakers and administrators that more attention to this issue was needed. Questions began to be asked about who was responsible for payment, how much was reasonable, and just how far were colleges required to go with these new types of students. The combination of the 1977 regulations and case law began to provide guidance. *Southeastern Community College v. Davis* in 1979, combined with the 1977 regulations, represented a turning point. 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. Colleges and universities started paying attention and improvements followed.

D. Parallel Developments Outside Higher Education

Because the Rehabilitation Act applies only to *federal* agencies, *federal* contractors, and recipients of *federal* financial assistance, most of the private sector was not affected by disability-discrimination mandates

41. 42 Fed. Reg. 22,676 (May 4, 1977) (now codified at 34 C.F.R. pt. 104).
42. 34 C.F.R. §§ 104.41–104.47 (2009).
43. 34 C.F.R. § 104.42 (2009).
44. *Id.* § 104.43.
45. *Id.* § 104.44.
46. *Id.* § 104.45.
47. *Id.* § 104.46.
48. *Id.* § 104.47.
49. 42 Fed. Reg. 22,676, 22,679 (now codified at 34 C.F.R. § 104.6(c) (2009)).

during this timeframe. To a great extent, the only private programs receiving substantial federal support were colleges and universities and health care programs such as major hospitals. While there was some judicial guidance regarding other portions of the private sector that received federal financial assistance, for almost two decades higher education was the primary laboratory for interpreting disability-discrimination policies.

E. Other Developments of Significance

Southeastern Community College provided the first major guidance—because it was the first Supreme Court case and because it addressed the important threshold issue of what it means to be "otherwise qualified."[50] There were a number of other significant developments during the decade following this decision. These developments addressed primarily, although not exclusively, procedural issues.

Between 1979 and 1990, there were four other Supreme Court cases in higher education that directly or indirectly addressed disability-discrimination issues. The one with the greatest immediate ramifications was *Grove City College v. Bell*,[51] where the Court held that when an institution receives federal financial assistance, only the program receiving the assistance is covered by the applicable discrimination statute (including the Rehabilitation Act of 1973).[52] Congress responded to the decision in 1988 by enacting the Civil Rights Restoration Act.[53] This ensured that when an institution received federal assistance, all of its operations were covered by the relevant statute.[54]

In 1981 in *University of Texas v. Camenisch*[55] the Supreme Court granted certiorari, but then ducked the issue of higher-education institutional responsibility under Section 504 of the Rehabilitation Act for paying for accommodations and auxiliaries. A deaf graduate student was seeking interpreter services, but the Court determined that the case was moot and did not decide the substantive issue.[56] This question remains unresolved by the Supreme Court to this day. A key federal appellate decision, however, provided some guidance. In *United States v. Board of Trustees*,[57] the Eleventh Circuit held that universities may require students to first seek state vocational-rehabilitation funding or other sources of

50. *See supra* Part III.A.

51. 465 U.S. 555 (1984).

52. *Id.* at 570–74.

53. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as scattered sections of 20 and 42 U.S.C.).

54. *Id.* § 4 (amending Section 504 of the Rehabilitation Act).

55. 451 U.S. 390 (1981).

56. *Id.* at 398.

57. 908 F.2d 740 (11th Cir. 1990).

funding to pay for services, but that when such services are not available, the university must provide them, unless it can demonstrate that it is unduly burdensome to do so. Perhaps because universities are reluctant to have their discretionary budgets examined in litigation, few, if any, subsequent cases have involved universities raising the defense of undue financial burden.

A 1985 Supreme Court decision not receiving much attention at the time was a precursor of a more detailed examination of what it means to be disabled. In *County of Los Angeles v. Kling* [58] the Court held that Crohn's disease is not a disability, but did not provide a great deal of explanation of the reasons why. This detailed discussion would come fifteen years later.[59]

A 1986 Supreme Court case involved whether vocational rehabilitation funding could be used for a student enrolled in a program for religious training. In *Witters v. Washington Department of Services for the Blind*[60] the Court decided that it does not violate the First Amendment Establishment clause for state rehabilitation funds to be used for that purpose.

The most significant legislative activity during this time period other than the Civil Rights Restoration Act was the 1988 amendment of the federal Fair Housing Act[61] to include "handicap" as a protected class in housing discrimination.[62] Although the Rehabilitation Act regulations[63] already addressed some issues of housing discrimination on campus for students with disabilities, the FHA Amendments provided additional coverage for them.

The activities of this decade, in combination with the increasing number of students with disabilities entering college and seeking services, resulted in an enhancement of offices for disability services throughout the country.

IV. SUBSTANTIVE RIGHTS EXPAND, 1990–1999

A. The Americans with Disabilities Act Enhances Protection Against Disability Discrimination

Higher education institutions were already fairly experienced with

58. 474 U.S. 936 (1985).

59. *See* discussion of the *Sutton* trilogy *infra* Part V.A.

60. 474 U.S. 481 (1986).

61. 42 U.S.C. §§ 3601–3631 (2006).

62. Pub. L. No. 100-430, § 6(a), 102 Stat. 1619, 1620–22 (1988). This section amended 42 U.S.C. § 3604 to extend housing-discrimination protections to disability or handicap status.

63. 34 C.F.R. § 104.45 (2009).

disability discrimination issues by the time the ADA[64] was enacted in 1990. The ADA was much more comprehensive than the Rehabilitation Act because of its substantially greater prohibition of discrimination in the private sector. Title I of the ADA applies to all but the smallest employers.[65] Title II applies to state and local governmental agencies.[66] And Title III applies to twelve categories of private providers of public accommodations, one of the categories being educational programs.[67] The ADA incorporates into its statutory provisions substantial clarifying language that resulted from the evolution of Rehabilitation Act case law. The ADA nondiscrimination language and definition of who is protected are virtually identical to the language of the Rehabilitation Act.[68] As a result, colleges and universities are not only subject to Section 504, but also to Title I (for employment), Title II (if they are a state or local institution), and—if private—Title III.

Unlike other programs, colleges and universities were already somewhat adept at addressing these issues when the ADA became law, and they were much further along in developing policies, practices, and procedures related to disability discrimination than other institutions. Given the importance of higher education as an avenue into full participation in American society, that was a good thing. Higher education could and has provided leadership in this area.

B. The Standard for "Reasonable Accommodation"

The case of *Wynne v. Tufts University Medical School*[69] established the standard for determining the burden related to reasonable accommodation. The case involved a medical student with a learning disability. He had been accommodated during the early part of his medical education through the use of modifications such as additional time on exams. After the school denied his request to take exams in a format other than multiple choice, he brought a Section 504 claim. The First Circuit, in remanding the case, established a standard for district courts to employ when making decisions about reasonable accommodations. The court required that the institution submit

64. 42 U.S.C. §§ 12101–12213 (2006). *See also* Sara Hebel, *How a Landmark Anti-Bias Law Changed Life for Disabled Students*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 26, 2001, at A23.

65. *See* 42 U.S.C. § 12111(5)(A) (2006) (excluding only businesses that employed fewer than fifteen persons working at least thirty calendar weeks in the preceding year).

66. *Id.* § 12131(1).

67. *Id.* § 12181(7)(J).

68. *Compare* 29 U.S.C. § 705(9) (2006) *with* 42 U.S.C. § 12102(2) (2006); *compare* 29 U.S.C. § 705(2)(A)(i) (2006) *with* 42 U.S.C. § 12112(8) (2006).

69. 932 F.2d 19 (1st Cir. 1991).

> 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*.[70]

In establishing this standard, the court referenced *Southeastern Community College v. Davis* and the Supreme Court's expectation that programs consider technological advances in making these assessments.[71]

Further proceedings applying this standard resulted in a decision that Wynne could not be reasonably accommodated by alternative format exams.[72] The 1991 decision, however, set out an extremely useful and often-cited standard for making determinations about reasonable accommodations, and indeed about making other decisions in disability-discrimination cases.

During this time, courts focused primarily on issues of reasonable accommodation, whether there was discrimination, and whether the student was otherwise qualified.[73] Little attention was given in higher education about whether the student's condition qualified as a "disability" under the Act.

C. Standardized Testing for Entrance Into Higher Education

Before the ADA, the standardized tests for admission into higher-education programs (SAT, ACT, LSAT, GRE, etc.) were not subject to any nondiscrimination mandates because the provider did not receive federal funding. Title III of the ADA applies to private testing programs, and, with its enactment, the providers of these tests were required to provide reasonable accommodations to test-takers with disabilities. While many of those providers had done so voluntarily long before the ADA, because the users of the test (the colleges and universities) were themselves subject to Section 504, test-takers had no direct remedy against the test provider.

After the ADA was enacted, there were a number of lawsuits against testing agencies. Many of the cases involved the issue of additional time as an accommodation, but some also addressed whether the student's condition was a disability.[74] The results in these cases varied, the outcomes

70. *Id.* at 26 (emphasis added).

71. *Id.*

72. Wynne v. Tufts University School of Medicine (Wynne II), 976 F.2d 791 (1st Cir. 1992).

73. *See* ROTHSTEIN & ROTHSTEIN, *supra* note 9, §§ 3:3, 3:8–3:20.

74. *See e.g.*, Harris v. P.A.M. Transport, Inc., 339 F.3d 635 (8th Cir. 2003) (truck-driving school did not violate ADA for dismissal of student with medical condition

depending on the specific facts of the case. The decisions, however, began providing precedent for addressing accommodations requests in related settings.

D. Professional Education and Professional Licensing Connection

The *Wynne* decision has come to be relied on by numerous other courts, which have praised its sound reasoning and utilized its rule as the standard for determining the reasonableness of accommodations. It is also an example of the fact that some of the most significant cases in higher education have involved the nexus between professional-preparation programs and professional licensing. This is because these are high stakes programs—both for the individual seeking the degree and license (in cost, time and prestige) and for the recipient of the services of a doctor, lawyer, or teacher. *Southeastern Community College* is, of course, the first and most significant case on that issue.

The application of the ADA to state professional licensing agencies (through Title II, applicable to state and local governmental agencies) created an even more important avenue of inclusion for professional-education students with disabilities. Before 1990, because these agencies did not receive federal financial assistance, they were not subject to the Rehabilitation Act. The ADA, however, ensured that students with disabilities who were graduating from medical school, law school, and other professional programs were not only protected from discrimination in their education programs, but were also entitled to nondiscrimination and reasonable accommodation in the licensing process. Two major areas became the focus of courts' attention.[75]

Many students with disabilities (particularly learning disabilities) had faced challenges in receiving accommodations on state licensing exams. Many individuals with mental-health and substance-abuse problems were concerned about the character and fitness questions asked by many state licensing boards about treatment and diagnosis for their conditions. Title II of the ADA provided them a basis to challenge these practices. Challenges

who would be unable to obtain a commercial driver's license); Biank v. Nat'l Bd. of Med. Exam'rs, 392 F. Supp. 2d 42 (D. Mass. 2005) (student who had completed part one of medical licensing exam in sufficient time not entitled to additional time on part two to accommodate disability); Gonzalez v. Nat'l Bd. of Med. Exam'rs, 60 F. Supp. 2d 703 (E.D. Mich. 1999) (student had never performed below expectations and was not limited in the major life activities of reading and writing, therefore defendant was not required to give him extra time in his board exams); Jacobsen v. Tillman, 17 F. Supp. 2d 1018 (D. Minn. 1998) (no ADA violation in refusing to waive mathematics requirement for teacher licensure test or refusing to substitute another test). For more general information on examinations and courses, see ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 5:7 (2009).

75. *See* ROTHSTEIN & ROTHSTEIN, *supra* note 9, §§ 5:7–5:8.

to the practices related to accommodations were more successful than the character and fitness question challenges, but cases in this area continue.[76]

A full discussion of these issues is beyond the scope of this article. It is important to recognize, however, that the application of the ADA to state licensing programs in combination with the application of Title III of the ADA to private standardized-testing agencies provided a more seamless experience for students with disabilities in higher education. The student now had protection in the initial admissions process, rights during the education program itself, and protection in the post-graduation entry into the professional stage. While the specific accommodations needed might be different and the qualifications for eligibility might be different, at least all stages of the process were covered by the nondiscrimination mandate.

E. Documentation Issues

During the 1990s, a number of questions related to documentation were addressed. These stem from the basic requirement under both Section 504 of the Rehabilitation Act and the ADA that for an individual to claim discrimination or to be eligible for reasonable accommodation, the disability must be "known."

Unlike students receiving special education in the K-12 setting, where students with disabilities in higher education and in admissions and licensing settings seek accommodations and nondiscrimination, the burden is on the student to provide documentation that is appropriately current, prepared by someone qualified to evaluate the disability, and that demonstrates that the assessment and the recommendation for accommodations relate to that disability.

For the student who had academic deficiencies but had not provided notice of a disability, the courts did not require second chances.[77] The institution is not required to re-admit a student who did not make known the disability, request accommodations, and provide the appropriate

76. *See e.g.*, Applicants v. Tex. State Bd. of Law Exam'rs, No. A 93 CA 740 SS, 1994 WL 923404 (W.D. Tex. Oct. 11, 1994) (allowing narrowly drawn questions asking about treatment for bipolar disorder, paranoia, and various other psychotic disorders within past ten years on licensing application); Medical Soc'y of N.J. v. Jacobs, Civ. A. No. 93-3670 (WGB), 1993 WL 413016 (D.N.J. Oct. 5, 1993) (prohibiting state medical board from asking questions about drug or alcohol abuse and mental and physical illness on licensing application); *In re* Frickey, 515 N.W.2d 741 (Minn. 1994) (state bar admissions board ordered to remove certain questions regarding mental health treatment from licensing application on grounds that such questions would deter licensing applications from seeking appropriate counseling). For more general information on licensing and character and fitness issues, see ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 5:8 (2009).

77. *See, e.g.*, Salvador v. Bell, 622 F. Supp. 438 (N.D. Ill. 1985) (holding no illegal discrimination where claimant did not provide initial notice of disability).

documentation to justify accommodations. Similarly, the courts demonstrated substantial deference to higher-education institutions regarding their determinations about essential requirements for the programs. They also began giving some guidance on the degree of deference to be given to the individual's treating evaluator versus the independent evaluator whom the program in question had employed.[78]

The two most highly publicized decisions on this issue were *Guckenberger v. Boston University*[79] and *Bartlett v. New York State Board of Law Examiners.*[80] The *Guckenberger* case was highly publicized in the media and involved how Boston University determined eligibility for accommodations for students with learning disabilities. The *Guckenberger* court held that requiring documentation to be created within the past three years imposed a significant additional burden on students with disabilities.[81] The court upheld a modified plan that allowed a student to procure a waiver of the testing standard when a qualified professional certified the testing as unnecessary.[82] The court further articulated the professional credentials required for testing for learning disabilities, attention deficit disorder, and attention hyperactivity deficit disorder.[83] A later decision in the case upheld the university's determination that a waiver of the foreign-language requirement would be a fundamental alteration of Boston University's academic program.[84] The *Bartlett* case, involving a claimant with a reading disability seeking accommodations on the bar exam, went up and down the trial and appellate courts (and was remanded by the Supreme Court at the same time that the Court decided the *Sutton* trilogy). Both involved requested accommodations for individuals with learning disabilities, *Guckenberger* at the undergraduate level and *Bartlett* on the New York state bar exam. These cases highlight the challenges resulting from the significant influx of students with learning disabilities into higher education and ultimately into the professions.

F. Athletes with Disabilities

During the 1990s the increased awareness of disability rights led to an increase in cases involving participation in college athletics. While many

78. *See* ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3.2. For a more detailed discussion of the issue of students with learning disabilities in higher education, see Laura Rothstein, *Judicial Intent and Legal Precedents, in* POSTSECONDARY EDUCATION AND TRANSITION FOR STUDENTS WITH LEARNING DISABILITIES ch. 3 (Loring C. Brickerhoff et al. eds., 2d ed. 2002).

79. 974 F. Supp. 106 (D. Mass. 1997).

80. 527 U.S. 1031 (1999).

81. *Guckenberger*, 974 F. Supp. at 136–37.

82. *Id.* at 136–37.

83. *Id.* at 137.

84. Guckenberger v. Boston Univ., 8 F. Supp. 2d 82, 87, 90 (D. Mass. 1998).

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.[85]

Although the highly publicized Casey Martin case[86] was not in the college setting, it highlighted one of the key issues for disability discrimination—essential functions and fundamental alterations. The case involved a professional golfer with a mobility impairment. He requested the accommodation of using a golf cart during a PGA tournament. The Supreme Court decision highlighted the importance of an individualized assessment in determining that walking is not an essential requirement for this professional golf tournament, and reinforced the expectation of such assessments in other sports contexts. The Court decided that Martin's requested accommodation was reasonable.[87]

Cases involving athletes with HIV addressed concerns about direct threat to the health of others. Those involving substance abuse focused on whether behavior and conduct were factors in determining qualification to participate.[88]

There was a great deal of attention focused on athletes with learning disabilities because NCAA rules at that time had a discriminatory effect on many of these students. The eligibility requirements for standardized test scores and courses taken in high school were at issue. The application of the ADA to the NCAA was never completely resolved because the NCAA changed its eligibility rules in response to the litigation.[89] Some of these cases are ongoing.

G. Faculty and Discrimination Issues

While the focus of this overview is on students with disabilities, it should be noted that higher education faced some unique employment issues in the context of disability discrimination. Beginning in the late 1990s, there was an increase in these cases. 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

85. For a discussion of these cases see Laura Rothstein, *Don't Roll in My Parade: Sports and Entertainment Cases and the ADA*, 19 REV. LITIG. 399, 404–14 (2000). *See also* ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3:11.

86. PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

87. *Id.* at 691.

88. *See, e.g.*, Salley v. Circuit City Stores, Inc., 160 F.2d 977 (3d Cir. 1998); Nanos v. City of Stamford, 609 F. Supp. 2d 260 (D. Conn. 2009).

89. In May 1998, the NCAA reached a settlement agreement with the Justice Department. While not conceding that the NCAA is subject to Title III of the ADA, the NCAA agreed to provide individualized assessment of athletes with respect to, inter alia, whether special education courses should count as core courses. *See* NCAA Consent Decree, http://www.ada.gov/ncaa.htm (last visited Feb. 21, 2010).

education faculty and the difficulty in defining essential functions and whether the faculty member is otherwise qualified.[90]

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 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. This seemed to be particularly the case for students with learning and related disabilities.

The professionalization of campus offices for students with disabilities has been significant.[91] Fifty years ago, it would be unlikely that most campuses would even have an office for students with disabilities. If any attention was given to these issues, it would probably have come from the affirmative action office or some other general office on diversity. Today, virtually all institutions of higher education have such offices, which handle providing or coordinating and facilitating accommodations, evaluating documentation to determine the eligibility for services, and a range of other tasks.

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 (many, but not all involving issues of learning disabilities), and began issuing Opinion Letters that provide insight and guidance, although not with the weight of a judicial decision. This avenue often proved less costly for both parties and a more efficient way to resolve issues than litigation did.

A 2009 report by the Government Accountability Office[92] provides some insight into the various roles that the Department of Education has played over time and highlights the lack of a coordinated approach taken by the ED with respect to students with disabilities. The three major offices within ED involved with these issues have different roles. The Office for Civil Rights (OCR) engages in enforcement, although it has been the lead

90. For an overview of this issue and these cases, see ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3:26.

91. The Association of Higher Education and Disabilities (AHEAD), with over 2500 members, provides substantial technical assistance on these issues, and has for many years.

92. U.S. GOV'T ACCTB'Y OFFICE, GAO-10-33, HIGHER EDUCATION AND DISABILITY: EDUCATION NEEDS A COORDINATED APPROACH TO IMPROVE ITS ASSISTANCE TO SCHOOLS IN SUPPORTING STUDENTS (2009).

office in providing technical assistance on disability issues to schools.[93] The Office of Special Education and Rehabilitative Services (OSERS) handles a range of support programs for parents and students, school districts, and state agencies in the areas of special education, vocational rehabilitation, and research with the goal of preparing students for postsecondary education.[94] The Office for Postsecondary Education (OPE) lacks technical expertise, but provides assistance to schools receiving grants for programs directly related to students with disabilities.[95] The GAO report highlights the lack of coordination and information sharing among these three offices. A major GAO recommendation based on the study of these three programs was that they develop and implement a coordinated approach to provide better technical assistance to higher education.[96]

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. It was almost always assumed that the person was covered. The ADA's coverage of the private sector substantially increased the amount of litigation involving disability-discrimination claims. With virtually all employers and places of public accommodation now covered, lawsuits abounded. But as the floodgates opened and more individuals with conditions such as back injuries and depression began seeking accommodations, particularly in the employment setting, employers began filing motions to dismiss on the basis that the individual was not "disabled" under the definition. The courts began to grant those motions, narrowing the definition of who is covered. This trend in lower courts ultimately led to the Supreme Court decisions known as the "*Sutton* trilogy."[97] In the context of nearsighted airline pilot applicants (whose vision was correctable with eyeglasses), a truck driver with monocular vision, and an individual with high blood pressure

93. *See id.* 25–27.

94. *See id.* 27–28.

95. *See id.* 28–29.

96. *See id.* 29–30.

97. Sutton v. United Airlines, Inc., 527 U.S. 471 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 525 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999). A 1998 Supreme Court decision involving a dental patient with HIV held that the disease qualified as an ADA disability. Bragdon v. Abbott, 524 U.S. 624 (1998). Previously, courts had determined with very little analysis that individuals with HIV or similar conditions were covered. *See, e.g.*, School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

controlled by medication, 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 conditions of the individuals in these cases were held not to fall within the confines of that test.[98]

In 2002 the Supreme Court addressed what constitutes a major life activity, again a response to the groundswell of employment-discrimination cases involving a wide range of conditions. In the context of a woman working on an automobile assembly line who claimed that her repetitive stress syndrome was a disability, the Court set the standard.[99] The Court determined that major life activities are those that involve tasks central to the daily lives of most people.[100] The case was remanded but settled, resulting in no further judicial guidance on whether the woman in question would be covered.

Under the Rehabilitation Act and the ADA, to be an otherwise qualified person with a disability, the individual must not pose a direct threat.[101] What was long uncertain was whether the direct threat must be to others or also to oneself. In 2002, 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.[102]

The combined fallout of those cases was a substantial narrowing of the definition of who is protected under the statutes. Cases were much more quickly being dismissed or discharged via summary judgments determining that the individual was not covered by the ADA or the Rehabilitation Act. Individuals with conditions such as epilepsy, diabetes, and cancer, whose conditions had been routinely presumed to be disabilities before the late 1990s, were no longer protected. The courts thus did not reach the issue of whether the person was "otherwise qualified" or whether accommodations being requested were "reasonable."

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).[103] The result was that the courts did not focus as much on the substantive aspects of qualifications and reasonable accommodations; thus there is little guidance on these issues. Lower courts have only recently begun refocusing on the

98. *Sutton*, 527 U.S. at 482.

99. Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184 (2002). The case settled after remand.

100. *Id.* at 197.

101. That requirement initially appeared in the regulations under Section 504 (34 C.F.R. §1630.2(r)) and was later incorporated into the statutory language of the ADA (42 U.S.C. § 12113(b)).

102. Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 77 (2002).

103. ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 1:8.

substantive issues.[104]

This trend in litigation had an interesting evolution in higher education. Soon after the passage of the Rehabilitation Act, the courts addressed some procedural issues, such as program specificity and immunity. Congress responded to some of these cases with amendments to the Rehabilitation Act. By 1979, and the decision in *Southeastern Community College v. Davis*, the courts were focusing on whether the individual was otherwise qualified and whether the program could accommodate the condition. The case law guidance on these issues was often in the higher-education context because most colleges and universities received federal financial assistance, and most employers and public accommodation programs did not. As a result, when looking for precedent on the issue of whether one is otherwise qualified or on reasonable-accommodation issues, more precedent is found in the pre-1999 cases.

Although before the late 1990s, colleges and universities seemed rarely to raise defenses of immunity or whether the individual was disabled, today they are much more likely to do so. In fact, in 1999, the same day the Court decided the *Sutton* trilogy, it remanded the *Bartlett v. New York State Board of Law Examiners* case,[105] which involved an individual with a learning disability seeking accommodations on the bar exam. The Court instructed the lower court to determine whether Marilyn Bartlett's learning disability had been mitigated so that it was not substantially limiting to any major life activity.[106] Ultimately on remand, it was determined that she was substantially limited in the major life activity of reading, and that her self-accommodations in getting herself through law school had not changed that.[107] Therefore, she did have a substantial impairment justifying reasonable accommodations.

It is important to note, however, that colleges and universities still seem 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). Higher education had evolved practices, policies, and procedures before other sectors affected by the ADA (with the exception of K-12 education). Because they were more experienced at finding ways to accommodate the student with chemical sensitivities who requested chalk-dust-free classrooms, they were unlikely to raise the condition's status as a disability as a defense. Colleges and universities also followed the

104. *Compare* Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983) *with* U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002)).

105. Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69 (2d Cir. 2000).

106. *Id.* at 86.

107. Bartlett v. N.Y. State Bd. of Law Exam'rs, No. 93 CIV. 4986(SS), 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001).

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 advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State.[108]

Colleges and universities have been the leaders in finding ways to use technology to accommodate students with a wide range of disabilities.

Although higher education was ahead of employers and public accommodation providers on disability discrimination issues, the road for higher education has not been entirely smooth. 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. Their special education had better prepared them for college. They expected a certain level of services in college as a result. What became apparent was that these students and their parents did not realize that not everything that the IDEA required in high school was required in college. In high school, the burden was on the school, at its own expense, proactively to identify and evaluate the student. In high school, the student was to be provided appropriate education, not just reasonable accommodations. In contrast, the college student has the responsibility to make known a disability and to request accommodations. That includes paying for the cost of an evaluation. The burden shifts in college.

For students with learning disabilities, there have been a number of challenges.[109] With the increased number of such students, and reinforced by the *Bartlett* and other decisions, higher education has become insistent that students with learning disabilities provide appropriate documentation to justify the requested accommodations. That means that evaluations must be done by professionals with appropriate expertise, and that these evaluations must be recent. It also means that the student pays for these evaluations. These new expectations came as a shock to some parents. With increased awareness, however, today there is less surprise.

Disability-rights advocates fought early on for expansion of the 1973 Rehabilitation Act rights, so that more than those receiving federal support

108. 442 U.S. 397, 412–13 (1979).

109. The courts have recently adjudicated several cases involving medical students with learning disabilities. While the focus has been on whether the condition in question was a covered disability, courts have also reverted to earlier determinations and addressed whether the medical student in question was otherwise qualified. For cases focusing on students with learning disabilities, see ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3:22.

would be covered. Because the expansion took seventeen years, the interpretation of the Rehabilitation Act (after which the substantive rights under the ADA are modeled) developed to a large extent within higher education. A broader application of disability discrimination law at an earlier stage might have resulted in an earlier groundswell of litigation and in a much earlier narrowing of these laws, as occurred in *Sutton* and the recent immunity decisions. We would not have the body of case law that provides guidance on a variety of issues to draw on.

B. Other Developments

1. Immunity

In addition to the contraction of the definitional coverage of "disability" and the litigation in the last decade applying that narrowed definition, there were a number of other developments that occurred during this time.

The Supreme Court addressed the issue of governmental immunity for state and local governmental agencies for damage actions under various ADA settings.[110] These decisions do not resolve whether state universities are immune from damage actions by students with disabilities, but because of the application of the Rehabilitation Act to most of these institutions, it is less significant whether public higher education institutions need to raise the defense or are likely to do so.

2. Architectural barrier issues

While there has not been a high volume of litigation about architectural-barrier issues in college and university settings, there has been some attention by the courts and the Office for Civil Rights.[111] Cases have involved a range of issues including housing,[112] public spaces,[113] parking,[114]

110. *See* United States v. Georgia, 546 U.S. 151 (2006) (holding that Title II validly abrogates state immunity insofar as it authorizes suits for conduct that independently violates the Fourteenth Amendment); Tennessee v. Lane, 541 U.S. 509 (2004) (holding that ADA Title II had properly abrogated state immunity in cases involving "the fundamental right of access to the courts"); Board of Trs. v. Garrett, 531 U.S. 356 (2001) (holding states to be immune from ADA Title I claims for monetary damages).

111. *See* ROTHSTEIN & ROTHSTEIN, *supra* note 9, §§ 3:16–3:18.

112. *See e.g.*, Kuchmas v. Towson Univ., Civil Action No. RDB 06-3281, 2008 WL 2065985 (D. Md. May 15, 2008) (statute of limitations did not bar student from claiming Fair Housing Act violations against university for inaccessible apartment; statute did bar claims against architect); Grand Valley State Univ. (MI), 12 Nat'l Disability L. Rep. ¶ 275 (OCR 1997) (new townhouses being built for students must meet access requirements regardless of whether there currently are students seeking such housing; the availability of accessible dorm rooms does not exempt the university from making other housing accessible).

113. *See e.g.*, Panzardi-Santiago v. Univ. of P.R., 200 F. Supp. 2d 1 (D.P.R. 2002) (prospective student with mobility impairment may have remedy in case involving

social events,[115] and classrooms.[116] The outcomes have varied, but all of these cases highlight the increasing awareness of rights under the Rehabilitation Act and the ADA. Colleges are at risk of liability if they schedule social and athletic events at inaccessible locations.

3. Programs abroad and field placements

This era also gave rise to attention to foreign-study programs and other activities and events that are sponsored at a location other than the campus, as well as courses offered not for credit. The challenges of programs abroad include the different laws that apply in the host country as well as cost issues. While the unique qualities of off-campus programs affect accommodations analyses, institutions remain subject to non-discrimination requirements in their administration of them.[117]

For the student taking fieldwork or other off-campus work, often supervised by another program or agency, the challenges include the importance of communication and determining which program is responsible for costs that might be incurred.[118] A university should

whether public pathway was accessible).

114. *See e.g.*, Brownscombe v. Dep't of Campus Parking, 203 F. Supp. 2d 479 (D. Md. 2002) (not a Section 504 violation to enforce parking code against student with a disability); Penn. State Univ., 12 Nat'l Disability L. Rep. ¶ 86 (OCR 1997) (Penn State had provided adequate accessible parking spots at stadium).

115. *See, e.g.*, Levy v. Mote, 104 F. Supp. 2d 538 (D. Md. 2000) (University's club inaccessible; case against organizer of bar association meeting); Letter to Univ. of Mass. Dartmouth, 36 Nat'l Disability L. Rep. ¶ 255 (OCR 2007) (agreement by university to make public forum space, formerly on a grassy area not accessible by ramps, accessible).

116. *See e.g.*, Letter to Univ. of Wyo., 31 Nat'l Disability L. Rep. ¶ 176 (OCR 2005) (when viewed in entirety, law school was accessible; classrooms were accessible; university provided notification about requesting move to other classrooms and student had not requested move).

117. *See generally* ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3.20; s*ee also* Arlene Kanter, *The Presumption Against Extraterritoriality As Applied to Disability Discrimination Laws: Where Does It Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL'Y REV. 291 (2003); A.M. Rubin, *Students with Disabilities Press Colleges to Help Them Take Part in Foreign Study*, CHRON. HIGHER EDUC. (Wash., D.C), Sept. 27, 1996, at A47; s*ee also* Bird v. Lewis & Clark Coll., 303 F.3d 1015 (9th Cir. 2002) (college did not violate Section 504 or Title III of ADA by failing to provide certain accommodations in overseas program; although wheelchair access was not provided in some instances, a number of other accommodations were provided).

118. *See generally* ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3.20; s*ee also* Hartnett v. Fielding Graduate Inst., 400 F. Supp. 2d 570 (S.D.N.Y. 2005), *aff'd in part, rev'd in part*, 198 F. App'x 89 (2d Cir. 2006) (requested accommodation denied because student failed to demonstrate potential benefit thereof); Raffael v. City of New York, Civil Action No. 00-CV-3837, 2004 WL 1969869 (E.D.N.Y. Sept. 7, 2004) (difficulty in commuting does not have to be accommodated); University of Cal., Los Angeles, 8 Nat'l Disability L. Rep. ¶ 314 (OCR 1996) (no Section 504 or ADA violation when student did not provide adequate notice of learning disability requiring

consider whether externship locations are accessible. While it is unlikely that *all* outside externship placements must be accessible, those placements should be in compliance with the ADA, and college must ensure reasonable access in a program as whole.

4. Hostile environment and retaliation issues

Also occurring at this time was the increase in claims of hostile environment[119] retaliation,[120] or both for making a complaint or seeking accommodations. While often the institution of higher education will prevail in these claims, these cases highlight the importance of ensuring that administrators and faculty take care to avoid any conduct that might be viewed as hostile or retaliatory.

5. Violence and disruption on campus

One other major area of attention during this decade was a response to issues of violence and disruption on campus.[121] The presence of students with mental health problems requires colleges and universities to balance possible concerns about safety and a positive academic environment with considerations of privacy and nondiscrimination on the basis of disability.

Violence at institutions of higher education (such as Virginia Tech and Northern Illinois University) has resulted in a re-examination of release of student records to individuals who might need to know.[122] The revised

accommodation in social-work field placement).

119. Rothman v. Emory Univ., 123 F.3d 446 (7th Cir. 1997) (law school did not create hostile environment for student with epilepsy by sending letter to bar examiners, nor did other incidents create a hostile environment, when the law school's actions were not related to student's epilepsy); Toledo v. Univ. of P.R., 36 Nat'l Disability L. Rep. ¶ 127 (D.P.R. 2008) (denying university's dismissal motion; student claimed harassment and discrimination after revealing schizoaffective disorder; accommodation of afternoon classes because of medication denied although the university had offered afternoon classes in the past); Guckenberger v. Boston Univ., 957 F. Supp. 306 (D. Mass. 1997) (denying dismissal of hostile-environment ADA claims).

120. Amir v. St. Louis Univ., 184 F.3d 1017 (8th Cir. 1999) (although dismissal of medical student with obsessive compulsive disorder was validly based on academic difficulties, student may have had basis for claim of retaliation); Bayon v. State Univ. of N.Y. at Buffalo, 32 Nat'l Disability L. Rep. ¶ 169 (W.D.N.Y. 2006) (awarding graduate student $100,000 in case claiming retaliation for bringing ADA complaint); Letter to Alamance Comm. Coll., 32 Nat'l Disability L. Rep. ¶ 48 (OCR 2005) (finding that suspension of student was because of physical abuse of another student in violation of Student Code of Conduct, not in retaliation for requesting auxiliary aids).

121. *See e.g.*, Tylicki v. St. Onge, 297 F. App'x 65 (2d Cir. 2008) (college student who was suspended after series of violent outbursts not entitled to manifestation hearing).

122. *See* Megan Devoran, *Communication as Prevention to Tragedy: FERPA in a Society of School Violence*, 1 ST. LOUIS U.J. HEALTH L. & POL'Y 425 (2008); Lynn Daggett, *FERPA in the 21st Century: Failure to Effectively Regulate Policy for All Students*, 58 CATH. U.L. REV. 59 (2008); Stephanie Humphries, *Institutes of Higher*

FERPA regulations under the Federal Education Rights and Privacy Act,[123] respond by allowing disclosure of records without consent where there is an emergency related to the health or safety of a student or others.[124] An institution of higher education may consider the totality of the circumstances and disclose information about the threat to those necessary individuals where there is an "articulable and significant threat" to the health or safety of the student or others when there is a rational basis for doing so.[125] The educational agency must be prepared to justify the disclosure and must record the nature and threat and to whom the information was disclosed under the emergency exception. Such "necessary" individuals include the parents of an adult student.

It is beyond the scope of this article to review those concerns, and they have been addressed in detail in recent articles by this author.[126] The importance of proactive development of policies, rather than responding to events, should be emphasized.

6. 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 the 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 these could prevent a great deal of discord on disability issues.[127]

VI. A REVERSAL OF COURSE, 2008–2010

As was noted previously, the definition of "disability" was limited by Supreme Court decisions in 1999 and 2002. Following those decisions,

Education, Safety Swords, and Privacy Shields: Reconciling FERPA and the Common Law, 35 J.C. & U.L. 145 (2008); Margaret O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679 (2003).

123. 34 C.F.R. pt. 99 (2009).

124. *Id.* §§ 99.31–99.32.

125. *Id.*

126. Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 101 (2009); Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531 (2008).

127. *See* Laura Rothstein, *Millennials and Disability Law: Revisiting* Southeastern Community College v. Davis*: Emerging Issues for Students with Disabilities*, 34 J.C. & U.L. 167 (2007).

there were many efforts to address that limitation, but it was not until September 2008 that Congress returned the definition of coverage to what disability-rights advocates thought had been intended at the outset.

In an amendment that did not receive much initial public attention because it occurred during the financial meltdown of fall 2008, Congress enacted the ADA Amendments Act of 2008, which took effect on January 1, 2009.[128] The Act clarifies that the intent of the ADA was to provide for broad coverage for disabilities.[129] The definition's amendment applies to both the ADA and to the Rehabilitation Act.[130]

The definition of disability basically remains the same and provides as follows:

> a physical or mental impairment that substantially limits one or more major life activities of such individual;
> a record of such an impairment; or
> being regarded as having such an impairment. . . .[131]
> . . . .
> [M]ajor life activities 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.[132]

For the student with a learning disability affecting learning, reading, concentrating, thinking, or communicating, these clarifications may mean a greater assurance of being covered by the definition.

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.[133]

For a student with HIV, asthma, chemical sensitivities, Crohn's disease,[134] diabetes, and a number of other conditions that were not always covered before 2008, this clarification means that now there is a greater likelihood of having the case decided on issues other than the fact of disability.

128. ADA Amendments Act of 2008, P.L. 110-325, 122 Stat. 3553 (2008) (codified as parts of 42 U.S.C. §§ 12101–12114, 12201–12210, and 29 U.S.C. § 705) (Supp. II 2008).

129. *Id.* § 4.

130. *Id.* § 7.

131. 42 U.S.C. § 12102(1).

132. 42 U.S.C. § 12102(2).

133. *Id.*

134. *See, e.g.*, County of Los Angeles v. Kling, 474 U.S. 936 (1985) (finding that Crohn's disease was not a disability).

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."[135]

The definition of "disability" does not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less.[136] Although most colleges and universities probably accommodate the student with a broken leg or similar condition, the disability definition does not require this accommodation. This may also be important in a situation where a student with flu or another contagious disease is prohibited from attending class or excluded from university housing. This student may have other claims, but will probably not be able to claim disability discrimination.

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.[137] It is not clear whether this definition will apply to professional education admission. For example, could acceptance to certain health care professional education residency program require an individual to have a certain level of vision without corrective measures?

At the time of this writing, the Equal Employment Opportunity Commission has proposed regulations relating to the ADA Amendments in the Notice and Public Comment phase, and other agencies will most certainly present proposals for regulations to implement various aspects of the ADA Amendments.[138] It remains to be seen whether the regulatory agencies will try to expand the definition beyond what the framework of the amended ADA provides, in which case the regulations may not withstand judicial scrutiny.

Because of the time it takes for cases to work their way through the judicial system, there has not yet been substantial guidance about how the courts will treat new cases under the amended definition of "disability" in the higher-education setting.[139] It may be that fewer cases will be

135. 42 U.S.C. § 12102(3).

136. *Id.* § 12102(4)(D).

137. *Id.* § 12102(4)(E).

138. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as amended, 74 Fed. Reg. 48,431 (proposed Sept. 23. 2009) (to be codified at 29 C.F.R. pt. 1630).

139. *See e.g.*, Brodsky v. New England Sch. of Law, 617 F. Supp. 2d 1 (D. Mass. 2009) (applying both pre- and post-2008 standards to case involving law student's

dismissed based on the definition, but that the ultimate outcome will often favor the institution when issues of qualifications and accommodations are addressed. In light of the increasing demands on disability student service offices, it can be expected that there will continue to be a rigorous requirement to provide appropriate documentation to justify the disability. Institutions, however, may be less likely to challenge whether the condition "substantially" limits a major life activity.

At the same time as Congress enacted the ADA Amendments Act of 2008, it also passed the Mental Health Parity and Addiction Equity Act.[140] This responded to longstanding criticisms about the differential treatment between health benefits for physical conditions and mental-health conditions. According to this new law, group insurance benefits (including caps and deductibles) provided by employers (if they have such a program) must be available on an equitable basis.[141] The current health care reform debate will most certainly have an impact on how this plays out in practice. The increased cost of providing health care services on campuses may result in across the board cuts in such services.

VII. THE CRYSTAL BALL – 2010 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?

The most recent government report indicates that students with disabilities represent about eleven percent of students in postsecondary education,[142] an increase from nine percent in 2000. The report highlights that students with disabilities are represented at a slightly higher rate in two-year schools than four-year schools.[143] The range of disabilities has changed somewhat over time, with a proportional increase in students with mental, emotional, or psychiatric conditions (including depression), attention deficit disorder, and learning disabilities from 2000 to 2008 (with 10 percent of students with disabilities having learning disabilities)[144] and a decrease in students with orthopedic or mobility impairments and those with health impairments.

The GAO report notes some of the challenges for postsecondary

request for readmission after memory and organizational deficits had been identified); Strahl v. Trs. of Purdue Univ., 39 Nat'l Disability L. Rep. ¶ 49 (N.D. Ind. 2009) (finding that student with Asperger's Syndrome was disabled, but denying requested exemption from foreign language requirement).

140. 29 U.S.C. § 1185a and 42 U.S.C. § 300gg-5.

141. 42 U.S.C. § 300gg-5(a).

142. U.S. GOV'T ACCTB'Y OFFICE, *supra* note 92, at 8.

143. *Id.* at 10.

144. *Id.* at 11.

institutions,[145] including the transition of students from K-12 (and the lack of preparation for the change). Other challenges include providing the range of services (many are resource intensive or require specialized knowledge) and providing staffing for these needs (such as for coaching students with autism in social skills). Institutions will be challenged to find the resources to provide the costly accommodations (such as sign language interpreters and having staffing to provide accommodated exams). 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 (a population that is expected to increase).

There are already signals of the future legal issues. As more institutions experiment with distance learning and online coursework, it is quite possible that students will seek assistance from the Office for Civil Rights, the courts, or both in seeking accommodations or raising other issues of discrimination. Lawsuits involving providing course materials on Kindle and website access may illuminate the direction on these issues. The internet and access to technology is likely to receive increased attention.

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 Middle East veterans. Another health-care-related issue is the increasing concern about contagious and infectious diseases and how students with disabilities might raise unique concerns about how such situations are handled. If there is a flu outbreak on campus, might students with disabilities (such as HIV) request nonexposure to those with contagious diseases, or will students who have contagious and infectious diseases try to claim disability protection?

In the area of professional education and its relationship to licensing, it is difficult to predict whether there will be an increase or a decrease in litigation. While judicial precedent has provided increased guidance on some of these issues, 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 possible that the licensing agencies themselves may take a new look at these issues and reconsider some of their policies and practices.

There have been a number of recent media stories about service and emotional-support animals in a variety of settings.[146] It is likely that more

145. *Id.* at 10, 20–25.

146. Kelly Field, *These Student Requests Are a Different Animal*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Oct. 13, 2006, at A30, A31; Sara T. Scharf, *How Much Is That Doggie in the Classroom?*, CHRON. OF HIGHER EDUC. (Wash., D.C.), June 1, 2007, at B5 (discussing the increase in student demands for on-campus pets).

cases in various arenas, including higher education, will address these issues. This is an area where the Department of Education (as well as other agencies) could assist in providing regulatory guidance.[147]

As the GAO Report notes, many of the emerging challenges have significant economic impact. This might mean that some colleges and universities decide to raise the undue-burden issue, although the chance that discretionary budgets could be opened to public scrutiny might deter some of them from trying this defense.

It is likely that litigation will clarify the impact of the ADA Amendments Act and the broader definition of disability that it now includes. Early cases in the employment setting[148] indicate that although the definition is broader, individuals do not necessarily win their cases.[149] The broader coverage, however, may mean that students with learning and related disabilities and some mental health conditions (such as depression) may at least be considered "disabled" and thus have the opportunity to prove their case on other grounds.

Moreover, as noted in the GAO report, the return of veterans with a variety of conditions ranging from mobility impairments to post traumatic stress disorder will present new challenges for colleges and universities.[150] The Post-9/11 Veterans Assistance Act of 2008[151] provides funding for tuition and fees, housing, and other assistance for returning veterans. This is likely to increase the number of individuals on campus returning from active service. Not only might the services they request be challenging, but there may be legal issues about documentation. Individuals returning from active service may not be able to get the traditionally required documentation quickly from the military to justify an accommodation, and institutions will need to determine whether they can adapt their policies to this new population.

Where could federal agencies provide guidance to institutions so that they know what is required to comply? And where might a coordinated

147. The Department of Justice had issued proposed regulations before the ADA Amendments Act, but these were withdrawn after the Obama Administration began.

148. *See e.g.*, Winsley v. Cook County Dep't of Pub. Health, 563 F.3d 598 (7th Cir. 2009) (driving not major life activity); Lewis v. Pennsylvania, 609 F. Supp. 2d 409 (W.D. Pa. 2009) (applicant with diabetes not regarded as disabled); Perez-Rosario v. Hambleton Group, Inc., 39 Nat'l Disability L. Rep. ¶ 42 (D.P.R. 2009) (tasks that are rarely or occasionally performed by most people not major life activities).

149. In one of the few decisions to discuss the retroactive application of the ADA, the court in *Jenkins v. National Board of Medical Examiners*, No. 08-5371, 2009 WL 331638 (6th Cir. Feb. 11, 2009), held that the ADA Amendments Act applies to petitions for prospective equitable relief pending at the time of the Act's adoption.

150. For a discussion of this issue, see Paul D. Grossman, *Foreword with a Challenge: Leading Our Campus Away from the Perfect Storm*, 22 J. POSTSECONDARY ED. & DISABILITY (2009).

151. P.L. 110-252 (2008).

effort within the Department of Education provide useful technical assistance? As noted previously, one area is with respect to assistance animals. In this area, it will be important for the various agencies to consider the balancing of factors in the range of settings. The risks and challenges are different when an animal is in a residence hall room, at a food court in the student center, at a football stadium, in a classroom or library, or in another venue. Thought should be given to these various settings.

The issue of housing is in need of attention. The changes in types of housing and new construction and the different types of campus housing highlight the need for attention in this area.

The high-profile, large-scale violence and individual suicide and violence events on campus highlight the importance of providing guidance on what is a direct threat and also the importance of providing mental health services on campus and ensuring that students get the needed services. The stressors of an economic downturn will certainly make attention to these issues essential.

We are probably in an era where there will be little legislative activity (other than on health care), but substantial regulatory guidance, and continued litigation and OCR activity. It is difficult to predict the outcome of various issues in these arenas with much certainty, but what is clear is that there is a dramatically increased awareness of disability rights on campus today and that the issue is here to stay.

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.

Finally, 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 in the future.