

PRACTICAL TIPS: MANAGING DISABILITY-RELATED ISSUES

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SOURCES OF LEGAL OBLIGATIONS

Federal Law

1. Americans with Disabilities Act of 1990 (ADA)
 - Title I: Employment
 - Covers Employers with 15 or more employees
 - Enforced by EEOC
 - Must exhaust administrative remedies
 - Title II: State and Local Governments
 - Covers all state and local governmental entities
 - Enforced by DOJ
 - No exhaustion requirement
2. Rehabilitation Act
 - §503
 - Covers federal contractors/subcontractors (>\$10,000)
 - §504
 - Covers federal agencies or activities receiving federal assistance
3. Fair Housing Act
 - Applies to rental properties.
 - Institutions, in the role of landlord, may need to make reasonable accommodations for disabled student-tenants.

State Law

Personnel Policies/Collective Bargaining Agreements

PURPOSE OF DISABILITY ANTI-DISCRIMINATION STATUTES

1. *Enable* individuals to satisfy essential job/course functions.
2. Need not excuse essential job functions or lower academic standard/substantially change a program.

BASIC ELEMENTS OF A DISABILITY CLAIM

1. Is the person legally disabled?
2. If so, parties must engage in an interactive process to identify possible reasonable accommodations.
3. Provide a reasonable accommodation, to do so causes an undue hardship.

WHO IS CONSIDERED DISABLED

- Is the person legally disabled?
 - Under Federal Law?
 - Under State Law?
- Review current/prior documentation.
- ADA defines “Disability” as:
 - A physical or mental impairment that substantially limits one or more major life activity of an individual;
 - A record of such an impairment; or
 - Being regarded as having an impairment.
- Avoid making assumptions about an individual’s condition... Focus on the objective behaviors and medical records.
- If a person is disabled, engage in the interactive process to determine whether a reasonable accommodation exists.

DIRECT THREAT

- Title I of the ADA defines “direct threat” as “ a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. § 12(1)(3).
- Title II of the ADA defines “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services a provided in §35.139.”
 - “Self” has been removed.
 - Actual or Perceived? Be clear about the threat?

REASONABLE ACCOMMODATION/INTERACTIVE PROCESS

1. For Students: The institution must “demonstrate that relevant officials within the institution consider alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result in lowering academic standards or requiring substantial program alteration ... ” citing Wynne v. Tufts Univ. School of Medicine, 976 F. 2d. 791, 793 (1992); Toledo v. Univ. of Puerto Rico, 2008 U.S. Dist. LEXIS 4248.
 - ADA and Rehabilitation Act are similar, but not identical.
 - E.g., DOJ’s revised regulation for ADA does not include emotional support animals in the definition of service animals. See 28 C.F.R. §35.104 (2011).
 2. For Employees: The institution must demonstrate:
 - No reasonable accommodation was available that would enable the employee to perform the essential job functions of either his/her current job or an available position for which he/she is qualified.
 - In a mixed-motive case, the School would have made the same decision regardless of the employee’s/applicant’s disability.
- Request for an accommodation need not be in writing. The institution, however, should memorialize the request in writing and provide a copy to the student and employer to ensure proper understanding of the request.
 - Respond to requests for an accommodation in an expeditious manner.
 - Come into the Interactive Process with an open mind.
 - Create record of discussions/proposed accommodations.
 - Use of interactive process to discuss possible accommodations.

- While student's/employee's requested accommodations may not be reasonable, proposed possible accommodations that may be reasonable to the institution.
- If a proposed accommodation is not reasonable, explain why.
- Must be clear as to what is "essential."
 - Not everything is essential.
 - Be prepared to explain why a function/requirement is essential.
 - Periodically Review Job Descriptions.
- Common requested accommodations:
 - Admission standards
 - Modification of exam procedures
 - Modification of course requirements
 - Modification of deadlines
 - Modification of work schedule
 - Modification of job duties (non-essential)
 - Leave of absence (even beyond FMLA)

MANAGING UNDER PERFORMING STUDENTS/EMPLOYEES

* Requires Effort

1. Ensure Student/Employee is aware of expectations and consequences.
 - Involve union (may avoid future grievance).
 - Document communication of expectation/consequences.
2. Ensure expectation/consequences are uniformly applied throughout student body/workforce.
3. Follow-up
 - Review for possible changes in accommodation
4. Take action in professional/considerate manner.
 - Document action and the reasons therefore.

**GETTING PRACTICAL:
ADA AND ACCOMMODATION ISSUES ON CAMPUS**

March 20 – 22, 2013

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OVERVIEW

It is not only students with disabilities who are unsuccessful in meeting the requirements of college life. Students with new freedom who have not developed self discipline, those who are not as academically prepared as they should be, and those who have distractions such as working or social life that interfere may not succeed. Students with disabilities, however, may have additional reasons for not meeting the academic and other requirements to succeed.

This session explores a range of scenarios when students with disabilities do not succeed and examines how these “failures” are addressed under disability discrimination law. It focuses primarily on students with learning and related disabilities (ADD, ADHD, etc.) and those with mental health challenges, because of the unique ways in which disability law may be an issue for those students. It suggests how a more proactive approach both by the higher education institution and the students themselves might improve success.

Special attention will be given to students in professional school programs. These students have been involved in a disproportionate number of OCR and judicial decisions. The reasons probably include the high stakes for professional programming and the licensing process.

Many of the reported cases involve students who do not make “known” the disability and/or the need for accommodations until after academic failure or misconduct of some type. While the courts have consistently found that the burden is on the student to make that known and do not require readmission or removal of the academic deficiency, there are a number of ways that a proactive approach by the higher education institution could improve the likelihood of success. This session will suggest how institutions might be more proactive in their approaches.

Attention will also be given to faculty members and other employees with disabilities and the best practices that can help in avoiding litigation and disputes.

Included in this presentation will be a discussion of the reasons why a student might not succeed in a legal challenge to an institution’s removal or adverse treatment of the student.

- 1) Student does not meet the definition of having a disability (even under the broadened definition after the 2008 amendments).
- 2) Student is simply not qualified even with accommodations
- 3) Accommodations were not provided
 - a) Student does not know of the disability and did not request accommodations
 - b) Student assumes college will provide what is needed without request by student (IDEA-model)
 - c) Student wants to try to succeed without accommodations
 - d) Student succeeded in past without accommodations and does not realize they might be needed (particularly true for transition into graduate and professional programs)
 - e) Student's condition is new (e.g., bipolar disorder for 20-something students)
 - f) Student was "overaccommodated" in past and institution has not provided the same accommodations that were granted previously (e.g., graduate and professional programs)
 - g) Accommodations requested are not reasonable – (e.g., waiver of requirements; not attending class)
 - h) Student did not follow accommodation request process – applied too late; did not know how to request the accommodations, etc.
 - i) Student's documentation is not adequate to justify accommodation; documentation may define a disability, but requested accommodations are not related to the disability
 - j) Student did not appropriately use the accommodations provided – doesn't show up for class when interpreter is present
- 4) Behavior and conduct issues
 - a) Student violates campus conduct requirements
 - b) Student does not meet attendance requirements
 - c) Student is depressed – cannot function and meet classroom expectations; student is suicidal or self destructive (is danger to "self" an appropriate basis for action under ADA regulations?)
 - d) Student is disruptive – interferes with educational experience of others
 - e) Student is dangerous – threatening to others (or self?)

Mental Health Problems – Class Attendance

Student A was admitted to state college to study history. During the first semester, she began experiencing anxiety and depression and missed a great deal of class as a result. Upon her return, one professor dropped her from the class and refused to accommodate her condition. The professor also ridiculed the student in front of the class. The following summer, the student attempted suicide, but returned the following fall. She was hospitalized in the fall, and again had attendance problems. She was also late for class as a result of the side effects of some of her medications. She provided the professor with a medical certificate regarding the medication issue. The professor refused to grant her additional time to complete assignments. The dean reprimanded the student for complaining about the professor on an evaluation form. The student was not permitted to enroll in the spring because of her academic standing. She has sued the university for violating Section 504 and the ADA.

ADD/Dyslexia – Various Accommodations

Student B enrolled as a first year law student. His long term goal is to practice in a major firm. He knows good grades will be important. He initially requests nothing from the law school. He received C's on most of his exams during the first semester (one B and one D), and upon returning in January, he provided to the office for students services a statement from his family physician that he has ADD and dyslexia. He requested the following: unlimited time on exams, exam administration at his convenience and in his apartment, waiver of a required moot court argument, and a reduced course load. He has also requested permission to retake courses in which he had received grades of C or lower and have the earlier grades deleted from his transcript. Aware that a reduced course load would put him below full time status, he has also requested a waiver of the college's financial loan rule that a student must be enrolled full time to receive student loans and scholarships.

Asperger's Syndrome – Behavior Issues

Student C enrolled as a freshman at state university. She has been diagnosed with Asperger's syndrome, a condition that makes it difficult for her to recognize social cues and adapt to new environments. Related learning disabilities also provide challenges to her ability to organize tasks. The disability services office has arranged to provide some accommodations to her academic program, but professors, classmates, and students who know her outside of class have raised concerns about some of her behaviors. These concerns include blurting out in class without raising her hand, shouting at other students who she thinks have slighted her in some way, and shouting at a professor who would not give her an extension to an assignment. At one campus speaker event, when she shouted something at the speaker, she was escorted from the room, and has been advised that her enrollment may be terminated because of her behavior.

A variation on this is Student D, a third year medical student. He has succeeded in passing the first two years of academic programming, but once he starts clinical rotations, he is receiving negative evaluations regarding his personal relationships with patients and others. He has been found to be rude by colleagues, nurses, staff, and others.

ADDITIONAL HYPOS

- 1) A student gets drunk at the Homecoming fraternity party and throws a chair through a window at the event. At campus disciplinary proceedings, he claims he is a recovering alcoholic.
- 2) A student claims “chronic lateness” and wants time extensions for submission of writing assignments.

In each of these scenarios – consider the following: -- “care, be fair, and prepare”

- 1) What is the institution legally required to do?
 - 2) What can the institution do?
 - 3) What should the institution do?
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The background of the current legal requirements of the ADA and Rehabilitation Act and the 2008 amendments revising the definition of disability will be provided as context for the practical guidance for colleges and universities on this issue.

I. 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

II. What statutes and policies are relevant -- in addition to disability discrimination laws?

- A. HIPAA
- B. State laws on privacy, and other matters

III. 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

IV. 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

V. 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 others (or self?)
- C. Alcohol and substance use are separately clarified – addiction to them would be a disability, but prohibiting use is still permissible

VI. 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

VII. 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

VIII. Otherwise Qualified

- A. Essential performance expectations need not be excused
- B. Obligation of student to make “known” the disability and request accommodation, before, not after nonperformance

IX. 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
- E. Enrolled Student
- F. Requesting accommodations
- G. Misconduct
- H. Troubling behavior
- I. Seeking help
- J. Removal from enrollment does not make problem go away

X. Ethical Dilemmas

- A. Balancing
 - The interest of the *student*
 - The interest of the *institution*
 - The interest of *others (patients, other students, others in the community)*

XI. Mental Health Concerns

- A. Referral for counseling
 - Avoiding undue and unnecessary pressure
 - Identifying signs of stress - training
 - Referral
 - Counseling

STATUTORY, REGULATORY, AND JUDICIAL REFERENCES

WHO IS PROTECTED

Must be substantially limited in one or more major life activities; be regarded as so impaired or have a record of such an impairment.

Must be otherwise qualified – able to carry out the essential functions of the program with or without reasonable accommodation. Undue hardship, fundamental alteration, lowering standards – not required.

Individual must not pose a direct threat to others. While employment consideration may be given to danger to self, it is unclear whether danger to self may be a consideration in taking action.

Individual must make “known” the disability and have appropriate documentation, and must do so in a timely manner. Second chances not generally required.

The ADA Amendments Act of 2008 clarifies and amends the definition of “disability”, see 42 U.S.C. § 12102 . 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.

The amendments respond to 1999 and 2002 Supreme Court decisions that had narrowed the definition, and provide for a broad interpretation of the definition of disability under the ADA. Under the revisions, whether an individual is substantially limited is to be determined without reference to mitigating measures, with an exception for ordinary eyeglasses and contact lenses. 42 U.S.C. § 12102(4)(E).

The amendments also add an illustrative list of major life activities, and by doing so codify the existing regulatory definitions and add to them.

The new definition of major life activities specifically includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and operating major bodily functions (which are further defined). Many of the conditions found not to be disabilities may prospectively be determined to fall within the definition, so long as the condition substantially limits one or more of those major life activities.

The Amendments specifically provide that concentrating, thinking, and communicating are major life activities. This amendment may make it more likely that an individual with a learning disability or with certain mental impairments will fall under the definition.

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, speaking, breathing, learning, reading, concentrating, thinking, communicating and

working. 42 U.S.C. § 12102(2). [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. 42 U.S.C. § 12102(2).

To meet 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.” 42 U.S.C. § 12102(3).

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. 42 U.S.C. § 12102(4)(D).

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. 42 U.S.C. § 12102(4)(E).

The Amendments also provide that “Nothing in this Act alters the provision..., specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations involved.” 42 U.S.C. § 12201(f).

The ADA Amendments of 2008 (42 U.S.C. § 12103(1)) codify the basic provisions of the ADA and Rehabilitation Act regulations by providing that auxiliary aids and services are to include:

- qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- acquisition or modification of equipment or devices; and
- other similar services and actions.

The Amendments state that the definitions are also to be applied to the Rehabilitation Act.

MAJOR ISSUES IN HIGHER EDUCATION

(Cases involving Professional and Graduate Students are in BOLD)

A. IS THE STUDENT “DISABLED” WITHIN THE DEFINITION?

Must be substantially limited in one or more major life activities; be regarded as so impaired or have a record of such an impairment. (see above for amplification of these requirements)

Recent Cases

***Ladwig v. Board of Supervisors of Louisiana State University*, 842 F. Supp. 2d 1003 (M.D. La. 2012)** Doctoral student with recurrent depression and head injury was not substantially limited in a major life activity; accommodation of attendance exceptions was contingent on her providing accommodation letter to professors; work was substandard; denying retroactive withdrawal or assigning grade of “incomplete”/doctoral student.

***Singh v. George Washington University School of Medicine*, 667 F.3d 1 (D.C. Cir. 2011)** The 2008 amendments to the ADA do not apply retroactively to student’s claim. The student failed to establish relationship of impairment to her performance. (facts arose pre-ADA amendments)

***Swanson v. University of Cincinnati*, 268 F.3d 307 (6th Cir. 2001)** Surgical resident with major depression was not substantially limited in ability to perform major life activities; difficulty with concentrating was temporary and alleviated by medication; communications problems were short-term, caused by medication and there were only a few episodes. (facts arose pre-ADA amendments)

***Cunningham v. University of New Mexico Board of Regents*, 2011 WL 1548389 (D.N.M. 2011)** Medical school student did not allege that his Scoptic Sensitivity Syndrome was a disability in claims against university.

***Rumbin v. Association of American Medical Colleges*, 2011 WL 1085618 (D. Conn. 2011)** Medical school applicant was not disabled. The accommodated convergence ratio was within normal range. Evaluating optometrist did not compare reading skills to average person.

***Forbes v. St. Thomas University, Inc.*, 2010 WL 6755458, 768 F. Supp. 2d 1222 (S.D. Fla. 2010)** Issues of material fact remain regarding law student as to whether post-traumatic stress disorder was a disability and if so if student had received reasonable accommodations; requiring some evidence that denial of requests was based on rational belief that no further accommodation could be made without imposing a hardship on the program.

Pre-ADA-Amendment Cases

***Davis v. University of North Carolina*, 263 F.3d 95 (4th Cir. 2001)** Student with multiple personality disorder was not disabled; she was not perceived as unable to perform broad range of jobs.

***Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2d Cir. 2000); 2001 WL 930792 (S.D.N.Y. 2001)** Bar exam applicant with learning disability who had self accommodated was still substantially limited in major life activity of reading.

***McGuinness v. University of New Mexico School of Medicine*, 170 F.3d 974 (10th Cir. 1998)** Test anxiety not a disability for a medical student.

B. IS THE STUDENT OTHERWISE QUALIFIED?

***Southeastern Community College v. Davis*, 442 U.S. 397 (1979)** Nursing school student must be able to meet the essential program requirements in spite of the disability.

C. HAS THERE BEEN DISCRIMINATION OR DENIAL OF REASONABLE ACCOMMODATION?

Key Case for Setting Reasonable Accommodation Standard:

***Wynne v. Tufts University School of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991)**. In cases involving modifications and accommodations 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 academic standards or require substantial program alteration.

The ADA Amendments Act of 2008 provides that nothing alters the ADA requirement provision that specifies that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modification...including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations involved. 42 U.S.C. §12201(f)

D. APPLICATION OF THESE ISSUES TO CASES INVOLVING STUDENTS WITH LEARNING DISABILITIES AND MENTAL HEALTH PROBLEMS

1. Admission Issues

Colleges must be sure that they do not discriminate in admissions in the recruiting, application, testing, interviewing, and decision making processes. - 29 U.S.C. Section 794; 34 C.F.R. § 104.42; 42 U.S.C. §§ 12101 et seq.

***Letter to University of Illinois*, 25 Nat’l Disability L. Rep. ¶ 230 (CRV Chicago (IL) 2002)** Law school that did an individualized review of all applicants did not have to modify the application process.

2. Testing Issues

Use of standardized tests and other eligibility criteria that tend to screen out individuals with disabilities does not necessarily violate ADA/504.

- a. Can students with disabilities be required to take standardized admissions tests?
Probably in most cases. Accommodations are provided by the testing services. There is currently a debate regarding students with visual impairments and the Law School Admission Test.
- b. Current litigation about use of certain technology on bar admissions exams.
- c. Deference to previous accommodations issue (see below)
- d. There is currently a significant amount of litigation involving flagging, documentation, and other issues with the Law School Admission Council as defendant. Holdings have been mixed.

Is flagging of test scores permissible? Still not definitively resolved by courts. In litigation.

Major Cases on Testing

***Doe v. National Board of Medical Examiners*, 199 F.3d 146 (3d Cir. 1999)** Suspended lower court ruling that stopped flagging tests given under nonstandard conditions.

***Breimhorst v. Educational Testing Services*, No. C-99-3387 (WHO) (N.D. 2000)**
Flagging of GMAT test may violate ADA.

***Gent v. Radford University*, 976 F. Supp. 391 (W.D. Va. 1997), *affd* 122 F.3d 1061 (4th Cir. 1997)** Student denied admission to graduate school did not have grade point average.

***University of Minnesota*, 6 Nat'l Disability L. Rep. ¶ 295 (OCR 1995)** Law student was not denied admission in violation of ADA/504. Applicant with learning disability had GPA and LSAT score considerably lower than other applicants. No applicant with both GPA and LSAT comparable to complainant was admitted. No violation to refuse to waive LSAT requirement or to refuse to upwardly adjust applicant's GPA.

***Letter to Houston Community College (TX)*, 25 Nat'l Disability L. Rep. ¶ 228 (CRVI, Dallas (TX) 2002)** Standardized test scores were low and were basis of denial of admission; accommodations were made to such scores, but applicant must complete required paperwork to pursue accommodations.

3. Documentation Issues

If disability is at issue, can documentation be required? Yes.

Who pays? Usually the student.

Procedure for accommodating the enrolled LD student. Campus policies should make clear the process for requesting accommodations and resolving disputes. Expert documentation should clarify what accommodations are appropriate. Campus policies

should be readily available and easily known to students. Communication of these policies and procedures is important.

Documentation Issues – timing, credentials of evaluator, identification of the condition, relationship of condition to requested accommodations, deference to previous accommodations

There are two highly publicized decisions on this issue. The court in *Guckenberger v. Boston University* 957 F. Supp. 306, 313-316 (D. Mass. 1997) 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. One of the results of *Bartlett v. New York State Board of Law Examiner*, 156 F.3d 321, (2d Cir. 1998); 970 F. Supp. 1094 (S.D. N.Y. 1997) *aff'd in part, vacated in part on other grounds*, 226 F.3d 69 (2d Cir. 2000) held that no presumption one way or another should be given to treating physician's evaluation of a learning disability.

ADA regulations promulgated in 2008 for Titles II and III provide new guidance on the documentation that should be required to receive accommodations on tests given by testing companies. 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.

Recent higher education cases indicate a more stringent assessment about whether a documented condition is a disability within the ADA where individual is not substantially limited in a major life activity.

Millington v. Temple University School of Dentistry, 36 Nat'l Disability L. Rep. ¶ 126 (3d Cir. 2008) (unpublished opinion) Long list of health problems were not sufficiently documented as demonstrating substantial limitation; student did not meet academic standards.

In re Reasonable Testing Accommodations of Terry Lee LaFleur, No. 2006 SD 86 (S.D. 9/20/06) Psychologist testifying about extra time with ADD was not an expert on bar exam accommodations; testimony was discounted.

Costello v. University of North Carolina at Greensboro, 33 Nat'l Disability L. Rep. ¶ 240 (M.D.N.C. 2006) Obsessive compulsive disorder as a disability.

Guckenberger v. Boston University, 974 F. Supp. 106 (D. Mass. 1997) University's policy of requiring re-evaluations by certified experts every three years was impermissible.

***Ware v. Wyoming Board of Law Examiners*, 1997 U.S. Dist. LEXIS 12155 (D. Wyo. 1997)** Summary judgment granted for defendants who had denied requested accommodations for applicant with multiple sclerosis. The fact that accommodations had been granted in law school did not mean that they should be granted for the bar exam. It is not clear whether the 2008 regulations would have changed the result if this case were decided today.

4. Otherwise Qualified

Students must be able to carry out essential requirements of the program, with or without reasonable accommodation. School need not lower standards nor fundamentally alter the program.

***Halpern v. Wake Forest University Health Sciences*, 669 F.3d 454, 2012 WL 627788 (4th Cir. 2012)** Medical student with ADHD and anxiety disorder did not request accommodations until several years after engaging in unprofessional acts, including abusive treatment of staff and multiple unexcused absences; proposed accommodation (allowing psychiatric treatment, participating in program for distressed physicians, and continuing on strict probation) was not reasonable.

***Ladwig v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 2012 WL 292508 (M.D. La. 2012)** A doctoral student with depression and anxiety did not make out Title I or Title II case. Student did not make out case that she was qualified to perform essential functions of graduate assistantship. Student did not adequately request accommodations for head injury excusing her from attendance and allowing additional time to turn in assignments. University had provided accommodations by providing letters supporting absences and extra time.

***Singh v. George Washington University School of Medicine*, 2011 WL 6118563 (D.D.C. 2011)** Causes other than learning disabilities related to academic deficiencies, including extracurricular activities, anxiety, and poor study habits. 667 F.3d 1 (D.C. Cir. 2011) Student failed to establish relationship of impairment to her performance.

***Harville v. Texas A&M University*, 833 F. Supp. 2d 645 (S.D. Tex. 2011) (S.D. Tex. 2011)** No violation of ADA for research assistant terminated because of excess absences.

***Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006)** Upholding attendance requirements for student with schizoaffective disorder.

***Marlon v. Western New England College*, 27 Nat'l Disability L. Rep. ¶ 70 (1st Cir. 2005)** Law school did not discriminate against student with learning disability, panic attacks and depression, insufficient evidence as to whether student was regarded as disabled.

***McGuinness v. University of New Mexico School of Medicine*, 170 F.3d 974 (10th Cir. 1998)** Medical school not required to advance student with marginal grades; this would be a substantial alteration.

***Kaltenberger v. Ohio College of Podiatric Medicine*, 162 F.3d 432 (6th Cir. 1998)** Graduate student with ADHD did not meet academic standards.

***Childress v. Clement*, 5 F. Supp. 2d 384 (E.D. Va. 1998)** Student who had plagiarized was not otherwise qualified for position as graduate student in criminal justice program. His learning disability had been taken into account in evaluating violations of the honor code. The inquiry was individualized.

***Doe v. Vanderbilt University*, 983 F. Supp. 205 (D.D.C. 1997)** Student with manic depression need not be readmitted to medical school. The dismissal based on academic deficiencies and behavior problems.

***Letter to University of Houston*, 32 Nat'l Disability L. Rep. ¶ 74 (OCR 2005)** Graduate School of Social Work could dismiss student with bipolar disorder who failed exam; student was not treated differently than other students.

5. Accommodations

***Cutrera v. Board of Supervisors of LSU*, 429 F.3d 108 (5th Cir. 2005)** Institutions should engage in interactive process to determine reasonable accommodations.

Accommodations can include the following:

- additional time for exams;
- other exam modifications (separate room; extra rest time);
- reduction, waiver, substitution, or adaptation of course work;
- extensions on assignments;
- extension of time for degree completion;
- preference in registration;
- permission to tape record classes

New issues arising regarding animals on campus

***Halpern v. Wake Forest University Health Sciences*, 669 F.3d 454, 2012 WL 627788 (4th Cir. 2012)** Medical student with ADHD and anxiety disorder did not request accommodations until several years after engaging in unprofessional acts, including abusive treatment of staff and multiple unexcused absences; proposed accommodation (allowing psychiatric treatment, participating in program for distressed physicians, and continuing on strict probation) was not reasonable.

***Ladwig v. Board of Supervisors of Louisiana State University*, 842 F. Supp. 2d 1003 (M.D. La. 2012)** Doctoral student with recurrent depression and head injury was not substantially limited in a major life activity; accommodation of attendance exceptions was

contingent on her providing accommodation letter to professors; work was substandard; denying retroactive withdrawal or assigning grade of “incomplete”/doctoral student.

***Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App.S.D. 2012)** No evidence that providing sign language interpreter to student in nursing program would fundamentally alter the program or pose a threat to safety.

Wolff v. Beauty Basics, Inc., 2012 WL 3634433 (D.D.C. 2012) Deaf prospective student applying to cosmetology school made out a case when she was denied sign-language interpreter request she needed to enroll.

Archut v. Ross University School of Veterinary Medicine, 46 NDLR 73 (D.N.J. 2012) Section 504/Title II claim by student with processing impairments who sought live reader for exams, but was provided tape instead and student failed exams; Rehab Act does not apply to program in a foreign country.

Schneider v. Shah, 2012 WL 1161584 (D.N.J. 2012) There is an obligation to engage in interactive process regarding accommodations, but that ends on the day the student sues university. Student in paralegal program had excess absences.

Reichert v. Elizabethtown College, 2012 WL 1205158 (E.D. Pa. 2012) Student with ADHD had been given numerous modifications. Student requested and was granted medical withdrawal after disciplinary issues. No case for “constructive discharge” from academic program.

Healy v. National Board of Osteopathic Medical Examiners, 2012 WL 1574783 (S.D. Ind. 2012) Taking exam with accommodations for student with ADHD.

Sellers v. University of Rio Grande, 838 F. Supp. 2d 677 (S.D. Ohio 2012) Although ordinarily tutors are not required, where services are provided to general population they must be provided. There were disputed facts about whether nursing student had been prevented from accessing these services.

***Enyart v. National Conference of Bar Examiners*, 630 F.3d 1153, 2011 WL 9735 (9th Cir. 2011)** Allowing preliminary injunction for bar applicant who was been denied computer accommodations she had used throughout law school and on the California bar exam on the tests administered by the NCBE; while this is brought pursuant to the ADA section on testing, it might be relevant for higher education.

***Argenyi v. Creighton University*, 44 Nat'l Disability L. Rep. ¶ 13 (D. Neb. 2011)** Medical student with significant hearing loss requested communications access real time transcription and interpreters as accommodation. Student could not show that certain accommodations would be necessary, although they were helpful. Court gave deference to faculty decisions.

***Jones v. National Conference of Bar Examiners*, 43 Nat'l Disability L. Rep. ¶ 224 (D. Vt. 2011)** Preliminary injunction allowing bar applicant with visual impairment to use screen access software on Multistate Professional Responsibility Exam.

***Bonnette v. District of Columbia Court of Appeals*, 43 Nat'l Disability L. Rep. ¶ 173 (D.D.C. 2011)** Applying “best ensures” standard from ADA regulations requiring bar examiner to allow use of certain technology.

***Hoppe v. College of Notre Dame of Maryland*, 43 Nat'l Disability L. Rep. ¶ 179 (D. Md. 2011)** PhD student with ADD had been given accommodations to exams, but failed 3 of 6. Student was not otherwise qualified. Reasonable accommodations in test-taking environment had been provided.

Dear Colleague Letter 43 Nat'l Disability L. ¶ 75 (OCR 2011) Advising universities that use of technology in classroom settings must either ensure full access to students with disabilities or provide an alternative that allows them to use the same benefits.

***Forbes v. St. Thomas University, Inc.*, 2010 WL 6755458, 768 F. Supp. 2d 1222 (S.D. Fla. 2010)** Issues of material fact remain regarding law student had received reasonable accommodations for post traumatic stress disorder; requiring some evidence that denial of requests was based on rational belief that no further accommodation could be made without imposing a hardship on the program.

***Constantine v. George Mason University*, 30 Nat'l Disability L. Rep. ¶ 157 (4th Cir. 2005)** Law student with intractable migraine syndrome requesting additional time on exam could pursue claim. No 11th amendment immunity.

***Bennett-Nelson v. Louisiana Board of Regents*, 431 F.3d 448 (5th Cir. 2005)** University not immune from suit alleging denial of sign language interpreters and notetakers in a 504 action. Immunity under the ADA was not decided.

***Stern v. University of Osteopathic Medicine and Health Sciences*, 220 F.3d 906 (8th Cir. 2000)** Dyslexic medical school student was not provided requested accommodations, but program did not have to supplement multiple choice test answers with oral or essay responses.

***Hayden v. Redwoods Community College District*, 33 Nat'l Disability L. Rep. ¶ 250 (N.D. Cal. 2007)** Summary judgment denied student seeking involvement in selection of interpreter to ensure effective communication.

***Long v. Howard University*, 2006 WL 1980645 (D.D.C. 2006)** Student's work was well beyond the period of doctoral candidacy; summary judgment denied to student claiming refusal to allow him to return.

***In re Kimmer*, 896 A.2d 1006 (Md. 2006)** Bar applicant had been accommodated in law school, denial of similar accommodations by Maryland bar on basis that he had not demonstrated a disability and had demonstrated above-average performance.

Ferris State University, No. 15002052 (OCR 2000) Student with dyslexia and test anxiety had absences that affected class grade; insufficient evidence that any denial of accommodations affected grade.

***Amir v. St. Louis University*, 12 Nat'l Disability L. Rep. ¶ 151 (E.D. Mo. 1998); 184 F.3d 1017 (8th Cir. 1999)** Medical student with obsessive compulsive disorder was dismissed because of academic deficiencies; unreasonable to grant request to change supervisors, which would be fundamental alteration; appeal recognized basis for claim of retaliation.

Guckenberger v. Boston University, 8 F. Supp. 2d 82 (D. Mass. 1998) University had demonstrated that waiving foreign language would be fundamental alteration of program.

Guckenberger v. Boston University, 974 F. Supp. 106 (D. Mass. 1997). Course substitution for foreign language may be a reasonable accommodation; course substitution in math was not; \$30,000 in damages awarded to the students.

***Bartlett v. New York State of Bar Examiners*, 970 F. Supp. 1094 (S.D.N.Y. 1997)** Bar applicant with dyslexia was substantially impaired; court ordered that she be given test over four days; extra time; computer; \$25,000 in damages awarded.

Columbia Basin College (WA), 7 Nat'l Disability L. Rep. ¶ 188 (OCR 1995) Title II (ADA) & Section 504 violated when college instructor (in good faith) went overboard in ensuring LD student understood classroom instructions. No violation in asking student to confirm in writing a decision to decline accommodations; violation by repeatedly and publicly asking student for reassurance of understanding of instructions.

Numerous OCR opinions have deferred to institution regarding requests to waive or substitute courses.

Companion animals as accommodations

75 Fed. Reg. 56,164-358 (September 15, 2010); 28 C.F.R. §§35.104, 36.104; 35.136; 36.302(c). A detailed summary of the revised regulations is beyond the scope of this outline, but the 2010 regulations address what animals are covered; what they must do; what documentation may be required in the context of Title II and Title III. These regulations do not address service and emotional support animal requirements in the context of student housing or employment. The 2010 regulations clarify distinction between service animals and emotional support animals.

Velzen v. Grand Valley State University, 2012 WL 4809930 (W.D. Mich. 2012) Student was allowed to proceed in Fair Housing Act, Section 504, and state law claims; university prohibited student from being allowed to have her guineau pig, a comfort animal, to control stress for cardiac arrhythmia; university had policy not allowing accommodations for emotional support assistance animal.

Alejandro v. Palm Beach State College, 2011 WL 7400018 (S.D. Fla. 2011) The court granted a temporary injunction to student seeking to bring psychiatric service dog to campus and classes; dog was trained to alert her to impending panic attack.

Recent litigation involves whether housing is treated separately from Title II and/or Title III in a university setting or whether it is only subject to the Fair Housing Act.

Rebecca J. Hussal, *Canines on Campus: Companion Animals at Postsecondary Educational Institutions*, 77 MO. L. REV. 417 (2012)

6. Readmission/Second Chances

What about a student who "flunks out", then discovers a learning disability? Or does not make learning disability known? Or engages in misconduct without knowing of a mental health condition?

Academic performance need not be excused because of mental or other impairments, although failure to make reasonable accommodations might justify reconsideration.

***Halpern v. Wake Forest University Health Sciences*, 669 F.3d 454, 2012 WL 627788 (4th Cir. 2012)** Medical student with ADHD and anxiety disorder did not request accommodations until several years after engaging in unprofessional acts.

***Maples v. University of Texas Medical Branch at Galveston*, 2012 WL 4510524, 46 Nat' Disability L. Rep. 14 (S.D. Tex 2012)** A "second chance" was not a reasonable accommodation; it would fundamentally alter the program; alteration of eligibility criteria not required; medical school student with ADHD and depression dismissed academically; discussed causation factors – ADA prohibits exclusion "by reason of disability"; 504 requires that to be the sole factor; paper was not turned in on time and did not meet standards of the course.

***Peters v. University of Cincinnati College of Medicine*, 45 Nat'l Disability L. Rep. 236 (S.D. Ohio 2012)** Failure to allow a student with a learning disability and ADD to retake exams after it was determined that her medication regimen had been stabilized might be required as a reasonable accommodation; student had only failed exam by a few points; student may have been dismissed because of a pattern of psychiatric problems.

***Lipton v. New York University College of Dentistry*, 865 F. Supp. 2d 403 (S.D.N.Y. 2012)** ADA/504 claim by dental student with reading disorder denied; requested accommodations of being allowed to retake a national exam an unlimited number of times without paying re-matriculation fee not reasonable; student had been granted additional time on exams.

Rivera-Concepcion v. Puerto Rico, 2011 WL 1938239 (D. Puerto Rico 2011) Expulsion of student with bipolar disorder from an internship program was made by officials of the state institution, but was made by employees of the non-profit organization with the coop

agreement to operate the program. Officials were unaware of bipolar disorder until after the expulsion.

Strujan v. Lehman College, 363 Fed. Appx. 84, 40 Nat'l Disability L. Rep. ¶ 17 (2d Cir. 2010) No discrimination when request to withdraw from course preceded making known a disability.

***Singh v. George Washington University*, 338 F. Supp. 2d 99 (D.D.C. 2005)** Obligation is on the individual student to make known the disability to obtain accommodations; institution not required to give a second chance where accommodations were requested after student was dismissed.

***Garcia v. State University of New York Health Sciences Center*, 2000 WL 1469551 (E.D.N.Y. 2000)** Student dismissed from medical school because of unsatisfactory academic performance; dismissal occurred before diagnosis was known.

***Zukle v. Regents of University of California*, 166 F.3d 1041 (9th Cir. 1999)** Medical student with a learning disability did not meet academic standards.

Michael M. v. Millikin University, No. 98-2082 (C.D. Ill. 1998) Student with obsessive compulsive disorder reinstated after settlement agreement; student was withdrawn after a panic attack episode; reenrollment conditioned on receiving weekly therapy and compliance with medication regimes prescribed by psychiatrist.

***Leacock v. Temple University School of Medicine*, 14 Nat'l Disability L. Rep. ¶ 30 (E.D. Pa. 1998)** Medical student with learning disability did not meet academic standards to continue. The student had not made known the disability during first year or before dismissal.

Haight v. Hawaii Pacific University, 116 F.3d 484 (9th Cir. 1997) Where an institution was aware of behavior or performance deficiencies or where reasonable questions are raised after dismissal, institutions may have discretion to make readmission subject to conditions not applied to students in the initial admission process.

***Tips v. Regents of Texas Tech University*, 921 F. Supp. 1515 (N.D. Tex. 1996)** Graduate psychology student did not make her learning disability known nor request accommodations; no violation of ADA or Rehabilitation Act in the dismissal.

Esmail v. SUNY Health Science Center, 633 N.Y.S.2d 117 (AD 1st 1995) Student's dismissal premature for failure to comply with administrative procedures; dismissal was because of drug addiction.

***Gill v. Franklin Pierce Law Center*, 899 F. Supp. 850 (D.N.H. 1995)** Law student was not otherwise qualified under Section 504. Student had not requested any accommodations. Claim that law school should have known he needed accommodations because of post-traumatic stress syndrome resulting from being the child of alcoholic parents.

DePaul University, 4 Nat'l Disability L. Rep. ¶ 157 (1993) Institution must at least consider effects of disability in evaluating student for readmission.

E. AUXILIARY AIDS AND SERVICES

ADA Amendments Act of 2008 codifies the listing of auxiliary aids and services as part of the definitions. These were previously only listed in the ADA regulations.

1. Cost Issues Related to Auxiliary Services

- a. Who pays? School pays or facilitates unless it can show undue burden. Recent developments relating to state voc rehab and graduate school may be helpful.
- b. What procedure for evaluating eligibility? Whatever procedure is used, it should be communicated to the student.
- c. State voc rehab and other resources — recent litigation may provide support for state voc rehab funding
- d. Can cost be a defense? Probably, the real question is whether a college wants to have its discretionary budget examined by the courts and opposing counsel (and the media and the public)

United States v. Board of Trustees, 908 F.2d 740 (11th Cir. 1990) While university may require student to seek state vocational rehabilitation funding or private funding, if these sources are unavailable, the university must provide the service unless it is unduly burdensome to do so. The university may not charge for these services.

Technology Issues

The Communications and Video Accessibility Act, which is effective in October 2013, 47 CFR 79.4(c)(1) requires that video content owners (not distributors) have the primary responsibility for captioning video information.

National Association of the Deaf v. Netflix, Inc., 2012 WL 2343666 (D. Mass. 2012) The court held that a subscription video company video streaming website a place of public accommodation.

***Argenyi v. Creighton University*, 2011 WL 4431177 (D. Neb. 2011)** A medical student with a significant hearing loss requested communications access through real time transcription and interpreters as accommodation. The student could not show that certain accommodations would be necessary, although they were helpful. The court gave deference to faculty decisions.

Dear Colleague Letter, 43 Nat'l Disability L. ¶ 75 (OCR 2011) Advising universities that use of technology in classroom settings must either ensure full access to students with disabilities or provide an alternative that allows them to use the same benefits.

Murdy v. Blindness & Visual Services, 677 A.2d 1280 (Pa. Cmwlth. 1996) No violation of Section 504 to send blind student materials about tuition payment in print rather than in Braille. State funding agency's policy of requiring blind student to complete undergraduate studies in eight semesters not unreasonable.

Technology as an accommodation issue

F. MENTAL AND SUBSTANCE ABUSE IMPAIRMENTS

Is there any way to know there is a problem student in the application process? Application questions should probably only ask about behavior and conduct, not status or treatment or history.

Clark v. Virginia Board of Bar Examiners, 880 F. Supp. 430 (E.D. Va. 1994). This case provides a detailed discussion of mental health history questions and a review of the status in other jurisdictions. For an excellent overview of this issue, see **Stanley Herr, Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities, 42 Villanova L. Rev. 635 (1997).**

Procedural safeguards and balancing with safety issues? Those dealing with students need to be educated on the ADA/504 obligations involving expulsion and other disciplinary measures relating to individuals with disabilities (including mental disabilities and contagious diseases). Importance of confidentiality.

Distinguishing between danger to self (depression, eating disorders, etc.), disruption, and danger.

Direct Threat

Title II regulations provide the following regarding direct threat:

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139. 28 C.F.R. §35.104 (definitions). The determination of direct threat is to be based on an individualized assessment “based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk.” 28 C.F.R. §35.139(b).

Title I regulations applicable to employment, however, allow direct threat as a defense when the individual poses a direct threat to the health or safety of the individual or others in the workplace. See 29 §§1630.2(4) &1630.15(b)(2).

The statutory language of the ADA does not define direct threat. While the EEOC regulation has been upheld by the Supreme Court as being valid and within the scope of the statute, *Chevon U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002), the Title II regulation (which is part of the regulations issued in 2010) has not been subjected to judicial review.

Many in higher education have raised concerns about how the Title II regulation (not considering threat to “self”) will be applied to actions towards students who are suicidal or who have other self-destructive behaviors such as severe depression or eating disorders.

Mershon v. St. Louis University, 442 F.3d 1069 (8th Cir. 2006) Student with disability banned from campus because of threat of violence against a professor.

Letter to Marietta College, 31 Nat’l Disability L. Rep. ¶ 23 (OCR XII, Cleveland 2005) Dismissal of student threatening suicide violated Section 504 because decision was not sufficiently based on a high probability to substantial harm.

St. Thomas University, School of Law, 23 Nat’l Disability L. Rep. ¶ 160 (2001) (No. 01-4151) Law student with bipolar disorder was dismissed because of threats to “blow up the legal writing department”; dismissal upheld.

Dixie College (UT) 8 Nat’l Disability L. Rev. ¶ 31 (OCR 1995) No ADA/Section 504 violation in expelling a student because of stalking and harassing a professor. Expulsion was not because of perceived mental disability but because she posed a threat.

Misconduct and misbehavior need not be excused even if it is caused by mental impairment.

***Rivera-Concepcion v. Commonwealth of Puerto Rico*, 786 F. Supp. 2d 489 (D. Puerto Rico 2011)** Student with bipolar disorder expelled from government internship program did not make out case of ADA/504 discrimination. Expulsion was based on manic episode. Program was not aware of mental condition, but based expulsion on behavior.

***Letter to Thomas M. Cooley Law School*, 31 Nat’l Disability L. Rep. ¶ 24 (OCR XII, Cleveland, (MI) 2005)** Student dismissed because of alcohol related conduct.

Other Cases on Mental Impairments

Toledo v. University of Puerto Rico, 36 Nat’l Disability L. Rep. ¶ 127 (D. P.R. 2008) Denying dismissal of case against university. Student claimed he was subjected to harassment and discrimination after revealing schizoaffective disorder. Accommodation of afternoon classes because of medication denied although it had offered afternoon classes in the past.

Letter to Austin Peay State University, 36 Nat’l Disability L. Rep. ¶ 156 (OCR 2006) Student was not denied academic adjustments because he did not provide required documentation to receive them; expulsion after veiled threat against professor and Web site posting targeting another; student claimed paranoid personality disorder.

Northern Michigan University, 7 Nat'l Disability L. Rep. ¶ 244 (OCR 1995) No Section 504 or ADA violation to place observers in classroom of student with Tourette's Syndrome to evaluate whether placement was for benefit of student.

G. OTHER ISSUES

One of most common issues raised by Office for Civil Rights when investigating complaints of discrimination on college campuses is the lack of appropriate policies and procedures to receive accommodations. An increasingly common issue is retaliation.

Bradford v. Board of Regents of the University of Houston, No. H-06-2478 (S.D. Tex., filed July 27, 2006). Case involves policy of allowing professor to deny reasonable accommodations.

Bertolotti v. Prunty, 2010 WL 374386, 4 Nat'l Disability L. Rep. ¶ 244 (S.D. W.Va. 2010) Dismissing claim of discrimination, but denying dismissal of the retaliation claim, by student with hearing impairment who informed professor that she could not read his lips and claimed she was ridiculed and questioned because of the request.

Whittier College (CA), 7 Nat'l Disability L. Rep. ¶ 187 (OCR 1995) No Section 504 violation where college delayed in providing auxiliary aids (notetaker and computer with spell check, etc.) to aspiring law student.

Wheaton College (MA), 7 Nat'l Disability L. Rep. ¶ 330 (OCR 1995) Requests for accommodations in course she had dropped were premature. Student sought course substitution and unlimited time.

Temple University (PA), 8 Nat'l Disability L. Rep. ¶ 125 (OCR 1995) No Section 504/ADA violation when student did not seek academic modifications for economics class until well into the semester.

Architectural Barrier Issues

Covington v. McNeese State University, 98 So.3d 414, 2011-1077 (La.App. 3 Cir.) The court ordered a substantial award in attorneys' fees and costs in case involving 15,000 architectural barriers. The court noted university's "prolonged 'militant' behavior" over several years of litigation.

Adams v. Montgomery College, 2011 WL 261093 (D. Md. 2011) The court allowed claim by student regarding inadequate parking accommodations during period of construction.

Cottrell v. Rowan University, 786 F. Supp. 2d 851 (D.N.J. 2011) The court held that advocates for disability rights did not have standing in claim on behalf of individual with disability. The claim involved advocacy group's attempt to monitor handicap parking violations. The ban from campus was not retaliation but was based on activity that was hostile, harassing, disruptive, and aggressive.

Grutman v. Regents of University of California, 2011 WL 3358265 (N.D. Cal. 2011) The court declined supplemental jurisdiction over claim involving college student's case that each day her disability affected ability to open dorm door was a new violation of state law; university contended a continuing violation that should cap damages. The case highlights the importance of attention to architectural barrier issues.

H. RECENT CASES AND REFERENCES INVOLVING FACULTY MEMBERS

Hoppe v. Lewis University, 2012 WL 37647171 (7th Cir. 2012) Faculty member with clinically-diagnosed adjustment disorder had been provided interactive process to provide office locations; no ADA violation.

Carter v. Chicago State University, 2011 WL 3796886 (N.D. Ill. 2011) Accounting professor with sleep apnea; not a disability under 1990 ADA; reasonable accommodations of scheduling had been provided in any case.

Craig v. Columbia College Chicago, 2012 WL 540095 (N.D. Ill. 2012) College instructor with hearing impairment not denied tenure track position based on disability. Nonrenewal was based on offensive blog entries and email correspondence to supervisor.

See also, AAUP Report on Accommodation of Faculty Members Who Have Disabilities (January 2012), including *Litigation over Dismissal of Disabilities of Faculty with Disabilities*, Appendix C by Laura Rothstein.

"The End of Forced Retirement: A Dream or a Nightmare for Legal Education?" ABA Syllabus (January 1993) by Laura Rothstein (raising issues regarding elimination of mandatory retirement).

Reference to Scholarship by Laura Rothstein

Higher Education and Disability Discrimination: A Fifty Year Retrospective, 36 J.C. & U.L. 843 (2010)

Disability Law Issues for High Risk Students: Addressing Violence and Disruption, 35 J.C. & U.L. 101 (2009)

Strategic Advocacy in Fulfilling the Goals of Disability Policy: Is the Only Question How Full the Glass Is? 13 TEX. J. CIV. LIBERTIES & CIV. RIGHTS 403 (2008)

Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual,” 69 U. PITT. L. REV. 531 (2008)

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

Disability Law and Higher Education: A Roadmap for Where We Have Been and Where We May Be Heading, 63 MD. L. REV. 101 (2004)

Don't Roll in My Parade: Sports and Entertainment Cases and the ADA, 19 U. TEX. REV. OF LITIGATION 400 (2000)

Health Care Professionals with Mental and Physical Impairments: Developments in Disability Discrimination Law, 41 ST. LOUIS U. L. REV. 973 (1997)

LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* (2012 and cumulative editions) (Thomson/West 2009) (treatise is updated cumulatively every six months)

The PowerPoint Presentation(s) for this session are available at the following link(s):

Michael Harrington: [March 2013 CLE Workshop: Getting Practical: ADA and Accommodation Issues on Campus](#)

Laura Rothstein: [March 2013 CLE Workshop: Getting Practical: ADA and Accommodation Issues on Campus](#)