The Americans with Disabilities Act and Higher Education
25 Years Later
An Update on the History and Current Disability Discrimination Issues
For Higher Education

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Presentation Abstract

The year 2013 was an opportunity reflect on forty years of developments for
disability issues in higher education since the 1973 Rehabilitation Act. The year 2015,
however, provides an opportunity to reflect on what the 1990 Americans with Disabilities
Act added to providing disability discrimination requirements and what the past 25 years
have brought.

This presentation and full day program will provide an overview and historical
reflection as well as an opportunity to focus on some of the most significant and
important recent developments that should be given a high priority by higher education
administrators and policymakers.

These include the following:
• Impact on higher education (for students, faculty, and staff) of the 2008
  amendments regarding the definition of disability (including the documentation
  requirements)
• 2010 DOJ regulations regarding service animals and other issues
• 2010 DOJ regulations regarding housing on campus – implications for various
  issues
• Mental health issues – Virginia Tech issues receive attention, but remain
  unresolved
• “Otherwise qualified” – a revisit of Southeastern Community College v. Davis –
  recent rulings on individuals with sensory impairments seeking admission into
  medical education program.
• Technology requirements – what do MOOCs and other distance learning delivery
  and websites and other technology issues mean for ensuring access for individuals
  with visual and other impairments
• The aging professorate – how to address disability issues appropriately
• Impact/guidance of recent settlements in highly publicized cases – food, animals,
  websites, testing, technology
More than forty years after Section 504 of the Rehabilitation Act and 25 years after the ADA were enacted, what are today’s hot legal issues for higher education?
What are likely areas of litigation?
What are courts and the Office for Civil Rights likely to do?
How can higher education administrators, legal counsel involved in these issues, and disability service providers proactively ensure that Section 504 and ADA requirements are followed with a minimum of litigation and confrontation?
And how can they do so proactively and positively and in the spirit of the intent of these laws in a time of shrinking resources and growing numbers of students, staff, and faculty members with disabilities?

**Presentation Description**

Section 504 of the 1973 Rehabilitation Act required that programs receiving federal financial assistance not discriminate on the basis of “handicap” (later disability). The enormous impact of this law (and later the Americans with Disabilities Act, enacted in 1990) on higher education was probably not foreseen in 1973. Before 1980, very little response to the Rehabilitation Act occurred. Since then, however, disability issues on campus have evolved. The challenges and complexities of technology, shrinking resources, increasing mental health concerns, and other issues make it critical to understand and appreciate the requirements of disability discrimination law for those who make and implement policy at the macro and micro levels as well as those who enforce and defend these issues in litigation, compliance reviews, and OCR interventions.

This presentation will include an overview of disability discrimination law in higher education as it relates to faculty, staff, and students and architectural and technology issues. It will trace the interrelationship among statutes, regulations, Office for Civil Rights (OCR) activities, and judicial decisions and case settlements and how current issues are affected by those developments. Attention will be given to the 2008 amendments to the definition as well as recent regulatory guidance on service animals, architectural barriers, and accommodations. Recent settlements involving use of technology in teaching and food allergies will be an area of attention. Recent judicial decisions about admitting students with sensory impairments into health care professional programs has caused the revisit of the 1979 Supreme Court decision in *Southeastern Community College v. Davis*. Does that signal a lessened deference to higher education? A prediction will be made about what areas are most likely to be litigated or to be given attention by OCR and what the outcomes in those cases are likely to be.

Hot topics that will be given focus will include documentation requirements for accommodations (including documentation challenges for students transitioning from K-12 to undergraduate programs and later to graduate and professional programs), mental health issues (highlighted by Virginia Tech and other recent campus shootings), ensuring accessible technology (websites, online courses, and E-readers), service and comfort animals as accommodations in settings ranging from housing to the classroom to employment on campus, issues raised by returning veterans, and issues raised by baby boomers and access to health care. New requirements relating to the built environment,
including housing and athletic facilities will be addressed. The pipeline from K-12 to college to graduate and professional schools and to professional licensing and the different expectation will be discussed, including unique issues arising in health care professional programs. Special challenges of community colleges will be addressed.

While undue burden has rarely been raised as a defense in judicial decisions, shrinking resources in higher education and the increasing population of students with disabilities on campus may change that. The probability of “undue burden” as a defense and issues that arise in such cases will be addressed.

The approach of the presentation is to discuss what the law requires (what higher education “must” do), what the areas of litigation or complaints to OCR are likely to be (and why), how disputes about whether the requirements have been violated are likely to be resolved, and how campus service providers, administrators, policymakers, and faculty members (and the students themselves) can be proactive in addressing what is required, what is not required, and how to best accomplish the goals of current law.

Current judicial decisions from areas other than higher education will be incorporated to identify likely outcomes on certain issues and trends in litigation. The approach is preventive lawyering – with the goal of avoiding litigation by assisting all stakeholders in understanding the requirements and how far they extend.

**Presentation Outcomes**

- Attendees will identify what is currently required for students, faculty, and staff with disabilities within the statutes, the regulations, the regulatory guidance, OCR opinion letters, case settlements, and judicial decisions.
- Attendees will understand what are the likely areas of dispute and challenge under current law and why.
- Attendees will learn how to apply this understanding of legal mandates and likely outcomes and areas of dispute in order to educate stakeholders (including students, faculty, administrators, and policymakers) about these requirements to facilitate a proactive set of practices and procedures in response.
- Attendees will be given an outline of legal requirements and a number of case study/hypotheticals to illustrate hot current issues and they will be given some tools to be proactive in avoiding conflict.
- Attendees will be introduced to the increasing trend towards high profile case settlements and the implication of those settlements for institutions of higher education.
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 self (not clear whether this applies outside of the employment context), property, or others.

- Individual must make “known” the disability and have appropriate documentation, and must do so in a timely manner in order to demonstrate that program discriminated or failed to provide a reasonable accommodation.

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.


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,

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.” 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. 29 U.S.C. § 705(9)(B), incorporating 42 U.S.C. §12102.

Major regulatory changes for Title II and Title III were issued by the Department of Justice in 2010, and there are several significant aspects of those changes that affect higher education. These include stadiums and swimming pools. There is also change defining housing on campus.

Increased Graduation Rates for K-12 Students Will Impact Higher Education


To assist with transition issues, the Department of Education has created and funded a new National Center for Information and Technical Support for Postsecondary Students with Disabilities. The purpose is to provide assistance and information about a number of practices for students with disabilities transitioning from high school to college.


Key Cases

*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.

*Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (establishes the definition of “otherwise qualified”)

Procedural and Enforcement Issues

*Covington v. McNeese State University*, 118 So.2d 343 (S. Ct. La. 2013) The court reversed some of the attorney fee awards and held that district court decisions on the amounts was not an abuse of discretion, but it did not overrule any of the substantive issues. For the facts in this case that lead to the decision, see *Covington v. McNeese State University*, 98 So.3d 414, 2011-1077 (La.App. 3 Cir.) The court ordered substantial award in attorneys’ fees and costs in case involving 15,000 architectural barriers; court noted university’s “prolonged ‘militant’ behavior” over several years of litigation. The initial claim involved the lack of accessible restrooms in the student center.

*Schneider v. Shah*, 2012 WL 1161584 (D.N.J. 2012) The obligation to engage in an interactive process in accommodations ends on day student sues university. The case involved a student in
paralegal program who had excess absences.

**Definition/Documentation Issues and Relationship to Accommodations**

**Definition of Disability**

*Alexiadis v. New York College of Health Professions*, 891 F. Supp. 2d 418 (E.D.N.Y. 2012) College student who was HIV positive was arrested for stealing bag of hand sanitizer and dismissed from college. The court allowed the claim to go forward regarding whether he was disabled; whether dismissal was because of disability; and whether explanation was a pretext. It is surprising today that there would be any dispute about whether an individual who is HIV positive has a disability.

*Ballard v. Jackson State University*, 62 F. Supp. 3d 549 (S.D. Miss 2014) The court denied a claim for associational discrimination by university compliance officer who claimed his advocacy on behalf of students with disabilities was reason for his termination. The court did not decide whether the Fifth Circuit even recognizes associational discrimination claims, but did determine that this was not basis for the universitys’ adverse employment action.

*Cordova v. University of Notre Dame Du Lac*, 936 F. Supp. 2d 1003, 2013 WL 1332268 (N.D. Inc. 2013) A student claiming learning disability and psychological disability claimed numerous denials of requested accommodations; dismissal due to statute of limitations for ADA, Rehab Act and state tort law; isolated bouts of depression did not constitute disabilities under the pre-2008 interpretation of the ADA when the complained of actions occurred.

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

*Dickinson v. University of North Carolina*, 2015 WL 1185850 (M.D.N.C. 2015) A student with severe migraine headaches and Polycystic Ovary Syndrome was disabled under revised definition applicable under four year statute of limitations.

*Doe v. Samuel Merritt University*, 921 F. Supp. 2d 958 (N.D. Cal. 2013) A student with anxiety disorders claimed the right for additional opportunities to take medical licensing exam. Case was allowed to go forward on issues of whether test-taking is a major life activity and whether limit on taking exams was entitled to deference.

*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.

*Girard v. Lincoln College of New England*, 2014 WL 2766075 (D. Conn. 2014) Summary judgment was precluded because fact issues remained about whether student’s auditory processing impairments was a disability and whether denial of reasonable accommodations violated Section 504.

*Ludwig 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.

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. The student did not meet academic standards.

North v. Widener University, 869 F. Supp. 2d 630, 2013 WL 3479504 (E.D. Pa. 2013) Disclosing disability after dismissal is not sufficient to give protection. Admission essay about medications for behavior was not sufficient to demonstrate that faculty members knew of his ADHD.

Rumin 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.

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)

Widomski v. SUNY at Orange, 748 F.3d 471 (2d Cir. 2014) A student whose hands shook too much to draw blood from patients was not perceived to have an impairment limiting a major life activity. He was still employable for medical technician jobs not requiring phlebotomy. The court did not reach issue of whether he was otherwise qualified.

Otherwise Qualified and Direct Threat

Otherwise Qualified

Alexiadis v. New York College of Health Professions, 891 F. Supp. 2d 418 (E.D.N.Y. 2012) A college student who was HIV positive was arrested for stealing bag of hand sanitizer and dismissed from college. The court allowed the claim to go forward regarding whether he was disabled; whether dismissal was because of disability; and whether explanation was a pretext.

Buescher v. Balwin Wallace University, 2015 WL 506989 (N.D. Ohio 2015) The court found no ADA violation against a student with claimed learning disability in a nursing program when the student did not go to school’s learning center to receive diagnosis.

Doe v. Board of Regents of the University of Nebraska, 846 N.W.2d 126 (S. Ct. Neb. 2014) A medical student with recurrent depressive disorder was terminated from enrollment. His lack of professionalism was the reason for dismissal and was not a pretext.

Halpern v. Wake Forest University Health Sciences, 669 F.3d 454, 2012 WL 627788 (4th Cir. 2012) A 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. The 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. The student did not make out case that she was qualified to perform essential functions of graduate assistantship. She did not adequately request accommodations for head injury excusing her from attendance and allowing additional time to turn in assignments. The university had provided accommodations by providing letters supporting absences and extra time.

*Morales v. State of New York*, 22 F. Supp. 3d 256 (S.D.N.Y. 2014) The court denied Title II violation in claim by a student alleging a disabling and unpredictable spinal injury and neck injuries. The court deferred to the institutional judgment regarding plagiarism and found that the student’s treatment was not discriminatory.

*Novak v. Board of Trustees of Southern Illinois University*, 777 F.3d 966 (7th Cir. 2015) The lapses of time in assessment of take-home assignment for student with PTSD in doctoral program did not make out Title II or Rehab Act cases when student was terminated. This opinion affirmed the lower court. The university had attempted to work with student on examination accommodations, including allowing several attempts to pass. The grade of the student with PTSD was well below passing and not based on discrimination.

*Novak v. Southern Illinois University*, 50 Nat’l Disability L. Rep. ¶ 7 (S.D. Ill 2014) The court granted summary judgment to the university on ADA and Section 504 claims. The student with PTSD could not show that disability was the “but for” cause of exclusion from Ph.D. program or show disparate treatment by being denied additional opportunities to take preliminary exams after four attempts.

*Palmer v. Davenport Civil Rights Commission*, 850 N.W. 2d 326 (S. Ct. Iowa) Program was discriminatory when it denied admission of a blind student to chiropractic program. Although the court addressed deference, it stressed the importance of individualized determination.

*Peters v. University of Cincinnati College of Medicine*, 45 Nat’l Disability L. Rep. ¶ 236 (S.D. Ohio 2012) A medical student with depression, learning disability, and ADD was placed on academic probation. The medical school refused to allow her to retake exams after medication regimen had stabilized because it decided her history of depression and mood swings would prevent her from being a good physician. The court found that evidence that dismissal was because of pattern of psychiatric difficulties might establish a Title II case.

*Rivera-Concepcion v. Commonwealth of Puerto Rico*, 786 F. Supp. 2d 489, 2011 WL 1938239 (D. Puerto Rico 2011) A student with bipolar disorder was expelled from a government internship program. The student did not make out case of ADA/504 discrimination. The expulsion based on manic episode, and the program was not aware of mental condition, but based the expulsion on behavior.
Roggenbach v. Touro College of Osteopathic Medicine, 7 F. Supp. 3d 338 (S.D.N.Y. 2014)  
Student in osteopathy program with HIV had a disability. His dismissal was based on conduct violations, not on his HIV status. Judicial deference is to be given to educational administrators on qualifications of students. The program did not know of his HIV status before beginning disciplinary measures.

The court denied summary judgment on the issue of whether student with schizophrenia was otherwise qualified. The student had been excluded from on-campus housing and enrollment was conditioned on continuing psychiatric treatment. Fact issues remained about the claim that the student was a direct threat.

Schuler v. University of Denver, 50 Nat’l Disability L. Rep. ¶ 110 (D. Colo. 2014) The court granted summary judgement to the university in a Section 504 claim by a student with insomnia, anxiety, depression and ADD who claimed that leave of absence for health reasons was basis for discriminatory treatment. The student claimed retaliation in handling financial aid status. The student had been advised of steps to return to class and return to student housing, but did not follow through.

Shah v. University of Texas Southwestern Medical School, 54 F. Supp. 3d 681 (N.D. Tex. 2014)  
A medical student with ADHD was dismissed because of lack of professionalism during clinical rotations. Title II claims were dismissed on procedural grounds of immunity. The court determined that the Section 504 claim should be dismissed because student did not demonstrate discrimination solely on basis of disability; motivation was by other considerations.

Shaikh v. Lincoln Memorial University, 46 F. Supp. 3d 775 (E.D. Tenn. 2014) A student dismissed from an osteopathic medicine program was not otherwise qualified because of academic deficiencies. Accommodations had been provided (additional exam time, access to lecture notes, class video recordings). Requested accommodations of deceleration of program was made after dismissal recommendation and would be unreasonable because it would require changes to clinical program, financial aid, and accreditation procedures.

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) Amendments to the ADA do not apply retroactively to student’s claim; student failed to establish relationship of impairment to her performance.

Sjostrand v. Ohio State University, 930 F. Supp. 2d 886, 2013 WL 1056390 (S.D. Ohio 2013) A Ph.D. program applicant with Crohn’s disease had disclosed her condition in the application process. No violation because faculty interviewers had legitimate basis for not accepting her for program. Sjostrand v. The Ohio State University, 750 F.3d 596 (6th Cir. 2014) Remanding for further disposition.

Widomski v. State University of New York at Orange, 748 F.3d 471 (2d Cir. 2014) Replacing lower court decision; student whose hands shook too much to draw blood from patients not perceived to have an impairment limiting a major life activity; he was still employable for medical technician jobs not requiring phlebotomy; did not reach issue of whether he was otherwise qualified.
Zimmeck v. Marshall University, 51 Nat’l Disability L. Rep ¶ 79 (S.D. W. Va. 2015) Granting summary judgment to the university. Medical student removal from the program was based on lack of professionalism (being consistently late and disruptive and failing to sit for a required exam) not her depression).

**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, *Chevron 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.

One recent decision provides valuable guidance on dealing with students whose conduct raises issues of direct threat. In *Stebbins v. University of Arkansas*, 2012 WL 6737743 (W.D. Ark. 2013), the court addressed accommodation of a student with “intermittent explosive disorder” who had engaged in tactless behavior with a faculty member. The court discusses the student’s repeated incidents of misconduct applying the “direct threat” analysis and determined that the student did not have to be readmitted because he was not otherwise qualified.

A settlement in 2015 between the Department of Justice and Quinnipiac University involved a student who was dismissed because of mental health issues. The settlement can be found at [http://www.ada.gov/quinnipiac_sa.htm](http://www.ada.gov/quinnipiac_sa.htm).

*Schurb v. University of Texas Health Sciences Center*, 2014 WL 5429307 (S.D. Tex. 2014) It did not violate Section 504 to remove a medical school student who had intentionally tried to harm himself by drinking antifreeze. The student did not provide treating psychiatrist certification that he was not a danger to self or others.

**Architectural Barriers**

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

Covington v. McNeese State University, 118 So.2d 343 (S. Ct. La. 2013) The court reversed some of the attorney fee awards and held that district court decisions on the amounts was not an abuse of discretion, but it did not overrule any of the substantive issues. For the facts in this case that lead to the decision, see Covington v. McNeese State University, 98 So.3d 414, 2011-1077 (La.App. 3 Cir.) The court ordered substantial award in attorneys’ fees and costs in case involving 15,000 architectural barriers; court noted university’s “prolonged ‘militant’ behavior” over several years of litigation. The initial claim involved the lack of accessible restrooms in the student center.

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

Innes v. Board of Regents of University System of Maryland, 29 F. Supp. 3d 56 (D. Md. 2014) The court allowed the case to go forward in ADA/504 claims by deaf spectators that university did not provide effective communication at athletic events and on sports websites.

Accommodations: Auxiliary Aids and Services

Accommodations can include auxiliary aids and services. Are tutors required?

Argenyi v. Creighton University, 2011 WL 4431177 (D. Neb. 2011) Medical student with significant hearing loss requested communications access 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.

Johnson v. Washington County Career Center, 2013 WL 6000925 (S.D. Ohio 2013) Reasonable issues remained regarding reasonable accommodations that should have been provided to student with dyslexia; student requested reading device for tests; scanning course materials into device and word bank; student sometimes received graded assignments back later than other students).

Millay v. Maine Department of Labor, Bureau of Rehabilitation, 762 F.3d 152 (1st Cir. 2014) Addressing whether blind commuter student in culinary arts program should be provided with reimbursement for commuting expenses. Decision on procedural issue only.

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 to students with disabilities. The case involved disputed facts about whether nursing student had been prevented from accessing these services.

Interpreter service is receiving increasing attention. General guidance about what services should be provided can be found at [http://www.pepnet.org/sites/default/files/22Americans%20with%20Disabilities%20Act%20- %20Responsibilities%20for%20Postsecondary%20institutions%20serving%20deaf%20and%20hard%20of%20hearing%20students.pdf](http://www.pepnet.org/sites/default/files/22Americans%20with%20Disabilities%20Act%20- %20Responsibilities%20for%20Postsecondary%20institutions%20serving%20deaf%20and%20hard%20of%20hearing%20students.pdf)

**Accommodations: Modification of Policies, Practices, and Procedures**

Accommodations can also include
- 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;
- modification of policies, practices and procedures;

Doe v. Samuel Merritt University, 921 F. Supp. 2d 958 (N.D. Cal. 2013) A student with anxiety disorders claimed the right for additional opportunities to take the medical licensing exam. The court allowed the case to go forward on issues of whether test-taking is a major life activity and whether limit on taking exams was entitled to deference.

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.

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.


Herschman v. Muhlenberg College, 17 F. Supp. 3d 454 (E.D. Pa. 2014) The court allowed a case by a former college student with depression to proceed. Student claimed ADA violations and negligent infliction of emotional distress. There was an issue of whether requested class substitution is a fundamental alteration. It was not appropriate to dismiss case of student
seeking to substitute a class when facts had not been considered regarding fundamental alteration including major and nature of courses involved.

*Hoppe v. College of Notre Dame of Maryland*, 835 F. Supp. 2d 26 (D. Md. 2011) Reasonable accommodations for comprehensive examinations for student with ADD had been provided. It was not required that she be given an additional opportunity to pass the exam.

*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. The student did not make out case that she was qualified to perform essential functions of graduate assistantship. She did not adequately request accommodations for head injury excusing her from attendance and allowing additional time to turn in assignments. The university had provided accommodations by providing letters supporting absences and extra time.

*McInerney v. Rensselaer Polytechnic Institute*, 2013 WL 4614263 (N.D.N.Y. 2013) Graduate student with permanent brain damage was allowed only one break during doctoral candidacy exam. This was not a denial of reasonable accommodation; student could have but did not ask for additional breaks.

*Reichert v. Elizabethtown College*, 2012 WL 1205158 (E.D. Pa. 2012) A student with ADHD had been given numerous modifications. The student requested and was granted medical withdrawal after disciplinary issues. Student could not make out a claim for “constructive discharge” from the academic program.

*Shaikh v. Lincoln Memorial University*, 50 Nat’l Disability L. Rep. ¶ 80 (E.D. Tenn. 2014). A student dismissed from an osteopathic medicine program was not otherwise qualified because of academic deficiencies. Accommodations had been provided (additional exam time, access to lecture notes, class video recordings). Requested accommodations of deceleration of program was made after dismissal recommendation and would be unreasonable because it would require changes to clinical program, financial aid, and accreditation procedures.

*T.W. v. Hanover County Public Schools*, 900 F. Supp. 2d 659 (E.D. Va. 2012) The court found that there was no obligation on the college under IDEA to offer free tuition to a student with disability after graduation from high school. The state required free education only through high school graduation.

**Testing accommodations – “best ensures”**

*Decisions listed below have all involved sensory impairments and examinations, which is what the regulations provide for*


*Enyart v. National Conference of Bar Examiners, Inc.*, 630 F.3d 1153 (9th Cir. 2011) The court
allowed a preliminary injunction for a blind bar exam applicant who had been denied a computer accommodation she had used throughout law school and on the California bar exam. The court applied the “best ensure” standard


*Saavedra v. Board of Regents of University of Wisconsin System*, 982 F. Supp. 3d 879 (E.D. Wis. 2014) Whether resident physician with dyslexia, ADHD & LD should receive additional time on medical licensing exam. Court granted motion to dismiss.

**Assistance and Support Animals**

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

*Velzen & Fair Housing Center v. Grand Valley State*, 902 F. Supp. 2d 1038, 2012 WL 4809930 (W.D. Mich. 2012) The court addressed the applicability of FHA and Section 504 to residential settings on campus. The case involved a student who had been prohibited from living with her guinea pig as a comfort animal to control stress. Although she had moved off campus, she was still enrolled and might still want to live on campus. The policy about animals had not changed so the case was not moot.

*United States v. University of Nebraska*, 4:11CV 3209. 2013 WL 2146049 (D. Neb. 2013) The court decision determines that student housing at University of Nebraska is subject to the Fair Housing Act. This makes the university subject to HUD guidance related to support and service animals.

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


**Campus Housing – FHA/504/ADA?? All of the above?**

DOJ regulations for Title II and Title III only require inclusion of dogs (and miniature horses) but only allow for minimal documentation – asking two questions:

FHA case law recognizes that other animals might be allowed that provide emotional support or other accommodations for documented disabilities, but allow programs to require greater documentation.

How is university housing to be treated? The 2010 DOJ regulations seem to indicate that campus housing as being subject to Titles II and III. 28 C.F.R. § 35.151 (f) (Title II) and
§ 36.406(f) (Title III). It is not clear whether fraternity and sorority housing falls under the Private Club Exception, 42 U.S.C. § 12187, and the implications if it does. The courts have not yet tested the validity of the DOJ regulations on this issue, nor have they clarified how the overlap of the FHA and the ADA on campus housing is to be applied regarding what animals are to be allowed and what documentation can be required.

**Campus Housing – Implications re: animals**

Implications for Elle Woods and Bruiser

**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.

Several recent settlements and agency actions highlight the importance of universities taking a proactive approach to the use of technology on campus websites and in teaching materials.

- OCR Resolution Letter and Agreement with South Carolina Technical College System at [http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-a.doc](http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-a.doc) and [http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-b.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-b.pdf) (websites)

- Settlement between Department of Justice and Louisiana Tech University and University of Louisiana System (involving online learning program that excluded a blind student from the course) at [http://www.justice.gov/opa/pr/2013/July/13-crt-831.html](http://www.justice.gov/opa/pr/2013/July/13-crt-831.html) and [http://www.ada.gov/louisiana-tech.htm](http://www.ada.gov/louisiana-tech.htm) (prohibiting University from purchasing materials that are not accessible and providing guidance on faculty involvement in ensuring access).


The Office of Civil Rights (OCR) recently issued a resolution agreement with the University of Montana as a model for institutions to use to ensure their electronic and information technologies (EIT) are accessible and compliant with Section 508 of the Rehabilitation Act of 1973.

http://www.ahead.org/Presidents%20Post/March%202014/Final%20Agrmt%20Univ%20Montana-Missoula%203-10-14%20Accessible.pdf

Harvard and Yale were sued in February 2014 over their online course captioning.


Dear Colleague Letter 43 Nat’l Disability L.Rep. ¶ 75 (OCR 2011) The CL advises 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.

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.

Author’s Guild v. HathiTrust, 902 F. Supp. 2d 445 (S.D.N.Y. 2012) This case addresses whether production of material in an alternate media is allowed by the fair use exception to the Copyright Act and protection under the Chafee Amendment; affects taking published books and putting them on tape, on braille, large print, etc.. The case is on appeal in the Second Circuit.


Innes v. Board of Regents of University of Maryland, 29 F. Supp. 2d 566, (D. Md. 2014). This case addresses whether a university must provide certain transcription services on jumbo-trons and similar places at athletic events to ensure equal access to individuals who are deaf. The court allowed the case to go forward and recognized that compensatory damages could be required under Title II of the ADA and the Rehabilitation Act. The case also discussed how alternative technologies, such as hand-held devices at sports events, did not provide equal access.

Mental Health Issues

Raises issues of “otherwise qualified” and “direct threat” and “threat to self”. Also raises issues of FERPA and duty to inform balanced with privacy rights. And raises issues of providing mental health services on campus.

Returning Veterans

Raises issues of documentation.

Title IX for Students with Disabilities
Department of Education Office for Civil Rights has taken interest in the issue of equal athletic opportunities for students in educational programs. This is primarily an issue for K-12, but could have implications for higher education. A January 25, 2013 Dear Colleague Letter notes what is already required—that programs should provide reasonable modifications to rules and other requirements, although they need not make fundamental alterations to programs. The letter gives some examples and encourages separate programs in some instances. See www.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf

Food Sensitivities and Allergies

There is little judicial guidance on this, and a Department of Justice settlement is not “precedent” but may provide insight into possible best practices for how universities might consider approaching this issue. The case involved a mandatory meal plan which did not address concerns for individuals with Celiac Disease. See Lesley University settlement at http://www.ada.gov/lesley_university_sa.htm and question and answer guidance at www.ada.gov/q&a_lesley_university.htm. Some of the practices included answering questions about menu ingredients and changing ingredients upon request. While the settlement does note that only reasonable steps are required that do not fundamentally alter the program and it is not clear how these steps might be required for voluntary food plans, the case highlights the increasing interest in issues of food. This could apply to increasing concerns about peanut and gluten allergies.

PF Chang sued over higher costs for gluten free items: https://www.yahoo.com/health/why-p-f-changs-is-being-sued-over-its-109996603802.html?soc_src=mags&soc_trk=ma

Eating Disorders -- relates to “threat to self” issue

Faculty – See Appendix A


Other Issues --

Alumni Cruises LLC v. Carnival Corp., 2013 WL 6511737 (S.D. Fla. 2013) The court allowed issues to be tried on whether cruise line had made reasonable modifications; organization allowed to have standing to bring these claims. This case raises the question about university “sponsored” and “facilitated” programs and their obligations for such programs.

Shrinking Resources -- Undue burden as a defense?

The Challenge of Compliance

“Knowledge is essential to understanding, and understanding should precede judging” – Louis Brandeis
APPENDIX A FACULTY ISSUES

Overview of the Issue

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

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

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

An increasing number of cases involve faculty claiming disability discrimination. In these cases, the institution of higher education generally has prevailed because of its ability to prove that the adverse employment decision was a result of factors other than the disability. These cases illustrate, however, the importance of establishing essential functions and fundamental requirements for a program at the outset, and documenting deficiencies on a careful and ongoing basis. Although many institutions of higher education have implemented detailed systems of post-tenure review and other improved faculty evaluation procedures and practices, those that have not may find themselves in messy and lengthy disputes.”

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

Who Is “Disabled”

To be protected under disability discrimination law the individual must be substantially limited in one or more major life activities, have a record of such a

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1 Amy Gajda, THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION (2009) (discussing the trends that courts are no longer as deferential to institutional decision making than has been the case previously).
limitation or be regarded as such. The ADA Amendments Act of 2008 and the 2011 EEOC Regulations make it clear that the definition of who is covered is to be broadly interpreted. The result is that in most cases, a dispute about discriminatory treatment should not focus on whether the faculty member meets the definition of “disability.” Instead, the focus should be on whether the institution has established the essential requirements of the program and whether the faculty member is otherwise qualified to carry those out. This assessment should take into account reasonable accommodations and should involve an interactive process.

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

**When Will Misconduct or Deficiencies Be In Question?**

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

Deficiencies that may raise concern could include the inability to teach a full load. Student evaluations (even with their limitations) might raise concerns about the faculty member’s performance in class. For example, several students might comment that the faculty member seemed frequently impaired in the classroom – perhaps by a controlled substance or perhaps because of a psychological or health condition. The faculty member may not turn in grades in a timely manner or meet with students according to expected norms. The faculty member may not meet the publication or other scholarship/productivity expectations. Or there may off-the-job conduct, such as drunk driving or inappropriate behavior that reflects on the institution. A faculty member may simply not be able to interact with other colleagues in required committee and other service responsibilities.

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

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

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

What Other Legal Issues Must Be Considered?

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

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

Faculty Termination

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

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

*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.

*Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (establishes the definition of “otherwise qualified”)

**Recent Cases (alphabetically listed) on Faculty and Staff Issues**

*Carter v. Chicago State University*, 2013 WL 3975009 (N.D. Ill. 2013) There were issues of retaliation raised in not promoting faculty member to chair position because of exercise of FMLA rights.

Lower court -- *Carter v. Chicago State University*, 2011 WL 3796886 (N.D. Ill. 2011) An accounting professor with sleep apnea which was found not to be a disability under the 1990 ADA. Reasonable accommodations of scheduling had been provided in any case. It is possible that under ADAAA of 2008, the sleep apnea would be a disability, but that the faculty member would still not be found to be otherwise qualified.

*Carter v. Chicago State University*, 50 Nat’l Disability L. Rep.¶ 103 (7th Cir. 2015) Denial of acting chair position was not FMLA retaliation. There was insufficient claim of temporal proximity of action and complainant failed to demonstrate that selected candidate was less qualified.

*Caruth v. Texas A&M University-Commerce*, 2013 WL 991336 (N.D. Tx. 2013) Court granted summary judgment to university in denial of tenure case based on publication guidelines.

*Coursey v. University of Maryland Eastern Shore*, 2013 WL 1833019 (D. Md. 2013) A professor required to undergo fitness for duty after aberrant behavior was not regarded as having a disability and issues of student safety were job-related.

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


*Fuoco v. Lehigh University*, 981 F. Supp. 2d 352 (E.D. Pa. 2013) A coordinator with ADD and depression who claimed discrimination did not establish that he had a disability or that employer had notice of a disability. She had not made known any request for accommodations and legitimate reasons for termination were several errors in performance.
Gascard v. Franklin Pierce University, 50 Nat’l Disability L. Rep. ¶ 140 (D.N.H. 2015) Court denied the motion to dismiss ADA claim by an art history professor. The issue was reasonable accommodation for situational stress in claim of bullying and differential treatment claimed for other faculty members who were allowed to leave meetings.

Hamilton v. Oklahoma City University, 911 F. Supp. 2d 1199 (W.D. Okla. 2012) The selection committee for a faculty position was not aware that the professor had vertigo. A summary judgment was ordered against the professor claiming discrimination.

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

Horton v. Board of Trustees of Community College Dist. No. 508, 107 F.3d 873 (7th Cr. 1997) Community college professor who was terminated because of excessive absences was not otherwise qualified.

Housel v. Rochester Institute of Technology, 6 F. Supp. 3d 294 (W.D. N.Y. 2014) A lecturer was terminated based on poor performance and insubordination. The reasons were not a pretext for action when claim was his FMLA request resulted in termination.

Hwang v. Kansas State University, 2014 WL 2212071 (10th Cir. 2014) Extended sick leave was denied to professor who could not work found not to be inherently discriminatory.

Kortyna v. Lafayette College, 47 F. Supp. 3d 225 (E.D. Pa. 2014) A college professor requested as an accommodation that his personal attorney be present during disciplinary proceedings related to sexual harassment complaints; disability of Adjustment Disorder (debilitating anxiety and depression). The court found no violation of Title I or Section 504 in denying the request. Other accommodations at hearing had been provided using good faith interactive process. There is no entitlement to requested or preferred accommodation; only reasonable accommodation.

McCracken v. Carleton College, 969 F. Supp. 2d 1118 (D. Minn. 2013) Court recognized prima facie case of disability discrimination by university buildings and grounds employee; burden of demonstrating his mental health and other conditions made him regarded as disabled.

Paststrump v. Southern Utah University, 50 Nat’l Disability L. Rep. ¶ 109 (D. Utah 2015) A professor with lupus, fibromyalgia, and chronic anemia was suspended based on performance deficiencies (failure to turn in document on time); accommodations to teaching schedule had been provided.

Silk v. Board of Trustees, Moraine Valley Community College, 2015 WL 4571171 (7th Cir. 2015) An adjunct professor with heart condition requiring triple bypass surgery was terminated because of his work, including problems with syllabi, using wrong textbook, poor attendance in courses and non-participatory classroom environment with students playing video games and talking on the phone.

Lower court decision
Silk v. Board of Trustees of Moraine Valley Community College, 46 F. Supp. 3d 821 (N.D. Ill. 2014) The court dismissed an adjunct sociology professor’s ADA claim that discrimination was
because he was regarded as disabled because of a heart condition and denied the university’s claim that condition was transitory and minor and not covered. The complaints about employer treatment, however, did not prove discrimination in not receiving further assigned classes. The employer’s reasons were not a pretext for discrimination.

**Simpson v. Alcorn State University**, 2014 WL 2685133 (S.D. Miss. 2014) Faculty member with spinal cord disorder could not demonstrate constructive discharge based on nonselection as department chair; grievance committee recommendation that newly appointed chair be removed from position did not cause reasonable person to feel compelled to resign; no constructive discharge.

**Stevens v. Southern Illinois University**, 45 Nat’l Disability L. Rep.¶ (S.D. Ill. 2012) A university professor responsible for maintaining and repairing nuclear magnetic resonance instruments had back problems affecting performance and needed more graduate assistance. The court allowed claims to go forward regarding engagement in interactive process under ADA/Section 504 and FMLA retaliation claim.

**Tse v. New York University**, 48 Nat’l Disability L. Rep. ¶ (S.D.N.Y. 2013) Court denied university motion for summary judgment holding that there were triable issues remaining about reasonable accommodation in a case involving a professor who lost status as a program director. Employer was not required to provide preferred accommodation to faculty member with severe arthritis and Lupus, but questions remained about whether university engaged sufficiently in the interactive process.

**Wallace v. Heartland Community College**, 48 F. Supp. 3d 1151 (C.D. Ill. 2014) The court granted summary judgment to college in a claim by tenured biology professor with fibromyalgia and osteoarthritis that she had been constructively discharged and harassed by failure to provide requested accommodations.

### Articles on Faculty/Staff Issues


Lawrence C. DiNardo, John A. Sherrill, & Anna R. Palmer, *Specialized ADR to Settle Faculty Employment Disputes*, 28 Journal of College & University Law 129

Topics to be addressed include:

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

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

III. What statutes and policies are relevant to senior faculty in addition to disability discrimination laws?
A. Age Discrimination in Employment Act
B. Family and Medical Leave Act
C. HIPAA
D. State laws on privacy, and other matters
E. Institutional policies on retention, privacy, etc.

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

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

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

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

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

IX. Major Life Activities
   A. Include but are not limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working
   B. Also includes operation of major bodily functions, including but not limited to functions of immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions
   C. Amendments mean that the following conditions are more likely to be covered – cancer, diabetes, HIV positive status, depression (depending on severity), mental health problems.
   D. Amendments MAY give more likely coverage to conditions such as back problems, obesity, and respiratory conditions

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

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

XII. Types of Accommodations to Consider
   A. Physical environment – location of classes; parking issues, etc.
   B. Teaching/scholarship/service reductions
   C. Leaves of absence
   D. Class scheduling – time of day, frequency
   E. Assistance for technical teaching – e.g., demonstrating a surgical procedure
XIII. What Are the Likely Issues for Senior Faculty and Why?
A. Mental impairments – depression, dementia, alcohol and substance abuse
B. Cancer and other health conditions more prevalent as faculty become older
C. Mobility impairments that occur more often or in more serious condition as faculty members become older
D. Vision and hearing conditions

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

XV. Incorporating Disability Discrimination Law Into Policy, Practice, and Procedure
A. Letter of appointment – essential functions
B. Annual and other review processes
C. HR policies on accommodation requests should be made known
D. Ensuring compliance with privacy and confidentiality of information (Challenge in committee review process)
E. Interactive process in considering reasonable accommodations
F. Internal disciplinary and dismissal procedures
G. Ensuring consistency for all similarly situated faculty in providing accommodations for situations other than disabilities
H. Notice and due process
I. Providing retirement and other human resources counseling and planning

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

*DISABILITIES AND THE LAW* Chapter 3 (Thomson West 2012) and cumulative editions (with Julia Irzyk)

*Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment,* 75 Ohio St. L. 1263 (2014)

(IHELG Monograph, 14-04, 2014),  

*Litigation over Dismissal of Faculty with Disabilities,* Appendix C of AAUP Report on Accommodating Faculty Members Who Have Disabilities (January 2012)


*Disability Rights,* Encyclopedia of Diversity in Education (Sage Publications) (2011)


*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)


*Southeastern Community College v. Davis,* chapter in Education Stories, Michael Olivas & Ronna Schneider eds. (Foundation Press 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)


Higher Education and Disabilities: Trends and Developments, 27 STETSON L. REV. 1 (Fall 1997)


College Students with Disabilities: Litigation Trends, 13 REV. OF LITIGATION (University of Texas) 425 (1994)

The End of Forced Retirement: A Dream or a Nightmare for Legal Education? ABA Syllabus (January 1993)


Bio Summary -- Laura Rothstein
Professor of Law and Distinguished University Scholar
University of Louisville, Louis D. Brandeis School of Law
B.A., University of Kansas; J.D., Georgetown University Law Center

Laura Rothstein was one of the first to write about disability law generally and its application to higher education specifically. Her work in this area began in 1979, at the University of Pittsburgh’s Developmental Disability Law Project, where she represented clients with disabilities while a faculty member at the University of Pittsburgh School of Law. This work began her scholarly focus on disability rights issues. She is one of the “founding” scholars in the area, writing some of the first works on these topics. From 1980 to 1986, she served as Faculty Editor of the Journal of College and University Law, the law journal published by the National Association of College and University Attorneys. This work highlighted for her the emerging disability issues in higher education that few had recognized at the time.

Since 1980, she has written fifteen books and dozens of book chapters, articles, and other works on disability discrimination, covering a broad range of issues, with an emphasis on disability discrimination in higher education and special education. She has brought her knowledge of legal issues to her leadership and service within higher education and legal education. She has applied her knowledge during her service in administrative positions – Associate Dean for Student Services (University of Houston Law Center from 1986 to 1993), Associate Dean for Graduate Studies (University of Houston Law Center 1999 to 2000), and Dean (University of Louisville Brandeis School of Law 2000 to 2005).

She is frequently consulted by advocates, government agencies, university administrators, and university counsel about these issues, and her perspective is one of an “advocate through education.” Her goal is to influence policy and practice by increasing awareness and understanding of legal requirements and how they can be implemented before disputes arise.

She has served as founding co-chair of the AALS Section on Disability Law, Chair of the American Bar Association Section of Legal Education Diversity Committee, a member of the LSAC Board of Trustees.

She received the William A. Kaplin Award for Excellence in Higher Education Law and Policy Scholarship, from the Center for Excellence in Higher Education Law and Policy, Stetson Law School in 2011 (recognizing scholars who have published works on education law that embrace the intersection of law and policy) and an award for Outstanding Research and Creative Activity from the University of Louisville in 2012 and Brandeis School of Law Outstanding Teacher in 2015.

Since beginning her academic career in 1976, she has served on the law faculties at five universities. In addition to her work in disability law, she has worked to promote racial and gender diversity within legal education and the legal profession.