Disability Law and Higher Education: a Road Map for Where We've Been and Where We May Be Heading

Laura Rothstein
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During the last week of December 2001, CNN did its annual review of the major news stories of 2001. Of course, the main story was about September 11. We should recall, however, that there were other major news stories that year. Before September 11, Gary Condit and shark attacks dominated the news. But during the summer of 2001, another major story made national news. That was the Supreme Court decision involving Casey Martin and his request to use a golf cart on the PGA tour. The decision captured our attention because it involved both an activity that most Americans understand and a particularly sympathetic plaintiff. The Casey Martin story is of much greater significance than sharks and Gary Condit because it has the potential of affecting a large segment of the population—people with disabilities.

For those who follow disability discrimination law, the decision was of particular interest because it was one of the few recent Supreme Court decisions favoring the plaintiff with a disability over the defendant. While the case involved public accommodations, rather than an institution of higher education, like most decisions involving disability discrimination law, the decision will apply to situations beyond the context of the instant lawsuit.

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Stanley Herr, a law professor at the University of Maryland, died on September 24, 2001. Professor Herr had been involved in several important disability rights issues. One of these affected individuals in higher education. Stan was a tireless advocate for the cause of changing mental health history questions asked of professional students seeking professional licensure. His advocacy and intellect will be missed, but his work has enabled others to build on the foundations he laid. My thanks to Julia Rothstein and Kurt Metzmeier for their research assistance, and to Becky Wimberg for her assistance in preparing the manuscript.

2. Id.
5. In several recent decisions, the Supreme Court ruled against the individual with a disability. See, e.g., Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) (restricting the definition of "disabled" under the Americans with Disabilities Act).
This Article takes a retrospective view of higher education disability law judicial decisions and opinions from the Department of Education Office for Civil Rights. It also reviews generally Supreme Court decisions to evaluate the status of disability policy with respect to institutions of higher education. This review will be used to offer a road map to where national policy is headed with respect to disability discrimination issues in the context of higher education.

The metaphor of a road map is useful. As the Article demonstrates, there are some issues where the roads are well built, clearly marked, and in good repair. On other issues, the roads still are under construction. And in still others, it is clear that roads are needed, but the resources (in terms of political will, funding, or other resources) are not yet there to set the course. Furthermore, in some areas, where the road seemed to be clear, unexpected potholes or dead ends have appeared. Finally, in other areas, there really is no road map, but only a compass pointing in a general direction.

I. WHERE WE ARE TODAY

A. Presence of Individuals with Disabilities on College Campuses

Recent data indicates that approximately one in eleven college freshmen self identifies as having a disability. That is triple the number reported in 1978. There are two major reasons for this increase. First, because of special education mandates beginning in 1975, by the late 1980s, more individuals graduating from high school could participate in the challenging and high-level academic requirements of higher education. Second, although Section 504 of the Rehabilitation Act of 1973 (Section 504) applied to colleges and universities for more than a quarter of a century, the passage of the Americans with Disabilities Act (the ADA) received much greater media attention.

7. Id.
As a result, the public is much more aware of disability discrimination protection.\textsuperscript{13}

In recent years, there has been a marked increase in the number of faculty and other employees claiming disability discrimination.\textsuperscript{14} It is estimated that 43 million Americans\textsuperscript{15} have disabilities that entitle them to be covered by federal disability discrimination law.\textsuperscript{16} There is little data to indicate whether one in five faculty and staff members on a college campus has a disability. Because of historical discrimination and qualification barriers, it may be that the number of staff and faculty members with disabilities in higher education is less than the overall presence in American society.

Generally speaking, most higher education staff positions do not involve duties that are unique to the higher education setting.\textsuperscript{17} Whether a clerical or custodial employee is qualified to perform job responsibilities generally is not different in a college environment than it is in most other employment settings.\textsuperscript{18} It is thus probable that the percentage of staff with disabilities in higher education is similar to that of staff with disabilities throughout the general workforce.

The rate of disability among faculty members, however, is difficult to assess. Because of tenure, faculty enjoy employment retention rates that are probably higher than many other professions.\textsuperscript{19} Accordingly, it is possible that faculty members, who may not have been impaired when they were hired, may later become disabled, but continue to serve as faculty members. While this scenario is not unlikely, it has not been verified because of the difficulty in collecting data on the incidence of disability among higher education faculty.\textsuperscript{20} However, considering the increase in disability discrimination claims among higher education employees and the prevalence of student dis-

\begin{itemize}
\item \textsuperscript{12} See Cary LaCheen, Achy Breaky Pelvis, Lumber Lung and Juggler’s Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio, 21 BERKELEY J. EMP. & LAB. L. 223 (2000) (discussing the extensive coverage of the ADA by the media).
\item \textsuperscript{13} Laura F. Rothstein, Higher Education and Disabilities: Trends and Developments, 27 STETSON L. REV. 119, 119 (1997).
\item \textsuperscript{14} Id. at 119-20.
\item \textsuperscript{15} That is approximately one in five Americans.
\item \textsuperscript{16} 42 U.S.C. § 12101(a).
\item \textsuperscript{17} Rothstein, supra note 13, at 135.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} See Robert B. Conrad & Louis A. Trosch, Renewable Tenure, 27 J.L. & EDUC. 551, 560-61 (1998) (discussing the effects of tenure on job retention).
\item \textsuperscript{20} Rothstein, supra note 13, at 135-37.
\end{itemize}
abilities, it is clear that disability issues have become a part of the landscape for higher education institutions.\textsuperscript{21}

**B. Issues that Predominate**

There are a number of issues that predominate the legal discussion in higher education. As will become apparent, in some areas there is greater judicial guidance than in others. Although the Supreme Court could have offered clearer pronouncements in some areas, lower court guidance in several other areas has proven valuable.

1. **Defining Who Is Disabled.**—The question that likely arises most often in higher education is the problem of defining who is entitled to protection—particularly in the context of a student claiming a learning disability. To answer this question, the first inquiry is whether an impairment is a substantial limitation to a major life activity.\textsuperscript{22} Related to that are several documentation questions. What documentation is required? Who is qualified to provide the necessary documentation? And how recent must the documentation be?

Defining who is disabled is a particularly contentious issue. Increasingly, college students enter higher education without understanding that it is their responsibility to inform the school of their disability, to provide the necessary documentation, and to pay the cost of any tests or evaluations used to justify the accommodation.\textsuperscript{23} This is in sharp contrast to most students’ pre-college experience with federal disability mandates. Under the federal special education laws, it is the obligation of the state to seek out children with disabilities who are in need of special education.\textsuperscript{24} Moreover, under these laws it is the state’s obligation to provide or pay for the necessary testing related to the provision of these services.\textsuperscript{25} Unfortunately, because there is low awareness of this change in a student’s obligations and responsibilities upon entering college, the potential for misunderstanding and miscommunication is great.

2. **Individuals with Mental and Substance Abuse Impairments.**—Individuals with psychiatric and emotional impairments are still subjected

\textsuperscript{21} Rothstein, supra note 9, at 214; Rothstein, supra note 13, at 136; Suzanne Abram, *The Americans with Disabilities Act in Higher Education: The Plight of Disabled Faculty*, 32 J.L. \& Educ. 1, 5-17 (2003).

\textsuperscript{22} Americans with Disabilities Act, 42 U.S.C. § 12102(2)(A) (2000); Rothstein, supra note 9, at 216.

\textsuperscript{23} Rothstein, supra note 9, at 218-19.


\textsuperscript{25} Id.
to prejudicial attitudes based on myths and stereotypes.\textsuperscript{26} In addition, highly publicized events such as the Columbine and the Appalachian Law School shootings\textsuperscript{27} give rise to attitudes of fear that have the potential of leading to exclusionary policies. Similarly, individuals with drug and alcohol problems create challenges for sound policy and practice in higher education.\textsuperscript{28}

Institutions of higher education must balance legitimate concerns about health and safety of others with the individual’s right to be protected against unwarranted discrimination. Striking that balance within legal mandates can be challenging. The high incidence of both mental and substance abuse impairments on campus today,\textsuperscript{29} however, makes it essential to know what is legally required and how to develop appropriate responses.

3. Appropriate Accommodations.—Once it has been determined that an individual is disabled and otherwise qualified, the institution often must resolve issues regarding appropriate accommodations. In particular, for students, questions about waiving certain courses, the amount of time allowed for exams, and the obligations related to providing auxiliary services can be troubling.\textsuperscript{30} For faculty members, questions can arise about stopping tenure clocks because of disability-related problems and allowing for leaves of absence in other cases.\textsuperscript{31}

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\textsuperscript{27} Karen Abbott, Columbine Student Withdraws Drug Suit, ROCKY MTN. NEWS (Denver), Feb. 7, 2003, at 25A (describing the dismissal of a lawsuit brought by a student injured in the Columbine attack alleging that the manufacturers of a drug, Luvox, which one of the Columbine killers took, were at fault for the attack); CNN.com, Suspect in Law School Slayings Arraigned (Jan. 17, 2002), at http://www.cnn.com/2002/US/01/16/law.school.shoot ing/index.html (last visited Sept. 6, 2003) (discussing the murder of two law school faculty members and one law student by a student, who had been academically dismissed from law school).

\textsuperscript{28} ROTHSTEIN, supra note 9, at 255.


\textsuperscript{30} ROTHSTEIN, supra note 9, at 232-33.

\textsuperscript{31} See Rothstein, supra note 13, at 135-37 (discussing the disability law issues confronting college and university faculty).
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4. Professional Students and the Licensure Process.—To obtain a license to practice, graduates of professional programs—law, health, and teaching, for example—often must take a licensing exam and complete an evaluation for character and fitness. To assist in this process, colleges and universities often must function as a “conduit” between education and the workplace by providing licensing agencies with information about accommodations received during the academic program and about the graduate’s character and fitness. On occasion, this creates conflicts and challenges for the college or university. These challenges include concerns about privacy and confidentiality relating to stigmatizing conditions. A related concern is that the reporting obligations of higher education institutions, about mental health or substance abuse treatment, deter students from seeking help. Questions also arise about whether it is appropriate for licensing agencies to rely on information about accommodations received in an academic setting to determine whether similar accommodations should be provided for the licensing exam.

These issues are particularly challenging for health care professional programs where patient health and safety may be at issue if the health care professional is impaired. In the legal profession, where public trust is paramount, issues of judgment are critical. Similarly, certification for teaching professions also demands that individuals demonstrate their fitness to carry out the essential requirements of the job.

5. Use of Standardized Test Scores.—Entry into institutions of higher education often requires an applicant take a standardized test of some type. A number of legal issues have emerged with respect to such testing. These issues include whether it is legal to mandate the test in the first place, whether it is permissible to “flag” these test scores on the report issued by the testing agency to the institution, and the use of minimum scores for admission. A great deal of litiga-

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32. See Rothstein, supra note 9, at 371 (explaining the challenges facing professional licensing boards).
33. Id. at 249.
34. Id. at 248-50.
36. Rothstein, supra note 9, at 369-71.
38. Rothstein, supra note 9, at 228.
39. Id. at 228-30.
tion involving student athletes and their challenges to NCAA practices relating to test scores has occurred, but clear resolution to these issues remains elusive.  

6. Accessible Technology.—Our society has become increasingly reliant on the use of technology for communication and information gathering. Access to the World Wide Web has been positive for individuals with some types of disabilities—mobility impairments in particular. Being able to access information without having to face the potential barriers of a physical structure has enhanced the experience for many students with mobility impairments. Unfortunately, the design of many computer programs and web sites presents a barrier for individuals with other types of disabilities, such as visual impairments and learning disabilities. The need to make such technology accessible to individuals who cannot use a mouse, who cannot access visual elements of a computer screen, or who have other impairments that prevent ready access to information technology, has presented new challenges and questions for institutions of higher education.

7. Off-Campus Programming.—Because we are a global society, students seek opportunities to study abroad. In connection with this trend, there are many questions regarding students with disabilities and their participation in these programs. For example, schools have received requests from deaf students in need of interpreters and students with mobility impairments who faced architectural barriers in countries without ADA-type access requirements.

Responsibility for accommodating students with disabilities in programs such as internships and field placements also has become an issue receiving greater attention. In addition, if a student requires an interpreter, whose responsibility is it to provide the interpreter? And what about placements in inaccessible locations?


42. Id. at 207.

43. Rothstein, supra note 9, at 247; see also Bird v. Lewis & Clark Coll., 303 F.3d 1015, 1017-18 (9th Cir. 2002) (describing a college's failure to accommodate a student with a disability in a study abroad program).

44. Rothstein, supra note 9, at 247.
8. Faculty with Disabilities.—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.45 Faculty members have brought challenges in the context of employment and tenure, as well as promotion decisions.46 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.47

9. Architectural Barrier Issues.—Section 504 mandated that colleges and universities address architectural barrier issues long before the ADA was enacted. Until recently, there was little litigation involving these issues because of a lack of federal enforcement and a lack of awareness by individuals. In the last several years, however, more challenges have arisen relating to physical facilities in general, and campus housing in particular.48

II. LEGAL OVERVIEW

In order to predict the future of disability discrimination policy generally, and higher education disability policy specifically, it is essential to review the history of this area of law. Disability discrimination law involves two major statutes, passed in 1973 and 1990, detailed sets of regulations, a growing body of Supreme Court opinions, many lower court decisions, and a substantial amount of guidance from the Office for Civil Rights of the Department of Education.

A. Statutory Coverage

1. Individuals with Disabilities Education Act.—The Individuals with Disabilities Education Act49 (the IDEA), which was enacted in 1975, is more than a nondiscrimination statute. It requires states that wish to receive federal funding for special education (which all states

45. Rothstein, supra note 13, at 135-37.
46. See, e.g., Meling v. St. Francis Coll., 3 F. Supp. 2d 267, 276-78 (E.D.N.Y. 1998) (awarding compensatory and punitive damages for termination in violation of the ADA, but refusing to order reinstatement with tenure due to the unusual nature of tenure decisions).
47. Id. at 277.
48. Rothstein, supra note 37, at 264; see, e.g., Kenny v. Loyola Univ. of Chi., No. 02-C-1006, 2003 WL 503119, at *3-5 (N.D. Ill. Feb. 20, 2003) (describing a student's challenge to denial of her request for accommodations relating to her campus dormitory).
do) to develop and implement a specific and comprehensive program to provide special education and related services at no cost to all age-
eligible students with disabilities. The educational program must be
appropriate and individualized. The local educational agency is
mandated to reach out and identify the students eligible for such ser-
vice. Elaborate and detailed procedural safeguards are in place to
ensure that these protections are provided.

The significance of the IDEA for higher education is twofold. First,
by the late 1980s, the IDEA created a situation in which a much
larger number of students graduating from high school were pre-
pared for college. Second, these students and their parents were
more aware of the available legal protection than ever before. Un-
fortunately, however, several of the beneficial aspects of special educa-
tion are not available in the higher education setting. Even more un-
fortunate is the fact that parents and students often are not aware
that the services and procedures required under the IDEA are not
applicable in higher education, where only nondiscrimination and
reasonable accommodation are required.

In making the transition from secondary to higher education,
one area of confusion is the obligation to give notice about a disabil-
ity. In public education, the school system has the burden to reach
out and find individuals who need special education, and to pay for
the evaluations used to identify these students. In contrast, discrimi-
nation laws, which often are implicated in the higher education con-
text, require the individual seeking protection or accommodation to
make known the presence of a disability, and to provide and pay for
the documentation concerning the disability.

50. Id. § 1412.
51. Id.; Rothstein, supra note 9, at 106, 108-09.
52. 20 U.S.C. § 1412; Rothstein, supra note 9, at 146-47.
53. 20 U.S.C. § 1412; Rothstein, supra note 9, at 145-46.
54. Rothstein, supra note 9, at 214.
55. Id.
56. See supra notes 23-25 and accompanying text (explaining the contrast between the
statutory requirements for public and higher education); see also Susan Chernseky, All Chil-
dren Have the Right to a Good Education in the U.S., WHYY Ready to Learn Services, at http://
www.whyy.org/education/rtl/edrights.html (last visited Sept. 6, 2003) (stating that "chil-
dren with learning disabilities sometimes may not receive adequate educational support
because parents are not always aware of their rights").
57. 20 U.S.C. § 1412; Rothstein, supra note 9, at 147-49.
58. Rothstein, supra note 37, at 255 (stating that in regard to paying for evaluations,
"because the burden is on the individual to make known the disability, the individual is
obligated to bear the cost"); see also Tips v. Regents of Tex. Tech. Univ., 921 F. Supp. 1515,
1517-18 (N.D. Tex. 1996) (holding that, because the plaintiff did not make her disability
known or request accommodations, there was no violation of the ADA or Section 504).
Procedural safeguards vary greatly between the pre-college and higher education levels. Special education law provides for an elaborate system of due process hearings, with impartial hearing officers, detailed notice, and other similar protections. In the higher education context, the complainant usually is limited to using an institutional grievance proceeding, complaining to the Department of Education Office for Civil Rights (the OCR), or going directly to court. In addition, special education and related services under the IDEA demand more of schools than the nondiscrimination and reasonable accommodation requirements under Section 504 and the ADA. For example, tutoring is not generally required as a reasonable accommodation under Section 504 or the ADA, but it might qualify as a related service for a high school student with a learning disability under the IDEA. Similarly, health services, such as physical therapy, and other services, e.g., assistance moving from class to class, might well be required of public schools under the IDEA, but would be viewed as individualized services not required of an institution of higher education under Section 504 of the ADA.

Parents and students are often surprised to discover these differences, in spite of the fact that the IDEA requires transitional services to prepare students for life after high school. Such services often do not prepare individuals for the burdens placed upon them by the shift from the proactive approach by the school in public education to the expectations imposed on the student seeking support in a higher education setting.

2. Rehabilitation Act of 1973, Section 504.—Disability discrimination law did not begin with the ADA in 1990, but rather with Section 504 of the Rehabilitation Act of 1973 (Section 504) and special edu-

59. 20 U.S.C. § 1412; see also ROTSTEIN, supra note 9, at 145-46 (describing the general procedural protections of the IDEA).
60. ROTSTEIN, supra note 9, at 262-63.
61. Compare id. at 232-39 (explaining services available to students in higher education under Section 504 and the ADA), with id. at 122-23 (describing services available to students in public education under the IDEA).
62. Compare id. at 125-26 (describing health services available to students under the IDEA), and id. at 128-31 (describing transportation available to students under the IDEA), with id. at 242-43 (describing health services available to students under Section 504).
63. 34 C.F.R. § 300.29 (2003); see also THE ARC, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: TRANSITION FROM SCHOOL TO WORK AND COMMUNITY LIFE, at http://www.thearc.org/faqs/qa-idea-transition.html (last visited Sept. 6, 2003) (explaining the importance of both transition and the transition services available under the IDEA).
64. THE ARC, supra note 63.
cation mandates made in 1975. Section 504 prohibits programs that receive federal financial assistance from discriminating against otherwise qualified individuals with disabilities.67

Initially, Section 504 had minimal impact on higher education. The reasons include the lack of regulations until 1978, the lack of federal enforcement after that, and the lack of awareness by individuals of their right to seek redress.68 In addition, because special education laws had not yet been in place for a sufficient amount of time, there was not a significant population of qualified students seeking access to higher education.69

Federal regulations require institutions of higher education to engage in self-evaluation.70 While most schools engaged in these self-evaluations, they did not implement them.71 Accordingly, the self-evaluations have collected dust and will continue to do so until the ADA mandates a reassessment of higher education policies, practices, and procedures.72

Section 504 defines individuals with disabilities as those who are substantially impaired in one or more major life activities, those who are regarded as so impaired, and those with records of such impairments.73 In addition, the individual must be "otherwise qualified," which means the individual must be able to carry out the essential requirements of the program with or without reasonable accommodation.74 Institutions are not required to lower standards or to fundamentally alter programs.75 Case law and regulations under Section 504 have further clarified the statute's requirements.76

3. The Americans with Disabilities Act.—The ADA was passed in 1990 as a result of extensive advocacy efforts. It provides for essentially the same legal protection as Section 504. It prohibits discrimination against otherwise qualified individuals with disabilities on the

67. Id.
68. Rothstein, supra note 37, at 242-44.
69. See Rothstein, supra note 9, at 214 (explaining that the special education mandate in public schools increased the number of students with disabilities entering college).
70. 45 C.F.R. § 84.6(c) (2003).
71. Rothstein, supra note 37, at 242.
72. See id. at 265 (noting that it would be helpful if new regulations were issued or if regulatory guidance was offered).
74. Id. § 794.
75. Id. §§ 794, 706(8)(D). Additionally, an individual who poses a direct threat to others is deemed not to be qualified.
76. Rothstein, supra note 9, at 216-18 (discussing the case law and regulations under Section 504).
basis of disability. The primary goal of the ADA was to extend the protections of Section 504 to a much broader segment of society. Where Section 504 applied only to federal employers, federal contractors, and recipients of federal financial assistance, the ADA applies to most private employers (Title I),79 to state and local governmental agencies (Title II),80 and private providers of twelve categories of public accommodation (Title III).81

While most institutions of higher education were recipients of federal financial assistance through grants or student financial aid programs, the ADA added a new layer of protection. For employees, Title I was available.82 For students and others seeking access, Title II applied to state and locally governmentally operated colleges and universities, and Title III applied to private institutions, educational programs being one of the twelve categories of private programs.83

But even with this new layer of legal protection, the ADA did not dramatically change the legal protections available to individuals with disabilities in the higher education context. However, the combination of heightened awareness of the law, resulting from increased media attention, and the growing population of college-bound students who were accustomed to special education protections, caused an explosion of judicial attention and complaints to the Department of Education.84 As a result, institutional administrators and their legal counsel took an increasing interest in developing sound policies, procedures, and practices to respond to this ground swell of activity.85

B. Judicial Interpretations As Guiding Trends in Higher Education Conduct

Although primary guidance on interpretation of disability discrimination law comes from the courts, institutions of higher educa-

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78. See id. § 12101(a)(8) (stating that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals").
79. Id. §§ 12111-12117.
80. Id. §§ 12131-12165.
81. Id. §§ 12181-12189. The ADA also includes regulations for transportation and accessibility guidelines for buildings and facilities. Id.
82. Id. §§ 12111-12117.
83. Id. §§ 12131-12165, 12181-12189.
84. See LaCheen, supra note 12, at 224-38 (discussing the heightened media attention due to the increased claims of disability discrimination).
85. For example, a common accommodation made by institutions of higher education is to increase the amount of time a student with a disability may use when taking a test. Rothstein, supra note 9, at 232.
tion also receive guidance from the OCR through its various letters of interpretation.\textsuperscript{86} While these do not carry the same weight as legal precedent, they are generally given substantial deference by the courts.\textsuperscript{87} These letters come as a result of complaints by individuals to the Department of Education, which is the administrative agency responsible for reviewing complaints about institutions of education.\textsuperscript{88} Although the discussion below focuses primarily on judicial interpretations, general guidance from the OCR is referenced when appropriate.

1. \textit{Cases Specifically Addressing Higher Education Issues.}—

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  \item a. \textit{Who Is Protected.}— Courts frequently have addressed the issue of who is entitled to statutory coverage under Section 504 and the ADA.\textsuperscript{89} In higher education, this issue arises most often in the context of learning disabilities and related conditions such as Attention Deficit Disorder (ADD) and Attention Hyperactivity Deficit Disorder (ADHD).\textsuperscript{90} Because of the increased awareness and improved identification methods for these conditions, a number of cases address this issue.\textsuperscript{91}

  In order for an individual to be entitled to protection, the individual must have an impairment that is a substantial limitation to a major life activity, have a record of such an impairment, or be regarded as having such an impairment.\textsuperscript{92} In the area of learning disabilities a number of issues have arisen about the documentation of such conditions.

  An analysis of who is protected requires fact determinations on several issues. The first is whether the condition is substantially limiting.\textsuperscript{93} The Supreme Court in the \textit{Sutton} trilogy held that if mitigating

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\textsuperscript{87} Courts also often give deference to the institutions themselves when examining the legality of a particular program. Rothstein, supra note 37, at 256.


\textsuperscript{89} See infra note 93 (citing cases addressing the determination of whether an individual has a disability).

\textsuperscript{90} See Rothstein, supra note 37, at 252-53.

\textsuperscript{91} Id. (citing Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997)). In Guckenberger, the court held that learning disabilities need not be diagnosed by a professional with a doctorate degree. Guckenberger, 974 F. Supp. at 140.

\textsuperscript{92} Americans with Disabilities Act, 42 U.S.C. § 12102(2) (2000).

\textsuperscript{93} See, e.g., Sutton v. United Air Lines, Inc., 527 U.S. 471, 481 (1999) (noting that the first question in determining if an individual is disabled is whether the individual possesses a physical impairment that is substantially limiting); Albertson's, Inc. v. Kirkingburg, 527
measures (such as eyeglasses or medication) cause the condition to no longer create a current substantial limitation, the individual is not disabled.\textsuperscript{94} This standard results in the absurd consequence that an individual who has epilepsy is not entitled to disability discrimination legal protection (i.e., is not “a person with a disability”) if the medication controls the seizures.\textsuperscript{95} Moreover, according to the \textit{Murphy} Court, if an individual does not use the medication, that person may no longer be otherwise qualified to perform the essential requirements of the program.\textsuperscript{96}

At the time the Supreme Court decided the \textit{Sutton} trilogy, it remanded another case that has great significance for higher education. In the case of \textit{Bartlett v. New York Board of Law Examiners},\textsuperscript{97} a woman with a learning disability had requested extensive accommodations on the bar exam.\textsuperscript{98} The New York Board of Law Examiners had denied some of the requested accommodations challenging her coverage.\textsuperscript{99} At issue was whether Ms. Bartlett’s learning disability substantially limited a major life activity.\textsuperscript{100} Most recently, a New York federal district court held that Ms. Bartlett is substantially limited in the major life activity of reading.\textsuperscript{101} Unfortunately, the court’s analysis provides unclear guidance for future courts. In Ms. Bartlett’s case, the district court engaged in a detailed analysis of the slowness with which she could read.\textsuperscript{102} The court may have come to a different result if it had focused on the fact that Ms. Bartlett had developed sufficient compen-

\textsuperscript{94} See, \textit{e.g.}, \textit{Sutton}, 527 U.S. at 475 (holding that “the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment”).

\textsuperscript{95} See, \textit{e.g.}, \textit{Murphy}, 527 U.S. at 521 (finding that the petitioner’s disability was not substantially limiting when his prescribed medication corrected his blood pressure impairment).

\textsuperscript{96} \textit{Id}. 94.

\textsuperscript{97} 226 F.3d 69 (2d Cir. 2000).

\textsuperscript{98} Specifically, she sought unlimited or extended time to take the test, permission to tape record her essay answers, and an accommodation allowing her to circle her multiple choice answers in the test booklet rather than completing the answer sheet. \textit{Id}. at 75.

\textsuperscript{99} \textit{Id}. (stating that the board denied her request because “her application does not support a diagnosis of a reading disability or dyslexia”).

\textsuperscript{100} \textit{Id}. at 74.


\textsuperscript{102} Specifically, the initial trial in the district court conducted a comparison of Bartlett’s reading ability versus that of a person with “comparable training, skills, and abilities.” \textit{Id}. at *1.
sating skills to enable her to graduate from law school, as evidenced by her other academic achievements.\textsuperscript{103}

While \textit{Bartlett} does not specifically address what constitutes a major life activity, the Supreme Court did so in another significant case. In \textit{Toyota Motor Manufacturing, Kentucky, Inc. v. Williams},\textsuperscript{104} the Court reviewed a case involving a woman who worked at an auto plant.\textsuperscript{105} The woman, who was the respondent in the case, argued that her carpal tunnel syndrome made it difficult for her to perform the subset of manual tasks to which she had been assigned.\textsuperscript{106} The respondent also claimed that her requested accommodation—permission to return to her original position in the plant—was denied.\textsuperscript{107} Whether an accommodation was required depended on whether the respondent was “disabled” under the \textit{ADA}.\textsuperscript{108} Toyota claimed that her limitations did not affect a major life activity.\textsuperscript{109} Justice O’Connor, writing for the Court, noted that a major life activity is one that involves the performance of a variety of tasks central to most people’s daily lives.\textsuperscript{110} Ultimately, the Court remanded the case.\textsuperscript{111} The subsequent settlement prevents us from knowing whether the respondent’s inability to perform the subset of manual tasks qualifies as a “major life activity.”

Another important aspect of determining whether someone has a disability is often whether appropriate documentation exists.\textsuperscript{112} If an individual is a quadriplegic and requests an accommodation such as access into a building, documentation would not become an issue.\textsuperscript{113} But where the individual claims a learning disability and is requesting additional time for an exam or a reduced course load, documentation

\begin{itemize}
  \item 103. In addition to graduating from law school, Ms. Bartlett also held a Ph.D. in Educational Administration. \textit{Bartlett}, 226 F.3d at 75.
  \item 104. 534 U.S. 184 (2002).
  \item 105. \textit{Id.} at 187.
  \item 106. \textit{Id.} at 189. In particular, the respondent began experiencing pain in her neck and shoulders after her new rotation required her to hold her hands and arms at shoulder level for extended periods of time. \textit{Id.}
  \item 107. \textit{Id.}
  \item 108. \textit{Id.} at 190. Respondent argued that she was disabled under the \textit{ADA} because her physical impairments “substantially limited her in (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working, all of which, she argued, constituted major life activities under the Act.” \textit{Id.}
  \item 109. \textit{Id.}
  \item 110. \textit{See id.} at 195-96 (citing the EEOC definition of substantially limiting as controlling).
  \item 111. \textit{Id.} at 203.
  \item 112. \textit{See, e.g., Rothstein, supra} note 9, at 219 (discussing the documentation requirements for students in higher education).
  \item 113. Obvious disabilities do not require documentation. \textit{Id.}
\end{itemize}
issues become very important.\textsuperscript{114} This is the case because of the substantial increase in requests by individuals claiming learning and related disabilities.\textsuperscript{115}

The requirement of appropriate documentation is an issue\textsuperscript{116} because the ADA and Section 504 protect only those individuals who make known the existence of a disability.\textsuperscript{117} Higher education, unlike elementary and secondary education, places the burden on the individual seeking accommodation or claiming nondiscrimination to make known the existence of a disability.\textsuperscript{118} As previously noted, where the condition is obvious, such as in the case of a wheelchair user, elaborate documentation is not needed to prove the existence of the disability, although the individual still will have the obligation to request individualized accommodations.\textsuperscript{119}

In the case of conditions such as learning disabilities or mental impairments, such as depression, the need for more detailed and specific documentation, in addition to the notice regarding accommodations, comes into play. Administrators of standardized admissions tests will not provide additional time or many other accommodations without appropriate documentation.\textsuperscript{120} Similarly, the educational institution will not grant reduced course loads, additional testing time, or other academic modifications without such documentation.\textsuperscript{121} The insistence on appropriate documentation has increased in the last

\begin{itemize}
\item \textsuperscript{114} Id.
\item \textsuperscript{115} See supra notes 6-16 and accompanying text (discussing the increased number of individuals reporting disabilities).
\item \textsuperscript{116} The documentation issues include inquiries into who is qualified to make assessments, how recent the assessments must be, and what must be included in the documentation. In addition, the issue of cost may be in question.
\item \textsuperscript{117} See, e.g., Americans with Disabilities Act, 42 U.S.C. § 12101(b)(5)(A) (2000) (noting that discrimination occurs when reasonable accommodations are denied to those that make their disability known).
\item \textsuperscript{118} See supra note 23 and accompanying text (explaining that in the higher education context it is the student's obligation to seek accommodation for a disability).
\item \textsuperscript{119} For example, a wheelchair user may not be required to give this type of notice for general architectural barrier removal required for all facilities, such as a ramp into the entrance of a building, but that same individual might be expected to make known the need to have a desk in a library raised to allow for a wheelchair to pull up to the desk. See Rothstein, supra note 9, at 219 (explaining that students with obvious disabilities will not be required to provide documentation for non-individualized accommodations).
\item \textsuperscript{120} See Rothstein, supra note 9, at 218-19 (explaining that students in higher education must provide appropriate documentation to receive accommodation for their disabilities).
\item \textsuperscript{121} Id.
\end{itemize}
decade because of the greater number of individuals requesting accommodations for learning and psychological impairments.122 Courts and the OCR have provided limited guidance on this issue,123 and the Supreme Court has yet to rule on the documentation issue.

b. Admissions Issues.—There are a number of cases and OCR complaints involving admissions issues. The issues raised in these claims include the use of standardized test scores, claims that the requirements of particular physical attributes (especially in health care professional programs) are discriminatory, and claims of general discrimination in admissions.124 In general, the courts and OCR express a fair degree of deference to the institutions of higher education.125 Institutions of higher education, however, still must satisfy the burden of justifying their practices.126

The requirement that an individual take a particular standardized test for admission purposes is generally viewed as a permissible practice.127 Since the enactment of the ADA, and even before the ADA was passed, virtually all of the major administrators of standardized admissions tests provided a number of accommodations.128 While these test providers have been challenged on occasion for denying certain requested accommodations, there is no case law or OCR opinion indicating that such tests must be waived.129

The primary challenge to standardized tests involves establishing minimum scores for admission. This practice arose primarily in the

122. See supra notes 6-12 and accompanying text (discussing the increase in higher education students claiming a disability).

123. See, e.g., Tips v. Regents of Tex. Tech Univ., 921 F. Supp. 1515, 1518 (N.D. Tex. 1996) (holding that there was no violation of the ADA or Section 504 where the student did not make known her learning disability by proper documentation).


125. See, e.g., Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 413 (1979) (noting that Section 504 does not require an institution of higher learning to lower or substantially modify its standards in order to accommodate individuals with disabilities).

126. See id. at 405 (explaining that institutions of higher learning are only required by Section 504 to not exclude those individuals with disabilities who are otherwise qualified).

127. ROTHSTEIN, supra note 9, at 228.

128. Id. at 229.

129. As a policy matter, however, some colleges and universities are beginning to question the value of these test scores and have eliminated them as an entrance requirement, at least at the undergraduate level. For example, Bowdoin College gives its applicants the option of whether or not to submit an SAT score as a part of the application. See Bowdoin College web site, at http://www.bowdoin.edu (last visited Sept. 6, 2003).
context of eligibility for athletic scholarships under a previous NCAA policy. The NCAA's absolute test score requirements had an allegedly discriminatory impact on students with learning disabilities. During the 1990s there was a substantial amount of litigation on this issue, and the NCAA subsequently has changed its policy to allow for a more individualized case-by-case approach to scholarship eligibility.

A second issue related to admissions is the establishment of physical attribute requirements, particularly for admission to health care professional programs. This issue was raised in Ohio Civil Rights Commission v. Case Western Reserve University, a highly publicized case assessing whether a blind applicant was qualified for medical school. The Ohio Supreme Court held that an admission denial was not a violation of the ADA where fundamental alterations to the program would be required to accommodate the applicant.

This decision reflects the deference that courts generally give to institutions of higher education, particularly in the context of health care programs. Despite this deference, courts generally require educational programs to ensure that the appropriate officials consider the effects of a particular physical attribute requirement. In so doing, the official must determine that changing the requirement would either fundamentally alter the program, lower the program's standards

130. See, e.g., Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 553 (3d Cir. 2002) (addressing a challenge to a change in NCAA policy, which increased the minimum academic eligibility requirements for athletic scholarships).

131. Id. at 552.

132. See Pryor v. Nat'l Collegiate Athletic Ass'n, 153 F. Supp. 2d 710, 714 n.3 (E.D. Pa. 2001) (indicating that a new rule imposed different requirements for learning disabled partial qualifiers than for non-learning disabled partial qualifiers); Cureton v. Nat'l Collegiate Athletic Ass'n, 198 F.3d 107, 110 (3d Cir. 1999) (noting the change in Division I policy affecting the eligibility of collegiate athletes participating in a Division I sport); Matthews v. Nat'l Collegiate Athletic Ass'n, 179 F. Supp. 2d 1209, 1231 (E.D. Wash. 2001) (finding that modification of the NCAA's rules would not fundamentally alter the NCAA's mission of promoting student athlete academic achievement); Bowers v. Nat'l Collegiate Athletic Ass'n, 130 F. Supp. 2d 610, 614 (D.N.J. 2001) (holding that the NCAA is subject to Title II of the ADA); see generally Laura F. Rothstein, Don't Roll In My Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding of the Americans with Disabilities Act, 19 Rev. Litig. 399 (2000) (discussing litigation involving sports issues under the ADA and Section 504). For a comprehensive listing of cases, see Rothstein, supra note 9, at 239.

133. 666 N.E.2d 1376 (Ohio 1996).

134. Id.

135. Id. at 1338; see also Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979). In Davis, the Court upheld a lower court determination that a prospective nursing student with a significant hearing impairment was not otherwise qualified to carry out the essential requirements of the program because of concerns about patient safety. Id. at 413.

136. See, e.g., Davis, 442 U.S. at 413 (stating that Section 504 does not require an educational institution to lower its standards to accommodate individuals with disabilities).
to provide the accommodation, or waive a standard.\textsuperscript{137} The message to the health care professional programs is that careful thought should go into determining why hearing, seeing, mobility, or other physical attributes are essential to carrying out the requirements of the program. In that vein, preclusion cannot be based on myths, stereotypes, or prejudice.\textsuperscript{138}

Complainants have rarely been successful in claims of discrimination in admissions. Numerous cases have addressed disability discrimination claims by rejected applicants, particularly individuals with learning disabilities. In virtually all of these cases, the claim failed because the court determined that the individual's disability did not result in overall qualifications that were substantially lower than those of admitted applicants.\textsuperscript{139} Further, if an institution demonstrates that individuals with learning disabilities have been admitted, the court often will find that the institution is not being illegally discriminatory.\textsuperscript{140}

c. Readmissions Issues.—Another issue that arises with frequency is the obligation of the institution to readmit a student with a disability where there has been academic failure or behavior that resulted in dismissal.\textsuperscript{141} This may occur in two situations. First, it often arises where the student's academic deficiency or misconduct is not known to the student.\textsuperscript{142} For example, a student may have an undiagnosed learning disability or mental health condition that affects his performance. The second situation arises when the student is aware

\begin{itemize}
\item \textsuperscript{137} See, e.g., Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 26 (1st Cir. 1991) (emphasizing that in cases involving modifications and accommodations, if an institution demonstrates that relevant officials within the institution considered alternative means, the feasibility of the alternative means, and the cost of and the effect on the program, and then comes to the conclusion that the alternatives would either lower academic standards or require substantial program alteration, a court could rule that the institution met its duty to seek a reasonable accommodation).
\item \textsuperscript{138} Pushkin v. Regents of Univ. of Col., 658 F.2d 1372, 1387-88 (10th Cir. 1981) (noting that preclusion from a health care program must be based on factors other than a disability); \textsuperscript{143} Rothstein, \textit{supra} note 9, at 510-11 (stating that an individualized assessment of a person with a disability is required before preclusion from a health care program).
\item \textsuperscript{139} See, e.g., Gonzalez v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 628-32 (6th Cir. 2000) (finding that the plaintiff, a medical student, did not suffer substantial impairments in the areas of reading, writing, and working).
\item \textsuperscript{140} Rothstein, \textit{supra} note 13, at 122.
\item \textsuperscript{141} See, e.g., McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 977-80 (10th Cir. 1998) (upholding a university's decision not to advance a student with marginal grades who claimed that he suffered from a disability covered by the ADA and the Rehabilitation Act).
\item \textsuperscript{142} Under these circumstances, the student would not likely prevail since, in the context of higher education, it is his obligation to make the disability known. \textsuperscript{144} Rothstein, \textit{supra} note 9, at 218-19.
\end{itemize}
of the condition, but because of either a desire to succeed without accommodations or a fear of stigma or discrimination, the student does not disclose the condition.\textsuperscript{143}

The law is clear that institutions are only required to accommodate known disabilities.\textsuperscript{144} It is also clear that institutions are not required to fundamentally alter programs or lower standards in order to accommodate disabilities.\textsuperscript{145} The burden, therefore, is on the student to make known a disability and to request reasonable accommodations.\textsuperscript{146}

While this is problematic for the student who does not know of a disability and understandable for the student concerned about stigma or discrimination, the institution still is not liable for discrimination where it did not know of the condition.\textsuperscript{147} In general, courts support dismissal of students who have not met the standards for the program.\textsuperscript{148} Similarly, institutions of higher education are not required to grant readmission unless the student can demonstrate that the requested reasonable accommodation was not appropriately provided.\textsuperscript{149} In the situation where a student is not aware of a disability, the law seems to require the institution at least to take the student's disability into account in considering a readmission request. But after such consideration, the institution is not required to readmit the student.\textsuperscript{150} This level of institutional obligation has not been discussed to any great extent in judicial decisions.

d. Accommodations.—Accommodations, which might be considered for students with documented disabilities, could include addi-

\textsuperscript{143} Again, in order for an institution of higher education to make reasonable accommodations, it must know of the existence of the disability, and it is the student's obligation to make the disability known. \textit{Id.}


\textsuperscript{145} \textit{See} McGuinness, 170 F.3d at 977-80 (10th Cir. 1998) (holding that a medical school was not required to advance a student with marginal grades because this would be a fundamental alteration not required under the ADA). For additional cases, see Rothstein, supra note 9, at 219-22.

\textsuperscript{146} Rothstein, supra note 9, at 218-19.

\textsuperscript{147} \textit{See}, \textit{e.g.}, Tips, 921 F. Supp. at 1518 (finding no violation of the ADA when the student did not make the disability known to the university).

\textsuperscript{148} \textit{See}, \textit{e.g.}, McGuinness, 170 F.3d at 977-80 (holding that a university need not advance a student who did not meet a program's grade requirements).

\textsuperscript{149} Rothstein, supra note 9, at 252-54.

\textsuperscript{150} Id.
tional time on exams or to carry out assignments, additional time to complete an academic program, waiver of courses, reduced course loads, interpreters, readers, or taking tests in distraction-free environments.\textsuperscript{151} Whether an institution is required to provide these or any other accommodations in a particular situation is generally to be determined on an individualized basis.\textsuperscript{152}

In 1991, the First Circuit, in Wynne \textit{v.} Tufts University School of Medicine,\textsuperscript{153} set the standard for determining whether an accommodation must be provided.\textsuperscript{154} The case involved a medical school student’s request for a multiple choice exam in a different format.\textsuperscript{155} The court held that if “relevant officials within the institution considered alternative means, their feasibility, cost and the effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lower academic standards or requiring substantial program alteration,” then a court could rule that “the institution had met its duty of seeking reasonable accommodation.”\textsuperscript{156} In \textit{Zukle v. Regents of the University of California},\textsuperscript{157} the Ninth Circuit added to Wynne’s mandate by declaring that institutions are not required to provide accommodations that are unduly burdensome administratively or financially.\textsuperscript{158}

Although it was not a higher education case, the Supreme Court decision in \textit{PGA Tour, Inc. v. Martin}\textsuperscript{159} provides additional guidance. In determining that it would not be a substantial alteration to accommodate Casey Martin by allowing the use of a golf cart in professional golf tournament play, the Court emphasized the importance of an individualized assessment.\textsuperscript{160} The Court noted that for Martin the use of a cart was not a fundamental alteration because the essential aspect of fatigue was still present for him.\textsuperscript{161} The Court added that other requests for golf carts would have to be individually assessed to ensure

\begin{enumerate}
\item \textit{Id.} at 232.
\item \textit{See, e.g.,} Zukle \textit{v.} Regents of the Univ. of Cal., 166 F.3d 1041, 1048 (9th Cir. 1999) (explaining that the totality of the circumstances of each case determine whether an accommodation is reasonable).
\item 932 F.2d 19 (1st Cir. 1991).
\item \textit{Id.} at 26; see also \textit{Rothstein}, supra note 9, at 233.
\item Wynne, 932 F.2d at 21.
\item \textit{Id.} at 26.
\item 166 F.3d 1041 (9th Cir. 1999).
\item \textit{Id.} at 1047.
\item 532 U.S. 661 (2001).
\item \textit{Id.} at 688.
\item \textit{Id.} at 690.
\end{enumerate}
that others would not be unfairly advantaged.162 This sends the signal that the Court would also apply an individualized analysis to most situations involving disability discrimination.

In summary, a number of judicial decisions and OCR opinions applied the foregoing standards in a variety of settings.163 Generally, in the higher education context, the courts and OCR have not required a waiver of courses.164 In fact, the courts and OCR generally are quite deferential to institutions of higher education in setting their standards and requirements,165 and are particularly deferential to health care professional programs.166

e. Architectural Barriers.—In the higher education context, there has not been a great deal of judicial activity or OCR attention to issues regarding architectural barriers. Several cases, however, address architectural barrier planning in other contexts, including sports arenas and movie theaters. The trend in this area indicates little judicial patience for violations of new construction and design requirements.167

Several recent cases involve attendance and participation in activities such as orientation and public events.168 These cases should serve to remind higher education officials that they must consider access not only for students, staff, and faculty, but for members of the

162. See id. at 691 (acknowledging that the ADA would require the PGA to individually assess golfers with disabilities who request a modification or waiver of the walking rule).

163. See, e.g., Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999) (stating that "whether a person has a disability under the ADA is an individualized inquiry").

164. See, e.g., Ohio Civil Rights Comm’n v. Case W. Reserve Univ., 666 N.E.2d 1376, 1386 (Ohio 1996) (explaining that an educational institution is not required to waive a course requirement that is necessary to properly use an academic degree).

165. See, e.g., Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1048 (9th Cir. 1999) (stating that "[d]eference is . . . appropriately accorded an educational institution’s determination that a reasonable accommodation is not available").

166. See, e.g., Stern v. Univ. of Osteopathic Med. and Health Scis., 220 F.3d 906, 908-09 (8th Cir. 2000) (holding that a medical school was not required to allow student to supplement multiple choice test answers with essays or oral responses). For additional cases, see Rothstein, supra note 9, at 232-34.


168. Parker v. Universidad de Puerto Rico, 225 F.3d 1, 3-4 (1st Cir. 2000) (discussing a personal injury suit brought under the ADA because a botanical garden, on campus, did not provide an accessible route for wheelchair users); Panzardi-Santiago v. Univ. of Puerto Rico, 200 F. Supp. 2d 1, 6 (D.P.R. 2002) (addressing an issue, raised by a prospective student, about public pathway accessibility problems arising during her enrollment experience); Levy v. Mote, 104 F. Supp. 2d 538, 547-48 (D. Md. 2000) (granting university’s motion to dismiss claim that university’s buildings’ entrances failed to comply with the ADA).
public who attend events sponsored by colleges and universities. It is particularly important to keep in mind the responsibility for events held off campus, such as at private clubs, when a higher education institution has a sponsoring or hosting role in the event.

f. Faculty Issues.—As previously noted, several factors demand increased attention to faculty issues of disability discrimination. These factors include the elimination of mandatory retirement and the challenges in measuring and documenting performance deficiencies.\(^\text{169}\) In addition, uncertainties, about the economy and whether retirement benefits will be sufficient, have caused more people to delay retirement.\(^\text{170}\) 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.\(^\text{171}\) 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.\(^\text{172}\) 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,\(^\text{173}\) those that have not may find themselves in messy and lengthy disputes.

g. Certification of Mental Health History Questions and Accommodation Information to Licensing Boards.—Professional education programs, such as law schools, medical schools, and teacher education programs, often find themselves in the position of certifying to state or other licensing agencies information about the qualifications, char-

\(^{169}\) Rothstein, supra note 13, at 135.
\(^{171}\) Rothstein, supra note 37, at 264.
\(^{172}\) See Abrams, supra note 21, at 10 (discussing cases in which the court determined that the professor was terminated because of poor performance, not a disability); Rothstein, supra note 9, at 261.
acter and fitness of individuals who attended their programs. This includes academic performance information, details about accommodations received during the academic program, and information about the character and fitness of the individual. This process places the academic institution in the role of a conduit to the employment of the individual. Without this certification, the individual may not be licensed to carry out the work of the profession for which the individual trained.

There has been substantial litigation against the certifying agencies involving whether certain mental health or substance abuse history questions are permissible. The complaints generally challenge these questions under Title II of the ADA. The courts have provided a great deal of guidance on what is permissible. As a result, most licensing agencies have narrowed the types of questions they ask. In the past, such questions often were framed in terms of whether an individual had ever been diagnosed with any mental health or substance abuse problems. As a result of this case law, the questions asked today tend to be framed more narrowly in terms of time frame and type of condition. Many of these inquiries have done a better job of focusing the questions on behavior, conduct, and performance that results from mental health or other conditions, rather than on the diagnosis.

In addition to the questions asked of the individual, institutions often are called upon to inform agencies about these same issues. For example, a law school might be asked by a bar admissions authority whether the student had any record of mental health problems.

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174. Rothstein, supra note 37, at 262.
175. See Ohio Civil Rights Comm’n v. Case W. Reserve Univ., 666 N.E.2d 1376, 1388 (Ohio 1996) (explaining that a determination as to whether an individual is qualified for a program should involve an inquiry into the requirements of the program and the abilities of the individual).
176. See Rothstein, supra note 9, at 371 n.66 (discussing relevant cases).
177. Id.
178. See id. (explaining that the majority of courts have held that broad questions violate the ADA).
180. See, e.g., Ellen S. v. Fla. Bd. of Bar Exam’rs, 859 F. Supp. 1489 (S.D. Fla. 1994). The question in this case asked whether the individual had ever consulted a doctor for any mental, nervous, or emotional condition, or drug or alcohol use. Id. at 1491 n.1.
181. See Applicants, 1994 WL 923404 at *2, *9 (explaining that the Texas Bar narrowed its question to certain specified mental illnesses).
182. See id. at *2 (noting that the questions asked of law students were reported to the bar association).
Although the student generally will have waived confidentiality, and, therefore, any such information in the student's record could be provided to the agency, institutions often face the dilemma of having to report information in a way that deters students from seeking help.183 A student experiencing severe depression may want to request a leave of absence or a reduced course load. In order to be granted that accommodation, the student would need to provide documentation of the psychological condition, information that would be included in the student's record as a justification for the accommodation.184 The institution then would be obligated to report that information when asked by the state licensing board. Although disclosure of this information generally would not impact a student's desire to obtain a license, many students understandably might be concerned that this information would prevent them from being licensed. As a result, the student who needs the help would not request it.

h. Immunity.—Recent decisions both in the Supreme Court and in lower courts have indicated a greater judicial tendency to find state agencies, including state colleges and universities, immune from certain types of actions by individuals under disability discrimination policy.185 A full discussion of immunity is beyond the scope of this Article, but it is fair to say that the Supreme Court likely will continue narrowing civil rights coverage by expanding on its holding in Board of Trustees of the University of Alabama v. Garrett.186 In that case, which involved a university employee, the Court held that state employees could not recover monetary damages against a state under Title I of the ADA.187 However, the Court did not decide whether a state is immune from other remedies or from damages under Title II of the ADA or Section 504 of the Rehabilitation Act.188

2. Recent Supreme Court Decisions and Their Impact on Higher Education.—In recent years, the Supreme Court term has addressed a num-

183. Stanley S. Herr, Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities, 42 VILL. L. REV. 635, 644 (1997) (arguing that the inquiries faced by law students before admission to the bar deters students with mental health problems from seeking treatment).
184. See Rothstein, supra note 37, at 253.
185. See, e.g., Carten v. Kent State Univ., 282 F.3d 391, 397-98 (6th Cir. 2002) (dismissing graduate student's claim under Title II of the ADA, holding that suit was barred by the Eleventh Amendment).
187. Id. at 374.
188. Id. at 360 (noting that the only issue resolved by the Court was whether state employees could seek monetary damages from the state in a Title I action).
Number of cases involving ADA issues. While some of these decisions are not particularly significant for higher education, many of them will have an impact on higher education and disability policy. The following is a brief review of those decisions and how they may affect higher education policy.

a. Immunity.—As the previous section noted, the Garrett decision left open the possibility that immunity from damages will extend beyond Title I of the ADA. The Garrett holding was limited to suits by state employees under Title I of the ADA in claims against the state. By statute, the U.S. Attorney General still may bring a damages action. Given the limited funding for enforcement, however, it is probable that many cases of disability discrimination will not be addressed. Garrett does not affect private actions under Title I because private institutions are not immune from such actions.

In another Supreme Court ruling, Barnes v. Gorman, the Court addressed whether punitive damages should be awarded to an individual who is a paraplegic whose arrest was inappropriately handled. To transport him to jail, police removed him from his wheelchair and crudely strapped him to a bench in a police van. During the ride, the straps came loose and the plaintiff was thrown to the floor, causing severe injuries that rendered him unable to work full time. In that case, the Court limited private claims under the ADA and Section 504 to compensatory damages, disallowing punitive damages.

In sum, the unsettled issue of remedies under Section 504 and the ADA may well be a barrier to private litigants. Further, until this issue is resolved, potential complainants may have difficulty finding legal counsel to represent them. If the issue is resolved by limiting damages entirely in cases involving state agencies, public institutions will have less pressure to ensure compliance with disability discrimination mandates.

b. Definition of Disability.—To be entitled to federal statutory protection from disability discrimination, one must be defined as dis-
abled. This means that an individual must be substantially limited in one or more major life activities, be regarded as having such a limitation, or have a record of having such a limitation. The individual also must be otherwise qualified to carry out the essential requirements of the program with or without reasonable accommodation. These requirements involve several factual determinations, some of which recently were addressed by the Supreme Court.

In 1999, the Court, in the Sutton trilogy narrowed the definition of who is covered under the ADA and the Rehabilitation Act. Specifically, in Sutton v. United Air Lines, Inc., the Court held that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment. Thus, if an individual has a condition that is no longer substantially limiting due to mitigating measures, such as eyeglasses or medication, the individual is no longer considered disabled and is not protected by statute.

The Court remanded Bartlett v. New York State Board of Law Examiners, a case that directly affects higher education. In Bartlett, the Court declined to decide whether an individual seeking accommodations on the New York bar examination was protected. Ms. Bartlett was seeking accommodations of additional testing time and other accommodations for a claimed learning disability. The issue on which the Supreme Court remanded was whether she was substantially limited in a major life activity when she had taken steps in law school to mitigate some of the effects of her learning disabilities. On remand, the district court held that Ms. Bartlett still is substantially limited in the major life activity of reading.

198. 42 U.S.C. § 12111(8).
200. See supra 93-96 and accompanying text (explaining the Court’s decisions in the Sutton trilogy).
201. Sutton, 527 U.S. at 475.
202. See id. at 482-83 (explaining that the effects of the corrective measures must be considered in addressing the individual’s disability).
203. 226 F.3d 69 (2d Cir. 2000).
204. Id. at 85.
205. Id. at 75.
206. Id. at 85.
Subsequent lower court decisions demonstrate a trend toward narrowing the definition of who is protected. Should this trend continue, it eventually may be that only individuals with conditions such as quadriplegia, paraplegia, blindness, and deafness will be covered. This clearly was not the intent of Congress in enacting disability discrimination laws.

c. Major Life Activity and Direct Threat.—Other Supreme Court decisions have further narrowed the definition of who is protected. In 2002, the Court in *Chevron U.S.A. Inc. v. Echazabal* held that individuals, whose disabilities pose a direct threat to their own safety or health, are not “otherwise qualified” under the ADA. Also in 2002, the Court determined in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that a major life activity under the ADA is one that is “of central importance to most people’s daily lives.” *Toyota* involved an assembly line worker whose ability to perform a subset of manual tasks had been affected by repetitive stress on the job. The parties stipulated to an agreement to voluntarily dismiss the case after the Supreme Court remanded it to the district court.

It is unclear what impact these cases will have for higher education. It seems likely, however, that for students in health care professional programs, the *Echazabal* case will be significant. For example, nursing and medical school students with HIV, because of their weakened immune systems, might be affected by exposure to patients with contagious diseases. Thus, a case might be made for excluding the HIV-positive individual from the program because of danger to self. It is important to note that the Court stressed in *Echazabal* that the threat must be based on reasonable medical judgment relying on cur-

208. See, e.g., *Swanson v. Univ. of Cin.*, 268 F.3d 307 (6th Cir. 2001). In *Swanson*, the court held that a surgical resident with severe depression was not substantially limited in his ability to perform major life activities because his difficulty concentrating was temporary and alleviated with medication, and his communication problems, caused by the medication, were short term. *Id.* at 318; see also *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 225 F.3d 620, 632 (6th Cir. 2000) (holding that a medical student was not substantially limited in his ability to read because he could read as well as the average person); *Pacella v. Tufts Univ. Sch. of Dental Med.*, 66 F. Supp. 2d 234, 239 (D. Mass. 1999) (holding that a dental student’s corrected eye condition did not substantially limit the major life activities of seeing and learning).


210. *Id.*

211. 534 U.S. 184 (2002).

212. *Id.* at 198.

213. *Id.* at 187.

214. See *Echazabal*, 536 U.S. at 81-82 (explaining that when a job poses a direct threat to an individual’s health, the employer may terminate the individual).
rent medical knowledge, not on untested and pretextual stereotypes.\textsuperscript{215} The assessment must also be individualized.\textsuperscript{216} Although this places a high burden on the institution, courts have been quite deferential to health care professional programs in these types of cases.\textsuperscript{217}

III. The Road Less Traveled—Where Guidance Is Needed

In a number of areas of disability law, institutions have tried to be proactive and to act in good faith. However, it is sometimes difficult for these institutions to know what is the appropriate course of action. In some of these areas, therefore, it would be extremely beneficial if federal agencies would give careful evaluation and guidance. In others, it would be helpful to receive guidance from national associations with oversight in particular aspects of higher education. These associations are often in a position to gather a variety of perspectives from stakeholders, and can seek and benefit from feedback on proposed guidelines on certain issues.\textsuperscript{218} This Article encourages these entities to respond. The following are some of the most significant issues where guidance would be beneficial.

A. Documentation

Several lower courts have rendered decisions in cases involving the documentation requirements needed to establish a disability.\textsuperscript{219} While these cases may be well reasoned, they do not provide clear guidance for colleges and universities. The Department of Education could perform a substantial service by spelling out what the qualifications should be for evaluators, how recent the documentation should be, and what the documentation should include in various settings.

\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} See, e.g., Fedorov v. Bd. of Regents for the Univ. of Ga., 194 F. Supp. 2d 1378, 1393 (S.D. Ga. 2002) (explaining that a dental student with a drug addiction, who also was a current drug user, posed a threat to patients); Doe v. Wash. Univ., 780 F. Supp. 628, 631 (E.D. Mo. 1991) (stating that denial of admission to an HIV-positive dental student was an academic decision, not a medical decision, because, when the student was evaluated "as a whole," the risk of transmission was a valid concern).
\textsuperscript{218} For example, the Association of American Law Schools is made up of a network of member law schools, and can conduct surveys and research and provide feedback. See Association of American Law Schools, What is the AALS?, at http://www.aals.org/about. html (last visited Oct. 2, 2003).
\textsuperscript{219} See Rothstein, supra note 13, at 122-24 (discussing the case law addressing the documentation required of students in higher education to establish a disability).
B. Flagging and the Use of Standardized Tests

Recent months have seen a strong public debate about standardized tests used for admission to institutions of higher education.\(^ {220} \) A part of this controversy involves the flagging of tests taken under nonstandard conditions.\(^ {221} \) Courts have not yet clearly ruled on this issue. This may be because the Department of Education has not changed its interim policy, which allows standardized tests taken under nonstandard conditions\(^ {222} \) to be flagged so that the recipient of scores is aware of this fact.\(^ {223} \) Some psychometricians support flagging, because test scores received under nonstandard conditions have not been validated.\(^ {224} \) Thus, in the interest of sound testing practices, these scores must note that accommodations were given, although, generally, the school is not advised about the basis for giving the additional time or other accommodation, nor is it advised of exactly what the accommodation was.\(^ {225} \)

The test takers, however, argue that such flagging impermissibly identifies a disability, thereby informing the school of a fact it could not directly ask as a preadmission inquiry.\(^ {226} \) Legal challenges to flagging have prompted several of the major higher education test providers to discontinue the practice.\(^ {227} \) However, the Law School Admission Test and others still are flagged.\(^ {228} \)

It would be beneficial if the Department of Education would determine, based on sound research, whether the interim policy should

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221. Rothstein, supra note 37, at 254 (discussing flagging in the context of higher education admission criteria for people with disabilities).

222. The nonstandard conditions usually involve the granting of additional time to complete a standardized test.

223. Id.

224. See Diana C. Pullin & Kevin J. Heaney, The Use of “Flagged” Test Scores in College and University Admissions: Issues and Implications Under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, 23 J.C. & U.L. 797, 824-25 (1997) (contrasting flagging critics’ assertion that flagging denies test takers with disabilities the ability to compete on the same playing field as test takers who are not disabled and the view that if the circumstances of a test were altered, the result of that test cannot be assumed to be like the others).

225. Id. at 818.

226. See Rothstein, supra note 9, at 225-28 (discussing preadmission inquiries). Flagging also imposes the potential for discriminatory use of flagged scores. Pullin & Heaney, supra note 224, at 824.

227. But see Rothstein, supra note 37, at 254 (noting that despite legal challenges the flagging of medical board exams remains valid).

be continued. If so, the Department of Education should issue a permanent policy. If flagging should not be considered permissible under disability law, then the policy should be revoked. Although this would not prevent litigation, it might provide a basis for finally resolving this troubling issue for standardized test administrators and test takers.

C. Inquiries About Emotional and Substance Abuse Impairments

When the ADA was enacted, state licensing boards faced challenges to mental health and substance abuse inquiries made during their licensing processes. Many states, in the process of licensing lawyers, physicians, and other professionals, asked applicants about the status of mental health and the use of drugs and alcohol. State licensing agencies had not previously been subject to Section 504 because they did not receive federal financial assistance. Title II of the ADA, however, applied nondiscrimination mandates to state agencies.

The licensing agencies argued that the inquiries were permissible because they asked about conduct and behavior, rather than status. Those challenging the inquiries argued that they were impermissible preadmission inquiries. In addressing these challenges, several courts have reached a variety of conclusions. Virtually all states, however, at least adjusted their questions. Before the passage of the ADA, questions were often unlimited in time and were broad in terms of what conditions were inquired about. Now, most states have narrowed the time frame to five or ten years and limit the inquiries to a few serious conditions. The licensing of physicians, however, raises special concerns because of access to controlled substances. Accordingly, a national dialogue within the various professions, along with a setting of standards approved by the Depart-

229. See Herr, supra note 183, at 636 (noting that professional licensing procedures were challenged after the enactment of the ADA).
230. See id. at 646-51 (evaluating bar questionnaires in forty-one states); see also Rothstein, supra note 37, at 262 (noting that reporting of mental health and substance abuse problems to medical licensing boards has been subject to much litigation).
231. See Rothstein, supra note 37, at 244-45 (discussing the scope of Section 504).
232. See id. at 245 (noting that Title II applied to state licensing agencies).
233. Rothstein, supra note 9, at 371.
234. Id. at 225.
235. Id. at 225-28.
236. See Herr, supra note 183, at 652-55.
237. Id.
238. See id. (summarizing the trend of bar questionnaires to ask less intrusive questions regarding an applicant's mental health and substance abuse problems).
ment of Justice, would be extremely positive steps. This dialogue and standard setting within the professions should include a study of the value of such inquiries as well as their negative effect. For example, it has been argued that inquiries about mental health status are a deterrent to getting treatment.239 Mental health inquiries have the potential to allow access to voluminous private medical records that could later be used by an unscrupulous agency employee to damage permanently the reputation of an individual.240 Engaging in a national discussion of this issue within each profession would allow for the evaluation and balancing of the various interests.

D. Auxiliary Aids and Services and Technology Assistance

There is a great deal of technical knowledge available about accommodating a variety of disabilities. In the employment setting, access to this information is available through the Job Accommodation Network.241 It would be extremely beneficial to higher education if there was a clearinghouse of information about the availability and cost of auxiliary aids and services commonly needed by students and others with disabilities. Such a clearinghouse might also provide model policies to assist campuses in dealing with students, staff, and faculty with disabilities. Of particular value would be a centralized source for information about making technology accessible.242

E. Housing

The Department of Education model regulations on post-secondary education include regulations addressing housing on campus.243 Unfortunately, these regulations have not been revised since 1978. Given the unique housing issues in higher education, and the recent changes in the type of housing provided to students, it would be extremely beneficial for the Department of Education to reissue guidelines on student housing.

239. See id. at 643-44 (discussing a White House aide's suicide and how he hesitated to seek help for fear of losing his job).
240. See id. at 675-77 (discussing the implications of executing broad medical records releases).
242. Making such a resource available at the national level would be of great service particularly to small institutions of higher education that often do not have individuals on staff with extensive experience in disability issues.
243. 34 C.F.R. § 104.45 (2002).
F. Health Care Professional Programs

Students in health care professional programs, including medicine, nursing, and dentistry, face unique issues with respect to disability discrimination policy. These students are training for professions that, in many instances, will involve life and death issues for patients, or at the very least issues of health and safety risk to patients. In the educational program itself, students often are trained through direct patient service, which has the potential to affect patient health and safety even before the students become practitioners.

Thus, it becomes relevant whether conditions such as HIV, alcohol or drug addiction, serious mental illness, sensory impairments, mobility impairments, learning disabilities, and other conditions affect the ability of students to deliver services without undue risk to patients. Accordingly, there has been a considerable amount of litigation addressing these issues involving health care professionals in practice, the licensing stage, and the educational program.

It would be of great value for the national professional health care programs to engage in a thoughtful discussion about these issues. The result of such a discussion should be the issuance of guidelines or the initiation of further research to evaluate appropriate guidelines for these issues. This discussion should consider a number of questions. For example, should there be a national standard that one must be able to see in order to complete medical school? Are there certain health care professions that involve invasive procedures in which individuals who are HIV positive (or those with other infectious or contagious diseases) should not be engaged because of the risk to patients? Or are these issues that should continue to be addressed at the institutional level?

One issue, which has been particularly troubling, involves students with learning disabilities in the medical school setting. A significant amount of judicial attention has been given to situations where students with learning disabilities have been successfully accommodated for the first two years of medical school, only to face problems of continued qualification when they begin work in clinical settings. If there are essential requirements for such continued qualification, should there be an earlier stage at which the student's disabilities are

244. See Rothstein, supra note 37, at 261 (stating that health professional programs have been the subject of much litigation because of concern for the health and safety of patients).
245. ROSENSTEIN, supra note 9, at 499-500.
246. Id. at 500-03.
247. Rothstein, supra note 37, at 262.
evaluated, so that the student does not commit two years toward an expensive program for which she is not qualified? Again, a national discussion by both medical school programs and state licensing boards would be of great value. Such a discussion may result in guidelines, standards, or the initiation of further research.

G. Financial Aid

It would clearly be impermissible for a school to have a policy that did not allow students with disabilities access to scholarships, loans, or other financial aid. Discrimination challenges in the financial aid area, however, involve less direct conduct. Eligibility for scholarships and loans often requires a student to be enrolled on a full-time basis. In other instances, the renewal of scholarships is only allowed for a four-year undergraduate program or for the number of years ordinarily required to complete a graduate level degree. Such policies can have a disparate impact on students with disabilities. For example, a student with a learning disability may require a reduced course load as an accommodation for the disability. Taking a less than full-time course load can result in the student being unable to complete a program in the normal time frame.

The application of disability discrimination law to this issue does not provide clear answers. Although it is likely that federally supported programs requiring full-time enrollment would be upheld as permissible in light of the fact that these programs were implemented with knowledge of disability law, the status is less clear for the policies of higher education programs. At present, the best course of action is for these institutions to evaluate their requirements and to either make a case that an essential requirement of the program mandates full-time enrollment or that it would fundamentally alter the program or lower standards to provide otherwise. Another course of action might be for the school to demonstrate that it is unduly burdensome to provide financial aid to students enrolled less than full-time. Maintaining a specific grade point average is likely to be upheld as a valid

248. See Rothstein, supra note 9, at 242.

249. A variation on this disparate impact would be a policy that requires a student to maintain a certain grade point average.

250. Rothstein, supra note 9, at 232-34 (stating that extension of time allowed for degree completion is a possible academic modification).

251. See id. (explaining that colleges are not required to modify the academic program if the requirement is essential to the program).
requirement in light of existing judicial interpretations. The fate of full-time enrollment policies, however, is less clear.

Some of these issues have been raised in litigation challenging NCAA scholarship eligibility at the undergraduate level. Unfortunately, although there is some judicial guidance on how the courts would view these issues, many questions remain unanswered. For this reason, it would be valuable if the Department of Education would evaluate this issue and provide guidelines for institutions of higher education.

H. Distance Learning and Technology

Students with a variety of impairments may have difficulty accessing academic programming provided through technology. Whether it is taking a class through distance learning, reading Power Point presentations in class, accessing the Internet, or participating in out-of-class discussions, students with learning disabilities, visual impairments, and mobility impairments face challenges in using technology.

The present status of the legal challenge involving accessibility to America Online for individuals who are blind remains unresolved. It is likely that the complexities of the Internet and attendant First Amendment issues will continue to make this a challenging topic. Therefore, colleges and universities already faced with budgetary challenges are finding this a daunting matter because the technological requirements are unclear, as there is limited availability of technical assistance, and the technology continues to change.

The federal government has begun to look at these issues and seems to require that institutions receiving federal financial assistance should ensure accessible technology. Given the complexity of this issue, however, the Department of Education and the Department of Justice should give substantially more attention to determining the appropriate level of access to technology in the context of higher education.

252. See id. at 233 (explaining that institutions of higher education are not required to make accommodations that will lower academic standards).


254. Bick, supra note 41, at 217 (discussing the lawsuit filed by the National Federation of the Blind against America Online).

255. Id. at 208 (noting that in 1996 the Department of Justice stated that "entities subject to Title II and III of the ADA must 'provide effective communication to people with disabilities'").
I. Programs Abroad

Like access to technology, programs abroad are a relatively new area of judicial attention. Problematically, colleges and universities are not clear about what they are expected to do in this area. These programs often involve a student from one institution enrolling in a summer program hosted by another institution. Thus, the question of which institution is responsible for accommodations is left unresolved.

This issue would benefit from attention by the Department of Education and higher education associations. For example, the American Bar Association, which approves summer abroad programs for law schools, could provide guidance on issues such as the degree of barrier-free access that should be expected in a program abroad. It also could provide guidance on policies and practices for providing interpreters to deaf students and other accommodations in countries where some of the programming is provided in a foreign language. Other higher education associations, such as the American Council on Education, might also provide useful leadership in developing model policies and practices and general guidelines on these issues.

J. Faculty Issues

In a sense, faculty issues are basically employment issues that have received a substantial degree of attention by the courts and the Equal Employment Opportunity Commission. Somewhat unique to higher education, however, is the difficulty in measuring competence. While there is an emerging body of case law on faculty issues, this is an area where greater guidance is needed. Such guidance might best come from accrediting associations and national organizations such as the American Council on Education. This guidance also should strive to establish sound economic and social policy.

IV. Crystal Ball—Is There a Mapmaker Out There?

The probable future for federal disability discrimination policy in higher education is somewhat unclear. From the vantage point of someone who follows the big picture of disability policy, the following
are my predictions for where this policy is likely to go, at least for the foreseeable future.

A. Congress

For a variety of political reasons, it is unlikely that the ADA or the Rehabilitation Act will be repealed. President George H.W. Bush signed the ADA into law in 1990, and it is one of the accomplishments of which he is most proud. Therefore, it is unlikely that his son, President George W. Bush, would encourage the repeal of the ADA.

What is possible, however, is that Congress may seek to clarify the definition of "disability." Many advocates for rights of people with disabilities believe that the definition has been too narrowly defined by the courts, and would like the definition broadened to what many believed is the original intent. Clarifications might be sought that would ensure protection for individuals discriminated against based on stigmatizing conditions such as epilepsy, diabetes, and serious mental illness, regardless of whether they are taking medication that mitigates their disabling condition. On the other hand, there has been a backlash from some who believe that disability discrimination laws have been abused and that one means of limiting the amount of litigation is to narrowly define who is protected.

Precisely because there are likely to be strong views at either end of the spectrum, it is unlikely that Congress will do anything. In addition, because there are so many other issues demanding Congress's attention, disability policy is unlikely to be high on the agenda.

B. Federal Agencies

One way to limit disability policy is to follow the example of the Reagan administration, by simply not funding enforcement or making it a high priority. Even in an administration that might view this as...

260. See Befort & Thomas, supra note 26, at 27 (quoting President George H.W. Bush, who described the ADA as "'an historic opportunity' representing 'the full flowering of our democratic principles'").
261. See id. at 74 (discussing the different policy arguments as to why the definition of disability should or should not be broadly construed).
262. See Larry Gostin, Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers, 17 Am. J.L. & Med. 109, 122-23 (1991) (explaining that being defined as "disabled" is particularly important for people who are perceived as having stigmatizing conditions).
263. See LaCheen, supra note 12, at 225 (discussing the effect of the media on the backlash against the ADA).
264. See Rothstein, supra note 37, at 243 (discussing the Reagan administration's general philosophy of deregulation, and the administration's effect on the enforcement of the Rehabilitation Act).
a high priority, enforcement agencies face difficulty in staffing enforcement under the best of circumstances. That leaves most of the enforcement of disability policy to the private plaintiffs. However, with the trend toward state agency immunity, it is quite possible that there will be a reduction in litigation as plaintiff attorneys become less likely to represent clients in difficult-to-win cases.²⁶⁵

As was noted in the previous section, there are a number of areas where federal agencies could provide substantial guidance. In the area of higher education, these include clarifying who is protected, defining the documentation needed to substantiate a learning or similar disability, clarifying whether flagging standardized test scores still is permissible, and providing guidance on higher education housing issues. Moreover, Section 504 regulations have not been revised in almost a quarter of a century, and there is little indication that they will be anytime soon.²⁶⁶

The OCR's opinion letters have provided sound guidance on disability issues.²⁶⁷ However, it remains possible that negative attitudes toward students with disabilities persist. This may be the result of the specious claims brought by some individuals, and the recognition by the Department of Education of the burden placed on institutions of higher education in addressing these claims.²⁶⁸ It would be unfortunate if the pendulum were to swing so far that universities and colleges no longer felt the need to employ a proactive approach to individuals with disabilities.

C. Judicial Trends

1. Supreme Court.—The Supreme Court in recent years has shown itself to be result-oriented in disability law cases. Although many would argue that the Supreme Court has only reached decisions adverse to the rights of individuals with disabilities, that is in reality not the case. Even recent decisions by the Supreme Court have

²⁶⁵ See Ruth Colker & Adam Milani, The Post-Garrett World: Insufficient State Protection Against Disability Discrimination, 53 ALA. L. REV. 1075, 1076, 1102 (2002) (discussing private enforcement of civil rights through state statutes after the Supreme Court held that suits against states for failure to comply with Title I of the ADA were barred by the Eleventh Amendment).

²⁶⁶ See Rothstein, supra note 9, at 4-5 (noting that Section 504 was last amended in 1974).

²⁶⁷ See Rothstein, supra note 13, at 122 n.14 (describing the Department of Education Office of Civil Rights’s authority under the ADA and Rehabilitation Act).

²⁶⁸ See Lisa Eichhorn, Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context, 26 J.L. & EDUC. 31, 51-52 (1997) (discussing the Office of Civil Rights’s finding that a university had the responsibility to train its staff to accommodate students with disabilities).
reached favorable conclusions for individuals with disabilities. In the case of *PGA Tour, Inc. v. Martin*,\(^\text{269}\) for example, the Court held for the plaintiff, concluding that walking was not a fundamental requirement for playing professional golf.\(^\text{270}\) In a similar vein, in *Cleveland v. Policy Management Systems Corp.*,\(^\text{271}\) the Court held that applying for and receiving disability benefits does not automatically preclude individuals from claiming that they are "otherwise qualified" in ADA discrimination cases.\(^\text{272}\) Also, in *Olmstead v. Zimring*,\(^\text{273}\) the Court held that the ADA requires that individuals with disabilities generally be placed in the community rather than in institutions where the state is providing services to these individuals.\(^\text{274}\)

These cases demonstrate that when the Supreme Court actually reaches the substantive issues in many disability claims, its rulings are not negative to the interests of individuals with disabilities. Unfortunately, the door is closed for many complainants because the definition of disability is so narrow.\(^\text{275}\) In addition, the state immunity rulings will further limit protection in a number of settings.\(^\text{276}\)

2. *Lower Courts*.—The lower courts seem to be demonstrating a backlash from the marginal disability law cases. As the number of students seeking redress under disability policy increases, it is probable that university counsel will become more likely to raise immunity as a defense and to bring motions to dismiss on the ground that the plaintiff is not disabled.\(^\text{277}\) Before the *Sutton* trilogy, most cases involving higher education reached the substantive issues, such as whether the accommodation was reasonable.\(^\text{278}\) Today, however, it is possible that many courts will not reach the substantive issues because the plaintiff will be unable to satisfy the definition of "disability" as narrowly construed by the *Sutton* trilogy.

\(^\text{270}\) Id. at 683.
\(^\text{272}\) Id. at 807.
\(^\text{274}\) Id. at 597.
\(^\text{275}\) See supra notes 94-96 and accompanying text (discussing the *Sutton* trilogy, which narrowed the definition of disabled).
\(^\text{276}\) See Colker & Milani, supra note 265, at 1076-81 (discussing the broad application of sovereign immunity in ADA cases).
\(^\text{277}\) See id.
\(^\text{278}\) See, e.g., Ohio Civil Rights Comm'n v. Case W. Reserve Univ., 666 N.E.2d 1376 (1996) (addressing the question of whether a blind medical student was reasonably accommodated).
SUMMARY AND CONCLUSION

With two major statutes, detailed regulations, and a growing body of judicial interpretation, it might seem that there is a well drawn road map to guide colleges and universities in crafting their disability discrimination policies. Unfortunately, however, as disability issues have become more complex, the map has become less clear and there remains a lot of uncharted territory. This Article suggests that institutions of higher education would benefit greatly from congressional, federal regulatory, and national association attention to these areas. Without this guidance, colleges and universities will continue to expend scarce resources addressing these issues reactively, as defendants in litigation, rather than proactively. With more than a quarter of a century of experience on national disability discrimination policy, Congress, federal agencies, and national associations are well equipped to provide this much needed guidance.