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Douglas K. Rush

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THROUGH THE LOOKING GLASS: JUDICIAL DEFERENCE TO ACADEMIC DECISION-MAKERS

The Conflict In Higher Education Between Fundamental Program Requirements and Reasonable Accommodations Under Section 504 of the Rehabilitation Act and The Americans With Disabilities Act

by Douglas K. Rush*

PROLOGUE¹

‘When *I* use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean – neither more or less.’

‘The question is,’ said Alice, ‘whether you *can* make words mean so many different things.’

‘The question is,’ said Humpty Dumpty, ‘which is to be master – that’s all.’²

Lewis Carroll, English author & mathematician (1832 - 1898)

INTRODUCTION

Lewis Carroll’s “Through The Looking Glass: and What Alice Found There”³ introduces us to Alice’s dream-induced fantasy world in her search for passage from

* Assistant Dean for Evening Programs and Disability Accommodation Coordinator, Saint Louis University School of Law. I am especially grateful for the input, suggestions and corrections provided by my wife, Janette M. Lohman, J.D., L.L.M. and for the support, review and editorial advice provided by Assistant Professor Nicole Porter, Saint Louis University School of Law.

¹ “[A]n introductory speech, often in verse, calling attention to the theme of the play.” THE AMERICAN COLLEGE DICTIONARY 969 (1948).

² LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 171 (Schocken Books 1979) (1872).

Victorian adolescence to adulthood. This novel, together with its predecessor, “Alice in Wonderland,”⁴ has been analyzed by legions of undergraduate and graduate students and their faculty who have divined undertones as diverse as awakening sexual liberation and feminism to rebellion from Victorian moral absolutism.⁵

The author’s reading of the novel and review of this commentary suggest that Alice’s fall through the looking glass led her to a world where she is a pawn and her every move is governed by the strict rules of a chess game. The looking glass world is devoid of moral principle. The Red Queen rules through decree, with little regard for any logical support of her mandates. The rule of law does not exist. The Queen’s arbitrary demands are based solely upon her authority for their justification. In this dream world, reality is a mirror image; nothing can be trusted. The characters who Alice meets are not real, do not show human compassion and do not provide guidance through the chess board world. Alice is saved only when the kindly White Knight defeats the Red Queen’s Knight and leads her through the forest to the chess board’s eighth square where she becomes a queen and then awakes from her dream.⁶

Learning disabled students in institutions of higher education, at times, must feel as if they have fallen through the looking glass into Alice’s dream world. Like Carroll’s Red Queen, many academic decision-makers are increasingly erecting barriers to such students’ participation in programs of higher education based on little more than their

³ LEWIS CARROLL, *THROUGH THE LOOKING GLASS: AND WHAT ALICE FOUND THERE* (Peter Piper Press ed., The MacMillan Company 1940) (1899), available at <http://etext.virginia.edu/etcbin/toccer-new?id=CarGlas.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=al1>.

⁴ CARROLL, *supra* note 2.

⁵ A web search reveals hundreds of thousands of links to articles, reviews and treatises analyzing the subject. Without attempting to list all such sources, the author would suggest that the reader do a web search for “Through The Looking Glass” if he or she is interested in an exhaustive and exhausting study of this issue.

⁶ See CARROLL, *supra* note 2.

arbitrary authority. Congress' intent to eliminate disability discrimination in higher education is being thwarted by administrators who, like Humpty Dumpty, place their own meaning on words contained in legislative mandates. The courts are increasingly abdicating their responsibility under the doctrine of deference to those decision-makers. Where are the White Knights to lead these students back to a world in which human compassion and moral principles trump arbitrary academic dictates? It is hoped that the readers of this article will gain a different perspective of these issues, a perspective based on the belief that students with learning disabilities can, and do, succeed in higher education where they are guided by White Knight administrators rather than Red Queens.⁷

The right of institutions of higher education to make independent admissions decisions has been noted as one of the four fundamental academic freedoms under the First Amendment to the United States Constitution.⁸ By enacting Section 504 of the Rehabilitation Act of 1973⁹ (hereinafter "Section 504") and the Americans With Disabilities Act¹⁰ (hereinafter "the ADA"), Congress also recognized that it is in the national interest to protect the rights of disabled individuals and to ensure that those persons are judged on their abilities and not on the basis of their real or perceived disabilities.¹¹

The right of disabled persons to participate in higher education programs can cause inevitable conflicts when academic decision-makers weigh fundamental program

⁷ My apologies for the "Through the Looking Glass" construct. I admit that it is not original and has become, possibly, trite. Nevertheless, to the extent that it stimulates readers to consider these issues it may serve a useful purpose.

⁸ *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citing *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 312 (1978) (internal citations omitted)).

⁹ 29 U.S.C. § 794 (2005).

¹⁰ 42 U.S.C. §§ 12101-12213 (2005).

¹¹ *See* 42 U.S.C. §§ 12101(a)(8), 12102(2) (2000).

requirements against the need to modify programs to accommodate individual disabilities. Issues of academic freedom, including the selection of student participants, course content, testing policy and graduation requirements, among others, may clash with Congressional mandates that prohibit discrimination against individuals with physical, mental or learning disabilities.

Recent court decisions demonstrate that courts give great deference to academic decision-makers, particularly where learning, cognitive or psychological disabilities are concerned. Academic and other institutions are placing an increasingly greater burden on students to document and prove the existence of learning disabilities and their need for academic accommodation.¹² Furthermore, the recent trend in court decisions is to measure the extent of an individual's learning or cognitive disability against the academic ability of the general population.¹³ Students with superior IQ test scores who have documented learning disabilities are being denied academic accommodations where their intellectual capacity is equal to or exceeds that of the general population.¹⁴ Those disabled students are often prevented from succeeding in graduate level education

¹² See, e.g., ASSOCIATION OF AMERICAN MEDICAL COLLEGES, MCAT DISABILITIES ACCOMMODATIONS (2003), <http://www.aamc.org/students/mcat/about/ada2003.pdf> (for determining whether to grant accommodations on the Medical College Admissions Test); ASSOCIATION ON HIGHER EDUCATION AND DISABILITY, GUIDELINES FOR DOCUMENTATION OF A LEARNING DISABILITY IN ADOLESCENTS AND ADULTS (1997), http://www.ldonline.org/ld_indepth/postsecondary/ahead_guidelines.html; CONSORTIUM ON ADHD DOCUMENTATION, ATTENTION DEFICIT/HYPERACTIVITY DISORDER IN ADOLESCENTS AND ADULTS (2003), http://www.learningsupportservices.villanova.edu/attention_deficit.htm; LAW SCHOOL ADMISSION COUNCIL, INC., GUIDELINES FOR DOCUMENTATION OF COGNITIVE DISABILITIES (2005), <http://www.lsac.org/pdfs/2005-2006/GuidelinesCognitive-2005.pdf> (for determining whether to grant accommodations on the Law School Admissions Test).

¹³ See, e.g., *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094 (S.D.N.Y. 1997) (comparing bar examination applicant's reading ability to that of the average college student in determining whether applicant was disabled under the ADA and the Rehabilitation Act); *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620 (6th Cir. 2000) (comparing medical student's reading and writing abilities to those of the "average student").

¹⁴ See, e.g., *Baer v. Nat'l Bd. of Med. Exam'rs*, 392 F. Supp. 2d 42 (D. Mass. 2005) (holding that medical student was not entitled to extended time for taking the United States Medical Licensing Examination, and pointing out that the plaintiff had very high IQ scores).

programs where simple accommodations, such as increased time on tests or the use of computers, could allow them to successfully complete their programs. The current rationale of many courts is that such students may suffer from a learning disability but they are not disabled within the meaning of Section 504 and the ADA because their impairment level still results in an academic ability which matches or exceeds the general population as a whole,¹⁵ even though the general population is incapable of completing graduate level academic programs. The trend toward evaluating learning disabled students by comparing them to the population as a whole may result in many superior students being prevented from fulfilling their educational goals, and may deny disabled students the opportunity to achieve their career potential.

This paper will review the statutory mandates of Section 504 and the ADA and examine the extent to which courts are willing to defer to institutional decisions concerning program modifications to accommodate learning disabled students. Courts have long recognized that academic decision-makers are entitled to deference, especially when their decisions concern issues related to educational programs.¹⁶ Courts must be vigilant, however, to properly weigh their role as the enforcers of Congressional legislation against the judicial policy of deference to academic decisions.

Section I of this article will review the federal statutory and regulatory frameworks governing disability accommodations as they relate to institutions of higher education. Section II will address the potential conflict between essential program requirements in higher education and compliance with federal mandates. Section III will consider the federal courts' deference to academic decision-makers, particularly with

¹⁵ See, e.g., *supra* note 13.

¹⁶ See *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978).

regard to granting or denying academic accommodations for persons with disabilities. Finally, Section IV will examine two cases that demonstrate the limits of the federal courts' deference to academic decision-makers.

I.

THE STATUTORY FRAMEWORK OF THE REHABILITATION ACT OF 1973 AND THE AMERICANS WITH DISABILITIES ACT AS THEY APPLY TO INSTITUTIONS OF HIGHER EDUCATION

There was a book lying near Alice on the table, and while she sat watching the White King . . . she turned over the leaves, to find some part that she could read, '— for it's all in some language I don't know,' she said to herself. . . .

She puzzled over this for some time, but at last a bright thought struck her. 'Why, it's a Looking-glass book, of course! And if I hold it up to a glass, the words will all go the right way again. . . .'

'It seems very pretty,' she said when she had finished it, 'but it's *rather* hard to understand!' (You see she didn't like to confess, even to herself, that she couldn't make it out at all.) 'Somehow it seems to fill my head with ideas – only I don't exactly know what they are!'¹⁷

A. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973¹⁸ was intended to prevent discrimination against handicapped individuals by any program which receives federal funds.¹⁹ The Act states in part:

No otherwise qualified individual with a disability²⁰ in the United States, as defined in section 7(20) [29 U.S.C. § 705(20)], shall, solely by reason of her or his disability, be

¹⁷ CARROLL, *supra* note 2, at 118, 120, 123.

¹⁸ 29 U.S.C. § 794 (2005).

¹⁹ See *LeStrang v. Consolidated Rail Corp.*, 687 F.2d 767 (3d Cir. 1982).

²⁰ Section 504 of The Rehabilitation Act as originally drafted used the term "handicapped individual." It was amended to substitute the term "individual with a disability." The Rehabilitation Act, Pub. L. No. 102-569, 106 Stat. 4348 (1992). The substitution was to make the terminology of the Rehabilitation Act consistent with the terminology of the Americans With Disabilities Act. It was not Congress' intent to change the meaning of the Act. 138 CONG. REC. 22900 (daily ed. Aug. 12, 1992).

excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.²¹

A plaintiff who wishes to establish a violation of Section 504 must prove that she meets four elements: (1) that she is an individual with a disability; (2) that “she is otherwise qualified for participation in the program;” (3) that “the program receives federal financial assistance;” and (4) that “she was denied the benefits of” or “subject to discrimination” under the program.²²

Section 504 defines the term disability as “a physical or mental impairment that constitutes or results in a substantial impediment to employment; or...a physical or mental impairment that substantially limits one or more major life activities.”²³ An individual with a disability is defined as any person who has (i) “a physical or mental impairment which substantially limits one or more of such person's major life activities”; (ii) “has a record of such an impairment”; or (iii) “is regarded as having such an impairment.”²⁴ The term “major life activities” is defined in the implementing regulations as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”²⁵ The definition of “program” includes “a college, university, or other postsecondary institution, or a public

²¹ 29 U.S.C. § 794(a) (2005).

²² *Nathanson v. The Med. Coll. of Pa.*, 926 F.2d 1368, 1380 (3d Cir. 1991) (citing *Strathie v. Dep’t of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983) (internal quotations omitted)); *Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 573 (6th Cir. 1988).

²³ 29 U.S.C. § 705(9)(A), (B) (1998).

²⁴ *Id.* § 705(20)(B)(i)-(iii).

²⁵ 45 C.F.R. § 84.3(j)(2)(ii) (2005).

system of higher education.”²⁶ Section 504 specifically authorizes federal agencies to issue regulations to carry out the purpose of the Act.²⁷

Section 504 also requires that a person who brings a claim prove that she was subject to discrimination “solely” because of her disability.²⁸ A disabled individual cannot establish a claim under Section 504 if she is unable to meet a facially-neutral program requirement, unless she “can establish . . . that the requirement was merely a pretext for unlawful discrimination.”²⁹

Implementing regulations prohibit educational institutions that receive federal financial aid from denying “a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service.”³⁰ A “qualified handicapped person” with respect to post-secondary or higher education is “a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient’s education program or activity.”³¹

In the admissions and recruitment of potential higher education students, an educational institution that receives federal financial aid may not deny handicapped persons admission to a program based on handicap.³² A program may not impose limits on the number of handicapped individuals that it may admit,³³ and a program cannot use

²⁶ 29 U.S.C. § 794(b)(2)(A) (2005); 34 C.F.R. § 104.3(k)(2)(i) (2005).

²⁷ 29 U.S.C. § 794(a) (2005).

²⁸ *Id.*

²⁹ *Murphy v. Franklin Pierce Law Ctr.*, 882 F. Supp. 1176, 1181 (D.N.H. 1994) (internal citations omitted)

³⁰ 34 C.F.R. § 104.4(b)(i) (2004). As noted *supra* note 20, Section 504 was amended to substitute the term “individual with a disability” for the term “handicapped individual.” Regulations issued by various agencies may not have been amended and may still utilize the term “handicapped person.” The author has used the terminology in the current version of the regulations in the body of this paper.

³¹ 34 C.F.R. § 104.3(l)(3) (2004).

³² *Id.* § 104.42(a).

³³ *Id.* § 104.42(b)(1).

any test or criterion for admission which has a disparate impact on such individuals.³⁴

Furthermore, a program cannot make any preadmission inquiry about whether the applicant suffers from a handicap.³⁵

Once a handicapped student is admitted into an educational program, the student may not be subject to discrimination.³⁶ The program cannot exclude any handicapped student from “any course, course of study, or other part of its education program or activity”³⁷ and must operate its program “in the most integrated setting appropriate.”³⁸

The implementing regulations also require that such a program:

make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for completion of degree requirements, and adaptation of the manner in which specific courses are conducted.³⁹

Educational programs subject to Section 504 must provide methods of evaluating a handicapped student’s performance which measure the student’s educational achievement rather than reflect the student’s impairment.⁴⁰ Programs must also provide handicapped students with auxiliary aids which may include taped texts, interpreters, readers for students with visual impairments, adapted classrooms for students with

³⁴ *Id.* § 104.42(b)(2).

³⁵ *Id.* § 104.42(b)(4).

³⁶ *Id.* § 104.43(a).

³⁷ *Id.* § 104.43(c).

³⁸ *Id.* § 104.43(d).

³⁹ *Id.* § 104.44(a).

⁴⁰ *Id.* § 104.44(c).

manual impairments, and other similar services and aids.⁴¹ Such programs, however, are not required to “provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.”⁴²

B. The Americans With Disabilities Act

In 1991, the United States Congress enacted the Americans With Disabilities Act,⁴³ noting that at the time there are over 43,000,000 persons with disabilities living in the United States.⁴⁴ Congress further noted that society tended to isolate and discriminate against these individuals in critical areas including education.⁴⁵ Unlike those suffering from race or sex discrimination, Congress observed, individuals suffering from discrimination due to physical or mental disabilities often had no legal recourse.⁴⁶ Congress determined 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...”⁴⁷

Accordingly, Congress enacted the ADA:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major

⁴¹ *Id.* § 104.44(d)(2).

⁴² *Id.*

⁴³ 42 U.S.C. §§ 12101-12213 (2005).

⁴⁴ *Id.* § 12101(a).

⁴⁵ *Id.* § 12101(a)(2)-(3).

⁴⁶ *Id.* § 12101(a)(4).

⁴⁷ *Id.* § 12101(a)(8).

areas of discrimination faced day-to-day by people with disabilities.⁴⁸

The ADA is divided into four Subchapters. Subchapter I concerns disability discrimination in employment.⁴⁹ Subchapter II prohibits discrimination based on disability in public programs, services and benefits.⁵⁰ Subchapter III prohibits discrimination based on disability in the area of public accommodations.⁵¹ Subchapter IV contains miscellaneous provisions.⁵² This paper will focus on Subchapters II and III (hereinafter “Title II” and “Title III”) as they have been applied to accommodation requests in institutions of higher education.

The ADA defines “disability” as:

with respect to an individual—
 (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 (B) a record of such an impairment; or
 (C) being regarded as having such an impairment.⁵³

Title II of the ADA provides that:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.⁵⁴

Title II defines “public entity” to include: “(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or

⁴⁸ *Id.* § 12101(b).

⁴⁹ *Id.* §§ 12111-12117.

⁵⁰ *Id.* §§ 12131-12165.

⁵¹ *Id.* §§ 12181-12189.

⁵² *Id.* §§ 12201-12213.

⁵³ *Id.* § 12102(2).

⁵⁴ *Id.* § 12132.

States or local government...”⁵⁵ Title II’s prohibition against discrimination extends to public colleges and universities.⁵⁶

Pursuant to Title II, a “qualified individual with a disability” is one:

who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.⁵⁷

Title II of the ADA adopted the remedies and procedures of the Rehabilitation Act.⁵⁸ Title II authorizes the Attorney General to promulgate regulations to implement this section, except in areas covered by the Department of Transportation, and requires the Attorney General to make his regulations consistent with the regulations of the Department of Health, Education and Welfare.⁵⁹

Title III of the ADA extends the prohibition of discrimination against people with disabilities to places of public accommodation,⁶⁰ to include private undergraduate and post-graduate educational programs.⁶¹ Title III prohibits the use of eligibility criteria that either discriminate or tend to screen out individuals with disabilities,⁶² and further requires:

reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of

⁵⁵ *Id.* § 12131(1).

⁵⁶ 34 C.F.R. § 104.3(k)(2)(i) (2005).

⁵⁷ 42 U.S.C. § 12131(2) (2000).

⁵⁸ *Id.* § 12133.

⁵⁹ *Id.* § 12134(b).

⁶⁰ *Id.* § 12182(a).

⁶¹ *Id.* § 12181(7)(J).

⁶² *Id.* § 12182(b)(2)(A)(i).

such goods, services, facilities, privileges, advantages, or accommodations.⁶³

The Department of Justice has adopted regulations to implement Congress' mandate in the ADA to eliminate discrimination against disabled individuals.⁶⁴ Testing must be done in a manner which accurately reflects a person's aptitude or achievement level rather than being reflective of her disability.⁶⁵ Institutions are not required to permit a disabled individual to participate in a program if her participation "poses a direct threat to the health or safety of others."⁶⁶ Institutions, however, are required to make an individualized assessment to determine whether the nature, duration and severity of the condition, when weighed against the potential injury and reasonable modifications of policies which would mitigate the risk, justify exclusion of the individual from the program.⁶⁷ This issue has arisen in cases involving admissions decisions concerning individuals with communicable diseases.⁶⁸

An individual claiming the ADA's protection must also prove that she suffers from a "physical or mental impairment that substantially limits one or more of [her] major life activities...."⁶⁹ Department of Justice regulations further define disability to include: "any mental or psychological disorder such as ... specific learning disabilities."⁷⁰

⁶³ *Id.* § 12182(b)(2)(A)(ii).

⁶⁴ 28 C.F.R. §§ 36.101-36.608 (2005).

⁶⁵ *Id.* § 36.309; Rothberg v. Law Sch. Admission Council, 300 F. Supp. 2d 1093 (D. Col. 2004).

⁶⁶ 28 C.F.R. § 36.208(a) (2004).

⁶⁷ *Id.* § 36.208(c).

⁶⁸ *See, e.g.,* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (holding that a school district could fire a teacher who had suffered a relapse of active tuberculosis if no reasonable accommodations would prevent her from being a danger to her students).

⁶⁹ 42 U.S.C. § 12102(2)(A) (2000).

⁷⁰ 28 C.F.R. § 35.104(3)(i)(B) (2004).

Accordingly, it has been held that a person who is claiming the protection of the ADA by reason of a learning disability must present proof of a “specific learning disability.”⁷¹

A critical issue which occurs in ADA claims in academic settings is the question of what constitutes a “specific learning disability.”⁷² A person who has been diagnosed with a learning disability is not necessarily “disabled” as that term is defined by the ADA.⁷³

The United States Court of Appeals for the Fourth Circuit considered this issue in *Betts v. Rector and Visitors of the University of Virginia*.⁷⁴ Betts had been admitted to the University’s Medical Academic Advanced Post-Baccalaureate (“MAPP”) program for economically disadvantaged or minority students.⁷⁵ Students who completed the program with a minimum 2.75 grade point average were guaranteed admission to the University of Virginia School of Medicine.⁷⁶ Betts had earned a 2.2 GPA in his first semester of the program and he continued into the second semester on academic probation.⁷⁷ He was tested for learning disabilities and was determined to have difficulty with short term memory and reading speed, although he was noted to have “average intellectual ability.”⁷⁸

Betts received extra time to complete his second semester exams and earned a 3.5 grade point average.⁷⁹ However, he had already taken some second semester exams

⁷¹ *Argen v. N.Y. State Bd. of Law Exam’rs*, 860 F. Supp. 84, 87 (W.D.N.Y. 1994).

⁷² *Id.*

⁷³ *Betts v. Rector and Visitors of the Univ. of Va.*, No. 97-1850, 1999 U.S. App. LEXIS 23105, at *15 (4th Cir. Sept. 22, 1999).

⁷⁴ *Id.*

⁷⁵ *Id.* at *3.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Betts*, 1999 U.S. App. LEXIS 23105, at *4.

without accommodations which reduced his overall grade point average to a 2.53.⁸⁰ He was then refused admission to the medical school.⁸¹

Betts filed suit alleging a violation of Section 504 and the ADA.⁸² The District Court granted summary judgment for the University, finding that Betts was not “disabled,” as that term is construed under the ADA.⁸³

On appeal, the Fourth Circuit stated that the analysis of whether a person with a learning disability was “disabled” for ADA purposes did not end with the diagnosis of the learning disability.⁸⁴ Courts must further determine whether the learning disability “substantially limits” at least one major life activity as required by the ADA.⁸⁵ Learning is considered a “major life activity.”⁸⁶ Thus, the issue became how to construe the “substantially limits” clause,⁸⁷ which is not defined within ADA.⁸⁸

The United States Supreme Court has held that when Congress does not expressly define a term, courts should “normally construe it in accord with its ordinary or natural meaning.”⁸⁹ The *Betts* court noted that to carry out the mandate of Title I, the Equal Employment Opportunity Commission (hereinafter “EEOC”) had issued regulations which defined the same term.⁹⁰ The EEOC’s defines “substantially limits” to mean that a person is:

- (i) [u]nable to perform a major life activity that the average person in the general population can perform; or

⁸⁰ *Id.* at *4-5.

⁸¹ *Id.*

⁸² *Id.* at *1.

⁸³ *Id.* at *7.

⁸⁴ *Id.* at *15.

⁸⁵ *Id.* at *16 (citing 42 U.S.C. § 12102(2)(A) (2000)).

⁸⁶ 29 C.F.R. § 1630.2(i) (2004).

⁸⁷ *Betts*, 1999 U.S. App. LEXIS 23105, at *16.

⁸⁸ *Id.*

⁸⁹ *Smith v. United States*, 508 U.S. 223, 228 (1993).

⁹⁰ *Betts*, 1999 U.S. App. LEXIS, at *18.

- (ii) [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the general population can perform that same major life activity.⁹¹

The *Betts* Court held that when “learning” is the “major life activity,” a person is not disabled “unless his ability to learn is significantly restricted.”⁹² Accordingly, the Court concluded that this determination required a comparison of the “learning disability” of the person alleging discrimination to the learning ability of most people in the general population.⁹³ The *Betts* Court provided a specific example of such a comparison:

Student A has average intellectual capability and an impairment (dyslexia) that limits his ability to learn so that he can only learn as well as ten percent of the population. His ability to learn is substantially impaired because it is limited in comparison to most people. Therefore, Student A has a disability for purposes of the ADA. By contrast, Student B has superior intellectual capability, but her impairment (dyslexia) limits her ability so that she can learn as well as the average person. Her dyslexia qualifies as an impairment. However, Student B's impairment does not substantially limit the major life function of learning, because it does not restrict her ability to learn as compared with most people. Therefore, Student B is not a person with a disability for purposes of the ADA.⁹⁴

Under this analysis, the Court found that while *Betts* had a learning disability, he was not “disabled” within the meaning of the ADA because his learning ability exceeded the learning ability of the general population.⁹⁵

⁹¹ *Id.* at *18 (quoting 29 C.F.R. § 1630.2(j)(1) (1998)).

⁹² *Id.* at *19.

⁹³ *Id.*

⁹⁴ *Id.* at *19-20 (citing, *Price v. Nat'l Bd. of Med. Exam'rs*, 966 F. Supp. 419, 427 (S.D.W.Va. 1997)).

⁹⁵ *Id.* at *20. However, the Fourth Circuit reversed the District Court's grant of summary judgment in favor of the University because it found that *Betts* was “regarded as having an impairment” since the University granted testing and course accommodations to *Betts*.

A similar result was reached in the case of *Spychalsky v. Sullivan*.⁹⁶ Spychalsky had been tested for learning disabilities when he was in high school.⁹⁷ The testing determined that his overall intelligence was within the high average range; his verbal ability was in the lower superior range; and his non-verbal ability was in the lower limits of the high average range.⁹⁸ He also tested in the high average range in abstract conceptualization and mathematic ability.⁹⁹ The tester found borderline achievement on tests which measure “passive auditory attention,” “short term memory” and “mental visual tracking,”¹⁰⁰ and concluded that the findings may indicate either a “lack of effort on the tasks” or a “genuine deficiency in attention skills.”¹⁰¹

After graduation from high school, Spychalsky attended Boston College where he requested no accommodations.¹⁰² He graduated in 1995 and took the Law School Admission Test (LSAT) without accommodations.¹⁰³ Spychalsky applied for and was granted admission to St. John’s University School of Law in 1997.¹⁰⁴ Once admitted, he requested testing accommodations.¹⁰⁵ St. John’s referred him for an additional evaluation which revealed that he tested at the 91st percentile in overall intellectual ability, placing him in the superior range.¹⁰⁶ However, the tester noted that he had weaknesses in spelling, where he tested at the borderline level.¹⁰⁷

⁹⁶ *Spychalsky v. Sullivan*, No. CV 01-0958, 2003 U.S. Dist. LEXIS 15704 (E.D.N.Y. Aug. 29, 2003).

⁹⁷ *Id.* at *2.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at *3.

¹⁰¹ *Id.*

¹⁰² *Spychalsky*, 2003 U.S. Dist. LEXIS 15704, at *5.

¹⁰³ *Id.* at *5-6.

¹⁰⁴ *Id.* at *6.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at *7.

¹⁰⁷ *Id.*

The tester recommended that Spychalsky not have spelling errors adversely affect his grades, that professors be notified not to penalize him for spelling errors, and that he should either type his exams with a computer with a spell checking feature or that he be allowed to dictate his exams and have a scribe write them out and correct his spelling.¹⁰⁸ The Law School granted these accommodations.¹⁰⁹ In 1998, Spychalsky requested that the Law School grant him “time and a half” to take his exams and again the Law School granted this accommodation.¹¹⁰

In October 2000, the Law School Registrar sent Spychalsky a note indicating that he had not completed the course in Taxation which was a requirement for graduation.¹¹¹ Spychalsky requested a waiver of that requirement due to his disability which “significant[ly] affect[ed] [his] ability to manipulate numbers.”¹¹² Sullivan, a Dean at the Law School, referred the request to Dean Furlong, who denied his request because the Taxation course was considered a core component of the curriculum.¹¹³ Her decision was reviewed by the Dean of the Law School and by members of the faculty who taught Taxation.¹¹⁴ The decision was also reviewed by the Director of the University’s Counseling Center.¹¹⁵ Following this review, Spychalsky’s request for a waiver of the Taxation requirement was denied.¹¹⁶ Spychalsky then filed suit claiming a violation of Title II of the ADA.¹¹⁷

¹⁰⁸ *Spychalsky*, 2003 U.S. Dist. LEXIS 15704, at *8.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at *8-9.

¹¹² *Id.* at *9.

¹¹³ *Id.* at *9-10.

¹¹⁴ *Spychalsky*, 2003 U.S. Dist. LEXIS 15704, at *10.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 11. The Court noted that the Title II claim failed to state a claim on which relief could be granted because Title II applied to public entities. St. John’s, as a private university, was not subject to suit under

Defendants filed a motion for summary judgment raising the issue that Spychalsky was not disabled within the meaning of the ADA.¹¹⁸ The Court noted that the United States Supreme Court held in *Toyota Motor Manufacturing Kentucky Inc. v. Williams*¹¹⁹ that merely submitting evidence of a diagnosis of a disability was insufficient to state a claim under the ADA.¹²⁰ Instead, claimants must offer “evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial.”¹²¹ The District Court then noted that Spychalsky had failed to present evidence which indicated that his impairment substantially limited the major life activities of reading or speaking.¹²² Spychalsky had graduated from high school, a prestigious university, and a top-ranked law school.¹²³ The Court further noted that Spychalsky’s testing rated him superior in overall intellect and in the superior or high average range on most tests.¹²⁴ The District Court concluded that “[t]his evidence, evaluated collectively, is insufficient to allow a reasonable trier of fact to conclude that Plaintiff was substantially limited in his ability to speak.”¹²⁵ The District Court held that “evidence of certain accommodations in high school and college ‘do not suffice to establish a record that his impairment created a substantial limitation of’ his ability to

Title II. Nevertheless, the Court considered the claim under Title III of the ADA which applied to providers of public accommodations including private universities.

¹¹⁸ *Id.* at 12.

¹¹⁹ *Toyota Motors Mfg. Ky. Inc. v. Williams*, 534 U.S. 184, 198 (2002).

¹²⁰ *Spychalsky*, 2003 U.S. Dist. LEXIS, at *20-21.

¹²¹ *Toyota Motors*, 534 U.S. at 198 (quoting *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999)).

¹²² *Spychalsky*, 2003 U.S. Dist. LEXIS, at *24-25.

¹²³ *Id.* at *24. While the case was pending, Spychalsky took and passed the Taxation course and was awarded his law degree.

¹²⁴ *Id.* at *23.

¹²⁵ *Id.* at *25.

learn, read, or speak.”¹²⁶ Accordingly, the District Court granted the Defendants’ motion for summary judgment.¹²⁷

C. Harmonizing the Rehabilitation Act and the ADA

Some courts have held that the elements of a claim under Section 504 of the Rehabilitation Act are “identical” to those under the ADA.¹²⁸ Other courts have noted that Title II of the ADA was “expressly modeled” on Section 504.¹²⁹ Furthermore, it has been noted that “there is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act.”¹³⁰ “[C]ourts are required to ‘construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.’”¹³¹ “Because the language of the two statutes is substantially the same... [t]he legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA.”¹³²

This analysis must be viewed with caution in light of the United States Supreme Court’s ruling in *Toyota Motors I*, where the Court noted that while the Department of Health, Education and Welfare was expressly granted regulating authority under Section 504, the EEOC was not granted similar authority to promulgate regulations interpreting

¹²⁶ *Id.* at *28 (quoting *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 159 (E.D.N.Y. 2002)).

¹²⁷ *Id.* at *1. The Court also held that Spsychalsky’s evidence was insufficient to overcome a motion for summary judgment on his ADA claim of having a record of a substantially limiting impairment or being discriminated against based on being regarded as having a disability.

¹²⁸ *Spsychalsky*, 2003 U.S. Dist. LEXIS, at *19 (citing *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999)).

¹²⁹ *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir. 1999).

¹³⁰ *Id.*

¹³¹ *Id.* (quoting *Bragdon v. Abbot*, 524 U.S. 624 (1998)).

¹³² *Id.* (internal quotations and citations omitted)

the term “disability” in the ADA.¹³³ Accordingly, the Court stated, the persuasive authority of the EEOC regulations is “less clear.”¹³⁴

One significant distinction is that under Section 504, a claimant must prove that his disability was the “sole” reason for the alleged improper discrimination.¹³⁵ This requirement puts an increased burden on a claimant when compared to the requirements of the ADA, which only require a showing that the disability was a “motivating factor in the discrimination.”¹³⁶

Other important distinctions between the two statutes concern the remedies available to claimants. Section 504 provides the same remedies that are available under Title VI of the Civil Rights Act of 1964 (hereinafter “Title VI”).¹³⁷ While Title VI is silent concerning the availability of a private cause of action for monetary damages, it is well settled that such a remedy is available for intentional violations of Title VI and, by analogy, is also available under the Rehabilitation Act.¹³⁸

Title II of the ADA likewise provides for monetary damages for violations. In the case of *Board of Trustees of the University of Alabama v. Garrett*,¹³⁹ however, the United States Supreme Court held that the grant of sovereign immunity contained in the Eleventh Amendment of the United States Constitution protects states from claims for monetary damages under Title I of the ADA.¹⁴⁰ The Supreme Court left open in *Garrett* the question of Eleventh Amendment immunity under Title II and specifically noted that

¹³³ *Toyota Motors*, 534 U.S. at 194.

¹³⁴ *Id.*

¹³⁵ 29 U.S.C. § 794(a) (2000). *See also* *Garcia v. S.U.N.Y. Health Sci. Ctr.*, 280 F.3d 98, 112 (2d Cir. 2001); *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1028 (8th Cir. 1999).

¹³⁶ *Spychalsky*, 2003 U.S. Dist. LEXIS, at *19.

¹³⁷ 42 U.S.C. § 2000a-6(b) (2000).

¹³⁸ *Garcia*, 280 F.3d at 111-12.

¹³⁹ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

¹⁴⁰ *Id.* at 374, n.9.

“[w]e are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment.”¹⁴¹

In *Garcia v. S.U.N.Y. Health Science Center*,¹⁴² the Second Circuit Court of Appeals, relying on *Garrett*, struck down claims for monetary damages against state actors under Title II of the ADA, where claims of discrimination were based on “deliberate indifference.”¹⁴³ The *Garcia* Court held that Title II claims for monetary damages against state actors must be based on “proof of discriminatory animus or ill will.”¹⁴⁴

The *Garcia* Court noted that Title II claims for monetary damages against local governmental agencies can still be brought based on a showing of “deliberate indifference” because local governmental agencies do not enjoy Eleventh Amendment immunity.¹⁴⁵ Furthermore, the Court held that its decision did not bar actions against state actors under Title II which sought injunctive relief for claims based on “deliberate indifference.”¹⁴⁶

The United States Supreme Court examined the Eleventh Amendment immunity issue as it applied to Title II in *Tennessee v. Lane*.¹⁴⁷ In *Lane*, a sharply divided Court held that Congress, in enacting Title II, appropriately exercised its power under section 5

¹⁴¹ *Id.* at 360, n.1.

¹⁴² *Garcia*, 280 F. 3d 98.

¹⁴³ *Id.* at 114.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Tennessee v. Lane*, 541 U.S. 509 (2004).

of the Fourteenth Amendment to waive states' Eleventh Amendment immunity where the constitutional violation implicated the accessibility of judicial services.¹⁴⁸

The Supreme Court is still defining the limits of Eleventh Amendment immunity as it applies to Title II actions. The Court recently accepted certiorari and consolidated the cases of *United States v. Georgia*¹⁴⁹ and *Goodman v. Georgia*¹⁵⁰ to determine whether a state was immune from a prisoner's Title II claim of discrimination due to alleged inadequately accessible prison housing.

Title III of the ADA incorporates the remedies which are contained in 42 U.S.C. section 2000a-3(a).¹⁵¹ Monetary damages are not available to private litigants under that section.¹⁵²

II.

THE OTHERWISE QUALIFIED VS. ESSENTIAL FUNCTION DILEMMA

'I know what you're thinking about,' said Tweedledum: 'but it isn't so, no how.'

'Contrariwise,' continued Tweedledee, 'if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic.'

'I was thinking,' Alice said very politely, 'which is the best way out of this wood: it's getting so dark. Would you tell me, please?'

But the fat little men only looked at each other and grinned.¹⁵³

¹⁴⁸ *Id.* at 531.

¹⁴⁹ *United States v. Georgia*, 125 S. Ct. 2256 (2005).

¹⁵⁰ *Goodman v. Ray*, 120 Fed. Appx. 785 (11th Cir. 2004), *cert. granted*, 125 S.Ct. 2266 (2005) (consolidated with *United States v. Georgia*, 125 S. Ct. 2256 (2005)).

¹⁵¹ 42 U.S.C. § 12188(a)(1) (2000).

¹⁵² *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401-02 (1968); *Spychalsky*, 2003 U.S. Dist. LEXIS, at *15.

Section 504 of the Rehabilitation Act provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”¹⁵⁴ The United States Supreme Court in *Southeastern Community College v. Davis*¹⁵⁵ noted that this mandate could not be followed literally because it would prevent any institution from taking any adverse action against a handicapped individual.¹⁵⁶ The Court noted that the regulations promulgated by the Department of Health, Education and Welfare stated that a qualified handicapped person is “[with] respect to post secondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school’s] education program or activity.”¹⁵⁷ “The term ‘technical standards’ refers to all nonacademic admission criteria.”¹⁵⁸

The Supreme Court also noted that the implementing regulations contained a statement in the appendix which expressed the Department’s intention as follows: “[u]nder such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be ‘otherwise qualified’ for the job of driving. Clearly, such a result was not intended by Congress.”¹⁵⁹ The Court concluded, therefore, that “neither the language, purpose, nor history of section 504 reveals an intent to impose an

¹⁵³ CARROLL, *supra* note 2, at 144.

¹⁵⁴ 29 U.S.C. § 794(a) (2000).

¹⁵⁵ *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979).

¹⁵⁶ *Id.* at 406.

¹⁵⁷ *Id.*; 45 C.F.R. § 84.3(k)(3) (1978).

¹⁵⁸ *Davis*, 442 U.S. at 406 (quoting 45 C.F.R. § 84.3(k)(3), pt. 84 App. A, p.405 (1978)).

¹⁵⁹ *Id.* at 407 (quoting 45 C.F.R. § 84.3(k)(3), pt. 84 App. A, p. 405 (1978)).

affirmative-action obligation on all recipients of federal funds.”¹⁶⁰ In addition, the Court noted that “[s]ection 504 imposes no requirement upon an educational institution to lower or to effect modifications of standards to accommodate a handicapped person.”¹⁶¹

Six years later, the Supreme Court revisited this issue in *Alexander v. Choate*.¹⁶² The Supreme Court acknowledged that its use of the term “affirmative action” had led to much criticism for failing to differentiate between affirmative action and reasonable accommodations.¹⁶³ It noted that “the former is said to refer to a remedial policy for the victims of past discrimination, while the latter relates to the elimination of existing obstacles against the handicapped.”¹⁶⁴ The Court found in *Alexander* that “affirmative action,” as used in *Davis*, referred to “‘changes,’ ‘adjustments’ or ‘modifications’ which were ‘substantial’” or which would constitute “fundamental alteration[s] in the nature of a program . . .”¹⁶⁵ when compared to “those changes that would be reasonable accommodations.”¹⁶⁶

Accordingly, the Court commented that:

The regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access. See, e.g., . . . 45 CFR § 84.44(a)(1984) (requiring certain modifications to the regular academic programs of secondary education institutions, such as changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted).¹⁶⁷

¹⁶⁰ *Id.* at 411.

¹⁶¹ *Id.* at 413.

¹⁶² *Alexander v. Choate*, 469 U.S. 287 (1985).

¹⁶³ *Id.* at 301 n.20.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (internal citations omitted).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 301 n.21.

The Supreme Court again examined the “otherwise qualified” question in *School Board of Nassau County v. Arline*.¹⁶⁸ In *Arline*, a school district fired a teacher who had a relapse of active tuberculosis.¹⁶⁹ The United States Court of Appeals for the Eleventh Circuit held that she was protected by Section 504.¹⁷⁰ The Supreme Court granted certiorari and remanding the case, holding that a person with a contagious disease can be handicapped within the meaning of Section 504 of the Rehabilitation Act.¹⁷¹

The Supreme Court further held that in order to determine whether the teacher was “otherwise qualified,” the District Court:

[would] need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.¹⁷²

The United States Court of Appeals for the Ninth Circuit in *Zukle v. The Regents of the University of California*¹⁷³ determined that *Davis* and *Alexander* made it “clear that an educational institution is not required to make fundamental or substantial modifications to its programs or standards; it need only make reasonable ones.”¹⁷⁴ The *Davis* court noted that a program receiving federal financial assistance may violate

¹⁶⁸ *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

¹⁶⁹ *Id.*

¹⁷⁰ *Arline v. Sch. Bd. of Nassau County*, 772 F.2d 759 (11th Cir. 1985).

¹⁷¹ *Arline*, 480 U.S. at 289.

¹⁷² *Id.* at 287.

¹⁷³ *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999).

¹⁷⁴ *Id.* at 1046 (citing *Alexander v. Choate*, 469 U.S. 287 (1985)).

Section 504 if it refuses to make modifications to its educational program which would not entail undue financial or administrative burden.¹⁷⁵

The United States Court of Appeals for the Third Circuit in *Nathanson v. The Medical College of Pennsylvania*¹⁷⁶ noted that federal regulations required consideration of the following factors in order to determine whether an accommodation would create an undue hardship:

- (1) The overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget;
- (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and
- (3) The nature and cost of the accommodation needed.¹⁷⁷

The *Nathanson* Court stated this determination must be made on a case-by-case basis.¹⁷⁸

The First Circuit echoed this sentiment when it found that “what is reasonable in a particular situation may not be reasonable in a different situation – even if the situational differences are relatively slight.”¹⁷⁹

Such case-by-case evaluations have led courts to conclude that: an optometry college need not modify or eliminate a program requirement which mandates the ability to use certain clinical instruments for a student suffering from retinitis pigmentosa, even though those requirements were put in place after the student enrolled in the program;¹⁸⁰ a law school need not eliminate the graduation requirement of completion of the taxation

¹⁷⁵ Se. Cmty. Coll. V. Davis, , 442 U.S. 397, 412-13 (1979).

¹⁷⁶ *Nathanson v. Med. Coll. of Pa.*, 926 F.2d 1368 (3d Cir. 1991).

¹⁷⁷ *Id.* at 1386 (citing 45 C.F.R. § 84.12(c)(1)-(3) (1990)).

¹⁷⁸ *Id.* at 1385.

¹⁷⁹ *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 795 (1st Cir. 1992).

¹⁸⁰ *Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 575 (6th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989).

course for a student claiming computational and other learning disabilities;¹⁸¹ a medical school need not modify its clinical training schedule by giving a student with a reading disability eight weeks between clerkships in order to study and prepare for the clinic rotations;¹⁸² a law school need not allow a disabled student to take a part-time course load where the school only offered a full-time program, even though the American Bar Association authorizes law schools to have part-time programs for the study of law;¹⁸³ a medical school was not required to allow a dyslexic student to provide supplemental oral answers to multiple choice tests;¹⁸⁴ a high school athletic association was not required to waive its age limitations for participation in sports programs for a learning disabled student;¹⁸⁵ a university was not required to waive its foreign language requirement for students with learning disabilities;¹⁸⁶ a medical school did not discriminate against a student with an obsessive-compulsive disorder who was dismissed after twice failing his psychiatry clinic;¹⁸⁷ a university need not modify its nursing program's clinical requirements for a student suffering from a non-typical pregnancy;¹⁸⁸ a college did not discriminate against a learning disabled Physicians Assistant student after granting and then withdrawing permission for the student to take his examinations orally;¹⁸⁹ a law school need not give a student oral examinations;¹⁹⁰ a medical school need not renew the faculty appointment of a visually impaired physician and did not need to offer the

¹⁸¹ *Spychalsky v. Sullivan*, No. CV 01-0958, 2003 U.S. Dist. LEXIS 15704, *36 (E.D.N.Y. Aug. 29, 2003).

¹⁸² *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1049-50 (9th Cir. 1999).

¹⁸³ *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 859 (5th Cir. 1993).

¹⁸⁴ *Pottgen v. Univ. of Osteopathic Med. and Health Scis.*, 220 F.3d 906, 909 (8th Cir. 2000).

¹⁸⁵ *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994).

¹⁸⁶ *Guckenberger v. Boston Univ.*, 974 F. Supp. 106,147 (D. Mass. 1998).

¹⁸⁷ *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1029 (8th Cir. 1999). However, the court reversed the district court's grant of summary judgment in favor of the University on the student's retaliation claim and remanded the case for further action.

¹⁸⁸ *Darian v. Univ. of Mass.*, 980 F. Supp. 77, 91 (D. Mass. 1997).

¹⁸⁹ *DuBois v. Alderson-Broadus Coll., Inc.*, 950 F. Supp. 754, 760 (N.D.W.Va. 1997).

¹⁹⁰ *Murphy v. Franklin Pierce Law Ctr.*, 882 F. Supp. 1176, 1182 (D.N.H. 1994).

physician a part-time appointment;¹⁹¹ a law school need not lower its 2.0 minimum grade point average standard to accommodate a student with a central nervous system metabolic disorder;¹⁹² a law school need not waive minimum grade point average requirements for a recovered alcoholic;¹⁹³ a law school did not discriminate by dismissing and failing to readmit a student suffering from post traumatic stress disorder who received more than nine credit hours of grades below a C- in violation of the school academic standards;¹⁹⁴ and a law school did not discriminate against a visually impaired law student by dismissing her after she failed to meet its 2.0 academic standard for continuation in its program.¹⁹⁵

Conversely, a summary judgment in favor of a medical school was reversed on appeal where the school failed to give extra time between clinical rotations and then dismissed a student with a verbal processing disorder who had repeatedly failed various clinical programs;¹⁹⁶ a university was denied summary judgment where it dismissed a pastoral psychology student who was hospitalized with clinical depression;¹⁹⁷ a state board of bar examiners was ordered to allow a dyslexic applicant to take the bar examination using twice the normal time, the use of a computer, permission to circle multiple choice examination questions in the examination booklet and the use of examinations with enlarged print;¹⁹⁸ and a testing agency was ordered to give a test-taker

¹⁹¹ *Hong v. Temple Univ.*, 2000 U.S. Dist. LEXIS 7301, *20-23 (E.D.Pa. 2000).

¹⁹² *Aloia v. N.Y. Law Sch.*, 1988 U.S. Dist. LEXIS 7769, *23-24 (S.D.N.Y. 1988).

¹⁹³ *Anderson v. Univ. of Wis.*, 665 F. Supp. 1372 (W.D.Wisc. 1987).

¹⁹⁴ *Gill v. Franklin Pierce Law Ctr.*, 899 F. Supp. 850, 854-56 (D.N.H. 1995).

¹⁹⁵ *Murphy*, 882 F. Supp. at 1177-82 (D.N.H. 1994).

¹⁹⁶ *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 821 (9th Cir. 1999).

¹⁹⁷ *Carlin v. Trs. of Boston Univ.*, 907 F. Supp. 509, 511 (D. Mass. 1995).

¹⁹⁸ *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 2001 U.S. Dist. LEXIS 11926, *147-48 (S.D.N.Y. 2001).

who suffered from an “expressive writing disorder” fifty percent additional time and a quiet room in which to take the Law School Admissions Test.¹⁹⁹

An in-depth reading of the above decisions demonstrates that both institutions and the courts have struggled while attempting to resolve “the otherwise qualified vs. essential function dilemma.”²⁰⁰ Some courts have issued conflicting decisions within the same year in almost identical cases.²⁰¹ The distinction in the outcome in these cases, if any, appears to be the extent to which the individual institutions have documented their efforts to justify what constituted “fundamental” program requirements as well as to justify the extent to which “reasonable” accommodations could be granted without changing the fundamental nature of their academic programs. To the extent that institutions could do so, the courts appear willing to defer to academic decision-makers.

III.

ACADEMIC DEFERENCE AND ITS LIMITS

Everything was happening so oddly that she didn't feel a bit surprised at finding the Red Queen and the White Queen sitting close to her, one on each side: she would have like very much to ask them how they came there, but she feared it would not be quite civil. However, there would be no harm, she thought, in asking if the game was over. “Please, would you tell me —” she began, looking timidly at the Red Queen.

“Speak when you're spoken to!” The Queen sharply interrupted her.²⁰²

¹⁹⁹ Rothberg v. Law Sch. Admission Council, Inc., 300 F. Supp. 2d 1093, 1098, 1107 (D.C. Col. 2004).

²⁰⁰ See discussion *supra* Part II.

²⁰¹ Compare *Zukle*, 166 F.3d at 1042-44 (upholding summary judgment in favor of the University of California on a Rehabilitation and ADA claim filed by a medical student who alleged that the University failed to allow her to retake certain courses and clinical courses after repeated failure), with *Wong I*, 192 F.3d at 811-15 (reversing summary judgment in favor of the medical school under almost identical circumstances, only seven months later).

²⁰² CARROLL, *supra* note 2, at 192.

In *Board of Curators of the University of Missouri v. Horowitz*, the United States Supreme Court addressed the issue of deference to academic decision-makers in the case of a student who had been dismissed from medical school for failure to meet the school's academic requirements in her clinical education program.²⁰³ Horowitz alleged that she was dismissed without being afforded procedural due process, in violation of the Fourteenth Amendment to the United States Constitution.²⁰⁴ While the case does not concern a claim under Section 504 or under the ADA, it is nevertheless instructive of the Supreme Court's evolving deference to academic decision-makers.

In *Horowitz*, the Supreme Court noted that the student did not have a recognized property right in her medical school education.²⁰⁵ It deferred a decision concerning whether she had a liberty interest in continuing her medical education.²⁰⁶ Instead, without deciding that such an interest existed, the Court concluded that she had been afforded the appropriate due process in her dismissal.²⁰⁷

In reaching this decision, the Court addressed the role of the courts in the academic decision making process. The Court noted that whether a student is making sufficient academic progress or whether the student should be dismissed from an academic program is akin to the "decision of an individual professor as to the proper grade for a student in his course."²⁰⁸ Additionally, the Court held that "[t]he determination whether to dismiss a student for academic reasons requires an expert

²⁰³ Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 79, 84-85 (1978).

²⁰⁴ *Id.* at 79-80.

²⁰⁵ *Id.* at 82.

²⁰⁶ *Id.* at 84.

²⁰⁷ *Id.* at 85.

²⁰⁸ *Id.* at 90.

evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking [sic].”²⁰⁹

The *Horowitz* Court “decline[d] to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship”²¹⁰ and concluded that “[c]ourts are particularly ill-equipped to evaluate academic performance.”²¹¹

In *Southeastern Community College v. Davis*, the Supreme Court addressed the issue of whether Section 504 required an academic institution to modify its educational program to admit a handicapped student.²¹² Ms. Davis suffered from a severe hearing loss which required her to read lips in order to understand what people said.²¹³ The nursing program at Southeastern Community College refused to admit her due to her inability to understand verbal communication.²¹⁴ It also refused her request to modify the nursing program to eliminate the clinical portion of her training.²¹⁵

Without directly addressing the issue of deference to academic decisions, the Court held that the college was not required to make fundamental modifications in its nursing program to accommodate Ms. Davis.²¹⁶ The Court noted that “Southeastern’s program, structured to train persons who will be able to perform all normal roles of a registered nurse, represents a legitimate academic policy.”²¹⁷ The Court stated that Section 504 does not impose an obligation on colleges to “lower or to effect substantial

²⁰⁹ *Horowitz*, 435 U.S. at 90.

²¹⁰ *Id.*

²¹¹ *Id.* at 91.

²¹² *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 400 (1979).

²¹³ *Id.* at 400-01.

²¹⁴ *Id.* at 401-02.

²¹⁵ *Id.* at 409-10.

²¹⁶ *Id.* at 410.

²¹⁷ *Id.* at 413 n.12.

modifications of standards to accommodate a handicapped person.”²¹⁸ Finally, the Court noted that “there was no violation of § 504 when *Southeastern* concluded that respondent did not qualify for admission to its program.”²¹⁹ Thus the Court deferred, in effect, to the college’s academic decision making concerning admission to its nursing program.

The Supreme Court revisited the academic deference issue in *Regents of the University of Michigan v. Ewing*.²²⁰ Ewing had been admitted to the University’s Inteflex program, a program which at the time, allowed graduation from college and medical school in six years.²²¹ Almost immediately, Ewing faced difficulty with the program and had to repeat several courses.²²² Eventually, Ewing managed to complete the first four years of the program and took the National Board of Medical Examiners Part I test (hereinafter NBME Part I); passage of which was essential to continuing in the clinical portion of the program.²²³ Ewing failed the NBME Part I, obtaining the lowest grade in the history of the Inteflex program at the University of Michigan.²²⁴ The University dismissed Ewing from the program and, despite several appeals, refused to readmit him or to let him retake NBME Part I.²²⁵

Ewing filed suit alleging various causes of action, including a violation of his substantive due process rights under the Fourteenth Amendment.²²⁶ After conducting a trial, the district court found that Ewing’s due process rights had not been violated by the

²¹⁸ *Davis*, 442 U.S. at 413.

²¹⁹ *Id.* at 414 (emphasis added).

²²⁰ 474 U.S. 214 (1985).

²²¹ *Id.* at 215.

²²² *Id.* at 217-18 (quoting *Ewing v. Bd. of Regents of the Univ. of Mich.*, 559 F. Supp. 791, 793 (E.D. Mich. 1983)).

²²³ *Id.* at 215-16.

²²⁴ *Id.* at 216.

²²⁵ *Id.* at 216-17.

²²⁶ *Ewing*, 474 U.S. at 217.

University.²²⁷ In reversing the district court's judgment, the United States Court of Appeals for the Sixth Circuit found that there was a constitutional violation and ordered the University to allow Ewing to retake the NBME Part I and to reinstate him if he passed the test.²²⁸ The Supreme Court granted certiorari and reversed the decision of the Sixth Circuit.²²⁹

In its decision, the Supreme Court again examined the issue of deference to academic decision-makers. The Supreme Court stated that

[w]hen judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.²³⁰

The Supreme Court also noted a concern about treading on the "academic freedom" safeguards contained in the First Amendment.²³¹ It stated that "[d]iscretion to determine, on academic grounds, who may be admitted to study, has been described as one of the 'four essential academic freedoms' of a university."²³²

In *Wynne v. Tufts University School of Medicine*, the United States Court of Appeals for the First Circuit considered the extent to which a medical school must alter its program of instruction to provide reasonable accommodations to a learning-disabled student.²³³ Wynne was allowed to enter Tufts Medical School under its affirmative

²²⁷ *Id.* at 220; *see Ewing*, 559 F. Supp. at 799, for the district court's analysis of why Ewing's due process rights had not been violated by the University.

²²⁸ *Ewing*, 474 U.S. at 221; *see also Ewing v. Bd. of Regents of the Univ. of Mich.*, 742 F.2d 913, 916 (6th Cir. 1984) (discussing the test that the court applied in finding the constitutional violation).

²²⁹ *Ewing*, 474 U.S. at 228.

²³⁰ *Id.* at 225 (citing *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)).

²³¹ *Id.* at 226 (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)).

²³² *Id.* (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

²³³ *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 20 (1st Cir. 1991) [hereinafter *Wynne I*].

action program for minority applicants even though his Medical College Aptitude Test (MCAT) score and undergraduate grade point average were lower than most Tufts students.²³⁴ During his first year in school he failed eight of his fifteen courses.²³⁵ Even though the program guidelines provide for dismissal after five failures, the dean allowed Wynne to repeat the first-year program.²³⁶

Prior to repeating the first-year program, Wynne underwent neuropsychological testing that determined profiles like his own had been identified in the learning-disabled population.²³⁷ After the testing, he reentered medical school and was provided accommodations which included counseling, tutors, note-takers and taped lectures.²³⁸ Nevertheless, Wynne failed two courses his second year, Pharmacology and Biochemistry.²³⁹ He was allowed to retake these exams and passed Pharmacology but again failed Biochemistry.²⁴⁰ At this time, he was formally dismissed from the medical school.²⁴¹

Wynne filed suit alleging a violation of Section 504 based on Tufts' failure to allow him to take oral final exams.²⁴² The district court granted summary judgment in favor of Tufts and Wynne subsequently appealed.²⁴³ A panel of the First Circuit reversed the district court's holding, stating that Tufts had failed to show that it did not have a duty under Section 504 to accommodate Wynne's special needs.²⁴⁴

²³⁴ *Id.* at 21.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Wynne I*, 932 F.2d at 21.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 22.

²⁴² *Id.* at 20, 22.

²⁴³ *Id.* at 20.

²⁴⁴ *Id.* at 20.

The First Circuit granted rehearing en banc and examined the nature of the obligations of educational institutions under Section 504.²⁴⁵ The Court noted that *Ewing* held that, in reviewing academic decisions, courts must “show great respect for the faculty’s professional judgment.”²⁴⁶ Furthermore, when courts review the “otherwise qualified-reasonable accommodations” requirement of Section 504, they must show the proper deference to academic decisions with two qualifications:

First, as we have noted, there is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation. Second, the *Ewing* formulation, hinging judicial override on “a substantial departure from accepted academic norms,” is not necessarily a helpful test in assessing whether professional judgment has been exercised in exploring reasonable alternatives for accommodating a handicapped person.²⁴⁷

Accordingly, the Court looked to an analysis similar to the process of determining the applicability of qualified immunity for governmental decision-makers.²⁴⁸ The Court created the following test for use in reviewing academic decisions:

If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.²⁴⁹

The Court remanded the case to the District Court for a determination of whether Tufts met its burden concerning the denial of the requested accommodation.²⁵⁰ On

²⁴⁵ *Wynne I*, 932 F.2d at 21.

²⁴⁶ *Id.* at 25 (quoting *Ewing*, 474 U.S. at 225).

²⁴⁷ *Id.* at 25-26.

²⁴⁸ *Id.* at 26.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 29.

remand, the district court again granted Tufts' motion for summary judgment and Wynne appealed to the First Circuit.²⁵¹

The First Circuit, on appeal, concluded that it would not second guess the academic decision made by the Tufts faculty.²⁵²

[T]he point is not whether a medical school is “right” or “wrong” in making program-related decisions. Such absolutes rarely apply in the context of subjective decision-making, particularly in a scholastic setting. The point is that Tufts, after undertaking a diligent assessment of the available options, felt itself obliged to make “a professional, academic judgment that [a] reasonable accommodation [was] simply not available.”²⁵³

Accordingly, the First Circuit affirmed the grant of summary judgment in favor of Tufts.²⁵⁴

Other courts have added important caveats to the above standards. The Third Circuit implied that stringent admission standards may be entitled to more deference if they were designed to “protect public health and safety, a concern that has been given considerable deference by the courts.”²⁵⁵ Similarly, the Sixth Circuit noted that, “[s]urely the law does not require that a handicapped person be accommodated by waiver of a requirement when his failure to meet the requirement poses potential danger to the public.”²⁵⁶

The Eighth Circuit declined to decide whether academic institutions, like employers, are required under the ADA to engage in an interactive process with students

²⁵¹ Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 793 (1st Cir. 1992) [hereinafter *Wynne II*].

²⁵² *Id.* at 794.

²⁵³ *Id.* at 795 (quoting *Wynne I*, 932 F.2d at 27-28).

²⁵⁴ *Id.* at 796.

²⁵⁵ Nathanson v. Med. Coll. of Pa., 926 F.2d 1268, 1384 (3rd Cir. 1990) (citing Judith Welsh Wegner, *The Antidiscrimination Model Reconsidered: Enshrining Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 476-78 (1984)).

²⁵⁶ Doherty v. S. Coll. of Optometry, 862 F.2d 570, 575 (6th Cir. 1988) (quoting *Doherty v. S. Coll. of Optometry*, 659 F. Supp. 662, 673 (W.D. Tenn. 1987)).

to determine whether reasonable accommodations can be found for their disability.²⁵⁷

The Fourth Circuit, meanwhile, noted that a university's academic decisions were entitled to less deference and were reviewable by courts where the university determined that a student was entitled to extra time on examinations but expelled the student from school based, in part, on grades which were obtained by the student before the accommodation was granted.²⁵⁸

The Ninth Circuit agreed with the First Circuit that "a court's duty is to first find the basic facts, giving due deference to the school, and then to evaluate whether those facts add up to a professional, academic judgment that reasonable accommodation is simply not available."²⁵⁹ However, the court cautioned that "extending deference to educational institutions must not impede our obligation to enforce the ADA and the Rehabilitation Act. Thus we must be careful not to allow academic decisions to disguise truly discriminatory requirements."²⁶⁰

Seven months later, in a strikingly similar case, the court affirmed its duty to beware of abuse of this deference, specifically noting the importance that the courts, "ensure that educational institutions are not 'disguis[ing] truly discriminatory requirements' as academic decisions; to this end, '[t]he educational institution has a real obligation...to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation."²⁶¹

²⁵⁷ See *Fjellstad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir. 1999); *Stern v. Univ. of Osteopathic Med. and Health Sciences*, 220 F.3d 906, 909 (8th Cir. 2000).

²⁵⁸ *Betts v. The Rector and Visitors of the Univ. of Va.*, 1999 U.S. App. LEXIS 23105 (4th Cir. 1999).

²⁵⁹ *Zukle v. The Regents of the Univ. of Cal.*, 166 F.3d 1041, 1048 (9th Cir. 1999) (quoting *Wynne I*, 932 F.2d at 27-28).

²⁶⁰ *Id.*

²⁶¹ *Wong*, 192 F.3d at 817 (quoting *Zukle*, 166 F.3d at 1048) (emphasis omitted).

The Court held that:

Subsumed within this standard is the institution's duty to make itself aware of the nature of the student's disability; to explore alternatives for accommodating the student; and to exercise professional judgment in deciding whether the modifications under consideration would give the student the opportunity to complete the program without fundamentally or substantially modifying the school's standards.²⁶²

To this end, the *Wong* Court concluded that institutions must meet certain standards and must be able to show that they met these standards.²⁶³ For example, these institutions will need to “submit undisputed facts showing that relevant officials considered alternative means, their feasibility, [and] cost and effect on the academic program.”²⁶⁴ Additionally, courts should refuse to defer to academic decisions, “when institutions present no evidence regarding who took part in the decision” or when “simple conclusory averments of [the] head of [an] institution” is all that is offered to support a “deferential standard of review.”²⁶⁵

Finally, the Fifth Circuit determined that while courts must defer to academic decisions which are devoid of evidence of either malice or ill-will, courts need not give deference to the American Bar Association standard for accrediting law schools when a court considers what accommodations are reasonable and required under Section 504 of the Rehabilitation Act.²⁶⁶

The primary lesson of these cases is that the courts will not interfere with academic operations as long as institutions can document that a deliberative process was

²⁶² *Id.* at 818.

²⁶³ *Id.*

²⁶⁴ *Id.* (quoting *Wynne I*, 932 F.2d at 26) (internal quotations omitted).

²⁶⁵ *Id.* (quoting *Wynne I*, 932 F.2d at 28) (internal quotations omitted).

²⁶⁶ *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 859 (5th Cir. 1993).

undertaken to determine whether a program requirement was truly fundamental.²⁶⁷ So long as such a deliberative process is in place, the courts will not second guess academic decision-makers.²⁶⁸ In other words, the courts will not try to decide whether the institutions' decisions were "right or wrong."²⁶⁹

Unfortunately, this excessive deference to academic decision-makers can sometimes result in courts not enforcing Congressional mandates to eliminate discrimination in academic programs where reasonable accommodations could allow disabled students to successfully compete in and complete academic programs. The courts must be vigilant to ensure that explanations offered by academic institutions were not created in hindsight to justify their discrimination against disabled students, but are truly reflective of important fundamental program requirements which cannot be altered to provide reasonable accommodation.

IV.

THROUGH THE LOOKING GLASS: ALICE'S JOURNEYS THROUGH THE WORLD OF ACADEMIC ACCOMMODATIONS AND THE STRANGE CREATURES SHE MET.

"Where do you come from?" said the Red Queen. "And where are you going? Look up, speak nicely, and don't twiddle your fingers all the time."

²⁶⁷ See *supra* text accompanying notes 220-34.

²⁶⁸ See *Zukle*, 166 F.3d at 1048 ("once an educational institution has fulfilled this obligation however, we will defer to its academic decisions"); see also *Wynne I*, 932 F.2d at 25-26 ("[T]here is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation.").

²⁶⁹ *Wynne II*, 976 F.2d at 795.

Alice attended to all these directions, and explained, as well as she could, that she had lost her way.

“I don't know what you mean by *YOUR* way,” said the Queen: “all the ways about here belong to *ME* -- but why did you come out here at all?” she added in a kinder tone. “Curtsey while you're thinking what to say, it saves time.”²⁷⁰

The Red Queen

Carlin v. Trustees of Boston University²⁷¹

Marie Carlin entered Boston University's Doctor of Philosophy program in pastoral psychology in September of 1987.²⁷² The program consisted of four semesters of academic general research followed by a two-year clinical component.²⁷³ Ms. Carlin completed the first year of the program and was awarded a fellowship from Boston University to attend the Danielson Institute for Pastoral Counseling to complete the two-year clinical portion of the doctoral program.²⁷⁴ She completed the first year of the Danielson fellowship training and in May of 1989, she received a certificate stating that she had successfully completed the first-year clinical requirement.²⁷⁵

Throughout her enrollment in the doctoral program, Ms. Carlin had been suffering from depression.²⁷⁶ Due to the worsening of her condition in the spring of 1989, she requested and was granted a leave of absence from Boston University to last for one year.²⁷⁷ In April of 1990, her condition deteriorated so much that she was admitted to a

²⁷⁰ CARROLL, *supra* note 2, at 124.

²⁷¹ 907 F. Supp. 509 (D. Mass. 1995).

²⁷² *Id.* at 510.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Carlin*, 907 F. Supp. at 510.

psychiatric hospital where she remained under treatment until February of 1991.²⁷⁸ She requested and was granted an extension of her leave of absence for an additional year.²⁷⁹

Ms. Carlin wrote to her academic advisor in June of 1991, informing him that she was ready to return to the doctoral program.²⁸⁰ She sent copies of the letter to both the Dean of Boston University and to the Director of the Danielson Institute.²⁸¹ She received a response in August of the same year, indicating that the faculty had decided not to readmit her into the program.²⁸² Ms. Carlin responded by filing suit in the United States District Court alleging that the University had violated Section 504 of the Rehabilitation Act.²⁸³

Boston University filed a motion for summary judgment, stating that the decision to terminate Ms. Carlin's participation in the program was based on the academic determination of the faculty and asserting that their determination was entitled to deference by the court.²⁸⁴ The court agreed that it was required to defer to the institution's decision "if there [was] evidence that the University made a 'professional academic judgment that [a] reasonable accommodation [was] simply not available.'"²⁸⁵

Ms. Carlin responded to the University's motion by submitting evidence that:

- (1) there was no documentation of lack of ability until after she took an approved leave of absence;
- (2) her clinical supervisor wrote a letter stating that she demonstrated good clinical skills;

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Carlin*, 907 F. Supp. at 510.

²⁸⁴ *Id.* at 511.

²⁸⁵ *Id.* at 510, (citing *Wynne I*, 932 F.2d at 27-28).

- (3) she received a certificate stating that she had successfully completed the first year clinical program;
- (4) she was not terminated at the end of the first clinical year but was allowed to go on a leave of absence;
- (5) she was not terminated from the program until she attempted to return from an approved leave of absence after her discharge from the psychiatric hospital; and
- (6) her academic supervisor wrote a letter stating that the reason for her termination from the program was “her history of serious mental health problems.”²⁸⁶

The Court denied the University’s motion for summary judgment stating that Ms. Carlin presented “significant probative evidence of pretext.”²⁸⁷ The Court noted:

The evidence set forth above suggests that the reason articulated by defendants for terminating plaintiff was untrue and that the defendants were in fact motivated by plaintiff’s mental illness and not her lack of aptitude in its decision to terminate her from the program. Boston University has absolute authority to render an academic judgment, but that decision must be a genuine one.²⁸⁸

Humpty Dumpty

Guckenberger v. Boston University²⁸⁹

Boston University is one of the largest private universities in the country.²⁹⁰ Its liberal arts curriculum has long required that students complete four semesters of a

²⁸⁶ *Id.* at 511.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ 974 F. Supp. 106 (D. Mass. 1997)[hereinafter *Guckenberger I*].

²⁹⁰ *Id.* at 116.

foreign language as a condition for graduation.²⁹¹ The University was also recognized, prior to 1995, as being among the leading academic institutions in proactively addressing the needs of its learning disabled students.²⁹² The University created the Learning Disabilities Support Services (“LDSS”), which was staffed by trained professionals to evaluate and provide accommodations for students.²⁹³ It was often described as a “model program”.²⁹⁴

Prior to 1995, LDSS provided accommodations to learning disabled students which included note-takers, tape-recorded text books, extra time on final exams and course substitutions, as well as alternate courses in lieu of the University’s foreign language requirement.²⁹⁵ LDSS conferred with the heads of various academic departments at the College of Liberal Arts and had developed an approved list of courses to substitute for the foreign language curriculum for learning disabled students.²⁹⁶ LDSS had not, however, sought the approval of the course substitutions from the President, Provost or central administration at Boston University.²⁹⁷

In the spring of 1995, Boston University’s then-Provost and later President, Jon Westling, discovered that LDSS had been allowing learning disabled students to substitute non-language courses in place of the foreign language requirement.²⁹⁸ Westling had no graduate degrees of any kind and no formal academic training in any aspect of learning disabilities.²⁹⁹

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Guckenberger I*, 974 F. Supp. at 116.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 117.

²⁹⁹ *Id.*

Westling was, in the words of the Court, “chagrined” to make this discovery regarding the waiver of the language requirement.³⁰⁰ Westling instructed his assistant, Craig Klafter, to conduct an investigation into the matter.³⁰¹ As a result of this investigation, Klafter confronted Loring Brickerhoff, the director of LDSS, and demanded proof that learning disabilities prevented students from successfully completing foreign language courses.³⁰² Brickerhoff referred Klafter to Brickerhoff’s book on the subject.³⁰³ Klafter, who did have a Ph. D. in Modern History, but no experience in the area of learning disabilities, reported to Westling that there was “no scientific proof that the existence of a learning disability . . . prevents the successful study of . . . [a] foreign language.”³⁰⁴

Westling informed Norman Johnson, the Vice-President and Dean of Students, that Boston University was to “cease granting course substitutions effective immediately.”³⁰⁵ Westling also ordered that all accommodation letters generated by LDSS were to be forwarded to his office for approval before they were sent to students or faculty.³⁰⁶ Westling made this decision without consulting any experts or members of the faculty concerning the importance of the foreign language requirement in a liberal arts curriculum.³⁰⁷ The court’s opinion stated that the course substitution issue had become a “bee in his academic bonnet.”³⁰⁸ The court noted that “Westling decided to become personally involved with the accommodations evaluation process, even though he had no

³⁰⁰ *Id.*

³⁰¹ *Guckenberger I*, 974 F. Supp. at 117.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 177-18.

³⁰⁶ *Guckenberger I*, 974 F. Supp. at 118.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 118 (internal quotations omitted).

expertise or experience in diagnosing learning disabilities or in fashioning appropriate accommodations.”³⁰⁹

During the time Westling became involved in this process, he “began delivering speeches denouncing the zealous advocacy of the learning disabilities movement.”³¹⁰ In the speeches, Westling “accused learning-disabilities advocates of fashioning ‘fugitive’ impairments that are not supported in the scientific or medical literature.”³¹¹ The district court identified a dominant theme running throughout the speeches: Westling believed that “the learning disability movement is a great mortuary for the ethics of hard work, individual responsibility, and pursuit of excellence....”³¹² In July 1995, Westling delivered a speech in which he described how a shy woman approached him on the first day of class and presented a letter containing a diagnosis of her learning disability and requesting certain accommodations: extra time on exams, copies of lecture notes, and a separate exam room. The letter continued, requesting that, should this young woman fall asleep in class, he should be “particularly concerned to fill her in on any material she missed while dozing.”³¹³ He named this student, “Somnolent Samantha.”³¹⁴

During the trial before the district court, Westling admitted he had fabricated Samantha in order to illustrate his point.³¹⁵ He further admitted that, “that such a student never existed . . . [and] that his description of her did not even represent a prototype of the learning-disabled students he had encountered.”³¹⁶

³⁰⁹ *Id.*

³¹⁰ *Id.* (internal quotations omitted).

³¹¹ *Guckenberger I*, 974 F. Supp. at 118.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

By the Fall 1995 semester, Boston University was at a “bureaucratic impasse.”³¹⁷ Brickerhoff at LDSS ignored Westling’s order and continued to grant accommodations without Westling’s approval.³¹⁸ As a result of his mandates being disregarded, an “irate” Westling demanded “that all accommodations letters that LDSS had prepared but that had not yet been picked up by the affected students be delivered to his office.”³¹⁹ Westling and his office staff then undertook to review all the approved accommodations even though neither Westling nor his staff had any training in the field.³²⁰ Westling then ordered Brickerhoff to deny the majority of the requests and to immediately implement Westling’s changes in the LDSS procedures.³²¹

On December 4, 1995 Brickerhoff sent a letter to all Boston University students who were receiving accommodations and informed them that they needed to renew their documentation and resubmit their request for accommodations for any previous diagnosis that was more than three years old.³²² Such documentation would need to contain a report by a licensed psychologist, psychiatrist or physician in order to comply with Westling’s standards.³²³

The result, as described by the court in its opinion, was “chaos.”³²⁴ In early 1996, Brickerhoff and several members of the disability services staff resigned.³²⁵ Westling hired an adjunct law professor to take over the LDSS office.³²⁶ The new head of the LDSS office undertook the review of all the accommodation files even though “the

³¹⁷ *Guckenberger I*, 974 F. Supp. at 119.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 120 (listing Westling’s instructions for change).

³²² *Id.*

³²³ *Guckenberger I*, 974 F. Supp. at 120.

³²⁴ *Id.*

³²⁵ *Id.* at 121 (explaining that the LDSS office was “virtually unstaffed”).

³²⁶ *Id.*

student files were in complete disarray . . . and neither he nor any other newly-hired DS staff members had any expertise in diagnosing learning disabilities or in fashioning appropriate accommodations.³²⁷ The remainder of the new LDSS staff was also “hand-picked” by Westling.³²⁸ For instance, prior to being hired by Westling as the new Coordinator of Disability Services, Judith Zafft had articulated to Westling that she believed there to be “too much abuse in the granting of accommodations”.³²⁹ Despite the extensive and selective new staffing, all LDSS recommendations were still forwarded to Westling’s office for final approval.³³⁰

In the midst of this “chaos,” Elizabeth Guckenberger, as well as the other Boston University students who had diagnosed learning disabilities, filed suit in the United States District Court alleging violations of Section 794 of the Rehabilitation Act, Title III of the ADA and various state law breach of contract claims.³³¹ At the end of the trial, the court held that Boston University had violated the law in regard to certain claims.³³² It awarded monetary damages to the students for Boston University’s change in its disability evaluation process and enjoined most of the changes.³³³

On the foreign language course substitution issue, however, the court noted that it was required to give deference to the academic decision-makers, Boston University.³³⁴ The court stated that a university is permitted to refuse to alter its programs to accommodate disabled students if it “‘undertake[s] a diligent assessment of the available

³²⁷ *Id.* at 121-22.

³²⁸ *Id.* at 122 n.10.

³²⁹ *Guckenberger I*, 974 F. Supp. at 122 n.10.

³³⁰ *Id.* at 122.

³³¹ *Id.* at 114.

³³² *Id.* at 153.

³³³ *Id.* at 153-55 (“The Court orders BU to cease and desist implementing its current policy of requiring that students with learning disorders (not ADD or ADHD) who have current evaluations by trained professionals with masters degrees and sufficient experience be completely retested.”).

³³⁴ *Id.* at 149.

options³³⁵ . . . and makes ‘a professional academic judgment that reasonable accommodation is simply not available.’³³⁶ The court further noted that Westling’s “ipse dixit” was not sufficient to meet this burden.³³⁷ To that end, the court held that,

Westling’s reliance on discriminatory stereotypes, together with his failure to consider carefully the effect of course substitutions on BU’s liberal arts programs and to consult with academics and experts in learning disabilities, constitutes a failure of BU’s obligation to make a rational judgment that course substitutions would fundamentally alter the course of study.³³⁸

The Court then ordered Boston University to conduct, within thirty days: “a deliberative procedure for considering whether modification of its degree requirement in foreign language would fundamentally alter the nature of its liberal arts program.”³³⁹ Complying with the court’s order, the University decided to use the Dean’s Advisory Committee to consider the question of whether the foreign language requirement was a fundamental component of the University’s liberal arts curriculum.³⁴⁰ The committee, composed of eleven members of the faculty of the Liberal Arts College, met on seven occasions. Of these seven meetings, five meetings were closed to the public.³⁴¹ No notes were taken of the committee’s deliberations until the court issued an order requiring the committee to do so.³⁴² The committee completed its report on December 2, 1997 which concluded that

³³⁵ *Guckenberger I*, 974 F. Supp. at 149 (quoting *Wynne II*, 976 F.2d at 795)(alterations in original).

³³⁶ *Id.* (quoting *Wynne I*, 932 F.2d at 27-28)

³³⁷ *Id.* at 149 n.35. “According to BLACK’S LAW DICTIONARY (8th ed. 2004), “ipse dixit” means, “something asserted but not proved”.

³³⁸ *Guckenberger I*, 974 F. Supp. at 149.

³³⁹ *Id.* at 154.

³⁴⁰ *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82, 86 (D. Mass. 1998)[hereinafter *Guckenberger II*].

³⁴¹ *Id.*

³⁴² *Id.* (“[F]ollowing the court’s order to do so at the October 6 hearing, minutes were kept for all but the last of the remaining meetings.”).

“the foreign language requirement is fundamental to the nature of the liberal arts degree at Boston University.”³⁴³

In further proceedings regarding the committee’s report, the court discussed its obligation to show deference to the academic decision making process.³⁴⁴ It held that there was no “right” or “wrong” way to make “program-related decisions” because “[s]uch absolutes rarely apply in the context of subjective decisionmaking [sic], particularly in a scholastic setting.”³⁴⁵ In giving due deference to the school, the court determined that it must “find the basic facts” which must include showings of “(1) an indication of who took part in the decision [and] when it was made; (2) a discussion of the unique qualities of the foreign language requirement as it now stands; and (3) a consideration of the possible alternatives to the requirement.”³⁴⁶

The court noted that the committee had “rallied around” the foreign language requirement.³⁴⁷ Some committee members expressed the belief that it was “important to be immersed in ancient Greek and Latin to understand Greek and Roman cultures.”³⁴⁸ Another member “waxed ‘that someone who can read in French would realize that Madame Bovary dies in the imperfect tense, something that we don’t have in the English language, and it makes for a very different understanding of the novel.’”³⁴⁹

³⁴³ *Id.* at 87.

³⁴⁴ *Guckenberger II*, 8 F. Supp. 2d at 87.

³⁴⁵ *Id.* at 87 (quoting *Wynne II*, 976 F.2d at 795).

³⁴⁶ *Id.* (quoting *Wynne I*, 932 F.2d at 27-28) (alterations in original) (internal quotations omitted); *see also* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287-88 (1987) (holding that courts should make “appropriate findings of fact” and show deference”).

³⁴⁷ *Guckenberger II*, 8 F. Supp. 2d at 88.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

The plaintiffs countered that the University's policy marked a "substantial departure from accepted academic norms".³⁵⁰ Their evidence showed that the majority of liberal arts colleges, including Harvard, Princeton, Yale, Columbia, Dartmouth, Cornell and Brown do not require a foreign language, or if they do have such a requirement, they waive the requirement for learning disabled students.³⁵¹ The plaintiffs then challenged the committee's findings, asserting that (1) a requirement of four semesters of foreign language is not enough for most students to master the language sufficiently to read major works of foreign literature ("thus debunking the Madame Bovary line of argument as involving an imperfect logic, not an imperfect tense"); (2) a foreign language requirement provides no cultural educational benefits to students; (3) learning a foreign language requires a particular thinking process that is distinctive from other types of learning; and (4) the foreign language requirement does not address ethnocentrism among students.³⁵² To support these arguments, the Plaintiffs presented the testimony of the Chair of the Language and Foreign Studies Department at American University who testified that she, along with other academics, "strongly disagree[d] with BU's conclusions and label[ed] them as 'trite', 'idealistic' or 'clichés'".³⁵³ Finally, the plaintiffs criticized what they considered the committee's failure to refer to outside experts.³⁵⁴

The court, however, determined that its role was not to "conduct a head-count" of what was done at other universities, and instead held that the appropriate question was whether the University's decision is "rationally justifiable" rather than being the only

³⁵⁰ *Id.* at 89.

³⁵¹ *Id.* at 89.

³⁵² *Guckenberger II*, 8 F. Supp. 2d at 90.

³⁵³ *Id.*

³⁵⁴ *Id.*

possible decision it could have reached.”³⁵⁵ Ultimately, the court answered that question, holding that the foreign language requirement was “‘rationally justifiable’ and represents a professional judgment with which the Court should not interfere.”³⁵⁶

CONCLUSION

‘Now! Now!’ cried the Queen. ‘Faster! Faster!’ And they went so fast that at last they seemed to skim through the air, hardly touching the ground with their feet, till suddenly, just as Alice was getting quite exhausted, they stopped, and she found herself sitting on the ground, breathless and giddy.

The Queen propped her up against a tree, and said kindly, ‘You may rest a little now.’

Alice looked round her in great surprise. ‘Why, I do believe we’ve been under this tree the whole time! Everything’s just as it was!’

‘Of course it is,’ said the Queen, ‘what would you have it?’

‘Well, in *OUR* country,’ said Alice, still panting a little, ‘you’d generally get to somewhere else -- if you ran very fast for a long time, as we’ve been doing.’

‘A slow sort of country!’ said the Queen. ‘Now, *HERE*, you see, it takes all the running *YOU* can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!’³⁵⁷

Like Alice, many learning disabled students find that no matter how hard they attempt to run through the bureaucratic accommodations chess board, they wind up in the same place. They remain trapped in a country ruled by a Red Queen, a country in which they must run twice as fast as is humanly possible if they expect to get anywhere.

³⁵⁵ *Id.* at 89.

³⁵⁶ *Id.* at 91 (holding that BU satisfied the requirements under *Wynne* because it “implemented a deliberative process by which it considered in a timely manner both the importance of the foreign language requirement... and the feasibility of the alternative”) (internal quotation omitted).

³⁵⁷ Lewis Carroll, *Alice in Wonderland* 127 (Donald J. Gray ed., Norton & Co. 2d ed. 1992) (1871).

Humpty Dumpty also survives today in the realm of academia. Decisions made by university faculties concerning participation of learning disabled students in academic programs are granted deference by the courts, provided that the institutions show that they engaged in a reasoned decision-making process concerning whether requested academic accommodations would fundamentally alter the nature of the program.³⁵⁸ Courts are unwilling to consider whether the academic decisions are right or wrong and will therefore not second guess those decisions, provided that the institutions can show something more than an “ipse dixit” process.

Today’s University President “Dumpty” seems to have amended his statement to fit into the academic realm: “words mean just what I, and the reasoned decision of my hand-appointed faculty committee, choose them to mean, neither more or less.”³⁵⁹ In today’s judicial environment such a response will ensure the insulation of his academic domain from the intrusive mandates of the courts. That is, until the White Knight rescues Alice from the Looking Glass World.

EPILOGUE³⁶⁰

Of all the strange things that Alice saw in her journey Through The Looking-Glass, this was the one that she always remembered most clearly. Years afterwards she could bring the whole scene back again, as if it had been only yesterday--the mild blue eyes and kindly smile of the Knight--the setting sun gleaming through his hair, and shining on his armor in a blaze of light that quite dazzled her--the horse quietly moving about, with the reins hanging loose on his neck, cropping the grass at her feet--and the black shadows of the forest behind--all this she took in like a picture, as, with one hand shading her eyes, she leant against a tree, watching the strange pair, and listening, in a half dream, to the melancholy music of the song..³⁶¹

³⁵⁸ See *supra* notes 284-97, 304-13, 317-24 and accompanying text.

³⁵⁹ See generally Carroll, *supra* note 2 (“‘When I use a word,’ Humpty Dumpty said . . . ‘It means just what I choose it to mean—neither more nor less’”).

³⁶⁰ THE AMERICAN COLLEGE DICTIONARY 404 (C.L. Barnhart & Jess Stern eds., 1964)(“[A] speech, usually in verse, by one of the actors after the conclusion of the play.”).

³⁶¹ Carroll, *supra* note 324, Chapter VIII.