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Transcript: Best Practices

American University Washington College of Law Disability Rights Law Clinic

BEST PRACTICES

ASSISTING LAW STUDENTS WITH
DISABILITIES IN THE 21ST CENTURY:
BRASS TACKS

PANEL 1: BEST PRACTICES
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MODERATOR:
JENNIFER DISANZA
Assistant Dean of Student Affairs,
Capital University Law School

PANELISTS:
LISA LERMAN
Professor of Law, Coordinator of Clinical Programs,
Catholic University of America, Columbus School of Law

ABEL MÓNTEZ
Director of Student Affairs,
Fordham University School of Law

MICHAEL R. MASINTER
Professor of Law,
Nova Southeastern University, Shepard Broad Law Center

PROCEEDINGS:

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JENNIFER DiSANZA: Thank you, David. I am very pleased to be here this morning. I am excited about the topics that we are going to talk about. Our first panel is Best Practices, and while that is a wide ranging category, we have three very excited panelists to talk about a wide range of things. First, I want to tell you a little bit about them and what they are going to talk about, and then I will turn it over to them.

Our first panelist is Abel Móntez. He is the Director of Student Affairs for Fordham University School of Law in New York. Abel will talk to us about implementation of accommodations for students with disabilities. He is the front line at Fordham so he will be able to share his best practices of what he does.

One of the things that I encourage—while we will leave time at the end of this panel to have questions and answers, I want to encourage you during the panel presentation to ask questions so we do not forget anything throughout. So Abel will talk about his processes and procedures that he handles at Fordham.

Our second panelist is Michael Masinter. He is a professor of law at Nova Southeastern in Fort Lauderdale, Florida. His topic is about what is a fundamental alteration in classrooms. He comes from the professor side of things. A lot of us are student services professionals. Both our second two panelists are professors, and we will talk about the practicality of making accommodations in the classroom and how they handle it. Professor Masinter will talk about the ADA language, what is a reasonable accommodation, who makes those decisions, and how can somebody, a third party, make a decision when it comes to what happens in a classroom. So I think that will be interesting, and again, feel free to ask questions throughout the talk.

Our last panelist is Lisa Lerman, who is a professor of law and coordinator of clinical programs at Catholic University right here in DC. She is going to take a little different approach to her talk. She is going to talk about humanizing students with disabilities and talking about her best practices in the classroom, how she handles students on an individual basis, and what she has done in the classroom herself. I think each one of our panelists will have an excellent point of view to share with us and things that we can take back to our schools and our firms.

Again, I encourage you to ask questions throughout the panel, and we

will also have time at the end. So first we will have Abel talk about his topic.

ABEL MÓNTEZ: Thank you, Jennifer. What I am going to go through is sort of a start to finish, what happens when you first have a conversation with a law student who is disclosing a disability and then some of the nuances that come up with that.

At the admissions stage, what is very critical is to provide disability services' policies and procedures to admitted students. You should have those policies available online and in a printed format at orientation, or even before orientation. It is really key to start having an early dialog with the students about what the requirements are and what your policies are.

You should also make sure that these policies and procedures are being made available to returning students, in order to address the students with newly diagnosed disabilities.

The admissions office might also want to alert you to students who have particular needs that you need to address from the get-go. For example, you may need to provide accommodations to students with physical disabilities even from the beginning of orientation. A blind student will need his or her reading materials for orientation prepared or made accessible.

With the admissions office, it is always good to have a running dialog. I believe it is really a question of what your policies and procedures are, whether you want the admissions office to inform you of all of the students who have disabilities or just particularly those students who have the physical disabilities. The reason I believe there is a distinction is that there are some students who do have disabilities who may not want to disclose or feel uncomfortable disclosing, and so you have to take that into account.

One possible approach is to make certain that everyone has the information and stressing to the students that they can come and speak to you individually and confidentially about what issues they have with registering for disability services.

What is also important is to set and publish a deadline each semester for students to register with your office. If you are getting documentation two weeks before exams you are not necessarily going to be able to evaluate it in time and provide the kinds of accommodations that are reasonable for the student.

I have had conversations with many professionals and they always say they feel guilty that they are somehow impacting a student's success in law school if they say to them, "I cannot accommodate you because you have missed the deadline."

It is appropriate to say "no" to a student who has missed the deadline

especially after they have been repeatedly informed about it. It is your responsibility to make sure that whatever accommodations you are granting are addressing the disability, and also that the student is following your particular guidelines and deadlines. You are probably going to be making better decisions if you are taking the time to look at the documentation, going back and forth with the student to make sure that you get the type of information or documentation you need to make the appropriate decision.

This really goes to the interactive process that you need to have with each student. It is very easy sometimes to have your policies and make decisions and send out the information but then neglect having a conversation with the student. That interactive process is key. You should have constant dialog with your students. In particular, you should start with first year students in discussing what is different about law school as opposed to their previous undergraduate or graduate programs.

Such conversations may allow you to address issues early on as opposed to waiting until the middle of the semester with a student approaching you and saying, "Well, in undergrad, I had no deadlines," or "In undergrad, I had three or four weeks to do something." If you had taken the time to talk to the student and let him or her know what is required and expected in law school, some of those issues could have been minimized or addressed earlier.

Before the semester begins you should assess whether disability accommodations will include in-class modifications. Most of the accommodations in law school are typically on exam, and not necessarily in-class. For in-class accommodations, you may have to deal with issues of priority seating, assistive technology, CART (Communication Access Realtime Translation) services, enlarged reading materials, and note taking.

To determine exam accommodations, there are several things you should consider. In terms of documentation, you should set clear and direct policies of what is required, by the university and by the law school. For example, students should know the type of psycho-educational report required for learning disabilities or the type of documentation appropriate for the student's disability. You should also make sure that the documentation is timely, that it is, for example, no more than four years old or three years old. For other types of disabilities, it may be a shorter time frame. You should also require that the documentation you are receiving is from a certified practitioner. It is recommended that you ask for a confirmation of undergraduate institution or graduate school accommodations. It is also recommended that your law school decide whether to take into account any LSAT accommodations. All this information from the student is necessary to assist you in determining how much additional time, if any, the student will receive on exams or other

types of accommodations.

There are three possible models for disability services in law schools. First, a university disabilities office that handles everything for the law school, from assessments to determinations, and then handles providing all accommodations, including administering exams.

The second model is where there is a law school disability office that consults with the university disabilities office, but the law school makes the determination of the student's accommodations. The law school disability services professional would also be in charge of handling the scheduling of exams.

The third model is one in which a university determines the accommodations and the law school basically just administers exams.

You should be aware that some students are very concerned about the confidentiality of their disclosure of a disability and of the documents that they provide your office. I believe having a conversation with a student about this early on is very important to assure the student that by disclosing the disability, he or she is going to be accommodated and treated fairly. The professor may or may not know or does not have to know about the particular accommodation.

If the student is only receiving accommodations on exams, there is really no need for the professor to know of the student's disability. If a student has in-class accommodations, then that is a little different, because you are going to have to basically disclose to the professor that this particular student needs something in class. For example, the student may require seating in the front row or may need special in-class equipment or special services.

It has been my experience that most law students, especially in the first year, do not feel comfortable disclosing their disability. It is important to have a conversation with the student about why that is.

When you are reviewing the documentation, you should make sure that your determination is based on not only your own university's policies but also on the law school's policies. Again, you should make sure that those kinds of guidelines are published and that you are letting the student know exactly what is expected.

Sometimes, you might get students who attended an undergraduate institution with a very flexible and liberal approach to disability services. Maybe the school did not require any documentation, or the student dealt with the undergraduate professor in a very informal manner. The student comes to law school and is suddenly facing something totally different. It is very important to stress to the student that even if they received accommodations in an educational or employment setting prior to coming to law school, that does not necessarily ensure the student will receive the

same or any accommodations at the law school level.

In determining whether to grant accommodations or what type of accommodations to grant, you may take different things into account. Such things should include the nature, extent and severity of the student's disability, the fundamental nature of the academic program or activity, the functional limitations and impact of the student's disability, the student's history of accommodations and academic achievement, and whether the accommodation would impose an undue burden on the institution.

One of the things that you also want to keep in mind is to make sure that you ensure confidentiality for the student. For example, you may have a student who is taking a class where only blue book exams are allowed, and your student, because of his or her particular disability, has to use a computer. What you should do is to make sure that you transcribe everything that a student has typed out into a blue book so that when the professor receives all the blue books the professor does not know which students are accommodated and which ones are not.

You also will need to think about a policy for provisional accommodations. If a student presents you with documentation that is not necessarily adequate, you may need to decide whether or not you want to provide that student with accommodations pending receiving those documents. One reason you may not want to grant provisional accommodations is that it will become harder to change the accommodation once you actually receive and review the required documentation. In addition, you may run the risk that you may not actually ever receive the documentation.

Accommodations for each student should be individualized; the accommodations you grant will depend on the type of disability the student has. You should also take into account that there are different types of exam accommodations, depending on whether it is an in-class exam, a take-home exam, whether the documentation supports the student's use of a computer, and whether it is a multiple choice exam or essay exam. Sometimes it may be easier to just have one policy for everyone. However, you should really be looking at the particular documentation, looking at the disability, to come up with accommodations that are specific to the particular student. It is very important for you to ensure that the student has equal access to education and an opportunity to be successful in law school.

You should pay close attention to the types of courses a student is taking, whether they are lectures, legal writing courses, drafting courses, seminar paper courses, or clinics. These types of courses lend themselves to different types of accommodations or none at all.

One issue that usually comes up when working in disability services is

attendance requirements. If you have a policy in your academic regulations that attendance is mandatory or you adhere to the ABA (American Bar Association) standards, then even with a disability, a student's law school attendance should not be waived. Of course, there may be some flexibility if the absences are few. By and large, students, even those with disabilities, have to make sure that they are abiding by your attendance requirements.

Neither Section 504 nor the ADA requires the university to change, lower, waive, eliminate, or fundamentally alter essential academic requirements. I believe other speakers will be addressing this issue later.[1]

Another area where this arises is when a student is claiming that because of a disability that he or she cannot participate during in-class Socratic Method discussions. If your school uses the Socratic Method, then it is advisable that the school formally state that it is an essential academic requirement of your law school. Just because you went to law school that used the Socratic Method, you think everyone in law school should learn using this method, and every law school you know of uses the Socratic Method does not mean that the Socratic Method is an essential academic requirement. It is advisable to have a curriculum committee meet and discuss whether your institution is identifying the Socratic Method as a requirement or a standard that is essential to your particular law school's curriculum. The institution must be able to demonstrate that whatever academic requirement you have is, in fact, essential.

JENNIFER DiSANZA: Thank you, Abel. Does anybody have any questions before we move onto Mike's section?

Could you speak into the mic? Otherwise, I will repeat your question.

AUDIENCE MEMBER: Hi.

ABEL MÓNTEZ: Hi.

AUDIENCE MEMBER: I am just curious as to whether there are different approaches to assigning additional time for take-home examinations. If a student receives double time for in-class examinations, should they receive double time for a twenty-four-hour take-home exam?

ABEL MÓNTEZ: One approach is to have a different time allotment for take-home examinations because the nature of these exams—how they are prepared and graded—may be different than the in-class examinations.

1. Americans with Disabilities Act of 1990, 42 U.S.C. §12101, *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

For example, you may have a policy to allow eight hours for a twenty-four-hour exam. I think it is also important to look at what the student's disability is, because the student—even if they are getting additional time for an in-class exam—may not necessarily need or require that they get additional time for a take-home. You should look at the documentation to see if there is anything about the type of disability that lends itself to allowing for additional time for take-home exams.

JENNIFER DiSANZA: Mike, I think we have a good segue into your section.

MICHAEL MASINTER: Yes, it came very nicely. Bear with me, I have a cold. Those of us who come from South Florida find this kind of weather bracing.

We are in a third wave of disability accommodation requests within the law school environment.

The first wave came with the enactment of Section 504[2] and largely required us to accommodate students with so-called traditional disabilities in ways that made our bean counters nervous, because expenses associated with accommodating traditional disabilities can be quite substantial. Although expensive, structural modifications, alternate format texts, and sign language interpreters did not affect teaching and grading, and therefore were not controversial among faculty.

The second wave Abel alluded to; it arose when we became aware of the need to offer exam accommodations, such as extended time, for some students with learning disabilities or ADD/ADHD. Exam accommodations impose little economic cost, but whether and to what extent we offer extended time on exams became a controversial issue. The controversy continues[3] because most law schools engage in normative grading. We have some kind of grade distribution system or grade curve, and our grades represent a considered judgment comparing students with each other rather than with some abstract scale on which all students can potentially achieve the same grade. Some of us became concerned that exam accommodations might distort the normative grading process, but professors who knew little about Section 504 gradually came to understand that it is a civil rights law;

2. 29 U.S.C. § 794.

3. *See, e.g.,* Craig S. Lerner, *"Accommodations" for the Learning Disabled: A Level Playing Field Or Affirmative Action For Elites?*, 57 VAND. L. REV. 1043 (2004); Rothberg v. Law School Admission Council, 102 Fed. Appx. 122 (10th Cir. 2004) (McConnell, J., concurring) (affirming denial of preliminary injunction requiring extended time on LSAT, suggesting "the parties should put on evidence regarding the amount of extra time needed to put her on an equal footing, but not give her an unjustified advantage on a test for which every student would benefit from extra time").

that its purpose is to provide students with disabilities equal access, and that one of the ways in which we do that is in appropriate cases by offering extended time on exams.

Most of our faculties understood that, consistent with our obligation to comply with Section 504, we bore an obligation to make reasonable judgments about whether a particular student is a person with a disability, and if so, entitled to a reasonable accommodation. In complying with Section 504, DSS staff necessarily had to exercise independent professional judgment and make hard professional decisions, and those of you who do that and those of us who work with you know that is exactly what you do. This is a profession. You are not clerks. This is not easy work and you make difficult judgments in an area in which bright lines are illusions. If you see them you should question your own judgment.

One of the conversations I think that continues to be essential in making a DSS office work within a law school is precisely the one to which I just alluded. You are making difficult judgments about who is or is not a student with a disability, and about what is or is not a reasonable accommodation or academic adjustment in light of the nature and severity of a particular impairment.

For those faculty members who hunger for a bright line test that will enable them to say, "Now I understand why this student has a sufficiently severe case of dyslexia or ADD to merit extended time as an accommodation," the answer is that a bright line test does not exist. We make those judgments on a case-by-case basis. But I do think that the notion that there are circumstances in which you will provide those accommodations has become uncontroversial and accepted within our faculty community.

The third and newest wave of accommodation requests that I see generating controversy are requests that in some sense bear on the way the classroom and course functions by modifying the way a professor teaches. They are, in my sense, an inevitable outgrowth of the tension that arises between IDEA[4] and Section 504. I have been involved in disability rights issues since the days of 94-142, the predecessor to IDEA[5].

IDEA creates an entirely different sets of rights and expectations for students with disabilities who come through the public school K-12 system. It fosters the expectation that curricular modifications are part and parcel of how you deal with disabilities, and that the responsibility of an educational institution is, in large measure, to adapt its curriculum to the needs of the student with the disability. That will include not only exam

4. 20 U.S.C. §§ 1400-20.

5. Pub. L. No. 94-142, 89 Stat 773 (1975).

accommodations or the provision of note takers, but changes in the way that courses are taught, changes in who teaches those courses, changes at every level of the pedagogical process.

While in theory, students who have come through the K-12 system with IDEA as their driving set of expectations should learn differently when they reach undergraduate institutions where IDEA gives way to Section 504, the reality is somewhat different. IDEA exerts a kind of upward pressure on the way undergraduate institutions treat students with disabilities. The competitive forces of a market economy, in which even nonprofit institutions are market participants that must fight for their own survival may exert some pressure on how undergraduate institutions accommodate students who come through the K-12 system.

At the same time, some faculty research and write about pedagogy, generating no end to the scholarship on new approaches to teaching, on the role learning styles will play in how different students learn, and how we as educators might want to adapt what we have always done in order to be better teachers by gearing the teaching we offer to the varied learning styles that students bring to our classrooms.

So many of us have a predisposition to want to make changes in how we teach in order to accommodate the interests not only of students with disabilities but just students in general. Remembering that people are part of a population and we ought to understand a population not in terms of its mean or average, but in terms of its distribution that averages tell us, or possibly the way people distribute across a range that really defines the population of students with which we deal. Students do not have to have disabilities to respond to different learning styles. That is just part of what makes us different within the range of normal distribution.

Today, students want to be relieved from attendance requirements, from class participation requirements, from writing requirements; they want to be given alternative evaluation formats, and they present those requests to DSS offices under the banner of Section 504.

We know that Section 504, as Abel mentioned, does not require modifying the essential requirements of a program,[6] or in the language of the ADA regulations, fundamental alterations are not reasonable accommodations.[7] Yet, one reads through Section 504, ADA regulations, and technical guidance in vain looking for certainty with regard to what is an essential program requirement, what is a fundamental alteration. We know that if we can call a requested accommodation a fundamental alteration or modification of an essential requirement of a program, Section

6. 34 C.F.R. § 104.44(a).

7. 28 C.F.R. §§ 35.130(b)(7), 36.302(a).

504 and the ADA do not require that it be waived or modified. We know that if we do not, then we had better be thinking in terms of an appropriate reasonable accommodation. How do we make that judgment?

If you have read reported cases and OCR letters, you are aware that OCR and the courts also are reluctant to offer any kind of a test that defines what is or is not essential to a program's requirements, and what is or is not a fundamental alteration.

The word that crops up in both reported cases and OCR letters is the word "deference." Schools seek, and the courts and OCR generally give, deference to the academic judgment that a particular requirement is essential or fundamental.[8] Underlying the question of deference is the answer to the question: "Who decides?" Who decides what is fundamental? Who decides what is essential? Do you, the institution, decide, or do OCR or the courts decide? And in the main, the answer is OCR and the courts will defer to you, the institution provided you have a process through which you make that determination and you have followed that process.

That process can play out at a couple of levels. Abel talked about attendance requirements. Attendance requirements are probably the easiest of the essential program requirements to defend. OCR letters and reported cases are unanimous, especially at the law school level, in concluding that attendance requirements, if uniformly applied, are essential program requirements that need not be modified in favor of students with disabilities.[9]

We have the twenty percent rule at my law school; it is one that I suspect many of you also have. Under our rule a student who misses more than twenty percent of the classes in the semester is disqualified from taking the exam, and it makes no difference whether the reason the student missed those classes was because of attendance at interscholastic moot court competitions, because of a disability, an unexpected illness, or because of unexpected economic circumstances. The rule admits no exceptions, and as long as the rule admits no exceptions then the rule is enforceable even

8. Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 436 (6th Cir. 1998) ("Courts must also give deference to professional academic judgments when evaluating the reasonable accommodation requirement"); *see also* Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 88 (2d Cir. 2004) ("When reviewing the substance of a genuinely academic decision, courts should accord the faculty's professional judgment great deference"); Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1047-48 (9th Cir. 1999); Letter to Webster University, 27 NDLR 255 (OCR 2003) ("OCR grants substantial deference to an educational institution's decisions regarding which requirements of its program are essential"); Letter to Northern Illinois University, 7 NDLR 392 (OCR 1995) ("OCR grants great deference to recipients to determine which academic requirements are essential to their programs of instruction.")

9. Letter to Seattle University, 27 NDLR 321 (OCR 2003) (law school attendance requirements essential); Letter to Flagler College (OCR 2001) (No. 04-01-2035) (undergraduate attendance requirements essential).

when it impacts a student with a disability.[10]

It is a hard rule, but it is one that is consistent with ADA requirements. Because we have adopted the rule and have a rule that admits no exceptions, we publish the rule, we make it part of our code of academic regulations, we distribute it to every student, and we make it part of the syllabus in every class so that no student can claim to be unfairly surprised.

More recently we have received requests from students with social anxiety disorder and related psychiatric impairments to be excused from all class participation. And we have had an interesting semester at my law school, discussing this before a faculty committee and in a faculty meeting, because, the question of whether class participation is essential, whether waiving it would constitute a fundamental alteration, is a question that in our view requires an interactive process; one not just between the DSS office and the student, but between the DSS office and the faculty.

Our organizational structure reposes entirely within the DSS office the responsibility for deciding whether a student has an impairment that substantially limits a major life activity and requires a reasonable accommodation.

But we do not think it is the exclusive responsibility of our DSS office to make the judgment of what is or is not essential to the program or the instruction that we offer; we think that is an academic judgment. We understand *Guckenberger v. Boston University*[11] and the OCR letters that have dealt with this question to contemplate that we have in place a process by which we make this determination as an academic judgment.

And so we involve a committee in making determinations like this, and our committee reports to the faculty. Our faculty committee had proposed a law school rule that class participation is an essential requirement that can be modified but not waived as a reasonable accommodation.[12]

Faculty consideration of the proposed rule provoked a spirited discussion; we learned from that discussion that we share no uniform idea of the role of class participation. Some faculty who teach some of our courses are willing not to call on a student as an accommodation, not because they think Section 504 requires them not to do so, but because they think that it is a reasonable way of teaching a particular course. Others who teach very different classes or whose classes require, by their very nature, that students participate will not make the same offer.

10. *Id.*

11. Guckenberger v. Boston Univ., 8 F. Supp. 2d 91 (D. Mass. 1998).

12. Letter to: Community College of Allegheny County, 33 NDLR 48 (OCR 2005) (deferring to college's determination that class participation was essential, stating: "OCR generally will not question academic judgments regarding course requirements, as such requirements are more appropriately decided by those experts in the academic field pursued").

After much discussion, we concluded that in response to a request to be excused from class participation, our DSS office should speak to the faculty member in the particular course, find out whether there are alternative methods of class participation that are available that will satisfy the needs of the student, perhaps letting the student know in advance when he/she will be called upon, just as we would accommodate a student with a speech impairment by making alternative communication methods available for class participation.

But if class participation is essential to the way that class is taught, then our DSS office will defer to that as an academic judgment and will not waive all class participation as an accommodation. We think the essence of making these determinations is a process; that the process has to be reasonably transparent; that is, at its core, it must be designed to make academic judgments, and that if it makes academic judgments and can provide a record of how those judgments are made, then there is every reason to think that OCR and the courts will defer to that judgment.

The process I described played out earlier when a student with a disorder of written expression insisted that we provide as an accommodation an editor who would review the student's writings before submission for grading. We offered a variety of accommodations ranging from the use of a scribe to the use of word processing software with spell checking and grammar checking features, but we insisted that the student retain the responsibility for the final determination of what to submit. A proofreader who could point out that an 'E' and an 'I' were transposed is very different from an editor who is, in essence, altering the content of the student's writing; we permit the former but not the latter. The student complained to OCR, but the complaint was dismissed.

At the risk of repetition, what matters here is process. It is the process that earns the deference that OCR and the courts will show to an academic judgment that a particular requirement, whether it is class participation or editorial judgment, is fundamental or essential to a course or program of instruction.

I think I am supposed to shut up and ask for questions and so I will do that. Yes?

AUDIENCE MEMBER: (Inaudible at 51:55)[13] year after year, hiring different ones (inaudible at 52:02)[14]

13. *See* Washington College of Law Podcasts, "Assisting Law Students with Disabilities in the 21st Century: Brass Tacks - Welcome/Panel 1 - Best Practices," *available at* http://www.wcl.american.edu/podcast/podcast.cfm?start=120&num=20 (Mar. 8, 2007).

14. *See id.*

JENNIFER DiSANZA: Let me repeat the question. Is there any process for consistency in the . . . [15]

AUDIENCE MEMBER: (Inaudible at 52:09)[16]

MICHAEL MASINTER: Well, consistency—that is a fair question, because I think the danger of a case by case or common law determination of questions like this as opposed to legislative or rule determination of matters like this is that there is a potential for inconsistency. I mean we have inconsistency right now with regard to the question of whether we would relieve a student from class participation, because I have colleagues who will accede to a student's request not to call on that student during the entire course.

Other colleagues who teach different kinds of courses would think that is an absurd request in, say, a pretrial practice course. How are you not going to call on a student in a seminar in which each student is responsible for a small group for a presentation? How are you not going to call on a student in a simulation course? There may be ways in which you can adapt calling on that student by scheduling in advance that student's presentation, but the student has to participate for the course to function.

So I think inconsistency is built into this kind of model. We have not had individual faculty members come to different conclusions from year to year in the same course. I would hope that that would not happen absent clear evidence that the change reflects a considered academic judgment respecting how best to teach a course.

The rationale for deference is limited to academic judgments. *Guckenberger* did not second guess the judgment of the school to impose a foreign language requirement with no waivers once the school made that judgment in an academic process.[17] Of course, when school administrators previously made that decision administratively based on stereotypes about "Somnolent Samantha," the court appropriately refused to defer and found the decision discriminatory.[18]

But no process is ever perfect. It is just that the process increases the likelihood of the deference that you want.

Yes?

15. *See id.*
16. *See id.*
17. Guckenberger v. Boston Univ., 8 F. Supp. 2d 91 (D. Mass. 1998).
18. Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997).

AUDIENCE MEMBER: I can see that a different format is, I think, an essential part of it, of course, but those requirements are not good enough for all of the syllabus or something like that. How can you tell that if (inaudible at 54:23)[19] your internal view about disabilities and what they think is not and what they're actually—what (inaudible at 54:31)?[20]

MICHAEL MASINTER: Well, that is a good question. The question notes that different courses will have different requirements for student participation, but if there is nothing in the syllabus that advises the student of what those requirements are, then how can you be certain that a professor is making a determination based on an academic judgment rather than some inappropriate reaction to a student with a disability? How do you deal with that in those circumstances?

Well, I think the response is the syllabus ought to state the course requirements. We write a syllabus for a reason, and we require that the syllabus disclose what is expected of the student in the course so that if there are class participation requirements they are set out in the syllabus.

I would think that is a reasonable obligation for the school (not the DSS office) to impose on faculty in writing a syllabus. Again, we are part of the same group, the university or the law school, and the DSS office ought not to have to bear all the weight and responsibility in these circumstances. If the institution, if a law school, wants some control over how changes are made and wants to be able to have some say in what is essential and that constitutes fundamental alternation, then it seems that part of the trade-off is to say to the faculty, "You have to tell us." We are not mind readers. That is not one of the skills that we bring to a DSS office.

If you think something is central to the course you teach, then you ought to put that in your syllabus so that we will know about it and we will be better equipped to talk to our students about it; that seems reasonable to me. I mean, most of us are reasonable people.

Yes?

JENNIFER DiSANZA: One more. This will be our last question.

AUDIENCE MEMBER: I am wondering about classes in the same subject that are taught by different professors for which one allows accommodations but the other basically says no, is that a problem?

19. *See* Washington College of Law Podcasts, "Assisting Law Students with Disabilities in the 21st Century: Brass Tacks - Welcome / Panel 1 - Best Practices," *available at* http://www.wcl.american.edu/podcast/podcast.cfm?start=120&num=20 (Mar. 8, 2007).

20. *Id.*

MICHAEL MASINTER: All right. Suppose a school has three first year sections of contracts, and two of the contracts professors model themselves after the legendary Professor Kingsfield. The third contracts professor has studied the modern literature of learning styles and has concluded that the Socratic Method narrowly appeals to a small set of students who possess one particular learning style, but is singularly ineffective in reaching several other sets of students with different learning styles. What do you do in those circumstances? And the answer is, "I do not have the answer either."

AUDIENCE MEMBER: Move the student?

MICHAEL MASINTER: Moving the student is of course one of the alternatives and it is an easy alternative if you can do it. But you may discover that you do not have a section in which every faculty member similarly shares this commitment to the diversity of learning styles and the methods of teaching that flow out of that diversity and so you may have some difficulties. I think individual faculty can disagree over whether class participation is essential, and I would hope OCR would defer to the academic judgment of those who conclude class participation is essential.[21]

We have disagreements among people who teach in our first year classes over precisely the question that you have raised. And so we ask our DSS office to talk to each of those professors in the face of a request from a student with what our DSS office has concluded is a legitimately documentable disability.

By the way, I have to tell you, many of us who work with students with disabilities are not thrilled with the line of cases from *Sutton*[22] to *Toyota Motors*[23] and think that the Supreme Court has adopted a highly crabbed definition of what constitutes a disability.

But again, the question of whether the school ought to offer what would be accommodations for impairments that are not disabilities within the meaning of current law seems to me to be a question that goes beyond the DSS office. If the DSS office wants to expand the definition of disability beyond the very gray limits that prevail under current Supreme Court

21. Letter to Villanova University, 16 NDLR 170 (OCR 1999) (Individual faculty similarly disagree over the importance of essay exam questions, but OCR has held that when used, essay examinations are essential to a law school program of instruction and therefore need not be modified by breaking complex questions into component parts or by permitting outline answers.)

22. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

23. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

decisions, I think that raises an academic judgment properly made by the university or the school, not its DSS office.

The ADA and Section 504 establish a floor, not a ceiling for accommodations, but if we are considering whether to raise the ceiling significantly beyond what the law requires then it seems to me that is a conversation that ought to involve more than just the folks who run our DSS office. That is an academic judgment that implicates the university or the school's academic standards, and I think that is a larger conversation than one that takes place within a DSS office.

But again I do not have an easy answer to your question other than the one that was suggested, which is that when you can move students that is an easy way around that problem and it often is possible to do that.

JENNIFER DiSANZA: Thank you, Mike. I would like to turn it over to Lisa Lerman, who is going to talk about what she actually does in her classroom and her practice. I think it will be interesting to hear and it is a great segue.

LISA LERMAN: Thank you. I am very glad to be here, and I guess I should say at the outset that I am not an expert in disability law, and I think my role here is to offer a worm's eye view of an ordinary law professor dealing with disabilities in the classroom.

My view is a very particular one because of all that I have learned from the many students that I have worked with. I think that legal education needs to be humanized and that accommodation of disabilities is part of that larger picture.

I deal with our disabilities services office sometimes and I often deal directly with students who have formal accommodations, but mostly I deal daily with students who have all kinds of problems—learning problems, health problems, or who are facing various challenges—and so I see the learning disability issues as part of that picture.

Law professors and law schools tend to deal with students in very large batches. This is a product of the way that legal education is structured. It is part of what makes all the law schools moneymakers for the universities. We have big classes, we have rules that apply to everybody evenly, and we kind of think that is a good way to be. One result of the large-group structure is that we spend a lot of time engaged in judgmental activities, setting challenges for the students, seeing if they can measure up. Can they perform in class on the spot when you ask them hard questions? Can they do well-reasoned, thoughtful legal analysis under enormous time pressure on a type of exam that they have never taken before, etc.? We set bars and see if they can jump over them, and we tend to spend more time judging

them than we do actually trying to help them learn or giving them feedback.

I believe we would be better educators if we focused less on the judgmental side of what we are doing and spent more time getting to know our students, understanding them and individuating how we teach them according to how they learn.

Although I think all of the things that the disability services offices do is incredibly important and very essential, I also believe that every single employee of a law school needs to get on the accommodations bus. I have a lot of colleagues who do not want to deal with students with disabilities, who do not want to think about it, who do not really want to know about the challenges their students are facing. Some faculties hold trainings on assisting students with disabilities. The usual suspects show up, and a lot of people are just not interested. And I think that the ones who are still trying to be Professor Kingsfield are the ones who most need training and are the least likely to participate voluntarily.

I guess my experience of dealing with disabilities among my students is sort of like walking through a field and randomly turning over a lot of rocks. I will give you a couple of examples of the types of problems that wander into my office. For several years I chaired our student affairs committee, which dealt with petitions for readmission from students who had been excluded for academic failure. Over and over, I saw students who flunked out—bright, capable, motivated, hard-working students who flunked out of law school, then got evaluated, had their learning disabilities diagnosed, got some tutorial attention or whatever that they needed, then were readmitted and came back to law school and did fine. That is a terrible story. This should never have happened.

Another example. Recently I bumped into an alumna who I had known really well in law school and who wrote a fabulous paper in a seminar with me. When she was in law school, I thought she was just a bit slow. This was puzzling to me, because she was such a very good writer. Then when I saw her years later, she told me she had a seizure disorder, which caused serious verbal processing problems and interfered with her ability to participate in class discussions. Several years after she finished law school, she had just had surgery to correct the disorder.

I felt terrible, because when she was in law school I did not know about the problem. I did not respect her as much as she deserved. I did not know what she was struggling with. Honestly, I think I would have been a better teacher for her if I had known.

A third example: I dealt with an honor board matter in which a student was accused of plagiarism. The student had turned in a paper outline that included some unattributed language. It is very possible that the student's

cut-and-paste process in assembling research into a written product was the product of a well-documented processing disability. The instructor in the class had no information about the disability and just looked at the outline and said, "This is plagiarized!" This may be the reason it became a disciplinary matter. That is a shame.

One of the issues we need to think about in considering how to accommodate students with learning disabilities is finding out who is the population of students who need accommodations. The DSS offices tend to see the learning-disabled population as consisting of the students who get evaluated, who come to them requesting accommodations, mostly students who have documented disabilities.

I think that there is a much larger number of students in law school who have learning disabilities than the group that presents itself to the DSS offices. Some of these are students who got evaluated and had accommodations in elementary school, high school, and college but who decided to tough it out in law school. Some of them are students who have never been evaluated, but who managed in elementary school, high school, and college because they were very bright. These students do not know about their own issues. They get to law school, and some of them drown.

I believe that the number of law students who would be entitled to accommodations if they were evaluated is much larger than the identified group. We need to think about how we structure legal education with an eye to that problem.

In responding to this situation, I try to deal with my students one person at a time. I try to get to know what is happening to them and to make individual adjustments as I see fit. Just as the disability services offices make academic judgments, I make a lot of academic judgments about what should be required of a particular student.

Another point. Life is too short to be hard on people. I would rather model a mode of professionalism which is compassionate, empathetic, and caring than one that treats law school like a type of boot camp.

So let us visualize a more compassionate version of legal education. For example, we have attendance requirements. A student who misses a certain number of classes is subject to being excluded from the course, precluded from taking the exam. I have many students who miss an excessive number of classes either because they are sick or because they are overcome by deep depression, a panic disorder, or by other medical issues. I do not exclude students from my courses if their reasons for missing class have to do with learning disabilities or medical problems. I insist that they come and talk to me, we work it out, but I do not believe that it is constructive to punish them for being sick.

Another example: some students are terrified of being called on. Only a

few of these have been diagnosed with social anxiety disorder. Maybe some of the others would get that diagnosis if they went and got tested. There is a problem here of economic injustice. The students who have more resources are more likely to have been evaluated and accommodated. We need to worry about that.

So how should we respond to students who are afraid of being called on? I tell my students, if sitting in class in first semester contracts fills you with dread about being called on, then that is not going to help you learn in class. You are not going to take good notes. You are not going to listen well. Come talk to me and we will work it out.

I do not know if any of those students have formal accommodations, but when a student comes to see me who is afraid of being called on, we make a deal. The student will try to poke up her—usually her—hand whenever she has something thoughtful to say. At least for a while, she is off the hook. I am not going to call on her; she does not have to worry about it. This works pretty well. Most students want to learn how to talk in class; they just need to be safe.

Sometimes I make accommodations for a whole class. In contracts, I give take-home examinations and giving the students a lot of time to work on their exams, because I believe that there are so many students who cannot do decent quality work under the usual in-class exam time pressure. Many of these students would probably be entitled to extended time if they got evaluated for disabilities, but most have not been evaluated. I have found that by giving students six, eight, ten hours to work on an exam, I get much better quality answers. I believe that I get a better measure of what they know than I would if I were administering an exam that was basically a speedwriting contest.

Another way that I try to help students with learning disabilities, both those who have and have not been formally diagnosed, is to try to create a learning environment in class and in my office in which my students can talk to me about the aspects of the work that are hard for them. They need space to be able to express themselves freely. They need not to feel that they have to shovel themselves into some sort of cookie cutter idea of a lawyer who is tough, who can answer quickly, who can write quickly, who can do everything just like everybody else. They need to recognize that we all function very differently and we are all good at some things and not so good at other things. To enable students to get over the things that really challenge them, they need to talk to somebody about their own work process; I believe that they need to talk not only to the disability services professionals but also to their teachers.

One high watermark in my own experience of this was in a year-long writing seminar. Partway through the spring semester, one student comes

into class one day, pretty much jumping for joy, waving a letter that she had just gotten, saying, "I have a learning disability! I am going to be able to get accommodations on the bar exam! This means I will be able to get through it in one go instead of two!" I thought it was really nice that she felt so safe that she could share this with the other students in the class and with me. She was an older student; she said that she had always known that she had a learning disability. She just never had gotten around to getting it identified.

By her sharing that with the class she really did a service to her fellow students. Within a couple of days after this class, one of the other students came to see me and said, "You know, I think I should get evaluated too." Then she went and got evaluated and it turned out she had very profound ADHD and was eligible for accommodations. Even with accommodations, she did not pass the bar exam the first time she took it, but eventually she did pass. Without accommodations, she might never have passed the test.

I think we have got to kill Professor Kingsfield off. Law school is not a boot camp. I am really tired of talking to people who say, "Well, my students are absolutely required to answer when I call on them because no judge is going to let them off the hook." Some of the students will become litigators and some of them will not. We do not have to force them all to be able to perform in exactly the same way. It is the responsibility of the people in this room to try to help educate those in the legal academy who do not yet understand these issues. Thank you.

JENNIFER DiSANZA: Since we got a late start I do not want to run too far over, but do we have any questions for the panel or for Lisa? If you do have a question please talk into the mic or let me repeat your question, since we are being webcast. Yes.

AUDIENCE MEMBER: Question, okay. I am wondering what your admissions office does for notification of students with disabilities.

JENNIFER DiSANZA: What does your admissions office do for notification of disabilities?

ABEL MÓNTEZ: We do allow students, when they apply, to provide an addendum on their application, and in consultation with the admissions office, this had come up a couple of weeks ago. What we are finding is that a lot of students in that addendum area are disclosing their disability to the admissions office. If they received LSAT accommodations it will also indicate whether they have a disability; although it does not necessarily state what it is.

Our admissions office will track to see, once the admissions process is over, what students have disabilities and then alert me to the ones that I have to be ready to accommodate for orientation.

AUDIENCE MEMBER: What do they do with that information?

JENNIFER DiSANZA: What does the admissions office do with the information they receive about disabilities?

ABEL MÓNTEZ: About disabilities? I mean, I think they do take it into account. I do not know how they end up deciding, and they are going to be looking at the LSATs, they are going to be looking at the GPA, and I think they would take it into account, as they would take anything else that a student would disclose. There are students that are disclosing economic difficulties or students that are disclosing very difficult personal tragedies or just anything else that they had happen in undergrad or as they grew up.

So I think they take it into account. To what extent I am not sure, but they are able to provide that information if they feel comfortable doing that. Oftentimes, you will find that they will disclose it in their personal statement, as a way to show that they have overcome a lot of obstacles and difficulties and I think it does lend itself to the admissions office making a good determination on their admittance.

I think I answered your question.

AUDIENCE MEMBER: Hi, Bob Dinerstein with American University. This is a question I guess for everybody, first for Abel, but then also for Lisa and Michael. You described early in your remarks one thing that your office has done, and I know we have done it here, regarding professors who require blue books, and that is if a student has typed the exam as an accommodation, then being the scribe and writing it afterwards and submitting it, which when I first heard about it I thought it was kind of amazing. One is a kind of a technical question, which is, I have not had that experience in terms of reading exams like that, but I would guess, knowing the way people write blue book exams under time pressure, that if you wanted to and you got that in, you could tell between something that was written in a more time—less time dependent way that is being as described versus something done under pressure. If that is so, then I guess the question is, are you in fact doing enough to hide the fact that this is a student with a disability?

But secondly, and I think more basically, has there been any conversation with the professors who require the blue books, about whether maybe there is a way to rethink this so that we do not have to go through

this process? Because some of what I think we see in any academic atmosphere, including law schools, is I am doing it this way because I have always done it this way and I do not see any reason to do it any differently, and the perception that if I have to change it I am somehow watering down some standard that matters to me.

ABEL MÓNTEZ: Well, I think I have been sort of lucky. When I first started I had transcribers everywhere, you know, in my office, in rooms, because I had students that were typing and we were having transcribers come in. Over the last two or three years we have gone in using secure exam, and there are some—some meaning all—students allowed to type if they so choose. They also still have the option of doing the blue book.

Up until this semester we were not letting first years use the secure exam because we did not have the facilities to be able to do that, and now this year we are allowing first years and all students.

We still have a couple of older professors that will not change their—I think it is a handful. You know, that has come up, your question about someone is going to be able to tell that this was transcribed versus someone who is under pressure and wrote everything and there are lines everywhere. And to be honest with you, the transcribers that we get have good handwriting; it may not necessarily be perfect. So I tell the transcribers that they should approach it as if they are writing something, you know, a letter or something, that someone is going to read, but if they make mistakes, they cross things out, they put lines and they forget—you know, they transpose things, and I say to them that that sort of adds to the authenticity; it is going to look more authentic in the end.

The one problem that I have had is when I am using the same transcriber. I do not use the same transcriber for the same class. And it is expensive, but I hire multiple transcribers so that a professor does not look and say, "You know, what is going on here?"

So we also have rules that govern those transcriptions. Students are not allowed to come in and actually review what has been transcribed. Once they give me the exam they cannot review it. We have proofers that actually proof to make sure that everything is in the exam as written.

It has not really come up as an issue, and I think it is probably because professors are reading so many that maybe they are not thinking about it. So hopefully, knock on wood, it is becoming less and less of an issue.

LISA LERMAN: Can I add just a brief comment about this? To me it seems like this is an easy problem to solve. I agree with Bob, especially if you look at this generation of law students. They are so used to writing on keyboards and having the ability to edit that if you take away the option to

type and edit, you significantly handicap the students. If a school just adopted an academic rule that instructors were required to allow students to take exams on the computer, the school could fire all your transcribers.

ABEL MÓNTEZ: Well, I mean the registrar's office used to ask professors whether they were going to be using computers and now we have come the other way. Everyone is pretty much going to be using computers unless you tell the registrar otherwise. And so I think that is why we only have a handful of professors that are actually letting us know that they use blue books. But it is much better off than when I started.

MICHAEL MASINTER: And most of the holdouts discover very quickly that if you let students type the exams it is easier to read them, and you can grade them faster. There really is not an issue at my school at that level.

I neglected to mention, one OCR letter I should have mentioned. The only OCR letter I could find on class participation was at the Community College of Alleghany County. And in a very matter-of-fact way, the 2005 OCR letter noted that the college characterized class participation as an essential requirement of the course and that OCR was not going to second guess that judgment. Therefore no waiver of the class participation requirement was allowed, and that is a community college, not a law school.

JENNIFER DiSANZA: One last question here.

AUDIENCE MEMBER: Sorry. Our law school is encouraging—it is encouraging faculty to convert quizzes and testing throughout the course of the semester and not just any (inaudible)[24] and when it comes to quizzes that are not supposed to take up the entire length of the class time I am curious to know what you have suggested to do in terms of students who need that additional time and with the Socratic method and with the privacy issues and stuff like that you run into issues with students who need to leave the classroom to do this and how people would not know that they are a student with a disability?

MICHAEL MASINTER: They do not. That is the shortest and simplest answer that I can give you. There is nothing in either Section 504

24. *See* Washington College of Law Podcasts, "Assisting Law Students with Disabilities in the 21st Century: Brass Tacks - Welcome / Panel 1 - Best Practices," *available at* http://www.wcl.american.edu/podcast/podcast.cfm?start=120&num=20 (Mar. 8, 2007).

or FERPA that absolutely creates a guarantee of confidentiality surrounding your status as a person with a disability.

FERPA disclosure requirements forbid us from disclosing educational records or information contained within educational records and disability information we think comes within the scope of that to the public but not to our colleagues.

Section 504 does not contain an express confidentiality requirement. Title II and Title III do not either. Title I does, but we are not governed by Title I. But we ought not to gratuitously disclose information; that could be well understood to be a form of retaliation, a policy that would inhibit students from seeking accommodations.

So we try to have confidentiality policies, because they are good practice and because there is simply no reason to disclose in the run of cases to anybody that the student is a student with a disability. But if it is impossible to accommodate a student covertly, then we have to accommodate them overtly. We do not think we are disclosing anything inappropriate when we bring a sign language interpreter into a classroom, do we? Nobody thinks that closed captioning is disclosing to somebody in the room information that ought to be confidential, that there happens to be a student in the room with a disability.

And so if we have instructional methods that require a student to take an exam in a different setting . . . And by the way, all of your students already know who is getting accommodated on exams even if your faculty do not, because they know who is not in the room, they know who are not talking after the exam is over, it is not a secret, and so we do the best that we can. But if we can not practically avoid disclosure, then it is not that we are disclosing, it is that we are accommodating, and there is nothing wrong with that in my view.

ABEL MÓNTEZ: Okay and I agree with that. I mean I have very few that do the in-class middle of the semester exams, but those professors and I have a dialog and so I need to get the exam from him or her anyway. I do not think the professor necessarily knows exactly who is being accommodated, because he or she is not proctoring that in-class exam and I think that is probably a wise way. If they are going to have those quizzes, maybe getting a proctor for that quiz like you would for end of the year exam.

The other way that it comes up with confidentiality is if a student is receiving note taking. I have to contact the professor because the professor is helping me to find that particular note taker, and so the professor is going to know that the student has a disability or needs this. And students are—it is sort of a mixed bag. Some students do not want that, and I try to avoid it

if I can, but more often than not when I am having difficulty finding a note taker I have to consult the professor so . . .

We will take a ten-minute break, and we will reconvene at 10:25 for the second panel.