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HOW PRIVATE SECONDARY SCHOOLS CAN MEET THEIR OBLIGATIONS TO ACCOMMODATE STUDENTS WITH SPECIFIC LEARNING DISABILITIES

JOSEPH F. SMITH, JR.*
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INTRODUCTION

Students with specific learning disabilities attending public schools have been entitled to special education and related services since 1975 under the Individuals with Disabilities Act.¹ Private schools not receiving federal funds, on the other hand, had no obligation to accommodate, or even to admit, students with specific learning disabilities.² This situation changed on January 26, 1992, the effective date of Title III of the Americans with Disabilities Act of 1990 (“ADA”).³

This Article demonstrates that the ADA covers private school students with specific learning disabilities and offers suggestions as to how private schools can comply with the Act. To accomplish these aims, this Article explains the nature of specific learning disabilities,⁴ suggests low-cost accommodations that afford private school students with learning disabilities the opportunity to succeed

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1. PUB. L. NO. 102-119, 105 Stat. 607 (codified as amended at 20 U.S.C. §§ 1400-85 (1988 & Supp. V 1993)).

2. See 29 U.S.C. § 794 (1988 & Supp. V 1993) (originally enacted as § 504 of the Rehabilitation Act of 1973, PUB. L. NO. 93-112, 87 Stat. 394). Section 504 of the Rehabilitation Act of 1973 provides: “No otherwise qualified individual with a disability in the United States . . . 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 . . .” *Id.*

3. PUB. L. NO. 101-336, 104 Stat. 328 (codified at 42 U.S.C. §§ 12101-12213 (Supp. V 1993)). Congress delayed the effective date for 18 months after its enactment. 42 U.S.C. § 12181.

4. The authors use the terms “learning disability” and “specific learning disability” interchangeably.

academically, and focuses on how Title III of the ADA provides these students with a right to the suggested accommodations.

I. LEARNING DISABILITIES DEFINED

The term "learning disabilities" is attributed to Samuel Kirk, who introduced it in 1963 at the time the Association for Children with Learning Disabilities was formed.⁵ This organization is now called the Division for Learning Disabilities of the Council for Exceptional Children.⁶ Prior to 1963, reading and language specialists recognized that adults suffering from strokes and brain injuries, as well as children with developmental disorders and brain injuries, could have similar problems with reading and/or spoken language.⁷

In 1967, the National Advisory Committee on Handicapped Children promulgated the following definition of "specific learning disability" which the Individuals with Disabilities Education Act⁸ and its implementing regulations⁹ have adopted:

[A] disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.¹⁰

5. See DANIEL P. HALLAHAN & JAMES M. KAUFFMAN, *EXCEPTIONAL CHILDREN: INTRODUCTION TO SPECIAL EDUCATION* 122 (1991).

6. *Id.* at 124; PATRICIA I. MYERS & DONALD D. HAMMILL, *LEARNING DISABILITIES: BASIC CONCEPTS, ASSESSMENT PRACTICES, AND INSTRUCTIONAL STRATEGIES* 20-24 (1982); ERNEST SIEGEL & RUTH F. GOLD, *EDUCATING THE LEARNING DISABLED* 9 (1982). The Council for Exceptional Children, Division of Learning Disabilities is located at 1920 Association Drive, Reston, VA 22091-1589. Its telephone number is (703) 620-3660.

7. HALLAHAN & KAUFFMAN, *supra* note 5, at 122, 124; MYERS & HAMMILL, *supra* note 6, at 20-24.

8. See 20 U.S.C. § 1401(a)(15) (Supp. V 1993).

9. See 34 C.F.R. § 300.5(b)(9) (1993).

10. *LEARNING DISABILITIES: PROCEEDINGS OF THE NATIONAL CONFERENCE* 549 (James F. Kavanagh & Tom J. Truss, Jr. eds., 1988) [hereinafter Kavanagh & Truss]; HALLAHAN & KAUFFMAN, *supra* note 5, at 126. For a discussion of the history and definition of learning disabilities, see SIEGEL & GOLD, *supra* note 6, at 3-31. This does not mean that environmental or cultural disadvantage, mental retardation, or emotional disturbance cannot occur along with specific learning disabilities. It simply means that "for children to be considered learning disabled their learning problems must be *pri-*

The legal definition of learning disabilities has never been changed, despite a recommendation submitted to Congress in 1987 by the U.S. Interagency Committee on Learning Disabilities and the Foundation for Children with Learning Disabilities.¹¹

Among the perceptual disabilities which may occur either by themselves or in combination are dyslexia (severe impairment of the ability to read, despite conventional educational experiences),¹²

marily the result of their learning disabilities." HALLAHAN & KAUFFMAN, *supra* note 5, at 126. See also LORING BRINCKERHOFF ET AL., PROMOTING POSTSECONDARY EDUCATION FOR STUDENTS WITH LEARNING DISABILITIES: A HANDBOOK FOR PRACTITIONERS 68-87 (1993).

11. "The [U.S.] Interagency Committee on Learning Disabilities was established by the Health Research Extension Act of 1985 (P.L. 99-158) to review and assess Federal research priorities, activities, and findings regarding learning disabilities and to report to Congress" Kavanagh & Truss, *supra* note 10, at v.

Except for the italicized changes below, the recommended definition is also essentially the same as the definition that the National Joint Committee for Learning Disabilities (comprised of representatives from the American Speech-Language-Hearing Association, the Association for Children and Adults with Learning Disabilities, the Council for Learning Disabilities, the Division for Children with Communication Disorders, the International Reading Association, and the Orton Dyslexia Society) set forth in 1981:

Learning disabilities is a generic term that refers to a heterogeneous group of disorders manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities, *or of social skills*. These disorders are intrinsic to the individual and presumed to be due to central nervous system dysfunction. Even though a learning disability may occur concomitantly with other handicapping conditions (e.g., sensory impairment, mental retardation, social and emotional disturbance), *with socioenvironmental influences* (e.g., cultural differences, insufficient or inappropriate instruction, psychogenic factors), *and especially with attention deficit disorder, all of which may cause learning problems, a learning disability is not the direct result of those conditions or influences.*

Kavanagh & Truss, *supra* note 10, at 550-51; HALLAHAN & KAUFFMAN, *supra* note 5, at 126-27; see generally BRINCKERHOFF, PROMOTING POSTSECONDARY EDUCATION, *supra* note 10, at 71-73.

The changes have been introduced because: (1) learning disabilities persist into adulthood; (2) learning disabilities are not a homogeneous condition; (3) the definition focuses on the results of the manifestations of the disorder rather than terms which are not all-inclusive such as minimal brain disorder; and (4) the definition emphasizes that learning disabilities may occur with other disorders, but to be considered learning disabled the learning problems of children and adults must "be primarily the result of their learning disabilities." Kavanagh & Truss, *supra* note 9, at 549-50; HALLAHAN & KAUFFMAN, *supra* note 5, at 127; BRINCKERHOFF, PROMOTING POSTSECONDARY EDUCATION, *supra* note 10, at 71-73.

12. HALLAHAN & KAUFFMAN, *supra* note 5, at 122 n.12; SPECIAL LEARNING CORPORATION, LEARNING DISABILITIES: A REFERENCE BOOK at Glossary of Terms (1980); Michael Spagna & Deidre Semoff, UNIVERSITY OF CALIFORNIA AT BERKELEY RESOURCE GUIDE: STUDENTS IDENTIFIED AS HAVING SPECIFIC LEARNING DISABILITIES 2 (1990) (unpublished paper, available from University of California, Berkeley, Disabled Students' Program); Marguerite C. Radencich, *The Learning Disability Para-*

dysgraphia (handwriting difficulties),¹³ dysphasia or developmental aphasia (referring to "both the expressive and receptive language learning disabilities"),¹⁴ and dyscalculia ("[d]ifficulty in performing mathematical functions").¹⁵ Other processing deficits such as difficulties in the areas of auditory perception, directionality, auditory discrimination, spatial orientation, perceptual speed, and attention deficit disorder may compound learning disabilities.

To determine if an individual student has specific learning disabilities, testing by a qualified person must show that the individual demonstrates a significant "discrepancy between achievement and intellectual ability in one or more of the following areas: (a) oral expression[;] (b) listening comprehension[;] (c) written expression[;] (d) basic reading skills[;] (e) reading comprehension[;] (f) mathematics calculation[; and/or] (g) mathematics reasoning."¹⁶ As stated before, an individual may not be identified as having a specific learning disability if the discrepancy is the *primary* result of (1) a visual, hearing, or motor disability; (2) mental retardation; (3) emotional disturbance; or (4) environmental, cultural, or economic disadvantage.¹⁷

As early as the 1890s, James Hinshelwood, a Scottish ophthalmologist, posited the theory that neurological conditions cause learning disabilities.¹⁸ Only recently, however, has scientific evidence developed to substantiate the neurological causes of some learning disorders.¹⁹ This explains why it is sometimes difficult to

digm, in 1 HANDBOOK OF LEARNING DISABILITIES 27, 36-37 (Kenneth A. Kavale et al. eds., 1987).

13. Spagna & Semoff, *supra* note 12, at 2; SPECIAL LEARNING CORPORATION, *supra* note 12, at Glossary of Terms.

14. Spagna & Semoff, *supra* note 12, at 3; SPECIAL LEARNING CORPORATION, *supra* note 12, at Glossary of Terms (under aphasia).

15. MATTHEW B. BOGIN & BETH GOODMAN, REPRESENTING LEARNING DISABLED CHILDREN: A MANUAL FOR ATTORNEYS 145 (1985); SPECIAL LEARNING CORPORATION, *supra* note 12, at Glossary of Terms.

16. *Evaluation and Assessment of LD*, in 1 HANDBOOK OF LEARNING DISABILITIES, *supra* note 12, at 299, 300.

17. See *supra* note 10 and accompanying text for a definition of specific learning disability.

18. Kenneth Jost, *Learning Disabilities*, 3 CQ RESEARCHER 1083, 1089 (1993).

19. NORMAN GESCHWIND & ALBERT M. GALABURDA, CEREBRAL LATERALIZATION: BIOLOGICAL MECHANISMS ASSOCIATIONS AND PATHOLOGY 58-63 (1987); Sandra Blakeslee, *New Clue to Cause of Dyslexia Seen in Mishearing of Fast Sounds*, N.Y. TIMES, Aug. 16, 1994, at C1 (citing findings published in the *Proceedings of the National Academy of Sciences* "suggest[ing] that dyslexia is at root not a visual or ordinary hearing problem, as many have thought, but a flaw in a specific brain circuit that handles rapidly flowing auditory information," a medical problem with a neurological basis); Margaret S. Livingstone et al., *Physiological and Anatomical Evidence for a Magnocel-*

make a definitive diagnosis.²⁰

II. SCREENING

Private school personnel may learn of a student's specific learning disabilities from parents or guardians who have had the student tested. They also may be alerted to the need for testing from the student's teacher(s) or guidance counselor. Schools that recommend students pursue outside testing should have a systematic procedure for making such recommendations. First, the school should designate a person to whom the teacher may make a referral (possibly a school counselor, if there is one).²¹ The teacher's referral should include behavioral and academic observations and other relevant statements. The designated person or counselor should make an independent assessment, including a review of identifying data, educational history, medical and developmental history, as well as current difficulties and attempted alternatives.²² Parents should be informed of the results of the review, and if school officials recommend testing, the school should provide the parents with a list of community referrals for a complete evaluation.

A comprehensive assessment should include a battery of intelligence, achievement, and perceptual motor skills tests.²³ The tests most frequently used by professionals to determine general intelligence are: Wechsler Intelligence Scale for Children-III-Revised; Wechsler Adult Intelligence Scale-Revised; or the Woodcock-Johnson Revised Tests of Cognitive Ability. Each of these tests includes some measures of perceptual-motor function.²⁴ In the interpretation of testing results, the highest ability level should be used as the best measure of cognitive aptitude.²⁵

Scores from standardized, normed achievement tests should be

lular Defect in Developmental Dyslexia, 88 PROC. NATL. ACAD. SCI. USA 7943, 7943-47 (1991).

20. Jost, *supra* note 18, at 1090; HALLAHAN & KAUFFMAN, *supra* note 5, at 127-29.

21. See generally Jonathan Cohen, *The Learning Disabled University Student: Signs and Initial Screening*, 21 NASPA JOURNAL 22, 22-27 (1984) (discussing the need for personnel who are able to recognize the signs and symptoms of learning disabilities).

22. Kevin P. Dwyer, *School Psychology Assessment*, in 1 HANDBOOK OF LEARNING DISABILITIES, *supra* note 12, at 325, 330-31.

23. *Id.* at 333; HALLAHAN & KAUFFMAN, *supra* note 5, at 129-33.

24. These measures include the perceptual organization cluster on the Wechsler tests and the perceptual speed cluster of the Woodstock-Johnson Revised tests.

25. Dwyer, *supra* note 22, at 334.

compared to the highest aptitude obtained on the IQ test in order to determine aptitude-achievement discrepancies. The most commonly used achievement tests are: Woodcock-Johnson Achievement Battery-Revised; Wide Range Achievement Test-Revised; Peabody Individual Achievement Test; Nelson-Denny Reading Comprehension Test; and the Stanford Reading Achievement Test. Standard scores should be used, when available, to compare the achievement tests to the ability level tests.²⁶

III. ACCOMMODATING STUDENTS WITH LEARNING DISABILITIES

Since a student with specific learning disabilities is one who demonstrates a significant discrepancy between achievement and intellectual ability, private schools need to determine those accommodations that will enable the student to achieve at a level commensurate with his or her intellectual capability. The purpose of this discussion is to identify accommodations that private schools can provide to their students with learning disabilities without causing an "undue burden" or "fundamentally altering" the school's program. One must remember when reviewing the following suggested accommodations that specific learning disabilities affect individuals in a variety of ways, depending on the severity and nature of the disability.²⁷ Consequently, accommodations must be specifically designed to meet the identified needs of the individual student.

A. Test Modifications

Many students with specific learning disabilities need accommodations when taking examinations to ensure that their performance demonstrates their knowledge of the material being tested. One of the most needed accommodations is extra time for course

26. For more information about testing, see ANNE ANASTASI, *PSYCHOLOGICAL TESTING* 496-505 (6th ed. 1988); PATRICIA ANDERSON & LORING BRINCKERHOFF, *INTERPRETING LD DIAGNOSTIC REPORTS FOR APPROPRIATE SERVICE DELIVERY 1-7* (Univ. of Conn. Special Educ. Ctr. Publication Series Document Number: LDC 19, 1989); BOGIN & GOODMAN, *supra* note 15, at 32-42 ("Understanding Testing"); LAWRENCE J. GREENE, *LEARNING DISABILITIES AND YOUR CHILD: A SURVIVAL HANDBOOK* 22-45 (1987); HALLAHAN & KAUFFMAN, *supra* note 5, at 129-33; Dwyer, *supra* note 22, at 325-41; BETTY B. OSMAN, *LEARNING DISABILITIES: A FAMILY AFFAIR* 175-80 (1979); LARRY B. SILVER, *THE MISUNDERSTOOD CHILD: A GUIDE FOR PARENTS OF LEARNING DISABLED CHILDREN* 110-20 (1984).

27. See generally 1 *HANDBOOK OF LEARNING DISABILITIES*, *supra* note 12, at 45-47, 77-298.

examinations.²⁸ There is widespread belief among educators that allowing learning disabled students extra time is unfair to nondisabled students.

Three recent empirical studies tested learning disabled students and non-learning disabled students under time constraints, with extra time and/or with no time limits.²⁹ One study found that college students with learning disabilities did not perform as well as non-learning disabled college students on the American College Test ("ACT") and the Nelson-Denny Reading Test under timed conditions. College students with learning disabilities performed just as well as non-learning disabled students on the ACT and the Nelson-Denny Reading Test, however, under untimed testing conditions.³⁰

Another study found that non-learning disabled students did not significantly improve their scores with extra time, while the learning disabled group improved their scores significantly.³¹ Although the learning disabled students were not able to complete the tests within the allotted time, they were as accurate as their non-learning disabled peers on the portion they had completed. When learning disabled students were given enough time to complete their tests, there was no significant difference in the comprehension scores between the two groups.³²

Most recently, a Canadian study compared the effect of extended and untimed testing for both learning disabled and non-learning disabled students; the results showed a marked increase in the test performances of the learning disabled students and a margi-

28. See MARJORIE RAGOSTA & CATHY WENDLER, ELIGIBILITY ISSUES & COMPARABLE TIME LIMITS FOR DISABLED AND NONDISABLED SAT EXAMINEES (College Bd. Report No. 92-5, 1992); M. Kay Runyan, *The Effect of Extra Time on Reading Comprehension Scores for University Students with and Without Learning Disabilities*, 24 J. LEARNING DISABILITIES 104 (1991) [hereinafter Runyan, *The Effect of Extra Time*]; M. Kay Runyan, *Extended Time on Tests for LD Students—Is It Fair?* THE EDUC. THERAPIST 5 (1992) [hereinafter Runyan, *Extended Time*]. See also Marian Howard & Margot Marek, *Different but Not Dumb: Dyslexics Who Belong in Independent Schools*, INDEPENDENT SCHOOL 30, 32 (1979).

29. See George A. Hill, *Learning Disabled College Students: The Assessment of Academic Aptitude* (1984) (unpublished doctoral dissertation, Texas Technical University, Lubbock); Runyan, *The Effect of Extra Time*, *supra* note 28; Susan Weaver, *The Validity of the Use of Extended and Untimed Testing for Postsecondary Students with Learning Disabilities* (1993) (unpublished doctoral dissertation, University of Toronto). There is no reason to suspect that the results of these studies would be different for elementary or secondary students.

30. Hill, *supra* note 29, at 105.

31. Runyan, *The Effect of Extra Time*, *supra* note 28, at 107.

32. *Id.*

nal increase in the scores of the non-learning disabled students.³³ Together, these studies suggest that non-learning disabled students can perform up to their capability under timed testing conditions and have little room for improvement. Students with learning disabilities, however, cannot perform up to their capabilities under timed conditions.³⁴

The amount of additional time a student may require will depend on several factors, including the type of learning disability, the degree of compensation, and the type of examination. Research findings by Educational Testing Service ("ETS") show that between time and a half and double time for special education test administration would allow students with learning disabilities, hearing impairments, physical disabilities, and most visual impairments to complete the SAT at rates comparable to those of nondisabled examinees. However, examinees with visual impairments who use braille or cassette tests appear to require between double and triple time. Further, ETS suggests that most subgroups appear to need more than time and a half but less than double time to complete their SATs at a rate equivalent to nondisabled examinees.³⁵

Teachers and administrators should also be aware that the format of an examination may have significant effects on the performance of students with specific learning disabilities. In most cases, exams should be typed in normal size print and double spaced. Teachers should resist the temptation to reduce the size of print to save paper. Reducing print size makes the test difficult for everyone, but possibly disastrous for a student with a learning disability. Tests printed on colored paper rather than white are often helpful for those individuals with visual-perceptual and concentrational difficulties. This helps to minimize the sharp black/white contrast which affects the perceptual function of many individuals with learning disabilities.³⁶ Students taking multiple choice tests should

33. Weaver, *supra* note 29, at 127-29.

34. For a discussion of perceptual speed deficit, see generally D.L. Speece, *Information Processing Subtypes of Learning Disabled Readers*, in *LEARNING DISABILITY SUBTYPING: NEUROPSYCHOLOGICAL FOUNDATIONS, CONCEPTUAL MODELS, AND ISSUES IN CLINICAL DIFFERENTIATION* (Stephen R. Hooper & W. Grant Willis eds., 1989); Weaver, *supra* note 29, at 11-15. "Perceptual speed deficit" is defined as trouble in-taking, processing, and/or reacting to information within the same time constraints as a non-learning disabled individual. Spagna & Semoff, *supra* note 12, at 2.

35. RAGOSTA & WENDLER, *supra* note 28, at 20.

36. Blue seems to be a preferred color for many. See generally Gregory L.W. Robinson & Robert N.F. Conway, *The Effects of Irlen Colored Lenses on Students' Specific Reading Skills and Their Perception of Ability: A Twelve Month Validity Study*,

be allowed to write their choices directly on the test booklet, rather than transferring them to a scantron form for electronic scoring.³⁷

Additional testing modifications may include (1) administering oral rather than written examinations³⁸ or allowing tape recorded or dictated answers;³⁹ (2) allowing a reader for a student with reading difficulties or providing recorded exam questions;⁴⁰ (3) assigning an assistant to ensure that the student understands the directions on an examination or to clarify a particular exam question;⁴¹ (4) providing a quiet room, free of distraction, for a student who is distractible, has attention deficit disorder, needs extra time or reads aloud as a reading strategy;⁴² (5) allowing the use of a typewriter or a computer for students with visual perceptual and visual processing problems;⁴³ (6) allowing students who have a conceptual understanding of math but experience problems in sequencing, visual perception, or number reversal problems to use calculators to perform mathematical calculations;⁴⁴ and (7) arranging exam schedules to allow adequate time between tests.⁴⁵

B. *Course and Classroom Modifications*

Some students with reading difficulties need recorded books. They may use recordings in place of, or in conjunction with, printed material. Recording for the Blind provides books on tape free of

23 JOURNAL OF LEARNING DISABILITIES 589 (1990) (finding that the use of tinted non-optical lenses minimizes visual-perceptual dysfunction).

37. Telephone Interview with Mrs. Connie Mulcahy, Coordinator of Admissions at the University School of Nova Southeastern University, in Fort Lauderdale, Fla. (July 23, 1994).

38. PAMELA ADELMAN & DEBBIE OLUFS, ASSISTING COLLEGE STUDENTS WITH LEARNING DISABILITIES: A TUTOR'S MANUAL 25 (1986); Loring Brinckerhoff, *Accommodations for College Students with Learning Disabilities: The Law and its Implementation*, in THE ASSOCIATION ON HANDICAPPED STUDENT SERVICE PROGRAMS IN POST-SECONDARY EDUCATION, FOR TOMORROW IS ANOTHER DAY 89, 93 (Joanna M. Gartner ed., 1985).

39. Brinckerhoff, *supra* note 38, at 93; RHONA C. HARTMAND & MARTHA R. REDDEN, AMERICAN COUNCIL ON EDUCATION, MEASURING STUDENT PROGRESS IN THE CLASSROOM: A GUIDE TO TESTING AND EVALUATING PROGRESS OF STUDENTS WITH DISABILITIES 4 (Heath Resource Center rev. 1985-86).

40. ADELMAN & OLUFS, *supra* note 38, at 25; Brinckerhoff, *supra* note 38, at 93; HARTMAND & REDDEN, *supra* note 39, at 4.

41. Brinckerhoff, *supra* note 38, at 93.

42. See, ADELMAN & OLUFS, *supra* note 38, at 25; Weaver, *supra* note 29, at 148.

43. KAY A. NORLANDER ET AL., THE UNIVERSITY OF CONNECTICUT PROGRAM FOR LEARNING DISABLED COLLEGE STUDENTS: FINAL REPORT 8-22, app. D (1987) (available from the University of Connecticut School of Education).

44. BRINCKERHOFF ET AL., *supra* note 10, at 232.

45. NORLANDER ET AL., *supra* note 43, at 32.

charge after an initial \$37.50 registration fee. The professional who conducted the learning disabilities assessment or a school counselor can complete the necessary application for this service.⁴⁶

Many learning disabled students who exhibit auditory processing deficits or visual-motor coordination problems have difficulty taking adequate notes.⁴⁷ Other students who are good note takers can be offered extra credit, community service hours, or be paid for providing a daily copy of notes to these students. The school should provide for the photocopying of notes or should provide the note taker with special multiple copy NCR paper.⁴⁸ It may also be reasonable to allow some students to tape record their classes.⁴⁹

Teachers can modify the manner in which they present information by using a multi-modal approach to instruction; this process includes integrating visual, auditory, and hands-on activities.⁵⁰ Having students work in small groups and using cooperative learning opportunities are effective teaching strategies for many students with learning disabilities. One method effective for all students that is particularly helpful for students with learning disabilities is called the interactive semantic mapping approach.⁵¹ The use of colored

46. The address for Recording for the Blind is 20 Roszel Road, Princeton, NJ 08540. Their toll free number is (800) 221-4792.

47. Leo E. Otterbein, *Written Language Problems*, in 1 HANDBOOK OF LEARNING DISABILITIES, *supra* note 12, at 169. If a student has an auditory processing deficit, he is processing language much slower than he is hearing it. With a visual motor coordination problem, a student may be a slow writer and fall behind in taking notes because the student (1) may have to think about how to spell each word and/or (2) may have to think about the formation of each letter. If the brain is not monitoring the motor movement as quickly as the hand is moving, the student may end up with illegible notes. Consequently, the student will not have the same information as classmates because the student has missed large chunks of relevant material. *Id.*; see generally HALLAHAN & KAUFFMAN, *supra* note 5, at 143.

48. This type of paper is often given to note takers for people who are deaf. It produces three copies and can be purchased at most office supply stores.

49. For students who have little or no experience with taping classes, see ADELMAN & OLUFS, *supra* note 38, at 14 (offering excellent technical advice). See *infra*, note 116 and accompanying text, for discussion of reasonable accommodations under the ADA.

50. PHYLLIS BERTIN & EILEEN PERLMAN, PREVENTING ACADEMIC FAILURE: A MULTISENSORY CURRICULUM FOR TEACHING READING, WRITING AND SPELLING IN THE ELEMENTARY CLASSROOM 2 (6th ed. 1989).

51. See David J. Scanlon et al., *Interactive Semantic Mapping: An Interactive Approach to Enhancing LD Students' Content Area Comprehension*, 7 LEARNING DISABILITIES RESEARCH & PRACTICE 142 (1992). "Interactive Semantic Mapping aids reading comprehension through a process centered on LD students collaborating with one another, their teacher, texts, and instructional materials to identify and make meaningful content area concepts. The central activity of ISM is group construction of a semantic map." *Id.* at 143.

chalk or colored markers is helpful in teaching sequential information such as algebra or other math.⁵² Something as simple as placing the letter "L" on the back of a student's left hand and the letter "R" on the right may enable a student whose disabilities preclude him from telling left from right to complete a driver's education course.⁵³

Students with specific learning disabilities should be taught learning strategies—how to learn—which then may be applied to the acquisition of specific course content.⁵⁴ Among the specific strategies that may be taught are: cognitive mapping for organization in writing;⁵⁵ memory strategies including categorization, mnemonics and short frequent reviews;⁵⁶ reading strategies focusing on

52. See TONY BUZAN, *USE BOTH SIDES OF YOUR BRAIN*, 109-10 (1983). Using a different colored chalk for each function of a mathematical problem will often help trigger the memory for the sequence for working the problem. For instance, the first function of an algebraic solution could always be done in the same color; the second in a different color. This is particularly helpful for students who may have sequencing difficulties and cannot remember the particular order for performing a math function. See also ADELMAN & OLUF, *supra* note 38, at 14 for color coding methods which help memory and concentration.

53. Dr. Runyan used this method very successfully when she was a public school teacher.

54. "LD students often lack the necessary skills to cope with the demands of content area learning. These students manifest deficits in multiple skill areas and lack the ability to activate and integrate on their own skills they do command." Scanlon et al., *supra* note 51, at 142 (citation omitted). See generally HALLAHAN & KAUFFMAN, *supra* note 5, at 137.

Children need to learn: when to use a strategy; what types of information are best suited for a particular strategy; and an idea of how to implement and modify each of the strategies to meet situational demands. They will benefit from a discussion of similarities and differences in strategies, and an opportunity to compare and contrast the efficiency of various strategies.

The goal of strategy instruction is to facilitate, to whatever extent possible, the efficient retention of information.

John Hartson, *Memory Skills: Why Some Children Still Have Academic Difficulty After Treatment and How To Help*, CHADDER 11 (April 1994).

55. Cognitive mapping is a brain storming and clustering technique used for organizing and prioritizing ideas. BUZAN, *supra* note 52, at 90 & fig. 35.

56. A mnemonic device is a procedure for organizing and encoding information for the sole purpose of making that information retrievable at a later date. A student associates the information to be learned with a cognitive cuing structure, thereby increasing later recall of the information. Lorayne and Lucas found that in order to remember any new piece of information it must be associated with something you already know or remembered in some ridiculous way. HARRY LORAYNE & JERRY LUCAS, *THE MEMORY BOOK* 5-13 (1992). Margo Mastroperi and Thomas Scruggs have developed a "mnemonic keyword method" as "a way of modifying curriculum materials so that abstract information is made more concrete." HALLAHAN & KAUFFMAN, *supra* note 5, at 152. For an excellent book on this subject, including descriptions of various types of memory strategies, see JOHN HARTSON, *THE FORGOTTEN R, REMEMBERING: MEMORY*

the SQ3R method;⁵⁷ and the Cornell method for note taking.⁵⁸ To maximize the effectiveness of learning strategies instruction, students should use their own books and assignments.⁵⁹ The school can provide this instruction in a course open to all students. If such courses are not available to everyone, it may be a reasonable ac-

STRATEGY INSTRUCTION FOR SCHOOL-AGED CHILDREN. In addition, research clearly shows that questions on tests which secondary school teachers administer emphasize rote memory. Lewis M. Putnam, *Characteristics of Questions on Tests Administered by Mainstream Secondary Classroom Teachers*, 7 LEARNING DISABILITIES RESEARCH AND PRACTICE 129 (1992). OFFICE OF CORPORATE QUALITY ASSURANCE AND ETS COMMITTEE ON PEOPLE WITH DISABILITIES, EDUCATIONAL TESTING SERVICE, TESTING PERSONS WITH DISABILITIES: A REPORT FOR ETS PROGRAMS AND THEIR CONSTITUENTS (1990). These tests require students to recall specific facts in a rote fashion. Unfortunately, many students with learning disabilities encounter major difficulties in memorizing this kind of information. Therefore, while it is necessary for the secondary classroom teacher to provide instruction in procedures that will enable all students to do well on tests, it is particularly imperative that students with learning disabilities learn this information. For this reason, the instruction should focus on the strategies a student should use to memorize material as well as a demonstration of the acquisition of content area information itself.

57. CAROL C. KANAR, *THE CONFIDENT STUDENT* 265-78 (1991). This strategy has been used for many years to increase reading comprehension. SQ3R is an acronym for Survey, Question, Read, Recite, and Review. For additional discussions of this strategy, see HARTSON, *supra* note 56, at 77; FRANCIS P. ROBINSON, *EFFECTIVE READING* 38-59 (1962).

58. KANAR, *supra* note 57, at 170-72. Dr. Walter Paul of Cornell University developed the Cornell method of note taking. This system is composed of six components: recording, reviewing, questioning, reciting, reflecting, and summary. *Id.* at 170.

The student begins by drawing a vertical line down the left side of the paper, 2.5 inches from the paper's edge. This leaves a 6 inch column for taking notes. The student records the facts and, as soon as possible, reviews the information. During this review, the student writes the main ideas in the left margin and formulates questions on the material. The questions help to strengthen recall and anticipate test questions. *Id.* at 170-71.

The next step involves reciting the facts and the ideas out loud, asking the questions and answering them, reflecting on the ideas, and applying them to other situations in real life or trying to relate them to what the student already knows about the subject. *Id.* at 170, 172. The student then writes a summary statement about the material at the bottom of the page. This summary can be done on each page of the notes or the whole lecture can be summarized at the end of the last page. *Id.* at 170-72. See also DAVID B. ELLIS, *BECOMING A MASTER STUDENT* 128-39 (6th ed. 1991) (available from College Survival, Inc., P.O. Box 8306, Rapid City, SD 57709-8306).

59. Putnam, *supra* note 56, at 129-35. "[C]ompelling evidence [indicates] that general strategies are ineffective when taught in isolation and that these strategies rarely operate in a mutually exclusive manner. An emerging view, though in its research infancy, is that general strategies are best taught in specific contexts." Maurice Hollinsworth & John Woodward, *Integrated Learning: Explicit Strategies and Their Role in Problem-Solving Instruction for Students with Learning Disabilities*, 59 EXCEPTIONAL CHILDREN 444, 453 (1993) (citations omitted). In addition, highlighting (underlining) text material is a study strategy which "is beneficial as a memory and a study aid," but which requires that the student own the book. HARTSON, *supra* note 56, at 81.

commodation to provide such instruction to students with specific learning disabilities. It should be noted the strategies listed above are important for all students, but are essential learning tools for the students with learning disabilities.

If a school provides access to computers or word processors, it may be reasonable to ensure access to the equipment for students with certain learning disabilities. For example, a student with dyslexia may be able to minimize his or her problems by having access to a word processor with a spell checker. Allowing such a student priority to a word processor when that student is preparing written assignments may be a reasonable accommodation.

Some students with learning disabilities (especially those with auditory processing deficits) may never master a foreign language.⁶⁰ To accommodate these students, it may be necessary to establish substitute courses to fulfill the requirement or, in some rare cases, to waive the requirement.⁶¹ Another reasonable accommodation to assist a student with specific learning disabilities identified to be at risk in a foreign language course is to allow the student to take the

60. See generally Richard Sparks et al., *Diagnosing and Accommodating the Foreign Language Learning Difficulties of College Students with Learning Disabilities*, 7 LEARNING DISABILITIES RESEARCH AND PRACTICE 150 (1992). There should be appropriate documentation of a student's learning disability in this area. The Modern Language Aptitude Test is frequently used to evaluate a student's aptitude for learning a foreign language, and provides good documentation when combined with a comprehensive assessment. *Id.* at 154-57. Although this article is geared to college students, the authors feel it is also relevant to high school students.

61. For example, if the curriculum contains courses about the culture of another country, such courses may be substituted.

Clearly, if the documentation verifies that there are serious deficits in information-processing abilities related to course mastery (e.g., auditory short-term memory, or simultaneous or sequential processing), then a policy regarding substitution should be accessed. A "fail first" philosophy not only has an impact on overall academic status but also is damaging to self-esteem and motivation.

BRINCKERHOFF ET AL., *supra* note 10, at 233. In addition, school administrators may wish to explore the feasibility of teaching foreign language classes in non-traditional ways. Some colleges and universities have done this, using a slower pace and strategies designed specifically for learning differences. Sparks et al., *supra* note 60, at 158; Letter From Terry Bodaine, University of Colorado at Boulder, Office of Services to Disabled Students, Learning Disabilities Program (March 10, 1993) (addressed to M. Kay Runyan). Sparks et al. speculate that:

a language like Latin, that is meant to be read, might be easier for students with phonological problems than are languages that are meant to be spoken. Likewise, . . . Spanish, which is phonetically regular, might be easier to master than irregular languages. To date, these questions have not been answered in the literature.

Sparks et al., *supra* note 60, at 156.

course on a credit/no credit or pass/fail rather than graded basis.⁶²

Some students with specific learning disabilities experience severe problems in mathematics. The same kinds of accommodations suggested for students with foreign language deficits may be appropriate.⁶³

C. *Teacher Selection*

The selection of a teacher may affect the success of a student with a learning disability. For example, if a learning disabled student has difficulty with multiple-choice exams, a teacher whose course requires papers or essay exams may be a better choice. Allowing such a student priority in class selection could be a reasonable accommodation. In addition, if an administrator is aware of the resistance on the part of a teacher to accommodate learning disabled students, then it would be in everyone's best interests to assign the student to another teacher.⁶⁴

IV. THE AMERICANS WITH DISABILITIES ACT

Prior to the enactment of the ADA, one of the most important federal statutes affecting the rights of persons with disabilities was section 504 of the Rehabilitation Act of 1973⁶⁵ which protects "otherwise qualified individual[s] with a disability . . . [from] discrimination under any program or activity receiving Federal financial assistance."⁶⁶ Unfortunately, this statute subjected individuals with disabilities to potential discrimination by myriad entities that did not receive federal funds. It became necessary, therefore, to resort to state law to redress discrimination.

Recognizing that persons with disabilities are subject to discrimination in a number of vital areas including employment, hous-

62. This would allow learning disabled students to complete a requirement without unfairly jeopardizing their grade point average. BRINCKERHOFF ET AL., *supra* note 10, at 233.

63. *Id.*

64. Barbara Bateman, *Learning Disabilities: The Changing Landscape*, 25 JOURNAL OF LEARNING DISABILITIES 29 (1992).

Many people still do not believe that learning disabilities are real Many regular educators are quite amenable to the concept of learning disabilities, until they are required to do something differently than they would otherwise. Then a learning disability dissolves into a fancy excuse for getting undeserved special consideration.

Id. at 29.

65. 29 U.S.C. § 794 (1988 & Supp. V 1993).

66. *Id.* § 794(a).

ing, public accommodation, education, transportation, and communication, Congress passed the ADA.⁶⁷ The Act is intended to provide a national mandate against such discrimination and clear, enforceable standards addressing discrimination against individuals with disabilities.⁶⁸ Additional purposes are

to ensure that the Federal Government plays a central role in enforcing the standards established in this [Act] on behalf of individuals with disabilities; and

... 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 areas of discrimination faced day-to-day by people with disabilities.⁶⁹

The ADA is divided into five titles.⁷⁰ Title III covers private schools and prohibits discrimination against students with disabilities. It provides that: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the

67. PUB. L. No. 101-336, 104 Stat. 328 (codified at 42 U.S.C. §§ 12101-12213 (Supp. V 1993)).

There are nine findings set forth in the ADA. See 42 U.S.C. § 12101(a)(1)-(9) (Supp. V 1993). The third finding states that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." *Id.* § 12101(a)(3). Congress also found that 43,000,000 Americans have disabilities, and that the number is increasing. *Id.* § 12101(a)(1). Further, they found that "historically, society has tended to isolate and segregate individuals with disabilities," *id.* § 12101(a)(2), and, often, people with disabilities had no legal recourse to redress such discrimination. *Id.* § 12101(a)(4).

68. *Id.* § 12101(b)(1)-(2).

69. *Id.* § 12101(b)(3)-(4).

70. TITLE I—EMPLOYMENT. See 42 U.S.C. §§ 12111-12117 (Supp. V 1993) (dealing with the employment of persons with disabilities). TITLE II—PUBLIC SERVICES. See *id.* §§ 12131-12165 (dealing with services and transportation by public entities). Title II defines a public entity as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority." *Id.* § 12131(1)(A)-(C). TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES. See *id.* §§ 12181-12189. Title III is the focus of this article. TITLE IV—TELECOMMUNICATIONS. See 47 U.S.C. §§ 225, 611 (Supp. V 1993) (dealing with telecommunications for hearing and speech impaired individuals and the closed captioning of public service announcements). TITLE V—MISCELLANEOUS PROVISIONS. See 42 U.S.C. §§ 12201-12213 (dealing with a variety of miscellaneous issues including construction, state immunity, prohibition against retaliation and coercion, regulations by the Architectural and Transportation Barriers Compliance Board, attorney's fees, technical assistance, federal wilderness areas, transvestites, coverage of Congress and the agencies of the legislative branch, illegal use of drugs, definitions, amendments to the Rehabilitation Act, alternative means of dispute resolution, and severability).

goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."⁷¹

To answer the question of whether the ADA requires private schools to accommodate a student with a learning disability, it is necessary to address several subsidiary questions. Is a private school a public accommodation under Title III? Does a learning disability constitute a disability under the Act? Does a failure to accommodate a student with a learning disability constitute discrimination under Title III?

Title III specifically includes private schools within its definition of public accommodations: "for purposes of this [title], . . . a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education" is considered a public accommodation if its operation affects commerce.⁷² In view of the Act's liberal definition of commerce,⁷³ virtually all private schools are places of public accommodations. Religiously operated schools are not covered, however, because Title III specifically exempts from coverage "religious organizations or entities controlled by religious organizations."⁷⁴

71. 42 U.S.C. § 12182(a).

72. *Id.* § 12181(7)(j).

73. 42 U.S.C. § 12181(1)(A)-(C) (Supp. V 1993). Title III of the ADA defines "commerce" as "travel, trade, traffic, commerce, transportation, or communication— (A) among the several States; (B) between any foreign country or between any territory or possession and any State; or (C) between points in the same State but through another State or foreign country." *Id.* The purpose of the Americans with Disabilities Act of 1990 is "to invoke the sweep of congressional authority, including the power to . . . regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." *Id.* § 12101(b)(4).

The federal regulations for the ADA provide that "commerce" as used in the ADA shall be interpreted "in the same manner as in [T]itle II of the Civil Rights Act of 1964, which prohibits racial discrimination in public accommodations." 28 C.F.R. pt. 36, app. B, 582 (1994). See *Katzenbach v. McClung*, 379 U.S. 294 (1964); see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

74. 42 U.S.C. § 12187. Both the legislative history and the commentary to the implementing regulations maintain that religiously controlled schools are within the exemption. EDUCATION AND LABOR COMM. REP., H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 125 (1990) and JUDICIARY COMM. REP., H.R. REP. NO. 485(III), 101st Cong. 2d Sess. 66, reprinted in 1990 U.S.C.C.A.N. 408, 489. The analysis to the regulations states:

The test is whether the church or other religious organization operates the public accommodation, not which individuals receive the public accommodation's services.

Religious entities that are controlled by religious organizations are also exempt from the ADA's requirements. Many religious organizations in the

The next issue is whether the Act protects an individual with specific learning disabilities. Under the ADA “the term ‘disability’ means 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.”⁷⁵ Although the Act does not define the terms “physical or mental impairment” and “major life activity,” these terms are defined in the implementing regulations⁷⁶ which include specific learning disabilities within the definition of “physical or mental impairment”⁷⁷ and the term “learning” within the definition of “major life activity.”⁷⁸ Therefore, when read in light of its implementing regulations, the ADA protects persons with learning disabilities.

Cases applying section 504 of the Rehabilitation Act of 1973

United States use lay boards and other secular or corporate mechanisms to operate schools and an array of social services. The use of a lay board or other mechanism does not itself remove the ADA’s religious exemption. Thus, a parochial school, having religious doctrine in its curriculum and sponsored by a religious order, could be exempt either as a religious organization or as an entity controlled by a religious organization, even if it has a lay board. The test remains a factual one—whether the church or other religious organization controls the operations of the school or of the service or whether the school or service is itself a religious organization.

28 C.F.R. pt. 36, app. B, 592 (1994).

The legislative history, according to the House Labor and Education Committee, states that the exemption is “modeled after the provisions in Title IX of the Education Amendments of 1972. Thus, it is the Committee’s intent that the term ‘controlled by a religious organization’ be interpreted consistently with the Attachment which accompanied the Assurance of Compliance with Title IX required by the U.S. Department of Education.” EDUCATION AND LABOR COMM. REP., H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 125 (1990) *reprinted in* 1990 U.S.C.C.A.N. at 408. The committee report continues:

[We recognize] that unlike the [T]itle IX exemption, this provision applies to entities that are not educational institutions. The term “religious organization” has the same meaning as the term “religious organization” in the phrase “entities controlled by a religious organization.”

Activities conducted by a religious organization or an entity controlled by a religious organization on its own property which are open to nonmembers of that organization or entity are included in this exemption.

Id.

The Judiciary Committee’s House Report No. 485(III), 101st Cong. 2d Sess. 66, *reprinted in* 1990 U.S.C.C.A.N. at 489, also states that the phrase “religious organization” should be interpreted in light of other civil rights laws, such as the exemption provided under Title IX of the Education Amendments of 1972. *Id.*

75. 42 U.S.C. § 12102(2)(A)-(C) (Supp. V 1993); 28 C.F.R. § 36.104 (1994).

76. 28 C.F.R. § 36.104(1)-(2).

77. *Id.* § 36.104(1)(iii).

78. *Id.* § 36.104(2).

provide additional support for this contention by analogy. The definitions of who is an "individual with a disability" under the ADA and section 504 are virtually identical.⁷⁹ Courts have held that claims alleging discrimination against individuals with learning disabilities are actionable under section 504.⁸⁰

The remaining question is how a private school covered by the ADA meets its obligation not to discriminate against a student with a learning disability. Section 302 of the ADA sets forth the criteria to determine what constitutes discrimination on the part of public entities.⁸¹ The section sets forth both general⁸² and specific prohibitions.⁸³ The specific prohibitions that obligate private secondary schools to educate students with specific learning disabilities disallow the use of "eligibility criteria that screen out or tend to screen out an individual with a disability."⁸⁴ The statute also states that discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford" participation by an individual with a disability,⁸⁵ and a failure to take steps to provide auxiliary aids and services to ensure participation.⁸⁶

79. Compare 29 U.S.C. § 706(8)(B)-(D) (1988 & Supp. V 1993) with 42 U.S.C. § 12102(2). Similarly, the definitions of "physical and mental impairment" and "major life activity" in the implementing regulations for § 504 are virtually the same as the definitions in the implementing regulations in the ADA. Compare 45 C.F.R. § 84.3(j)(2) (1993) with 28 C.F.R. § 36.104(1)-(2) (1994).

80. See *Pandazides v. Virginia Bd. of Educ.*, 946 F.2d 345, 348-49 (4th Cir. 1991) (holding that the test for "otherwise qualified is based on § 504"); *Wynne v. Tufts Univ. Sch. of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991) (holding that academic institution must show that it considered feasibility, cost, and effect on academic program to meet its duty of seeking reasonable accommodations); *Stutts v. Freeman*, 694 F.2d 666, 668-69 (11th Cir. 1983) (holding that § 504 requires employers to expand employment opportunities for handicapped persons).

81. 42 U.S.C. § 12182 (Supp. V 1993).

82. See *id.* § 12182(b)(1).

83. See *id.* § 12182(b)(2).

84. *Id.* § 12182(b)(2)(A)(i).

85. *Id.* § 12182(b)(2)(A)(ii). This subsection provides that discrimination includes:

(ii) a failure to make 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 such goods, services, facilities, privileges, advantages, or accommodations

Id.

86. *Id.* § 12182(a)(2)(A)(iii). This subsection provides that discrimination includes:

(iii) a failure to take such steps as may be necessary to ensure that no

The previous discussion demonstrates that for many students with learning disabilities, academic success is dependent upon their receiving some combination of the suggested accommodations. We contend that a failure to provide accommodations such as extra time to complete an examination constitutes "a failure to make reasonable modifications in policies, practices, or procedures" necessary for these students to obtain the "services, privileges, . . . [and] advantages" which private schools provide.⁸⁷ A school failing to appropriately accommodate a student with learning disabilities would be guilty of discrimination unless the accommodations would constitute a "fundamental[] alter[ation of] the nature of such goods, services, facilities, privileges, advantages, or accommodations"⁸⁸ provided.

Neither the specific regulation implementing the "reasonable modification" requirement nor its analysis gives much guidance concerning the application of this subsection to schools. The specific regulation⁸⁹ is a restatement of the statutory provision and the pertinent analysis does not refer to schools.⁹⁰ Furthermore, the examples proffered by the analysis do not provide much guidance by way of analogy. However, the legislative history of the ADA demonstrates that Title III is intended to extend the general prohibitions of section 504 to privately operated places of public accommodation.⁹¹ Consequently, section 504 is relevant when interpreting the ADA. In addition, section 504 authority is helpful to understand the ADA because of the similarities among the general prohibitions of discrimination under the section 504 regulations and

individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden

Id.

87. *Id.* § 12182(a).

88. *Id.* § 12182(a)(iv).

89. 28 C.F.R. § 36.302(a) (1994).

90. 28 C.F.R. pt. 36, app. B, 605-07 (1994).

91. See H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 99 (1990) *reprinted in* 1990 U.S.C.C.A.N. 303, 381-82. According to the Education and Labor Committee's report: Section 504 of the Rehabilitation Act of 1973 prohibits Federal agencies and recipients of Federal financial assistance from discriminating against persons with disabilities. The purpose of Title III of the legislation is to extend these general prohibitions against discrimination to privately operated public accommodations and to bring individuals with disabilities into the economic and social mainstream of American life.

Id.

those set forth in Title III of the ADA.⁹²

The section 504 regulations relevant to primary and secondary schools⁹³ do not provide an analogy helpful in understanding the obligations of private primary and secondary schools under the ADA. This is because the section 504 regulations primarily refer to public schools⁹⁴ and require covered entities to provide a free appropriate education⁹⁵ to students with handicaps, as well as an individualized education program similar to that required by the Individuals with Disabilities Education Act⁹⁶—requirements which may not be mandated by the ADA.⁹⁷ Further, the section 504 reg-

92. Compare 34 C.F.R. § 104.4 (1994) (§ 504 regulation entitled "Discrimination Prohibited") with 42 U.S.C. § 12182 (Supp. V 1993).

93. 34 C.F.R. §§ 104.31-.39 (1994); 45 C.F.R. §§ 84.31-.39 (1993).

94. 34 C.F.R. §§ 104.31-.39. However, § 104.39 specifically addresses the obligations of private primary and secondary schools. The section provides, in part, that "[a] recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in § 104.33(b)(1), within the recipient's program." *Id.* § 104.39(a). For an explanation of an appropriate education, see *infra* notes 95-98 and accompanying text.

95. 34 C.F.R. § 104.33. One way this requirement can be met is by developing an individualized education program consistent with the Individuals with Disabilities Education Act ("IDEA"). *Id.* § 104.33(b)(2). The IDEA replaced the Education of the Handicapped Act.

96. The IDEA, 20 U.S.C. §§ 1400-1485 (1988 & Supp. V 1993), requires that public school students with disabilities be given a free appropriate public education in order for individual states to qualify for federal assistance. *Id.* § 1412(1); see also 34 C.F.R. §§ 300.300-307 (1993). The § 504 regulations applicable to primary and secondary schools also require that primary and secondary schools covered by the Act provide a free appropriate public education. 34 C.F.R. § 104.33 (1994).

97. The analysis to the definition section of the regulations and the legislative history of Title III clearly state that although schools are places of public accommodation, the Act does not require private schools "to provide a free appropriate education or develop an individualized education program in accordance with regulations implementing § 504 of the Rehabilitation Act of 1973 . . . and regulations implementing part B of the Individuals with Disabilities Education Act." H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 100 (1990) reprinted in 1990 U.S.C.C.A.N. at 383; S. REP. NO. 116, 101st Cong., 1st Sess. 59-60 (1989); 28 C.F.R. pt. 36, app. B, 589 (1994). The IDEA is a funding statute intended to provide a free appropriate education to children with disabilities by emphasizing special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(c) (1988 & Supp. V 1993). The Act was passed in response to the fact that in the United States over half the children with disabilities did not receive an appropriate education and one million of the eight million disabled children were completely excluded from the public school system. *Id.* § 1400(b)(1), (3)-(4). However, Congress determined that with adequate funding the educational needs of these children could be met. *Id.* § 1400(b)(7). Consequently, it is not surprising that the members of the House and Senate Committees and the drafters to the analysis of the Title III regulations did not intend to extend the heavier burdens of the IDEA to the operators of private schools who are not receiving the federal financial assistance intended to extend a free appropriate education to children who are disabled.

ulation's references to a free appropriate education incorporate the requirements of providing special education and related services—obligations which go beyond this Article's suggested accommodations.⁹⁸

It is important to note that although private schools not receiving federal funds are apparently not under an obligation to provide special education and related services to students with disabilities, private school students with disabilities who meet the requirements of the IDEA may be entitled to receive these services from their local public school.⁹⁹ Consequently, adjusting the schedule of a

98. See 34 C.F.R. § 104.33(b). Section 504 regulations define an appropriate education as “regular or special education and related aids and services that (i) are designed to meet individual educational needs of disabled persons as adequately as the needs of nondisabled persons are met.” *Id.* The section also requires that the procedures employed to provide an appropriate education comply with the requirements of the sections relevant to § 104.34 (“Educational setting”), § 104.35 (“Evaluation and placement”), and § 104.36 (“Procedural safeguards”). *Id.* § 104.32(b)(ii). The regulations state that one way of meeting this requirement is by the “[i]mplementation of an individualized education program developed in accordance with the Education of the Handicapped Act.” *Id.* § 104.33(b)(2).

Similarly, the IDEA and its regulations define an appropriate education in terms of special education and related services “provided in conformity with an individualized education program.” 20 U.S.C. § 1401(a)(18)(D) (1988); 34 C.F.R. § 300.8 (d). Both the § 504 regulations and the IDEA require that the appropriate education be provided for free. 20 U.S.C. § 1401(a)(18)(A); 34 C.F.R. § 104.33(c). Special education means “specially designed instruction, at no cost to the parent or guardians, to meet the unique needs of a child with a disability, including—(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.” 20 U.S.C. § 1401(a)(16) (1988 & Supp. V 1993); 34 C.F.R. § 300.13(a) (1993). “The term ‘related services’ means transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.” 20 U.S.C. § 1401(a)(17); 34 C.F.R. § 300.16(a). Although the accommodations suggested to assist learning disabled students in private schools can fit into the definitions of special education and related services, it is apparent that those terms encompass a greater obligation than our suggested accommodations.

99. 20 U.S.C. § 1413(a)(4)(A) (1988 & Supp. V 1993).

§ 1413. State plans

(a) Requisite features.

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each plan shall—

.....
 (4) set forth policies and procedures to assure—

(A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such

learning disabled student who attends a private school to allow that student to receive special education and related services at a local public school could constitute a reasonable accommodation under the ADA.

Section 504 requires recipients of federal funds to make reasonable accommodations for the benefit of persons with disabilities as long as those accommodations do not constitute a substantial modification or fundamental alteration of the recipient's program. However, this principle derives from cases applying the section 504 prohibition of discrimination against "otherwise qualified individuals with handicaps."¹⁰⁰ In contrast, Title III states that "[n]o individual may be discriminated against on the basis of disability" without requiring the individual to be "otherwise qualified."¹⁰¹ Consequently, when using section 504 authority to assist in interpreting the terms "reasonable modification" and "fundamental alteration" under Title III of the ADA, one must be careful not to read into Title III an "otherwise qualified" requirement. Congress did include the term "qualified individual with a disability" in Title I—Employment¹⁰² and Title II—Public Services¹⁰³ of the ADA, so

children in the program assisted or carried out under this subchapter by providing for such children special education and related services

Id. See also 34 C.F.R. § 300.451 (1993).

In addition, "[e]ach [local educational agency] shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency." *Id.* § 300.452.

In *Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993), the Court held that the Establishment Clause of the First Amendment of the United States Constitution did not prohibit a local educational agency from paying for interpreter services for a student who was deaf attending a parochial school. The majority of the Court found it unnecessary to address statutory issues before deciding the constitutional issues. *Id.* at 2466. Four dissenting justices would have remanded the decision of the case to the lower court to decide Respondent's argument "that the Individuals with Disabilities Education Act . . . does not require it to furnish petitioner with an interpreter at any private school so long as special education services are made available at a public school." *Id.* at 2470 (Blackmun, J., dissenting, joined by Souter, J., and joined in part by Steven, J. and O'Connor, J.)

100. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987); *Alexander v. Choate*, 469 U.S. 287 (1985); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). For a case reviewing both United States Supreme Court and United States courts of appeals decisions applying § 504, see *Wynne v. Tufts University School of Medicine*, 932 F.2d 19, 23-26 (1st Cir. 1991). See also LAURA F. ROTHSTEIN, *DISABILITIES AND THE LAW* § 3.05, at 87 (1992); BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, *LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW* 5:1-5:31 (1992).

101. 42 U.S.C. § 12182(a) (Supp. V 1993).

102. 42 U.S.C. §§ 12111-12117 (1988 & Supp. V 1993). The general rule of Title I specifically provides: "No covered entity shall discriminate against a *qualified individ-*

it would appear the omission of the term in Title III was intentional.¹⁰⁴

In order to understand the concept of a fundamental alteration, it is necessary to review *Southeastern Community College v. Davis*,¹⁰⁵ the case in which the United States Supreme Court first applied the principle to section 504. In *Davis*, a person with "a serious hearing disability" was denied admission to a program which would make her eligible to become a registered nurse.¹⁰⁶ The Court reasoned that she could not safely participate in an essential portion of the program, the clinical part, and to dispense with the clinical portion would be a fundamental alteration of the program. Further, the Court held that providing her with close individual faculty supervision for the clinical program went beyond any requirements of providing her with reasonable accommodations and auxiliary aids.¹⁰⁷

The accommodations suggested in this Article are not fundamental alterations of the practices, procedures, and accommodations of private schools. The *Davis* Court did not suggest that any

ual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a) (emphasis added).

103. 42 U.S.C. §§ 12131-12165 (1988 & Supp. V 1993). Title II specifically provides: "Subject to the provisions of this title, 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." *Id.* § 12132 (emphasis added).

104. A review of the congressional committee reports regarding Title III reveals no reference to why the word "qualified" was not used to describe individuals with disabilities in § 302. Perhaps the explanation lies in the differences among the entities and activities covered in the various titles. Title III includes twelve categories of "public accommodation." The term "public accommodation" covers a variety of general entities including stores, places of entertainment, hotels and professional offices. In general, these are activities which do not encompass special qualifications. *Id.* § 12181(7)(A-L).

105. 442 U.S. 397 (1979).

106. *Id.* at 400.

107. *Id.* at 409-10. The Court was interpreting the "otherwise qualified" language of § 504. The Court adopted the test that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Id.* at 406. Statements in the opinion that § 504 does not mandate affirmative action gave rise to the contention that § 504 did not require accommodations. However, the Court's later decisions in *Alexander v. Choate*, 469 U.S. 287 (1985), and *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), demonstrate that the Court does recognize an obligation under § 504 to make reasonable accommodations—a requirement Congress has specifically included in Title III of the ADA. 42 U.S.C. § 12182(a)(2)(A)(ii) (Supp. V 1993).

curriculum modification constitutes a fundamental alteration. The school in *Davis* was conducting a program designed to train people to perform the functions of a registered nurse. The Court found that the clinical portion of the program was an essential component of the program. In most cases, curriculum changes in private secondary schools will not be factual equivalents to the deletion of the clinical program in *Davis*.

Recently, the Court of Appeals for the First Circuit considered the obligations of a graduate school to accommodate a student with a disability. The issue of whether a medical school discriminated against a student with dyslexia in violation of section 504 by requiring him to take a multiple-choice examination was considered by the court of appeals in *Wynne v. Tufts University School of Medicine*.¹⁰⁸ By the time the case was heard on appeal, Wynne's claim was limited "solely to the school's failure to offer an alternative to written multiple choice examinations."¹⁰⁹ After reviewing section 504 authority, as well as cases affording judicial deference to purely academic decisions, the court in its en banc opinion stated the following test to balance the statutory obligations to accommodate students with disabilities and the need for universities to make independent decisions of an academic nature:

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.¹¹⁰

The court of appeals later held the district court properly applied this standard when, on remand, it granted Tufts' motion for summary judgment.¹¹¹ In its affirmance, the Court of Appeals for

108. 932 F.2d 19, 20-21 (1991) [*Wynne I*]. The district court had held in favor of the defendant medical school and a panel of the First Circuit Court of Appeals reversed. The appellate court then granted Tufts' petition for a rehearing en banc. The en banc panel remanded the case to the district court. *Id.* at 28. The district court then granted defendant's motion for summary judgment. *Wynne v. Tufts Univ. Sch. of Medicine*, No. CIV.A.88-1105-Z, 1992 WL 46077 (D. Mass. March 2, 1992). The court of appeals affirmed. *Wynne v. Tufts Univ. Sch. of Medicine*, 976 F.2d 791, *cert. denied*, 113 S. Ct. 1845 (1993) [*Wynne II*]. For a complete history of the case, see *id.* at 791-93.

109. *Wynne I*, 932 F.2d at 22.

110. *Id.* at 26.

111. See *Wynne II*, 976 F.2d 791.

the First Circuit panel carefully set forth a number of factors important to its decision. The court specifically noted that Tufts had made a number of accommodations on Wynne's behalf.¹¹² The opinion stressed that Wynne's demand to take his biochemistry examination orally was made after he was dismissed from Tufts¹¹³ and that:

[g]iven the other circumstances extant in this case, we do not think that a reasonable factfinder could conclude that Tufts, having volunteered such an array of remedial measures, was guilty of failing to make a reasonable accommodation merely because it did not *also* offer Wynne, unsolicited, an oral rendering of the biochemistry examination.¹¹⁴

The opinion ends with the court stating:

We add a final note of caution. Although both parties to this litigation invite us to paint with a broad brush, we decline their joint invitation. The issue before us is *not* whether a medical student, authoritatively diagnosed as a dyslexic and known to the school to be so afflicted, is ever entitled, upon timely request, to an opportunity to take an examination orally. Rather, we are limited to the idiosyncratic facts of Wynne's case. The resulting record presents a narrower, easier issue—and we believe that the district court resolved that issue correctly.¹¹⁵

The authors of this Article have concerns regarding the *Wynne* test. Although the majority opinion in the en banc decision in *Wynne* carefully reviewed the authority, and the court in the final panel decision construed its opinion narrowly, we fear that some courts may abdicate their judicial function by simply accepting the decisions of administrators and teachers as to what constitutes reasonable accommodation in an academic setting.

112. *Id.* at 795. The court of appeals stated the following:

The undisputed facts show that Tufts neither ignored Wynne nor turned a deaf ear to his plight. To the contrary, the defendant (a) warned Wynne in 1983 that he was failing biochemistry and suggested he defer his examination (a suggestion that Wynne scotched); (b) arranged for a complete battery of neuropsychological tests after Wynne failed eight courses in his freshman year; (c) waived the rules and permitted Wynne to repeat the first-year curriculum; (d) furnished Wynne access to tutoring, taped lectures, and the like; (e) allowed him to take untimed examinations; and (f) gave him make-up examinations in pharmacology and biochemistry after he again failed both courses.

Id.

113. *Id.* at 796 & n.3.

114. *Id.* at 795.

115. *Id.* at 796 (emphasis added).

One of the suggested accommodations for some students with learning disabilities is the elimination or modification of a foreign language requirement. The authors contend that, in general, this would not constitute a fundamental alteration of a program. We do acknowledge that in exceptional cases this may not be true. If, for example, a particular private school conducts all of its classes in a foreign language, a demand that the school waive the requirement for a particular student would constitute a fundamental alteration of the program. However, we reject the general argument that a college preparatory private school would fundamentally alter its program by waiving a foreign language requirement because many colleges demand the successful completion of a foreign language requirement for admission. First, not all colleges will demand proficiency in a foreign language for admission purposes, and, second, colleges who do have that requirement may themselves be in violation of section 504 and the ADA by failing to modify the requirement for students with certain learning disabilities. Similarly, in all but exceptional cases, the suggested modifications for examinations would constitute reasonable modifications.

Another of the suggested accommodations to assist students with learning disabilities is to provide someone to make sure that the student understands directions on examinations. Unless understanding the directions is what is being tested, this accommodation should likewise not be deemed a fundamental alteration. Additionally, the learning disabilities of some students may interfere with the student's ability to communicate and this suggested accommodation may be considered an auxiliary aid.¹¹⁶ In general, the sug-

116. Section 302 of the ADA provides, in part, that discrimination includes:

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden

42 U.S.C. § 12182(b)(2)(A)(iii) (Supp. V 1993).

The ADA does not define the terms "auxiliary aids and services," but does state that the terms include:

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

Id. § 12102(1)(A)-(D).

gested accommodations would be mandated under section 504 regulations applicable to post-secondary schools and would likewise constitute reasonable accommodations under section 302 of the ADA. As the foregoing discussion indicates, it is incorrect to make categorical statements about the requirements of the ADA because exceptional circumstances can be present in particular situations which could render a particular modification a fundamental program alteration in a specific setting.

To this point the discussion of accommodations that private secondary schools must provide a student with learning disabilities has assumed that the student is already attending the school. Title III of the ADA will also have an impact on the admissions process of private schools. There are two components to this issue. First, what accommodations must a secondary school provide an applicant with a learning disability? Second, when may a private school reject an applicant with a learning disability?

When private schools require applicants to take entrance examinations, the schools must grant requests for reasonable accommodations. The possible accommodations are identical to those suggested for course examinations above.¹¹⁷ Again, whether a particular accommodation is "reasonable" or a "fundamental alteration" will depend on the needs of the particular applicant and the purpose of the test being administered.¹¹⁸ Likewise, the ADA requires independent entities administering examinations for admis-

The regulations implementing Title III expand upon this list, 28 C.F.R. § 36.303(b)(1)-(4) (1994), and then state that "[a] public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." *Id.* § 36.303(c). The authors assert that certain learning disabilities so affect an individual's ability to communicate that they are entitled to auxiliary aids. Support for this view can be found in 28 C.F.R. § 36.309(b)(3). This regulation implementing § 309 ("Examinations and Courses") of the ADA, discussed *infra*, note 118, states:

Auxiliary aids and services required by this section may include taped examinations, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, Brailled or large print examinations and answer sheets or qualified readers for individuals with visual impairments or *learning disabilities*, transcribers for individuals with manual impairments, and other similar services and actions.

28 C.F.R. § 36.309(b)(3) (emphasis added). The analysis accompanying the regulation commented that the Department of Justice specifically referred to individuals with learning disabilities in this context "because, in fact, some individuals with learning disabilities have visual perception problems and would benefit from a reader." *Id.* pt. 36, app. B at 617 (1994).

117. *See supra* notes 28, 35-45 and accompanying text.

118. *See supra* notes 35-45 and accompanying text. Neither § 302 of the ADA, 42 U.S.C. § 12182, nor its implementing regulation, 28 C.F.R. § 36.302, gives specific gui-

dance regarding what constitutes reasonable accommodations in the private school admissions process. However, § 302 does provide that discrimination includes:

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make 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 such goods, services, facilities, privileges, advantages, or accommodations

42 U.S.C. § 12182(b)(2)(A)(i)-(ii).

Taken together, these provisions mandate that private schools that administer admission tests must make reasonable accommodations to applicants with learning disabilities, unless the school can show the accommodation in question would constitute a fundamental alteration of its program. In most cases it will be difficult to demonstrate this.

Section 309 provides:

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

Id. § 12189 (emphasis added). The regulation implementing this section adds:

(i) The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure);

(2) Required modifications to an examination may include changes in the length of time permitted for completion of the examination and adaptation of the manner in which the examination is given.

(3) A private entity offering any examination covered by this section shall provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that private entity can demonstrate that offering a particular auxiliary aid would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden. Auxiliary aids and services required by this section may include taped examinations, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, brailled or large print examinations and answer sheets or qualified readers for individuals with visual impairments or learning disabilities, transcribers for individuals with manual impairments, and other similar services and actions.

28 C.F.R. § 36.309(b)(1)(i), (2)-(3) (1994).

It is probable that § 309 of Title III and its implementing regulation is intended to apply to independent testing agencies, such as Independent School Entrance Examination ("ISSE") and Secondary Scholastic Aptitude Test ("SSAT"). The analysis to the

regulation states that the section is intended to ensure coverage of entities not covered by Title II of the ADA nor § 504. 28 C.F.R. pt. 36, app. B at 616 (1994). As private secondary schools are specifically covered in the definition of a "public accommodation," 42 U.S.C. 12181(7)(J) (Supp. V 1993), it would be redundant to include them in § 309. However, it may also be argued that a private school which self administers entrance examinations (either their own or those produced by an outside entity) is within the purview of § 309, and the section is designed to clarify their obligations when administering these exams. This argument is bolstered by the fact that § 309 clearly covers entities offering specialized courses, such as bar review courses or courses to prepare applicants for admission examinations, despite the fact that such entities also meet § 301's definition of a public accommodation. *See id.* ("other place of education").

If private secondary schools are not covered by § 309, that section and its implementing regulation may be used by analogy to define the accommodations that private schools administering admission examinations should afford applicants with disabilities. There is no reason why the Act should not afford the same protection to an individual with a disability taking an entrance exam at a private school that it affords a similarly situated individual taking an examination which is administered by an independent entity.

Section 504 regulations for post-secondary schools and Title I of the ADA may also be of assistance by analogy. For example, the § 504 regulations provide, in part:

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment

(b) *Admissions.* In administering its admission policies, a recipient . . . :

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests

34 C.F.R. § 104.42(a)-(b)(1)-(3) (1994).

The same basic approach is incorporated in Title I of the ADA. With respect to employment, Title I includes the following as discrimination:

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or

sion to private schools to "offer such examinations . . . in a place or manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."¹¹⁹

The fact that Title III does not refer to "qualified" individuals with a disability raises the issue of whether a private school may demand that a student with a disability meet specified levels of intelligence, achievement or other indicators of academic potential. The goods and services provided by private schools include academic instruction in particular courses, the successful completion of which leads to the awarding of a diploma. As previously stated, Section 302 provides that reasonable accommodations must be afforded to individuals with disabilities so they may benefit from the offered goods, services, etc.¹²⁰ If a student with reasonable accommodations cannot complete the program at a private school, it would not be discrimination to reject that student's application because the student could not benefit from the school's goods, services, etc.

Section 302 also prohibits public accommodations from employing eligibility criteria which screen out or tend to screen out individuals with disabilities, unless those criteria are necessary for the enjoyment or participation in the goods and services of the accommodation.¹²¹ A similar provision is found in the implementing regulation.¹²² Obviously, the ADA allows public accommodations to apply legitimate eligibility requirements to both individuals with

speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. § 12112(b)(6)-(7) (Supp. V 1993).

As stated previously, both § 504 and Title I of the ADA protect "qualified" individuals with disabilities from discrimination. The sections quoted above dovetail with this concept. However, the basic principle that the administration of admission and employment tests should be done in a manner to minimize an individual's disability, unless the examination itself is designed to test a specific ability, also dovetails with the concept that accommodations in administering admission tests must be made unless the accommodations would constitute a fundamental alteration.

119. 42 U.S.C. § 12189 (Supp. V 1993). The text of the section, as well as portions of the implementing regulation, are set forth *supra*, note 118. ISSE and SSAT make accommodations for students with learning disabilities. EDUCATIONAL RECORDS BUREAU, TEST PROGRAMS AND SERVICES CATALOG, 1994-1995, at 6, 14 (1994) and 1994-95 SSAT STUDENT GUIDE: SECONDARY SCHOOL ADMISSIONS TEST 1994, at 22.

120. 42 U.S.C. § 12182(b)(2)(A)(ii); *see supra* note 118.

121. *Id.* § 12182(b)(2)(A)(i); *see supra* note 118.

122. 28 C.F.R. § 36.301(a) (1994).

and without disabilities. Otherwise, the Act would eliminate all eligibility requirements and there would be no reason to require a private school to provide reasonable accommodations when administering tests to determine the eligibility of potential students. Further evidence of this congressional intent is found in the provision mandating that independent entities administering entrance and qualification examinations accommodate individuals with disabilities.¹²³

CONCLUSION

In 1979, Marian Howard and Margot Marek called for private preparatory schools to admit, accommodate, and educate children with learning disabilities.¹²⁴ Without the aid of the Americans with Disabilities Act, they understood that children with learning disabilities seeking a private education had been the victims of discrimination—"that there are prejudices and stereotypes about dyslexia as irrational and damaging as the blanket prejudgments about any other disability or group of people."¹²⁵ They recognized that with reasonable accommodations these children could succeed and excel. They contended that these students often bring a unique and creative point of view which would enrich and benefit both their peers and teachers.

Today, the ADA mandates that private schools admit and accommodate students with learning disabilities in the manner suggested fifteen years ago by Howard and Marek. Undoubtedly there are educators who fear the impact of the ADA. This Article is intended to alleviate those fears by demonstrating that the mandates of the Act will not overburden the educational programs of private schools. "The 'best schools,' those that pride themselves on having a highly trained, imaginative, sensitive teaching faculty are, if they put their minds to the task, well equipped to educate these . . . children"¹²⁶ and we, as a society, can no longer afford to allow some of our brightest and most creative students to be denied opportunities because of misunderstandings and fears.

123. 42 U.S.C. § 12189 (Supp. V 1993).

124. Howard & Marek, *supra* note 28, at 32. In their article, they referred to children with dyslexia, but it appears the word was used in a broad sense and would encompass a variety of specific learning disabilities. *See generally id.*

125. *Id.* at 30.

126. *Id.* at 31.