

THROUGH THE LOOKING GLASS: JUDICIAL DEFERENCE TO ACADEMIC DECISION MAKERS

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

by Douglas K. Rush *

PROLOGUE¹

"When I use a word," Humpty Dumpty said in rather a scornful tone. "It means just what I choose it to mean - neither more or less."

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

"The question is," said Humpty Dumpty, "which is to be master - that's all."

Lewis Carroll

English author & mathematician (1832 - 1898)²

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¹ "An introductory speech, often in verse, calling attention to the theme of the play." The American College Dictionary, Random House, 1963 Edition.

² Carroll, Lewis, "Through the Looking Glass", Chapter VI, Project Guttenberg, Champaign, Ill. ebook ISBN 0585005095

INTRODUCTION

Lewis Carroll's "Through The Looking Glass: And What Alice Found There" introduces us to Alice's dream induced fantasy world in her search for passage from Victorian adolescence to adulthood. This novel, together with its predecessor, "Alice in Wonderland," has been analyzed by legions of undergraduate and graduate students and their faculty who have divined undertones as diverse as awakening sexual liberation and feminism to rebellion from Victorian moral absolutism.³

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

³ A web search reveals hundreds of thousands of links to articles, reviews and treatises analyzing the subject. Without attempting to list all such sources, the author would suggest that the reader google "Through The Looking Glass" if he or she is interested in an exhaustive and exhausting study of this issue.

Learning disabled students in institutions of higher education, at times, must feel as if they have fallen through the looking glass into Alice's dream world. Like Carroll's Red Queen, many academic decision makers are increasingly erecting barriers to such students' participation in programs of higher education based on little more than their arbitrary authority. Congress' intent to eliminate disability discrimination in higher education is being thwarted by administrators who, like Humpty Dumpty, place their own meaning on words contained in legislative mandates. The courts are increasingly abdicating their responsibility under the doctrine of deference to those decision makers. Where are the White Knights to lead these students back to a world in which human compassion and moral principles trump arbitrary academic dictates? It is hoped that the readers of this article will gain a different perspective of these issues, a perspective based on the belief that students with learning disabilities can, and do succeed in higher education where they are guided by White Knight administrators rather than Red Queens.⁴

The right of institutions of higher education to make independent admissions decisions has been noted to be one of the four fundamental academic freedoms under the First Amendment to the United States Constitution.⁵ By enacting Section 504 of the Rehabilitation Act of 1973⁶ (hereafter "Section 504") and the Americans With Disabilities Act⁷ (hereafter "the ADA"), Congress also

⁴ My apologies for the "Through the Looking Glass" construct. I admit that it is not original and has become, possibly, trite. Nevertheless, to the extent that it stimulates readers to consider these issues it may serve a useful purpose.

⁵ *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985), citing *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978).

⁶ 29 U.S.C. § 794(a) (2000).

⁷ 42 U.S.C. § 12101, et seq. (2000).

recognized that it is in the national interest to protect the rights of disabled individuals and to ensure that those persons have the right to be judged on their ability and not on the basis of their disabilities, real or perceived.⁸

The right of disabled persons to participate in higher education programs can cause inevitable conflicts when academic decision makers weigh fundamental program requirements against the need to modify programs to accommodate individual disabilities. Issues of academic freedom, including the selection of student participants, course content, testing policy and graduation requirements, among others, may often clash with Congressional mandates which prohibit discrimination against individuals with physical, mental or learning disabilities.

Recent court decisions demonstrate that courts give great deference to academic decision makers, particularly where learning, cognitive or psychological disabilities are concerned. Academic and other institutions are placing an increasingly greater burden on students to document and prove the existence of learning disabilities and their need for academic accommodation.⁹ Furthermore, the recent trend in court decisions is to measure the extent of an individual's learning or cognitive disability against the academic ability of the general population. As discussed in the following sections of this article, students with

⁸ 42 U.S.C. § 12101(a)(8), and § 12102(2) (2000).

⁹ *See, e.g.*, "Guidelines for Documentation of a Learning Disability in Adolescents and Adults" developed by an ad hoc committee of the Association on Higher Education and Learning (AHEAD) available on the AHEAD web site at ahead@ahead.org; "Guidelines for Documentation of Attention Deficit/Hyperactivity Disorder in Adolescents and Adults" developed by the Consortium on ADHD Documentation and available from the Office of Disability Policy of the Educational Testing Service available on the ETS web site www.ets.org; "Guidelines for Documentation of Cognitive Disabilities" adopted by the Law School Admissions Council for determining whether to grant accommodations on the Law School Admissions Test which is available on its web site at www.lsac.org; and "MCAT Disability Accommodations" adopted by the Association of American Medical Colleges for determining whether to grant accommodations on the Medical College Admissions Test which is available on its web site at www.aamc.org.

superior IQ test scores who have documented learning disabilities are being denied academic accommodations where their intellectual capacity is equal to or exceeds that of the general population. Those disabled students are often prevented from succeeding in graduate level education programs where simple accommodations, such as increased time on tests or the use of computers, could allow them to successfully complete their programs. The current rationale of many courts is that such students may suffer from a learning disability but they are not “disabled” within the meaning of Section 504 and the ADA because their impairment level still results in an academic ability which matches or exceeds the general population as a whole, even though the general population is incapable of completing graduate level academic programs.

The trend toward evaluating learning disabled students by comparing them to the population as a whole may result in many superior students being prevented from fulfilling their educational goals and may deny disabled students the opportunity to achieve their career potential.

This paper will review the statutory mandates of Section 504 and the ADA and examine the extent to which courts are willing to defer to institutional decisions concerning program modifications to accommodate learning disabled students. Courts have long recognized that academic decision makers are entitled to deference, especially where their decisions concern educational programmatic issues.¹⁰ Courts must be vigilant, however, to properly weigh their role as the

¹⁰ See: Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978).

enforcers of Congressional legislation against the judicial policy of deference to academic decisions.

Section I of this article will review the federal statutory and regulatory framework governing disability accommodations as they relate to institutions of higher education. Section II will address the potential conflict between essential program requirements in higher education and compliance with federal mandates. Section III will consider the federal courts' deference to academic decision makers, particularly in regard to granting or denying academic accommodations for persons with disabilities. Finally, Section IV will examine two cases which demonstrate the limits of the federal courts' deference to academic decision makers.

I.

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

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

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

“*It seems very pretty,*’ she said when she had finished it, ‘but it’s **RATHER** hard to understand!’ (You see she didn’t like to confess, ever to herself, that she couldn’t make it out at all.) ‘Somehow it seems to fill my head with ideas -- only I don’t exactly know what they are!’”¹¹

A. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973¹² was intended to prevent discrimination against handicapped individuals by any program which receives federal funds.¹³ The Act states in part:

No otherwise qualified individual with a disability¹⁴ in the United States, as defined in section 7(20), 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.¹⁵

The definition of “program” includes “a college, university, or other postsecondary institution, or a public system of higher education.”¹⁶ Section 504

¹¹ Carroll, *supra*, Chapter I.

¹² 29 U.S.C. § 794(a) (2000).

¹³ *LeStrang v. Conrail*, 687 F. 2d 767 (3rd Cir. 1982).

¹⁴ Section 504 of The Rehabilitation Act as originally drafted used the term “handicapped individual.” It was amended to substitute the term “individual with a disability”. Pub. L. No. 102-569 §102(f) October 1992. The substitution was to make the terminology of the Rehabilitation Act consistent with the Terminology of the Americans With Disabilities Act. It was not Congress’ intent to change the meaning of the Act. 138 Cong. Rec. 22900, August 11, 1992.

¹⁵ 29 U.S.C. § 794(a) (2000).

¹⁶ 29 U.S.C. § 794(b)(2)(A) (2000), 34 C.F.R. 104.3(k)(2)(i) (2004).

specifically authorizes federal agencies to issue regulations to carry out the purpose of the Act.¹⁷

A plaintiff who wishes to establish a violation of Section 504 must prove that she meets four elements: (1) that she is an “individual with a disability;” (2) that she is “otherwise qualified” for participation in the program; (3) that the program receives “federal financial assistance;” and (4) that she was “denied benefits of” or “subject to discrimination” by the program.¹⁸

Section 504 defines the term disability as: “a physical or mental impairment that constitutes or results in a substantial impediment to employment or a physical or mental impairment that substantially limits one or more major life activities.”¹⁹

An individual with a disability is defined as: “any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment.”²⁰ The term “major life activities” is defined in the implementing regulations as: “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”²¹

Section 504 also requires that a person who brings a claim must prove that she was subject to discrimination “solely” because of her disability.²² A disabled

¹⁷ 29 U.S.C. § 794(a) (2000).

¹⁸ *Nathanson v. The Medical College of Pennsylvania*, 926 F.2d 1368, 1379 (3rd Cir. 1991) ; *Doherty v. Southern College of Optometry*, 862 F.2d. 570, 573 (6th Cir. 1988).

¹⁹ 29 U.S.C. § 705(9)(B) (2000).

²⁰ 29 U.S.C. § 705(20)(B)(i-iii) (2000).

²¹ 45 C.F.R. § 84.3(j)(2)(ii) (2004), 34 C.F.R. 104.3 (j)(2)(ii) (2004).

²² 29 U.S.C. § 794(a) (2000).

individual cannot establish a claim under Section 504 if she is unable to meet a facially neutral program requirement unless she “can establish that the requirement was merely a pretext for unlawful discrimination.”²³

Implementing regulations prohibit educational institutions that receive federal financial aid from denying “a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit or service.”²⁴ A “qualified handicapped person” with respect to post secondary or higher education is “a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient’s education program or activity.”²⁵

In the admissions and recruitment of potential higher education students, an educational institution that receives federal financial aid may not deny handicapped persons admission to a program.²⁶ A program may not impose limits on the number of handicapped individuals that it may admit.²⁷ The program cannot use any test or criterion for admission which has a disparate impact on such individuals.²⁸ Furthermore, the program cannot make any preadmission inquiry about whether the applicant suffers from a handicap.²⁹

²³Heilweil v. Mount Sinai Hospital, 32 F.3d. 718, 722 (2d. Cir. 1994); Murphy v. Franklin Pierce Law Center, 882 F. Supp. 1176, 1180 (U.S.D.C. N.H. 1994).

²⁴ 34 C.F.R. § 104.4(b)(i) (2004). As noted in FN 14, Section 504 was amended to substitute the term “individual with a disability” for the term “handicapped individual.” Regulations issued by various agencies may not have been amended and may still utilize the term “handicapped person.” The author has used the terminology in the current version of the regulations in the body of this paper.

²⁵ 34 C.F.R. § 104.3(l)(1) (2004).

²⁶ 34 C.F.R. § 104.42(a) (2004).

²⁷ 34 C.F.R. § 104.42(b)(1) (2004).

²⁸ 34 C.F.R. § 104.42(b)(2) (2004).

²⁹ 34 C.F.R. § 104.42(b)(4) (2004).

Once a handicapped student is admitted into an educational program, the student may not be subject to discrimination.³⁰ The program cannot exclude any handicapped student from “any course of study, or other part of its education program or activity”³¹ and must operate its program “in the most integrate setting appropriate.”³²

The implementing regulations also require that such a program must:

make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of the degree requirements, substitution of specific courses required for completion of the degree requirements, and adaptation of the manner in which specific courses are conducted.³³

Educational programs subject to Section 504 must provide methods of evaluating a handicapped student’s performance which measure the student’s educational achievement rather than reflect the student’s impairment.³⁴ Programs must also provide handicapped students with auxiliary aids which may include taped texts, interpreters, readers for students with visual impairments, adapted

³⁰ 34 C.F.R. § 104.43(a) (2004).

³¹ 34 C.F.R. § 104.43(c) (2004).

³² 34 C.F.R. § 104.43(d) (2004).

³³ 34 C.F.R. § 104.44(a) (2004).

³⁴ 34 C.F.R. § 104.44(c) (2004).

classrooms for students with manual impairments and other similar services and aids.³⁵ Such programs, however, are not required “to provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.”³⁶

B. The Americans With Disabilities Act

In 1991, the United States Congress enacted the Americans With Disabilities Act,³⁷ after finding that there are over 43,000,000 persons with disabilities living in the United States.³⁸ Congress further found that society tended to isolate and discriminate against these individuals in critical areas including education.³⁹ Congress found that, unlike those suffering from race or sex discrimination, individuals suffering from discrimination due to physical or mental disabilities often had no legal recourse.⁴⁰ Congress determined that “the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”⁴¹

Accordingly, Congress enacted the ADA:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

³⁵ 34 C.F.R. § 104.44(d)(2) (2004).

³⁶ 34 C.F.R. § 104.44(d)(2) (2004).

³⁷ 42 U.S.C. § 12101, et seq. (2000).

³⁸ 42 U.S.C. § 12101(a) (2000).

³⁹ 42 U.S.C. § 12101(a)(2)&(3) (2000).

⁴⁰ 42 U.S.C. § 12101(a)(4) (2000).

⁴¹ 42 U.S.C. § 12101(a)(8) (2000).

- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.⁴²

The ADA is divided into five Titles. Title I concerns disability discrimination in employment.⁴³ Title II prohibits discrimination based on disability in public programs, services and benefits.⁴⁴ Title III prohibits discrimination based on disability in the area of public accommodations.⁴⁵ Title IV concerns the availability of communications services to hearing and speech impaired individuals.⁴⁶ Title V contains miscellaneous provisions.⁴⁷ This paper will focus on Title II and Title III as they have been applied to accommodation requests in institutions of higher education.

The ADA defines “disability” as:

with respect to an individual--
(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.⁴⁸

⁴² 42 U.S.C. § 12101(b) (2000).

⁴³ 42 U.S.C. §§ 12111-12117 (2000).

⁴⁴ 42 U.S.C. §§ 12131-12165 (2000).

⁴⁵ 42 U.S.C. §§ 12181-12189 (2000).

⁴⁶ 47 U.S.C. §§ 225 and 611 (2000).

⁴⁷ 42 U.S.C. §§ 12201-12213 (2000).

⁴⁸ 42 U.S.C. § 12102(2) (2000).

Title II of the ADA⁴⁹ provides that:

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.⁵⁰

Title II defines “public entity” to include: “(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government.”⁵¹ Title II’s prohibition against discrimination extends to public colleges and universities.⁵²

Pursuant to Title II a:

"qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.⁵³

Title II of the ADA adopted the remedies and procedures of the Rehabilitation Act.⁵⁴ Title II authorizes the Attorney General to promulgate regulations to implement this section, except in areas covered by the Department of Transportation, and requires the Attorney General to make his regulations

⁴⁹ 42 U.S.C. § 12131, et seq. (2000).

⁵⁰ 42 U.S.C. § 12132 (2000).

⁵¹ 42 U.S.C. § 12131(1) (2000).

⁵² 34 C.F.R. § 104.3(k)(2)(i) (2004).

⁵³ 42 U.S.C. § 12131(2) (2000).

⁵⁴ 42 U.S.C. § 12133 (2000).

consistent with the regulations of the Department of Health, Education and Welfare.⁵⁵

Title III of the ADA extends the prohibition of discrimination against people with disabilities to places of public accommodation.⁵⁶ A “place of public accommodation” includes private undergraduate and post graduate educational programs.⁵⁷ Title III prohibits the use of eligibility criteria that either discriminate or tend to screen out individuals with disabilities.⁵⁸ Title III further requires:

reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.⁵⁹

The Department of Justice has adopted regulations to implement Congress’ mandate in the ADA to eliminate discrimination against disabled individuals. Testing must be done in a manner which accurately reflects a person’s aptitude or achievement level rather than be reflective of her disability.⁶⁰ Institutions are not required to permit a disabled individual to participate in a program if her participation would “pose a direct threat to the health or safety of others.”⁶¹ Institutions, however, are required to make an individualized assessment to determine whether the nature, duration and severity of the

⁵⁵ 42 U.S.C. § 12134 (a) & (b) (2000).

⁵⁶ 42 U.S.C. § 12182 (a) (2000).

⁵⁷ 42 U.S.C. § 12181 (7)(J) (2000).

⁵⁸ 42 U.S.C. § 12182 (b)(2)(A)(i) (2000).

⁵⁹ 42 U.S.C. § 12182 (b)(2)(A)(ii) (2000).

⁶⁰ 28 C.F.R. § 36.309 (2004), *Rothberg v. LSAC*, 300 F.Supp, 2d. 1093 (D.C.Col. 2004).

⁶¹ 28 C.F.R. § 36.208 (2004).

condition, when weighed against the potential injury and reasonable modifications of policies which would mitigate the risk, justify exclusion of the individual from the program.⁶² This issue has arisen in cases involving admissions decisions involving individuals with communicable diseases.⁶³

An individual claiming the ADA's protection must also prove that she suffers from a disability which is defined as a "physical or mental impairment that substantially limits one or more of the major life activities of an individual."⁶⁴ Department of Justice regulations further define disability to include: "any mental or psychological disorder such as ... specific learning disability."⁶⁵ Accordingly, it has been held that a person who is claiming the protection of the ADA by reason of a learning disability must present proof of a "specific learning disability."⁶⁶

A critical issue which occurs in ADA claims in academic settings is the issue of what constitutes a "specific learning disability." A person who has a diagnosis of a "learning disability" is not necessarily "disabled" as that term is defined by the ADA.⁶⁷

The United States Court of Appeals for the Fourth Circuit in *Betts v. Rector and Board of Regents of the University of Virginia*⁶⁸ considered this issue.

⁶² 28 C.F.R. § 36.207(c) (2004).

⁶³ For example, see: *School Board of Nassau Co. v. Airline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed.2d 307 (1987) in which the Supreme Court held that a school district could properly fire a teacher who had suffered a relapse of active tuberculosis if no reasonable accommodations would prevent her from being a danger to her students.

⁶⁴ 42 U.S.C. § 12102(2)(A) (2000).

⁶⁵ 28 C.F.R. § 35.104(2) (2004).

⁶⁶ *Argen v. New York State Board of Law Examiners*, 860 F. Supp. 84, 87 (W.D. N.Y. 1994).

⁶⁷ *Betts v. Rector and Visitors of the University of Virginia*, 1999 U.S. App. LEXIS 23105, at p.15.

⁶⁸ *Betts*, supra p. 1.

Betts had been admitted to the University's Medical Academic Advanced Post-Baccalaureate ("MAPP") program for economically disadvantaged or minority students. Students who completed the program with a minimum 2.75 grade point average were guaranteed admission to Medical School.⁶⁹ Betts had a 2.2 GPA in his first semester of the program and he continued into the second semester on probation. He was tested for learning disabilities and was determined have difficulty with short term memory and reading speed although he was noted to have "average intellectual ability."⁷⁰

Betts received extra time to complete his second semester exams and received a 3.5 grade point average. However, he had already taken some second semester exams without accommodations which reduced his overall grade point average to a 2.53 and he was refused admission to Medical School.⁷¹

Betts filed suit alleging a violation of Section 504 and of the ADA. Summary judgment was granted to the University as the District Court found that Betts was not "disabled."⁷²

The Fourth Circuit, on appeal, stated that the analysis of whether a person with a learning disability was "disabled" for ADA purposes did not end with the diagnosis of the learning disability. Courts must further determine whether the learning disability "substantially limits one or more major life activities" as

⁶⁹ Id. at 3.

⁷⁰ Id. at 4.

⁷¹ Id. at 5.

⁷² Id. at 7.

required by the ADA.⁷³ Learning is considered a “major life activity.”⁷⁴ Thus issue was: how is “substantially limits” defined?

The ADA does not provide a definition for this term. The United States Supreme Court has held that when Congress does not expressly define a term the courts should “normally construe it in accord with its ordinary meaning.”⁷⁵ The Betts Court noted that the Equal Employment Opportunity Commission (“EEOC”) issued regulations to carry out the mandate of Title I which defined the same term. According to the EEOC, “substantially limits” means:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the general population can perform the same major life activity.⁷⁶

The Betts Court held that when “learning” is the “major life activity” a person is not disabled “unless his ability is significantly restricted.”⁷⁷ Accordingly, the Court concluded that this determination required a comparison of the “learning disability” to the learning ability of most people in the general population.⁷⁸ The Betts Court provided a specific example of such a comparison:

Student A has average intellectual capability and an impairment (dyslexia) that limits his ability to learn so that he can only learn as well as ten percent of the population. His ability to learn is substantially impaired because it is limited in comparison to most people. Therefore, Student A has a disability for purposes of the ADA. By contrast, Student B has

⁷³ 42. U.S.C. § 12102(2)(A) (2000); Betts, *supra* p. 16.

⁷⁴ 29 C.F.R. § 1630.2(i) (2004).

⁷⁵ Smith v. United States, 508 U.S. 223, 228, 124 L.Ed. 2d 138, 113 S.Ct. 2050 (1993).

⁷⁶ 29 C.F.R. § 1630.2(j)(1) (2004).

⁷⁷ Betts, *supra* at 17.

⁷⁸ Id. at 19.

superior intellectual capability, but her impairment (dyslexia) limits her ability so that she can learn as well as the average person. Her dyslexia qualifies as an impairment. However, Student B's impairment does not substantially limit the major life function of learning, because it does not restrict her ability to learn as compared with most people. Therefore, Student B is not a person with a disability for purposes of the ADA.⁷⁹

Therefore, the Court found that while Betts had a learning disability, he was not “disabled” within the meaning of the ADA because his learning ability exceeded the learning ability of the general population.⁸⁰

A similar result was reached in the case of *Spychalsky v. Sullivan*.⁸¹ Spychalsky had been tested for learning disabilities when he was in high school. The testing determined that his overall intelligence was within the high average range; his verbal ability was in the lower superior range; and that his non-verbal ability was in the lower limits of the high average range. He also tested as high average in abstract conceptualization and mathematic ability. The tester also found borderline achievement on tests which measure “passive auditory attention,” “short term memory” and “mental visual tracking.”⁸² The tester concluded that the findings may indicate either a “lack of effort on the tasks” or a “genuine deficit in attention skills.”⁸³

⁷⁹ *Betts*, supra, citing, *Price v. National Board of Medical Examiners*, 966 F. Supp. 417 427 (S.D.W.Va. 1997).

⁸⁰ *Id.* at 20. However, the Fourth Circuit reversed the District Court’s grant of summary judgment in favor of the University because it found that Betts was “regarded as having an impairment” due to the University granting testing and course accommodations to Betts.

⁸¹ 2003 U.S. Dist. LEXIS 15704, p.2.

⁸² *Id.*

⁸³ *Id.* at 3.

After graduation from high school, Spychalsky attended Boston College where he requested no accommodations. He graduated in 1995 and took the Law School Admission Test (LSAT) without accommodations.⁸⁴

Spychalsky applied for and was granted admission to St. John's University School of Law in 1997. Once admitted, he requested testing accommodations.⁸⁵ St. John's referred him for an additional evaluation which revealed that he tested at the 91st percentile in overall intellectual ability which ranked in the superior range. However, the tester noted that he had weakness in spelling which tested at the borderline level.⁸⁶

The tester recommended that Spychalsky not have spelling errors adversely affect his grades; that professors be notified not to penalize him for spelling errors; and that he should either type his exams with a computer with a spell checking feature or that he be allowed to dictate his exams and have a scribe transcribe and correct his spelling. The Law School granted these accommodations.⁸⁷ In 1998, Spychalsky requested that the Law School grant him "time and a half" to take his exams and again the Law School granted this accommodation.⁸⁸

In October 2000, the Law School Registrar sent Spychalsky a note indicating that he had not completed the course in Taxation which was a requirement for graduation. Spychalsky requested a waiver of that requirement due to his disability which "significant[ly] affect[ed] [his] ability to manipulate

⁸⁴ Id.

⁸⁵ Id at 6.

⁸⁶ Id at 7.

⁸⁷ Id. at 8.

⁸⁸ Id. at 9.

numbers.”⁸⁹ Sullivan, a Dean at the Law School, denied his request because the Taxation course was considered a core component of the curriculum.⁹⁰ Her decision was reviewed by the Dean of the Law School and by members of the faculty who taught Taxation. The decision was also reviewed by the Director of the University’s Counseling Center. Based on this review, Spychalsky’s request for a waiver of the Taxation requirement was denied.⁹¹ Spychalsky then filed suit claiming a violation of Title II of the ADA.⁹²

Defendants filed a motion for summary judgment raising the issue that Spychalsky was not disabled within the meaning of the ADA.⁹³ The Court noted that the United States Supreme Court in *Toyota Motor Mfg. Kentucky Inc. v. Williams*⁹⁴ held that merely submitting evidence of a diagnosis of a disability was insufficient to state a claim under the ADA. Instead, claimants must offer “evidence that the extent of the limitation caused by their impairment in terms of their own experience is substantial.”⁹⁵ The District Court then noted that Spychalsky had failed to present evidence which indicated that his impairment substantially limited the major life activity of learning. Spychalsky had graduated from high school, a prestigious university and a top ranked law school.⁹⁶ The

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id at 10.

⁹² Id. The Court noted that the Title II claim failed to state a claim on which relief could be granted because Title II applied to public entities. St. John’s, as a private university, was not subject to suit under Title II. Nevertheless, the Court considered the claim as having been brought under Title III of the ADA which applied to providers of public accommodations which included private universities.

⁹³ Id. at 12.

⁹⁴ 534 U.S. 184, 198, 151 L. Ed. 2d 615, 122 S. Ct. 681 (2002).

⁹⁵ *Toyota Motors Mfg. Ky. Inc. v. Williams*, 534 U.S. at 198.

⁹⁶ Spychalsky, supra, p. 24 While the case was pending, Spychalsky took and passed the Taxation course and was awarded his law degree.

Court further noted that Spychalsky's testing rated him superior in overall intellect and in the superior or high average range on most tests. The District Court concluded that "this evidence, evaluated collectively, is insufficient to allow a reasonable trier of fact to conclude that Plaintiff was substantially limited in his ability to speak."⁹⁷ The District Court held that "evidence of certain accommodations in high school and college 'do not suffice to establish a record that his impairment created a substantial limitation of' his ability to learn."⁹⁸ Accordingly, the District Court granted the Defendants' motion for summary judgment.⁹⁹

C. Harmonizing the Rehabilitation Act and the ADA

Some courts have held that the elements of a claim under Section 504 of the Rehabilitation Act are "identical" to those under the ADA.¹⁰⁰ Other courts have noted that Title II of the ADA was "expressly modeled" on Section 504.¹⁰¹ Furthermore, it has been noted that "there is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act"...and that courts are required to "construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act...[b]ecause the language of the two statutes is substantially the same" and the

⁹⁷ Id. at 25.

⁹⁸ Id. at 28, quoting *Jacques v. DiMarzio, Inc.* 200 F. Supp. 2d 151, 159 (E.D.N.Y. 2002).

⁹⁹ Id. at 19. The Court also held that Spychalsky's evidence was insufficient to overcome a motion for summary judgment on his ADA claim of having a record of a substantially limiting impairment or being discriminated against based on being regarded as having a disability.

¹⁰⁰ *Spychalsky*, supra at 19, citing *Rodriguez v. City of New York*, 197 F.3d 611,618 (2d Cir. 1999).

¹⁰¹ *Zukle v. The Regents of the University of California*, 166 F. 3d 1041, 1045 (9th Cir. 1999).

“legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA.”¹⁰²

This analysis must be viewed with caution in light of the United States Supreme Court’s ruling in *Toyota Motors* where the Court noted that while the Department of Health, Education and Welfare was expressly granted regulating authority under Section 504, the Equal Opportunity Employment Commission was not granted similar authority to promulgate regulations interpreting the term “disability” in the ADA. Accordingly the Court stated that the persuasive authority of the EEOC regulations is “less clear.”¹⁰³

One significant distinction is that under Section 504, a claimant must prove that his disability was the “sole” reason for the alleged improper discrimination.¹⁰⁴ This requirement puts an increased burden on a claimant when compared to the requirements of the ADA which only require that the disability was a “motivating factor in the discrimination.”¹⁰⁵

Other important distinctions in the two statutes concern the remedies available to claimants. Section 504 provides the same remedies that are available under Title VI of the Civil Rights Act of 1964 (“Title VI”).¹⁰⁶ While Title VI is silent concerning the availability of a private cause of action for monetary damages, it has been well settled that such a remedy is available for intentional

¹⁰² *Id.*

¹⁰³ *Toyota Motors*, *supra* at 194.

¹⁰⁴ 29 U.S.C. §794(A) (2000), See also, *Garcia v. S.U.N.Y. Health Science Center*, 280 F.3d 98, 112 (2d Cir. 2001); *Amir v. Saint Louis University*, 184 F.3d 1017, 1028 (8th Cir. 1999).

¹⁰⁵ *Spychalsky*, *supra* at 19.

¹⁰⁶ 42 U.S.C. §2000e (2000).

violations of Title VI and by analogy also available under the Rehabilitation Act¹⁰⁷

Title II of the ADA likewise provides for monetary damages for violations. In the case of *Board of Trustees of the University of Alabama v. Garrett*,¹⁰⁸ however, the United States Supreme Court held that the grant of sovereign immunity contained in Eleventh Amendment of the United States Constitution protects states from claims for monetary damages under Title I of the ADA.¹⁰⁹ The Supreme Court in *Garrett* left open the question of Eleventh Amendment immunity under Title II and specifically noted that “we are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment.”¹¹⁰

In *Garcia v. S.U.N.Y. Health Science Center*¹¹¹ the Second Circuit Court of Appeals, relying on *Garrett*, struck down claims for monetary damages against state actors under Title II of the ADA where claims of discrimination were based on “deliberate indifference.”¹¹² The *Garcia* Court held that Title II claims for monetary damages against state actors must be based on “proof of discriminatory animus or ill will.”¹¹³

The *Garcia* Court noted that Title II claims for monetary damages against local governmental agencies can still be brought based on a showing of

¹⁰⁷ *Garcia*, supra p. 111.

¹⁰⁸ 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001).

¹⁰⁹ *Id.* at 374.

¹¹⁰ *Garrett*, 121 S. Ct. at 960, n.1.

¹¹¹ 280 F. 3d 98 (2d. Cir. 2001).

¹¹² *Id.* at 114.

¹¹³ *Id.*

“deliberate indifference” because local governmental agencies do not enjoy Eleventh Amendment immunity.¹¹⁴ Furthermore, the Court held that its decision did not bar actions against state actors under Title II which sought injunctive relief for claims based on “deliberate indifference.”¹¹⁵

The United States Supreme Court examined the Eleventh Amendment immunity issue as it applied to Title II in *Tennessee v. Lane*.¹¹⁶ In *Lane*, a sharply divided Court held that Congress, in enacting Title II, appropriately exercised its power under §5 of the Fourteenth Amendment to waive states’ Eleventh Amendment immunity where the constitutional violation implicated the accessibility of judicial services.¹¹⁷

The Supreme Court is still defining the limits of Eleventh Amendment immunity as it applies to Title II actions. The Court recently accepted certiorari and consolidated the cases of *United States v. Georgia*¹¹⁸ and *Goodman v. Georgia*¹¹⁹ to determine whether a state was immune from a prisoner’s Title II claim of discrimination due to allegedly inadequately accessible prison housing.

Title III of the ADA incorporates the remedies which are contained in 42 U.S.C. §2000a-3(a).¹²⁰ Monetary damages are not available to private litigants under that section.¹²¹

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).

¹¹⁷ *Id.* at 530.

¹¹⁸ 04-1203, 2005 US LEXIS 3952, decided May 16, 2005, on certiorari from *Goodman v. Ray*, 2004 US App. LEXIS 27938 (11th Cir. 2004).

¹¹⁹ 04-1236, 2005 US LEXIS 3953.

¹²⁰ 42 U.S.C. §12188(a)(1) (2000).

¹²¹ See, *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 401-402, 19 L.Ed.2d 1263, 88 S. Ct. 964 (1968); and *Spychalsky*, *supra* at 15.

II.

THE OTHERWISE QUALIFIED VS. ESSENTIAL FUNCTION

DILEMMA

“I know what you're thinking about,' said Tweedledum: `but it isn't so, nohow.'

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

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

But the little men only looked at each other and grinned.”¹²²

Section 504 of the Rehabilitation Act provides that no “otherwise qualified individual with a disability...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance...”¹²³ The United States Supreme Court in *Southeast Community College v. Davis*¹²⁴ noted that this mandate could not be followed literally because it would prevent any institution from taking any adverse action against a handicapped individual.¹²⁵ The Court noted that the regulations promulgated by

¹²² Carroll, *supra*, Chapter IV.

¹²³ 29 U.S.C. § 794(a) (2000).

¹²⁴ 442 U.S. 397, 99 S. Ct. 2361, 60 L.Ed.2d 980 (1979).

¹²⁵ *Id.* at 406.

the Department of Health, Education and Welfare stated that a qualified handicapped person is “[with] respect to post secondary and vocational educational services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school’s] educational program or activity.”¹²⁶ The term “technical standards” refers to all nonacademic admission criteria.¹²⁷

The Supreme Court also noted that the implementing regulations contained a statement in the appendix which expressed the Department’s intention as follows: “under such a literal reading, a blind person possessing all the qualifications for driving a bus except for sight could be said to be ‘otherwise qualified’ for the job of driving. Clearly, such a result was not intended by Congress.”¹²⁸ The Court concluded, therefore, that “neither the language, purpose, nor history of §504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds.”¹²⁹ In addition, the Court noted that “[s]ection 504 imposes no requirement upon an educational institution to lower or to effect modifications of standards to accommodate a handicapped individual.”¹³⁰

Six years later, the Supreme Court revisited this issue in *Alexander v. Choate*.¹³¹ The Supreme Court acknowledged that its use of the term “affirmative action” had led to much criticism for failing to differentiate between affirmative action and reasonable accommodations. It noted that “the former is said to refer to

¹²⁶ *Id.*, 45 C.F.R. §84.3(k)(3) (1978).

¹²⁷ *Id.* at 406.

¹²⁸ 442 U.S. at 407, citing 45 C.F.R. pt. 84 App. A, p.405 (1978).

¹²⁹ 442 U.S. at 411.

¹³⁰ *Id.* at 413.

¹³¹ 469 U.S. 287, 105 S. Ct. 712, 83 L.Ed.2d 661 (1985).

a remedial policy for the victims of past discrimination, while the later relates to the elimination of existing obstacles against the handicapped.”¹³² The Court in Alexander concluded that “affirmative action” as used in Davis referred to changes, adjustments or modifications which were “substantial” or which would constitute “fundamental [alterations] in the nature of the program”¹³³ when compared to “those changes that would be reasonable accommodations.”¹³⁴

Accordingly, the Court commented that:

The regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access. See, e.g. ... [45 CFR § 84.44\(a\) \(1984\)](#) (requiring certain modifications to the regular academic programs of secondary education institutions, such as changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted).¹³⁵

The Supreme Court again examined the “otherwise qualified” question in *School Board of Nassau County v. Airline*.¹³⁶ In *Airline*, a school district fired a teacher who had a relapse of active tuberculosis. The United States Court of Appeals held that she was protected by Section 504.¹³⁷ The Supreme Court granted certiorari and held that a person with a contagious disease can be

¹³² Id. at 300.

¹³³ Id.

¹³⁴ Id.

¹³⁵ Id. at 301 note 21.

¹³⁶ 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed.2d 307 (1987).

¹³⁷ 772 F. 2d 759 (11th Cir. 1985).

handicapped within the meaning of Section 504 of the Rehabilitation Act and remanded the case to the District Court.¹³⁸

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

will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.¹³⁹

The United States Court of Appeals for the Ninth Circuit in *Zukle v. The Regents of the University of California*¹⁴⁰ determined that Davis and Alexander made it “clear that an educational institution is not required to make fundamental or substantial modifications to its programs or standards; it need only make reasonable ones.”¹⁴¹ The Davis Court noted that a program receiving federal financial assistance may violate Section 504 if it refuses to make modifications to its educational program which would not entail undue financial or administrative burden.¹⁴²

The United States Court of Appeals for the Third Circuit in *Nathanson v. The Medical College of Pennsylvania*¹⁴³ noted that federal regulations required

¹³⁸ 480 U.S. at 289.

¹³⁹ Id. at 287.

¹⁴⁰ 166 F.3d 1045 (9th Cir. 1999).

¹⁴¹ Id. at 1046.

¹⁴² 442 U.S. at 412-413.

¹⁴³ 926 F.2d 1368 (3rd Cir. 1991).

consideration of the following factors in order to determine whether an accommodation would create an undue hardship:

- (1) The overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget;
- (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and
- (3) The nature and cost of the accommodation needed.¹⁴⁴

The Nathanson Court stated this determination must be made on a case by case basis.¹⁴⁵ “[W]hat is reasonable in a particular situation may not be reasonable in a different situation—even if the differences are relatively slight.”¹⁴⁶

Such case-by-case evaluations have led courts to conclude that: an optometry college need not modify or eliminate a program requirement which mandates the ability to use certain clinical instruments for a student suffering from retinitis pigmentosa, even though those requirements were put in place after the student enrolled in the program;¹⁴⁷ a law school need not eliminate the graduation requirement of completion of the taxation course for a student claiming computational and other learning disabilities;¹⁴⁸ a medical school need not modify its clinical training schedule by giving a student with a reading disability eight weeks between clerkships in order to study and prepare for the clinic rotations;¹⁴⁹ a law school need not allow a disabled student to take a part-

¹⁴⁴ Id. at 1385, citing 45 C.F.R. § 84.1(c)(1-3) (1990).

¹⁴⁵ Id. .

¹⁴⁶ Wynne v. Tufts University School of Medicine, 976 F.2d 791, 795 (1st Cir. 1992).

¹⁴⁷ Doherty v. Southern College of Optometry, 862 F.2d 570, 575 (6th Cir. 1988), cert. denied, 493 U.S. 810, 107 L. Ed. 2d 22, 110 S. Ct. 53 (1989).

¹⁴⁸ Sychalsky, supra at 36.

¹⁴⁹ Zule, supra at 1050.

time course load where the school only offered a full-time program, even though the American Bar Association authorizes law schools to have part-time programs for the study of law;¹⁵⁰ a medical school was not required to allow a dyslexic student to provide supplemental oral answers to multiple choice tests;¹⁵¹ a high school athletic association was not required to waive its age limitations for participation in sports programs for a learning disabled student;¹⁵² a university was not required to waive its foreign language requirement for students with learning disabilities;¹⁵³ a medical school did not discriminate against a student with an obsessive-compulsive disorder who was dismissed after failing his psychiatry clinic twice;¹⁵⁴ a university need not modify its nursing program's clinical requirements for a student suffering from a non-typical pregnancy;¹⁵⁵ a college did not discriminate against a learning disabled Physicians Assistant student after granting and then withdrawing permission for the student to take his examinations orally;¹⁵⁶ a law school need not give a student oral examinations or allow the student to enroll on a part-time basis;¹⁵⁷ a medical school need not renew the faculty appointment of a visually impaired physician and did not need to offer the physician a part-time appointment;¹⁵⁸ a law school need not lower its 2.0 minimum grade point average standard to accommodate a student with a

¹⁵⁰ *McGregor v. Louisiana State University Board of Supervisors*, 3 F.3d 850 (5th Cir. (1993)).

¹⁵¹ *Stern v. University of Osteopathic Medicine and Health Sciences*, 220 F.3d 906 (8th Cir. 2000).

¹⁵² *Pottgen v. Missouri State High School Activities Association*, 40 F.3d 926 (8th Cir. 1994).

¹⁵³ *Guckenberger, v. Boston University*, 8 F. Supp. 82 (D.C. Mass. 1998).

¹⁵⁴ *Amir v. Saint Louis University*, 184 F.3d 1017 (8th Cir. 1999) However, the court reversed the district court's grant of summary judgment in favor of the University on the student's retaliation claim and remanded the case for further action.

¹⁵⁵ *Darian v. University of Massachusetts*, 980 F. Supp. 77 (D.C. Mass. 1997).

¹⁵⁶ *DuBois v. Alderson-Broadus College, Inc.*, 950 F. Supp. 754 (D.C.N.D. Va. 1997).

¹⁵⁷ *Murphy v. Franklin Pierce Law Center*, 882 F. Supp. 1176 (D.C. N.H. 1994).

¹⁵⁸ *Hong v. Temple University*, 2000 U.S. Dist LEXIS 7301(E.D.Pa. 2000).

central nervous system metabolic disorder;¹⁵⁹ a law school need not waive minimum grade point average requirements for a recovered alcoholic;¹⁶⁰ a law school did not discriminate by dismissing and failing to readmit a student suffering from post traumatic stress disorder who received more than nine credit hours of grades below a C- in violation of the school academic standards;¹⁶¹ and a law school did not discriminate against a visually impaired law student by dismissing her after she failed to meet its 2.0 academic standard for continuation in its program.¹⁶²

Conversely, a summary judgment in favor of a medical school was reversed on appeal where the school failed to give extra time between clinical rotations and then dismissed a student with a verbal processing disorder who had repeatedly failed various clinical programs;¹⁶³ a university was denied summary judgment where it dismissed a pastoral psychology student who was hospitalized with clinical depression;¹⁶⁴ a state board of bar examiners was ordered to allow a dyslexic applicant to take the bar examination using twice the normal time, the use of a computer, permission to circle multiple choice examination questions in the examination booklet and the use of examinations with enlarged print;¹⁶⁵ and a testing agency was ordered to give a test taker who suffered from an “expressive

¹⁵⁹ Aloia v. New York Law School, 1988 U.S. Dist. LEXIS 7769 (D.C.S.D. N.Y. 1988).

¹⁶⁰ Anderson v. University of Wisconsin, 665 F. Supp. 1372 (D.C.W.D. Wisc. 1987).

¹⁶¹ Gill v. Franklin Pierce Law Center, 899 F. Supp. 850 (D.C.N.H. 1995).

¹⁶² Murphy v. Franklin Pierce Law Center, 882 F. Supp. 1176 (D.C.N.H. 1994).

¹⁶³ Wong, v. Regents of the University of California, 192 F.2d 807 (9th Cir. 1999).

¹⁶⁴ Carlin v. Trustees of Boston University, 907 F. Supp. 509 (D.C. Mass. 1995).

¹⁶⁵ Bartlett v. New York State Board of Bar Examiners, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. 2001).

writing disorder” fifty percent additional time and a quiet room in which to take the Law School Admissions Test.¹⁶⁶

An in depth reading of the above decisions demonstrates that both institutions and the courts have struggled while attempting to resolve the “otherwise qualified vs. essential functions dilemma”. Some courts have issued conflicting decisions within the same year in almost identical cases.¹⁶⁷ The distinction, if any, in the outcome in these cases appears to be the extent to which the individual institutions have documented their efforts to justify what constituted “fundamental” program requirements as well as to justify the extent to which “reasonable” accommodations could be granted without changing the fundamental nature of their academic programs. To the extent that institutions could do so, the courts appear willing to defer to academic decision makers.

III.

ACADEMIC DEFERENCE AND ITS LIMITS

“Everything was happening so oddly that she didn't feel a bit surprised at finding the Red Queen and the White Queen sitting close to her, one on each side: she would have like very much to ask them how they came there, but she feared it would not be quite civil. However, there would be no

¹⁶⁶ Rothberg v. Law School Admission Council, Inc., 300 F. Supp 2d 1093 (D.C. Col. 204)

¹⁶⁷ See: e.g., Zuckle, supra where the Ninth Circuit on February 23, 1999, upheld summary judgment in favor of the University of California on a Rehabilitation and ADA claim filed by a medical school student who alleged that the University failed to allow her to retake certain courses and clinical programs after repeated failure; and Wong , supra, where a different panel of the court, seven months later, reversed a summary judgment in favor of the medical school under almost identical circumstances.

harm, she thought, in asking if the game was over. 'Please, would you tell me -- ' she began, looking timidly at the Red Queen.

'Speak when you're spoken to!' The Queen sharply interrupted her."¹⁶⁸

The United States Supreme Court in *Board of Curators of the University of Missouri v. Horowitz*,¹⁶⁹ addressed the issue of deference to academic decision makers in the case of a student who had been dismissed from medical school for failure to meet the school's academic requirements in her clinical education program. Horowitz alleged that she was dismissed without being afforded procedural due process in violation of the Fourteenth Amendment to the United States Constitution.¹⁷⁰ While the case does not concern a claim under Section 504 or under the ADA, it is nevertheless instructive of the Supreme Court's evolving deference to academic decision makers.

In *Horowitz*, the Supreme Court noted that the student did not have a recognized property right in her medical school education.¹⁷¹ It deferred a decision concerning whether she had a liberty interest in continuing her medical education.¹⁷² Instead, without deciding that such an interest existed, the Court concluded that she had been afforded the appropriate due process in her dismissal.¹⁷³

¹⁶⁸ Carroll, *supra*, Chapter VIII.

¹⁶⁹ 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978).

¹⁷⁰ *Id.* at 79.

¹⁷¹ *Id.* at 82.

¹⁷² *Id.* at 84.

¹⁷³ *Id.* at 91.

In reaching this decision, the Court addressed the role of the courts in the academic decision making process. The Court noted that whether a student is making sufficient academic progress or whether the student should be dismissed from an academic program is similar to the “decision of an individual professor as to the proper grade for a student in his course. The determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making.”¹⁷⁴

The Court “decline[d] to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship”¹⁷⁵ and concluded that “[c]ourts are particularly ill-equipped to evaluate academic performance.”¹⁷⁶

The Supreme Court in *Southeast Community College v. Davis*¹⁷⁷ addressed the issue of whether Section 504 required an academic institution to modify its educational program to admit a handicapped student. Ms. Davis suffered from a severe hearing loss which required her to read lips in order to understand what people were saying. The nursing program at Southeast Community College refused to admit her due to her inability to understand verbal communication. It also refused her request to modify the nursing program to eliminate the clinical portion of her training.¹⁷⁸

¹⁷⁴ Id. at 90.

¹⁷⁵ Id.

¹⁷⁶ Id. at 91.

¹⁷⁷ *Davis*, supra at 400.

¹⁷⁸ Id. at 407.

Without directly addressing the issue of deference to academic decisions, the Court held that the college was not required to make fundamental modifications in its nursing program to accommodate Ms. Davis.¹⁷⁹ The Court noted that “Southeast’s program, structured to train persons who will be able to perform all normal roles of a registered nurse, represents a legitimate academic policy.”¹⁸⁰ The Court stated that Section 504 does not impose an obligation on colleges to “lower or to effect substantial modifications of standards to accommodate a handicapped person.”¹⁸¹ Finally, the Court noted that: “there was no violation of §504 **when Southeast concluded** that respondent did not qualify for admission to its program.”(emphasis added)¹⁸² Thus the Court, in effect, deferred to the college’s academic decision making concerning admission to its nursing program.

The Supreme Court revisited the academic deference issue in *Regents of the University of Michigan v. Ewing*.¹⁸³ Ewing had been admitted to the University’s Inteflex program which allowed graduation from college and medical school in six years.¹⁸⁴ Ewing faced immediate difficulty with the program and had to repeat several courses.¹⁸⁵ Eventually, Ewing managed to complete the first four years of the program and took the National Board of Medical Examiners Part I Test (NBME Part I), passage of which was essential to continuing in the clinical portion of the program. Ewing failed the NBME Part I, obtaining the

¹⁷⁹ Id. at 410.

¹⁸⁰ Id. at 413.

¹⁸¹ Id.

¹⁸² Id. at 414.

¹⁸³ 474 U.S. 214, 106 S. Ct. 507, 88 L. Ed.2d 523 (1985).

¹⁸⁴ Id. at 215.

¹⁸⁵ Id. at 216.

lowest grade in the history of the Inteflex program at the University of Michigan.¹⁸⁶ The University dismissed Ewing from the program and refused to readmit him or to let him retake the NBME Part I test.¹⁸⁷

Ewing filed suit alleging various causes of action including a violation of his substantive due process rights under the Fourteenth Amendment.¹⁸⁸ The District Court conducted a trial and found no violation of Ewing's due process rights.¹⁸⁹ The United States Court of Appeals for the Sixth Circuit reversed the District Court's judgment, found a constitutional violation and ordered the University to allow Ewing to retake the NBME Part I test and to reinstate him if he passed the test.¹⁹⁰ The Supreme Court granted certiorari and reversed the decision of the Sixth Circuit.¹⁹¹

In its decision, the Supreme Court again examined the issue of deference to academic decision makers. The Supreme Court stated that: “[w]hen judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”¹⁹²

¹⁸⁶ Id.

¹⁸⁷ Id. at 217.

¹⁸⁸ Id.

¹⁸⁹ Id. at 220.

¹⁹⁰ Id. at 221, citing 742 F.2d 913,916 (6th Cir. 1984).

¹⁹¹ Id. at 228.

¹⁹² Id. at 225.

The Supreme Court also noted that it was concerned about treading on the academic freedom safeguards contained in the First Amendment.¹⁹³ It stated that: “[d]iscretion to determine, on academic grounds, who may be admitted to study, has been described as one of the ‘four essential academic freedoms’ of a university.”¹⁹⁴

In *Wynne v. Tufts University School of Medicine*,¹⁹⁵ (hereafter “Wynne I”) the United States Court of Appeals for the First Circuit considered the extent to which a medical school must alter its program of instruction to provide reasonable accommodations to a learning disabled student. Wynne was allowed to enter Tufts Medical School under its affirmative action program for minority applicants even though his Medical College Aptitude Test (MCAT) score and undergraduate grade point average were lower than most Tufts students.¹⁹⁶ During his first year in school he failed eight of his fifteen courses.¹⁹⁷ He was dismissed from the program but was allowed to reenter the following fall.¹⁹⁸

Prior to reentering the school, Wynne underwent neuropsychological testing which revealed cognitive difficulties which suggested dyslexia.¹⁹⁹ When he reentered medical school he was provided accommodations which included counseling, tutors, note-takers and taped lectures.²⁰⁰ Nevertheless, Wynne failed two courses his second year, Pharmacology and Biochemistry. He was allowed to

¹⁹³ Id. at 226.

¹⁹⁴ Id., citing *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978).

¹⁹⁵ 932 F. 2d 19 (1st, Cir. 1992).

¹⁹⁶ Id. at 21.

¹⁹⁷ Id.

¹⁹⁸ Id.

¹⁹⁹ Id.

²⁰⁰ Id.

retake these exams and passed Pharmacology but again failed Biochemistry.²⁰¹ He was again dismissed from medical school.²⁰²

Wynne filed suit alleging a violation of Section 504 due to Tufts' failure to allow him to take oral final exams.²⁰³ The District Court granted summary judgment in favor of Tufts and Wynne appealed.²⁰⁴ A panel of the First Circuit reversed stating that on the record below Tufts had failed to show that it was incapable of altering its program to accommodate Wynne's disability.²⁰⁵

The First Circuit granted rehearing in banc and examined the nature of the obligations of educational institutions under Section 504.²⁰⁶ The Court noted that Ewing held that when courts review academic decisions they are required to "show great respect for the faculty's professional judgment."²⁰⁷ Furthermore, when courts review the "otherwise qualified-reasonable accommodations" requirement of Section 504, they must show the proper deference to academic decisions with two qualifications:

First, as we have noted, there is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation. Second, the Ewing formulation, hinging judicial override on "a substantial departure from accepted academic norms," is not necessarily a helpful test in assessing whether professional judgment has been exercised in exploring reasonable alternatives for accommodating a handicapped person.²⁰⁸

²⁰¹ Id.

²⁰² Id. at 22.

²⁰³ Id. at 20.

²⁰⁴ Id.

²⁰⁵ Id.

²⁰⁶ Id. at 21.

²⁰⁷ Id. at 25.

²⁰⁸ Id. at 26.

Accordingly, the Court looked to an analysis similar to the process of determining the applicability of qualified immunity for governmental decision makers.²⁰⁹ The Court created the following test for use in reviewing academic decisions:

If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.²¹⁰

The Court remanded the case to the District Court for a determination of whether Tufts met its burden concerning the denial of the requested accommodation.²¹¹ On remand the District Court again granted Tufts motion for summary judgment and Wynne appealed to the First Circuit. (*Wynne II*)²¹²

The First Circuit, on appeal, concluded that it would not second guess the academic decision made by the Tufts faculty. “The point is not whether a medical school is ‘right’ or ‘wrong’ in making program-related decisions. Such absolutes rarely apply in the context of subjective decision making, particularly in a scholastic setting. The point is that Tufts, after undertaking a diligent assessment of the available options, felt itself obliged to make ‘a professional, academic

²⁰⁹ Id.

²¹⁰ Id.

²¹¹ Id. at 29.

²¹² 976 F.2d. 791. 793 (1st Cir. 1992).

judgment that [a] reasonable accommodation [was] simply not available.”²¹³

Accordingly, the First Circuit affirmed the grant of summary judgment in favor of Tufts.²¹⁴

Other courts have added important caveats to the above standards. The Third Circuit implied that stringent admission standards may be entitled to more deference if they were designed to “protect public health and safety, a concern that has been given considerable deference by the courts.”²¹⁵ Similarly, the Sixth Circuit in *Doherty v. Southern College of Optometry* noted that: “surely the law does not require that a handicapped person be accommodated by waiver of a requirement when his failure to meet the requirements poses potential danger to the public.”²¹⁶

The Eighth Circuit refused to decide whether academic institutions, like employers, are required under the ADA to engage in an interactive process with students to determine whether reasonable accommodations can be found for their disability.²¹⁷

The Fourth Circuit noted that a university’s academic decisions were entitled to less deference and were reviewable by courts where the university determined that a student was entitled to extra time on examinations but expelled

²¹³ *Id.*

²¹⁴ *Id.* at 796.

²¹⁵ Nathanson, *supra*, at 1384.

²¹⁶ *Doherty*, *supra* at 575, citing *Copeland v. Philadelphia Police Dept.*, 804 F.2d 1139, 1148-49 (1988).

²¹⁷ *Stern*, *supra* at 909, citing *Fjellstad v. Pizza Hut of America*, 188 F.3d 944, 951-951 (8th Cir. 1999) and *Gluckenbeger*, *supra* at 140-142.

the student from school based, in part, on grades which were obtained by the student before the accommodation was granted.²¹⁸

The Ninth Circuit agreed that “a court’s duty is to first find the basic facts, giving due deference to the school, and then to evaluate whether those facts add up to a professional, academic judgment that reasonable accommodation is not available.”²¹⁹ However, the Court cautioned that: “extending deference to academic institutions must not impede our obligation to enforce the ADA and the Rehabilitation Act. Thus we must be careful not to allow academic decisions to disguise truly discriminatory intent.”²²⁰

Seven months later, the same court in a strikingly similar case, noted that: “[w]e must insure that educational institutions are not ‘disguising truly discriminatory requirements’ as an academic decision; to this end, ‘the educational institution has a real obligation...to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation.’”²²¹ The Court held that:

Subsumed within this standard is the institution's duty to make itself aware of the nature of the student's disability; to explore alternatives for accommodating the student; and to exercise professional judgment in deciding whether the modifications under consideration would give the student the opportunity to complete the program without fundamentally or substantially modifying the school's standards.²²²

²¹⁸ Betts, *supra* at 13-14.

²¹⁹ Zukle, *supra* at 1048.

²²⁰ *Id.*

²²¹ Wong, *supra* at 817, citing Zukle, *supra* at 1048, quoting Wynne I, *supra* at 25-26.

²²² Wong, *supra* at 818.

To this end, the Court concluded that institutions need to: “submit undisputed facts showing that relevant officials considered alternative means, their feasibility, [and] cost and effect on the academic program” and courts should not grant deference to academic decisions “when institutions present no evidence regarding who took part in the decisions” and stated that “finding simple conclusory averments of [the] head of institution[s] [is] insufficient to support [a] deferential standard of review.”²²³

Finally, the Fifth Circuit determined that while courts must defer to academic decisions which are devoid of evidence of malice or ill-will, courts do not need to give deference to the American Bar Association standard for accrediting law schools when a court considers what accommodations are reasonable and required under Section 504 of the Rehabilitation Act.²²⁴

Higher education institutions appear to have learned the lessons of these cases. The primary lesson is that the courts will not interfere with academic operations as long as institutions can document that a deliberative process was undertaken to determine whether a program requirement was truly “fundamental.” As long as such a deliberative process was in place, the courts will not second guess academic decision makers. In other words, the courts will not try to decide whether the institutions decisions were “right or wrong”.

Unfortunately, this excessive deferral to academic decision makers can sometimes result in the courts not enforcing the mandates of Congress to

²²³ Id., citing *Wynne I* at p 26, 28.

²²⁴ *McGregor*, *supra* at 859.

eliminate discrimination in academic programs where reasonable accommodations could allow disabled students to successfully compete in and complete academic programs. The courts must be vigilant to ensure that explanations offered by academic institutions were not created in hindsight to justify their discrimination against disabled students but are truly reflective of important fundamental program requirements which cannot be altered to provide reasonable accommodation.

IV.

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

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

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

'I don't know what you mean by *YOUR* way,' said the Queen: 'all the ways about here belong to *ME* -- but why did you come out here at all?' she added in a kinder tone. 'Curtsey while you're thinking what to say, it saves time.'²²⁵

The Red Queen

Carlin v. Trustees of Boston University²²⁶

²²⁵ Carroll, *supra*, Chapter II.

²²⁶ 907 F. Supp. 509 (D.C. Mass. 1995).

Marie Carlin entered Boston University's Doctor of Philosophy program in Pastoral Psychology in September 1987. The program consisted of four semesters of academic general research followed by a two-year clinical component.²²⁷ Ms. Carlin complete the first two years of the program and was awarded a fellowship from Boston University to attend Danielson Institute for Pastoral Counseling to complete the two year clinical portion of the doctoral program.²²⁸ She completed the first year of the fellowship and, in May 1989, received a certificate stating that she had successfully completed the first year clinical requirement.²²⁹

Throughout her enrollment in the doctoral program, Ms. Carlin had been suffering from depression. Her condition worsened in the spring of 1989 and she requested and was granted a leave of absence from Boston University.²³⁰ In April 1990, her condition deteriorated to the point where she was admitted to a psychiatric hospital where she remained under treatment until February 1991. She requested and was granted an extension of her leave of absence.²³¹

Ms. Carlin wrote to her academic advisor in June 1991, informing him that she was ready to return to the doctoral program. She sent copies of the letter to the Dean of Boston University and to the Director of the Danielson Institute.²³² She received a response in August indicating that the faculty had decided to not

²²⁷ Id. at 510.

²²⁸ Id.

²²⁹ Id.

²³⁰ Id.

²³¹ Id.

²³² Id.

readmit her into the program.²³³ Ms. Carlin responded by filing suit in the United States District Court alleging that the University had violated Section 504 of the Rehabilitation Act.²³⁴

Boston University filed a Motion for Summary Judgment stating that the decision to terminate Ms. Carlin's participation in the program was based on the academic determination of the faculty which was entitled to deference by the Court.²³⁵ The Court noted that it was required to defer to the institution's decision: "if there is evidence that the University made a 'professional academic judgment that [a] reasonable accommodation [was] simply not available.'"²³⁶

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

- (1) there was no documentation of lack of ability until after she took an approved leave of absence;
- (2) her clinical supervisor wrote a letter stating that she demonstrated good clinical skills;
- (3) she received a certificate stating that she had successfully completed the first year clinical program;
- (4) she was not terminated at the end of the first clinical year but was allowed to go on a leave of absence;

²³³ Id.

²³⁴ Id.

²³⁵ Id. at 511.

²³⁶ Id. at 510, citing *Wynne I*, 932 F.2d at 27-28.

- (5) she was not terminated from the program until she attempted to return from an approved leave of absence after her discharge from the psychiatric hospital; and
- (6) her academic supervisor wrote a letter stating that the reason for her termination from the program was: “her history of serious mental health problems.”²³⁷

The Court denied the University’s motion for summary judgment stating that Ms. Carlin presented “significant probative evidence of pretext.”²³⁸

The Court noted:

The evidence set forth above suggests that the reason articulated by defendants for terminating plaintiff was untrue and that the defendants were in fact motivated by plaintiff’s mental illness and not her lack of aptitude in its decision to terminate her from the program. Boston University has absolute authority to render an academic judgment, but that decision must be a genuine one.²³⁹

Humpty Dumpty

Gluckenerger v. Boston University²⁴⁰

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

²³⁷ Id. at 511.

²³⁸ Id.

²³⁹ Id.

²⁴⁰ 974 F. Supp. 106 (D.C. Mass. 1997); 8 F. Supp 2d 82 (D.C. Mass. 1998).

of foreign language as a condition for graduation.²⁴¹ The University was also recognized, prior to 1995, as being among the leading academic institutions in proactively addressing the needs of its learning disabled students. The University had created the Learning Disabilities Support Services (“LDSS”) staffed by trained professionals to evaluate and provide accommodations for students. It was often describes as a “model program.”²⁴²

Prior to 1995, LDSS provided accommodations to learning disabled students which included, note-takers, tape-recorded text books, extra time on final exams and course substitutions, including alternate courses in lieu of the University’s foreign language requirement.²⁴³ LDSS conferred with the heads of various academic departments at the College of Liberal Arts and had developed an approved list of courses to substitute for the foreign language curriculum for learning disabled students. LDSS had not, however, sought the approval of the course substitutions from the President, Provost or central administration at Boston University.²⁴⁴

In the spring of 1995, Boston University’s then Provost and later President, Jon Westling, discovered that LDSS had been allowing learning disabled students to substitute non-language courses in place of the foreign language requirement. Westing had no graduate degrees of any kind and no formal academic training in any aspect of learning disabilities.²⁴⁵

²⁴¹ Id. at 115.

²⁴² Id.

²⁴³ Id.

²⁴⁴ Id.

²⁴⁵ Id. at 117.

Westling was, in the words of the Court, “chagrined” to make this discovery.²⁴⁶ Westling told his assistant, Craig Klafter to conduct an investigation. Klafter confronted LDSS Director, Loring Brickerhoff and demanded proof that learning disabilities prevented students from successfully completing foreign language courses. Brickerhoff referred Klafter to Brickerhoff’s book on the subject.²⁴⁷ Klafter, who had a Ph. D. in Modern History but no experience in the area of learning disabilities, reported to Westling that there was “no scientific proof that the existence of a learning disability prevents the successful study of ...[a] foreign language.”²⁴⁸

Westling informed Norman Johnson, Vice-President and Dean of Students, that Boston University was to “cease granting course substitutions effective immediately.”²⁴⁹ Westling also ordered that all accommodation letters generated by LDSS were to be forwarded to his office for approval before they were sent to students or faculty. Westling made this decision without consulting any experts or members of the faculty concerning the importance of the foreign language requirement in a liberal arts curriculum.²⁵⁰ The Court’s opinion stated that the course substitution issue had become “a bee in his academic bonnet.”²⁵¹ The Court noted that: “Westling had decided to become personally involved with the accommodation evaluation process, even though he had no expertise or

²⁴⁶ Id.

²⁴⁷ Id.

²⁴⁸ Id.

²⁴⁹ Id.

²⁵⁰ Id.

²⁵¹ Id. at 118.

experience in diagnosing learning disabilities or in fashioning appropriate remedies.”²⁵²

During the time Westling became involved in this process, he “began delivering speeches denouncing the zealous advocacy of the learning disability movement.”²⁵³ He accused learning disability advocates of “fashioning fugitive impairments that are not supported in the scientific or medical literature.”²⁵⁴ The dominant theme in his speeches was that the movement was: “a great mortuary for the ethics of hard work, individual responsibility, and pursuit of excellence.”²⁵⁵ In July 1995, he delivered a speech in which he described how a shy woman approached him on the first day of class and presented a letter containing a diagnosis of learning disability and requesting the accommodation of extra time on exams, copies of lecture notes, a separate exam room and that, should she fall asleep in class, he should be “particularly concerned to fill her in on any material she missed while dozing.”²⁵⁶ He named this student “Somnolent Samantha.”²⁵⁷

During the trial before the District Court, Westling admitted he had fabricated Samantha. He further admitted that: “not only that such a student never existed, but that his description of her did not even represent a prototype of the learning-disabled students he had encountered.”²⁵⁸

²⁵² Id.

²⁵³ Id.

²⁵⁴ Id.

²⁵⁵ Id.

²⁵⁶ Id.

²⁵⁷ Id.

²⁵⁸ Id.

The Court noted that by the fall 1995 semester, Boston University was at a “bureaucratic impasse.”²⁵⁹ Brickerhoff at LDSS was ignoring Westling’s order and was continuing to grant accommodations without Westling’s approval. “Irate that his mandates were being disregarded, Westling directly ordered that all accommodations letters that LDSS had prepared but that had not yet been picked up by the affected students be delivered to his office.”²⁶⁰ Westling and his office staff then undertook to review all the approved accommodations even though neither Westling nor his staff had any training in the field.²⁶¹ Westling then ordered Brickerhoff to deny the majority of the requests and to immediately implement changes in the LDSS procedures demanded by Westling.²⁶²

On December 4, 1995 Brickerhoff sent a letter to all Boston University students who were receiving accommodations and informed them that they needed to renew their documentation and resubmit their request for accommodations if their previous diagnosis was more than three years old. Such documentation needed to contain a report by a licensed psychologist, psychiatrist or physician.²⁶³

The result, as described by the Court in its opinion was “chaos.”²⁶⁴ In early 1996, Brickerhoff and nearly all of his staff at LDSS resigned.²⁶⁵ Westling hired an adjunct law professor to take over the LDSS office. That individual undertook to review all the accommodation files even though “the files were in complete

²⁵⁹ Id. at 119.

²⁶⁰ Id.

²⁶¹ Id.

²⁶² Id. at 120.

²⁶³ Id.

²⁶⁴ Id.

²⁶⁵ Id. at 121.

disarray and neither he nor any other newly hired DS staff members had any expertise in diagnosing learning disabilities or in fashioning appropriate remedies.”²⁶⁶ The new LDSS staff was “hand-picked” by Westling and Zafft, the new Coordinator of Disability Services, had expressed to Westling her belief that “there is too much abuse in the granting of accommodations prior to her consideration for the job.”²⁶⁷ All LDSS decisions still had to go to Westling’s office for final approval.²⁶⁸

In the midst of this “chaos,” Elizabeth Gluckenberger and several other Boston University students who had diagnosed learning disabilities filed suit in the United States District Court alleging violations of Section 504 of the Rehabilitation Act, Title III of the ADA and various state law breach of contract claims.²⁶⁹ The Court conducted a two week trial and held that Boston University had violated the law in regard to certain claims. It ordered money damages awarded to the students for Boston University’s change in its disability evaluation process and enjoined most of the changes.²⁷⁰

However, on the foreign language course substitution issue, the Court noted that it was required to give deference to the academic decision makers.²⁷¹ The Court stated that a university can refuse to alter its programs to accommodate disabled students if it “undertakes a diligent assessment of the available options

²⁶⁶ Id. at 122.

²⁶⁷ Id. at 121.

²⁶⁸ Id.

²⁶⁹ Id. at 114.

²⁷⁰ Id. at 153-154.

²⁷¹ Id. at 148.

and makes a professional academic judgment that reasonable accommodation is simply not available.”²⁷²

The Court further noted that Westling’s “ipse dixit” was not sufficient to meet this burden.²⁷³ The court stated that:

Westling’s reliance on discriminatory stereotypes, together with his failure to consider carefully the effect of course substitutions on BU’s liberal arts programs and to consult with academics and experts in learning disabilities, constitutes a failure of BU’s obligation to make a rational judgment that course substitutions would fundamentally alter the course of study.²⁷⁴

The Court ordered Boston University to conduct, within thirty days: “a deliberative process for considering whether modification of its degree requirement in foreign language would fundamentally alter the nature of the liberal arts program.”²⁷⁵

Complying with the Court’s order, the University decided to use the Dean’s Advisory Committee to consider the question of whether the foreign language requirement was a fundamental component of the University’s liberal arts curriculum.²⁷⁶ The committee was composed of eleven members of the faculty of the Liberal Arts College.²⁷⁷ The committee met on seven occasions

²⁷² Id. at 149.

²⁷³ Id. at; According to Black’s Law Dictionary (5th ed. 1979) “ipse dixit” means: “He himself said it; a bare assertion resting on the authority of an individual.” Gluckenberg, note 35, Id at 149.

²⁷⁴ Id. at 149.

²⁷⁵ Id. at 154.

²⁷⁶ 8 F. Supp. 2d 82, 86 (D.C. Mass. 1998).

²⁷⁷ Id.

which were closed to the public. No notes were taken of the committee's deliberation until ordered to do so by the Court.²⁷⁸

The committee completed its report on December 2, 1997 which concluded that "the foreign language requirement is fundamental to the nature of the liberal arts degree at Boston University."²⁷⁹

In further proceedings, the Court discussed its obligation of deference to the academic decision making process. It noted that: "[t]he point is not whether a [university] is 'right' or 'wrong' in making program-related decisions. Such absolutes rarely apply in the context of subjective decision making, particularly in a scholastic setting."²⁸⁰ The Court determined that it must give due deference to the basic facts which included: "(1) an indication of who took part in the decision [and] when it was made; (2) a discussion of the unique qualities of the foreign language requirement as it now stands; and (3) a consideration of the possible alternatives to the requirements."²⁸¹

The Court noted that the committee had "rallied around" the foreign language requirement.²⁸² One committee member believed it was "important to be immersed in ancient Greek and Latin to understand Greek and Roman culture."²⁸³ Another: "waxed that someone who can read in French would realize that Madame Bovary dies in the imperfect tense, something that we don't have in the English language, and it makes for a very different understanding of the novel."²⁸⁴

²⁷⁸ Id.

²⁷⁹ Id. at 87.

²⁸⁰ Id., citing *Wynne II*, 976 F.2d at 795

²⁸¹ Id. at 87.

²⁸² Id. at 88.

²⁸³ Id.

²⁸⁴ Id.

The plaintiffs countered that the University's policy marked a substantial deviation from accepted academic norms. Their evidence showed that the majority of liberal arts colleges, including Harvard, Princeton, Yale, Columbia, Dartmouth, Cornell and Brown either do not require a foreign language, or waive the requirement for learning disabled students.²⁸⁵ Furthermore, the plaintiffs asserted that a requirement of four semesters of foreign language is not sufficient for most students to read major works of foreign literature, "thus debunking the Madame Bovary line of argument as involving an imperfect logic, not an imperfect tense."²⁸⁶

Finally, the plaintiffs presented the testimony of the Chair of the Language and Foreign Studies Department at American University who testified that she and other academics: "strongly disagreed with BU's conclusions and labeled them as 'trite', 'idealistic' or 'clichés.'"²⁸⁷

The Court, however, determined that its role was not to "conduct a head-count" of what was done at other universities, the appropriate question being whether the University's decision is "rationally justified rather than the only possible conclusion it could have reached."²⁸⁸ In conclusion, the Court held that the foreign language requirement was: "rationally justified and represents a professional judgment with which the Court should not interfere."²⁸⁹

CONCLUSION

²⁸⁵ Id. at 89.

²⁸⁶ Id. at 90.

²⁸⁷ Id.

²⁸⁸ Id. at 89.

²⁸⁹ Id. at 91.

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

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

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

`Of course it is,' said the Queen, `what would you have it?'

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

`A slow sort of country!' said the Queen. `Now, *HERE*, you see, it takes all the running *YOU* can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!'²⁹⁰

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

Humpty Dumpty also survives today in the realm of academia. Decisions made by university faculties concerning participation of learning disabled students in academic programs are granted deference by the courts provided the institutions show that they engaged in a reasoned decision making process concerning whether requested academic accommodations would fundamentally alter the nature of the program. Courts are unwilling to consider whether the academic decisions are right or wrong as the courts will

²⁹⁰ Carroll, *supra*, Chapter II.

not second guess those decisions provided that the institutions can show something more than an “ipse dixit” process.

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

EPILOGUE²⁹¹

“Of all the strange things that Alice saw in her journey Through The Looking-Glass, this was the one that she always remembered most clearly. Years afterwards she could bring the whole scene back again, as if it had been only yesterday -- the mild blue eyes and kindly smile of the Knight -- the setting sun gleaming through his hair, and shining on his armour in a blaze of light that quite dazzled her -- the horse quietly moving about, with the reins hanging loose on his neck, cropping the grass at her feet -- and the black shadows of the forest behind -- all this she took in like a picture, as, with one hand shading her eyes, she leant against a green, watching the strange pair, and listening, in a half dream, to the melancholy music of the song.”²⁹²

²⁹¹ “A speech, usually in verse, by one of the actors after the conclusion of the play.” The American College Dictionary, Random House, 1963 Edition.

²⁹² Carroll, supra Chapter VIII

