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Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students

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I. AN ILLUSTRATIVE SCENARIO

Law schools regularly deal with academically dismissed students claiming that disability resulted in their academic failure, and asserting that, perhaps with accommodations, they can be successful if readmitted. Consider, for example, the following scenario:

A law student (“Student”) with a 1.87 GPA is dismissed at the end of her first year for failing to earn her law school’s (“Law School”) minimum required GPA of 2.0. Student petitions for readmission, asserting that her just-diagnosed learning disability of dyslexia/reading disorder caused her academic failure. Student’s petition also asserts that if she is readmitted and provided with accommodations for her disability consisting of: a) tutoring, b) note taking assistance, c) elimination of the writing requirement, (a graduation requirement in which students must research and write an academic paper similar to a law review article), and d) extra time on exams she will be successful. Student’s petition notes that she always suspected she had a reading problem since she reads very slowly, and after receiving her fall grades (averaging 1.75), she suspected she might have dyslexia and considered getting tested, but decided to “tough it out.” Student’s Spring grades averaged 1.92.

In support of her petition Student submits an evaluation report from a clinical psychologist (“Evaluator”), dated after Student’s dismissal. In it, Evaluator diagnoses Student with the specific learning disability of dyslexia/reading disorder, based in large part on testing which indicates Student’s reading speed and decoding skills are well below average as compared with college graduates. Evaluator concludes that Student is therefore covered by Section 504 and the ADA. The report states that Student has always had this learning disability which has caused her great difficulty in reading, particularly in decoding words, and greatly slowed her

reading speed, but Student has used her above average intelligence and self-developed coping strategies to compensate prior to law school. Evaluator recommends Student receive tutoring, note taking assistance, extra time on exams, and elimination of the writing requirement.

Evaluator concludes: "In my professional opinion Student is a bright, motivated young woman who will succeed in law school if these accommodations are provided."

Law School solicits feedback from Student's teachers, two of whom report that Student seems not to have mastered legal analysis nor many of the basic concepts. A review of Student's file reveals she earned a B average as a political science major at a state university. Student's LSAT score was quite low compared with those of her classmates, and Student was admitted to Law School contingent upon her beginning in the summer and taking a reduced load. Student's tutor in the Law School's Academic Resource Program notes that Student missed several scheduled sessions, and also that Student was extremely active in extracurricular activities. Student agrees in her appearance before the committee that she was an active member of six student groups.

Law School's readmission rule was adopted by the faculty and is contained in Law School's academic rules, which are set out in the student handbook. The readmission rule requires a recommendation by a faculty committee to the faculty, which decides the matter by majority vote. The burden is on the dismissed student to demonstrate that

1) her failure was caused by extraordinary circumstances, which are defined as beyond those difficulties regularly encountered by law students (such as minor illness or the end of a romantic relationship), and which exclude those for which the student had a reasonable opportunity to recover or obtain administrative relief prior to being dismissed,

and

2) if readmitted, there is a convincing likelihood the student will achieve good standing in law school, and be able to pass a bar exam and practice law competently.

Law School's recent graduates have had some difficulty with its state's bar exam; in several recent administrations, Law School's graduates' pass rate has been below the state average. Recent analysis by Law School of the bar exam performance of readmitted students over the past few years indicates few of them have passed the bar exam.

Law School must decide whether to readmit Student. That decision is always difficult and complex; it is even more so in Student's case. Deciding whether to readmit Student involves reviewing technical information concerning her learning disability, and considering: a) whether Student's learning disability is protected by federal disability discrimination statutes as Evaluator asserts, b) whether the learning disability is an extraordinary circumstance as defined by Law School's readmission rule, c) what caused Student's academic failure, d) whether the requested accommodations are reasonable, and e) whether with (or without) them there is a convincing likelihood Student will succeed in law school, on the bar exam, and in practice. In Student's case, Law School also faces review of its decision beyond that available to dismissed students generally. Specifically, if Student believes Law School has acted on her petition in a way which is discriminatory, she may file an internal complaint under the school's disability policy, an administrative complaint with the Office of Civil Rights and/or a lawsuit alleging violation of federal disability discrimination laws.

II. INTRODUCTION

This Article examines disability discrimination claims brought by academically

dismissed law students who have been denied readmission to law school, including the claims which Student in the above scenario might bring if Law School does not readmit her.¹ Part III of the Article offers an overview of Section 504 of the Rehabilitation Act of 1973 (“Section 504”)² and the Americans with Disabilities Act (“ADA”).³ They are the two federal statutes that prohibit disability discrimination against covered higher education students, and under which Student may file claims concerning Law School’s decision not to readmit her. This overview pays particular attention to recent United States Supreme Court decisions that strictly interpret the “disabilities” protected by these statutes,⁴ and to recent cases in which lower courts have accordingly held that a student’s impairment is not a statutorily protected disability.⁵ The statutory overview also compares the markedly different approaches of Section 504 and ADA provisions concerning disability discrimination and higher education students, with the federal preK-12 special education statute (the Individuals with Disabilities Education Act (“IDEA”)),⁶

¹For other, brief, discussions of this issue, see Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We’ve Been and Where We May Be Heading*, 63 MD. L. REV. 122, 140-141 (2004); Laura Rothstein, *Higher Education and the Future of Disability Policy*, 52 ALA. L. REV. 241, 258 (2000); Bonnie Tucker, *Application of the Americans with Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students*, 23 J. COLL. & UNIV. L. 1, 35-39 (1996); Adam Milani, *Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability Law*, 22 J. COLL. & UNIV. L. 989, 1004-08 (1996).

²29 U.S.C. § 794 (2000).

³42 U.S.C. §§ 12101 - 12213 (2000).

⁴See *infra* Section III.A.2.

⁵See *infra* Section III.A.2.b.

⁶20 U.S.C. §§ 1401 - 1461 (2000).

under which many such students were served earlier in their educational careers, and which creates expectations on the part of the students about their eligibility and protection under higher education disability law.

Part IV of the Article reviews and examines the Supreme Court's tradition of deference to higher education academic decisions, recently reiterated in the University of Michigan affirmative action cases, in which higher education admissions decisions were challenged as racially discriminatory.⁷ The Court has not yet decided a case in which an academically dismissed student claims disability discrimination. The Court has, however, deferred in cases in which higher education academically dismissed students made constitutional claims,⁸ and appeared to defer to a higher education decision concerning the impact of a student's disability on her qualifications for admission to a higher education program.⁹ There is thus every indication the Court would defer to a law school's judgment in a case in which an academically dismissed law student claimed disability discrimination.

Part V of the Article reviews the body of law (both actual lower court cases and OCR administrative opinions) in which academically dismissed higher education students denied readmission have made disability discrimination claims. In the overwhelming majority of these cases and opinions, including all of the court cases involving law schools,¹⁰ schools have

⁷Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

⁸See *infra* notes 171-202 and accompanying text.

⁹See *infra* notes 203-215 and accompanying text.

¹⁰See *infra* Section V.B.

prevailed without going to trial, normally by receiving summary judgment.¹¹ Moreover, courts in these cases have regularly announced a policy of deferring to the school's academic decisions concerning academical dismissal and readmission.¹² Examination of the few court cases in which (non law) schools were not granted summary judgment offers helpful guidance to law schools faced with such claims.¹³ The Article finds that the courts' approach in these cases is appropriate, although no doubt frustrating to students whose planned careers may well have ended.¹⁴ The Article in Part VI offers guidelines and options for law schools trying to do the right thing (i.e. make a decision which is both principled and nondiscriminatory) when faced with readmissions petitions by Student or other dismissed students claiming a disability.¹⁵

III. APPLICABLE FEDERAL STATUTES – SECTION 504 AND THE ADA

Law schools are subject to two federal statutes which prohibit disability discrimination against covered students, as well as employees.¹⁶ “Section 504”¹⁷ of the Rehabilitation Act of

¹¹See *infra* note 237 and accompanying text.

¹²See *infra* notes 238, 258, and 288 and accompanying text.

¹³See *infra* Section V.C.

¹⁴See *infra* Section V.F.

¹⁵See *infra* Section VI.B.

¹⁶For overviews of the statutes' applicability to higher education, see Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading*, 63 MD. L. REV. 122 (2004); Laura Rothstein, *Higher Education and the Future of Disability Policy*, 52 ALA. L. REV. 241 (2000).

¹⁷29 U.S.C. § 794.

1973¹⁸ applies to all schools, public or private, K-12 or higher education, which receive any federal education funds, such as federally guaranteed student loans, federal student grants, and federal research grants.¹⁹ The Americans with Disabilities Act (“ADA”) applies to a much broader variety of institutions, and without regard to whether they receive federal funds, including employers (Title I),²⁰ states and state and local government-run “public entities” (including state law schools) (Title II),²¹ and “places of public accommodation,” specifically defined to include private schools (Title III).²² Hence, absent very unusual circumstances,²³ public law schools are forbidden from discriminating against covered students with disabilities by both Section 504 and Title II of the ADA, and private law schools by both Section 504 and Title III of the ADA. Law schools must also comply with any applicable state laws.²⁴

¹⁸29 U.S.C. §§701 - 795 (2000).

¹⁹29 U.S.C. §794(b)(2)(A) (2000) (defining covered “program or activity” in pertinent part as a college or university); 34 C.F.R. §104.3(h) (defining “federal financial assistance”). Much of the meat of Section 504's obligations for schools are set out in its regulations, which include separate sections and separate standards for K-12 public schools, 34 C.F.R. §§104.31-38 (2004), K-12 private schools, 34 C.F.R. §104.39, and higher education, 34 C.F.R. §§104.41-47.

²⁰42 U.S.C. §§ 12111 - 12117 (2000).

²¹*Id.* at §§ 12131 - 12134.

²²*Id.* at §§ 12181 - 12189.

²³To avoid Section 504 obligations, a public or private law school and its parent university would need to avoid receiving any federal education funds, including federally guaranteed student loans and federal student grants. Title III of the ADA excludes “entities controlled by religious organizations, including places of worship,” 42 U.S.C. §12187, which theoretically could include a private, religiously controlled, law school. All public law schools appear to be covered by Title II of the ADA.

²⁴Discussions of applicable state laws is beyond the scope of this Article. It should be noted, however, that such laws might impose additional obligations on law schools, such as

The ADA is modeled on Section 504, and as concerns higher education students with disabilities, the two statutes are essentially the same.²⁵ In fact, the ADA explicitly provides that no less than the applicable Section 504 standard shall apply to the ADA.²⁶ An overview of which students are covered by these statutes, and schools' obligations to covered students, follows. Generally speaking, both Section 504 and the ADA cover students with a physical or mental impairment (present, past, or merely perceived) which is severe enough to "substantially limit" a "major life activity" such as learning or walking. To be covered, students must also be "qualified" for the school's program, meaning that they can meet the school's academic and similar requirements, at least if certain academic or other adjustments, often referred to as "reasonable accommodations," are made. Some students' disabilities actually preclude them from being "qualified" for law school,²⁷ while other students with disabilities are not

defining covered students more broadly than do the federal statutes, and/or imposing obligations beyond the federally required academic adjustments.

²⁵See Bonnie Tucker, *Application of the Americans with Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students*, 23 J. COLL. & UNIV. L. 1, 2 (1996) ("With one possible exception, that being in the area of safety, the ADA does not add any substantive protections for individuals with disabilities in the postsecondary education context, although in some contexts there are procedural differences.").

²⁶42 U.S.C. §12201(a) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title."), *cited in* *Toyota Motor Mfg., Kentucky, Inc., v. Williams*, 534 U.S. 184, 194 (2002).

²⁷Consider, for example, a first year law student who is in a car accident and left with severe brain damage, which greatly impairs memory and reasoning. At the time of initial admission, the student was academically and otherwise qualified to attend the law school. Moreover, without question the now brain-damaged student has a disability that substantially impairs learning and likely other major life activities. However, if the student can no longer

academically qualified for a law school's program for reasons apart from their disability.²⁸

Section 504 and the ADA also impose the same obligations on schools for covered students. In addition to the obligation of nondiscrimination, schools are required to make their programs physically accessible²⁹ and to make some adjustments to their programs to accommodate students' disabilities.³⁰ On the other hand, schools are not required to alter any of the basic, essential requirements of their programs, such as minimum GPA and attendance requirements.³¹

A. Covered persons

1. Person with a disability; impairments. The two federal statutes define "person

reason well enough to maintain the minimum GPA the law school requires, even if academic adjustments are provided, she is not "qualified" to continue attending the law school and is not protected by the federal disability statutes.

²⁸Consider here the example of a different first year law student diagnosed with dyslexia, a learning disability involving written language, who receives academic adjustments including extra time on exams because the student's dyslexia causes her to read and write much more slowly than her classmates. This student fails to meet the law school's attendance requirements, and consequently receives grades of "F" in some classes and does not earn the minimum GPA required by the law school. This student may have a substantially impairing disability under Section 504 and the ADA but is not qualified to continue to attend the law school because she has not met the school's basic attendance requirements for reasons unrelated to her disability. Note in this example that the disability, dyslexia, would not interfere with the student's ability to regularly attend class. Even in the case of other conditions (such as chronic fatigue syndrome or fibromyalgia) which might preclude regular class attendance, however, OCR has found that waiving law school attendance requirements is beyond legally required academic adjustments. Seattle University School of Law, 27 Nat'l Disability L. Rep. ¶ 321 (OCR 2003).

²⁹*See, e.g.*, 29 U.S.C. § 794c (Section 504); 42 U.S.C. §§ 12146, 12147 (ADA Title II); 12183 (ADA Title III).

³⁰34 C.F.R. § 104.44 (Section 504); 28 C.F.R. § 36.302 (ADA Title III).

³¹34 C.F.R. § 104.44 (Section 504).

with a disability” essentially identically.³² This term is defined in those laws’ general sections; hence, with minor exceptions³³ the definitions and interpretative case law apply across employee, student, and other statutory contexts. Moreover, both statutes define persons with disabilities broadly: rather than listing covered disabilities, the statutes refer to persons with a “physical or mental impairment” which “substantially limits” a “major life activity” (such as learning or walking).³⁴ Persons with a history of such an impairment (such as persons with a history of cancer, heart attack or mental illness) or who are regarded as having such an impairment are also included in the definition.³⁵ Law students with “impairments” included in Section 504 and the ADA’s definitions include, for example, students with physical or sensory conditions (such as cerebral palsy, quadriplegia, or impaired vision or hearing), learning disabilities and attention deficit disorder, and emotional conditions including mental illnesses.³⁶ Learning disabilities may be the most common impairment of law students; according to one survey, more than half of law

³²29 U.S.C. § 706(8)(B) (Section 504); 42 U.S.C. § 12 (ADA). *See Toyota Motor Mfg., Kentucky, Inc., v. Williams*, 534 U.S. 184, 193 (“Congress drew the ADA’s definition of disability almost verbatim from the definition of ‘handicapped individual’ in the Rehabilitation Act, § 706(8)(B)”).

³³*See, e.g.*, 29 U.S.C. §705(20)(C)(4) (for employment purposes only, certain active alcoholic employees are not covered); *id.* at (D) ((for employment purposes only, certain contagious employees are not covered).

³⁴42 U.S.C. § 12102(2) (ADA); 29 U.S.C. § 705 (a) (Section 504).

³⁵The Court limited the “regarded as” prong to cases where the person is believed to have a substantially limiting disability when in truth there is either no disability, or a disability which is not substantially limiting. *Sutton v. United Airlines*, 527 U.S. 471, 489-494 (1999). *See infra* note 47 and accompanying text.

³⁶Section 504 regulations provide a nonexclusive list of disabilities. *See* 34 C.F.R. § 104.3(j)(2).

students who requested accommodations had learning disabilities.³⁷ Certain conditions are specifically excluded by the statutes.³⁸ Under Section 504 and the ADA, it is the higher education student's responsibility to self-identify as having a disability, and to pay for and provide the school with appropriate documentation of the impairment.³⁹

2. Substantial limitation.

As the Supreme Court has noted, “[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity. . . . To qualify as disabled, a claimant must further show that the limitation on the major life activity is ‘substantial.’”⁴⁰ The Court has also determined that the extent to which an impairment is limiting must be examined in light of any mitigators, such as hypertension medication, or corrective aids such as eyeglasses.

a. Effect of mitigators. In the “*Sutton* trilogy,” three 1999 United States Supreme Court decisions involving employees with disabilities, the Court held that whether an impairment is “substantially limiting” under the ADA and thus a statutorily protected disability

³⁷ Donald Stone, *The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KANSAS L. REV. 567, 570 (1996) (54% of students requesting exam accommodations have learning disabilities).

³⁸ Excluded conditions include persons currently using illegal drugs, 29 U.S.C. §706 (20)(C); 42 U.S.C. §12211, as well as a statutory list of conditions relating to sexuality, gambling, kleptomania and pyromania, 29 U.S.C. at §706(20)(E),(F); 42 U.S.C. §12211.

³⁹ See Bonnie Tucker and Bruce Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law § 911D* (2005); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 437 (6th Cir. 1998); *Brown v. Univ. of Cincinnati*, 2005 WL 1324885 at *10 (S.D. Ohio 2005).

⁴⁰ *Toyota Motor Mfg, Kentucky, Inc. v. Williams*, 534 U.S. 184, 195 (2002).

must be determined with reference to any mitigators.⁴¹ Thus a person with high blood pressure who takes medication has a physical impairment but with the mitigating medicine it may not be a substantially limiting statutory disability;⁴² similarly, a person with impaired vision corrected with eyeglasses,⁴³ or by “self-mitigation” in the form of bodily adjustments⁴⁴ may not have the “substantial impairment” required to be covered by the statute. These decisions relied primarily on the ADA’s present tense language requiring that eligible persons have a disability which “substantially limits” a major life activity,⁴⁵ and rejected contrary administrative interpretations.⁴⁶ In them, the Court rejected the argument that persons in these situations were “regarded as disabled” and thus covered by the statutes, requiring that persons must be perceived to have a condition which substantially limits a major life activity to be “regarded” as having an

⁴¹Sutton v. United Airlines, 527 U.S. 471 (1999); Murphy v. United Parcel Service, 527 U.S. 516 (1999); Albertsons v. Kirkingburg, 527 U.S. 555 (1999).

⁴²Murphy, 527 U.S. at 521 (with medication, employee’s “high blood pressure does not substantially limit him in any major life activity.”). Note, however, that if the mitigators have their own negative effects (e.g. medicinal side effects) these must also be considered in determining whether the impairment is substantially limiting.

⁴³Sutton, 527 U.S. at 488 - 489 (nearsighted pilots whose vision with corrective lenses was 20/20 “have not stated a claim that they are substantially limited in any major life activity.”).

⁴⁴Albertsons v. Kirkingburg, 527 U.S. 555, (employee with vision in only one eye used “bodily adjustments” presumably involving cognitive correction of monocular vision to compensate).

⁴⁵Sutton, 521 U.S. at 482-483.

⁴⁶See Sutton, 527 U.S. at 480 (noting guidance from EEOC, 29 C.F.R. pt. 1630, App. §1630.2(j), and Department of Justice, 28 C.F.R. pt. 35, App. A §35.104, indicating mitigators are not relevant to disability determinations).

impairment.⁴⁷ While these cases were decided in an employment context, as discussed above, the “substantially limits” ADA definition language interpreted by the Court is found in the general provisions of the ADA and thus also applies to cases of disability discrimination by students against schools.⁴⁸ Moreover, and as a dissent in one of these cases noted, the ADA definition of disability is “drawn ‘almost verbatim’ from the Rehabilitation Act of 1973.”⁴⁹ Thus, law school and other higher education students’ disabilities are also to be evaluated with any mitigators.⁵⁰

b. “*Substantial*” limitation of a “*major*” life activity. In a 2002 decision, *Toyota Motor Mfg., Ky., Inc. v. Williams*, (“*Toyota*”), the Court held that “substantial” limitation involves “considerable or to a large degree”⁵¹ “permanent or long-term”⁵² impairment of

⁴⁷See *supra* note 35 and accompanying text.

⁴⁸See 42 U.S.C. § 12102.

⁴⁹*Sutton*, 527 U.S. at 497 (Stevens, J., dissenting) (citing 29 U.S.C. §706(8)(B) and the Court’s opinion in *Bragdon v. Abbott*, 524 U.S. 631 (1998)).

⁵⁰See, e.g., *Pacella v. Tufts University School of Dental Medicine*, 66 F.Supp. 2d 234 (D. Mass. 1999) (dismissed dental student with vision problem did not have a statutorily protected disability where the impairment was largely mitigated with corrective lenses; no discrimination involved in his dismissal).

⁵¹*Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196-197 (2002) (citing dictionary definitions of “substantial”).

⁵²*Id.* at 198 (“The impairment’s impact must also be permanent or long term.”) (citing EEOC regulations). See, e.g., *Sanders v. Arneson Products*, 91 F.3d 1351 (9th Cir. 1996) (psychological impairment lasting four months is not a statutory disability); *Ogburn v. UFCW Local 881*, 305 F.3d 763 (7th Cir. 2002) (short term depression is not a statutory disability); *Swanson v. University of Cincinnati*, 268 F.3d 307 (6th Cir. 2001) (short term major depression mitigated with medicine was not a statutory disability); see also 29 C.F.R. Part 1630 Appx § 1630.2(j) (listing examples of temporary impairments which are not statutory disabilities).

activities “that are of central importance to daily life,”⁵³ and further noted that “these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled.”⁵⁴ While reserving the question of whether Equal Employment Opportunity Commission (EEOC) ADA regulations which measure limitation as compared to the average person were within legislatively delegated authority, the Court also quoted from these regulations:

According to the EEOC regulations, ‘substantially limited’ means ‘[u]nable to perform a major life activity that the average person in the general population can perform;’ or ‘[s]ignificantly restricted as to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.’⁵⁵

Thus, the Court noted that an employee who alleged that her carpal tunnel syndrome substantially impaired her in the major life activity of performing manual tasks, an impairment which kept her from performing assembly line work but not from performing daily living tasks such as brushing her teeth, may not in fact have a statutorily protected disability.⁵⁶

The *Toyota* court specifically noted that the definitional ADA language it interpreted was

⁵³*Id.* at 197 (“‘Major life activities’ thus refers to those activities that are of substantial importance to daily life.”) (citing dictionary definition of “major”).

⁵⁴*Id.* at 197. The Court also held that the “substantially limiting” determination must be made on an individualized basis for each person. *Id.* at 199 (noting the wide range of severity of carpal tunnel syndrome). In an earlier case, the Court affirmed a lower court finding that an asymptomatic HIV-positive plaintiff was a person with a disability per se under the ADA, and specifically a physical impairment which substantially impaired the major life activity of reproduction. *Bragdon v. Abbott*, 524 U.S. 624 (1998). The plaintiff had decided not to have a child because of her condition, *id.* at 641, and the Court also noted the real and significant medical risk of transmission to the child and/or to the partner during conception, *id.* at 639-641, finding that “[c]onception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health.” *Id.* at 641.

⁵⁵*Id.* at 195-196 (citing 29 C.F.R. §1630.2(j)).

⁵⁶*Id.* at 199-203 (remanding for determination of whether the undisputed physical

taken from Section 504 and applied not only to employment but also to other areas of the ADA, specifically including public accommodations.⁵⁷ Thus, under these decisions, a law student with high blood pressure that is asymptomatic with medication would likely not have a statutory disability and thus likely would not be covered by the statutes.⁵⁸ Similarly, a law student with mild dyscalculia, a math-related learning disability, which with self-mitigating coping strategies, but without any school-provided academic adjustments, did not interfere with a wide range of that student's learning activities but did render the student unable to succeed in an LL.M. program in tax law would likely not have a statutory disability which substantially impaired her ability to learn in the LL.M program.⁵⁹

impairment was substantially limiting to the plaintiff and thus statutorily covered).

⁵⁷*Id.* at 193-194.

⁵⁸In such a case it would be essential to have an evaluation of the student while on the treating medication.

⁵⁹While perhaps ultra vires, *see* Sutton, 527 U.S. at 479 (suggesting EEOC has not been delegated authority to write regulations concerning the ADA's general provisions but "determining [the regulations'] validity is not necessary to decide this case," and declining to decide "what deference they are due, if any."), it is worth noting that EEOC ADA regulations define "substantially limit" in general as

"(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 average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."

The same regulations offer a different definition of "substantially limit" for the major life activity

Several courts have found graduate students' diagnosed mental impairments (such as learning disabilities and ADHD) not to "substantially" limit learning in the graduate school context and thus not to amount to statutory disabilities. These decisions involved students with a history of academic success at least through college without accommodations, and/or a diagnosis based on test scores which documented below average performance only as compared with other highly educated persons, rather than below average performance as compared with the general population.

Most recently and notably, in *Wong v. Regents of California*, ("*Wong II*"),⁶⁰ a case

of working:

"(3) With respect to the major life activity of working--

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes)."

29 C.F.R. §1630.2(h). The Court also reserved the question of whether work was a major life activity. 534 U.S. at 200.

⁶⁰410 F.3d 1052 (2005). In an earlier decision in the same case, the court denied the school's motion for summary judgment on a different theory (specifically that no reasonable jury could find that the requested accommodations for alternative test formats were reasonable onesmit the student violated disability discrimination laws), since there was not a record of the school's readmissions decision-making process. *Wong v. Regents of Univ. Of Cal.*, 192 F.3d

involving a dismissed medical student diagnosed with a learning disability, the Ninth Circuit affirmed a summary judgment for the school, holding that the student's undisputed impairment was not a statutorily protected disability as a matter of law.⁶¹ As a young person, Wong had received special education but also participated in gifted classes. In college, Wong earned a 3.5 GPA in biochemistry without accommodations.⁶² The student also took the MCAT without accommodations, and successfully completed the first two years of medical school without accommodations and passed the Boards Step 1, a national standardized test taken after two years of medical school and required for physician licensing, without accommodations.⁶³ After struggling in and failing some clinical work, Wong was diagnosed with a learning disability,⁶⁴ but was dismissed because of his unsatisfactory clinical work.⁶⁵ He filed a disability discrimination claim.

807 (9th Cir. 1999) ("*Wong I*"), discussed *supra* at note 334 and accompanying text.

⁶¹*Id.* at 1056.

⁶²*Id.* at 1056-1057.

⁶³*Id.* at 1057.

⁶⁴*Id.* Testing revealed Wong's reading comprehension was in the 99th percentile untimed, but at an 8th grade level under time limits. *Id.* at 1066. For the *Wong* court the student's testing documentation of poor timed reading speed as compared with the general population was insufficient evidence to survive summary judgment in light of the student's long history of success without accommodations.

⁶⁵*Id.* at 1057-1058. Typically in medical school third and fourth year students rotate through various hospital departments such as internal medicine and surgery. During each rotation students not only perform direct patient care but also read extensively on diagnosis and treatment of conditions and diseases treated by the department in which the student is doing a rotation in preparation for an exam.

The Ninth Circuit framed the issue as “whether Wong presented sufficient evidence to demonstrate that he was substantially limited in the specified major life activities [reading, learning, and working] for purposes of daily living, or as compared to what is important in the daily life of most people.”⁶⁶ It concluded that Wong’s impairment did not substantially impair reading or learning, relying heavily on his history of academic success without accommodations.⁶⁷ The court rejected Wong’s argument that its analysis made it next to impossible for a student to prove a statutory disability⁶⁸ and reiterated that whether an impairment’s limitation is “substantial” must be made with reference to the general population:

The relevant question for determining whether Wong is "disabled" under the Acts was not whether he might be able to prove to a trier of fact that his learning impairment makes it impossible for him to keep up with a rigorous medical school curriculum. *It was whether his impairment substantially limited his ability to learn as a whole, for purposes of daily living, as compared to most people.* The level of academic success Wong achieved during the first two years of medical school, without any special

⁶⁶*Id.* at 1065.

⁶⁷Specifically, the court noted that “[r]egarding the activity of learning, Wong's claim to be "disabled" was contradicted by his ability to achieve academic success, and to do so without special accommodations. Most notably, Wong completed the first two years of the medical school program, the academic courses, on a normal schedule, with a grade point average slightly above a "B," and he passed the required national board examination at that point, both without the benefit of any special accommodations.” *Id.* at 1065.

⁶⁸The court noted “That is not to say that a successful student by definition cannot qualify as "disabled" under the Acts. A blind student is properly considered to be disabled, because of the limitation on the major life activity of seeing, even if she graduates at the top of her class. Nor do we say that a successful student cannot prove "disability" based on a learning impairment. A learning-impaired student may properly be considered to be disabled if he could not have achieved success without special accommodations. But a student cannot successfully claim to be disabled based on being substantially limited in his ability to "learn" if he has not, in fact, been substantially limited, as that term is used in the Acts.” *Id.* at 1065.

accommodation provided to him by the school, made that proposition implausible. . . .⁶⁹

As to learning disabilities specifically, the Ninth Circuit noted that

The term "learning disability" . . . can be misleading, however, for it is clear that a person who has a "learning disability" is not necessarily "disabled" under the Acts. The Acts use the term in a narrower fashion, to cover only those persons who have an impairment that substantially limits one of the major life activities. As a unanimous Supreme Court made explicit in *Toyota*, . . . having an impairment does not necessarily mean that a person is "disabled" for purposes of the Acts. The Acts establish a "demanding standard." [citation omitted] To be "disabled" under the Acts, a person has to be substantially limited in a major life activity, and that is measured by "most people's daily lives," not unique needs of a particular position. [citation omitted] Although he may have a learning disability, Wong is not substantially limited in the life activity of "learning" as compared to most people. The law compels accommodations for someone who is "disabled" as that term is used in the Acts, but not for everyone who may have a condition described as a "learning disability."⁷⁰

A dissenting judge characterized the consequence of the majority standard as “effectively bar[ring] the entire class of learning disabled students from receiving ADA accommodations in graduate school.”⁷¹

The federal district court in *Marlon v. Western New England College* (“*Marlon*”),⁷² a case involving a dismissed law school student diagnosed with several physical and cognitive impairments,⁷³ also found that the student did not have a statutory disability. Relying heavily on

⁶⁹*Id.* at 1065-1066 (emphasis added).

⁷⁰*Id.* at 1066-1067.

⁷¹*Id.* at 1071 (Thomas., J., dissenting). The dissent suggested a more individualized, fact-based approach, which would result in denial of summary judgment in the case at hand.

⁷²2003 WL 22914304 (D.Mass. 2003), *aff’d*, 29 Nat’l Disability L. Rep. ¶ 139 (1st Cir. 2005).

⁷³After being dismissed, the student was granted readmission and accommodations

Toyota and the EEOC regulations defining “substantially limit,”⁷⁴ the court rejected the student’s claims that her major life activities of working and learning were substantially limited by her impairments of learning disability, depression and panic attacks.⁷⁵ As to working, the court noted that EEOC regulations define substantial limitation of the specific major life activity of working, as being unable to perform a broad class of jobs, but the plaintiff had worked successfully as a paralegal without accommodations before and after her time in law school.⁷⁶ As to learning, statements in the student’s neuropsychological evaluation indicated that the learning disability was significant and longstanding. The court focused, however, on the student’s actual past success in learning. In this regard, the court noted that before law school the student had been academically successful in college and professionally successful as a paralegal, all without accommodations, and thus her claimed learning disability-related inability to succeed on long exams was not a substantial limitation on learning.⁷⁷

A medical school received summary judgment in a disability discrimination claim

consisting of a reduced course load, notetaking, taped classes, and extra time for and typing of exams for newly disclosed disabilities of carpal tunnel syndrome, anxiety, depression, and panic attacks. Despite these accommodations and taking classes for the second time, the student again failed to earn the required grades. She then obtained a diagnosis of a learning disability and requested additional accommodations, but was denied a second readmission, and sued under Section 504, the ADA, and state discrimination law. *Id.* at *2 - *3.

⁷⁴*Id.* at *6.

⁷⁵*Id.* at *7-8.

⁷⁶*Id.* at *7. Note that the EEOC regulations employ this broad class of jobs analysis only for the major life activity of working. *See supra* notes 55 and 59 and accompanying text.

⁷⁷*Id.* at *7 and n.18.

brought by a dismissed student in his last year of medical school.⁷⁸ After struggling on exams and being dismissed, the student was evaluated by the university's own internal experts and diagnosed with reading disorder and generalized anxiety disorder.⁷⁹ The student had performed well in high school and college.⁸⁰ The student also got a second post-dismissal evaluation which opined that the student's "failure to pass standardized tests was due to his reading disorder" and also concluding that the reading disorder "substantially impairs the major life activity of learning," and if the recommended accommodations were provided, the student would be successful in medical school.⁸¹ Citing *Toyota*, the court found insufficient evidence of a legal disability to survive summary judgment.⁸² While there was some dispute about whether the student's test scores were normed with other highly educated persons or with the general population, the court found the student's history of academic success in high school and college dispositive.⁸³

It stands to reason that not every individual who scores below average or low-average on this particular neuropsychological battery can be deemed to be disabled, particularly

⁷⁸*Brown v. Univ. of Cincinnati*, 2005 WL 1324885 (S.D. Ohio 2005).

⁷⁹*Id.* at *1.

⁸⁰*Id.* at *2-*3.

⁸¹*Id.* at *6.

⁸²*Id.* at *9-*12.

⁸³*Id.* at *11.

since, as plaintiff's situation demonstrates, an individual can succeed academically through at least the college level despite scoring at the lower end of the range of the scores on the battery. . . . In short, it is undisputed that plaintiff excelled in high school and college and was eventually able to achieve passing and above passing grades in the vast majority of his medical school courses. Certainly, this level of achievement greatly exceeds that which the average, unimpaired individual is able to attain, so that it is not reasonable to say that plaintiff was significantly restricted in his ability to learn as compared to 'the average person in the general population.'⁸⁴

A bankruptcy court also recently found that a dismissed medical student's attention deficit disorder impairment was not substantially impairing when compared with most people and thus did not amount to a statutory disability.⁸⁵ None of the student's three evaluations indicated below average learning abilities as compared to other adults in general or those her age.⁸⁶

Some courts have performed a similar analysis in pre-*Toyota* cases. The Tenth Circuit has also found that a medical student with "test anxiety" anxiety disorder manifesting on certain exams does not have a substantially limiting disability, finding that "[a]n impairment limited to specific stressful situations, such as the mathematics and chemistry exams which trigger [the student's] anxiety, is not a disability under the Rehabilitation Act."⁸⁷ In several cases involving

⁸⁴*Id.* at *11-*12.

⁸⁵In re Allegheny Health, Education and Research Foundation, 321 B.R. 776, 793-795, 797, 803-804 (Bankr. W.D. Pa. 2005) (disallowing dismissed student's claims for more than \$8 million against bankrupt medical school, and also rejecting claim that school regarded student as having a statutory disability absent evidence the school perceived the student as having a substantially limiting impairment).

⁸⁶*Id.* at 785-787.

⁸⁷*McGuinness v. University of New Mexico School of Medicine*, 170 F.3d 974, 980 (10th Cir. 1998).

medical students diagnosed with attention deficit disorder, reading disorder, and/or disorder of written expression seeking accommodations for the medical school Boards Step 1, courts have also found that the students' ability to learn was not substantially impaired as compared with most people and thus they are not persons with a disability under Title III of the ADA.⁸⁸ These courts paid special attention to the students' long history of average to superior academic performance to find that any impairments they had⁸⁹ did not substantially limit learning.⁹⁰ These courts also relied on legislative history and agency regulations as support for their conclusions that a substantially limiting impairment is one which limits a major life activity as compared with the general population, rejecting the students' arguments that their learning should be compared with persons of similar age and education level (i.e. college graduates).⁹¹

⁸⁸*Gonzales v. National Board of Medical Examiners*, 60 F. Supp. 2d 703 (E.D. Mich 1999) (student diagnosed with reading disorder and disorder of written expression); *Price v. National Board of Medical Examiners*, 966 F. Supp. 419 (S.D. W.Va. 1997) (three students all diagnosed attention deficit disorder, two of whom were also diagnosed with reading disorder and disorder of written expression).

⁸⁹The courts also questioned the diagnoses obtained by the students. The defendants' independent experts reviewed the evaluations supplied by the students, and disagreed with the diagnoses. The courts found the defendants' experts opinions more credible than those of the students' experts. *Gonzales*, 60 F. Supp.2d at 708; *Price*, 966 F. Supp. at 423-424.

⁹⁰*Gonzales*, 60 F. Supp.2d at 708-709; *Price*, 966 F. Supp. at 423-424. In the *Gonzales* case, the court also rejected the argument that the student's impairments limited the major life activity of working under the special EEOC regulation's standard, since the case was not brought under the employment part of the ADA. 60 F. Supp.2d at 709-710.

⁹¹*Gonzales*, 60 F. Supp.2d at 707-708 (citing S. Rep. No. 101-116; 28 C.F.R. Part 36 App. B; also noting general EEOC regulations definition 29 C.F.R. § 1630.2(j)(1)(ii)); *Price*, 966 F. Supp. at 425 (same). The Department of Justice regulations for Title III of the ADA state in pertinent part that "A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not

Not every lower court interprets *Toyota* this way. For example, in *Singh v. George Washington University* (“*Singh*”), a federal district court found that it was appropriate to compare a medical student to other college graduates to determine if her learning disability was substantially limiting.⁹²

In essence, the issue is whether “substantially” is to be defined objectively or subjectively. The Court’s opinion in *Toyota* suggests that the standard is an objective one, and the Ninth Circuit in *Wong II* and other courts so hold. These courts measure the substantialness of the impairment against the functioning level of a reasonable, ordinary person. *Wong II* and similar decisions’ objective analysis of a “substantially” limiting statutory “disability” is quite different than the learning disability evaluation protocol used by evaluators to diagnose adults, which compares the individual’s skills and achievement to the individual’s ability and potential.⁹³ Thus, when a law school receives information that a student has been diagnosed with a learning “disability,” the limitations of the impairment have likely been measured in a largely subjective manner quite different from the statutory analysis. The *Singh* court’s approach approaches the subjective analysis employed by learning disability evaluators, with the student’s learning compared to persons with similar levels of education.

While for certain physical or sensory impairments such as deafness, blindness, and cerebral palsy, taking a subjective or objective approach likely makes no difference, the

impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.” 28 C.F.R. Part 36 App. B.

⁹²*Singh v. George Washington University*, 368 F.Supp.2d 58, 65-68 (D.D.C. 2005) (medical student).

subjective and objective approaches may have very different consequences for mental impairments such as learning disabilities and attention deficit disorder. Several commentators in fact suggests that using the general population or “most people” standard means few if any law or other higher education students with newly diagnosed learning disabilities will be legally entitled to receive accommodations; these commentators disagree about whether this is a good result.⁹⁴

This analytic framework is also used by disability experts who have become familiar with the relevant legal standards through their work reviewing requests for accommodations on bar exams. These disability experts agree that many mental impairments (such as psychiatric disabilities, ADHD, and learning disabilities) first diagnosed in graduate students do not substantially impair learning and thus do not amount to statutory disabilities. For example, one neuropsychologist expert on ADHD who reviews bar examination accommodations requests notes that

reviewing the documentation, it is often unclear whether the student’s difficulty is a function of ADHD or the fact that they are simply struggling to succeed in a more difficult academic environmentIt is easy to forget that students who made it through

⁹³Eichhorn, *infra* note 152, at 34.

⁹⁴Melissa Krueger, *The Future of ADA Protection for Students With Learning Disabilities in Post-Secondary and Graduate Environments*, 48 U. KAN. L. REV. 607 (2000). The author relies on public policy as well as EEOC regulations defining “substantial” limits on the major life activity of working for employees, which require comparison with other persons of similar training and experience. 29 C.F.R. §1630.2(j)(3). The author suggests that for the major life activity of learning, the substantialness of the impairment be measured with reference to a group of similar age and education level (e.g. a reference group of college graduates for law students); Gregory Murphy, *Toyota v. William and the Late-Discovered Learning Disability*, 74 Bar Examiner 46, 48-49 (2004); Stuart Duhl and Gregory Duhl, *Testing Applicants with Disabilities*, 73 BAR EXAMINER 7, 10 (2004) (after *Toyota* testing accommodations for bar examinees require proof of impairment in “performing mental or physical tasks of central importance to their daily lives, and not tasks that are tied only to taking the bar examination or practicing law.”).

college are still likely above average in terms of their learning ability.⁹⁵

This expert indicates a person diagnosed with ADHD likely does not have a statutory disability “if [such] an individual has never been afforded accommodations yet has been able to complete an undergraduate education and achieve law school admittance.”⁹⁶

Other experts reach similar conclusions,⁹⁷ noting

it is nearly impossible to justify the [ADHD] diagnosis when symptoms suddenly arise after high school graduation. It is particularly hard when the first instance of any real problems arose after graduation from college. . . .How impaired can a person be relative to the general population if the worst of his or her problems occurs in academic settings far beyond the reach of most people? Without persuasive proof that impairment has been long-standing, consistent, and truly disruptive to normal functioning, the diagnosis is likely inappropriate.⁹⁸

Commentary from these disability experts also provides insight into the perspective of evaluators who diagnose these impairments. One psychiatrist who reviews requests for bar exam

⁹⁵*Ranseen, supra* note 100, at 10 and 11; *id.* at 11 (noting that there is no standardized test to diagnose ADHD; it is a clinical judgment);

⁹⁶*Id.* at 11; *see also id.* at 17 (“Let’s face it, whether or not it is a good thing in the long run, it is not all that likely that someone who is in law school and has completed undergraduate school, with or without [pharmacological] treatment, can really be considered [statutorily] disabled. . . .”); *id.* at 17-18 (“Put simply, there are too many students diagnosed with ADHD and requesting accommodation during adulthood who have clearly demonstrated – either with or without treatment – a history of academic success that can only be viewed as well beyond that of the average person within the population.”).

⁹⁷Gordon, Murphy, and Keiser, *infra* note 100, at 28-29.

⁹⁸*Id.* at 31; *id.* at 32 (noting that high IQ and/or hard work are not sufficient justification for a late onset ADHD diagnosis); *id.* (“Generally, if an individual is able to cope with the academic and social demands of a secondary education without substantial assistance, he or she is likely neuropsychologically intact and therefor unimpaired compared to most people.”); *id.* at 33 (“By stretching the age of onset for symptom presentation until young adulthood . . . clinicians risk distorting the concept of disability to include anyone who reaches an academic level that outstrips her or her particular array of talents.”).

accommodations from persons with psychiatric impairments notes “treating physicians, therapists and other caregivers are ethically required to act as advocates for their patients, and as a result their reports are rarely neutral or unbiased.”⁹⁹ A neuropsychologist who reviews requests for bar exam accommodations similarly notes concerns that evaluators often appear to be acting as advocates rather than with impartiality, are more familiar with and oriented to IDEA disability standards rather than the standards for statutory disabilities for higher education students, and “typical clinical practice involves a natural desire to be helpful to the individual requesting and paying for services.”¹⁰⁰

The foregoing discussion does not mean there are not substantial numbers of law students with statutory disabilities. For example, the law school where the author is a faculty member has enrolled students with physical disabilities such as cerebral palsy and quadriplegia, sensory disabilities such as legal blindness and deafness, and mental impairments which amount to statutory disabilities such as dyslexia diagnosed in childhood and requiring special education since that time. The foregoing discussion also does not mean law students should not pursue an initial disability diagnosis while in law school. Diagnosis of an impairment, even if it does not

⁹⁹Douglas Tucker, *Accommodations for Psychiatric Disabilities on the Bar Examination: Perspectives from an Expert Reviewer*, 71 THE BAR EXAMINER 14, 17 (2002) (also noting the “strong incentives” for persons seeking accommodations to “distort their responses” and urging evaluators to be vigilant in ferreting out any such attempted distortion and not rely solely on information reported by the examinee to arrive at a diagnosis).

¹⁰⁰John Ranseen, *Reviewing ADAD Accommodation Requests: An Update*, 69 BAR EXAMINER 6, 15-16 (2000) (also urging evaluators considering an ADHD diagnosis to rely primarily on outside evidence of attentional difficulties beginning in childhood, rather than self-reported history or test scores); *id.* at 16 (citing unpublished research indicating the majority of evaluators think disability involved comparison to peers rather than the general population); Michael Gordon, Kevin Murphy, and Shelby Keiser, *Attention Deficit Hyperactivity Disorder (ADHD) and Test Accommodations*, 67 BAR EXAMINER 26, 27-28 (1998) (reporting similar

amount to a statutory disability and trigger eligibility for law school accommodations, may offer the law student an opportunity for helpful treatment (pharmacological, compensatory strategy and/or therapy) which may enhance the student's functioning, academic and otherwise.

However, these legal developments do mean that many law students, law schools, evaluators, and other officials such as university disability offices need to reexamine their beliefs concerning legal disabilities.

B. “Qualified”

The statutes protect only “otherwise qualified” persons with disabilities.¹⁰¹ While the students in *Wong II* and similar cases may be characterized as not impaired enough to be covered by the discrimination statutes, other persons' impairments are so severe that they are not qualified for certain programs and thus also are not covered by the statutes.¹⁰² Still other persons are not qualified for a job or a school program for reasons unrelated to their disabilities. In contrast to the definition of disability which applies generally to employees, students, and others, “qualified” is defined differently in the Section 504 regulations in different contexts. As to employees, statutory eligibility also requires that the person be “qualified,” or “able to perform the essential functions” of the job, at least if reasonable accommodations are provided.¹⁰³ For higher education students, a “qualified” person is defined as “one who meets the academic and technical standards requisite to admission or participation in the recipient's education program or

conclusions re knowledge level and orientation of evaluators).

¹⁰¹ See 29 U.S.C. §794(a).

¹⁰² Cf. *Haddon v. Board of Bar Examiners*, 882 P.2d 509 (Mont. 1994) (evaluator-identified “difficulties with ‘concept formation, problem solving, strategy generation, and hypothesis testing’” would prevent bar success), cited in *Duhl and Duhl, supra* note 94, at 18.

activity.”¹⁰⁴

In its first Section 504 case, the Supreme Court held that a prospective nursing student whose deafness, even with reasonable accommodations, prevented her from being able to succeed in the clinical portions of her training,¹⁰⁵ was not otherwise qualified and therefore not protected by Section 504.¹⁰⁶ Similarly, a person with significant permanent brain damage is likely not otherwise qualified to be a law student. Other students with disabilities are not qualified for a school’s program for reasons unrelated to their disabilities. As an example, a student who is not admitted to a law school because of her low LSAT score and poor undergraduate grades and also has a disability likely is not qualified for admission to that law school because of a demonstrated lack of ability and academic success.

In the context of defining “qualified” for academically dismissed law students, such students’ dismissal makes them not qualified to continue in law school. However, they are otherwise qualified to apply for readmission and have their petitions considered on a nondiscriminatory basis with the petitions of other students without disabilities.

C. Substantive entitlements of eligible students

In addition to basic nondiscrimination and physical accessibility requirements, and anti-

¹⁰³34 C.F.R. §104.3(l)(1).

¹⁰⁴*Id.* at §104.3(l)(3).

¹⁰⁵Parts of the clinical training involved work in operating rooms and intensive care units where the caregivers are masked and lipreading would thus not be possible. *Id.* at 403.

¹⁰⁶*Southeastern Comm’y Coll. v. Davis*, 442 U.S. 397 (1979).

retaliation provisions,¹⁰⁷ under Section 504 regulations, higher education students may receive “academic adjustments,” commonly referred to as “reasonable accommodations,” to their educational programs.¹⁰⁸ Students have the burden of documenting a disability and requesting adjustments/accommodations.¹⁰⁹ “Academic adjustments” or “reasonable accommodations” (referred to in this Article as “accommodations”) are those which are necessary to allow the student with a disability to participate in a nondiscriminatory basis with persons who do not have disabilities.¹¹⁰ Such adjustments/accommodations are to be determined on a case-by-case basis and do not include those which would pose an “undue hardship,” either financially or administratively, on the school.¹¹¹ The regulations include examples of academic adjustments: extra time to complete degree requirements, substitution of required courses,¹¹² “adaptation of

¹⁰⁷See 34 C.F.R. §100.7 (Section 504); 42 U.S.C. § 12203; 28 C.F.R. §§35.134 (Title II); 36.206 (Title III).

¹⁰⁸34 C.F.R. §104.44. The obligation to provide persons with disabilities with reasonable accommodations or academic adjustments stands in contrast to nondiscrimination obligations on other bases, such as race and gender, which do not include such affirmative obligations.

¹⁰⁹See Tucker and Goldstein, *supra* note 39 at § 9IID.

¹¹⁰34 C.F.R. §104.44(a) (“A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, . . .”).

¹¹¹34 C.F.R. §104.44(a) (“Academic requirements that the recipients 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.”)

¹¹²Perhaps, for example, a hearing impaired undergraduate student faced with a foreign language requirement could substitute either a course which dealt with the written foreign language only, or a sign language course.

the manner in which specific courses are conducted,¹¹³ waivers of rules which limit the student's participation such as allowing a student whose disability precludes effective note-taking to tape record class or waiving a no animal rule for a service animal,¹¹⁴ evaluating students in a nondiscriminatory way,¹¹⁵ and providing "auxiliary aids" such as "taped texts, interpreters, orally delivered materials. . . , [and] readers in libraries"¹¹⁶

Schools are not required to provide "devices or services of a personal nature" such as "attendants, individually prescribed devices, [nor] readers for personal use or study."¹¹⁷ Thus, schools are generally not required to offer tutors to students, although to the extent a school makes tutoring services available (perhaps through an Academic Resource Program or upperclass students offering weekly tutorials for 1L classes) they must be available on a nondiscriminatory basis to students with disabilities.¹¹⁸ Common reasonable accommodations for law students with disabilities include access to special technology (such as casebooks on

¹¹³34 C.F.R. §104.44(a).

¹¹⁴34 C.F.R. §104.44(b).

¹¹⁵34 C.F.R. §104.44(c). For example, a student with significant dyslexia, a learning disability involving written language, likely reads and writes quite slowly and may need extended time on examinations.

¹¹⁶34 C.F.R. §104.44(d).

¹¹⁷*Id.*

¹¹⁸Oregon State University, 5 Nat'l Disability L. Rep. ¶ 19 (OCR 1993). See also *Robinson v. Hamline University*, 1994 WL 175019 (Minn. App. 1994) (so holding with regard to state discrimination law modelled on Section 504 in case brought by dismissed law student). Moreover, to the extent the school offers services beyond reasonable accommodations, it may charge for them. *Id.*

CD), notetaking assistance, and extra time on examinations.¹¹⁹

Schools are also not required to provide adjustments or accommodations which would compromise the essential requirements of its program. However, whether a requested accommodation would compromise the essential elements of a law school program must be determined on an individualized basis.¹²⁰ Examples of accommodations which have in typical law school contexts to go beyond reasonable ones include waiver of minimum GPA requirements,¹²¹ waiver of class attendance requirements,¹²² taking exams at home,¹²³ and

¹¹⁹For a report on a law school survey regarding the kinds of accommodations law schools provide for students with disabilities, see Donald Stone, *The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KAN. L. REV. 567 (1996). See also Lisa Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J. LAW & EDUC. 31, 34 (1997) (thorough overview of possible accommodations for students with learning disabilities).

¹²⁰Cabrillo College, 2 Nat'l Disability L. Rep. ¶ 78 (OCR 1991) ("A generalized decision that . . . requirements can never be waived, without consideration of the reasons for the existence of an individual requirement, would not meet the standards set forth in Section 104.44 of the regulation."). As another example, although meeting law school attendance standards is generally an essential requirement for law students, if a professor set a stringent attendance requirement for her class, but made exceptions for nondisability reasons, modification of the attendance requirements for that class might be a reasonable accommodation for a student with a disability.

¹²¹Analogously, the ADA Title II Technical Assistance Manual suggests that bar examiners and other licensing authorities need not waive bar examination requirements nor minimum passing scores as accommodations. Civil Rights Division of the Department of Justice, *ADA Title II Technical Assistance Manual* at 14 (undated).

¹²²OCR has found that waiving law school attendance requirements is beyond legally required academic adjustments. Seattle University School of Law, 27 Nat'l Disability L. Rep. ¶ 321 (OCR 2003).

¹²³*McGregor*, 3 F.3d at 859-860.

providing an alternate format for multiple choice tests.¹²⁴

In the specific context of deciding whether requested exam modifications are reasonable, one expert suggests that if the modification “will change the skill being measured,” give the student’s score a different meaning than the scores of other students, or would also benefit other students without disabilities, it is not a reasonable one.¹²⁵ Other experts note that “appropriate accommodations help[] to better reveal an examinee’s true ability without inflating or . . . diminishing it.”¹²⁶

The decision whether a requested academic adjustment goes to essential academic standards is one which is given deference by both OCR¹²⁷ and the courts.¹²⁸

While as discussed above the statutes’ eligibility definitions apply across contexts, Section 504 and the ADA’s substantive provisions treat employees, preK-12 students, and higher education students somewhat differently. Section 504’s substantive provisions for higher education students requiring “academic adjustments” are akin to those for employees requiring

¹²⁴*Wynne*, 932 F.2d at 794-95.

¹²⁵Phillips, *infra* note 417, at 16.

¹²⁶Martha Thurlow, Judith Elliott, Ronald Erickson and James Ysseldyke, *Learning Disabilities and Accommodations: Best Practices for Bar Exams*, 66 BAR EXAMINER 17, 27 (1996).

¹²⁷Northern Ill. Univ., 7 Nat. Disability L.Rep. ¶ 392 (OCR 1995) (“OCR grants great deference to recipients to determine which academic requirements are essential to their programs of instruction).

¹²⁸*Wynne*, 932 F.2d at 795; *McGregor*, 3 F.3rd at 859; *Brown*, 2005 WL 1324885 at *10.

“reasonable accommodations” to perform their jobs.¹²⁹ Like the academic adjustments provision for higher education students, the reasonable accommodations provisions for employees exclude modifications which would alter the essential functions of the employee’s job, as well as modifications which would pose an undue hardship on the employer.¹³⁰

D. Enforcement

Section 504 regulations require schools to designate a Section 504 coordinator as well as to establish an internal grievance process for “prompt and equitable” resolution of disability discrimination complaints.¹³¹ External recourse is also available. Aggrieved students may file a complaint under either Section 504 or Title II of the ADA with the Office of Civil Rights in the U.S. Department of Education (“OCR”) within 180 days of the alleged violation, or at a later time for good cause.¹³² OCR investigates complaints informally (normally by a on-site visit to the school to review files and interview relevant persons, and without a hearing) and may issue

¹²⁹34 C.F.R. §104.12. The burdens of establishing eligibility and asking for accommodations for higher education students also resemble those for employees as opposed to preK-12 students. As discussed above, whereas under both Section 504 and the IDEA, public preK-12 schools must identify and evaluate eligible students, 34 C.F.R. §104.32 (Section 504); 20 U.S.C. § 1412(a)(3) (IDEA), higher education students, like employees, must self-identify to their schools, pay for and supply appropriate documentation of their disability, and request accommodations. Schools are not required to offer accommodations beyond those requested by the student. *See, e.g.*, Whittier College School of Law, 4 Nat. Disability L. Rep. ¶ 183 (OCR 1993).

¹³⁰*See* 34 C.F.R. § 104.12 (Section 504); 42 U.S.C. § 12112(5) (ADA).

¹³¹34 C.F.R. §104.7. These regulations do not require schools to make the grievance process available to applicants for admission. *Id.*

¹³²34 C.F.R. §100.7.

an opinion letter containing a finding that disability discrimination has (not) occurred.¹³³ Students may also file private lawsuits under both Section 504 and the ADA.¹³⁴ Relief is normally injunctive in nature; damages are available only under limited circumstances,¹³⁵ and not in private lawsuits under Title III of the ADA.¹³⁶ Attorney's fees are available to prevailing plaintiffs, although recent case law developments make it more difficult to be eligible for a fee award.¹³⁷

E. The prima facie case

A prima facie claim of disability discrimination in a readmissions case under Section 504 has four elements: 1) the plaintiff is a statutorily covered person with a disability, 2) she is otherwise qualified for readmission, 3) she was denied readmission solely by reason of her disability (here the student can make out a prima facie case, the school can articulate a legitimate reason for its decision, and the student can then prove pretext,) and 4) the defendant school

¹³³29 U.S.C. §794a(a)(2) (making procedures under Title VI available); 34 C.F.R. §104.61 (same).

¹³⁴29 U.S.C. §794a(a)(2).

¹³⁵See 29 U.S.C. § 794(a)(2) (Section 504); 42 U.S.C. § 12131 (ADA Title II); *id.* at § 12188 (ADA Title III). Punitive damages are not available under ADA Title II nor Section 504. *Barnes v. Gorman*, 536 U.S. 181 (2002).

¹³⁶See 42 U.S.C. § 12188(b)(2).

¹³⁷29 U.S.C. §794a(b) (Section 504); 42 U.S.C. § 12188 (ADA). For example, in a recent Supreme Court case, the Court indicated a private settlement of a civil rights claim was insufficient "prevailing" to create eligibility for reimbursement of attorney's fees. *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health Res.*, 532 U.S. 598, 605 (2001). For a discussion of this case's impact on the IDEA, see Lynn Daggett, *Special Education Attorney's Fees: of Buckhannon, the IDEA reauthorization bills, and the IDEA as civil rights statute*, 8 UC DAVIS J. OF JUV. L. & POL. 1 - 54 (2004).

received federal education funds.¹³⁸ It does not appear that reverse disability discrimination claims are available,¹³⁹ so schools may choose to engage in affirmative action in favor of students with disabilities without fear of liability.¹⁴⁰

F. The IDEA's different approach and the student expectations it creates

Most students entering law school with (or without) an impairment are familiar with the coverage and entitlements of the IDEA, the federal preK-12 special education statute. Some have their own experience being served under the statute; others (at least those in public schools) likely saw the statute at work in their schools with certain of their classmates.¹⁴¹ The IDEA¹⁴²

¹³⁸*See, e.g.,* Zukle v. Regents of University of California, 166 F.3d 1041(9th Cir. 1999) (dismissed medical student). With regard to the otherwise qualified requirement, this court announced a burden shifting framework:

“the plaintiff-student bears the initial burden of producing evidence that she is otherwise qualified. This burden includes the burden of producing evidence of the existence of a reasonable accommodation that would enable her to meet the educational institution's essential eligibility requirements. The burden then shifts to the educational institution to produce evidence that the requested accommodation would require a fundamental or substantial modification of its program or standards. The school may also meet its burden by producing evidence that the requested accommodations, regardless of whether they are reasonable, would not enable the student to meet its academic standards. However, the plaintiff-student retains the ultimate burden of persuading the court that she is otherwise qualified.”

Id. at 1047.

¹³⁹*See infra* note 407 and accompanying text.

¹⁴⁰At the law school where the author is a member of the faculty, the faculty recently reaffirmed its commitment in admissions to diversity by deciding to consider a number of forms of diversity in applicants, including disability. The law faculty has not decided to give special consideration to disability or other diversity factors in readmissions decisions.

¹⁴¹Disability evaluators also tend to be more familiar with and oriented to the IDEA than to the laws governing higher education students. *See supra* notes 99-100 and accompanying text.

¹⁴²20 U.S.C. §§1401-1461.

took effect with the 1978-79 school year.¹⁴³

The statutes are set up quite differently; the IDEA is publicly funded,¹⁴⁴ Section 504 and the ADA are unfunded mandates.¹⁴⁵ The IDEA applies to public preK-12 schools;¹⁴⁶ as applied to higher education Section 504 and the ADA apply to both public and private schools.¹⁴⁷ The IDEA's approach to eligibility and substantive entitlements is markedly different than that of the higher education statutes. Understandably, law students have expectations about coverage and services in law school based on their earlier experience with the IDEA.

1. Eligibility. Under the IDEA, a diagnosis of an impairment such as a learning disability or ADD is normally sufficient to qualify for services. The IDEA defines covered students as those aged 3 to 21, who are diagnosed with one or more of a statutory list of disabilities, and who need special education instruction.¹⁴⁸ The group of IDEA-eligible students is thus both broader and narrower than the group of higher education students covered by Section 504 and the ADA. On the one hand, Section 504 and the ADA potentially cover impairments not on the IDEA's statutory list, as well as past and perceived impairments. On the other hand, IDEA eligibility determinations are based primarily on a diagnosis, rather than the student's level

¹⁴³The preK-12 regulations for Section 504 were modeled on and are quite similar to the IDEA. 34 C.F.R. §§ 104.31-104.38.

¹⁴⁴See 20 U.S.C. § 1411 (allotting funds for special education).

¹⁴⁵The ADA is Commerce Clause legislation. See 42 U.S.C. § 12101 (b)(4). Section 504 is a condition on the receipt of federal education funds. See 29 U.S.C. § 794 (a).

¹⁴⁶See 20 U.S.C. § 1413 (requirements for local educational agencies).

¹⁴⁷See *infra* notes 17- 24 and accompanying text.

¹⁴⁸20 U.S.C. §§ 1401(3); 1412(a)(1).

of functioning, which has become primary under Section 504 and the ADA.

The IDEA's approach to eligibility is largely subjective. It involves no "substantial limitation" analysis. A diagnosed student is IDEA-eligible unless she functions so well that she does not need special education instruction,¹⁴⁹ and no level of student functioning is too low for IDEA eligibility.¹⁵⁰ Thus, a gifted student with a learning disability or attention deficit disorder may well be eligible if the disability limits the student's ability to achieve her potential.¹⁵¹ The typical evaluation approach for learning disabilities under the IDEA is even more subjective; a requirement for diagnosing a learning disability is a significant gap between the individual student's intellectual ability (normally via an IQ test) with the persons's measured achievement.¹⁵²

Schools have responsibility for identification and documentation of eligibility under the IDEA and the preK-12 Section 504 regulations; they must seek out, evaluate at school expense,

¹⁴⁹20 U.S.C. § 1401(3) (ii).

¹⁵⁰*See, e.g.,* Timothy W. v. Rochester, New Hampshire, Sch. Dist., 875 F.2d 954 (1st Cir.1989) (IDEA is a zero-reject statute; no student is so low-functioning as to be ineligible; profoundly retarded and multiply handicapped student whom school's experts opine has no functioning cerebral cortex and thus cannot engage in higher order thinking is eligible under the IDEA).

¹⁵¹*See, e.g.,* West Chester Area Sch. Dist. v. Bruce and Suzanne C., 194 F.Supp.2d 417 (E.D.Pa. 2002) (ADD student with high verbal IQ and much lower reading, spelling and math reasoning skills who is earning passing but not excellent grades is IDEA-eligible).

¹⁵²34 C.F.R. § 300.541(a)(2); see Lisa Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J. LAW & EDUC. 31, 34 (1997) (also providing a thorough overview of diagnosis, nature, and possible accommodations for students with learning disabilities).

and identify eligible students.¹⁵³ As discussed earlier, under Section 504 and the ADA, higher education students have the burdens of identification, documentation, and requesting accommodations.¹⁵⁴

2. Protection from punishment for disability-related behavior. There is no “otherwise qualified” analysis under the IDEA limiting eligibility for students whose disabilities prevent them from meeting a school’s standards. In fact, IDEA students are protected from discipline for conduct related to their disability.¹⁵⁵ An IDEA student cannot be punished, particularly in the form of suspension or expulsion, for behavior that is a manifestation of his disability.¹⁵⁶ While most discipline under the IDEA is nonacademic (public preK-12 schools do not academically dismiss students), this rule applies to all discipline. In contrast, Section 504 “forbids discrimination based on stereotypes about a handicap, but it does not forbid decisions based on the actual attributes of the handicap.”¹⁵⁷

3. Substantive entitlements. In stark contrast to the “academic adjustments” required for higher education students, the IDEA (as well as the substantive Section 504 provisions for preK-12 public school students) establish a right to a “free appropriate public

¹⁵³20 U.S.C. § 1412 (a)(3) (IDEA); 34 C.F.R. §104.32 (Section 504 preK-12 public school regulations).

¹⁵⁴*See supra* note 109 and accompanying text.

¹⁵⁵20 U.S.C. §1415(k).

¹⁵⁶*Id.* at §1415(k)(4), (5); *see also* Honig v. Doe, 484 U.S.345 (1986).

¹⁵⁷*Anderson v. University of Wisconsin*, 841 F.2d 737, 740 (7th Cir. 1988) (citing *Davis*).

education”¹⁵⁸ in the “least restrictive environment.”¹⁵⁹ Under the IDEA these obligations are met by having a team of persons, including the parents, prepare an Individual Education Program (IEP) for the student, in order to ensure that the student received the FAPE to which each IDEA-covered student is statutorily entitled. IEPs often include extensive personal instructional and other services such as speech and language therapy, occupational and physical therapy, and counseling, tutoring and personal aides, and even placement in a private school at the public school’s expense.¹⁶⁰ This experience creates expectations about eligibility and levels of required services in higher education which are at odds with what the federal disability discrimination statutes actually offer to higher education students.¹⁶¹

4. Enforcement. Perhaps in part because of mistrust of schools based on their past failings in dealing with preK-12 students with disabilities, Congress chose to set up an elaborate, adversarial system in the IDEA for parents to challenge schools’ judgments.¹⁶² This dispute resolution system includes an administrative hearing process for IDEA complaints presided over by impartial hearing officers trained in both law and special education.¹⁶³ Courts

¹⁵⁸34 C.F.R. §104.33(a) (Section 504); 20 U.S.C. § 1412(a)(1) (IDEA).

¹⁵⁹34 C.F.R. §104.34(a) (Section 504); 20 U.S.C. §1412(a)(5) (IDEA).

¹⁶⁰See 34 C.F.R. § 300.24 (defining related services to include various therapies and counseling); 20 U.S.C. § 1412(a) (10) (placement in private schools).

¹⁶¹Between their IDEA years and law school, students have of course been to college, where they have had experience with the reduced entitlements of higher education students with disabilities.

¹⁶²See generally 20 U.S.C. § 1415. States must make a complaint process available, as well as mediation and administrative hearings.

¹⁶³20 U.S.C. § 1415(f)(3).

hearing IDEA cases do so somewhat in the manner of hearing an administrative appeal of the hearing officer's decision, receiving the record and decision from the administrative hearing, although in contrast to administrative appeals courts hearing IDEA cases may take additional evidence.¹⁶⁴ While money damages are generally not available for IDEA violations, attorney's fees are available to prevailing parents.¹⁶⁵

5. Impact of the IDEA on law student perspectives. Law students, including those who participated in the IDEA, performed well enough academically to go on to enroll in and graduate from college, and did well enough there and on the LSAT to be accepted to law school. Acceptance to law school conveys to prospective law students that they have the ability to succeed in law school,¹⁶⁶ although law faculty are well aware that not everyone, including some very bright persons, can master the unusual mode of analysis, often referred to as "thinking like a lawyer," that is at the heart of lawyering.

Such students enter law school with a history of academic success, some with significant support under the IDEA, and a belief that they will continue to succeed. Once in law school, the amount and level of work is significantly higher than most have encountered before, but for those with impairments, the level of support is much lower than before. Some students who were served under the IDEA in fact will not be persons with a disability under Section 504 and the ADA, perhaps because they did not self-identify and document an impairment, or perhaps because the impairment, with mitigators, does not substantially limit a major life activity and

¹⁶⁴20 U.S.C. § 1415 (i)(2)(C).

¹⁶⁵20 U.S.C. § 1415 (i)(3).

¹⁶⁶Law school accreditation standards limit law schools to admitting students the school

thus does not amount to a statutory disability. A number of such students are bright enough to have succeeded prior to law school without any participation in special education or accommodations. For law students who are covered by the federal disability discrimination statutes, the accommodations offered are often much more meager than the services provided under their IDEA IEP.

It is likely that at no point in their pre-K-12 education has such a student's impairment been a barrier to academic participation, since the IDEA is a zero-reject statute, and special statutory rules prohibit discipline for behavior related to the student's disability. Moreover, the vague higher education statutory language about what is required in terms of academic adjustments/accommodations, in concert with the kinds of services that were available under the IDEA, may cause frustration on the student's part that assistance perceived to be both necessary and legally required is not being provided by the law school. Other students who have never been served or diagnosed as a person with a disability, find themselves struggling, paying for an expert evaluation, and being told by the expert that they have a "disability" that has contributed to their current academic struggles. These students may well assume that the diagnosed "disability" means they are entitled to extensive services under disability laws.

When law students do not earn the minimum GPA required by the law school and are dismissed, it is devastating. Most students have taken out significant loans to finance their education.¹⁶⁷ Of course, most unhappily for the student, the dismissal means they likely will not

believes will be academically successful. *See infra* Section VI.A.2.

¹⁶⁷Cf. Milam and Marshall, *infra* note 169 at 335 & n. 4 (most dismissal litigation involves medical schools because of "financial investment and potential loss").

have a career as an attorney.¹⁶⁸ Requesting new or different accommodations for an impairment than what they received from the law school in the past, whether the impairment is one the student has known about or is newly diagnosed as part of the readmissions process, perhaps accompanied by an evaluator's prediction of success if the accommodations are provided, offers dismissed students a concrete basis for their belief that they will be successful if readmitted. It also provides a legal basis for challenging the school's decision if it is not in their favor. However, as Parts IV and V of the Article explain, in the vast majority of cases, students pursuing such claims will not get past summary judgment, as the court will defer to their school's academic judgment that the student should not be readmitted.

IV. JUDICIAL DEFERENCE TO ACADEMIC DECISIONS BY HIGHER EDUCATION AUTHORITIES

There is a tradition of U.S. Supreme Court deference to higher education authorities' academic judgments.¹⁶⁹ This tradition spans several decades and was recently reaffirmed in the

¹⁶⁸*Id.* at 347 (“Presumably, students who have invested substantial time and money in a graduate or professional program, and who exhibit academic inadequacies throughout their enrollment are most likely to sue universities for academic dismissals. Such students expect to complete their education and practice their chosen profession. Indeed, the school has allowed them to continue their education in the belief that they will receive a degree. The university's refusal to allow them to continue or to award a degree often results in litigation. On the other hand, the academically inadequate student whom the university dismisses from the program early does not have the same emotional, financial and personal investment. . . . [and] is less likely to initiate a lawsuit.”). In the author's experience, dismissed students rarely believe they are not capable of succeeding, if they are offered another chance.

¹⁶⁹For more thorough overviews of deference to higher education decisions than this Article affords, see Steven Milam and Rebecca Marshall, *Impact of Regents of the University of Michigan v. Ewing on Academic Dismissals from Graduate and Professional Schools*, 13 J. COLLEGE & UNIV. L. 335 (1987); Anne Dupre, *Disability, Deference and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393 (1998) (comparing the lack of deference under the IDEA with the deference accorded universities, and arguing that, in part because of expertise, preK-12 schools also deserve the deference accorded higher education judgments); Edward Stoner and Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's*

University of Michigan affirmative action cases. Although the Court has not yet specifically heard a case in which a dismissed student made a disability discrimination claim, this deference has been extended to academic judgments even in the contexts of constitutional and discrimination claims, as well as to claims by academically dismissed students,¹⁷⁰ strongly suggesting the Court would offer the same deference to a readmissions decision in the context of a disability discrimination claim.

In the 1970's, in *Board of Curators of the University of Missouri v. Horowitz* (“*Horowitz*”),¹⁷¹ the Court rejected procedural and substantive due process claims by a medical school student who had been academically dismissed for unsatisfactory work in her clinical rotations.¹⁷² As to procedural due process requirements, the Court relied upon the medical school’s notice to the student of her insufficient academic progress and the “careful and

Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students In the Eighteen Months Before Grutter, 30 J. COLL. & UNIV. L. 583, 614 (2004).

¹⁷⁰For a discussion of lower court deference to academic dismissal decisions not involving disability, see K.B. Melear, *The Contractual Relationship Between Student and Institution: Disciplinary, Academic, and Consumer Contexts*, 30 J. COLL. & UNIV. L. 175, 196-199 (2003).

¹⁷¹435 U.S. 78 (1978).

¹⁷²The student was nearing the end of medical school, *id.* at 81, and some of the specific issues underlying her academic failure were not purely academic (see *id.*, noting “erratic attendance” and “lack[] [of] a critical concern for hygiene” as specific reasons for rating the student’s clinical performance as unsatisfactory). As one commentator has noted, the dismissal in *Horowitz* may thus be characterized as less than purely academic, but the Court still found the decision was owed deference. Fernand Dutille, *Disciplinary versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J. COLL. & UNIV. L. 619,627 (2003) (despite Supreme Court statements to the contrary in fact there is no bright line between academic and nonacademic bases for punishment; for example, the commentator asks whether a grade of F in a course for either not meeting attendance requirements or for cheating, causing a student’s GPA to fall below the required minimum, is really an academic dismissal; suggesting that at least rudimentary due process be extended to academic decisions and that deference to nonacademic

deliberate” nature of the school’s decision, which was made by a committee and reviewed by the faculty and administration.¹⁷³ The Court found that the “significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct” “calls for far less stringent procedural requirements in the case of an academic dismissal.”¹⁷⁴ In contrast to discipline, in which the Court’s precedent required some sort of hearing, the Court held that in academic dismissals, a hearing was not required,¹⁷⁵ in part because “the school considers and weighs a variety of factors,”¹⁷⁶ and academic judgments require “expert evaluation of cumulative information.”¹⁷⁷

As to substantive due process, the Court noted the subjective nature of the academic dismissal decision and its resulting unsuitability for close judicial review:

[t]he decision to dismiss . . . rested plainly on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more *subjective and evaluative* than the . . . average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his court, 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

decisions is sometimes appropriate).

¹⁷³435 U.S. at 85.

¹⁷⁴*Id.* at 86. With regard to the student’s claim that due process required an adversary hearing, a claim the appeals court had adopted, the Court noted that “We stop short, however, of requiring full trial-type procedures in such situations. A graduate or professional school is, after all, the best judge of its students’ academic performance and their ability to master the required curriculum.” *Id.* at 85 n.2.

¹⁷⁵*Id.* at 89-90.

¹⁷⁶*Id.* at 91 n.6

¹⁷⁷*Id.* at 90.

judicial or administrative decisionmaking.¹⁷⁸

The Court also found that judicial second-guessing of academic decisions could well be harmful to the faculty student relationship:

The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, ‘one in which the teacher must occupy many roles – educator, adviser, friend, and, at times, parent-substitute. . . . This is especially true as one advances through the varying regimes of the educational system, and the instruction becomes both more individualized and more specialized. . . . We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship.’¹⁷⁹

Finally, the Court noted that historically, control of education was the province of the states rather than the federal courts.¹⁸⁰

As to any review of the merits of the decision, the Court found that “[e]ven assuming that the courts . . . can review an academic decision of a public educational institution,” a showing of arbitrariness or capriciousness would be required.¹⁸¹ Without discussion, the *Horowitz* Court found no evidence of arbitrariness or capriciousness by the medical school.¹⁸²

In the 1980's the Court heard claim by a dismissed student in *Regents of the University of*

¹⁷⁸*Id.* at 90 (emphasis added). Later, the Court noted that “Courts are particularly ill-equipped to evaluate academic performance.” *Id.* at 92.

¹⁷⁹*Id.* at 90.

¹⁸⁰*Id.* at 91 (citation omitted) (noting that “[b]y and large, public education in our Nation is committed to the control of state and local authorities”).

¹⁸¹*Id.* at 91-92.

¹⁸²*Id.* at 92 and nn.7-8 (adopting trial court’s finding on this issue, and noting that the medical school had followed its own procedures and handled the plaintiff’s case no differently than other such cases).

Michigan v. Ewing (“*Ewing*”)¹⁸³ who had failed the Boards Step 1 exam taken after the fourth year of his school’s special six year B.A.-M.D. program.¹⁸⁴ A nine-member committee voted unanimously to dismiss the student after “considering the record in some detail,” including the student’s report of circumstances which caused his failure: his mother’s heart attack a year and a half earlier, and the end of a romantic relationship six months earlier.¹⁸⁵ The student claimed that the school’s refusal to let him retake the Boards, when all other students who failed the exam were allowed to do so, and a school pamphlet stated that if a student failed the Boards, “an opportunity is provided to make up the failure in a second exam,” was arbitrary and capricious in violation of his substantive due process rights.¹⁸⁶

Reversing the appeals court,¹⁸⁷ the Court again reserved the question of whether academic judgments would be reviewed for arbitrariness and capriciousness, finding no arbitrariness or capriciousness in the university’s dismissal decision.¹⁸⁸ As in *Horowitz*, the *Ewing* Court found that the school used fair procedures and saw no evidence of bad faith in the

¹⁸³474 U.S. 214 (1985).

¹⁸⁴*Id.* at 216. The medical school refused to allow the student to retake the test. *Id.* at 215.

¹⁸⁵*Id.* at 216 and n.2. The trial court noted the student’s history of academic problems, including many “marginal” (C and C-) grades, incompletes, repeated courses, delayed examinations, makeup examinations, appealed grades, reduced course loads, and a leave of absence. *Id.* at 217 n.4.

¹⁸⁶*Id.* at 219. The student’s score of 235 was well below the required score of 380, and the national average of 500, and was the lowest score ever received by a student in the B.A.-M.D. program. *Id.* at 216.

¹⁸⁷*Id.* at 221.

¹⁸⁸*Id.* at 222-223.

decision.¹⁸⁹ As in *Horowitz*, the *Ewing* Court found that the “faculty’s decision was made conscientiously and with careful deliberation, based upon the entirety of Ewing’s academic career,”¹⁹⁰ and the committee that made the decision was “especially well situated to make the necessarily subjective judgment” since it was in a unique position to observe him.¹⁹¹ This careful, expert and holistic dismissal decision counseled judicial deference:

When 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. [footnote omitted] 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

The *Ewing* Court also reiterated the basis in federalism for judicial deference to (public school) academic judgments¹⁹³ and introduced the idea that academic freedom also indicated deference to academic judgments,¹⁹⁴ noting that

[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, . . . but also, and somewhat inconsistently, on autonomous decision making by the academy itself. . . . Discretion to determine, on

¹⁸⁹*Id.* at 225 (“It is important to remember that this is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing; the District Court found that the Regents acted in good faith.”).

¹⁹⁰*Id.* at 225.

¹⁹¹*Id.* at 228 (Powell, J., concurring).

¹⁹²*Id.* at 225 (citing *Horowitz*: “University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.”)

¹⁹³*Id.* at 229-230 (Powell, J., concurring).

¹⁹⁴*Id.* at 226. For an overview and history of the case law on academic freedom, see Cheryl Cameron, Laura Meyers, and Steven Olswang, *Academic Bills of Rights: Conflict in the Classroom*, 31 J. COLL. & UNIV. L. 243 (2005).

academic grounds, who may be admitted to study, has been described as one of the ‘four essential freedoms’ of a university.¹⁹⁵

A prior case identified these four “essential freedoms” of a university: “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, *and who may be admitted to study.*”¹⁹⁶

The deference paid to the school’s judgment by the *Ewing* Court may be even greater than that accorded in *Horowitz*. With the school’s pattern and practice of allowing students a second opportunity to pass the Boards, even some students with many incomplete or low grades, the *Ewing* Court found that while “it may well have been unwise to deny Ewing a second chance,”¹⁹⁷ dismissing him “was not beyond the pale of reasoned academic decision-making when viewed against the background of his entire career at [the University.]”¹⁹⁸ In a footnote the Court indicated that rejecting Ewing’s reported causes of his failure was not “irrational,”¹⁹⁹ as the school might have had interpreted these causes as “inability to handle stress, . . . lack of

¹⁹⁵*Id.* at 226 n.12.

¹⁹⁶*Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added). One commentator notes that the disability discrimination statutes seem to be drafted and interpreted to protect academic freedom; specifically, the limits on prohibited discrimination such as the otherwise qualified requirement and the idea that reasonable accommodations do not include those which alter a school’s academic standards. He suggests that without these limitations, or if disability-based affirmative action were required, academic freedom would be impaired. James Leonard, *Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEBR. L. REV. 27, 55-57 (1996).

¹⁹⁷*Id.* at 227 (noting that a second attempt at the Boards might have averted the litigation).

¹⁹⁸*Id.* at 227-228.

¹⁹⁹*Id.* at 227 n.13.

judgment and an inability to set priorities” which may have caused concerns about Ewing’s ability to succeed as a practicing doctor.²⁰⁰ The Court also found that the school’s pattern and practice of second chances to pass the Boards did not mean that the school “deviated from accepted academic norms” in refusing Ewing a second chance at the exam.²⁰¹ The Court noted Ewing’s overall record, and that the school “was uniquely positioned to observe Ewing’s judgment, self-discipline, and ability to handle stress, and was thus especially well-situated to make the necessarily subjective judgment of Ewing’s prospects for success in the medical profession.”²⁰²

Horowitz and *Ewing* did not involve discrimination claims, either statutory or constitutional. In between these decisions, however, the Court decided a discrimination case involving a student with a disability pursuing a career as a health care professional. In *Southeastern Community College v. Davis* (“*Davis*”),²⁰³ a student was denied admission to a nursing program squarely because of her disability: a severe²⁰⁴ hearing impairment. The school determined this impairment prevented her from successfully and safely participating in the clinical portion of her training, as well as being successful in nursing positions such as those in

²⁰⁰*Id.*

²⁰¹*Id.* at 228 n.14.

²⁰²*Id.* at 228 n.14 (also noting that the school had dismissed some other students before allowing them to take the Boards).

²⁰³442 U.S. 397 (1979).

²⁰⁴With a hearing aid, *Davis* could detect some sounds but could not understand spoken words without lipreading. *Id.* at 401.

the operating room or ICU where doctors and nurses are masked,²⁰⁵ and thus made her not “otherwise qualified” for admission despite her undisputed impairment. The student claimed disability discrimination in violation of Section 504 and the Constitution. In its first Section 504 case,²⁰⁶ the Court cited Section 504 regulations defining “qualified” for higher education students as meeting the school’s “academic and technical standards,”²⁰⁷ which the Court found included “necessary physical qualifications.”²⁰⁸ Rejecting the student’s arguments that with extra faculty supervision and waiver of some required courses she could succeed in certain office-based nursing positions, the Court instead appeared to defer to the school’s judgment. The court found that the special faculty supervision required for the student would amount to the “individualized,” “personal” aids and services which Section 504 regulations explicitly said were not required academic adjustments,²⁰⁹ and that waiver of the clinical coursework would be a “fundamental alteration in the nature of [the] program” which also went beyond statutory requirements.²¹⁰ Similar to but less explicitly than in *Horowitz* and *Ewing*, the *Davis* Court appeared to give some deference to the school’s decision that it could not offer the requested academic adjustments and admit the student, relying in part on the lack of evidence of any

²⁰⁵*Id.* at 401-402. This decision was reviewed and affirmed by the entire nursing school staff. *Id.*

²⁰⁶See *Id.* at 405.

²⁰⁷*Id.* at 406 (citing 45 C.F.R. § 84.3(k)(3), now codified as 34 C.F.R. § 104.3).

²⁰⁸*Id.* at 407.

²⁰⁹*Id.* at 409 (citing 45 C.F.R. §84.44(a), now codified at 34 C.F.R. §104.44).

²¹⁰*Id.* at 409-410.

“animus against handicapped individuals,”²¹¹ and the consistency of the school’s mission to train students for all nursing positions with that of other nursing schools,²¹² although doing so might have been inconsistent with some nursing licensing standards:

Southeastern’s program, structured to train persons who will be able to perform all normal roles of a registered nurse, represents a legitimate academic policy, and is accepted by the State. In effect, it seeks to ensure that no graduate will pose a danger to the public in any professional role in which he or she might be case. Even if . . .licensing requirements . . . are less demanding, nothing in the Act requires an educational institution to lower its standards.²¹³

The Court concluded that “[n]othing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program.”²¹⁴ The Court has taken a similar approach with regard to employment, suggesting that an accommodation for an employee with a disability is not reasonable if it conflicts with a major workplace rule which is disability-neutral, such as a seniority system, unless the employee shows waiver would be reasonable in her particular case.²¹⁵

Much more recently, the Court deferred to a law school’s academic judgment in the context of performing the demanding strict scrutiny analysis applied to claims of unconstitutional

²¹¹*Id.* at 413.

²¹²*Id.*

²¹³*Id.* at 413 n.12.

²¹⁴*Id.* at 414.

²¹⁵*U.S. Airways v. Barnett*, 535 U.S. 391, 405 (2002) (waiver of seniority system as accommodation is not a reasonable accommodation unless employee shows otherwise in her particular case).

race discrimination. In *Grutter v. Bollinger* (“*Grutter*”),²¹⁶ the University of Michigan Law School’s race conscious admissions program was challenged by rejected white students as race discrimination in violation of the Constitution and Title VI.²¹⁷ The law school’s detailed written admissions policy, written and unanimously approved by the law school faculty, required subjective and holistic review of applications by admissions officials, with consideration of many enumerated factors including race. The law school sought a diverse class with a “critical mass of minority students” both for academic reasons (to “promote ‘cross-racial understanding,’” to “break down racial stereotypes,” and to make possible the “livelier, more spirited, and simply more enlightening and interesting” discussion when a class consists of students with the “greatest possible variety of backgrounds,”)²¹⁸ and to prepare a group of future leaders who are well prepared to deal with a diverse society.²¹⁹

A majority of the Court found that these judgments were not only owed deference, citing *Horowitz* and *Ewing*, but amounted to a compelling interest sufficient for the first part of constitutional strict scrutiny analysis:

The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we will defer. . . . Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally proscribed limits. We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought

²¹⁶ 539 U.S. 306 (2003).

²¹⁷*Id.* at 317.

²¹⁸*Id.* at 330.

²¹⁹*Id.* at 331-332.

associated with the university environment, universities occupy a special niche in our constitutional tradition.²²⁰

In addition to reiterating the lack of expertise courts bring to review of academic decisions as noted immediately above, the *Grutter* Court also noted the academic freedom basis for its deference to the Michigan Law School faculty's academic judgment,²²¹ and concluded that "good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"²²²

In the undergraduate University of Michigan affirmative action case, *Gratz v. Bollinger* ("*Gratz*"),²²³ the Court reiterated its general holding in *Grutter* that diversity could be a compelling reason for higher education admissions.²²⁴ The Court did not specifically find, however, that the undergraduate policy, which was apparently promulgated by University admissions officers rather than academics,²²⁵ and did not rest on any specifically identified educational basis, was owed deference or rose to the level of a compelling state interest. Moreover, the point system used in the undergraduate admissions process, which assigned 20 points to racial diversity and various points to GPA, SAT, and other factors, and admitted

²²⁰*Id.* at 328-329 (citing *Ewing*, *Horowitz*, and Justice Powell's concurrence in *Bakke*). In *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), a groundbreaking earlier case involving affirmative action a majority of the Court did not discuss deference, but Justice Powell did in a concurring opinion. *Id.* at 312-313 (Powell, J., concurring).

²²¹*Id.* at 329 (noting in part that "[w]e have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.")

²²²*Id.* (citation omitted).

²²³539 U.S. 244 (2003).

²²⁴*Id.* at 268.

²²⁵*Id.* at 253 ("University's Office of Undergraduate Admissions . . . oversees the . . .

students whose point total was at least 100,²²⁶ was not described by the Court as an “educational judgment” as was the subjective, holistic whole file review performed by the Law School. The *Gratz* Court quoted Justice Powell’s concurrence in *Bakke* which “emphasized the importance of considering each particular applicant as an individual, assessing all the qualities that individual possesses, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education.”²²⁷ One commentator aptly sums up the *Gratz* majority opinion as holding that the “undergraduate college’s reliance on one single factor – race – was not the exercise of careful and deliberate educational judgment to which the judicial process might defer²²⁸ There will be judicial deference to careful and deliberate educationally informed decision-making on campus but not to decisions in which educational judgment is not used.”²²⁹ This commentator contrasts the Law School’s “multifaceted, individualized analysis of every candidate, in which the [Admissions] committee was allowed to rely on its years of experience to conduct a highly complex task” with the automatic point awards at the undergraduate level which “did not require application of any educational judgment.”²³⁰

These cases show a pattern of academic deference by the Court to higher education

admissions process using written guidelines for each academic year”).

²²⁶*Id.* at 255.

²²⁷*Id.* at 271 (citation omitted).

²²⁸Edward Stoner and Michael Showalter, *Judicial Deference to Educational Judgment: Justice O’Connor’s Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students In the Eighteen Months Before Grutter*, 30 J. COLL. & UNIV. L. 583, 614 (2004).

²²⁹*Id.* at 615.

²³⁰*Id.* at 615-616.

academic decisions which is consistent in its underlying basis: the complex and subjective nature of these decisions, protection of the student-teacher relationship, courts' lack of expertise, academic freedom, and federalism concerns. The Court has also consistently deferred to academic decisions across contexts, including both constitutional (*Horowitz, Ewing, and Grutter*) and discrimination (*Grutter* and *Davis*) claims, in decisions not to admit students (*Davis* and *Grutter*) and to dismiss them (*Horowitz* and *Ewing*), as well as what accommodations to make for a student with a disability(*Davis*), establishment of general academic standards (*Grutter*) and applying them to individual students (*Horowitz, Ewing, and Davis*).

In several cases (*Horowitz* and *Ewing*, as well as the faculty-established admissions standards in *Grutter*), the Court has noted the school's careful decision-making process, perhaps suggesting that such care might be a condition of judicial deference. In *Ewing*, the Court rejected the student's attempt to use pattern evidence, pointing to allegedly dissimilar treatment of other students, as a basis for not deferring to the school's judgment to dismiss him, but suggested in *Ewing* that evidence of improper process or bad faith would be different. In its most recent case, *Grutter*, the Court seemed to find it significant that the full faculty approved the admissions standards in question. In all of the cases the decisions were made by a faculty committee or by the full faculty, rather than administrators or other officials such as the admissions officials who established the point-based undergraduate admissions found by the *Gratz* court to amount to unconstitutional race discrimination.

The Court consistently noted with apparent approval the use of context and personal knowledge to make the decisions: the students' entire academic records in *Horowitz, Ewing, and Davis*, the school's experience educating the students in *Horowitz* and *Ewing*, and the needs of

the law school and society in *Grutter*. Finally, the Court appeared willing to characterize “academic” decisions and the considerations which underlie them and thus merit deference broadly: the attendance and hygiene concerns in *Horowitz*, determining that handling stress, judgment, self-discipline, and setting priorities were important qualifications for successful practice as a physician in *Ewing*, safety considerations in *Davis*, and preparing future leaders of society and breaking down racial stereotypes in *Grutter*.

Not surprisingly, lower courts have followed the Supreme Court’s lead and deferred in most cases to the academic decisions of higher education faculty. Commentators reviewing these decisions offer a variety of reasons for this deference, including academic freedom, courts’ lack of expertise in academic matters, the inherent subjectivity of such decisions, the special, nonadversarial relationship between university and student, and perhaps the idea that universities are a “separate realm” whose working is not well understood by courts.²³¹ Review of these lower court decisions also reveals patterns: courts hearing student challenges to school academic decisions tend to defer if 1) the school used and adhered to fair processes to make its decision, including some articulated basis for the decision, 2) there is a reasonable or rational basis for the decision, and 3) there is no evidence of bad faith by the school.²³²

²³¹James Leonard, *Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEBR. L. REV. 27, 57-60 (1996) (explaining basis of doctrine of academic abstention).

²³²See generally Steven Milam and Rebecca Marshall, *Impact of Regents of the University of Michigan v. Ewing on Academic Dismissals from Graduate and Professional Schools*, 13 J. COLL. & UNIV. L. 335 (1987); Fernand Dutille, *Disciplinary versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J. COLL. & UNIV. L. 619,643-648 (2003); Anne Dupre, *Disability, Deference and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393 (1998) (discussing deference specifically in the context of disability claims); James Leonard, *Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act*

V. ACADEMIC²³³ DISMISSAL READMISSIONS CASES AND OCR OPINION LETTERS

A. Law school readmissions process and standards

1. Academic dismissal criteria. Law schools are governed primarily by their faculty,²³⁴ which operate by majority vote. By vote of the faculty, law schools typically enact academic rules requiring students to maintain a minimum cumulative GPA. While the establishment of a minimum GPA is a discretionary decision, its application to specific students is objective and ministerial: students who do not achieve the minimum GPA are dismissed from the law school and are no longer enrolled students. Dismissals most often occur at the end of the first year of law school. Because the actual dismissal “decision” is normally a ministerial one based on a student’s failure to achieve a disability-neutral minimum GPA standard, there is

and Titles II and III of the Americans with Disabilities Act, 75 NEBR. L. REV. 27 (1996) (extended discussion of deference in the context of disability claims).

²³³This Article examines disability discrimination claims in the context of readmissions requests by students who have been dismissed for academic reasons (i.e. failure to maintain minimum required grades). Discussion of disability discrimination claims by students dismissed for nonacademic reasons (e.g. misconduct) is beyond the scope of this article. For examples of such nonacademic claims, however, see *Gonzaga University*, 27 Nat. Disability L. Rep. ¶ 286 (OCR 2003) (university did not engage in disability discrimination when it permanently suspended law student with history of mental illness for “continued threatening and harassing behavior,” including “harassing and threatening telephone calls to . . . faculty and other students,” “impersonation of another student” and “threats of bodily harm” which violated university conduct code); *University of Idaho*, 13 Nat. Disability L. Rep. ¶ 127 (OCR 1998) (finding no disability discrimination where student with emotional, cognitive and physical disabilities was suspended for one year for failing to disclose criminal history on his application, and penalty for nondisclosure was not inconsistent with discipline imposed on students without disabilities). These OCR opinions suggest that where the student is dismissed for violating some general conduct rule which is applied consistently to all students, with or without disabilities, and where the school considers disability information as appropriate in applying the rule (for example, in addressing relevant state of mind issues), it appears that nonacademic discipline does not violate disability discrimination laws.

²³⁴*See infra* notes 430-431 and accompanying text.

generally no plausible basis for a student with a disability to challenge her dismissal.²³⁵

2. Readmissions process and criteria. Many law schools offer academically dismissed students a chance to petition in writing to be readmitted to the law school, with supporting documentation of the student's choosing. Other law schools provide no opportunity to dismissed students to apply for readmission, at least if their GPA falls below a certain level. The process and standards for readmission are generally established in an academic rule enacted by vote of the law school's faculty. Usually, a faculty committee reviews readmissions applications and other relevant information such as the student's entering LSAT and GPA credentials, and seeks comments from the student's teachers. Generally there is not a formal hearing but the student has a chance to appear before the committee, in order to make a statement and/or to answer questions from committee members. The law school faculty may delegate the power to make readmissions decisions to this committee, or the committee may prepare a recommendation for full faculty vote.

Standards for readmission generally center around two issues: 1) whether the student's failure was for a good reason or "extraordinary circumstances," which will no longer be an obstacle to the student's success, and 2) whether the student will be successful if she is readmitted. The student typically has the burden of proving she meets the readmission standard. In contrast to the actual dismissal, application of these readmissions standards involves

²³⁵Of course, if a law school sometimes waived minimum GPA requirements and did not actually dismiss all students who did not earn the minimum required GPA, a student with a disability could claim discrimination if that same law school refused to waive the GPA requirement and dismissed her. *Cf.* Central Carolina Comm'y Coll., 31 Nat. Disability L. Rep. ¶ 78) (OCR 2005) (OCR investigation determines veterinary technician program followed its own policy of not permitting more than one readmission to any dismissed student; finds no

discretion. Consequently, students can and have claimed that their law school's readmissions standard has been applied to them in a discriminatory way.

B. Court cases addressing disability discrimination claims by academically dismissed law students.

Eight²³⁶ published opinions involve academically dismissed law students denied readmission claiming disability discrimination under federal statutes. Each of these eight cases reached identical procedural results: summary judgment for the school,²³⁷ affirmed by the First, Fifth, Seventh, and Ninth Circuits in each of the appealed cases.

The cases make it clear that a disability discrimination complaint does not provide an opportunity to review the merits of a law school's decision not to readmit a student who has been dismissed for academic failure. Anti-discrimination laws such as Section 504 do not guarantee correct decisions about persons with disabilities. What they do require is a decision which is not the result of illegal discrimination. This is especially true in the context of a school's academic judgments about a student, a context in which, in *Anderson v. University of Wisconsin*

discrimination against dismissed student with disability who was refused a second readmission).

²³⁶For another case brought by a law student with an alleged disability who had been dismissed twice, but was offered readmission, see *Colombini v. Members of the Board of Directors of the Empire College School of Law*, 2001 WL 1006785 (N.D. Cal. 2001) (granting summary judgment to the school). In this case, the school and the student disagreed over the precise accommodations the school would offer to the student, but the student did reenroll and eventually graduated. The court in this case found insufficient evidence that the student had a disability; he presented the school with letters from a psychiatrist referring to an unspecified disability, *id.* at *6 and refused to get a second opinion at the school's expense, *id.* at *1, nor offered any evidence of failure to provide reasonable accommodations or other discrimination, *id.* at *7.

²³⁷See also *Robinson v. Hamline University*, 1994 WL 175019 (Minn. App. 1994) (affirming summary judgment for law school in case brought by dismissed law student under state discrimination law modeled on Section 504).

(“*Anderson*,”) a federal appeals court notes, citing *Horowitz* and *Ewing*, that “[t]he Supreme Court has repeatedly admonished courts to respect the academic judgments of university faculties.”²³⁸

In *Anderson*, a law student who had been academically dismissed filed several claims including disability discrimination. The student was an alcoholic²³⁹ with a troubled academic history²⁴⁰ which included an incident in which he “harassed and threatened his legal writing partner” while drunk and earned a D in that course.²⁴¹ The student petitioned for readmission to a committee, claiming drinking had caused his academic failure and that he was now in recovery. The committee denied the petition, finding he still drank, was not prepared for the stress of law

²³⁸*Anderson v. University of Wisconsin*, 841 F.2d 737 (7th Cir. 1988) (citing *University of Michigan v. Ewing*, 474 U.S. 214 (1985) (rejecting claim by academically dismissed student), *University of Missouri v. Horowitz*, 435 U.S. 78 (1978) (rejecting claim by academically dismissed medical school student). For another case where a court announced a policy of deference to a law school’s readmission decision and affirmed a summary judgment for the school, see *Hash v. University of Kentucky*, 138 S.W.2d 123, 127, 128 (Ky. App. 2004) (citing *Anderson*, *Horowitz* and *Ewing*) (student with a disability who voluntarily withdrew from first semester of law school before taking exams because of depression and then was denied readmission in part because of references in his application materials to a mentally ill law student who went on a shooting spree); *id.* at 126 n.4 (noting that “a law school is entitled to consider a candidate’s psychological and emotional problems, as any mental impairment may be relevant to the . . . ability to cope with the stresses of law school, . . . to deal with constant pressures from other students and professors, and to withstand the demands associated with classroom attendance and participation”); *id.* at 129 n.11 (where student has not requested accommodations, failing to provide accommodations does not violate the law).

²³⁹The school did not contest the student’s assertion that he was a statutorily covered person with a disability by reason of his alcoholism, although no accommodations were requested. *Id.*

²⁴⁰His first semester grades were below the required average. *Id.* at 739. Moreover, he had not documented receipt of an undergraduate degree, and was not allowed to finish his first year. *Id.* He was allowed to return the next year, and then to withdraw. The next year he again reenrolled, earned grades below the required minimum, and was dismissed. *Id.*

school, and would not succeed if readmitted.²⁴²

Citing *Davis*, the Seventh Circuit found the student not otherwise qualified because his grades did not meet the school's required standards, although that failure may have been directly caused by the alcoholism disability.²⁴³ The court found no evidence of discrimination even though other students with somewhat lower grades had been readmitted and the student's grade were quite close to the required minimum,²⁴⁴ and in spite of an opinion offered by the student's counselor that the student could now handle law school.²⁴⁵

The court framed the issue before it:

[t]he question is not whether a court believes that [the student] could handle the work. It is whether the University discriminated against him because of his handicap – that is, excluded him even though it would have readmitted a student whose academic performance and prospects were as poor but whose difficulties did not stem from a “handicap.” . . . [T]he Rehabilitation Act requires only a stereotype-free assessment of the person's abilities and prospects rather than a correct decision.²⁴⁶

Applying this standard, and in spite of the counselor's opinion, the appeals court affirmed a summary judgment for the school. The court explained that

Nothing in the record suggests that the University's decision was based on stereotypes

²⁴¹*Id.* at 739.

²⁴²*Id.* The student grieved the denial to a different committee, which also declined to readmit him. *Id.*

²⁴³*Id.*

²⁴⁴*Id.* at 740.

²⁴⁵*Id.* at 741.

²⁴⁶*Id.* at 741 (footnote and citations omitted). The court noted the school had allowed the student to re-enroll several times and to take courses in its business school, as well as his drinking and subsequent misconduct toward a classmate, as evidence of a lack of hostility toward the student. *Id.*

about [the student's disability] as opposed to honest judgments about how [the student] had performed in fact and could be expected to perform.²⁴⁷

The court also noted that “[n]ot a shred of evidence in the record suggests that the University held a stereotypical view of [the student's disability]. The committees and the Vice Chancellor looked, hard, at what [the student] had done and could do.”²⁴⁸

The court specifically rejected the student's claim that a jury should hear the matter and hopefully agree with the student's counselor's assessment that the student could now be successful in law school:

The [Rehabilitation] Act does not designate a jury, rather than the faculty of the Law School, to decide whether a would-be student is up to snuff. The Law School may set standards for itself, and jurors unacquainted with the academic program of a law school could not make the readmissions decision more accurately than the faculty of the Law School; the process of litigation would change the substantive standard in addition to raising the costs of litigation.²⁴⁹

The court concluded that “[l]aw schools may consider academic prospects and sobriety when deciding whether an applicant is entitled to a scarce opportunity for an education. At all events, the University acted on the basis of Anderson's performance rather than his condition.”²⁵⁰

²⁴⁷*Id.*

²⁴⁸*Id.*

²⁴⁹*Id.*; see also *Scott v. Western State University College of Law*, 112 F.3d 517, 1997 WL 207599 (9th Cir. 1997) (table) (unpublished decision); *cert. denied*, 522 U.S. 1050 (1998) (affirming summary judgment for law school where dismissed student claimed disability discrimination; student who had been dismissed for academic failure was not otherwise qualified, and student did not even assert a disability in initial request for readmission).

²⁵⁰*Id.* at 742.

Allison v. Howard University (“*Allison*”)²⁵¹ involved the unfortunate situation of a law student dismissed at the end of his third year, presumably after investing much time and money in a legal career, after failing a 12-credit clinical course.²⁵² Various law school committees rejected an appeal of the clinic grade and five readmissions petitions.²⁵³ In his readmissions petitions, the student informed the law school for the first time that he had a disability, “temporary emotional distress” beginning in the fall of his third year.²⁵⁴ The court granted summary judgment to the school and other defendants on all claims.²⁵⁵ As to the Section 504 claim, the court found that the student “likely would have serious difficulty” proving both that he was a covered person with a disability, and that he was otherwise qualified for readmission.²⁵⁶ The court also found “not even a scintilla of evidence” that the student’s readmissions petitions were denied solely by reason of his alleged disability, finding instead, citing *Anderson*, that the student was denied readmission because of his academic performance.²⁵⁷ In granting summary judgment on the claim that failure to offer accommodations, and to change the clinic grade,

²⁵¹209 F. Supp.2d 55 (D.D.C. 2002).

²⁵²*Id.* at 58. The student had also done poorly in other courses. *See id.* (D’s in three courses in the first semester of law school); *id.* at 58 n.3 (failing grade in Legal Writing III).

²⁵³*Id.* at 58.

²⁵⁴*Id.* It is unclear whether the student provided documentation of his condition or merely asserted it.

²⁵⁵*Id.* at 63. The student sued the law school and the clinic professor who failed him, claiming a violation of Section 504 by not readmitting him and by not offering reasonable accommodations, as well as asserting constitutional and state law tort and contract claims. *Id.* at 56.

²⁵⁶*Id.*

amounted to breach of contract, the court cited *Horowitz* and *Anderson* and announced it would defer to the law school's judgments.²⁵⁸

In *Gill v. Franklin Pierce Law Center* ("*Gill*"),²⁵⁹ another third year law student was dismissed after receiving poor grades. The student petitioned for readmission to a faculty committee, which denied it, as did the full faculty on appeal, citing lack of ability to succeed and an inadequate plan²⁶⁰ to address the cause of the failure.²⁶¹ The student sued under Section 504, noting that on his application's personal statement he reported that he was an adult child of an alcoholic.²⁶² The court granted the school's motion for summary judgment.²⁶³ The court found no evidence that the student was otherwise qualified for readmission because he did not meet the ability to succeed readmission standard.²⁶⁴ Citing precedent cases involving dismissed medical

²⁵⁷*Id.*

²⁵⁸*Id.* at 61 (citations to *Horowitz* and *Anderson* omitted).

²⁵⁹899 F. Supp. 850 (D.N.H. 1995).

²⁶⁰The student's plan included quitting his part-time employment, a change in diet, a study schedule, and "medita[tion] to overcome my anger at whatever institutional deficiencies I see at [the law school]." *Id.* at 854-855.

²⁶¹*Id.* at 852. The Committee's denial also noted other problems, from failure to timely respond to the committee's questions to noncompliance with various law school rules.

²⁶²*Id.* at 851, 855. The student claimed he disclosed that he suffered from post traumatic stress syndrome on his statement, but the court's review of the statement indicated otherwise.

²⁶³*Id.* at 857. The student was proceeding pro se and did not file a response to the school's motion. The school did not dispute, for purposes of its motion, the first element of the prima facie case, that the student was a covered person with a disability. Under current law, the school would appear to have had a strong argument that the student did not have a statutory disability.

²⁶⁴*Id.* at 855.

students, the court also found that for students with disabilities, ability to succeed if readmitted should be predicted with the provision of reasonable accommodations, if “the student ever put . . . the school on notice of his handicap by making ‘a sufficiently and specific request for accommodations.’”²⁶⁵ The court found that the disclosure on the students’s application’s personal statement was insufficient to meet this standard.²⁶⁶ In another case involving the same law school, the First Circuit affirmed a summary judgment for the school in a case brought by a dismissed law student with diplopia, a vision impairment, finding no evidence that the decision to dismiss was based on disability discrimination rather than the stated reason that the student “lacked the analytic skills” necessary for law school success.²⁶⁷

In *Scott v. Western State University College of Law (“Scott”)*,²⁶⁸ the Ninth Circuit affirmed summary judgment for the law school on an academically dismissed first year law student’s Section 504 and ADA Title III claims.²⁶⁹ The student claimed a disability for the first time in his applications for readmission.²⁷⁰ The court found that the student’s academic

²⁶⁵*Id.* at 854 (citing *Wynne v. Tufts Medical School*, 932 F.2d 19, 24-25 (1st Cir. 1991), cert. denied, 507 U.S. 1030 (1993); *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1381 (3rd Cir. 1991)).

²⁶⁶*Id.*

²⁶⁷*Murphy v. Franklin Pierce Law Center*, 56 F.3d 59 (1st Cir. 1995).

²⁶⁸112 F.3d 517, 1997 WL 207599 (9th Cir. 1997) (table) (unpublished decision); cert. denied, 522 U.S. 1050 (1998).

²⁶⁹*Id.* at *2.

²⁷⁰*Id.* at *1.

dismissal rendered him not qualified.²⁷¹ Moreover, since the school had no knowledge of the alleged disability when it dismissed him, the court found that the dismissal could not have resulted from disability discrimination.²⁷² The student requested accommodations not specified in the opinion; the court found that accommodations would not be required since they would require the school to “lower or substantially modify [its] standards.”²⁷³

The most recent of this group of cases is *Marlon v. Western New England College* (“*Marlon*”).²⁷⁴ In *Marlon*, a dismissed student was granted readmission and accommodations consisting of a reduced course load, notetaking, taped classes, and extra time for and typing of exams for newly disclosed disabilities of carpal tunnel syndrome, anxiety, depression, and panic attacks.²⁷⁵ Despite the accommodations and taking classes for the second time, the student again failed to earn the required grades.²⁷⁶ She then obtained a diagnosis of a learning disability and requested additional accommodations, but this time was denied readmission, and sued.²⁷⁷ As

²⁷¹*Id.*

²⁷²*Id.* The court’s reasoning is unconvincing here; the claim centered on the denial of readmission rather than the ministerial “decision” to dismiss, and the school did have notice of the claimed disability when it denied readmission.

²⁷³*Id.*

²⁷⁴2003 WL 22914304 (D. Mass. 2003) (awarding summary judgment to the law school); *aff’d*, 29 Nat’l Disability L. Rep. ¶ 139 (1st Cir. 2005) (agreeing that the student did not have a statutory disability).

²⁷⁵*Id.* at *1-2.

²⁷⁶*Id.*

²⁷⁷*Id.* at *2-3. Claims were made under Section 504, the ADA, and state discrimination law, asserting in part that the school failed to effectively implement her accommodations. *Id.* at *5.

discussed earlier in this Article, the court found that the student was not a covered person with a disability under the federal statutes.²⁷⁸ The *Marlon* court also noted that the school was not on notice of the learning disability until after the student had been dismissed for the second time, and thus it could not be the basis for illegal discrimination.²⁷⁹ Finally, and as to the student's claim that the school regarded her as having a disability since it received a letter stating she had a disability and needed accommodations, the court found that "[t]he mere fact that an ADA defendant makes an accommodation is not evidence that it regarded the plaintiff as having a disability."²⁸⁰ The court also noted that the letter, from the school's disability services office, did not find nor make a determination that the student was a statutorily covered person with a disability.²⁸¹

Like *Anderson*, *McGregor v. Louisiana State University* ("*McGregor*")²⁸² is a case in which a federal appeals court, this time the Fifth Circuit, announced a policy of deference to a law school's readmission decision. In *McGregor*, a student with neurological and spine injuries causing fatigue and pain received some accommodations from the law school but was denied

²⁷⁸*Id.* See *supra* notes 72-77 and accompanying text. The court thus did not reach the issue of the implementation of the accommodations for the student.

²⁷⁹*Id.* at *8 & n.18. As in *Scott*, the court's reasoning is questionable here; the claim centered on the denial of readmission rather than the ministerial "decision" to dismiss, and the school did have notice of the claimed disability when it denied readmission.

²⁸⁰*Id.* at *9 (citing employment cases so holding).

²⁸¹*Id.*

²⁸²3 F.3d 850 (5th Cir. 1993), *cert. denied*, 510 U.S. 1132 (1994).

others, and had continuing academic difficulty in his first year.²⁸³ The next year, the student received additional accommodations as he was now wheelchair-bound, but in the spring was denied the accommodation of taking his exams at home, and again had academic difficulty.²⁸⁴ He was offered readmission again to retake his spring 1L classes, but requested advanced standing, a part-time schedule, and taking his exams at home as accommodations.²⁸⁵

The Fifth Circuit affirmed summary judgment on all claims for the school.²⁸⁶ The court found that the accommodations requested (as well as some of the accommodations the school agreed to provide) went beyond those which were legally required and would work to alter the school's standards, specifically including the school's academic decision to require full-time status.²⁸⁷ The court held that "absent evidence of discriminatory intent or disparate impact, we

²⁸³The school provided the student with a special parking permit and extra time on an exam, *id.* at 854-855, but denied the student part time status as an accommodation as the school had made an academic judgment that all first year students must be full-time. *Id.* at 855, 858. The student did not earn the required minimum grades in his first semester. *Id.* at 855. Nonetheless, the school allowed him to audit two classes in the spring and provided individual tutoring, and he earned passing grades. Despite the school's rule requiring dismissed students to wait a year, he was readmitted for the next fall as a full-time probationary first year student. *Id.* at 855-856. The school's admissions and academic policies at the time resulted in a high student attrition rate. *Id.* at 854 n.3.

²⁸⁴*Id.* at 856. His grades were passing in the fall but below passing in the spring. *Id.*

²⁸⁵*Id.* at 857. The student and school could not agree, and the student sued not only the school, but each of the faculty committee members, personally, asserting Section 504, ADA, constitutional and state law claims. *Id.* at 857, 862-867.

²⁸⁶*Id.* at 868.

²⁸⁷*Id.* at 859-860. The court noted that not requiring alteration of academic standards reflected Section 504's balancing of the school's right to set its own academic standards and the right of students with disabilities to be free from discrimination. *Id.* at 858 (citing *Alexander v. Choate*, 469 U.S. 287 (1985)).

must accord reasonable deference to the Law Center's academic decisions."²⁸⁸ Finding no evidence of discriminatory intent, the court deferred to the school's academic decisions to require full-time status and to require exams be taken in class, decisions which were based in part on maintaining equity among students.²⁸⁹ The student was thus found to be not otherwise qualified for retention because he could not meet the school's academic standards with reasonable accommodations.²⁹⁰

Finally, *Aloia v. New York Law School* ("Aloia")²⁹¹ involved a third year student dismissed for low grades whose petition for readmission and request for reconsideration were denied. The student then submitted a letter from his doctor indicating that he had central nervous system metabolic disorder. The school again reconsidered the case and offered to allow the student to reenroll at a later time, if he supplied medical documentation that the condition was sufficiently under control so as to allow him to resume his studies. The court initially granted a preliminary injunction allowing the student to reenroll and take exams immediately.²⁹² Ultimately, however, the court granted summary judgment for the school. The court held it would defer to the school's decision,²⁹³ and rejected the student's attempt to prove discrimination

²⁸⁸*Id.* at 859 (citations omitted). The court assigned to the student the burden of demonstrating that his requested accommodations were reasonable. *Id.* at 859 n.11.

²⁸⁹*Id.* at 859-860.

²⁹⁰*Id.* at 860.

²⁹¹1988 WL 80236 (S.D.N.Y. 1988).

²⁹²The court said this decision was based on the possibility of irreparable harm, rather than a showing of likely success on the merits. *Id.*

²⁹³*Id.* at n.4 ("Faculty academic evaluations of this nature are entitled to considerable

by comparing the treatment of his petition with those of other dismissed students.²⁹⁴ The court also found that the school was entitled to find the student's medical documentation insufficient and require a medical statement that his condition was sufficiently under control so that he could resume his studies.²⁹⁵

* * * * *

These cases' uniform ultimate result – summary judgment for the school – did not vary although the nature of the claimed disability in these cases varied greatly from physical to emotional to mental, and some dismissals occurred at the end of the first year and others in the third year (*Allison, Gill and Aloia*) when the students presumably had made major investments, financial and otherwise, in preparing for a career as an attorney.

Several patterns and areas of guidance for law schools are apparent from this group of cases. First, in a number of the cases (*Anderson, Allison, Marlon and McGregor*) the students had a long record of academic struggles in law school, and several students (*Anderson, Marlon and McGregor*) had been given prior second chances to succeed before the dismissal. The long term academic struggles and prior second chances in these cases may have been taken by the

deference from the courts.”).

²⁹⁴*Id.* at n.4. The court distinguished one other dismissed student's situation, and as to two other more similar cases in which the students were readmitted noted that “the Law School's policies reserve to the Academic Status Committee the right to consider each student on an individual basis. In the case of the two students in question, they had demonstrated higher levels of academic performance than had Aloia. The Law School says, in substance, that those performances furnished sufficient evidence of potential to retain the students in question.”

²⁹⁵Physician statements supplied to the school indicated "this condition is treatable and has an excellent prognosis for full functioning," and it is “imperative that Richard remain in Law School so as to facilitate" his treatment by medication, were found by the court to “stop well short of expressing an opinion that treatment has succeeded to the point where the individual is able to "meet all of a program's requirements in spite of his handicap.” *Id.* at n.5.

courts deciding them as evidence of the absence of any hostility toward students with disabilities on the one hand, as the *Anderson* court appeared to do. On the other hand, the *McGregor* opinion hints that perhaps the law school had done the student a disservice by waiving so many standards and rules.

Second, in two cases, *Anderson* and *Aloia*, the students attempted to create an inference of discrimination from pattern evidence. In both of these cases, the courts rejected an inference of bad faith from the student's proffered evidence that other dismissed students had been treated differently. Third, in *Marlon*, the only one of the group decided after *Toyota*, the school was successful in convincing the court that the student's impairments did not amount to a statutory disability, despite the opinion of the student's evaluator; in another, *Allison*, the court questioned the student's status as a person with a disability. Fourth, in several cases, for example *Anderson* and *Allison*, the court announced it owed deference to the school's decision not to readmit; in *MacGregor* this deference was extended to the school's decision as to whether providing requested accommodations would alter the school's academic standards. Fifth, in several cases (*Anderson*, *Gill*, *Scott*, *Marlon* and *Aloia*) the disability was claimed for the first time after the dismissal. *Aloia* suggests that in this event the school can request documentation beyond that supplied by the student and can condition readmission upon additional information. Finally, *Gill* indicates that the school should attempt to predict the student's ability to succeed with reasonable accommodations.

C. Court cases addressing disability discrimination claims by other academically dismissed higher education students

Disability discrimination cases brought by academically dismissed students against non-

law school higher education programs²⁹⁶ show a similar pattern to those brought against law schools. In most such non-law school cases, summary judgment or dismissal was granted to the school.²⁹⁷ Frequently, the courts in these cases deferred to the school's academic judgments

²⁹⁶In a very early Section 504 case in which the court engaged in extensive analysis to determine such now obvious issues as whether there is a private right of action and whether administrative exhaustion is required prior to filing suit, a court addressed a disability discrimination claim by a doctor with multiple sclerosis who was rejected by a psychiatric residency program at a teaching hospital. *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372, 1377-82 (10th Cir. 1981). While the case involves admission to a residency program rather than academic dismissal, *Pushkin* is worth noting, as the court in that case determined that the doctor was rejected on the basis of stereotyped information about his disability, and in spite of a letter from the doctor's supervisor in his prior residency that the doctor performed well and his condition did not impair his performance. *Id.* at 1387-88 (also noting interview ratings by a four person committee were the articulated basis for the denial, for this applicant only, and describing stereotyped comments by committee members and assumptions by them about the effects of the doctor's condition). One commentator suggests the court in this case performed an analysis like that of intermediate scrutiny under the Equal Protection clause. Anne Dupre, *Disability, Deference and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393, 412 (1998).

²⁹⁷*Wong v. Regents of University of California*, 410 F.3d 1052 (9th Cir.2005) (dismissed medical student with learning disability who performed well academically throughout college and two years of medical school does not have a "substantially limiting" statutory disability); *Zukle v. Regents of University of California*, 166 F.3d 1041 (9th Cir. 1999) (dismissed medical student); *Kaltenberger v. Ohio College of Podiatric Medicine*, 162 F.3d 432 (6th Cir. 1998) (student with ADD who failed out even after being readmitted and receiving accommodations); *Wolsky v. Medical College of Hampton Roads*, 4 Nat. Disability L. Rep. ¶ 91 (4th Cir. 1993) (medical student with panic disorder; disability claims are time-barred); *Pacella v. Tufts University School of Dental Medicine*, 66 F. Supp.2d 234 (D.Mass. 1999) (dismissed dental student with vision problem did not have a statutorily protected disability where the impairment was largely mitigated with corrective lenses; no discrimination involved in his dismissal); *Ferrell v. Howard University*, 17 Nat. Disability L. Rep. ¶ 194 (D.D.C. 1999) (medical student with ADD who failed Boards Step 1 three times; no discrimination where school was unaware of the disability which was not yet diagnosed at the time readmission was refused; also noting split of authority on whether ADD was an ADA disability); *Leacock v. Temple University School of Medicine*, 14 Nat. Disability L. Rep. ¶ 30 (E.D. Pa. 1998) (medical student with learning disability; no discrimination where student merely mentioned to school after she was dismissed that she might have a learning disability and school was unaware of a diagnosed disability at the time readmission was refused and school employed fair procedures to allow dismissed students to appeal their dismissal; school not required to reconsider decision after disability is documented; claims also time-barred); *Betts v. Rector and Visitors of University of Virginia*, 30

surrounding the readmission.²⁹⁸

Nat. Disability L. Rep. ¶ 241 (4th Cir. 2005) (premedical student with learning disability found in earlier decision not to amount to a statutory disability whose grades improved after accommodations but did not achieve required cumulative GPA in special program for guaranteed entry into medical school whose acceptance was rescinded because of grades); *Lewin v. Medical College of Hampton Roads*, 910 F. Supp. 1161 (E.D. Va. 1996) (dismissed medical student); *Ellis v. Morehouse School of Medicine*, 925 F.Supp. 1529, 1539, 1541-1542 (N.D. Ga. 1996) (fourth year medical student with dyslexia); *Goodwin v. Keuka College*, 929 F. Supp. 90, 94 (W.D.N.Y. 1995) (occupational therapy student who was dismissed under rule requiring automatic dismissal upon failing two field placements later diagnosed with mental illness; a “student may not challenge a particular grade or other academic matter absent demonstrated bad faith, arbitrariness, capriciousness, irrationality, or a constitutional or statutory violation”); *Id.* at 95, (nor is “a student who is automatically terminated from a program who brings subsequent evidence of an alleged learning disability [] entitled under federal law to reconsideration of that decision based on new evidence”); *Riedel v. Board of Regents of State of Kansas*, 4 Nat. Disability L. Rep. ¶ 276 (D.Kans. 1993) (medical student alleging learning disability diagnosed two years after dismissal for failing Boards Step 1 four times; student lacked standing since he was neither enrolled nor an applicant); *Hanlon v. Board of Regents of the University of Wisconsin System*, 27 Nat. Disability L. Rep. ¶ 274 (Wisc. App. 2004) (asthmatic student dismissed from physician assistant training program; no discrimination where school was unaware of the disability at the time of dismissal; no discrimination where student merely mentioned to school after she was dismissed that she had asthma and school was unaware of a diagnosed disability at the time readmission was refused); *cf. Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 22 Nat. Disability L. Rep. ¶ 30 (2nd Cir. 2001) (dismissed medical student who did not earn required grades even after retaking the first year subsequently diagnosed with attention deficit disorder and learning disability; summary judgment granted on claim seeking only damages and not injunctive relief because of limitations on the circumstances under which damages are available under Title II of the ADA and Section 504); *Amir v. St. Louis University*, 16 Nat. Disability L. Rep. ¶ 29 (8th Cir. 1999) (medical student with obsessive compulsive disorder who failed his clinical work; affirming summary judgment for school where no evidence indicated dismissal was based on discrimination rather than failing grades, but reversing summary judgment for school on retaliation claim where dismissal and other adverse actions followed student’s filing of grievance); *McGuinness v. University of New Mexico School of Medicine*, 170 F.3d 974 (10th Cir. 1998) (medical student with test anxiety and unsatisfactory grades who refused opportunity to repeat coursework). *Tips v. Regents of Texas Tech University*, 921 F. Supp. 1515 (N.D. Tex. 1996) (entering judgment apparently after bench trial for school on disability claim by dismissed student in graduate psychology program who failed her written qualifying exams).

²⁹⁸*See, e.g., McGuinness*, 170 F.3d at 979 (10th Circuit); *Zukle*, 166 F.3d at 1047-48 (9th Circuit) (and noting “we must be careful not to allow academic decisions to disguise truly discriminatory requirements. The educational institution has a ‘real obligation ... to seek

Only one non-law school case resulted in a judgment for the student. The few non-law school cases in which the dismissed student's claim survived summary judgment offer guidance with regard to what will cause a court not to defer to a school's educational judgment not to readmit a dismissed student: primarily, affirmative evidence of discriminatory intent or bad faith.

1. Evidence of discriminatory (bad faith, stereotypical and/or retaliatory)

thinking. The court in *Carlin v. Trustees of Boston University* ("*Carlin*")²⁹⁹ announced it would

suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation.' [citation omitted] Once the educational institution has fulfilled this obligation, however, we will defer to its academic decisions"); *Kaltenberger*, 162 F.3d 432, 436-37 (6th Circuit) (citing *Horowitz* and *Ewing*, also holding that school's academic decisions concerning which accommodations are and are not reasonable are entitled to deference, noting "[w]e should only reluctantly intervene in academic decisions 'especially regarding degree requirements in the health care field where the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession'"); *Ellis*, 925 F.Supp. at 1539, 1541-42 (N.D. Ga.) (deferring even though dismissed fourth year medical student enrolled in another medical school and was apparently successful there); *Ferrell*, 17 Nat. Disability L. Rep. ¶ 194 (D.D.C.) (citation omitted) (a judgment by a school official that a student has not performed adequately to meet the school's academic standards is a determination that usually calls for judicial deference"); *Leacock*, 14 Nat. Disability L. Rep. ¶ 30 (E.D. Pa.) (citation omitted) ("[w]here there is an academic dismissal, . . . 'courts are ill-equipped to review the largely subjective academic appraisals of the faculty'") (also citing *Horowitz* and *Ewing* as mandating deference); *Betts*, 30 Nat. Disability L. Rep. ¶ 241 (4th Cir.) (citation omitted) (noting school's "two choices: ignore years of objective evidence, . . . and allow *Betts* to matriculate based solely on good grades on five tests taken (with double time) over 18 days; or rely on *Betts*' entire academic record . . . and render its judgement. . . . We decline to limit the faculty's academic judgment in this fashion. 'Courts must also give deference to professional academic judgments when evaluating the reasonable accommodation requirement.');" *cf.* *Diaz v. Lehman College, City University of New York*, 11 Nat. Disability L. Rep. ¶ 321 (S.D.N.Y. 1998) (college student with depression who ceased attending class and left the college with a 1.108 GPA; college's minimum 2.0 GPA requirement is a reasonable decision entitled to deference); *White v. University of South Carolina-Columbia*, 1996 WL 276540, *3 (N.D. Cal. 1996) (nursing student with learning disability provided with some accommodations who was not earning required grades and withdrew; absent evidence of discrimination, deference is owed to school's determination regarding which accommodations of those recommended by evaluator are reasonable ones).

²⁹⁹907 F. Supp. 509 (D. Mass.1995).

normally defer to a school's judgment but found sufficient evidence of pretext to deny the school's motion for summary judgment. The case involved a student with depression in a doctoral pastoral psychology program who successfully completed three years of classroom instruction and clinical training. She then sought a leave of absence as her depression worsened and she was ultimately hospitalized, then denied readmission to the program.

As to deference, the court held that it would “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.”³⁰⁰ In this event, the court noted that the burden would shift to the plaintiff to show “that facts were genuinely disputed or [that] there [is] significantly probative evidence of bad faith or pretext.”³⁰¹ Applying this standard, the court found that the school had offered evidence that it had terminated the student because, based on feedback from several faculty and supervisors, she “lacked the capacity” for “psychodynamically oriented pastoral psychology,”³⁰² and had offered to allow her to transfer to a different program. The court also found that the student had offered evidence of pretext, including that no ‘lack of capacity’ was mentioned until her leave of absence and hospitalization, that her third year clinical experience was successful according to her supervisor, and perhaps most notably, a statement by her advisor that the student was dismissed because “her history of ‘serious mental

³⁰⁰*Id.* at 510 (citing *Wynne v. Tufts University School of Medicine*, 932 F.2d 19, 27-28 (1st Cir. 1991)).

³⁰¹*Id.* (citing *Wynne*, 932 F.2d at 26).

³⁰²*Id.* at 511.

health problems’ . . . did not provide ‘the kind of environment that is conducive to a return.’”³⁰³

The court concluded that the school “has absolute authority to render an academic judgment, but that decision must be a genuine one.”³⁰⁴

Similarly, in *Amir v. St. Louis University* (“*Amir*”),³⁰⁵ the Eighth Circuit’s announced deference resulted in summary judgment for the school on a student’s discrimination claim. However, the court found sufficient evidence of retaliation for that claim to survive summary judgment. *Amir* involved a medical student who had some difficulty, both academic and behavioral, in his first two years of classroom-based instruction, but was not at risk of dismissal.³⁰⁶ After the student entered his third year, which involved clinical rotations, his mental health difficulties escalated to the point where he was hospitalized.³⁰⁷ He was then denied readmission to the rotation and filed a grievance.³⁰⁸ He was eventually permitted to complete the rotation with the same supervisor, but in the interim the psychiatry department had passed a new grading policy which gave the supervisor more discretion.³⁰⁹ The student would

³⁰³*Id.*

³⁰⁴*Id.*

³⁰⁵184 F.3d 1017 (8th Cir. 1999).

³⁰⁶*Id.* at 1022.

³⁰⁷*Id.* at 1023 (the student believed he was being poisoned by his food, drink and medicine, and tried to purge the “poison” with forced vomiting and laxatives). During his psychiatry rotation, the student was diagnosed with obsessive-compulsive disorder and his supervisor, the chairperson of the school’s Psychiatry department, convinced him to hospitalize himself. *Id.*

³⁰⁸*Id.*

³⁰⁹*Id.* at 1023-1024.

have passed the rotation under the old grading policy but failed it under the new policy, the only student to do so.³¹⁰ Several months later, the school dismissed the student “based on a history of poor academic performance and a long-standing history of inappropriate behavior, misrepresentations, and difficulties dealing with staff and faculty” and “failing grades in [two clinical rotations] and [being] ranked near the bottom of his class in overall performance in [another rotation].”³¹¹ The student enrolled in and completed medical school in the Philippines.³¹²

The trial court had granted summary judgment to the school on both claims,³¹³ but the Eighth Circuit saw the retaliation and the discrimination claims quite differently. The appeals court found enough evidence of possible retaliation against the student for filing the grievance and the lawsuit to reverse summary judgment on the retaliation claim for the school.³¹⁴ Specifically, the student’s grievance had made the supervisor admittedly angry, and soon thereafter the department which she chaired changed a grading policy which expanded discretion, and which she used to fail the plaintiff student and no one else.³¹⁵ After the initial

³¹⁰*Id.* at 1023. He was denied the opportunity to redo the rotation or to do it at another location or with another supervisor and was placed on leave while his possible dismissal was investigated, *id.* at 1024, at which point he filed a lawsuit.

³¹¹*Id.*

³¹²*Id.* He amended his lawsuit to claim that his dismissal and refusal to implement his requests as reasonable accommodations amounted to illegal disability discrimination in violation of Title III of the ADA. *Id.*

³¹³*Id.*

³¹⁴*Id.* at 1026-1027.

³¹⁵*Id.* at 1026 & n.3.

lawsuit was filed, the medical school then dismissed the student without a chance to redo the rotation, as it had allowed him and other students to do in the past.³¹⁶

On the other hand, the court saw insufficient evidence, either as to the refusal to provide the requested accommodation or as to the dismissal, for the discrimination claim to survive summary judgment. The court found no evidence that the student's disability motivated his dismissal; it found that either his academic performance or retaliation against him for his grievance and lawsuit were the motives supported by some evidence.³¹⁷ As to the refusal to grant the requested accommodations, the court cited *Ewing* and announced a policy of deferring to reasonable academic judgments: "We will not invade a university's province concerning academic matters in the absence of compelling evidence that the policy is a pretext for discrimination. . . . No such inference can be drawn in the present case."³¹⁸

2. Refusal to consider disability information. Two medical students' claims survived summary judgment when the school refused to consider their disability information, another form of discrimination. In *Steere v. George Washington University* ("*Steere*"),³¹⁹ a medical school committee recommended to the dean that a student with poor grades be

³¹⁶*Id.* at 1027. For a case granting summary judgment on a dismissed student's first amendment retaliation claim, see *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 22 Nat. Disability L. Rep. ¶ 30 (2nd Cir. 2001).

³¹⁷*Id.* at 1028.

³¹⁸*Id.* at 1029 (citations omitted) (also noting that school policy precluded students with academic difficulty from doing coursework elsewhere, and request for a different supervisor was not disability-related).

³¹⁹368 F.Supp. 2d 52 (D.D.C. 2005).

dismissed.³²⁰ The student had not identified himself as having a disability either while enrolled or to the committee, but submitted documentation of attention deficit disorder and a learning disability to the dean and requested accommodations.³²¹ The dean “gave no weight to plaintiff’s disability report, stating that his decision was based on plaintiff’s poor academic performance and that he was adopting the [committee] recommendation.”³²² The student enrolled in a medical school in the Caribbean, where he received accommodations (extended time on exams) and earned passing grades,³²³ and sued his former school under Title III of the ADA. The court found that the student may have been entitled to a “second chance,” not of readmission itself but of reconsidering his request for readmission in light of the new impairment information, since the student was not at fault in not identifying himself as having a disability earlier, and denied the school’s motion for summary judgment.³²⁴ More recently, and on essentially a rerun of *Steere* (a dismissed student at the same medical school submitted documentation of a learning disability to the dean after the committee recommended dismissal, and the dean refused to consider the new disability information), the same court again denied summary judgment to the

³²⁰*Id.* at 54.

³²¹*Id.* at 54-55.

³²²*Id.* at 55.

³²³*Id.*

³²⁴*Id.* at 57-58. The court contrasted this case, where the student provided documentation of an impairment before the decision to dismiss, to others where the student either did not mention a disability or only self-reported as possibly having a disability without submitting an actual diagnosis. *Id.* at 56 (citations omitted).

school in *Singh v. George Washington University* (“*Singh*”).³²⁵

3. Limited deference in the First and Ninth Circuits. Two federal appeals courts require schools to create a factual record of their deliberations when considering readmission of a student with a disability as a condition of deference to the readmission decision. These courts reason that this condition affords both deference to the school’s academic judgment and meaningful protection of the student’s rights under disability discrimination laws.

In *Wynne v. Tufts University School of Medicine* (“*Wynne*”),³²⁶ an academically dismissed student diagnosed with dyslexia requested an alternative format to multiple choice tests as an accommodation for his disability. While ultimately granting summary judgment to the school,³²⁷ the First Circuit, citing *Ewing*, announced a policy of deference to the school’s academic judgment in the context of statutory discrimination claims, with limits.³²⁸ Specifically, the court required a “factual record” from the school demonstrating that the school had considered alternative ways for the student to meet its academic standards with reasonable

³²⁵*Singh v. George Washington University*, 368 F. upp.2d 58 (D.D.C. 2005) (deference is not appropriate where the disability information has not been considered) (also finding an issue of fact as to whether the dismissed medical student was a person with a disability under federal statute), *reconsideration denied*, 2005 WL 2009875 (D.D.C. 2005).

³²⁶932 F.2d 19 (1st Cir. 1991), on appeal from remand, 976 F.2d 791 (1st Cir. 1992), cert. denied, 507 U.S. 1030 (1993).

³²⁷976 F.2d at 796.

³²⁸The court contrasted *Ewing*, in which there was no statute which limited the school’s freedom to use its academic judgment. 932 F.2d at 25. The *Wynne* deference standard has been criticized as too limited. Claire McCusker, *The Americans with Disabilities Act: Its Potential for Expanding the Scope of Reasonable Accommodations*, 21 J. COLL. & UNIV. L. 619, 634 (1995) (calling *Wynne* “an inroads into the halls of academe by calling upon professional educators to present evidence regarding the steps they have taken to verify the reasonableness of their determination”).

accommodations:

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.³²⁹

The court found a “conclusory affidavit” from the medical school’s dean insufficient as it did not consider alternatives and it was not specifically clear that this was the medical school’s faculty’s judgment,³³⁰ and remanded the case.³³¹ On remand, the court found the factual record submitted by the school, which detailed the faculty’s thought process as to why a different testing format would alter its academic standards, to be sufficient as a matter of law, even as against the student’s affidavits indicating that one other medical school and a national testing service offered oral versions of multiple-choice tests, and affirmed a summary judgment for the school.³³² The court noted:

[T]he point is not whether a medical school is ‘right’ or ‘wrong’ in making program-related decisions. Such absolutes rarely apply in the context of subjective decisionmaking, particularly in a scholastic setting. The point is that Tufts, after undertaking a diligent assessment of the available options, felt itself obliged to make ‘a professional, academic judgment that [a] reasonable accommodation [was] simply not available.’³³³

³²⁹*Id.* at 26. The court indicated that the sufficiency of this factual record would normally be a legal question, *id.*, and thus presumably resolvable by summary judgment. *Id.*

³³⁰*Id.* at 27. In a dissent authored by then-Judge Breyer, three judges agreed with the limited deference standard announced by the majority, but found that the dean’s affidavit met this standard. *Id.* at 29-31 (Breyer, J., dissenting).

³³¹*Id.* at 29.

³³²*Id.* at 794-95.

³³³*Id.* at 795.

This limited deference approach to issues both of whether requested accommodations are reasonable and whether, with accommodation, dismissed students are "qualified" to continue their studies was adopted by the Ninth Circuit in *Wong v. Regents of University of California* ("Wong I"):³³⁴

[D]eference is not absolute . . . courts still hold the final responsibility for enforcing the Acts, including determining whether an individual is qualified, with or without accommodation, for the program in question. We must ensure that educational institutions are not "disguis[ing] truly discriminatory requirements" as academic decisions; to this end, "[t]he educational institution has a 'real obligation ... to seek suitable means of reasonably accommodating a handicapped person *and to submit a factual record indicating that it conscientiously carried out this statutory obligation*'. . . . 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. See Wynne I, 932 F.2d at 26 (explaining that institution needs to submit "*undisputed facts*" showing that "relevant officials" "considered alternative means, their feasibility, [and] cost and effect on the academic program") (emphasis added); *id.* at 28 (refusing to defer when institution presented no evidence regarding "who took part in the decision" and finding "simple conclusory averment" of head of institution insufficient to support deferential standard of review). We defer to the institution's academic decisions only after we determine that the school has fulfilled this obligation.³³⁵

Applying this standard, the Ninth Circuit reversed the summary judgment granted to the school on the reasonableness of the requested accommodation of an eight week reading period prior to each clinical rotation. The appeals court found an issue of fact as to whether this was a reasonable accommodation for several reasons: the Section 504 regulations specifically include

³³⁴192 F.3d 807 (9th Cir. 1999). As discussed earlier, see *supra* notes 60-71 and accompanying text, the court later granted the school's motion for summary judgment on a different basis; namely, that the student did not have a statutorily protected disability, as his impairment was not substantially limiting in light of his history of academic success, without accommodations.

extending the time to complete degree requirements as an example of a reasonable accommodation, the school had provided pre-clinical rotation reading periods in the past for Wong and other students, and Wong had been successful with a reading period, the reading period was being recommended by a member of the medical school faculty who was the school's Coordinator of Student Learning Disability Resource Teams,³³⁶ the decision not to offer the accommodation was made by the school's dean without consideration of disability information or consultation with the student, the initially articulated basis for refusing the reading period was not academic, but rather the student's reported desire to graduate in the normal time and the dean's belief that the student did not need to reading period, and finally the dean told the student not to mention the requested accommodation to the school's readmission committee.³³⁷

The court concluded:

The deference to which academic institutions are entitled when it comes to the ADA is a double-edged sword. It allows them a significant amount of leeway in making decisions about their curricular requirements and their ability to structure their programs to accommodate disabled students. On the other hand, it places on an institution the weighty responsibility of carefully considering each student's particular limitations and analyzing whether and how it might accommodate that student in a way that would allow the student to complete the school's program without lowering academic standards or otherwise unduly burdening the institution. . . . We will not sanction an academic institution's refusal to accommodate a disabled student and subsequent dismissal of that student when the record contains facts from which a reasonable jury could conclude that the school made those decisions for arbitrary reasons unrelated to its academic standards.³³⁸

³³⁵*Id.* at 817-18 (citations omitted).

³³⁶On these facts the court found that a jury could find this faculty member to be an expert on whether the reading periods would be a reasonable accommodation. *Id.* at 820.

³³⁷*Id.* at 819- 20.

³³⁸*Id.* at 826.

4. Judgment on the merits for a student. A final case, *Dearmont v. Texas A & M University* (“*Dearmont*”),³³⁹ actually resulted in a judgment for a dismissed student which included reinstatement, money damages, and attorney’s fees. A student in a small agricultural economics doctoral program twice failed his qualifying exams. He was then tested and found to have a learning disability involving the processing of symbols. With the accommodation of double time, the student then took the qualifying exams, which very recently had been modified in content, format and grading, for a third time, earning a lower score than he had previously. The student then had a “surprise oral exam” from departmental faculty and was dismissed, but offered the opportunity to continue as a research assistant. The student appealed, and the decision was affirmed by committee without allowing the student to appear in person. The student then appealed to the school’s graduate council, which ordered reexamination under the original content, format and grading procedures. The department then changed the GPA requirements for serving as a research assistant; the student did not meet the new requirement and was replaced. Without the income for this position the student apparently was not financially able to continue his studies.

The court found as follows, in language that offers helpful guidance for schools on what not to do when dealing with an academically dismissed student with a disability:

[b]y the time Dearmont [was diagnosed] . . . , the faculty had formed an opinion from the effects of his disability that Dearmont was a marginal student at best, and they refused to make a reasonable accommodation to his handicap. When required by outside pressure, they went through the motions of accommodation, while stepping up the pressure directly and indirectly. The actual accommodations were more than offset by the concomitant harassment. . . .

³³⁹2 Nat. Disability L. Rep. ¶ 10 (S.D. Tex. 1991).

[Section 504] does not require institutions to engage in the expensive, empty gesture of educating people who cannot function productively in the community. It does, however, prevent this kind of casual rejection of someone who is capable and qualified because of ungenerous perceptions of the effects of a non-disabling handicap.

A vast amount of the process of higher education must be subjective. The necessity of subjectiveness does not require society to abandon the students to the mere will of the professors, the experts. If any governmental program [ought] to be able to articulate the reason of its procedures, graduate education should. Governmental professors, with their own careers, policies, and favorites, are no less prone to abuse of the authority the community has conferred on them than the officer on the beat.

Despite making exceptions for other students who had a problem passing the qualifying examination, the faculty decided that Dearmont's performance made him unqualified. To support their decision to replace Dearmont with a more promising candidate, Dearmont's faculty advisors threw him a surprise defense of his research plan. Assuming his performance at the inquisition was deficient, it was a wholly contrived requirement. The development of Dearmont's research had never been discussed with him in any deliberate session with any of the faculty advisors before the bushwhacking.

The actions of the defendants show a rejection of Dearmont based on his handicap, followed by a series of transparent gimmicks to cloak the decision with additional evidence.³⁴⁰

* * * * *

The non-law school cases, most of which involve medical school or other health care professional training programs, also show a pronounced pattern of success for the school, and perhaps even more consistently announced deference to the school's decision than do the law school cases. The seven cases in which the school did not completely prevail (*Carlin*, *Steere*, *Singh*, and *Amir*, in which the school was denied summary judgment, *Wong* and *Wynne*, in which the school lost its initial motion for summary judgment but then prevailed on a subsequent summary judgment motion, and *Dearmont*, in which a judgment was actually ordered in favor of a dismissed student against a school) show clear patterns which provide helpful guidance for

schools. First, in a number of the cases the dismissal/readmission decision was made by a single person (a dean in *Singh*, *Steere*, *Wong*) or a small and presumably close department (*Carlin*, with apparent significant influence on the decision by a single faculty member who was the student's adviser, and *Dearmont*). In such cases, the danger of a decision tainted by discriminatory intent, or at least a disputed issue of fact on intent, is likely heightened. Second, in several cases (*Singh*, *Steere*, and *Wong I*), the decision-making dean refused to consider the student's disability information. In these two cases, there was a committee that made a recommendation to the dean but apparently without any preannounced standards to apply to make that recommendation.

Third, in several cases, there was evidence that the decisionmaker(s) engaged in discriminatory (bad faith, stereotypical and/or retaliatory) thinking. In *Carlin*, a previously successful student was found to have a "lack of capacity" and terminated after she was hospitalized for depression. In *Amir*, grading and other policies and practice were changed and applied to the student's detriment by a small department chaired by a person who was admittedly angry that the student had filed a disability discrimination complaint. In *Wong*, the dean instructed the student not to mention the disability to a committee and did not initially articulate academic reasons for his denial of requested accommodations. Last but certainly not least, in *Dearmont* the court found that the small department engaged in harassment after the student documented a disability. Fourth, in two cases (*Steere* and *Amir*), there was unusually strong conflicting evidence that the student could succeed: the dismissed student enrolled at another school, received the requested accommodations, and was academically successful.³⁴¹

³⁴⁰*Id.*

³⁴¹Such conflicting evidence is less likely to be available to law students, since law

Finally, in some cases, the denial of readmission was contrary to the recommendation of an internal school expert. In *Wong*, for example, the decision was contrary to a recommendation by an internal faculty expert. Similarly, the assessment of the student's ability conflicted with her clinical supervisor's favorable assessment of the student's performance in *Carlin*. Similarly, in an OCR opinion discussed below,³⁴² DePaul University's internal expert evaluation that a student's dyslexia impairment was significant conflicted with its law school's assessment based on the previously supplied report of an eye doctor that the dyslexia was not significant. One pattern these cases do not evidence is a pattern of greater deference to schools when the disability is mental as opposed to physical, despite the contrary suggestion of one commentator.³⁴³

When the law school and non-law school are combined, a variety of patterns emerge. Most striking of course is the pattern of results: schools win, and do so convincingly, normally at the as-a-matter-of-law level at the summary judgment or dismissal stage, rather than going to trial and reaching the merits. This is so in large part because courts hearing these disability discrimination claims routinely announce a pattern of deference to the school's academic judgments. Deference is specifically extended to the decisions as to 1) whether the dismissed

school accreditation requirements require dismissed students to sit out two years before applying to other law schools. See ABA Law School Accreditation Standard 505, available at www.abanet.org/legaled/standards/standard.html. However, if a law school allows dismissed students to continue in summer courses while their petitions are pending, students' grades in those courses may amount to such evidence.

³⁴²See *infra* notes 377-396 and accompanying text.

³⁴³Tucker, *supra* note 25, at 39 (suggesting that for academic decisions generally, more deference is paid when the student's disability is mental rather than physical).

student meets the school's readmission standards, and 2) whether academic accommodations requested by the dismissed student are reasonable on the one hand, or would alter the school's academic standards on the other.

While the courts' announcement of deference to these decisions is consistent, there is some variety in the articulated reasons for the deferral, the conditions that will trigger deferral, and the exact nature of the deferral. One commentator, suggests that "[w]hile deference determinations under Section 504 and the ADA vary considerably, the general trend . . . seems to be toward some form of rational basis review."³⁴⁴ Another, Professor James Leonard, reviews the cases on disability challenges to academic decisions including dismissal and readmission, and identifies three approaches to deference in these cases. In the first approach, in which Professor Leonard finds only one case, the court simply did not defer and instead allowed the parties to create a battle of experts, with the court ultimately imposing its own judgment.³⁴⁵ Leonard places *McGregor* and *Anderson* in a second group of cases in which, largely for reasons of lack of judicial expertise, and much in the manner of the Court in *Ewing*, courts will "defer to academic authorities whenever they can demonstrate a reasonable [educational] basis for their decisions,"³⁴⁶ and there is no evidence of discriminatory intent. The third group of cases, into which Leonard places *Wynne*, supplements the reasonable basis standard of the second group of

³⁴⁴Anne Dupre, *Disability, Deference and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393, 418 (1998).

³⁴⁵James Leonard, *Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEBR. L. REV. 27, 61-62 (1996) (citing *Pushkin*, *supra* note 296, which involved a doctor seeking a paid residency and is thus technically an employment case).

³⁴⁶*Id.* at 63-68.

cases and adds a requirement that the school “consider any suggestions for accommodations in good faith and keep reliable records of the decisional process.”³⁴⁷

This pattern of deference to higher education schools’ academic judgments in the context of federal statutory disability claims is again in contrast to the approach taken under the IDEA. Although IDEA disputes typically involve a challenge to a school’s academic judgment about what is the free appropriate public education for a given student,³⁴⁸ or where is the least restrictive environment to provide that program,³⁴⁹ courts do not defer to the school’s judgment on these issues.³⁵⁰ This lack of judicial deference exists even though the staff at public preK-12 schools, unlike higher education faculty, is formally trained in education and the team which makes IDEA programming decisions includes at least one internal school expert in special education.³⁵¹ However, because of the special dispute resolution system Congress established

³⁴⁷*Id.* at 68-69 (suggesting that this standard is actually the most protective of school autonomy, as whether a school engaged in good faith consideration of accommodations is normally an undisputed factual issue which can be resolved at the summary judgment stage).

³⁴⁸The first U.S. Supreme Court case interpreting the IDEA involved a dispute over its free appropriate public education provision. *Board of Educ. v. Rowley*, 458 U.S. 176 (1982) (IDEA’s appropriate education requirement requires a program reasonably calculated to confer educational benefit; as to hearing impaired student easily earning passing grades with tutoring and a hearing aid IDEA is satisfied; a full-time sign language interpreter is not required).

³⁴⁹*See, e.g., Sacramento Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994) (least restrictive environment for student with mental retardation is general education).

³⁵⁰20 U.S.C. § 1414; 34 C.F.R. § 300.344.

³⁵¹For a comparison of the lack of deference under the IDEA with the deference accorded universities, and an argument that, in part because of expertise, preK-12 schools also deserve the deference accorded higher education judgments, see Anne Dupre, *Disability, Deference and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393 (1998).

for the IDEA,³⁵² and in marked contrast to the cases where courts examine higher education students' disability discrimination claims, a court reviewing a dispute under the IDEA has the benefit of the expertise not only of school authorities but also of the hearing officer who is trained in special education.

D. OCR opinions addressing disability discrimination claims by academically dismissed law students.

While not binding precedent, OCR has issued numerous opinions concerning disability discrimination complaints by academically dismissed law and other higher education students. Just as in the courts, academically dismissed students have had very little success with OCR. In almost all of the law school cases, OCR has found for the school.³⁵³ A review of these opinions, however, indicates OCR takes a somewhat different approach than the courts.

The OCR opinions concerning academically dismissed law students do not discuss deference specifically; however, in other cases OCR has announced a policy of deference.³⁵⁴

³⁵²*See supra* notes 162-164 and accompanying text.

³⁵³University of Alabama, 1 Nat. Disability L. Rep. ¶ 121 (OCR 1990); University of Chicago, 26 Nat. Disability L. Rep. ¶ 187 (OCR 2003); McGeorge Law School, 1 Nat. Disability L. Rep. ¶ 337; Golden Gate University, 2 Nat. Disability L. Rep. ¶ 253 (OCR 1991); Cleveland State University, 3 Nat. Disability L. Rep. ¶ 198 (OCR 1992); Hastings College of Law, 4 Nat. Disability L. Rep. ¶ 226 (OCR 1993); University of San Francisco, 17 Nat. Disability L. Rep. ¶ 61 (OCR 1999); Villanova University, 16 Nat. Disability L. Rep. ¶ 170 (OCR 1999); University of Akron, 26 Nat. Disability L. Rep. ¶ 263 (OCR 2003); Texas Wesleyan University, 13 Nat. Disability L. Rep. ¶ 208 (OCR 1998); Southwestern University School of Law, 26 Nat. Disability L. Rep. ¶ 211 (OCR 2003).

³⁵⁴Northern Ill. Univ., 7 Nat. Disability L. Rep. ¶ 392 (OCR 1995) (“OCR grants great deference to recipients to determine which academic requirements are essential to their programs of instruction); University of Tenn. at Martin, 14 Nat. Disability L. Rep. ¶ 72 (OCR 1998) (“[A]bsent evidence of a discriminatory intent, reasonable deference must be accorded to the academic decisions of educational institutions.”); Indiana University Northwest, 3 Nat. Disability

OCR does make it clear, however, in the dismissed law student opinions that meeting the school's minimum academic standards is an essential academic requirement, and a legitimate nondiscriminatory reason for dismissing/refusing to readmit a student. As to those standards, OCR has suggested that a variety of readmissions standards are nondiscriminatory, from not making a readmissions process available at all,³⁵⁵ to rules which limit the opportunity to petition for readmission to students in a certain GPA range, and provide no opportunity to petition to students with GPAs below this range;³⁵⁶ to requiring dismissed students to sit out a year before reenrolling.³⁵⁷ In applying the school's readmission standard, OCR has suggested that schools may consider a variety of information, including accreditation standards concerning admission,³⁵⁸ whether the petition is honest and truthful,³⁵⁹ or is of good quality,³⁶⁰ and whether

L. Rep. ¶ 150 (OCR 1992) (OCR deference to “collective wisdom of the faculty”).

³⁵⁵Southwestern University School of Law, 26 Nat. Disability L. Rep. ¶ 211 (but if a process is established, it must be available on an equal basis to students with disabilities). Note that if a readmissions process is not available, dismissed students with disabilities could still use the Section 504 grievance procedure, as well as OCR complaints and litigation to challenge their dismissal.

³⁵⁶University of Akron, 26 Nat. Disability L. Rep. ¶ 263 (2.0 minimum GPA; students below 1.8 have no opportunity to petition for readmission).

³⁵⁷Texas Wesleyan University, 13 Nat. Disability L. Rep. ¶ 208.

³⁵⁸Villanova University, 16 Nat. Disability L. Rep. ¶ 170 (referring to former ABA requirement 304 that “A law school shall not, either by initial admission or subsequent retention, enroll or continue a person whose inability to do satisfactory work is sufficiently manifest. . . .”, now see ABA accreditation standards 501 and 505).

³⁵⁹Cleveland State University, 3 Nat. Disability L. Rep. ¶ 198.

³⁶⁰Golden Gate University, 2 Nat. Disability L. Rep. ¶ 253 (spelling grammar and other mechanical problems as well as less than “compelling reasoning and arguments”).

the student is effective in any presentation to-- and meeting with-- the committee.³⁶¹

All of these standards and information must be applied to and considered for all students, with and without disabilities. To determine whether the decision was tainted by improper discrimination, OCR often interviews the committee members who made the readmission recommendation/decision, reviews the school's policies and practices with regard to students with disabilities,³⁶² and examines statistics and individual files of other petitioning students, presumably in order to compare application of the readmissions standard and process as between applicants with and without disabilities.

As concerns specific disability information presented by a petitioning student, OCR indicates that law schools may require dismissed students to provide documentation of disability or other circumstances,³⁶³ and law schools must give any such submitted documentation "reasoned and informed consideration."³⁶⁴ Moreover, law schools may require expert evaluations to be submitted in writing and need not agree to have the expert appear in person to discuss the evaluation with the committee (presumably to the extent it does not allow petitioning students to present witnesses generally).³⁶⁵

After duly considering disability information supplied by a petitioning student, OCR has

³⁶¹University of Alabama, 1 Nat. Disability L. Rep. ¶ 121 (student rambled and did not answer committee's questions).

³⁶²See Tucker, *supra* note 25, at n.22 and accompanying text, for a collection of OCR opinions on the issue of the existence and adequacy of such policies.

³⁶³Southwestern University School of Law, 26 Nat. Disability L. Rep. ¶ 211.

³⁶⁴Southwestern University School of Law, 26 Nat. Disability L. Rep. ¶ 211.

³⁶⁵Villanova University, 16 Nat. Disability L. Rep. ¶ 170.

suggested that law schools may find that the nondisability reasons contained in a student's readmission petition caused her failure, rather than a disability not disclosed in the petition.³⁶⁶ A law school may conclude that academic failure was caused by circumstances unrelated to any disability. For example, a law school may deny admission to a student with a disability because of a "very low LSAT score" and "simply not understand[ing] the basic concepts of the subject matter."³⁶⁷ Similarly, a law school may conclude that a student's learning disability did not cause his academic failure.³⁶⁸ A law school may conclude that the student's failure was caused by lack of understanding of the material, lack of preparedness for class, lack of organization and being an hour late for an exam, rather than a disability.³⁶⁹

When a law school's readmission standard requires extraordinary circumstances, a law school need not find a dismissed student's disability to be an extraordinary or compelling circumstance,³⁷⁰ but law schools must consider dismissed students' disabilities which were "previously unknown or undisclosed," to the extent the school considers other unknown or undisclosed nondisability circumstances.³⁷¹

In considering a dismissed student with disability's potential to succeed if readmitted, a

³⁶⁶Southwestern University School of Law, 26 Nat. Disability L. Rep. ¶ 211.

³⁶⁷Hastings College of Law, 4 Nat. Disability L. Rep. ¶ 226.

³⁶⁸McGeorge Law School, 1 Nat. Disability L. Rep. ¶ 337 (student with learning disability who succeeded on some timed exams and whose reading speed was in the normal range); University of Alabama, 1 Nat. Disability L. Rep. ¶ 121 (legally blind student with cumulative GPA of 0.533).

³⁶⁹Whittier College School of Law, 4 Nat. Disability L. Rep. ¶ 183 (OCR 1993).

³⁷⁰University of San Francisco, 17 Nat. Disability L. Rep. 61 (1999).

law school should evaluate “how the student’s disability affected his or her performance, and whether the student has been provided the necessary [accommodations].”³⁷² When petitioning students assert that they can succeed with accommodations, law schools must take failure to receive accommodations into account in making readmissions decisions if there has been reasonable documentation of a disability and a proper request for accommodations, however the “significance of the failure to receive [accommodations] would vary with the circumstances of the case.”³⁷³

A law school may determine that certain requested accommodations are not reasonable. For example, while whether an accommodation is reasonable must always be determined on an individualized basis, OCR has found certain requests in specific cases to be beyond those which are required reasonable accommodations. Normally, for example, minimum GPA requirements are essential academic standards and waiver of them is not a reasonable accommodation.³⁷⁴ Along the same lines, a law school need not agree to a dismissed student’s request for accommodations in the form of breaking down complex essay exam questions into parts and allowing outline format for answers, as these adjustments would modify essential elements of the

³⁷¹Southwestern University School of Law, 26 Nat. Disability L. Rep. ¶ 211.

³⁷²Hastings College of Law, 4 Nat. Disability L. Rep. ¶ 226.

³⁷³Southwestern University School of Law, 26 Nat. Disability L. Rep. ¶ 211.

³⁷⁴University of Akron, 26 Nat. Disability L. Rep. ¶ 263 (also noting that school’s judgments and resulting rules concerning minimum GPAs and opportunities for readmission were based on past successes of students with low GPAs, the school’s bar pass rate, and a desire to avoid taking tuition from students whose prognosis for academic success, success on the bar exam, and competence in practice was poor, and were recommended by a faculty committee and adopted by the full faculty).

law school program.³⁷⁵

In two reported law school cases, each more than ten years old, OCR expressed concern about a law school's handling of a student with a disability's readmission petition. In one such case, OCR appeared to believe that the law school had steered a student who might have a disability toward an evaluator about whose qualifications OCR had concerns, but made no final determination as to whether the school had engaged in discrimination.³⁷⁶ OCR noted that this evaluator had established a course of "treatment" (OCR's quotation marks) for the student's learning disability. The school agreed to fund "valid diagnostic testing . . . from a qualified professional." One might infer from this that OCR thought the learning disability may not have been appropriately diagnosed and could not be "treated" effectively, at least by this evaluator.

In the second case, *DePaul University*,³⁷⁷ the student in question had not been formally diagnosed with, nor received any services for, an impairment prior to law school, and had maintained a B average in college.³⁷⁸ As a college senior, an ophthalmologist (an M.D. specializing in vision care) informed her that she was dyslexic without doing any testing.³⁷⁹ The student reported she was dyslexic on her application as a means of supporting her assertion that

³⁷⁵Villanova University, 16 Nat. Disability L. Rep. ¶ 170 (also noting that an expert evaluation which stated the student needed these changes to succeed in law school actually was evidence that she could not be academically successful unless the law school program was fundamentally altered).

³⁷⁶Pepperdine University, 7 Nat. Disability L. Rep. ¶ 62 (OCR 1995).

³⁷⁷4 Nat. Disability L. Rep. ¶ 157 (OCR 1993).

³⁷⁸*Id.*

³⁷⁹*Id.*

her LSAT score underestimated her ability.³⁸⁰ She attached a letter from the ophthalmologist which noted that “dyslexia is minimal and [she] should not require accommodations.”³⁸¹

In her first year of law school the student struggled and was referred by a friend to the university’s program for diagnosing and evaluating students with learning disabilities.³⁸² The program completed testing on the student and orally requested accommodations for the student, specifically a reduced course load and extra time on exams, from the law school.³⁸³ The law school asked for written documentation before making a decision; when documentation was provided, which was near the end of the academic year, the law school implemented the bulk of the requested accommodations.³⁸⁴ The student did not earn the minimum required grades, was academically dismissed, and petitioned for readmission.³⁸⁵

After two days of meetings to decide 33 readmissions petitions in which much information was not available until the members arrived at the meeting, the readmissions committee granted 13 of the petitions.³⁸⁶ The student’s petition was the only one which reported a disability and it was denied.³⁸⁷ In fact, the committee could not recall any prior petitions

³⁸⁰*Id.*

³⁸¹*Id.*

³⁸²*Id.*

³⁸³*Id.*

³⁸⁴*Id.*

³⁸⁵*Id.*

³⁸⁶*Id.*

³⁸⁷*Id.*

asserting a disability.³⁸⁸ A readmissions form for each student had a space for the committee to write the reasons for its decision, but the form was left blank or only cursorily completed in many cases including that of the complaining student.³⁸⁹ There were no notes of the meeting available from the law school or individual committee members.³⁹⁰

In the complaining student's case, no committee member could remember who was assigned responsibility for presenting her petition, nor could any committee member specifically recall the reason(s) for denying it, and the partial recollections were somewhat inconsistent.³⁹¹ OCR closely second guessed both the committee's reasoning as much as it could be reconstructed, and its pattern of readmitting a number of students who appeared to be no more qualified than the complaining student. For example, the committee readmitted a student who attributed her failure to a personal problem which happened before starting law school but for which she did not receive counseling during her first year of law school, and others who attributed their failures to "difficulties with the academic rigors of law school," and "poor study habits" respectively.³⁹² Moreover, OCR found that some of the committee members' comments to one another, particularly a statement by one member that the impairment was "now just an

³⁸⁸*Id.*

³⁸⁹*Id.*

³⁹⁰*Id.*

³⁹¹ Lapse of time may explain the committee members' lapse of memory. These readmissions decisions took place in the summer of 1988. The OCR decision is dated May 1993, almost 5 years later. Section 504 regulations provide that OCR complaints must be filed within 180 days of the alleged discrimination, unless OCR finds good cause for a later filing. 34 C.F.R. §100.7. The opinion does not address the delay in filing the complaint.

³⁹²*Id.*

excuse for her poor grades,” demonstrated an improper, stereotyped view of how disability might impact academic performance.³⁹³ OCR concluded that the committee had considered the disability information in a stereotyped rather than an informed way.³⁹⁴ Under these circumstances, OCR faulted the committee for not undergoing any training, nor consulting with its own in-house experts at the university program for students with learning disabilities.³⁹⁵ The university agreed to settle the complaint in an undisclosed manner.³⁹⁶

E. OCR opinions addressing disability discrimination claims by other academically dismissed higher education students.

In non-law school academic dismissal readmissions cases, OCR has also consistently found for the school.³⁹⁷ In the one non-law school academic dismissal readmissions case in

³⁹³*Id.*

³⁹⁴*Id.*

³⁹⁵In more recent cases, OCR has made it clear that under normal circumstances, schools must consider expert information in a reasoned and informed way, but are not required to seek out nor defer to expert opinions on academic issues. See, e.g., Southwestern Community College District, 29 Nat. Disability L. Rep. ¶ 210 (OCR 2004) (school which provided OCR with detailed record of its decision-making process, in which the school considered letter of support provided by the university disability support services officer but denied readmission petition of academically dismissed dental hygiene student did not engage in illegal discrimination).

³⁹⁶*Id.*

³⁹⁷Southwestern Community College District, 29 Nat. Disability L. Rep. ¶ 210 (OCR 2004) (dental hygiene student); Lourdes College, 29 Nat. Disability L. Rep. ¶ 25 (OCR 2004) (nursing program); Touro University, College of Osteopathic Medicine, 24 Nat. Disability L. Rep. ¶ 292 (OCR 2002); Eastern Virginia Medical School, 2 Nat. Disability L. Rep. ¶ 229 (OCR 1991); Texas Chiropractic College, 2 Nat. Disability L. Rep. ¶ 252 (OCR 1991); University of Pennsylvania, 28 Nat. Disability L. Rep. ¶ 192 (OCR 2003) (M.S.W. student); cf. California State University, 7 Nat. Disability L. Rep. ¶ 96 (OCR 1995) (student denied readmission to teacher preparation program after withdrawal “by mutual consent” and related to her emotional

which OCR determined Section 504 had been violated, the school had failed to offer the student timely and reasonable accommodations.³⁹⁸ The school agreed to readmit the student on probationary status and provide appropriate accommodations.³⁹⁹

F. Judicial deference to reasoned academic readmissions judgments is appropriate

Judicial deference to the judgment of a law school or other higher education program's faculty not to readmit an academically dismissed student is the only sound approach.⁴⁰⁰ The

disability); Regent University, 27 Nat. Disability L. Rep. ¶ 63 (OCR 2003) (school did not discriminate when it required M.B.A. student with bipolar disorder who withdrew from program after erratic and threatening behavior to undergo a psychiatric evaluation as a consideration of readmission).

³⁹⁸Tuskegee University, 1 Nat. Disability L. Rep. ¶ 226 (1990) (university disability office told student with learning disability before he enrolled that accommodations would be available; that office's director then retired, and the student was not provided with accommodations for several months until the problem was discovered).

³⁹⁹*Id.*

⁴⁰⁰Other commentators agree. See Anne Dupre, *Disability, Deference and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393, 466-471 (1998) (deference should extend to the academic decisions of both preK-12 and higher education academic decisions, with limits such as those announced in *Wynne* which she equates with intermediate scrutiny); James Leonard, *Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act and Titles II and II of the Americans with Disabilities Act*, 75 NEBR. L. REV. 27, 88-90 (1996) (advocating the *Wynne* limited deference approach); *id.* at 70-74 (academic higher education decision are particularly subjective and far outside the courts' expertise and thus without deference would be resolved by a battle of experts in areas in which the experts themselves disagree and in which there are no concrete standards to apply); *id.* at 74-83 (higher education academic standards and decisions are polycentric in nature, as described by Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978), involving many interdependent competing interests and thus are unsuited to judicial resolution but are appropriately resolved by managerial direction, such as faculty decision-making, and also noting that law school standards are school-specific and thus what other schools do is not particularly probative evidence); *id.* at 83-84 (lack of deference would incentivize schools to soften their academic standards to avoid litigation and inappropriately adversarialize the student-faculty relationship); *id.* at 85-86, 88-89 (unlimited deference may not encourage schools to truly introspect and consider alternatives for students with disabilities, but *Wynne* limited deference standard addresses this concern).

One commentator suggests that the judicial deference to academic decisions generally is

readmissions judgment is not only academic in nature, but is subjective, complex, context-dependent, and highly specialized. Apparently in contrast to the approach at some medical schools where a single dean makes the decision,⁴⁰¹ at law schools readmissions decisions are normally made by a group of persons (a faculty committee or the entire faculty). In the case of a student claiming a disability, there are built-in statutory incentives to err on the side of the student in close cases,⁴⁰² thus minimizing the possibility of the decision being made inappropriately. In contrast even to another group of deferred-to academic decisions, initial admissions to higher education programs, the decision not to readmit a student who has been academically dismissed is made by a faculty after it has had considerable experience with the student's academic performance and abilities. Readmission of an academically dismissed student is thus the sort of decision most inimical to the program's academic freedom, and most outside the expertise of the courts.

Deference to these decisions is also particularly appropriate at the level of professional school and similar programs, where virtually all the actual cases occurred, because of the stakes involved in wrongful readmission for the readmitted student, the school, and the public.

Whether or not she has a disability, the student who wrongfully is not readmitted at least can try

appropriate because it “provides for a more efficient distribution of decision-making between the courts and higher education while retaining the ability for courts to intervene in situations where the university officials may act inappropriately.” Edward Stoner and Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students In the Eighteen Months Before Grutter*, 30 J. COLL. & UNIV. L. 583, 585 (2004).

⁴⁰¹See *Steere* and *Signh*, discussed *supra* at notes 319-325 and accompanying text.

⁴⁰²The prospect of costly litigation, as well as the prospect of losing the litigation and becoming responsible for the student's attorney's fees under these fee-shifting statutes, provide incentives for schools to err on the side of the student in close cases.

her luck at other schools and perhaps ultimately continue on her planned career path. For example, the many students in the court cases and OCR opinions discussed above whose impairments are first diagnosed at the time of their dismissal can develop learning and other coping mitigative strategies for their newly discovered impairments and later apply for admission. In contrast, the student who is wrongfully readmitted (that is, is readmitted when she is not academically capable even if reasonable accommodations are provided) is at serious risk of being unable to pass related licensing exams such as bar exams and the medical Boards exams, and/or to competently practice her chosen profession. As one court has noted, by readmitting a student, a school conveys its imprimatur that the student will in fact be successful in these ways.⁴⁰³ When a student is wrongfully readmitted, the school's integrity and reputation are harmed. Most importantly, there is obvious risk to the public if wrongfully readmitted students go on to practice their profession less than competently. In the case of health care professionals, health and safety are directly at risk. In the case of attorneys, the risk is not a physical safety one but rather puts at risk the competent resolution of clients' high stakes legal problems, including for example incarceration of criminal defendants, and custody of children.

Deference is also consistent with the systems established by Congress for resolution of disability discrimination disputes. While the IDEA establishes a system of impartial hearing officers trained in both special education and law who have the necessary expertise to closely review a school's judgment, no such system is in place for higher education students' disability

⁴⁰³ *Kaltenberger*, 162 F.3d at 436-37 ((citing *Horowitz* and *Ewing*, also holding that school's academic decisions concerning which accommodations are and are not reasonable are entitled to deference, noting "[w]e should only reluctantly intervene in academic decisions 'especially regarding degree requirements in the health care field where the conferral of a degree

discrimination claims. Judges hearing IDEA lawsuits receive the administrative record from this hearing, including specific findings of fact and conclusions, and may base their judgment solely on this record, treating the matter in the manner of an administrative appeal. In contrast, in higher education Congress chose not to establish administrative hearings, and chose not to involve expert hearing officers; hence, the judge hearing a higher education disability discrimination case does so without an administrative record nor independent expertise.

The different natures of the schools covered by the IDEA on the one hand, and the schools covered by the Section 504 and ADA provisions concerning higher education students on the other, also suggest the appropriateness of deference. The IDEA essentially applies to public preK-12 schools. The IDEA is a government-funded program which applies to schools which are governmental entities. It is government regulating government. Moreover, IDEA-covered public preK-12 schools are not ones which are thought to possess either institutional or individual faculty academic freedom in the same way as do higher education institutions and faculty members. Students attend IDEA-regulated public preK-12 schools at least in part to comply with state compulsory education laws; they have not chosen to attend. However, and again unlike higher education, under state laws there is a right (under state statute if not also under the state constitution) right to attend public preK-12 school; while enrollment in public or private higher education is a privilege rather than a legal right. In contrast, many higher education institutions are private. Private or not, higher education institutions clearly enjoy academic freedom both at the institutional and individual faculty level. Section 504 and the ADA offer no specific government funds to subsidize providing accommodations and the other

places the school's imprimatur upon the student as qualified to pursue his chosen profession").

costs of compliance. Higher education program enrollment is of course optional.

The IDEA is helpful in providing guidance in one area: the plethora of disputes concerning the application of imprecise statutory standards to specific cases which would occur if there were close judicial review of academic decisions regarding students with disabilities rather than deference to those decisions. Like Section 504's and the ADA's imprecise terms of impairments such as limiting coverage to impairments which "substantially" limit a major life activity and "reasonable" accommodations or adjustments, the IDEA's own imprecise terms entitle students to an "appropriate" education in the "least restrictive environment." The imprecise and subjective nature of the statutes' coverage and entitlements and the "otherwise qualified" limitation also suggest that Congress meant for schools to operate with some discretion. This imprecision also invites disputes over whether statutory obligations have been met. Under the IDEA, the combination of close administrative and judicial review, and the imprecise statutory standards, has in fact resulted in an enormous amount of litigation.⁴⁰⁴

The limits courts have put on deference, particularly the "factual record of introspection" limited deference standard in the First and Ninth Circuits, provide sufficient protection for students claiming disability discrimination. Requiring a school to carefully consider disability and other information concerning a student with a disability, and to create a record of those decisions, helps to ensure that a school will give disability information the reasoned and informed consideration the law requires and make a good faith readmissions decision. Whether

⁴⁰⁴The Individuals with Disabilities Law Reporter (IDELR), a looseleaf service which collects court and hearing officer decisions under the IDEA, had 43 volumes from 1978 when the IDEA took effect through September 2005. Recent IDELR volumes numbered 1000+ pages each.

or not this limited deference standard is applied, affirmative evidence of any discriminatory (stereotypical, bad faith, or retaliatory) thinking by a school⁴⁰⁵ or refusal to consider disability information will likely result in a triable issue of fact precluding summary judgment, but the mere fact of denying readmission to a student with a disability⁴⁰⁶ will not be sufficient for her discrimination claim to withstand a summary judgment motion.

VI. DOING THE RIGHT THING: GUIDELINES AND OPTIONS FOR MAKING
PRINCIPLED, NONDISCRIMINATORY READMISSIONS DECISIONS WHEN STUDENTS CLAIM A
DISABILITY

A. The consequences of going beyond statutory requirements

Law schools may consider doing more than the statutes require in one or more of three ways. First, law schools may choose to serve some students with impairments which do not amount to statutory disabilities. Second, law schools may offer more than statutorily required reasonable accommodations to students with (statutory or nonstatutory) disabilities. Third, law schools may choose to apply the readmissions standard more leniently to dismissed students with (statutory or nonstatutory) disabilities. Some parent universities of law schools may wish to make one or more of these choices for the university, including the law school.

While choosing to go beyond statutory requirements would not appear to open law schools up to reverse discrimination claims by students without disabilities,⁴⁰⁷ other

⁴⁰⁵Evidence of discriminatory thinking can be obtained by the student using discovery, or perhaps through the investigation process if an OCR complaint is filed.

⁴⁰⁶Nor, apparently, will allegations that other students similarly situated were treated differently.

⁴⁰⁷Other discrimination laws such as Titles VI, VII, and IX, which prohibit discrimination

considerations including law school accreditation requirements, issues of academic freedom, potential triggering of additional disability law obligations, and even potential tort and contract liability, limit and to some extent caution against going beyond statutory requirements.

Moreover, the equities do not clearly favor doing more than the statutes require.

1. The equities. From the perspective of the student with a statutory or nonstatutory disability, the equities weigh heavily in favor of serving students with diagnosed impairments even if they do not amount to statutory disabilities, providing academic adjustments even if they go beyond legally required ones, and applying the readmissions standard leniently to students with statutory or nonstatutory disabilities. For example, the student in *Wong* whose dyslexia has caused him to read very slowly, but whose impairment does not amount to a statutory disability, has an equitable argument that failure to offer him extra time on exams will mean that the exam will measure his slow reading speed more than his mastery of the course material. A dismissed law student with a newly diagnosed impairment and who has thus never had accommodations, such as Student in the illustrative scenario, may also argue as a matter of equity that if she can demonstrate a real possibility of success with accommodations, the school should offer her a second chance even if there is not the convincing likelihood of success required by the School's readmission standard.

While these arguments are cogent ones, there are competing concerns and counter

“on the ground of” race or gender, *see, e.g.*, 42 U.S.C. § 2000d (Title VI prohibition “on the ground of race, color, or national origin”) and have been interpreted as prohibiting discrimination against either gender, and against any racial minority or racial majority group. *See, e.g., Gratz*, discussed *supra* notes 223-230 (affirmative action program amounts to illegal race discrimination against white applicants). In contrast, Section 504 and the ADA define the group of covered persons with statutory disabilities, and prohibit discrimination against the covered group. *See, e.g.*, 29 C.F.R. § 794(a) (Section 504).

arguments also centered on equity and fairness. As a threshold matter and as discussed below,⁴⁰⁸ from the perspective of the law school faculty, maintaining academic standards is primary. It does no one any good, most of all the dismissed student, to readmit her if there is not a good faith belief she will succeed, not only by maintaining required grades while in law school but also by passing the bar exam and practicing competently. As one court observed in a non-law school case, granting a degree (and readmission in the shorter term) conveys the school's imprimatur that the student can and will be successful in these ways.⁴⁰⁹ Also and as discussed below,⁴¹⁰ accreditation standards also bar law schools from (re)admitting students unless they are likely to succeed the second time around.

Beyond this mandated limitation of readmission of any student, with or without a disability, to those who are likely to succeed, law schools have some discretion in deciding how to apply readmissions standards to students with disabilities and still comply with disability law. The faculty may believe equity among all the school's students is best served by holding everyone to the same standards, particularly as regards extra time on exams, except when disability laws require academic adjustments, for a number of reasons, from the nature of law school grades, to line-drawing concerns, to concerns about test validity and skills needed for successful law practice, to risking future failure on the bar exam and in practice for the student

⁴⁰⁸See *infra* notes 430-432 and accompanying text.

⁴⁰⁹Cf. Steven Milam and Rebecca Marshall, *Impact of Regents of the University of Michigan v. Ewing on Academic Dismissals from Graduate and Professional Schools*, 13 J. COLL. & UNIV. L. 335, 352 (1987) ("Graduate and professional schools owe a duty to the public, the student and the respective professions to assure that they award degrees only to qualified individuals. The same obligation compels institutions to dismiss those not qualified to practice.")

⁴¹⁰See *infra* Section VI.A.2.

provided with nonrequired accommodations.

As to offering academic adjustments to students without statutory disabilities, or beyond legally required reasonable accommodations, it is important to note that this decision is a qualitatively different one than other sorts of affirmative action; for example, considering diversity of various kinds (race, gender, disability, etc.) in making initial admissions decisions. This latter sort of affirmative action is done in the context of deciding which qualified students will be offered an opportunity for legal education. Once such students are admitted, they are held to the same academic standards as all other students; there no individualized adjustment of academic standards.

In contrast, offering some law students academic adjustments which go beyond legally required reasonable accommodations (for example giving a student with a reading disorder impairment primarily involving slow reading speed which is not a statutory disability extra time on exams) gives individual students an academic experience and in some cases an evaluation of their performance which is different than those for most students. In a graduate school program where grading is criterion-based (i.e. excellent work receives a grade of “A,” no matter how the other students perform), such a practice might affect the individual student (her grades might overestimate her performance), but would not likely have much impact on the other students. The great majority of law schools, however, have mandatory grade curves which mean that law school grades are largely normative, measuring how the student performed relative to her classmates. Thus in law school there is special risk that academic adjustments beyond legally required ones unfairly disadvantage other students. A legal commentator notes “a general sense of unease . . . about whether the various accommodations afforded for learning disabilities truly

‘level the playing field’ in a meaningful and valid way, or instead serve to provide unfair advantages to some. In some cases, . . . a strong suspicion of ‘gaming the system’ arises.”⁴¹¹

Hence, a law school may decide not to go beyond statutory requirements because it believes the fair and equitable thing is to hold all students to the same academic standards except as required by law.

Law schools may also be concerned about the impact of the specific academic adjustment of extra time on exams on the validity of scores on those exams, and thus wish to limit that adjustment to circumstances where it is legally required. Commentary by some disability experts corroborates this concern. It is not documented, for example, that the accommodation of additional time on exams for students with disabilities does not impair test validity.⁴¹² Some research with extra time on the SAT suggests the extra time compromises its predictive validity.⁴¹³ Other research suggests that extra time and quiet rooms “increases the testing scores

⁴¹¹Murphy, *supra* note 94, at 46.

⁴¹²*See, e.g., Tucker, supra* note 99, at 17 (assuming test anxiety is a legal disability, providing extra time as an accommodation does reduce anxiety for the examinee, creating, the “paradox. . . of a non-anxious examinee with extra time”); *Ranseen, supra* note 96 at 8-9 (effectiveness of typical exam accommodations for examinees with ADHD such as extra time has not been documented with empirical research; “there is no evidence that an accommodation of extra time does not alter test validity,” citing another expert review of studies of extra time for examinees with reading disabilities do not seem to help these students differentially; all examinees afforded additional time improved their performance); Gordon, Murphy and Keiser, *supra* note 100, at 35 (“Unlike accommodations such as wheelchair ramps or elevator signs written in braille, ADHD accommodations are universal in their potential benefit even for people without the disorder.”); *id.* (“In the case of ADHD there is no scientific research nor theoretical basis to indicate that extra time on an exam is necessarily helpful.”).

⁴¹³Phillips, *infra* note 417, at 23 (citation omitted) (research indicating SAT scores of learning disabled students given extra time predicted higher freshman college grades than those students actually received).

of all test takers.”⁴¹⁴ One commentator notes, for example, that if an exam is speeded, an extra time accommodation “would be unfair to the applicants without disabilities.”⁴¹⁵ Experts note that when diagnosing an impairment and recommending accommodations, evaluators “gear their efforts toward helping their patients feel better. . . and will not tend to worry terribly much . . . about the ultimate implications of lax standards for test integrity or simple fairness for all.”⁴¹⁶

Another commentator, an education professor with a J.D. and a doctorate in psychometrics, examines the impact of test accommodations for examinees and concludes that while test accommodations for persons with physical disabilities do not reduce test validity, accommodations for examinees with mental disabilities may in fact compromise test validity.⁴¹⁷

Standards of professional associations for educators and psychologists indicate

Unless it has been demonstrated that the psychometric properties of a test . . . are not altered significantly by some modification, the claims made for the test . . . cannot be generalized to the modified version.”⁴¹⁸

More generally, other disability experts note success on exams without accommodations may correlate with skills needed by practicing attorneys, specifically suggesting that attorneys need to remain attentive for long periods, be able to “sustain mental effort” for long periods, and

⁴¹⁴Ballard and Elwork, *infra* note 420, at 34.

⁴¹⁵Duhl and Duhl, *supra* note 94, at 14.

⁴¹⁶Gordon, Murphy, and Keiser, *supra* note 100, at 29.

⁴¹⁷Susan Phillips, *High-Stakes Testing Accommodations: Validity versus Disabled Rights*, 64 BAR EXAMINER 8 (1995).

⁴¹⁸*Id.* at 12 (citations omitted) (also noting the small populations given modified exams make any empirical research on this issue difficult at best, and suggesting in deciding requests for test accommodations, the test’s purpose, skills to be measure, and inference to be drawn from the score should all be considered).

“work under pressure.”⁴¹⁹ Some experts note that “some learning disabilities (e.g, reading disorders) involve mental functions that are inherently relevant and critical to the practice of law”⁴²⁰ and thus accommodations “may mask certain disabilities that are important to the practice of law and simply make it easier for learning disabled applicants to pass the bar examination.”⁴²¹ These experts posit that mental processing speed and distractibility, which test accommodations attempt to compensate, may in fact be relevant to law practice, which involves “researching, understanding, retaining, and applying an enormous amount of highly complex legal information. . . . [L]awyers must be able to pay a great deal of attention to detail, . . . express themselves clearly. . . often under time pressure and in emotionally charged situations, . . . [and possess] quick thinking and the ability to focus.”⁴²² Thus, “the presence of a learning disability may impede a person’s ability to practice law.”⁴²³

Returning to the student without a statutory disability but with reading disorder-related slow reading speed, the law school may also understand that its students’ reading speed varies greatly and for a myriad of reasons (from students’ overall information processing speed to their

⁴¹⁹John Ranseen and David Campbell, *Adult Attention Deficit Disorder: Current Concepts and Controversies*, 65 BAR EXAMINER 49, 54 (1996).

⁴²⁰Robin Ballard and Amiram Elwork, *Accommodating Learning Disabled Applicants During Bar Examinations: What is reasonable under the ADA?*, 74 BAR EXAMINER 31, 31 (2005).

⁴²¹*Id.*

⁴²²*Id.* at 33.

⁴²³*Id.*; *id.* at 34 (“Licensing boards should assume that some learning disabilities can significantly impede an applicant’s ability to practice law effectively. The public interest is protected not by using measuring methods that assess the applicant’s potential abilities, but by employing those methods that attempt to determine how the applicant will actually serve his or

reading skills to their temperament to their interest in the material to their work ethic) and determine that it is not equitable to provide extra time on exams only for students whose slow reading speed is related to an impairment and not caused by other reasons. The faculty may be concerned about line drawing, specifically about how far to go in tailoring education and evaluation to each student's strengths and weaknesses. If a student has a diagnosed impairment of dyslexia but it does not amount to a statutory disability, should the student have extra time for her exam? If so, does equity also require postponing the same exam for a student who is recovering from a virus, or for a student who had a fight with her significant other. A disability expert questions whether a "low-achieving student" who would likely perform better on an exam with extra time "is less deserving of the opportunity to demonstrate maximum performance than is a student who has been labeled learning disabled."⁴²⁴ Similarly, the faculty may not find it administratively (nor perhaps financially)⁴²⁵ workable to tailor education and evaluation beyond the ways in which the statutes require, particularly given the large size of most law school classes.

A law school might also conclude that the student with a nonstatutory disability is not herself served well by offering adjustments that will not be available later in life to the student. As earlier parts of this Article make clear, bar examiners typically do not offer accommodations beyond those which are legally required, and have trained disability experts in the relevant legal

her clients).

⁴²⁴Phillips, *supra* note 417, at 12; *id.* at 14 ("To minimize the potential for an invalid inference, a test user may want to grant only those accommodations judged essential.").

⁴²⁵Section 504 and the ADA offer no funds to cover any of the costs of compliance. *See supra* notes 144-145 and accompanying text.

standards to review requests for accommodations.⁴²⁶ Employers are required only to offer reasonable workplace accommodations to employees with statutory disabilities. Some commentators and attorneys with disabilities suggest that rigorous application of academic standards, presumably including readmission, is in the best interests of students with disabilities as well as other students. One commentator, referring to the post-law school experiences and opinions of several law school graduates with disabilities, suggests that

Schools do their students a disservice by allowing them to become dependent upon accommodations such as extra time that will not always be available in practice. As one learning disabled graduate . . . noted, "I thought [school] was the big hurdle. But it turns out it isn't.... I really don't see that I'm ever going to eliminate the fact that I take twice as long to do things as other people." . . . This student would have been better served had he received counseling, before graduation, from someone like Paul Grossman, the OCR attorney described . . . above. [Grossman] acknowledges that he has to work on weekends, holidays, and over vacations. . . . He does so willingly, however, because he loves his work. . . . Similarly, many learning disabled law students succeed academically simply by studying longer and more intensely than their classmates. . . . Of course, in law practice, in which the average non-disabled practitioner already works long hours, it is extremely demanding to self-accommodate in this way. Thus, students preparing for practice should be counseled that the demands on their time in practice will be even greater than those in law school.⁴²⁷

Another commentator suggests that "students who make individual agreements with professors to remain in the university often may be postponing academic dismissal. . . .and increasing likelihood of a lawsuit when the student is eventually dismissed."⁴²⁸ In *Ewing*, the evidence was that "[Ewing] often beguiled his professors into allowing him to postpone or retake

⁴²⁶For some of the commentary by disability experts used by bar examiners, see notes 94-100 and accompanying text.

⁴²⁷Lisa Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J. LAW & EDUC. 31, 61-62 (1997) (citations omitted).

⁴²⁸Milam and Marshall, *supra* note 169, at 350-351 and n.108.

examinations or to ignore certain of his low mid-semester scores so as to raise his overall course average.⁴²⁹

2. Accreditation requirements. Law school accreditation requirements impose two relevant limitations: 1) law schools cannot (re)admit students whom the law school does not predict will be both academically successful and capable of passing the bar exam and meeting other licensing requirements, and 2) law schools must set their own educational policy, which of course includes setting and applying academic standards for dismissal and readmission.

Law schools operate under ABA and AALS accreditation standards that prohibit them from readmitting students unless the school believes the student will be successful.⁴³⁰ A law school cannot readmit a student, with or without a disability, which the law school does not believe will be academically successful. Accreditation standards also limit admissions and

⁴²⁹Petition for Writ of Certiorari at 5, Ewing, 106 S.Ct. at 507.

⁴³⁰ABA Standards for the Accreditation of Law Schools provide in relevant part: Standard 501. ADMISSIONS. . . (b) A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar.

Standard 505. PREVIOUSLY DISQUALIFIED APPLICANT. A law school may admit or readmit a student who has been disqualified previously for academic reasons upon an affirmative showing that the student possesses the requisite ability and that the prior disqualification does not indicate a lack of capacity to complete the course of study at the admitting school. . . . For every admission or readmission of a previously disqualified individual, a statement of the considerations that led to the decision shall be placed in the admittee's file. *See* www.abanet.org/legaled/standards/standard.html.

AALS Standard Section 6-2(a) Admissions provides in pertinent part: a. A member school shall admit only those applicants whose applications have been evaluated pursuant to a process consistent with Bylaw 6-3 and who appear to have the capacity to meet its academic standards. *See* www.aals.org/about_handbook_requirements.php.

retention decisions to law schools acting through their faculty and dean;⁴³¹ thus, universities cannot readmit law students. These accreditation standards also reserve to the law school “academic standards for retention, advancement, and graduation of students,” and provide that while “[a] law school may involve alumni, students, and others in a participatory or advisory capacity; . . . the dean and faculty shall retain control over matters affecting the educational program of the law school.”⁴³²

Hence, to the extent academic adjustments would be involved, a law school’s parent university cannot unilaterally choose to go beyond statutory requirements in certain academic respects for law students. Specifically, a university cannot unilaterally decide to offer academic adjustments to a law student without a statutory disability (for example, unilaterally offering extra time on exams to a student whose learning disability does not substantially impair her

⁴³¹ABA Law School Accreditation Standards and interpretations provide in relevant part: Standard 204. GOVERNING BOARD AND LAW SCHOOL AUTHORITY. a) A governing board may establish general policies that are applicable to a law school if they are consistent with the Standards. b) The dean and faculty shall formulate and administer the educational program of the law school, including curriculum; methods of instruction; admissions; and academic standards for retention, advancement, and graduation of students; and shall recommend the selection, retention, promotion, and tenure (or granting of security of position) of the faculty.

Interpretation 204-2:

Admission of a student to a law school without the approval of the dean and faculty of the law school violates the Standards. (December 1975; 1994; August 1996)

Standard 206. ALLOCATION OF AUTHORITY BETWEEN DEAN AND FACULTY. The allocation of authority between the dean and the law faculty is a matter for determination by each institution as long as both the dean and the faculty have a significant role in determining educational policy.

Standard 207. INVOLVEMENT OF ALUMNI, STUDENTS AND OTHERS. A law school may involve alumni, students, and others in a participatory or advisory capacity; but the dean and faculty shall retain control over matters affecting the educational program of the law school.

learning or other major life activities), nor unilaterally offer academic adjustments to students with statutory disabilities which are beyond statutory reasonable accommodations (for example, unilaterally offering a waiver of attendance requirements to a student with quadriplegia). These decisions can only be made by the law school.

3. Academic freedom issues.⁴³³ Academic freedom protects both higher education institutions and individual faculty. There are several types of academic freedom claims. For example, academic freedom claims may be made by institutions against government, such as the U.S. Supreme Court case in which universities unsuccessfully asserted that the Solomon Amendment limited their academic freedom.⁴³⁴ In the disability context, either faculty or institutions might assert that disability discrimination laws, which uniquely among discrimination laws impose obligations to make academic adjustments for covered students,⁴³⁵ impinge on their academic freedom. The Supreme Court has indicated, however, that academic freedom does not extend to noncompliance with discrimination laws, noting that while it generally defers to academic judgments, this “principle of respect [is] for *legitimate* academic

⁴³²Id.

⁴³³More than a cursory discussion of academic freedom issues is beyond the scope of this article. For more extensive general discussion of academic freedom issues, see J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 *YALE L. J.* 251 (1989). For a brief discussion of individual and institutional academic freedom issues and disability, see Claire McCusker, *The Americans with Disabilities Act: Its Potential for Expanding the Scope of Reasonable Academic Accommodations,* 21 *J. COLL. & UNIV. L.* 619, 639-41 (1995). For a more extensive discussion, see Leonard, *supra* note 196 .

⁴³⁴*Rumsfeld v. Forum for Academic and Inst’l Rts., Inc.*, 126 S.Ct 1297 (2006).

⁴³⁵*See supra* Section VI.A.1.

decisionmaking,” which the Court indicated would not include illegal discrimination.⁴³⁶

Finally, and most relevant to this Article, there are academic freedom claims between faculty and their employing universities. Specifically, faculty who are told of academic adjustments for their students might assert infringement of their individual academic freedom. Such claims might be enforced via lawsuit,⁴³⁷ and/or by a grievance under a labor contract or faculty handbook, or a complaint to accrediting agencies or professional organizations such as AAUP. The outcome of such claims seems clear if the academic adjustments are required by discrimination laws: academic freedom does not trump the obligation to comply with such laws.

If on the other hand the academic adjustments go beyond those which are legally required, the outcome may be different. As one commentator notes, institutional academic freedom is protected as the collective of individual faculty academic freedoms:

[C]ourts’ willingness to defer to [institutional] policies is in large part a consequence of their having been established or reviewed by duly constituted faculty bodies (e.g., course content is the province of curriculum committees; the overall level of academic rigor is ultimately traceable to decisions of faculty admissions committees). In a very real sense, then, the *institutional* academic freedom recognized in many judicial opinions may be viewed as the sum of acts of *individual* faculty academic freedom.⁴³⁸

⁴³⁶University of Penn. v. Equal Empl. Opp’y Comm’n, 493 U.S. 182, 199 (1990) (private university’s academic freedom does not include right to keep peer review documents from EEOC in connection with a tenure applicant’s discrimination claim); *id.* at 199 n.7 (defendant university does not assert race or gender are “academic grounds” for academic freedom purposes); *id.* at 198 (precedent cases on academic freedom involve “direct infringements on the asserted right to determine for itself on academic grounds who may teach”).

⁴³⁷One commentator references a lawsuit filed by a mathematics professor who was told to provide extra time on exam to a student with a disability. Laura Rothstein, Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities, 17 J. COLL. & UNIV. L. 471, 473 (1991).

⁴³⁸Steven Poskanzer, Higher Education Law: The Faculty 102 (The Johns Hopkins University Press 2002).

This means that the individual faculty member’s academic freedom likely does not extend to noncompliance with faculty-approved academic policies (such as, for example, a mandatory grade curve). It also means that institutional judgments by administrators rather than faculty may not have the protective armor of academic freedom and thus may be overridden by the individual faculty member’s academic freedom. Consequently, one important issue in academic freedom claims involving nonstatutorily required academic adjustments would be who made the decision to provide the non-required academic adjustments. If the law school faculty had voted to go beyond statutory requirements, precedent cases suggest requiring compliance with faculty-approved academic policies would not violate individual dissenting faculty’s academic freedom.⁴³⁹ If on the other hand nonacademic university officials attempted to make such a decision, the faculty member would seem to have a colorable claim of infringement of academic freedom in addition to the violation of accreditation standards described above.

The Ninth Circuit provided helpful guidance on these issues in the context of a professor’s successful challenge to his discipline pursuant to his school’s sexual harassment policy. In that case, the Ninth Circuit held that higher education discrimination policies which are vague and/or overbroad “impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . . [and] discourage[] the exercise of first amendment freedoms.”⁴⁴⁰

4. Triggering additional disability law obligations. If a law school chooses

⁴³⁹*See, e.g.,* Wozniak v. Conry, 236 F.3d 888 (7th Cir.), *cert. denied*, 121 S.Ct. 2243 (2001) (academic freedom of faculty member not violated by requiring compliance with faculty-approved grading policies).

⁴⁴⁰Cohen v. San Bernardino Valley College, 92 F.3d 968, 972 (9th Cir. 1996).

to serve students who have impairments which do not amount to statutory disabilities, and/or to make accommodations beyond the statutorily required ones, additional obligations under disability law may be triggered. First, serving students with impairments which do not amount to statutory disabilities and who therefore are not covered by disability laws may suggest that the law school “regards” such students as having a disability within the meaning of the statute.⁴⁴¹ Federal appeals courts are currently split on whether there are reasonable accommodation obligations toward persons who are regarded as having a disability. Relying primarily on the plain language of the statutes, which impose affirmative obligations equally on persons who actually have statutory disabilities and who are merely regarded as having statutory disabilities, the First,⁴⁴² Third⁴⁴³ and Tenth Circuits⁴⁴⁴ have held that reasonable accommodation obligations include persons regarded as having statutory disabilities. The Fifth,⁴⁴⁵ Sixth,⁴⁴⁶ Eighth⁴⁴⁷ and

⁴⁴¹As discussed earlier in the Article, persons who are regarded as having a disability are covered by the statutes as well as persons who actually have statutory disabilities. *See supra* note 35 and accompanying text. The Court in *Sutton* clarified that persons “regarded as disabled” are those who are perceived as having a statutory disability when in fact they do not have an impairment, or their impairment does not amount to a statutory disability. *See supra* note 47 and accompanying text. In *Sutton*, the employee did not fall into this category since there was no evidence that her employer perceived her as having a statutory disability. *Id.*

⁴⁴²*Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir. 1996).

⁴⁴³*Williams v. Philadelphia Housing Auth. Police Dep’t*, 380 F.3d 751, 773-76 (3rd Cir. 2004).

⁴⁴⁴*Kelly v. Metalics West, Inc.*, 410 F.3d 670, 675 (10th Cir. 2005).

⁴⁴⁵*Newberry v. East Texas St. Univ.*, 161 F.3d 276, 280 (5th Cir. 1998).

⁴⁴⁶*Workman v. Frito-Lay Inc.*, 165 F.3d 460, 467 (6th Cir. 1999).

⁴⁴⁷*Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999).

Ninth⁴⁴⁸ Circuits have rejected accommodation obligations toward “regarded as” persons, because those courts perceive “bizarre results” would result from imposing such obligations.⁴⁴⁹ Thus it appears that in some circuits a law school can, by serving a student who does not have a statutory disability, assume nondiscrimination and reasonable accommodation obligations to that student. A law school may be able to avoid this scenario by documenting to such students that while the school is choosing to serve them, the school does not believe them to have statutory disabilities. For example, in the illustrative scenario, if the law school decides to readmit dismissed Student but does not believe she has a statutory disability, it might choose to offer her accommodations, while at the same time clarifying with her that it does not perceive her as having a statutory disability.

Somewhat similarly, if a law school chooses to offer services to a student with a statutory disability beyond those which are statutorily required reasonable accommodations, the school’s obligations may indirectly become enhanced. If for example, a school offers a student with a disability a waiver of class attendance requirements (which normally would be an essential requirement for law students and thus not subject to reasonable accommodation), it does not necessarily operate to waive an argument a school might make in the future about its legal obligations. As one court has noted, making concession neither obligates a school to do it in future, nor makes the concession a legal reasonable accommodation.⁴⁵⁰ However, a jury may

⁴⁴⁸Kaplan v. City of Las Vegas, 323 F.3d 1226, 1231-33 (9th Cir. 1996).

⁴⁴⁹Id. (also noting that it would be a “perverse and troubling result” if “impaired [but not actually disabled] employees would be better off under the statute if their employers treated them as disabled even if they were not”).

⁴⁵⁰See *Wong I*, 192 F.3d at 820.

find actually making an accommodation to be persuasive evidence that it is a reasonable accommodation.⁴⁵¹ Moreover, a law school which offers tutoring or other personal services to students must offer those services on a nondiscriminatory basis to students with disabilities.⁴⁵² Thus, for example, making tutoring available to an impaired but not statutorily disabled law student triggers an obligation to make tutoring available on a nondiscriminatory basis to students with statutory disabilities.

5. Potential tort and contract claims. A student who is wrongfully readmitted (that is, readmitted when there is not a good faith basis for believing she will be academically successful) and who does not in fact succeed after paying the law school additional tuition rather than earning income or pursuing a different educational or training program may file tort and or contract claims against the school. While courts have rejected claims sounding in educational malpractice for public policy reasons, claims of misrepresentation⁴⁵³ (that, given the accreditation standards discussed above, readmission amounts to an affirmative representation by the law school of its belief that the student will succeed) and/or breach of the implied covenant of good faith and fair dealing in the contractual relationship between the student and the school⁴⁵⁴ may be viable.

Faculty for whose students nonstatutorily required academic adjustments are made without their consent may also have contractual claims in addition to those surrounding their

⁴⁵¹See *Wong I*, 192 F.3d at 820.

⁴⁵²See *supra* note 118 and accompanying text.

⁴⁵³See generally JAMES RAPP, 5 EDUCATION LAW § 12.05[4] (2006).

⁴⁵⁴See generally *id.* at § 12.05[5].

academic freedom. Some faculty handbooks or labor contracts may offer faculty the opportunity to grieve not just violations of school policy, but more generally decisions which the faculty member believes are wrong.⁴⁵⁵

B. Guidelines for complying with disability discrimination statutes in readmissions cases

1. Verify the existence of a statutory disability. It has long been clear that higher education students are responsible for self-identifying as having a disability, and for providing appropriate documentation of their disability.⁴⁵⁶ More recently, the Court's 1999 *Sutton* trilogy decisions requiring that mitigators be considered in determining whether the impairment is a statutory disability, and its 2002 *Toyota* decision emphasizing the requirement that the impairment "substantially limit" a major life activity in order to be a statutory disability, make it clear that having a diagnosed impairment is not necessarily equivalent to being a statutorily covered person with a disability. These developments may require some rethinking on the parts of schools and students, who may have been accustomed to equating a diagnosed impairment with a statutory disability.

Most of the disputes in the readmissions cases precede the Court's 2002 *Toyota* decision interpreting "substantially limits." Perhaps in part for this reason, when there was a documented impairment, most of the schools in the readmission cases did not dispute whether the complaining student was a statutorily covered person with a disability. In appropriate future

⁴⁵⁵ At the author's university, for example, the faculty handbook makes available a grievance process culminating in binding arbitration for decisions the faculty member believes to be "unfair, unjust, or in violation of University policy." Gonzaga University Faculty Handbook § 307.02a, available at guweb.gonzaga.edu/AVP+Office/Information+For+Faculty/default.htm.

cases, as illustrated by *Wong II* and *Marlon*, law schools may well challenge whether a dismissed student claiming a “disability” caused academic failure actually has a statutory disability.

Whether a dismissed student has a physical or mental impairment is not an issue about which law school faculty normally have special expertise. However, the law school can insist on documentation that the dismissed student claiming a disability has a diagnosed impairment, and that the impairment, with mitigators, does in fact substantially impair a major life activity.

Commentary by both legal scholars and disability experts suggests that few law students newly diagnosed learning disabilities, ADHD, or other mental impairments will meet the post-*Toyota* “substantially impairs” standard, since few such students’ learning disabilities substantially limit their learning in comparison to the average learner.⁴⁵⁷ Similarly, a student with a broken (writing) arm may not have the long-term or permanent substantial limitation of writing that the *Toyota* Court appears to require. A student with a mental illness such as bipolar disorder which is successfully treated with medication may not have substantial impairment with the medication mitigator. On the other hand, if the medication has significant negative side effects, such as rendering the student unable to think clearly at certain times of day, those side effects must be considered in determining if the student has a statutory disability.

In the illustrative scenario, the law school has undisputed evidence that Student has the impairment of dyslexia, and the readmissions committee has neither the expertise nor any informational basis to dispute the diagnosis. If the committee has questions about the diagnosis, it may consult with disability experts within the university, such as the disability services office,

⁴⁵⁶See *supra* note 109 and accompanying text.

⁴⁵⁷See *supra* notes 94-100 and accompanying text.

and in appropriate cases might ask the student for permission to speak with Evaluator, obtain additional information from Evaluator, or even obtain an additional evaluation or outside expert review (if from a person of the school's choosing at the school's expense). Otherwise, disputing the diagnosis suggests the committee is improperly operating based on stereotypes.

As discussed above, however, having an impairment and being a statutorily protected person with a disability are not the same thing; the impairment must, with mitigators, substantially impair a major life activity such as learning. The evidence provided in the illustrative scenario suggests the impairment does not amount to a statutory disability. Student has apparently used self-mitigators (coping strategies) in the past, with success; these must be considered in the analysis. With a B average in college in a subject area which involves substantial reading and without any accommodations, and an LSAT high enough to gain admittance to law school, Student's record indicates that Student's prior learning, and thus overall learning, may not have been substantially limited. Any factual findings by Evaluator about the extent to which the impairment affected Student should normally be accepted, but to the extent the committee has additional information on this point (e.g. the undergraduate success) that additional information is also relevant.

Who has expertise and responsibility for making the legal determination of the presence of a statutory disability will vary from one law school to another; perhaps it is the university disability services office, perhaps the committee, perhaps university counsel.⁴⁵⁸ What is clear is

⁴⁵⁸See James Leonard, *Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEBR. L. REV. 27, 34 (1996) (status of dismissed student as a person with a disability is not an academic judgment and courts will not defer to school's determination on this issue).

that: 1) Evaluator's diagnosis of an impairment is not necessarily sufficient, and 2) Evaluator lacks the expertise and responsibility for determining that the impairment amounts to a statutory disability.⁴⁵⁹

2. Carefully document consideration of the case by a faculty committee and/or the full faculty. The court cases also provide substantial guidance as to what constitutes a nondiscriminatory readmissions process when a law student claiming a disability is involved, and specifically what will trigger judicial deference to the school's judgment not to readmit. First and foremost, the cases announce a policy of deference when the school's judgment is a careful, truly academic one; a factual record of introspection about the basis for the decision and the consideration of disability information is specifically required by some courts.⁴⁶⁰ The newest Supreme Court decisions in *Grutter* and *Gratz* are significant in according deference to a law school's academic judgment in the context of a race discrimination claim requiring strict judicial scrutiny. Conspicuously, the Court in those cases deferred to a law school faculty-approved, subjective, holistic admissions policy tied to specific academic needs on the one hand.⁴⁶¹ The Court did not defer to an undergraduate admissions policy created by nonacademic administrators, and which was neither subjective nor holistic and was not tied to specific

⁴⁵⁹The committee may decide to proceed on the explicitly stated assumption, without so finding, that Student is a statutorily protected person with a disability. If the committee decides to do so, and/or to go beyond statutory requirements in treating a readmissions petitioner as disabled, it should of course note that in its report so the full faculty can engage in meaningful review.

⁴⁶⁰*See infra* Section V.C.3.

⁴⁶¹*See supra* notes 216-22 and accompanying text.

academic needs.⁴⁶² These cases counsel law schools, both in initially setting standards for dismissal and for readmission, and in applying the readmissions standards, to do so as a faculty, or as a committee or other group of faculty with delegated authority from the faculty, rather than as a decision by a single administrator or administrative group⁴⁶³ and to set and apply standards that are tied to the law school's academic integrity and needs, in ways which are documented by the law school. It is clear from a review of relevant authority that neither a court nor OCR will normally second guess generally applicable readmissions standards.

Most law schools appear to assign at least initial responsibility for evaluating readmissions petitions to a faculty committee, with some schools delegating actual decision making authority to the committee.⁴⁶⁴ While no court or OCR opinion has questioned the decision by committee approach, there are advantages to faculty-wide decisions. Reserving the decision to the full faculty, with a recommendation from a committee, both helps avoid appearance of bias by individual/small groups in some of the cases discussed earlier⁴⁶⁵ in which schools encountered difficulty, and ensures consistency of application of the readmission

⁴⁶²See *supra* notes 223-230 and accompanying text.

⁴⁶³See *Guckenberger v. Boston University*, 974 F.Supp. 106, 149 (D. Mass. 1997) (applying Wynne limited deference standard to determining whether course substitutions were reasonable accommodations or altered essential academic standards, University Provost's unilateral determination, based in part on stereotype and bias, was insufficient); *id.* at 154 (ordering university to convene a faculty committee to make this determination).

⁴⁶⁴The author is unaware of any law schools which leave readmissions decisions to a single person, which was problematic for the medical school in *Singh* and *Steere*, nor of law schools whose parent university has the power to overturn the law school faculty's decision on readmission. At least the latter would appear to violate accreditation standards as discussed earlier in Section VI.A.2..

⁴⁶⁵See *supra* Section V.C.1.

standard from one year to the next.

3. Make a decision which is holistic and considers context. The cases also emphasize that deference is appropriate when academic decisions are made holistically and in context. It is thus appropriate for law schools to use context, both school-wide and student-specific, to make readmissions decisions, and to document that context. At the school-wide level, for example, the law school may have data on the law school grades and/or bar exam performance of readmitted students from past years and may accordingly adjust its readmissions standards and/or how strictly it applies them to current petitions. Law schools also operate under ABA accreditation standards that prohibit them from readmitting students unless the school believes the student will be successful.⁴⁶⁶ Law schools may also wish to consider the extent to which faculty and other resources are available to help marginal students succeed. At the student-specific level, the law school has a wealth of information about each petitioning student, most importantly the feedback of the faculty who have actually instructed and evaluated the student, and if applicable the student tutors who have worked with the petitioning student,

⁴⁶⁶ABA Standards for the Accreditation of Law Schools provide in relevant part:

Standard 501. ADMISSIONS. . . (b) A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar.

Standard 505. PREVIOUSLY DISQUALIFIED APPLICANT. A law school may admit or readmit a student who has been disqualified previously for academic reasons upon an affirmative showing that the student possesses the requisite ability and that the prior disqualification does not indicate a lack of capacity to complete the course of study at the admitting school. . . . For every admission or readmission of a previously disqualified individual, a statement of the considerations that led to the decision shall be placed in the admittee's file.

AALS Standard Section 6-2(1) Admissions provides in pertinent part: a. A member school shall admit only those applicants whose applications have been evaluated pursuant to a process consistent with Bylaw 6-3 and who appear to have the capacity to meet its academic standards.

perhaps in an academic resource program. The law school also has information from the student's file including the student's LSAT score and undergraduate grades, as well as the student's actual exam answers and numerical data comparing the student's exam and course grades with those of classmates. Several decisions, including *Horowitz* and *Ewing*, teach that documentation of this complex basis for each readmission decision is crucial.⁴⁶⁷ While collecting and synthesizing this information and memorializing the basis for the decision is time consuming, it is crucial to assist the school in making both correct and legally defensible admissions decisions.⁴⁶⁸

4. Give reasoned and informed consideration to disability information, with appropriate confidentiality. To the extent a petitioning student submits disability information, it must be considered in a reasoned and informed way. As discussed below, however, the committee need not and should not defer to the disability information to the extent it offers an opinion on an academic issue, such as the student's ability to succeed if readmitted, or a legal issue, such as whether the student has a statutory disability. Normally the disability information submitted by a student is an evaluator's report containing a diagnosis and recommendations addressed to the committee, written so that it can be readily understood by law faculty. The

⁴⁶⁷See *supra* notes 171-202 and accompanying text.

⁴⁶⁸As discussed earlier, most law school admissions decisions are made over the summer, when most law faculty are not on contract. It may thus be tempting to do this often uncompensated work over the summer break in a less than completely thorough fashion. The author suggests that admissions work is important and time consuming enough to compensate 9-month faculty who are willing to take time from their summer to perform it, just as faculty who teach summer school are paid, and faculty who engage in scholarship over the summer may receive a research stipend. The *DePaul* OCR opinion, discussed *supra* at notes 377-396 and accompanying text, illustrates the consequences when such decisions are made in a way which appeared to OCR to be less than careful and thorough.

court decisions and OCR opinions do not suggest that under usual circumstances the school needs to consult with technical experts in order to interpret disability information.⁴⁶⁹ In fact, a policy or practice which requires all petitioning students' disability information to go to a university disability services office, with a summary report of that information prepared by that office for the committee and not the underlying disability information, may be a form of disability discrimination. Specifically, such a policy would preclude students from using unfiltered information to make a strong, documented case for readmission, a criterion which OCR has indicated is a legitimate factor in making readmissions decisions.⁴⁷⁰ On the other hand, in the event a student wishes to use the services of the university disability office in connection with her petition, she should be allowed to do so. Moreover, to the extent a law school committee is unclear about any disability information provided, or, as in *DePaul*,⁴⁷¹ there is any evidence that any committee member is engaging in stereotypical or otherwise discriminatory thinking, disability experts (such as university counsel, the university disability services office, and/or the evaluator as appropriate) could be brought in.

While the ADA's employee provisions require confidentiality for employee disability

⁴⁶⁹See, e.g., *Marlon*, discussed *supra* at notes 280-281 and accompanying text (disability services office evaluation attached to student's petition, but office is not otherwise involved, opinion expresses no concern about this and grants summary judgment for the school); *Anderson*, discussed *supra* at notes 249 and 249 and accompanying text (student's counselor's report apparently went directly to committee without involvement of disability services office, says student can now handle stress of law school; committee does not agree, opinion expresses no concern about this and grants summary judgment for the school).

⁴⁷⁰See *supra* notes 360-361 and accompanying text.

⁴⁷¹See *supra* notes 377-396 and accompanying text.

information,⁴⁷² there are no corresponding provisions concerning student disability information under Section 504 or the ADA.⁴⁷³ As student records information, however, student disability information is subject to FERPA (Family Education Rights and Privacy Act, the federal student records statute).⁴⁷⁴ FERPA requires confidentiality of information contained in student records unless the student has given written consent for disclosure,⁴⁷⁵ or the disclosure is pursuant to one of FERPA's many exceptions.⁴⁷⁶ Most pertinent is FERPA's exception for internal sharing with school employees who have "legitimate educational interest" in the information,⁴⁷⁷ as defined in the school's student records policy. Under this exception, it is appropriate to share disability information with agents of the school, such as the committee making readmissions decisions/recommendations, and the full faculty if the readmission decision is its to make. Persons who have such information must keep it confidential; disclosure beyond that permitted by FERPA may be treated as a form of disability discrimination.

⁴⁷²See 42 U.S.C. §§ 12112(d)(3)(B); (d)(4); 29 C.F.R. § 1630.14; EEOC Enforcement Guidelines on Pre-Employment Inquiries Under the Americans with Disabilities Act, 8 FEP Manual 405:7191, 7201-7202 (BNA 1995) (requiring employers to keep ADA-covered employees' medical information in a confidential file separate from the employee's personnel file).

⁴⁷³Section 504 regulations do require that under the limited circumstances in which it is permissible for schools to make pre-admissions inquiries about applicants' disabilities, such information be kept confidential. 34 C.F.R. § 104.41(c)(2).

⁴⁷⁴20 U.S.C. § 1232g. For more detailed discussions of FERPA, see Dixie Snow Huefner and Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. L. REP. (WEST) 469 (2001); Lynn M. Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. L. REV. 617 (1997).

⁴⁷⁵20 U.S.C. § 1232g(b).

⁴⁷⁶*Id.*

5. Defer, and refuse to defer, as appropriate: university administrators and law faculty should defer when appropriate, but the law faculty should not defer, internally or externally, on academic issues. The law school must also determine which issues and decisions regarding the readmission petition are: 1) academic, such as whether a student is likely to be successful if readmitted and whether a requested accommodation would alter the law school's academic standards, and thus ones in which it has primary expertise and the responsibility for making the ultimate judgment, 2) concern the existence and nature of an impairment, for which a disability expert has primary expertise and should make the ultimate judgment, or 3) legal, such as whether an impairment is a substantially-limiting-with-mitigators statutory disability.

In the illustrative scenario, Evaluator recommends and Student requests accommodations consisting of tutoring, note taking assistance, elimination of the writing requirement and extra time on exams. Their recommendation by Evaluator does not necessarily mean these adjustments are legally required reasonable accommodations. At many law schools, the university disability office makes recommendations for reasonable accommodations, while the law school retains the final decision, primarily so that it can determine whether any proposed accommodations would alter the law school's academic standards or present an undue hardship. Here, assuming Student is a statutorily covered person with the disability of dyslexia/reading disorder, there are two proposed accommodations, notetaking and extra time on exams, which are rather common for dyslexic/reading disordered students and should be familiar and noncontroversial to the committee. As to the recommendation for tutoring, the statutes provide that personal services are not required, although to the extent a school makes tutoring available

⁴⁷⁷20 U.S.C. § 1232g(b)(1)(A).

to students without disabilities (as this school apparently does through its academic resource program for 1Ls) it must make such tutoring available to students with disabilities on a nondiscriminatory basis.⁴⁷⁸ Finally, as to the elimination of the writing requirement, the decision as to whether this amounts to a change in academic standards is an academic one about which the law school, not Evaluator nor the university disability office, has expertise and ultimate responsibility.⁴⁷⁹

Not deferring to internal or external disability experts on academic issues is expected by the courts,⁴⁸⁰ and is important both to making good decisions on the merits and to preserving court and/or OCR deferral if those decisions are challenged. Consider, for example, a law school committee which defers to the opinion of its disability services office, or that of the student's evaluator, that a newly diagnosed student's grades would be substantially higher if she were allowed extra time on exams, when the committee really thinks that the student had not grasped legal analysis (in which event the student extra time will not improve the student's exam performance). This committee's actions suggest that the decision is not such an academic one. Consequently a court has little reason to defer to that judgment. Conversely, university administrators hearing internal appeals of readmissions decisions or internal disability

⁴⁷⁸See *supra* note 118 and accompanying text.

⁴⁷⁹Of course, even if not a legally required reasonable accommodation, the law school may decide to waive it or offer an alternative adjustment.

⁴⁸⁰See, e.g., *Marlon*, discussed *supra* at notes 280-281 and accompanying text (disability services office report on evaluation is not an independent judgment, nor legal finding); *Anderson*, discussed *supra* at notes 245 and 249 and accompanying text (affirming summary judgment for school which denied readmission despite report from student's counselor that student can now handle stress of law school).

discrimination complaints should also defer to the law faculty's academic judgments. Second guessing by university administrators of the law faculty's decisions on academic issues invites courts and OCR to do so as well, intrudes upon the expertise of the law faculty, and violates accreditation standards.⁴⁸¹

6. Apply the readmission standard in a nondiscriminatory way. The school need not make the “correct” decision, with the aid of hindsight, on a petition, but it must apply its readmission process and standards in a nondiscriminatory way. This obligation runs from the mundane (e.g. applying a deadline for documentation equally to disability and other information) to the complex (e.g. predicting a petitioning student's future success). A school decision on the more complex end of the spectrum is whether to apply its readmission standard strictly or leniently. For example, if a school's policy or practice was to be lenient about the “extraordinariness” of circumstances required if a student's GPA is very close to the required minimum, the school must be equally lenient about extraordinariness when a student with a disability's GPA is very close to the required minimum. It would be helpful for law schools to collect and periodically review the readmission decisions of all students over a several-year period to ensure that standards are being applied nondiscriminatorily, and as OCR is likely to do if it investigates a complaint.

a. *Nondiscriminatory consideration of disability as an extraordinary circumstance.* Applying the readmission standard to Student's petition in the illustrative scenario, and assuming arguendo that Student has a statutory disability, the committee must first determine whether the student's failure was caused by “extraordinary circumstances.” The

⁴⁸¹See *supra* Section VI.A.2.

committee's determination of the cause of academic failure is an academic judgment for which the law school has expertise and responsibility. Student's asserted disability may be, but is not automatically, an extraordinary circumstance. In fact, the impairment could be an extraordinary circumstance even if it does not amount to a statutory disability.⁴⁸² In the illustrative scenario, there is conflicting evidence on this issue, both about causation and about whether Student had a reasonable opportunity to obtain administrative relief prior to dismissal. As to the cause of failure, there is Evaluator and the student's claim that an undiagnosed and unaccommodated disability is the cause. On the other hand, there is a suggestion that an unwise decision to spend inordinate time on extracurricular activities is a problem. Even more significantly, there is evidence (the "very low" LSAT score) that the student was not one for whom legal analysis would come easily, and that Student's failure to master legal analysis and some of the basic concepts (based on instructor feedback) was the cause of the failure. As to whether there was a reasonable opportunity to obtain administrative relief, the committee might reasonably conclude that Student has the legal obligation to self-identify and document a disability, and then to request accommodations. The committee might reasonably conclude that Student should have pursued disability documentation and accommodations after receiving her poor fall grades, in concert with her actual understanding that she likely has a reading disability and could be tested for it. On the other hand, the committee might reasonably conclude that a person similarly situated to Student who has always done well without accommodations is reasonable in thinking she can "tough it out" successfully. In any event, the committee must apply the extraordinary

⁴⁸²In such a case, however, disability discrimination claims would not be available to the student for review of the school's readmission decision.

circumstances standard (with the tort-like multiple causes and reasonable person analysis as illustrated by the scenario) in the same way to Student's case as it does to other cases not asserting a disability, or at least no more harshly than it does to other cases. For example, if another student asserts her failure was caused by a nasty divorce during her first year, the committee must do a no less strict "are the circumstances extraordinary/causation/reasonable person analysis," with the same degree of strictness to that case.⁴⁸³

b. Nondiscriminatory consideration of disability and prediction of future success if readmitted. Whether the student would be academically successful if readmitted is the ultimate academic judgment for which the law school has the expertise and responsibility. In the illustrative scenario, as discussed above, there is conflicting evidence as to the cause of the failure and thus conflicting evidence about Student's ability to succeed in the future. The law school faculty have provided legal instruction to Student for a year; no one else has done so. The law school faculty collectively have decades if not centuries of observing law students go on to succeed or fail in law school, on the bar exam, and in practice. The law school faculty know that some students, while bright, are just not intellectually suited to do legal analysis.

In the scenario, Evaluator has opined that Student will succeed if provided with the requested accommodations. While not disputing Evaluator's good intentions, she has neither the information (she is likely not privy to the student's LSAT score, nor the instructor and tutor feedback) nor the expertise (she has not attended law school, taught law school, taken a bar

⁴⁸³One approach the committee may want to consider is to assume without deciding that the newly diagnosed disability is an extraordinary circumstance, or alternatively to make no

exam, nor practiced law) to form an opinion about likely academic success to which the law school must or should defer. Nor, in fact do the university disability services office or university administrators such as provosts have the expertise to helpfully opine on this ultimate academic judgment call. The committee must consider all of the disability information provided by the student, including Evaluator's prediction of future academic success. The actual judgment, however, in all its subjectivity and complexity, should and must be made by the committee. This is necessary not only to make the best decision possible but also, and somewhat ironically, to preserve the possibility of judicial deference to the decision down the road. As previously discussed, if a law school defers to the judgment of another on this issue, it risks a court later seeing the issue as not such an academic one and thus not deferring to the school's decision.

In predicting success, the committee should do its best to factor in legally required reasonable accommodations if the student is a person with a statutory disability. Specifically, the committee should try to predict how Student in the illustrative scenario would perform if provided with reasonable accommodations (in the scenario, likely notetaking and extra time on tests)⁴⁸⁴ In some cases where the student has received accommodations such as extra time on tests and still not earned the minimum required grades, making this prediction is fairly straightforward. In the illustrative scenario, there is no data on Student's performance with accommodations, and the committee simply must do its best to make a prediction. The committee may, for example, find it helpful to see if Student performed better on law school

finding on this issue, and move on to the future success criterion.

⁴⁸⁴Note that in the scenario, Student was already taking a reduced load, a common accommodations for students with dyslexia, as they need more time to complete the reading for each class.

assignments such as take home exams and legal writing papers which did not have time limits. If she did not, it suggests that something other than reading and writing under time limits (perhaps the problems with analysis and concept mastery identified by the instructors) is the primary cause of the student's failure, and additional time on exams is not likely to significantly improve performance. The scenario is further complicated by the fact that some of the requested accommodations may not be reasonable ones as discussed above.⁴⁸⁵ On this last issue, one approach the committee may want to consider is to explicitly assume without deciding that the requested accommodations are reasonable, and predict success with all the requested accommodations.

In the illustrative scenario, there is conflicting evidence on Student's ability to succeed. On the one hand is the evaluation which may be taken to suggest that Student's exam performance underestimates her mastery of the curriculum, and the "very low" LSAT without accommodations might also be underestimating Student's potential. On the other hand, the LSAT score suggests Student's native legal reasoning ability may be limited, and feedback from Student's instructors suggests the problem is one with legal reasoning rather than reading, which will not be cured with additional exam time. Student's extremely active role in extracurricular activities and failure to attend tutoring sessions suggests other possible causes of her failure. Student's history of academic success, including a B average in a major subject area requiring much reading, suggests her reading abilities may not be severely limited. Student's suggestion in her petition that she needs tutoring and a waiver of the writing requirement to succeed might be taken to suggest that she is not otherwise qualified for readmission if those adjustments are

⁴⁸⁵See *supra* note 478 and accompanying text.

determined to be part of the school’s fundamental academic standards. The committee could reasonably decide either way; it must, and can only, do what it thinks is the “right thing,” and can expect a court to defer to its decision when it does so if it follows the above-described guidelines.

VII. CONCLUSION

It is an honor for college administrators that the Supreme Court has selected higher education as the one unique community in our society eligible for such judicial deference. Like all honors, it comes with a responsibility . . . a challenge to all those working in higher education: use your educational judgment carefully, deliberately, and often. If we continue to do so, we will both earn judicial deference to our efforts and continue to create vibrant, living, learning environments for our students, faculty, and staff.⁴⁸⁶

While this statement was made with regard to higher education academic decisions generally, it applies with equal force to the specific category of deciding whether to readmit academically dismissed students who claim a disability. The confluence of strict standards for defining who has a statutory disability, and the courts’ largely deferential approach to disability discrimination claims by academically dismissed students, means that schools can normally make readmissions decisions about students with disabilities without worrying about being reversed in court. Law schools thus currently have the freedom to do the right thing, as their educational judgment defines it: to “use [our] educational judgment carefully, deliberately, and often” to make readmissions decisions, including denying readmission to students with disabilities, nondiscriminatorily and in good faith. The court cases suggest that the courts believe law schools have been meeting this standard, and they must endeavor to continue to do

⁴⁸⁶Edward Stoner and Michael Showalter, *Judicial Deference to Educational Judgment: Justice O’Connor’s Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students In the Eighteen Months Before Grutter*, 30 J. COLL. & UNIV. L. 583,

so, or risk the judicial deference law schools currently enjoy.