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Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements

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Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements

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ABSTRACT

Statistics compiled by the American Council on Education reveal that the number of students reporting learning disabilities and other mental handicaps in higher education continues to grow, leading to double time on exams, impunity from spelling errors, distraction free environments for exam taking, alternate formats for exams, readers, and other accomodations that would increase the likelihood of success for any student. At the same time, the cases demonstrate that universities and colleges occasionally accommodate students who do not meet the ADA's definition of "disabled." This article examines the ADA and cases involving mentally disabled students to assist institutions of higher learning in developing guidelines and policies for accommodating students within the confines of the law.

I. INTRODUCTION

The numbers of students reporting mental disabilities in higher education continue to grow at an astonishing rate. In 1988, 16.1% of students with disabilities reported a learning disability. In 2001, the per-

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centage had more than doubled, rising to 40.1%.[1] During the same period, all other reported disabilities declined. An often-cited explanation for this phenomenon centers on the relatively recent discovery of handicapping learning disabilities, such as dyslexia, dyscalculia, dysgraphia, dyspraxia, Attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity Disorder (ADHD), and the enactment in 1975 of the Education for All Handicapped Children Act (reauthorized in 1997 as the Individuals with Disabilities Education Act),[2] which gave rise to the "entitlement model" of special education and began the movement to help disabled students achieve success through support and services.[3] Learning disorders have always existed; they simply were not recognized as disabilities requiring accommodations. Today, the law protects mentally disabled students and requires institutions of higher learning to provide accommodations intended to ameliorate the effects of an individual's functional limitations.

Claiming a learning disability may lead to double time on exams, course waivers, distraction free environments for taking exams, addi-

1. The following table appears in AMERICAN COUNCIL ON EDUCATION, COLLEGE FRESHMEN WITH DISABILITIES: A BIENNIAL STATISTICAL PROFILE, 7 tbl.2 (2001). It is reproduced in its entirety.

TYPES OF DISABILITIES REPORTED BY FULL-TIME COLLEGE FRESHMAN ATTENDING FOUR-YEAR INSTITUTIONS, BY PERCENTAGE: SELECTED YEARS

Disability	1988	1991	1994	1996	1998	2000
			(by percentage)			
Hearing*	11.7	10.5	9.3	8.5	8.5*	8.6
Speech	3.6	4.2	3.3	3.2	3.0	2.9
Orthopedic	13.2	12.2	9.7	9.0	8.1	7.1
Learning disability	16.1	17.6	24.5	28.3	34.3	40.4
Health-related	15.8	15.4	17.6	17.4	16.4	15.4
Partially sighted or blind	30.0	31.3	27.3	23.7	19.9	16.1
Other	19.1	18.9	17.7	18.6	17.8	16.9

*Hearing data were not collected in 1998. This figure reflects 1996 data.

Notes:

- Above data should be interpreted in the following way: For example, in 2000, 40.4 percent of students with disabilities reported a learning disability.
- Columns do not necessarily add to100 percent because students could list more than one disability.

Source: HEATH Resource Center, American Council on Education. (Based on unpublished data from the Cooperative Institutional Research Program, UCLA, selected years.)

2. 20 U.S.C. § 1400 *et seq.* (1975).

3. Shelby Keiser, *Test Accommodations: An Administrator's View, in* ACCOMMODATIONS IN HIGHER EDUCATION UNDER THE AMERICANS WITH DISABILITIES ACT 47 (Michael Gordon & Shelby Keiser eds., 1998) [hereinafter ACCOM. IN HIGHER EDUC.].

tional days for completing written assignments, impunity from spelling errors, alternative exam formats, note takers, readers, and many others. These accommodations increase the likelihood of success in college for any student who for whatever reason is unable to compete unaided. When the student receiving accommodation is legally entitled, and the accommodation is tailored to reduce the effects of the individual's disabling condition, the result is a level playing field in which no student has an unfair advantage. Students are entitled to accommodations if they meet the requirements of the Americans with Disabilities Act (ADA).[4]

Students may not meet ADA requirements for various reasons. Students may lack adequate documentation to establish impairment, or they may be impaired, but not substantially limited in any major life activities when compared with most people in the general population. Further, students may be disabled under the ADA, but there may be no reasonable way to accommodate their functional limitations without lowering academic standards or altering the academic program. In these situations, there is no federal legal requirement for institutions to provide accommodation.[5]

Nevertheless, institutions of higher education occasionally accommodate students who are not legally entitled under the ADA. The much-celebrated case of *Guckenberger v. Boston University* provides one example.[6] Students at Boston University sued after accommodations in the form of course waivers that they had been receiving were withdrawn. The court found that several of the students lacked sufficient information to determine whether they were entitled to accommodations, and that the course waiver accommodations were not reasonable.[7] During the trial, Dr. Robert Shaw from Brown University's learning disabilities department testified that students come into the learning disabilities office at Brown requesting accommodations even though they lack sufficient documentation, and that he gives them what he refers to as "vanilla" accom-

4. 42 U.S.C. § 12101 *et seq.* (1990).

5. State laws that may impact decisions to accommodate individuals in higher education are beyond the scope of this article.

6. 957 F. Supp. 306 (D. Mass. 1997) [hereinafter *Guckenberger I*]; 974 F. Supp. 106 (D. Mass. 1997) [hereinafter *Guckenberger II*]; 8 F. Supp. 2d 82 (D. Mass. 1998) (memorandum and order on the issue of course substitution); 8 F. Supp. 2d 91, 96 (D. Mass. 1998) (memorandum and order on assessment of attorneys' fees and costs).

This article examines several cases in which students were granted accommodation even though they did not meet the ADA's requirements. *See infra* Section III.

7. *Guckenberger II,* 974 F. Supp at 119.

modations anyway.[8] He explained that vanilla accommodations include extra time on exams and distraction free environments for testing.[9]

As *Guckenberger* reveals, institutions of higher education accommodate unentitled students. Perhaps they do not understand what the law actually requires,[10] or are motivated by a desire to do the "politically correct" thing. They may also hope to avoid costly litigation.[11] Either they do not know that they are accommodating unentitled individuals, or they do know, but prefer not to make waves. Whatever the motivation, and even if it happens only rarely, granting accommodations to students who are not legally entitled to receive them creates an unfair system in which students who are earning their degrees by traditional means must compete with students having greater advantages, and greater likelihood of success.[12]

This article does not challenge the philosophical underpinnings of the ADA in its application to mentally handicapped individuals in higher education. An enlightened society must make educational opportunities available to all of its citizens. The aim here is more practical. Offered instead is an examination of the law and cases involving mentally disabled students so as to assist institutions of higher education in developing guidelines and policies for accommodating students.

II. THE LEGAL FRAMEWORK

In 1990, Congress passed the ADA, extending disability protection to private employers and places of public accommodation, and to "all programs, activities and services provided or made available by state and local government or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance."[13] The ADA accomplishes its broad remedial purpose through subchapters

8. Lawrence S. Elswit et al., *Between Passion and Policy: Litigating the* Guckenberger *Case*, 32 J. LEARNING DISABILITIES 292, 299 (1999).

9. *Id.*

10. *See* Price v. Nat'l Bd. of Med. Exam'rs, 966 F. Supp. 419, 422 (S.D. W. Va. 1997).

11. *See* Dubois v. Alderson-Broaddus Coll., 950 F. Supp 754 (N.D. W. Va. 1997).

12. For a thorough treatment of the fairness issue, *see* MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE, AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILTIES (1997).

13. H.R. 101-485(II), 101st Cong. (1990), reprinted in 1990 4 U.S.C.C.A.N. 303, 360. Prior to the enactment of the ADA, disabled individuals relied on the Rehabilitation Act of 1973, which prohibited discrimination by programs that received federal financial assistance. 29 U.S.C. §

called "Titles." Title I applies to employers with 15 or more employees so long as they engage in an industry that affects interstate commerce.[14] Title II applies to public entities, including states and local governments, and Title III applies to places of public accommodation. Private entities such as universities are considered public accommodations if their operations affect commerce.[15] Under the ADA, institutions of higher education, being either state entities or places of public accommodation, may not discriminate against disabled students because of their disability.[16]

Discrimination includes failing to provide reasonable accommodation to disabled students.[17] But only disabled individuals are legally entitled to accommodation, and only reasonable accommodation is required. Who then is a disabled student for purposes of the ADA? And, what is reasonable accommodation?

III. THE ADA DEFINITION OF DISABILITY

With respect to an individual, the ADA defines disability as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.[18]

An individual claiming entitlement to accommodation due to disability might theoretically meet the requirements of any one of these three

794(a) (year). Cases against universities and colleges are generally brought under both the ADA and the Rehabilitation Act. Because of the symmetry of the two laws, precedent interpreting the Rehabilitation Act is applied in cases arising under the ADA, and courts often discuss the two laws interchangeably. Thus, for ease in developing the issues in this article, henceforth, references will be only to the ADA.

14. 42 U.S.C. § 12111.

15. 42 U.S.C. § 12181.

16. Title II of the ADA provides that "[s]ubject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Similarly, Title III provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182.

17. 42 U.S.C. § 12131(2); 42 U.S.C. § 12182 (b)(2)(A)(ii).

18. 42 U.S.C. § 12102(2).

criteria. Generally, however, individuals establish that they have a mental impairment that substantially limits a major life activity.[19] This definition involves analysis of three basic issues: (1) whether the individual has a mental impairment; (2) whether the impairment limits a major life activity; and (3) whether the limitation is substantial.

A. What Constitutes a Mental Impairment under the ADA?

Regulations promulgated by the Equal Employment Opportunity Commission (EEOC) define mental impairment as "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[20] Examples of mental illnesses include bipolar disorder, major depression, anxiety disorders such as panic disorder, obsessive-compulsive disorder, and post-traumatic stress disorder, schizophrenia and personality disorders.[21] Mental impairment under the ADA does not encompass common personality traits such as irritability, poor judgment, or irresponsible behavior.[22]

Mental health professionals often rely on the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)[23] in diagnosing mental impairments in individuals. However, the DSM-IV lists disorders that are expressly excluded from either the statutory language or the definition of disability contained in the regulations. Current

19. It is also possible for a student to be discriminated against on the basis of a perceived disability. 42 U.S.C. § 12102(2)(C).

20. 29 C.F.R. § 1630.2(h)(2)(1993). The ADA does not define "mental impairment," "major life activity," or "substantially limits." Authority to promulgate regulations under the ADA was divided among three agencies. The Equal Employment Opportunity Commission (EEOC) has authority to regulate under Title I, 42 U.S.C. §12116, the Attorney General regulates under Title II, 42 U.S.C. § 12134, and the Secretary of Transportation regulates transportation provisions under Title III, 42 U.S.C. § 12186(a)(1). The U.S. Attorney General regulates the remaining provisions. 42 U.S.C. § 12186(b). The Supreme Court recently noted that no agency has been given authority to regulate under the generally applicable provisions of the ADA, which include the definition of disability. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999). In *Sutton*, the Court quoted extensively from the regulations, but declined to decide what deference courts should give to agency regulations interpreting these provisions. The lower courts have been divided as to the binding nature of agency regulations. Nonetheless, courts having occasion to decide cases arising under the ADA generally consider agency regulations, even if they decide not to follow them. For this reason, included are relevant agency regulations that are helpful in understanding the ADA.

21. SECTION 504 COMPLIANCE HANDBOOK, LAWS, REGULATIONS & ORDERS, App. III, 621 (1997). The list is not meant to be exhaustive, only exemplary.

22. Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989).

23. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV (1994).

use of illegal drugs is one example.[24] Homosexuality is another.[25] Thus, a person may be diagnosed with a mental disorder, yet not qualify as disabled under the ADA. The opposite is also true: a mental condition may not be listed in the DSM-IV, yet qualify as impairment under the ADA. The United States Supreme Court has stated that an impairment need not appear in a list of disorders to constitute a disability under the ADA.[26] Nonetheless, courts recognize the DSM-IV as persuasive authority in the identification of mental impairments.[27]

Mental impairments for which students in higher education seek accommodation are usually, though not always, impairments affecting learning, or cognitive functioning. Dyslexia (difficulty with reading) is the most common cognitive impairment that college students report,[28] but they may also report disorders such as dyscalculia (difficulty with math), dysgraphia (difficulty with writing), anxiety disorders, Attention Deficit Disorder (ADD) and Attention Deficit/Hyperactivity Disorder (ADHD).[29] Because individuals with these disorders exhibit characteristics also prevalent in normal adult behavior, great care must be taken to document that the individual displays otherwise normal behaviors in an abnormal range. For example, the core symptoms of ADHD are inattention and impulsiveness, both of which are basic human characteristics. Similarly, many people may suffer from reading problems associated with poor study skills or a lack of background knowledge, but being a poor reader does not qualify as a learning disability.[30] Finally, it is estimated that approximately 25%

24. 42 U.S.C. § 12114.

25. 29 C.F.R. § 1630.3(e).

26. Bragdon v. Abbott, 524 U.S. 624 (1998) (establishing HIV positive status as an impairment).

27. Price v. Nat'l Bd. of Med. Exam'rs, 966 F. Supp. 419, 422 (S.D. W. Va. 1997).

28. Barbara J. Lorry, *Language-Based Learning Disabilities, in* ACCOM. IN HIGHER EDUC., *supra* note 3, at 131.

29. There is reference in the literature to a learning disability called "dysrationalia" or difficulty with thinking. Keith E. Stanovich hypothesized dysrationalia in 1993 as part of a thought experiment, arguing that such a disability was forced upon the field of learning disorders by the "discrepancy" based definition of learning disorders. Keith E. Stanovich, *Dysrationalia: A New Specific Learning Disability*, 26 J. LEARNING DISABILITIES 501 (1993). For a discussion of the discrepancy model, *see infra* note 62-77 and accompanying text.

30. Keith E. Stanovich, *Explaining the Differences Between the Dyslexic and the Garden-Variety Poor Reader: The Phonological-Core Variable-Difference Model*, 21 J. LEARNING DISABILITIES 590 (1988).

of the adult population will experience an anxiety disorder at some point during the normal life span.[31] Test anxiety is an example.

Learning disabilities offices are grappling with the dilemma of whether test anxiety is an impairment that should give rise to accommodation under the ADA. With adequate documentation, experts argue that test anxiety should be accommodated. However, a medical doctor's certification that a student vomits when faced with an exam is not sufficient to qualify test anxiety as impairment for purposes of the ADA.[32] Test anxiety may well be one symptom of a genuine impairment, but all by itself, it is nothing more than normal adult behavior. As one author notes:

> Anxiety is an almost universal response to the test-taking situation. In fact, some degree of anxiety may increase arousal and translate into enhanced performance. What is important for clinicians to keep in mind is that test anxiety is not a psychiatric disorder per se. Therefore, simply scoring poorly on a test, even if it is due to anxiety, is not sufficient evidence of a mental illness as classified by DSM-IV. The burden of proof falls on the clinician to document a preexisting, anxiety-driven disorder that has manifested itself in other antecedent spheres of activity. In other words, the patient must meet criteria for generalized anxiety disorder or one of the other anxiety-related illnesses.[33]

Accordingly, behavior suggestive of a cognitive impairment must be distinguished from relatively normal behavior exhibiting similar personality traits. This is largely a matter of judgment that can only be made by a qualified professional with relevant training and experience. Certified psychologists, neuropsychologists, clinical psychologists, learning disabilities specialists, other professionals with special training and experience working with adult populations are competent to diagnose a cognitive impairment.[34]

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31. Lauren Wylonis & Edward Schweizer, *Mood and Anxiety Disorders, in* ACCOM. IN HIGHER EDUC., *supra* note 3, at 154.

32. *Id.* at 157.

33. *Id.*

34. Joan McGuire, *Educational Accommodations: A University Administrator's View, in* ACCOM. IN HIGHER EDUC., *supra* note 3, at 42.

What constitutes adequate documentation of a mental impairment? The law offers little guidance. In *Guckenberger*,[35] the court found Boston University's policy of requiring updated documentation every three years unduly burdensome for students and thus unreasonable. Testing and consulting with specialists are expensive and time consuming. Some forms of mental impairment, notably dyslexia and ADHD, become apparent in early childhood and remain relatively consistent throughout adulthood. Therefore, updating adds little if anything to some student files.

Nevertheless, universities and colleges should decline to accommodate a student if the documentation is not adequate to confirm the diagnosis.[36] Moreover, institutions of higher learning are not required to accept a clinician's opinion. In *Dubois v. Alderson-Broaddus College, Inc.*,[37] the court upheld the college's rejection of a request for accommodation where the clinician's report did not make a clear and unequivocal diagnosis of a recognized mental impairment.

B. When Does Impairment Limit a Major Life Activity?

Determining that the individual has a mental impairment is only the beginning of the analysis of whether he or she is disabled under the ADA. At least one major life activity that is limited as a result of the impairment must be identified. Regulations promulgated under Title I of the ADA define major life activities as "those basic activities that the average person in the general population can perform with little or no difficulty."[38] Regulations promulgated under Title II list major life activities as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[39] The courts have expanded this relatively short list of major life activities to include sleep-

35. Guckenberger v. Boston Univ., 8 F. Supp. 2d 91, 96 (D. Mass. 1998) (memorandum and order on assessment of attorneys' fees and costs).

36. For a thorough analysis of mental impairments, including a discussion of what documentation is needed to establish that an individual suffers from a mental impairment, *see generally* James G. Frierson, *Legal Requirements for Clinical Evaluations, in* ACCOM. IN HIGHER EDUC., *supra* note 3, at 79-82.

37. 950 F. Supp. 754, 758-59 (N.D. W. Va. 1997).

38. 29 C.F.R. Pt. 1630, App. § 1630.2(I) (1991).

39. 28 C.F.R. § 35.104(l)(iii)(2) (1991).

ing, engaging in sexual relations and interacting with others;[40] reproduction;[41] eating, drinking and learning;[42] thinking;[43] and reading.[44]

Major life activities are thus basic human functions. It stands to reason therefore, that individually preferred activities are not major life activities under the ADA. For example, in *Reeves v. Johnson Controls World Services, Inc.*,[45] the plaintiff alleged that because of his mental impairment (panic disorder with agoraphobia), he was unable to take a vacation, go alone to the shopping mall, or travel along routes that might require one to cross a bridge or go through a tunnel, and that therefore the major life activity of "everyday mobility" was substantially limited. The court rejected the plaintiff's argument, finding that "everyday mobility" is not a major life activity under the ADA.[46] Other activities that are not major life activities include working a narrow range of jobs,[47] and playing intercollegiate basketball.[48]

Activities normally associated with getting an education, like learning or reading, are not the only major life activities that may be affected by cognitive disorders. In *Amir v. Saint Louis University*,[49] a medical student diagnosed with obsessive compulsive disorder whose condition caused excessive vomiting was found to be disabled under the ADA. His impairment limited the major life activity of eating.[50] Major life activities limited by cognitive impairments may be any one or several of the activities listed above, or others that have not yet been identified by the courts.

40. McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999). *But see* Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997) (the court rejected plaintiff's claim that his mental illness substantially limited his ability to get along with others, stating that while the ability to get along with others is a "skill to be prized," it is "different in kind from breathing or walking" and thus not a major life activity under the ADA).

41. Bragdon v. Abbott, 524 U.S. 624 (1998).

42. Amir v. Saint Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999), *reh'g denied*, 1999 U.S. App. LEXIS 22998 (1999).

43. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999).

44. Bartlett v. N.Y. State Bd. of Law Exam'rs, 2001 US Dist. LEXIS 11926 (S.D.N.Y. 2001).

45. 140 F.3d 144 (2d Cir. 1998).

46. *Id* at 153.

47. Jasany v. U.S. Postal Serv., 755 F.2d 1244, 1249 (6th Cir. 1985).

48. Knapp v. Northwestern Univ., 101 F.3d 473, 480 (7th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997).

49. 184 F.3d 1017 (8th Cir. 1999).

50. Although Amir was disabled, the accommodation that he requested was not reasonable, and he lost the case.

C. When is Impairment Substantially Limiting?

Having thus determined that an individual is mentally impaired and that the impairment affects a major life activity, it must be determined that the effect of the impairment on the individual's major life activity is "substantially limiting." The EEOC regulations define "substantially limits" 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.[51]

The regulations thus contemplate comparing the residual abilities of an impaired person to the abilities of an average person. The EEOC gives the following example in its interpretive guidance to the regulations:

> [A]n individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at a moderately below average speed.[52]

In *Price v. National Board of Medical Examiners,*[53] the court employed the "average person in the general population" formula in concluding that three medical students who were denied additional time and separate rooms for the United States Medical Licensing Examination (USMLE) were not disabled for purposes of the ADA. All three students had been diagnosed with ADHD, and two of the students had been further diagnosed with learning disorders. The court noted that the students were clearly impaired. The court held, however, that they were not substantially limited in the major life activity of learning, because they were able to learn as well as or better than the average person in the general population. In reaching its conclusion, the court utilized an example involving two hypothetical students:

51. 29 C.F.R. § 1630.2(j)(1).
52. 29 C.F.R. Pt. 1630, App. § 1630.2(j).
53. 966 F. Supp. 419 (S.D. W. Va. 1997).

> Student A has average intellectual capability and an impairment (dyslexia) that limits his ability to learn so that he can only learn as well as ten percent of the population. His ability to learn is substantially impaired because it is limited in comparison to most people. Therefore, Student A has a disability for purposes of the ADA. By contrast, Student B has superior intellectual capability, but her impairment (dyslexia) limits her ability so that she can learn as well as the average person. Her dyslexia qualifies as an impairment. However, Student B's impairment does not substantially limit the major life function of learning, because it does not restrict her ability to learn as compared with most people. Therefore, Student B is not a person with a disability for purposes of the ADA.[54]

The court found that the plaintiffs in this case best compared to Student B. Plaintiff Price had graduated from high school with a 3.4 grade point average, and from Furman University with a 2.9 grade point average without accommodations. He received accommodations on the MCAT, and was admitted to medical school. Plaintiff Morris was a national honor student in high school, graduated from Virginia Military Institute with average grades, maintained a 3.4 grade point average at Sheperd College while earning the necessary science credits for medical school and was admitted to medical school—all without accommodations. Plaintiff Singleton was in a gifted program from second grade through high school, graduated high school with a 4.2 grade point average, was admitted into the United States Naval Academy, graduated from Vanderbilt University, and was admitted to medical school—all without accommodations. This history reflected superior scholastic achievement with no evidence of substantial limitation on learning ability. The court held that although these students were impaired, they were not substantially limited in the major life activity of learning in comparison to most people.[55]

Other courts have utilized the "average person in the general population" formula to determine whether a learning disorder substantially limits the individual's major life activity. In *Gonzalez v. National Board of Medical Examiners,*[56] the plaintiff's doctor, a psychologist in the Nueropsychology Division of the University of Michigan Hospitals, tes-

54. *Id.* at 427.

55. *Id.*

56. 60 F. Supp. 2d 703 (E.D. Mich. 1999).

tified that he "compared plaintiff's performance to fourth year college students and found that some of his scores were below average to impaired."[57] Noting that the ADA does not define "substantially limits," the court turned to legislative history. According to the report of the Senate Committee which developed the ADA structure, an impairment must restrict a person's major life activity as to the "conditions, manner, or duration under which [the activity] can be performed in comparison to *most people*."[58] The court concluded that it was error to compare plaintiff's performance to other college students and found that, when compared with "most people," the plaintiff was not disabled because he was superior to the average person in the general population.

Of the cognitive impairments reported by students, learning disorders often give rise to questions about whether the student is substantially limited for ADA purposes. Learning disorders are characterized by varying degrees of low functioning in specific cognitive areas.[59] The aptitude-achievement discrepancy model, which compares current achievement to innate potential (measured by standard IQ testing),[60] has dominated the assessment of learning disabilities and is still widely used by clinicians and learning disabilities offices.[61] Under the model, an individual is learning-disabled only when there is a discrepancy between aptitude and achievement. Simply stated, the learning disabled individual is actually much brighter than his or her grades would indicate.

In recent years, the belief that IQ scores are valid measures of intellectual potential has been subject to criticism. Stanovich argues:

> Indeed, standard texts in educational measurement and assessment routinely warn against interpreting IQ scores as measures of intellectual potential. At best, IQ test scores are gross measures of current cognitive functioning. In short, we have been basing systems of educational classification in the area of reading disabilities on spe-

57. *Id.* at 707.

58. *Id.*, quoting S. REP. No. 101-116 (1989).

59. Some experts contend that that they do not even exist. *See* KELMAN & LESTER, *supra* note 12, at 18. Among experts who agree that dyslexia, for example, does exist, there is disagreement on what tests and other measures are necessary to diagnose it.

60. The most widely used IQ test is the Wechsler Adult Intelligence Scales (WAIS-R or WAIS-III). *Accord* Linda S. Siegal, *Issues in the Definition and Diagnosis of Learning Disabilities: A Perspective on* Guckenberger v. Boston University, 32 J. LEARNING DISABILITIES 304 (1999).

61. Siegel, *supra* note 60.

> cial claims of unique potential that are neither conceptually nor psychometrically justifiable.[62]

According to Stanovich, "IQ fetishism" and intelligence play no role in diagnosing dyslexia. He points to recent studies that demonstrate that "the information-processing operations that underlie the word recognition deficits of poor readers are the same for poor readers with low IQ and high IQ."[63] Furthermore, there is no evidence that poor readers with high IQ scores are neuroanatomically different than those with low IQ, or that they respond differently to treatment.[64] In short, there is no scientific proof that low IQ causes poor reading in one group of individuals, while dyslexia causes it in the other group.[65] As a result, it is not justifiable to reserve the "reading disabled" label for poor readers with high IQ, while those with low IQ are labeled "slow."

Proponents of the discrepancy model argue that it serves the necessary purpose of separating learning-disabled students from other poor performers. There is wide disagreement, however, on how much of a deviation between achievement and aptitude is required to diagnose a learning disorder.[66] Even among experts, studies reveal that misdiagnosis occurs frequently.[67] Consequently, diagnosing a learning disability on the basis of aptitude-achievement discrepancy can be an arbitrary undertaking.[68] Students with IQs above a certain score receive accommodations, while those below do not.

The discrepancy model may lead a qualified clinician to conclude that an individual is learning disabled, and in need of accommodation, even though the person is not substantially limited under the ADA. This is precisely what happened in *Price*.[69] Because the plaintiffs were functioning below *their* potential, the clinician recommended accommodation. The medical board, however, refused to accommodate the plaintiffs because they were functioning at an average level when compared to the

62. Keith E. Stanovich, *The Sociopsychometrics of Learning Disabilities*, 32 J. LEARNING DISABILITIES 350, 354 (1999).

63. *Id.* at 352

64. *Id.*

65. Karla K. Struebing et al., *Validity of IQ-Discrepancy Classifications of Reading Disabilities: A Meta-Analysis,* 39 AM. EDUC. RES. J. 469 (2002).

66. Stanovich, *supra* note 62, at 354.

67. KELMAN & LESTER, *supra* note 12, at 29-32.

68. Struebing, *supra* note 65, at 510.

69. Price v. Nat'l Bd. of Med. Exam'rs, 966 F. Supp. 419, 427 (S.D. W. Va. 1997).

general population. At trial, the plaintiffs' expert testified that the plaintiffs were disabled, stating, "The law says that you must look at the discrepancy between their ability and their achievement."[70] The court, however, agreed with the medical board and held that the plaintiffs were not disabled under the ADA. The plaintiffs, although clearly impaired, were achieving at an average level. They were therefore not substantially limited in the major life activity of learning, despite the fact that they exhibited a discrepancy between aptitude and achievement.[71]

Recently, the Supreme Court issued an opinion that turned on the definition of "substantially limits" in the ADA. In *Sutton v. United Air Lines, Inc.*,[72] twin sisters with severe myopia contended that the airline's refusal to hire them as commercial pilots violated the ADA. While the twins had 20/20 vision with corrective lenses, their vision was only 20/200 uncorrected. The airlines required uncorrected vision of at least 20/100. The Supreme Court found that myopia qualified as impairment under the ADA, and that the impairment affected the major life activity of seeing. However, the Court determined that the twins were not substantially limited by their myopia, because corrective lenses mitigated the effects of the impairment. Consequently, the twins were not disabled for purposes of the ADA.

The *Sutton* decision is remarkable for its pronouncement that mitigating measures must be considered in determining whether impairment is substantially limiting under the ADA. The Court found that Congress intended that disability be determined using a functional approach. The term "substantially limits" means currently limiting, not potentially or hypothetically limiting.[73] Hence, impairments that can be controlled or corrected may not amount to a substantial limitation on a major life activity. The decision is significant for cases involving mental impairments, which can sometimes be controlled with medication. Also, many students compensate for their learning deficits by working harder, or by improving their study habits. Even self-mitigating measures like these

70. *Id.*

71. There is much confusion among disability advocates about what the law requires. The plaintiffs' expert in *Price* believed that the law requires the use of the discrepancy model. It is true that the regulations under the Individuals with Disabilities Education Act, *supra* note 2, incorporate the discrepancy model for diagnosing learning-disabled children. However, the ADA does not require its use. For an interesting legal discussion of the court's view of the discrepancy model, see Bartlett v. N.Y. State Bd. of Bar Exam'rs, 2001 US Dist. LEXIS 11926 (2001).

72. 527 U.S. 471 (1999).

73. *Id.* at 491.

may eliminate the effects of impairment, thereby rendering the individual not substantially limited and as a result, not disabled under the ADA.[74]

In *McGuinness v. University of New Mexico School of Medicine,* the Tenth Circuit considered a claim by a medical student that he was disabled because he had an anxiety disorder that substantially limited his "academic functioning." His disorder manifested itself when he took chemistry and mathematics tests.[75] The court first determined that although the anxiety disorder qualifies as impairment under the ADA, its manifestation in only two subjects did not amount to a limitation on a major life activity.[76] However, the court stated that even if McGuinness' impairment limited a major life activity, that limitation would not be substantial. The court found that McGuinness had developed study habits that allowed him to overcome his difficulties, thus mitigating the effects of his anxiety disorder. In holding that McGuinness was not disabled, the court stated: "Just as eyeglasses correct impaired vision, so that it does not constitute a disability under the ADA, an adjusted study regimen can mitigate the effects of test anxiety."[77]

After *Sutton*, students whose conditions are controlled by medication or mitigated through hard work and diligence could find themselves outside of the ADA's protection. It is speculative at this point, but query whether *Sutton* will be interpreted to impose a burden on individuals to mitigate the effects of impairment, such that an individual who could mitigate (but has not) would not be entitled to ADA accommodation.

IV. WHAT IS REASONABLE ACCOMMODATION UNDER THE ADA?

When a student has an impairment that substantially limits one or more major life activities, he or she is disabled for purposes of the ADA, thus triggering the requirement that the institution provide reasonable

74. McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974 (10th Cir. 1998), *cert. denied,* 526 U.S. 1051 (1999).

75. *Id.* at 977.

76. The court reasoned that limitations with respect to academic subjects is similar to limitations in working; to be disabled from working, an individual must be unable to perform "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." *Id.* at 978, quoting 29 C.F.R. § 1630.2(j)(3)(1).

77. *Id.* at 979.

accommodation. More often than not, educational institutions provide some form of accommodation to disabled students. Extra time and separate rooms for exams are generally found to be reasonable accommodations by the courts.[78] What amounts to a reasonable accommodation in one context, however, may not be reasonable in another.

Accommodations under the ADA must be tailored to the student's functional impairment. For instance, students with ADHD are often given double time on exams. However, there is no evidence that extra time ameliorates the effects of this condition; one of the characteristics of many ADHD individuals is that they work too quickly.[79] Similarly, a student with panic disorder that manifests during exams is not "helped" by extra time and a separate room for exams. Effective accommodation might include allowing the student "to stop the exam, leave the room for up to one hour, and perhaps even to take medication to treat the attack."[80] Experts in the field of reading disabilities note that while extra time and separate rooms for exams are commonly requested by individuals with dyslexia and other reading impairments, other accommodations might better serve someone with a reading disability. These might include: "audiotape versions of examinations, a reader, assistance in completing answer sheets, extended breaks, large print examinations, or a verbal copy of printed instructions read by the proctor."[81]

Despite accommodation, some disabled students are unable to meet program requirements. Under the operative provisions of the ADA, these students are not "otherwise qualified."[82] The ADA only prohibits discrimination against a "qualified" individual with a disability, defined as:

> [A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision

78. Axelrod v. Phillips Acad. Andover, 36 F. Supp. 2d 46, 52 (D. Mass. 1999); Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 436 (6th Cir. 1998). Unlimited time, however, has been held to be an unreasonable accommodation for the reason that it is not in accord with real life situations. Panazides v. Va. Bd. of Educ., 804 F. Supp. 794 (E.D. Va. 1992), *rev'd on other grounds,* 13 F.3d 823 (4th Cir. 1994).

79. Michael Gordon & Kevin Murphy, *Attention Deficit Hyperactivity Disorder, in* ACCOM. IN HIGHER EDUC., *supra* note 3, at 117.

80. Wylonis & Schweizer, *supra* note 31, at 166.

81. Lorry, *supra* note 28, at 151.

82. 42 U.S.C. § 12132. *See* Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041 (9th Cir. 1999).

> of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[83]

Thus, an individual who cannot meet the program requirements with reasonable accommodation is not a qualified individual for purposes of the ADA. *Zukle v. Regents of the University of California*[84] illustrates this aspect of the ADA.

The plaintiff in *Zukle* was diagnosed learning disabled in reading. The University's Learning Disability Resource Center recommended various accommodations, all of which were granted. Yet despite accommodations, Zukle was unable to pass her medical school courses and was finally dismissed. The district court concluded that the plaintiff was unable to meet academic standards and was therefore, not qualified for medical school. As a result, her ADA claim was rejected. On appeal, Zukle argued that the accommodations she received were not reasonable. Reasonable accommodations in her case would have included interrupting the sequence of required clerkships, leaving the hospital early during the in-hospital portion of clerkships to prepare for her written exams, and obtaining a decelerated schedule during the clerkship portion of her medical studies. The University argued that these accommodations would substantially modify the program and lower academic standards. The appellate court agreed and affirmed the lower court's determination that plaintiff was not qualified for medical school.

The United States Supreme Court has made it clear that institutions of higher education are not required to fundamentally alter their programs or substantially modify academic requirements.[85] An educational institution's decision that reasonable accommodation is not available will be given deference so long as the decision is based on reasoned, professional academic judgment.[86] The following test was endorsed in *Guckenberger*:

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83. 42 U.S.C. § 12131(2) (emphasis added). Note that Title III governing places of public accommodation does not contain the language "qualified individual with a disability."

84. 166 F.3d 1041 (9th Cir. 1999).

85. Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979); Alexander v. Choate, 469 U.S. 287 (1985).

86. Guckenberger v. Boston Univ., 8 F. Supp. 2d 82, 87 (D. Mass. 1998); *see also* Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 26 (1st Cir. 1991), *cert. denied*, 507 U.S. 1030 (1993) [hereinafter *Wynne I*] *and* Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 795 (1st Cir. 1992) [hereinafter *Wynne II*].

> 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.[87]

In *Guckenberger,* Boston University's determination that course waivers in foreign language and math would lower academic standards was upheld. In *McGregor v. Louisiana State University Board of Supervisors,*[88] the university's refusal to allow a law student to attend part-time and take exams at home was upheld as a fundamental alteration of the program. In *Jacobsen v. Tillman,*[89] the court found the plaintiff's request to be relieved of the requirement of passing the math portion of a teacher certification program to be an unreasonable accommodation for her dyscalculia. In *Maczaczyj v. State of New York,*[90] despite his severe panic disorder, plaintiff's request to attend a required residency program via telephone was refused. The court found that although the institution maintained a distance-learning program through which the plaintiff had earned his bachelor's degree, the master's program was not designed for distance delivery. The court held that personal attendance in the residency program was a fundamental requirement, allowing students to engage in intensive academic seminars, group discussions, presentations, and critiques of each other's contributions. In upholding the institution's refusal to grant the requested accommodation, the court stated: "It is the severe nature of plaintiff's handicap rather than the defendant's failure to offer reasonable accommodation that is limiting plaintiff's ability to achieve his educational objectives."[91]

Accommodations must be reasonable and they must serve to eliminate or reduce the impact of the student's impairment. Furthermore, accommodating measures should be no more extensive than necessary. The central aim of the ADA is to level the playing field so that disabled individuals have equal opportunities in education, not to provide advantages

87. *Guckenberger,* 8 F. Supp. 2d at 87.
88. 3 F.3d 850, 858 (5th Cir. 1993), *cert. denied,* 510 U.S. 1131 (1994).
89. 17 F. Supp. 2d 1018 (D. Minn. 1998).
90. 956 F. Supp. 403 (W.D.N.Y. 1997).
91. *Id.* at 409.

that would benefit any student just to enable a disabled student to succeed. "The ADA is not designed to allow individuals to advance to professional positions through a back door. Rather, it is aimed at rebuilding the threshold of a profession's front door so that capable people with unrelated disabilities are not barred by that threshold alone from entering the front door."[92]

V. CONCLUSION

Students with cognitive impairments may not be entitled to ADA protection for various reasons. They may lack adequate documentation to establish impairment, or they may be impaired, but not substantially limited in any major life activities when compared with most people. Finally, students may be disabled under the ADA, but there may be no reasonable way to accommodate their functional limitations without lowering academic standards or altering the academic program. In these situations, there is no legal requirement for institutions to provide accommodation.

Yet some colleges and universities choose to accommodate unentitled students. As the cases examined in this paper demonstrate, students end up litigating (and they often lose) because they were granted accommodations at earlier stages in their lives and expected to continue receiving them. The *Guckenberger* students believed they were entitled to accommodations because they had been routinely given accommodations, whether or not they were disabled under the law.[93] In *Gonzalez*, *Price*,[94] *Pazar*, and *Bartlett*, the students had all been given accommodations at various points during their education, giving rise to the expectation that they would continue to receive accommodations as requested. When they were refused accommodations by a different institution, they sued. *Dubois* involved a student seeking accommodations at an undergraduate institution for the very first time, but the facts reveal that the college provided the requested accommodations even though the student had not

92. Price v. Nat'l Bd. of Med. Exam'rs, 966 F. Supp. 419, 421-22 (S.D. W. Va. 1997) (quoting Jamie Katz & Janine Valles, *The Americans With Disabilities Act and Professional Licensing*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 556 (1993)).

93. It should be noted that some of the *Guckenberger* plaintiffs met the ADA threshold and had received reasonable accommodations. Here, reference is only to the students who were not entitled under the law.

94. It should be noted that of the three plaintiffs requesting accommodations in *Price*, only Mr. Price had actually received accommodations prior to the request at issue in the case.

documented a learning disability.[95] All of these students were given accommodations although none was entitled to accommodations under the ADA. *Pazar* and *Dubois* did not have documented cognitive impairments; *Price* and *Gonzalez* were not substantially limited in comparison to the average person in the general population; the *Guckenberger* students were, at least in part, receiving unreasonable accommodations.

Some advocates for mentally impaired students argue that the ADA is too rigid, and that it excludes individuals who should be accommodated. After all, there is no good reason for preventing impaired individuals from reaching their full potential in education (indeed in life) when their handicaps can be easily accommodated. At the other end of the spectrum are those who contend that accommodating mentally handicapped students in higher education is inherently unfair. By setting up two sets of rules, it lowers academic standards and blemishes the integrity of testing procedures and grades.[96] The ADA represents a middle ground between these extremes. It is designed to give disabled individuals equal opportunities in education, and sets forth a standard for determining when an impaired individual is disabled. According to the ADA, unless an individual is functionally impaired as compared with the average person in the general population, he or she should not receive unfair advantages. Unless the requested accommodation actually reduces the impact of the student's functional limitations, it should not be granted. To do otherwise is unfair.

However motivated, accommodating students who are not entitled to ADA protection does not "help" anyone. It perpetuates a system that is not only genuinely harmful to the entire university population, but also unfair. It creates the expectancy that accommodations will continue, leading to costly and protracted litigation. The best way to avoid litigation is to know what the law requires, publish a well defined policy implementing the institution's legal obligations, maintain flexibility to change as courts mold the law to fit social reality, and have the courage to strictly adhere to that policy.

95. Dubois v. Alderson-Broaddus Coll., 950 F. Supp 754, 759 (N.D. W. Va. 1997). It appears from the context in which the suit arose that the college was attempting to avoid litigation by giving the student wide berth to provide adequate documentation, which he failed to do. Finally, the college refused to continue the accommodations, and the student sued.

96. Faculty thinking that a student receiving accommodations may not be entitled under the ADA should call the disability officer at their institution and voice concern. The privacy of students with disabilities is protected by the Family Educational Rights and Privacy Act , Pub. L. No. 93-380 § 513 (1974), commonly known as FERPA. Therefore, faculty may not learn much about a particular student unless the student grants permission to the disability office to talk about that student with the faculty member.